

JUDICIAL STUDY OF THE SINKING OF INDONESIAN-FLAGGED SHIPS DECISIONS (Study of the Supreme Court Decision Number 2563 K/Pid.Sus/2015)

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ABSTRACT

Ship sinking of illegal fishing abusers as a concrete form of the government of Indonesia which has declared the world's maritime shaft state. Pros and cons take place both internationally and internationally. Already many foreign-flagged ships are drowned or burned because they are proved to have done illegal fishing. Ship sinking not only is applied to foreign ships but also Indonesian flagged ships. The problem arises when the drowned is the Indonesian-flagged ships because there is no legal basis underlying the implementation of the policies. This can be seen from the Supreme Court decision on the KM Sino 26 case which of course it is necessary to create a legal basis when Indonesia intends to protect the territory of the oceans and the natural resources contained therein. The law will be enforced without discrimination, the sinking of ships not only for foreign-flag ships but also for Indonesian-flagged ships that have been proven to do illegal fishing.

Keywords: ship sinking, illegal fishing

I. INTRODUCTION

Indonesia is known as the maritime country because two-thirds of Indonesia consists of the sea (Siombo, 2009: 2). The potential of Indonesia is an opportunity and economic potential that can be utilized for the progress of the Indonesian economy, as well as the backbone of national development. However, on the other hand the potential or circumstances precisely cause the occurrence of illegal fishing in the territory of Indonesia (Arief Arfianto, <https://news.detik.com/opini-anda/1218292/illegal-fishing-kejahatan-transnasional-yang-dilu-pakan-> accessed on April 20, 2017).

Illegal fishing practices are in fact very detrimental to Indonesia, both in the economic, ecological, and social sectors. According to Hamdiah (2015: 1), Indonesia suffers losses about 4 Billion US \$ per year equivalent to 62% of the value of marine resources in Indonesia. Other than that illegal fishing itself also gives a bad impact for a country, as quoted in Septaria (2016: 78) states that IUU Fishing gives the impact of losses on fish stocks that result in economic conditions such as the increase in the cost to buy fish because fish stock has run out and income of fishermen and unemployment.

Also according to Hikmah (2013: 63) illegal fishing does not only affect the individual losses but also to the state and disrupt the security and the stability in the sea and the potential conflict between countries. Other losses incurred by these are environmental damage and losses in the social sector (Kristiyanto, 2015: 71). Furthermore, a result of illegal fishing practices are, the proportion of Indonesian people's consumption of animal protein derived from fish is only 54%. (Riza Damanik, <http://nasional.kompas.com/read/2014/12/12/14000081/Penengge.page.Kapal.Asing> accessed on January 13, 2018).

Based on the problem, concrete steps must be done, especially since illegal fishing from several years has increased (Yulia et al., 2017: 64). One of these steps in the form of ship sinking which did illegal fishing both Indonesian flagged and foreign committed by law enforcer as one of the steps to create a deterrent effect for the offenders who commit criminal acts in the fishery (Wahyu Nugroho, 2015: 12). The legal basis for the drowning or sinking and burning of a foreign- flagged fishing ships committing a criminal offense in the field of fishery refers to Article 69 Paragraph (4) of Law Number 45 of 2009 about fisheries which affirms that in carrying out the functions as referred to in paragraph (1) of the investigator and or the fishery supervisor may take special action in the form of burning and or sinking of a foreign flagged fishing ships based on sufficient initial evidence .

This is certainly a form of law enforcement from fisheries regulations in Indonesia. Another problem that arises is not foreign ships sunk, but the Indonesian-flagged ships that carry out illegal fishing also drowned. According to Januarius Kuwado, there are at least 21 Indonesian-flagged ships drowned from October 2014 until April 1, 2017 (Januarius Kuwado <http://nasional.kompas.com/read/2017/04/01/12003881/lagi.81.kapal.pencuri.ikan.ditenggelamkan.di.penjuru.indonesia> accessed on January 13, 2018).

Also, one of the concrete steps of the sinking of Indonesian-flagged ships is stated in Supreme Court Decision Number 2563 K/Pid.Sus/2015. The decision stated that the appeal filed by the defendant was rejected so that KM Sino 26 which was Indonesian ship was still seized for destruction then the ship was carried out by the drowning. If we analyzed the penalty of Indonesian-flagged ships are not provided in national law in Indonesia, but it was decided by the judge by using Law No. 45 of 2009 on the Amendment of Act No. 31 of 2004 about Fisheries.

In this case, judges are based on Article 93 paragraph (1) jo Article 27 paragraph (1) sub-paragraph of Law Number 31 of 2004 about Amendment to Law Number 31 of 2004 about Fisheries jo Law Number 45 of 2009 which only affirms imprisonment and fines for the perpetrator. This indicates that there is a juridical issue regarding the legal basis of the sinking of Indonesian-flagged

ships. Based on the background that has been presented, the researchers are interested to do juridical studies against the drowning of Indonesian-flagged ships that have engaged illegal fishing.

Furthermore, in this research, the researcher argues that the legal basis for deciding and carrying out the sinking of Indonesian-flagged ships is still weak so it is necessary to establish a new regulation to strengthen the legal basis of the ship sinking policy. This research will be divided into several parts, namely: The first, introduction that contains the background of the problem. The second, analysis and discussion which contains the definition of illegal fishing according to national and international law, sinking of ship based on national and international law perspective, the case of KM Sino 26 position as stated in Supreme Court Decision No. 2563 K/Pid.Sus/2015 and juridical analysis the sinking of KM Sino 26 which is an Indonesian flagship. The third, the concluding cover of the analysis and discussion that has been done by the researcher.

II. ANALYSIS AND DISCUSSION

a. Definition IUU Fishing in the Legal Perspective

1. IUU Fishing by Food Agricultural Organization (FAO)

According to FAO (<http://www.fao.org/3/a-i6069e.pdf>, accessed on January 13, 2018) covered in IUU (Illegal, Unreported and Unregulated) fishing includes :

- a) Conducting fishing activities that are contrary to national, regional and international laws.
- b) Unreported fishing, misreporting or less reporting on fishing operations and the results.
- c) Fishing conducted by a ship that has no nationality.
- d) Conducting fishing in the area of Regional Fisheries Management Organizations (RFMOs) conducted by non-member countries of RFMOs.
- e) Fishing activities that are not regulated by the State and difficult to supervise.

2. IUU Fishing by High Seas Task Force (HSTF)

According to the HSTF a fishing activity may also be categorized as an action that is contrary to international law when fishing is conducted in a free sea where no applicable regulations are in conflict with the state's responsibility to conserve marine resources on the high seas, as well as carried out by a state not a member of RFMOs. Also, although members of the RFMOs state must submit to and obey the established provisions (M Gianni and W Simpson, 2005: 69).

3. Illegal, Unreported and Unregulated Fishing by European Commission (EC)

According to the European Commission in Article 2, the EC regulation referred to as illegal fishing is:

- a) Conducted by national or foreign fishing vessels in maritime waters under the jurisdiction of a state, without the permission of that state, or in contravention of its laws and regulations;
- b) conducted by fishing vessels flying the flag of states that are contracting parties to a relevant regional fisheries management organization, but which operate in contravention of the conservation and management measures adopted by that organization and by which those states are bound, or of relevant provisions of the applicable international law; or
- c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating states to a relevant regional fisheries management organization;
'Unreported fishing' means fishing activities;
- a) Which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- b) Which have been undertaken in the area of competence of a relevant regional fisheries management organization and have not been reported, or have been misreported, in contravention of the reporting procedures of that organization;
'Unregulated fishing means fishing activities;
- a) Conducted in the area of application of a relevant regional fisheries management organization by fishing vessels without nationality or by fishing vessels flying the flag of a state, not the party to that organization or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
- b) Conducted in areas or for fish stocks about which there are no applicable conservation or management measures by fishing vessels in a manner that is not consistent with state responsibilities for the conservation of living marine resources under international law.

4. Illegal Fishing in Indonesian Legal Perspective

Definitively under Indonesian law, there is no definition for certain about the meaning of illegal fishing, but this was interpreted by some experts. One of them is according to Mahmudah (2015: 18) states that illegal fishing comes from the word "illegal" which means unofficial. Fishing is a noun meaning fishery; from the word fish in English which means fish, take.

Law No. 45 of 2009 about fisheries in Article 1 Paragraph 5 states that fishing is an activity to obtain fish in waters that are not cultivated by any means, including activities that use ships to load, transport, store, cool, handle, process, and or preserve it. Under the mentioned means, illegal fishing means any kind of fishing activity is violating Law Number 45 of 2009 and other legislation that still valid.

b. Ship Sinking Based on National and International Law

Based on the above description and definition IUU Fishing, it can be analyzed that IUU Fishing is a prohibited activity both in the perspective of national law and international law. Therefore, as a preventive and repressive step and the form of law enforcement, the Indonesian government is doing concerted steps in the form of the ship sinking both to foreign and Indonesian flag ships.

If analyze from a juridical perspective, the foreign ship sinking have a strong legal basis, but for Indonesian-flagged ships are still no legal basis. The basis for the sinking of foreign ships is based on the provisions of Chapter V of UNCLOS which regulates the ZEE, which Indonesia in this matter has issued Law No. 5 of 1983 on Exclusive Economic Zone of Indonesia (Mohammad, 2015: 165).

In relation to the enforcement of fisheries laws in ZEE, Article 73 (1) of UNCLOS argues that coastal states in exercising their sovereign rights in their exclusive economic zones may take such actions as climbing, checking, holding and prosecuting the law, to ensure the enforcement of legislation issued by coastal states in accordance with UNCLOS.

Therefore, coastal states may enforce legislation on violations by foreign fishing vessels that conduct unlicensed fishing in ZEE. However, the authority to board, examine, detain and impose penalties the perpetrators of such violations are required to enable coastal states to implement conservation and management measures fish resources in ZEE (Aqorau, 2000: 40).

Furthermore, the United Nations on the Law of the Sea (UNCLOS) 1982 also authorizes that the coastal state to have an exclusive sovereign right to explore and to exploit certain natural resources and jurisdictions (Sefrani, 2014: 216). Based on that, Indonesia has the authority to do national law as long as it does not a contradiction with UNCLOS.

However, if further analyzed the provisions of the enforcement of coastal state law in the Exclusive Economic Zone of Indonesia can not be fully implemented. The captured ships and crew must be released immediately after providing reasonable bail. Also, the penalties imposed for violators of the laws and regulations in ZEE should not include any reduction or corporal punishment. Therefore, the act of burning or ship sinking that has conducted illegal fishing in ZEEI can not be done because at any time can be applied for exemption after paying the security deposit. Unless the case has been decided by the court with a decision on the status of the seized evidence to be destroyed.

Referring to the UNCLOS, Indonesia had Law No. 45 of 2009 on Fisheries and had to amend Article 69 so that Article 69 affirms as follows:

- a) Supervisor fishery has function carry out surveillance and law enforcement in the field of a fishery in the territory of fisheries management of the Republic of Indonesia.
- b) The fishing ships as meant in paragraph (1) may be equipped with firearms.
- c) Fisheries supervisory ships may stop, inspect, carry and hold ships suspected or reasonably suspected of committing violations in the territory of the Republic of Indonesia fisheries management to the nearest port for further processing.
- d) In carrying out the functions referred to in paragraph (1) the investigation or fishery supervisor may take special action in the form of burning and or sinking of a foreign flagged fishing vessel by sufficient initial evidence.

Based on Article 69 paragraph 4, then Indonesia has the authority to carry out the sinking of foreign ships as a form of the sovereignty of the coastal state. The sinking of the ships is carried out by a fishery investigator or supervisor by sufficient preliminary evidence. About this provision, other countries shall comply with the laws and regulations of the coastal states so long as they are not in contravention of international conventions and laws (Purnamasari, 2016: 5). Before this provision, the Indonesian government did not have the power to drown or burn foreign ships that had illegally caught fish.

Moreover, reference to Article 76A ship sinking as objects or instruments used for committing criminal offenses can destroyed including by way of drowning. The article states that "A tools used in and or resulting from a fishery crime may be confiscated for the state or destroyed after obtaining approval from the Chairman of the District Court". This is done by the investigator or public prosecutor (Article 76 of Law No. 31 of 2004 on Fisheries). This can be done on foreign ships and Indonesian ships which are carried out before the trial.

c. The KM Sino 26 Flagged Ship Case Position Which Drowned

This case began when the defendant I that is Chen Xiangqi as Fishing Master and defendant II Fadlan Latukau as KM Sino 26 Master on Monday December 08, 2014 using KM. Sino 26 Indonesian-flagged as a fishing ship with a shipping weight of 265 GT which has crew of 17 (seventeen) people consisting of 3 (three) Indonesian citizens and 14 (fourteen) foreign citizens is conducting fishing activities in the Arafuru Islands Sea Watershed, and KM. Sino 26 detected by KRI Abdul Halim Perdana Kusuma-355 while patrolling in Arafuru Sea waters at position 08° 36'20" LS - 137° 56'30"BT due to suspicious, then KRI Abdul Halim Perdana Kusuma-355 immediately approached and did a document check and KM Sino 26 Shipload at position 08° 36'20" LS - 137° 56'30"BT (Decision of Supreme Court Supreme Court No 2563 K/Pid.Sus/2015, p. 2).

Furthermore, based on the results of inspection of KRI Abdul Halim Perdana Kusuma- 355, document KM. Sino 26 as the fishing ship conducting fishing activities using SIPI (Permit to Catch Fish in Indonesia Territory) who has been penalized for revocation by Letter No. B.6964/DJPT.4/PI.440.D4/X/2014 dated October 30, 2014 by the Directorate General of Capture

Fishery so that it is no longer valid (Decision of Supreme Court Supreme Court No 2563 K/Pid.Sus/2015, p.3). The fishing permit license or SIPI is a written permit which every fishery ship must possess to carry out fish catching which is an inseparable part of SIUP as regulated in Article (1) number 17 of Law Number 31 of 2004 about Fisheries.

Based on the case, Ambon District Court passed a decision on the captain to pay a fine of Rp 100,000,000.00 (one hundred million rupiahs), provided that the non-payment penalty is replaced with imprisonment for 4 (four) months each. Also, ship evidence is also returned to the ship owner through the defendant (Ambon District Court No. 5/Pid.Sus-Prk/2015 / PN.Amb).

With respect to the first instance decision, an appeal law is applied which in the appellate court namely the High Court of Ambon Decision revokes the Ambon District Court Decision and declares that the defendant is guilty and sentenced to imprisonment for 2 (two) years and a fine of Rp 1,000,000,000-, (one billion rupiahs) provided that if the fine is not paid then it is replaced with imprisonment for 6 (six) months. Also KM Sino 26 was also declared seized by the country for destruction (Decision No 34/ Pid.Prk/2015/PT.AMB.). This decision is certainly very contradiction to the first-level court ruling which is more profitable for the perpetrators of illegal fishing because the penalty given is not as big as the results obtained. It also does not impose a criminal punishment of a prison to the perpetrator.

Based on the decision of the High Court, the defendant appealed because the decision was deemed incompatible with the legal facts. However, the verdict strengthened the verdict of the Ambon High Court and rejected the appeal by the defendant. In this case, the Supreme Court considered that the activities carried out by the defendant used the ship KM. Sino 26 has violated the Ministerial Regulation No. 11 of 2009 about the use of Fish Net in the Exclusive Economic Zone (ZEE) using fishing in ZEE without the use of Fishing Permit (SIPI).

The Court and the High Court of Ambon assessed, in this case, the defendant using KM. Sino 26 also violates Article 93 paragraph (1) jo Article 7 paragraph (2) letter a of Law Number 45 of 2009 regarding the Amendment of Law Number 31 of 2004 in conjunction with Article 55 paragraph (1) of the Criminal Code so as to decide the imprisonment and the sinking of the KM Sino 26. In the Supreme Court Decision No. 2563 K/Pid.Sus/ 2015 was imprisoned and fine to ship captain Chen Xiangqi and Fadlan Latukau as well as the sinking of the ship.

d. Juridical Analysis Sinking KM Sino Ship 26

It is interesting to observe the decision regarding KM Sino 26 which is a different perspective on the implementation of illegal fishing perpetrators conducted by Indonesian-flagged ships. In that case, the contrast is seen in the very far-reaching law enforcement between the Ambon District Court and the High Court of Ambon supported by the Supreme Court. This indicates that basically within the law enforcement apparatus itself there are still doubts about the legal basis for the sinking of Indonesian-flagged ships.

Law enforcement the sinking of Indonesian-flagged ships are considered a form of non-discrimination against all ships conduct illegal fishing, so not only are foreign-flagged ships are sunk, but also Indonesian-flagged ships will also be dealt with firmly if found guilty of illegal fishing. As a result of the KM Sino 26 destroyed by drowning.

If analyzed by juridical then the acts committed by the defendant using the ship KM. Sino 26 has violated the provisions of Article 93 (paragraph) 1 of Law No. 45 of 2009 on Fisheries which states:

"Any person who owns and or operates Indonesian-flagged fishing ships, fishing in the fishery management territory of the Republic of Indonesia and or on the high seas, which does not have SIPI as referred to in Article 27 paragraph (1), shall be punished by the maximum imprisonment duration of 6 (six) years and a fine of not more than Rp 2,000,000,000.00 (two billion rupiahs)".

Also, the defendant violated the provisions of Article 7 point 2 letter a Law about Fisheries which states that "Any person doing business and or activities of fisheries management required to comply with the provisions referred to in paragraph (1) regarding the type, amount, and size fishing gear". In this case clearly, the defendant did not use the standard fishing equipment by the provisions.

From the provisions and cases of the above positions, basically, the actions taken as in the case of KM Sino 26 can only be sentenced to imprisonment for a maximum of 6 (six) years and a maximum fine of Rp 2.000.000.000-, (two billion rupiahs)". In the article, there is no substance of the article that states that KM. Sino 26 must be sentenced to sink the ship. In this case the prosecution of illegal fishing perpetrator cases can only be sentenced to imprisonment and fine as stated in Article 93 Paragraph 1 of the Fisheries Law.

Furthermore, if we conduct further analysis of the possibilities that can be used as the legal basis for the sinking of Indonesian-flagged ships are to refer to Article 76A of the Fisheries Law. Article 76A states that objects and or tools used in and or resulting from a fishery crime may be confiscated for the state or destroyed after obtaining approval from the chairman of the district court. With analyzing the interpretation of the provisions of Article 76A of the evidence may be destroyed then to the KM Sino 26 cases can not be applied. This is because the KM Sino 26 case was in the first-tier trial process even cassation and is no longer in the investigation process.

This is due to Article 76A of the Fisheries Act No 45 of 2009 can not be interpreted in a piece-piece and stand alone because it is a series of Article 76 of Law No. 31 of 2004 about Fisheries. The article is a guide for investigators and prosecutors

before the case is delegated to the District Court. Based on the exposure, it should have made legal basis regarding the policy of sinking Indonesian-flagged ships which can be used as legal basis for judges to decide cases. Also this is also to support government policy to protect the territorial sovereignty and marine wealth owned by Indonesia so that it can become a maritime shaft country.

III. CONCLUSION

Ship sinking policy is not only applied to foreign-flagged ships but also applied to the Indonesian-flagged ships, such as in the case of KM Sino 26. Based on Article 69 paragraph (1) and paragraph (4) of Law Number 45 of 2009 about Fisheries which has a legal basis for drowning a ship is a foreign ship that does illegal fishing, but in its implementation the government of Indonesia itself also did the sinking of Indonesian-flagged ships. Based on the facts revealed the decision of the Supreme Court gave a sentence that will all bodies of the accused and ruled ship sinking is not in accordance with the legislation. This can be seen from the judges' consideration which is based on Article 93 Paragraph 1 of the Fisheries Law which only implicates the imprisonment and the fine. In the Article is not listed at all a duty or punishment that was made in the form of sinking the ship. Besides that possibility can be used as a legal basis, the sinking of Indonesian-flagged ships is referring to Article 76A of Fisheries Act, but the article can not be applied because KM Sino cases was into the trial even appeal.

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