

SINK THAT VESSEL! : REFLECTING INDONESIA SINKING VESSEL POLICY IN LIGHT OF UNCLOS*

Kaizar Nararya** and Emilio Bintang Risanda***

Abstract

The practice of Illegal, Unreported and Unregulated (“IUU”) Fishing has seen substantial growth, primarily in South East Asia. In light of this Indonesia had displayed a more stringent approach in eradicating IUU fishing, and since the adoption Agreement On Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing in 2012, Indonesia has frequently conducted Maritime Law Enforcement (“MLE”) over IUU Fishing vessels in form of destruction of the apprehended vessels. This Practices are similar to MLE Practice adjudicated by ITLOS in Tomimaru and Honshimaru, which remained contentious to this day

Intisari

Praktek Perikanan Ilegal, Tidak Dilaporkan dan Tidak Teratur (“IUU”) telah mengalami pertumbuhan yang substansial, terutama di Asia Tenggara. Mengingat Indonesia ini telah menunjukkan pendekatan yang lebih ketat dalam memberantas penangkapan ikan IUU, dan sejak diadopsinya Perjanjian Tindakan Portabel untuk Mencegah, Menghilangkan dan Menghilangkan Perikanan yang Tidak Terukur, Tidak Dilaporkan, dan Tidak Teratur. Pada tahun 2012, Indonesia telah sering melakukan Penegakan Hukum Laut (“MLE”) di atas kapal Perikanan IUU dalam bentuk penghancuran kapal yang ditangkap. Praktik ini mirip dengan MLE Practice yang diadili oleh ITLOS di Tomimaru dan Honshimaru, yang tetap diperdebatkan sampai hari ini.

Keywords: illegal fishing, UNCLOS, ITLOS
Kata Kunci: perikanan illegal, UNCLOS, ITLOS,

* Preferred Citation Format: Nararya, K. & Risanda, E.B. (2017). Sink That Vessel! Reflecting Indonesia’s Sinking Vessel Policy in Light of UNCLOS, J.G.L.R., 5(2), 25-32.

**2014, International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

*** 2014, International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Sinking Vessel Legal Regime of IUU Fishing In Indonesian Exclusive Economic Zones

Indonesia has displayed a more stringent approach towards the eradication of Illegal, Unreported, Unregulated (“IUU”) Fishing in its jurisdiction, as demonstrated by the recent sinking of F/V Viking, one of the last of the six vessels of the Bandit 6, which was one of a series of illegal fishing vessels wanted by Interpol and various other national authorities.

After receiving reports regarding F/V Viking’s unreported entry into the Indonesian Exclusive Economic Zone (“EEZ”) from various sources, Task Force 115 arrested F/V Viking for *inter alia* failing to identify herself and her seafaring data as prescribed in Article 193(2) of Indonesia’s Seafaring law, Article 14 of Indonesia’s Governmental Regulation regarding Navigation, and Article 27(3) of Law No. 31 of 2004 regarding Fisheries. Consequently, based on Indonesia’s positive law, F/V Viking was destroyed by Indonesian Taskforce 115 on the basis of sufficient preliminary evidence.

Amongst these notable policies, the bulwark of maritime enforcement in relation to the Vessel Sinking Policy can be seen to be regulated in: Law No. 45 of 2009, Law No 34 of 2004, Law No. 17 of 2008, Governmental Regulation No. 5 of 2010, Law No. 31 of 2004, Presidential Regulation No. 115 of 2015, Presidential Regulation No. 43 of 2016, Ministry of Maritime Affairs and Fisheries Decision KEP.50/MEN/2012, and Ministry of Maritime Affairs and Fisheries Decision KEP.34/MEN/200.

In protecting Indonesian fisheries, The Ministry of Maritime Affairs and Fisheries is supported by the Navy, Coastguard, Sea Police, and Water Transportation Directorate. In executing their respective duties, Article 69(4) of Law No 45 2009 gives them the authority to conduct specific actions such as burning down and / or sinking foreign fishing vessels based on sufficient initial evidence. According to the aforementioned article, sufficient initial evidence is deemed to

have been gathered when the investigator believes that there is strong enough indication of a criminal act that a certain foreign vessel is fishing without having the proper permit. Upon satisfying the requirement of sufficient preliminary evidence, investigators are enabled to take further action.

While the Article does not define the extent of the supervised areas, it is implied that the effective area of operation is within the established Archipelagic Waters of Indonesia through Law No.17 of 1985, which signifies Indonesia’s ratification of the UNCLOS. Therefore in doing so, Indonesia referred to its right to conserve its natural resources within its EEZ as stated in Article 56(1)(a) of UNCLOS. In result, the law in regard to the National Army mandates the Indonesian Navy *inter alia* to conduct national defense at sea, maintenance of sovereignty and law enforcement at sea within national waters.

In the particular case of IUU Fishing, the Navy would then have a role in the sinking of foreign vessels in the investigation stage based on the orders of a court. The newly issued Presidential Regulation No. 115 of 2015 established Task Force 115 that has the specific duty of eradicating IUU Fishing within Indonesian waters. As stated in Article 2 of such Presidential Regulation, Task Force 115 has the authority to take necessary legal measures needed to deal with IUU Fishing. Task Force bases its policies on a Ministry of Maritime Affairs and Fisheries decision where a national plan was drafted to mitigate IUU Fishing Based on the IPOA-IUU Fishing 2001 (No.Kep.50/MEN/2012 concerning National Action Plan for the Prevention and Mitigation of IUU Fishing).

B. Court Practice Relating to IUU Fishing

By the end of 2016, Indonesian Authorities had sunk a total of 115 illegal fishing vessels within its waters. (Sentosa, 2010) Among the sunken vessels, one of the most prominent string of cases were the IUU Fishing cases involving PT. Sino Indonesia Shunlida Fishing.

In one of the cases adjudicated by the High Court of Jayapura, the accused Guo Yunping, the Fish Master of F/V Sino – 29 was sentenced to three years in prison with a fine of Rp. 1.000.000.0000 with additional 6 months of detention. The Court declared Guo Yunping to be guilty of violating Article 93(1) in conjunction with Article 27(1) of the Indonesian Fisheries law. Article 93 and Article 27 of the Fisheries Law regulates the need for fishing vessels, domestic and/or foreign to possess fishing permits whenever fishing is conducted within Indonesian waters.

The Court further charged the accused under the consideration that through the wide media coverage of the sinking of IUU Fishing vessels, it still had not inhibited the intentions of the accused to conduct a fishery crime. Additionally, the Court felt that due to the State's yearly loss of Rp.30.000.000.000.000, it was necessary to further punish the accused by ordering the destruction and prolong the imprisonment so as to create a deterrent effect in conducting IUU Fishing. Thus, in accordance with Article 76A of Indonesian Fisheries Law, F/V Sino – 29 was destroyed by the National Authorities.

C. Setting Out Coastal State Regulatory Rights In the EEZ

To determine whether demolition or sinking foreign vessels policy as illustrated above, are in compliance with the rules and limits set out by the United Nations Convention on the Law of The Sea 1982 (UNCLOS), one must first determine what are the various coastal state competences in her own EEZ?

Article 58 (1) of UNCLOS, and when read together with Article 56 (1), represents a clear polar concepts that are intertwining, a form of tug-of-war, where one polar represent the freedom of navigation along with the freedoms of other state in a coastal state's EEZ and another polar that upheld the sovereign rights that is given to other coastal states in another state's waters (Hoffman, 2011). While Article 56 (1) of UNCLOS and

related articles¹ represents regulatory power of the Coastal State, Article 73 and its related articles ²represents Maritime Law Enforcement (“MLE”) powers, and both of these subdivisions of Coastal powers are to be taken into consideration in the application of Article 58 of UNCLOS.

D. Coastal State Regulatory Powers against IUU Fishing

Coastal states are given the exclusive right to determine the total allowable catch pursuant to Article 61 (1) of UNCLOS, and consequent to such right, Coastal states may also take proper conservation and management measures in order to maintain and promote optimum utilization, additionally any surplus of the allowable catch must be allowed to be transferred to third state. The logic that flows from this interaction is that nationals of other state that wish to fish in the EEZ of the Coastal state must comply with the fishing laws and regulation, and similarly the laws enacted by the coastal state must strictly abided by third states (Enderson, 2006).

In the application of Article 56 (1), Coastal state are given a far-reaching regulatory power, this include the ability to set the definition of operable vessels, the standard of equipment that are utilized, the types of fish that are permissible to be harvested, and the amount of harvest in the EEZ (Tanaka, 2012).

E. Sinking Vessel Policy as a part of State Regulatory Powers against IUU Fishing

With the vast arrays of technological developments there are certain mode of commercial activities that may not be necessarily covered in the UNCLOS. Activities such as bunkering, refrigerating, transship and other modes of support

¹ Stemming from Article 56 (1) of UNCLOS, the Coastal State Regulatory Rights are also found throughout Article 60-68 of UNCLOS that represents a far-reaching Regulatory power of the state.

² Article 73 of UNCLOS are to be read together with Section 7 of the Convention that sets-out the limitation and safeguards in proceeding with enforcement powers.

vessels that deliver supplies and workers now exist and are operating in EEZ in a manner that was not previously specifically regulated by UNCLOS (Ndiaye, 2011),

Thus, the question arises whether the regulatory or enforcement measures adopted by coastal state that are not specifically set out in the UNCLOS are permissible. In short, coastal states may still enact laws and adopt regulatory measures not specifically mentioned in the UNCLOS as long as the measures adopted are within the spirit or are in direct connection of the existing provisions (Schatz, 2016).

ITLOS has reviewed various efforts by coastal state to extend the application of regulative measure in EEZ that are not specifically set out in UNCLOS, for example in the *M/V Virginia G Case* and *M/V Saiga* where The Tribunal questioned whether Guinea and Guinea-Bissau have the jurisdiction to extend its anti-bunkering law and Customs Law in its EEZ. In both of these cases the tribunal unanimously found that the bunkering of fishing vessels are an application of Article 73 (1) that is compliant with the spirit of Article 56 (1) of UNCLOS.³ The reasoning behind the decision was then further amplified and are adopted as standards assessing whether a particular measures are indeed “extendable” to a coastal state’s EEZ. (Scovazzi, 2015).

This standard is further known as *Direct Connection Standard*. The standard put forward one simple standard in order for a particular measures to qualify as “Extendable” to the EEZ, which is the question whether such measures are (a) In Direct Connection with existing provisions, (b) Supportive and/or accommodating the execution of a particular existing rights, and (c) do not violate the flag state’s rights provided in the Convention (Schatz, 2016; Gullett, 2004).

The wording of Article 69(4) of Law No. 35 Year 2009, it states that *that the*

authority to conduct specific actions such as burning down and / or sinking foreign fishing vessels [is] based on sufficient initial evidence. As such, these do not amount to a regulatory power, but a form of MLE. Albeit the discussion on MLE will be discussed in the following part, the principles of *Direct Connection Standard* remains valid to be applied as a test of necessity in MLE thereby shall still be taken into account while applying the test in Article 73.

F. Coastal State Maritime Law Enforcement Powers against IUU Fishing

As noted above, the sinking vessel policy is a form of MLE, and the nature of MLE are essentially to support and enforce the normative framework. In essence MLE, coastal states are equipped with the ability to enforce certain measures as dictated in Article 73 (1) UNCLOS. This includes the right to board, inspect, arrest and conduct judicial proceeding (Tanaka, 2012). Such article sets out that any enforcement measures may only be conducted when such measures are deemed *necessary* to ensure compliance with the coastal state’s laws⁴

At its core, the necessity test seeks to ask whether the MLE measures undertaken by coastal state *payed particularities to circumstances of the case, as means of last resort, and considered the gravity of the MLE in regard to the scale of the violation*⁵ (Gao, 2012). Additionally, other safeguards to MLE Measure are the requirement of Prompt Release as elaborated in Article 73 (2) arrested vessels and crew must be promptly released upon posting of a reasonable bond or other security (Hoffmeister, 2010).

With regard to posting bonds, the Flag state may commence proceedings against the coastal state for its alleged failure to

³ See *M/V “Saiga” Case* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea Case No. 1 and The *M/V “Virginia G” Case* (Panama v. Guinea-Bissau), ITLOS, Case No. 19, Merits, Judgment, 14 April 2014, ¶¶ 215, 452

⁴ See *In the Matter of the Arctic Sunrise Arbitration (The Netherlands v Russia)*, PCA case no. 2014-02 [2015] *Arbitral Tribunal* that seeks to elaborate the standards of necessity. in *Maritime Law Enforcement*.

⁵ See ITLOS, *The M/V “Virginia G” Case*, ¶¶ 256-257.

comply with the requirement of prompt release, which is the case when the Coastal state fails to post a bond in a prolonged manner, or the bonds that were posted are considered unreasonable in value (Barret, 1998) Other safeguards that are in place for the purpose of the application of MLE are posited in Article 73 (4), which put forward the requirements that coastal state shall notify flag state in cases of arrest or detention of a foreign vessel, including an IUU Vessel. However, the most contentious and highlighted safeguards in the context of this journal, are put forward in Article 73 (4) whereas it is stated that *unless the states had agreed otherwise, imprisonment shall not be a viable recourse for retribution in case of violations of laws applicable in EEZ*, and that corporal punishment is explicitly prohibited.

This dilemma is best painted in the *M/V Saiga* case, where prompt release was ordered without any form of penal action even though the *M/V Saiga* was indeed operating against the laws of Guinea. This decision to the horrors of some of the judges, might cause negative implications in the future as some see that compliance with the Tribunal decision might potentially undermine coastal state enforcement programs, as upon posting bonds, the coastal state is required to release the IUU vessel, thus re-introducing illegal fishers into circulation.⁶

Taking this caveat, we shall see that several states dismiss the prohibition of detention and imprisonment in lieu of deterrent effects,⁷ and thus raises the question of whether this allows Indonesia to apply its Sinking Vessel Policy?

G. Sinking Vessel Policy as a part of State's MLE Powers against IUU Fishing

Although there is no mention of destruction or sinking an IUU vessel as a

recourse of MLE, it is arguable that in principle, an MLE that is not explicitly mentioned in the Convention, such as confiscation and destruction of foreign vessels can indeed be justified, ITLOS had indeed recognized that many states have forfeiture provisions and other MLEs aimed at the prevention and deterrence of illegal fishing activities. This was confirmed in the *Tomimaru* case. Thus, it is possible for the Authors to draw parallels between Confiscation and Demolition/Sinking Vessel.

For the purpose of this paper, the requirement to test the validity of an MLE can be summarized as shown next.

H. Sinking Vessel Policy is not prohibited under any provision of the convention; Article 73 (1) is not exhaustive

Article 73 (1) is non-exhaustive (Blakely, 2008) and thus, allowing MLE to extend further than what is listed. Article 73 (1) is construed to be an open-ended provision, similar to the construction of Article 56 (1). As observed above, the construction of Article 56 (1) of the Convention is similarly open-ended thereby non-exhaustive to accommodate and to be read together with other provisions (Scovazzi, 2015). Subsequently, destruction and sinking foreign vessels as MLE measures is not excluded. Article 73 (1) may allow extension of MLE measures, as long as such MLE measures are in direct-connection, and are not prejudicial against other provisions.

In addition to this, precedents in ITLOS have accepted MLE Measures not listed in Article 73 (1) as permissible,⁸ given such measures are (a) In Direct Connection with existing provisions, (b) Supportive and/or accommodating the execution of a particular existing rights, and (c) do not violate the flag state's rights provided in the Convention, particularly in connection with the Coastal State's right to Prompt Release (Schatz, 2016; Gullett, 2004).

⁶ See Dissenting Opinion of Vice President Wolfrum and Judge Yamamoto in the *The M/V "SAIGA"* Case, ¶ 9

⁷ See Separate Opinion of Judge Jesus, para 6 (stating that confiscation measures are supported by undisputed state practice)

⁸ See deliberations in *M/V Virginia G*, ¶ 257, See also *Tomimaru Case*, ¶¶ 72, 74.

I. Demolition of IUU could manifest as necessary

Article 73 (1) allows states to take measures as *may be necessary* to ensure compliance with its laws and regulations relating to living resources. One might be able to argue that this is indicative that new MLE measures, such as confiscation or sinking IUU Fishing vessels, might be a permissible. To adjudicate this, it is wise to reflect the construction of article 73 in general. Firstly, the drafting committee repeatedly opted to allow for broader enforcement jurisdiction in Article 73, as compared to that in other LOSC articles providing for enforcement jurisdiction. Hence, it might act as a possible recourse to justify additional MLE Measures (Blakely, 2008).

Secondly, MLE Measures must comply with the *necessity* test posited in *M/V Virginia G* and *The Red Crusader Case*, wherein Confiscation MLE measures are to be justified when it “*payed particularities to circumstances of the case, as a means of last resort, and considered the gravity of the MLE in regard to the scale of the violations.*”⁹

Judge Ndiaye in *M/V Virginia G* stressed that MLE Measure must be necessary to produce certain goal, and must be conducted in due regard to the gravity of the violations. As illustrated in that case, Confiscation of *M/V Virginia* are only permissible if the measures are proportional with the intended deterrent effect. The severity of MLE Measures must take into consideration the severity of the measure in per-case basis to prevent exceedingly unnecessary damage.

One may still argue that destruction of IUU fishing vessels is indeed *necessary*, especially in Indonesia noting that the government annually loses Rp.30.000.000.000.000 due to IUU Fishing. One may argue that destruction may be a viable option to increase deterrence against future IUU Fishing.

⁹ This formed the two-pronged test of Article 73 (1): Necessity and Proportionality. For further elaboration of the matter, see *ITLOS, The M/V “Virginia G” Case*, ¶¶ 256-257.

Several judges in ITLOS opined that confiscation and destruction of IUU Vessels – though not expressly regulated under Article 73(1) – might just be proportional to produce deterrent effect.

J. No denial of Prompt Release and offered the flag state to challenge the MLE Measures

In the *Tomimaru* case, the Tribunal put extra emphasis on the distribution of rights between the coastal state’s authorities to conduct MLE with the Flag state’s right to challenge the confiscation before national court. Although the court does not specifically set out where one can draw the balance, it is evident that *prompt release* standards apply indefinitely.

In essence, MLE measures – either confiscation or destruction – cannot interfere with the function of Article 292, which is the ability of flag state to submit challenge against MLE measures. Therefore, the protection is only true when there is indeed a link between the vessel and the flag state.

As noted in the *Tomimaru* case, the main hurdle to confiscation was the existence of Japan’s right to submit against Russia as a consequence of operation of Article 292 of the convention. On the contrary, the absence of a link between the vessel and the flag state, (*as in the case of IUU Fishing vessels apprehended by Indonesian authorities*) might effectively allow MLE measures, such as confiscation and destruction without regard to *prompt release* right of the flag states.

K. Conclusion

In conclusion, there might not be a possible means to determine whether destruction as an MLE Measure is indeed justifiable. One can draw from past precedents to imply that Article 73(1) is non-exhaustive. This creates a leeway to extend the applicable MLE Measures.

As elaborated previously, the destruction of IUU fishing vessels as an MLE Measure is inherently “extendable” as long as such extension is deemed to be *necessary*. However, the parameter of

necessary may be arguable, bearing in mind the rate and gravity of the loss incurred by Indonesia that was caused by the IUU fishing.

Additionally, as far as Indonesian practice goes, the vessels are merely IUU Fishing Vessels that are not recognized by their flag-State. This practically allows Indonesia as a State to adopt far-ranging MLE measures with less restriction set by the *prompt release* standards.

Lastly, the demolition measures could not be considered as arbitrary, as any MLE Measure requires prior court decisions.

BIBLIOGRAPHY

Books and Journals

A. J Hoffman (2011), "Freedom of Navigation" *Max Planck Encyclopedia of Public International Law*, Vol III, 568, 571-572. 19.

D. Nelson (2008), "Exclusive Economic Zone", *Max Planck Encyclopedia of Public International Law*, Vol III, 10351 1038. 14.

David Enderson (2006), *Modern Law of The Sea Selected Essays Vol.59*, Marthinus Nijhoff Publishers, 217.

T.M. Ndiaye "Illegal, Unreported, and Unregulated Fishing : Responses in General and In West Africa" Vol. 10, *Chinese Journal of International Law*, 376.

Valentine J. Schatz, "Combating Illegal Fishing in The Exclusive Economic Zone", *Gottingen Journal of International Law* 7, 2, 383-414, 390, 391, 392.

Yoshifumi Tanaka "*The International Law of The Sea*" Ed: 1, Cambridge University Press, 126-128, 130.

Tullio Scovazzi, 'ITLOS and Jurisdiction over Ships', in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff, 2015), 382, 395.

Gullett, W, *Developments in Australian fisheries law: setting the law of the sea convention adrift?*, (Environmental and Planning Law Journal, 21(3), 2004), 173.

J. Gao, 'Reasonableness of the Bond under Article 292 of the LOS Convention: Practice of the ITLOS', 7 *Chinese Journal of International Law* (2008) 1, 115, 115-142
Malcolm Barrett, *Illegal Fishing Subject to National Jurisdictions* (1998), 5JICULR. 11, 14.

T. Treves, "The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea," (1996).

Laurence Blakely, "The End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone" , *Pacific Rim Law and Policy Journal Association*, (2008), 690, 692.

Case Laws

The M/V "Virginia G" Case (Panama v. Guinea-Bissau), ITLOS, Case No. 19, Merits, Judgment, 14 April 2014.

High Court of Jayapura, Judgement No 70/Pid.Sus-Prk/2016/PT Jap, Page 19

In the Matter of the Arctic Sunrise Arbitration (The Netherlands v Russia), PCA case no. 2014-02 [2015]

The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), *International Tribunal for the Law of the Sea Case No. 2*

The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), *International Tribunal for the Law of the Sea Case No. 1*

The Tomimaru Case (Japan v. Rus. Fed.), Judgment, I.T.L.O.S. Case No. 15

Investigation of Certain Incidents Affecting the British Trawler Red Crusader, Report of 23 March 1962, UNRIAA, Vol XXIX, 521.

Others

Mas Achmad Sentosa, "The Fight Against Fisheries And Associated Crimes In Indonesia" http://fishcrime.com/wp-content/uploads/2016/10/Presentation_Mas-Achmad-Santosa.pdf (accessed on 28 May 2017).

Ministry of Maritime Affairs and Fisheries, http://djpsdkp.kkp.go.id/ppsdk/arsip/c/205/10-Kapal-Akan-Ditenggelamkan/?category_id= (Accessed on 23 May 2017).