

Reconstruction Of Flag State Responsibility In Addressing Illegal Fishing Justly

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ABSTRACT: The efforts to combat illegal fishing as a transnational crime have not yet yielded optimal results. Illegal fishing continues to occur and brings significant losses to the world, especially to coastal countries. The fines imposed by coastal states are always unpaid by the captain, while imprisonment as a substitute for fines is not possible according to international legal instruments. On the other hand, the shipowner as the beneficiary owner cannot be touched by the law either. The reconstruction of flag state responsibility is considered capable of addressing illegal fishing, given its existence thus far, which has practically been ineffective due to the absence of clear and firm regulations on what and how flag states should be responsible. This research uses a normative legal method by evaluating the principle of flag state responsibility based on existing illegal fishing cases, examining the concepts of ship flags, comparing illegal fishing countermeasures in other countries, and of course, not overlooking international agreements related to illegal fishing as a transnational crime. Article 94 of UNCLOS explains the obligations of the flag state towards its ships in technical, administrative, and social aspects by conducting due diligence. Neglecting due diligence causes the flag state to be responsible for illegal fishing conducted by its ships. The use of the flag state responsibility principle is considered the most ideal concept to address the root problems in combating illegal fishing. The Flag State is positioned as the party with the most significant role, particularly in terms of oversight and enforcement, and ultimately, international cooperation becomes the spearhead of this mechanism.

Keywords: Reconstruction, State Responsibility, Addressing Illegal, Fishing Justly

INTRODUCTION

The issues in fisheries, both on an international and national scale, continue to evolve, in line with the increasing global demand for food, especially fish as a primary source of protein for humans^[1]. As a consequence of this, the world is faced with the threat of overfishing. The Food and Agriculture Organization (FAO) has reported indications of overfishing on an increasingly widespread international scale, namely 16% overexploited and 44% fully exploited^[2], caused by illegal fishing. Considering the significant losses caused by illegal fishing practices, optimal efforts are necessary in addressing this issue. Mitigation is the key to stopping or at least reducing illegal fishing. The Indonesian government has implemented several strategies to combat illegal fishing^[3], including the recent effort of sinking foreign vessels proven to be engaged in illegal fishing in Indonesian waters. However, since the beginning of this effort, after hundreds of foreign ships were sunk, the practice of illegal fishing has continued^[4], marked by the ongoing capture of foreign fishermen, whether their cases go to court or are resolved "on the field".

Table. 1 Data of Ships Destroyed/Blown Up in 2021

No	Name Boat	Ship Nationality	Name/Nationality of Suspect	Capture Location	Case Status	Information
1	KM.SL FA 2675	Malaysia	ZAW/Myanmar	North Sumatra Malacca Strait EEZ Waters	Inkracht No.03/ Pid.Sus. PRK/2016/ PN-	Captured 12-13-2015 and blown up April 1, 2017

					MDN/2016	
2	KM.SLFA 4778	Malaysia	Chia Kee Chan/ Malaysia	Territorial Waters of the Malacca Strait of North Sumatra	Inkracht No.05/ Pid.Sus. PRK/2016/ PN-MDN	Captured 02-17-2016 and blown up April 1, 2017
3	KM.P KFA 3378	Malaysia	Terparak Insorn/ Thailand	North Sumatra Malacca Strait EEZ Waters	Inkracht No 12/ Pid.Sus. PRK/2016/ PN-MDN/2016	Captured July 25, 2015 and detonated April 1, 2017
4	KM EXT RA JOSS-III	Indonesia	Amiruddin /Indonesia	Territorial Waters of the Malacca Strait of North Sumatra	Inkracht No. 13/ Pid.Sus. PRK/2016/ PN-MDN	Captured July 25, 2016 and detonated April 1, 2017
5	KM.P KFB 1152	Malaysia	Chit Soe/ Myanmar	Territorial Waters of the Malacca Strait of North Sumatra	Inkracht No. 15/ Pid.Sus./2016/ PN-MDN/2016	Captured July 30, 2016 and detonated April 1, 2017
6	KM.P KFA 8115	Malaysia	Moe Ais Swan/ Myanmar	Perairan North Sumatra Malacca Strait Territory	Inkracht No. 526/ Pid.Sus. PRK/2016/ PN-MDN/2016	Captured July 30, 2016 and detonated April 1, 2107
7	KM. KHF 1767	Malaysia	Ko Kyaw Soe Ais Kyaw Soe/ Myanmar	Territorial Waters of the Malacca Strait of North Sumatra	Inkracht No.05/ Pid.Sus./PN-MDN/2016	Captured 25-08-2016 and blown up 1 April 2017

Source: Head of the Gakkum Sub-Directorate of the North Sumatra Police Water Police, Belawan December 2021

Several arrests of foreign fishermen by Indonesian officers seem not to deter other foreign fishermen. This indicates the need to seek alternative solutions that can effectively eliminate or at least reduce the practice

of illegal fishing^[5]. One of the ideas is how to involve countries, in this case, the flag states of foreign vessels engaged in illegal fishing or other countries that benefit from illegal fishing. In other words, as a form of prevention and law enforcement, state responsibility is needed to educate their fishermen^[6], whether on a corporate or individual scale, not to fish in the waters of other countries, and simultaneously, state responsibility in the form of pecuniary reparation for the losses suffered by the coastal state due to the specific loss of fish stocks or environmental damage caused by illegal fishing if negligence by the flag state is proven.

From the cases that have occurred, the accountability of the flag state still seems abstract, not tangible enough to assess its effectiveness. In cases of law enforcement against illegal fishing, primarily, vessels engaged in illegal fishing, after being captured and tried within the jurisdiction of the exclusive economic zone (EEZ) of the coastal state^[7], are then subjected to fines that can be settled through the prompt release mechanism. Prompt release is the obligation for the immediate release of foreign fishing vessels and their entire crew engaged in illegal fishing within the EEZ of the coastal state after providing a reasonable bond [7], as stipulated in Article 73 paragraph (2) of UNCLOS 1982 and adopted in Article 104 paragraph (1) of Law No. 31 of 2004 on Fisheries.

However, in reality, the prompt release mechanism often encounters obstacles in its implementation. The existence of conflicting interests between the coastal state, which is the aggrieved party, and the flag state, which wants to release its ship from the coastal state's detention, manifested through their respective national laws. In cases of ship detention that have occurred, such as the MV Monte Confurco, MV Volga (Australia vs. the Russian Federation), MV Hoshinmaru (the Russian Federation vs. Japan), the conflicts that arise are objections to the nominal fines in the prompt release set by the coastal state, which are considered unreasonable by the flag state, and differing interpretations of the obligations violated by the flag state^[8]. The value of legal certainty becomes interesting to highlight when the International Tribunal of Law of The Sea (ITLOS), as an international forum for resolving existing issues, does not have enforcement power in its decisions. Every Tribunal decision always relies on the willingness of the countries involved in the dispute to voluntarily implement it Andi Putra Sitorus, "Penegakan Hukum Terhadap Illegal , Unreported , Unregulated (IUU) Fishing Dengan Konsep Tanggung Jawab Negara Bendera" (n.d.): 497-515.

METHOD

This research aims to examine the efforts to achieve the discipline of international law norms towards achieving justice between flag states and coastal states in the process of combating illegal fishing as a transnational crime. By using a legislative and case approach, the aim is to address the issues that will be researched. The data collection process was carried out through literature study and supplemented with data obtained from interviews with the PSDKP Belawan. The theory of environmental justice and critical legal study are used as analytical tools in this research. Anna Grear states that Environmental Justice is defined as the right to receive protection from environmental hazards and benefits from the environment fairly for individuals, groups, or communities without distinguishing between race, nation, or economic status^[10].

DISCUSSION

The Application Of The Due Diligence Principle To Flag States Regarding Vessels Flying Their Flag

The Due Diligence principle or thorough examination is the main principle in the concept of flag state responsibility. This means that a flag state can only be held accountable when it does not apply the due diligence principle to the ships flying its flag. The principle of due diligence contains details of activities or things that must be carried out or supervised^[11]. In International Law, the details of what must be done by the flag state are regulated, so neglecting the principle of due diligence is a violation of international law^[12]. The obligation of the flag state to conduct due diligence serves as the starting point for the concept of flag state responsibility. Whether or not the flag state can be held accountable for its ship begins with the presence or absence of neglect, either partially or entirely, of the principle of due diligence. In cases of illegal fishing as transnational crimes, it is appropriate that the principle of due diligence should be viewed

as an international obligation held by the flag state. Especially when linked to the concept of combating illegal fishing as transnational crimes, the principle of due diligence can be categorized as a preventive measure.

As a preventive measure, the principle of due diligence is the most effective and efficient effort. It is said to be effective because by applying the principle of due diligence, ships flying the flag of the flag state will practically operate their vessels correctly and in accordance with the provisions set by international law when fishing. This is because the Flag State is obligated to ensure the seaworthiness of the vessel, both in terms of the crew including the captain and the equipment on board. Related to illegal fishing, it means that the flag state is obligated to provide education or training about what is allowed and what is not allowed in fishing activities, or how far the ship can sail. More importantly, the flag state is obligated to ensure that the equipment used on the vessel for fishing is permitted by law. The flag state is also obligated to prohibit and take action if any of its vessels use equipment that can damage the marine environment. The flag state is obligated to provide knowledge training to the ship's crew, especially the Captain, about illegal fishing and its dangers to global life in general, both from an economic aspect and, more importantly, from the aspect of marine environmental sustainability. This training or counseling is absolute, meaning that the ship's crew, especially the captain, cannot use their ignorance about the dangers of illegal fishing and its forms to avoid punishment. The competence of the ship's crew can be proven by the certification for each captain regarding their knowledge of illegal fishing. This certification is mandatory and must be conducted by the flag state periodically to achieve the maximum standards.

Due diligence carried out by the flag state can also efficiently address illegal fishing. Efficient here means that the eradication of illegal fishing does not have to occur first before law enforcement is carried out. However, it is aimed that with due diligence, illegal fishing does not occur. In enforcing illegal fishing laws, it certainly requires quite high costs and significant effort, and often faces numerous obstacles in the field, causing both flag states and coastal states to incur costs that should be avoidable. Efficiency in this context is placed on supervision or monitoring. The presence of inherent supervision conducted by the flag state, which is also part of due diligence, is the key to successfully combating illegal fishing. Oversight by the flag state can be carried out by involving all existing state apparatus, including the use of the latest technology. The supervision by the flag state includes administrative, social, and technical aspects. In other words, this supervision is comprehensive in all aspects, allowing the flag state to determine the necessary measures related to the supervision.

With the use of the most advanced technology, it will be difficult for ships to feel unmonitored by the flag state, especially regarding the aspect of the ship's location. The presence of the ship will always be precisely monitored by the flag state by observing the ship's coordinates, which can be seen from monitoring equipment (radar), making it very easy to determine whether the ship is still within the territorial waters of the flag state or has entered the territorial waters of another country. From the presence of the ship, the flag state can actually take preventive measures to ensure that the ship flying its flag does not engage in illegal fishing. If the ship is already in the maritime zone of another country, it can be reasonably suspected that the ship has the potential to engage in illegal fishing, so extra supervision can be conducted on the ship.

Imposition of Sanctions by International Organizations on Flag States That Are Not Committed to Combating Illegal Fishing.

Illegal fishing is classified as an extraordinary crime and falls under the criteria of transnational organized crime. Illegal fishing has serious impacts on the sustainability of a healthy global economy and the preservation of the sea, especially its fishery resources^[13]. Comprehensive measures to combat illegal fishing have become important, thus demanding strong commitment from countries around the world, especially flag states. The commitment of flag states is very important because flag states are the primary responsible parties in both preventive and repressive aspects as part of law enforcement against illegal fishing as a transnational crime^[14]. This is due to the involvement of foreign elements (other countries) as either the perpetrators or the aggrieved parties, so in resolving issues between two or more countries, there must be mechanisms regulated by international law, including the imposition of sanctions on flag states that are not committed to combating illegal fishing.

The imposition of sanctions on this flag state can be detailed into two conditions. The first condition is when the flag state has already conducted due diligence on the vessel flying its flag as one of its international obligations and all its international obligations, but the vessel still engages in illegal fishing, then the only sanction that can be imposed is a moral sanction in the form of cooperation that must be carried out in the effort of law enforcement. Cooperation here is defined in the form of mutual legal assistance (MLA) or extradition, as well as the provision of information and data necessary for the coastal state in the law enforcement process as a guarantee for the coastal state in obtaining its rights due to the losses suffered from illegal fishing. The second condition is when the flag state has neglected due diligence towards its vessels as an international obligation^[15]. Neglecting these international obligations certainly has implications for international demands as a joint commitment to combat illegal fishing as outlined in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. It is clearly stated in the IPOA that all countries must commit to preventing, deterring, and eliminating illegal fishing, especially flag states. Most of the articles in this IPOA emphasize the responsibilities of flag states.

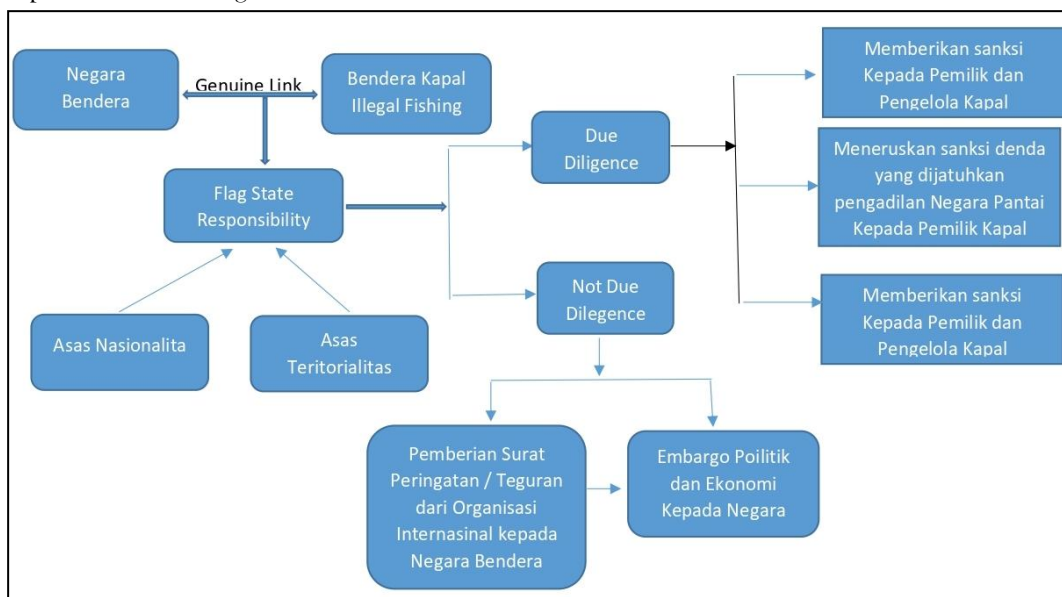


Fig 1. Flag State Responsibility Concept Map in Combating Illegal Fishing

Neglecting due diligence as an international obligation can be addressed by bringing it to the realm of international courts, in this case, the International Tribunal for the Law of the Sea (ITLOS), as the official judicial body under the UN authorized to resolve international maritime law. International rules regarding the imposition of sanctions do not yet exist, but their presence is actually very much needed considering the increasing number of cases. This was expressed by one of the ITLOS judges, J.H. Paik, who provided his separate opinion on the issue of flag state responsibility, which was a response to the question posed by the Sub-Regional Fisheries Commission (SRFC) to ITLOS.

That there have been significant developments in international law regarding the responsibility of the flag state for illegal fishing conducted by vessels flying its flag. This development has at least been partially accommodated within UNCLOS 1982. Article 94 of UNCLOS regulates the general duties of the flag state, based on Article 5, paragraph 1, of the 1958 Geneva Convention. Article 58, paragraph 3 of UNCLOS 1982 reinforces the obligation of the flag state to ensure that fishing vessels flying its flag comply with the laws and regulations adopted by the coastal state when fishing in its EEZ. The flag state has the obligation to ensure that its fishing vessels do not engage in illegal fishing. Bilateral fisheries access agreements are also very necessary to regulate the balance of rights and obligations between the flag state and the coastal state, although the UN Fish Stocks Agreement has also clearly detailed the obligations of the flag state. Guidance on the content of obligations and due diligence has not yet been found, so Flag States are required to take the following steps:

- a. Control over fishing vessels is carried out through the issuance of fishing permits, specifically the prohibition of fishing by these vessels in the coastal state's EEZ without permission from the flag state;
- b. Formation and maintenance of national records of fishing vessels;
- c. Requiring fishing vessels to be marked and easily identified according to generally applicable standards;
- d. Monitoring, control, and supervision of fishing vessels and their operations;
- e. Making illegal fishing that violates the laws and regulations of the coastal state in its EEZ a criminal offense based on the national legislation of the flag state and its enforcement, including the imposition of sufficiently severe sanctions Anggota SRFC et al., "Pendapat Terpisah Hakim Paik" (n.d.).

Judge Paik's opinion above provides an overview of the actual responsibilities of the flag state towards its ship. The regulations regarding what and how the flag state is responsible are clearly outlined in several conventions and international agreements. However, there are no regulations regarding what and how sanctions should be imposed on flag states for their ships engaging in illegal fishing. The absence of regulations regarding sanctions creates an opportunity for ship-owning corporations and flag states that are solely profit-oriented to perpetuate illegal fishing. International sanctions against countries that have committed international violations from the past to the present remain an interesting issue to discuss, due to the difficulty in enforcing these sanctions. This difficulty is caused by the fundamental nature of international law, which is indeed not as strong as national law. There are no international mechanisms specifically established in the process of enforcing international law. Moreover, the position of each country in the world, which holds equal status and standing, with no country having legal authority over others, also makes it difficult to enforce these international sanctions. This difficulty is not only in the field of international maritime law but also in other fields of international law such as Human Rights (HR), Humanitarian Law, International Trade, and Diplomatic Law.

The reluctance of flag states to fully commit to combating illegal fishing is caused by several factors. Most flag states can issue their national flag to ships that do not actually have a direct citizenship connection with their vessels^[17]. For example, if the ship owner is a citizen of another country and the ship is managed by a company located in another country, but because the flag state offers conveniences including low registration fees, the ship that was previously registered under another country's flag for business purposes then changes its national flag to the country that provides those conveniences^[18].

The advantage for the flag state that provides this flag of convenience is the economic factor. The flag state requires ship owners and ship management companies to relocate their legal domicile to the flag state if their domicile was previously not in that flag state^[19]. This is intended to increase investment in the flag state, as all activities and money circulation will take place in the flag state, and the flag state can also collect taxes on these economic activities, which will ultimately boost economic growth in the flag state. The absence of a genuine link between the flag state and the vessel is what complicates law enforcement in the field of illegal fishing, including the imposition of sanctions on the flag state Vladimir, Op.Cit.

International sanctions that can be imposed on flag states that are not committed to illegal fishing can take the form of compensation. This compensation arises due to the losses suffered by the coastal state. The fish that are taken illegally can certainly be accounted for along with the environmental damage if there is any. The responsibility for the environmental damage caused is of a pecuniary reparation nature, where the losses incurred in the form of environmental damage must be restored by the country that caused it. As a result of this compensation claim, it is necessary to involve an international institution that can resolve the existing issues. One of the international institutions that can impose sanctions is ITLOS. Maritime legal disputes and international fisheries disputes can be resolved through this tribunal, although there are assessments that question the effectiveness of this institution. This assessment is not without reason considering there have been several cases that have received rulings from the tribunal but could not be implemented in practice. However, at least there is already an institution that is specifically expected to impose penalties on countries that do not align with the commitment to combat illegal fishing. The effectiveness of this ITLOS decision indeed cannot stand alone. Cooperation and coordination among countries in the world is indeed a necessity. In imposing sanctions on flag countries, it is the same. At the regional level, there must already be agreements made as a joint commitment so that if a country violates this commitment, it can be followed by actions from other countries bound by the agreement to

impose economic sanctions on the violating country. This economic embargo is initially carried out by severing cooperation in the fisheries sector, for example, by prohibiting that country from entering the EEZ of regional countries. The imposition of sanctions by regional fisheries organizations is considered very effective in combating illegal fishing. This is due to the intense relationship that creates needs and dependencies caused by the proximity of locations.

CONCLUSION

Combating illegal fishing as a transnational crime using the concept of flag state responsibility is considered very ideal. This responsibility begins with the obligation to conduct due diligence on its vessels. The flag state cannot be held directly accountable if it has applied the principle of due diligence to its vessels. If the ship continues to engage in illegal fishing, the flag state is obligated to impose sanctions on the shipowner, whether an individual or a corporation, by collecting the fines imposed by the coastal state's court. Flag States that are not seriously committed to combating illegal fishing can be ostracized from the international community through economic embargoes and the termination of cooperation. International cooperation in the future will be the key to successfully combating illegal fishing as a transnational crime.

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CONFLICT OF INTEREST

The authors declare that there is no conflict of interest