CHAPTER FOUR

FINDING AND ANALYSIS

A. The Brief of State Responsibility

The policy or action which is taken by a country not infrequently may cause injury to, or insult to the dignity or authority of another country. The rules of international law on state responsibility regarding the circumstances and the principles of a harmed be entitled to compensation for the loss suffered. State responsibility is expressly limited to "responsibility of State for the internationally wrongful acts."[26] It is the responsibility of the state in the strict sense; the source of that responsibility is an action or omission that violate international law.

The law of state responsibility is developed through customary law that emerges from state practice, the opinions of experts, as well as international court decisions. Regarding the clear obligation based on international law for unlawful acts is dependent on the circumstances of a particular case. The responsibility of the state can only be accused in international relations between the states when there is a state that is harmed by another state due to a breach of obligation/omission that arises from the treaty, international customary law, or due to not fulfill the obligations that arise from a court decision.[27]

[26] J. G. Starke, 2010, *Pengantar Hukum Internasional*, Jakarta: Sinar Grafika, p. 391.
[27] Martin Dixon, 2000, *Textbook on International Law*, Fourth Edition, UK: Blackstone Press Limited, p. 232.

Besides, according to Abdul Ghafur Hamid, a state is responsible if a State violates the territorial sovereignty of another State, damages the territory or property of another State, uses armed forces against another State, injures the diplomatic representatives of another State, or mistreats the nationals of another State.[28]

The violations which are committed by a state and harmed other states, but not violate the international law obligations, will not cause the responsibility of state. For example, the state actions that reject the entry of a foreign citizen even a foreign diplomat. This is due to under international law the state has the right to deny the entry of a person into its territory, even without giving a reason.[29]

In the interaction between two states, there is a big possibility that a state makes mistakes or violations that harm the other state. It arises the responsibility of state.[30] The errors or losses that may cause the responsibility of state are various. The violations of international law obligations may be an action, or omission.

Basically, in international law, a sovereign state cannot enjoy its rights without respecting the rights of other states. In every relationship between a state and another state, the possibility of an action or violation which is committed by the state to another state cannot be excluded. The action or

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[28] Abdul Ghafur Hamid, 2011, *Public International Law*, Malaysia: Thompson Reuters, Sweet & Maxwell Asia, p. 215.
[29] F. Sugeng Istanto, 1998, *Hukum Internasional*, Yogyakarta: Universitas Atma Jaya Yogyakarta, p. 77.
[30] Mohd. Burhan Tsani, 1990, *Hukum dan Hubungan Internasional*, First Edition, Yogyakarta: Liberty, p. 47.

violation may cause that state to repair it and to be responsibility for it. Martin Dixon emphasized that this is because, based on the law, the violation against the obligation which is binding under the law will cause a state is responsible upon its mistakes.

There are two rules, namely Primary Rule and Secondary Rule in International Law to be known. Rules are one of the most important parts of the law. According to the one of expert law, Hart[31], rule becomes important and binding not because it is the command of the ruler, but because the rules are accepted and applicable in society. The rules act as regulators of human behavior which bound with how the society respond to those rules and behaviors that must conform to those rules.[32]

One of the main pillars of rule theory according to Hart is about Primary Rule and Secondary Rule. The primary rule is rule that raise a positive obligation in the sense of obligation to do something. Meanwhile Hart defines secondary rule as confer powers, namely rule that allow the primary rule to be implemented.[33] In this case, the primary rule and the secondary rule are interrelated. There is the possibility that if a state violates the primary rule, it could create the responsibility of state.

[31] Hart is a serious critic of positivism. His full name is Herbert Lionel Adolphus Hart, born on July 18th, 1907 in Harrogate, Yorkshire, England.
[32] HLA. Hart, 1994, *The Concept of Law*, Second Edition, Oxford: Oxford University Press, p. 56.
[33] Atip Latipulhayat, Khazanah: Hart, *Padjadjaran Jurnal Ilmu Hukum*, Volume 3 Nomor 3, 2016, ISSN 2460-1543, e-ISSN 2442-9325, p. 660-661.

1. Responsibility of States for Internationally Wrongful Acts (International Law Commission Articles on State Responsibility)

In International Law, a state may be held the responsible if a state violates international obligations, both in a treaty and in international customs. In 1956, a commission was established by the United Nations namely, International Law Commission (ILC) that has discussed the question of state responsibility. In 2001, the ILC succeeded in drafting an article on state responsibility for the action that considered wrongful based on International Law (draft Articles on Responsibility of States for Internationally Wrongful Acts). Then, the draft of ILC's article was issued by the United Nations by inviting UN member states. The aim was to respond to the question of state responsibility and to consider the issue back in 2007.

Along with its development in International Law, the draft of ILC 2001 on state responsibility (Draft articles on the Responsibility of States for Internationally Wrongful Acts) brought about a change in the discussion in the International Law. Talking about the responsibility of the state means an act of a state in violation of the obligations that are ordered in International Law. In this case, there can be arise speculation when can a state be held responsible and who has the right to demand state responsibility. In addition, this is important because the subject is the State. The state is one of the objects in International Law.

The ILC's Draft Article of State Responsibility 2001 consists of 4 parts and 59 articles. The first part is about The Internationally Wrongful Act of a State; the second is on the Content of the International Responsibility of a State; the third is on The Implementation of the International Responsibility of a State; and the fourth is on General Provision.

Article 1 of the ILC's Article of State Responsibility 2001 stated that "Every internationally wrongful act of a State entails the international responsibility of that State." Article 1 emphasized that the responsibility arises when the action of a State considered wrongful based on International perspective. The obligation violation that considered wrongful internationally could be the action or omission. That statement is also regulated in the Article 2 of ILC's Article which contains the element that an action is considered the internationally wrongful action if it is (1) based on international law that action can be given to the State, (2) the action causes an obligation violation toward international law.

Furthermore, Article 3 of ILC's Article stated that "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law". The Article explains that International Law regulates the characterization of acts or omissions of a state that are considered wrongful internationally

and the National Law does not affect the characterization. It means that even if an act of a state is declared valid by the National Law, but under International Law it is stated otherwise, then the applicable law is the law which is stipulated in International Law.

Article 1, Article 2 and Article 3 of the ILC's Article explain that a violation of an international obligation committed by a state shall not be limited until a state commits the violation. It is determined based on international sources, such as international treaties, customary international law, or international court decisions, and other law sources. The provisions which are contained in the ILC's Article are applied to a state responsibility, not applicable to the responsibility of international organizations or individuals.

a. Attribution of Conduct to the State

Since the State is an abstract entity, it cannot act by itself. States can act only by and through their organs. The basic rule for state organs is that any behaviour of the state organs are considered as an act of the state which becomes its responsibility based on international law. So, the organs of State have the function to examine their functions as the attribution of conduct to the State.

According to Article 4 of the ILC's Article of State Responsibility, 2001, "the conduct of any State organ shall be considered an act of that State under international law, whether the

organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." Refer to the state organ, it covers all the institutions, like individual or collective. The state organ will conduct and organize the State upon the act on its behalf. In the past, the International Court of Justice has emphasized that based on the regulations in the international decisions, the State has the responsibility upon the conduct of each organs or officials in their capacity, and it has been recognized.

There are three main organs of State, *first*, Executive organ, which, in Indonesia, consists of President and Vice President. *Second*, Judicial organ and *third*, Legislative organ. So, each body have the functions and authority to conduct on their behalf as the attribute of a State.

Article 4 makes the actions of the State organs equal, there is no distinction of "superior" and "subordinate" authority. Either higher level officials or lower level officials conduct their authority. However, it is attribution to the State.

b. Breach of an International Obligation

Breach of an international obligation is the second element of an internationally wrongful act. Article 12 stated that, "There is a

breach of an international obligation by a State when an act of that State is not conformity with what is required of it by that obligation, regardless of its origin or character." The meaning of the article is that if a state violates its international obligations, the provisions whether its action are appropriate or not can be seen from the international obligations themselves.

According to the article 13-15 of ILC's Article on Responsibility of States, to determine if a country violates an international obligation, the Article regulates that it should be determined on a case-by-case. The article also specifies that the action of a state is not considered a violation of an international obligation if it occurs before a state is bound by an international obligation. It is the international law principle that is already generally accepted, which means that an action must be judged according to the law at the time it action occurs, not when a dispute arises from the action.[34]

[34] I Dewa Gede Palguna, 2008, Tanggung Jawab Individu dan Negara Menurut Hukum Internasional, speech in the event "The Improvement of International Humanitarian Law and Human Rights for Kostrad Officers", located at the Army Strategic Reserves Command Headquarters, Jakarta, October 21st, 2008.

2. A State Will Only be Responsible Due to Its Own Omission or Inaction

In principle, a State is not responsible for the acts of private individuals. But the act of private individuals may be caused by some omissions which are conducted by the State for which the State is responsible. Nevertheless, it is to be noted that in the case of violence and other unlawful acts against foreigners and foreign property, the State is not responsible for the acts of the individuals (*i.e.* the conduct of the individual cannot normally be attributable to the State); it is responsible only if its own conduct by omission that may be proved. The State is responsible for the conduct (omission, inaction, failure) of its own organs (police, security forces, courts, etc.).[35] There are two forms of omission which can be conducted by a State for which the State is responsible:

a. Failure to Exercise "Due Diligence"

A State is responsible under international law if it fails to exercise "due diligence"[36] to prevent private persons from attacking foreign nationals or destroying foreign property. There is an extensive and consistent State practice and arbitral decisions supporting the duty of a State to exercise due diligence to protect foreign nationals and property.

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[35] Abdul Ghafur Hamid, *op. cit*., p. 227.

[36] Due Diligence or reasonable diligence is that level of attention required by the circumstances in order to avoid liability in negligence. Steven H. Gifis, 2008, *Dictionary of Legal Terms*, Fourth Edition, New York: Barron's Study Green, p. 146.

b. Denial of Justice

A State is responsible under international law if it fails to punish responsible individuals or to provide the injured foreign national with the opportunity of obtaining compensation from the wrongdoers in the local courts. This is an example of what is called denial of justice.

Based on the explanation above, a State is considered to be held the responsible if a State cannot protect the foreigners from the attack from its citizens and cannot keep the foreign property from others. It is the responsibility of a state to maintain what it should be. Besides, based on the International Law, a state may be asked for the responsibility if a state cannot give the sanction to the perpetrators. Also, a state is considered responsible if a state did not give the opportunity to the foreigners who should have the right to get the compensation based on the decision of local court. Hence, if a state violates those actions, a state has to be held responsible for it based on international law.

3. Legal Consequences of an Internationally Wrongful Act

There are several remedies for a country that committed an internationally wrongful act, such as full reparation or compensation. A country may be asked for the responsibility if that state violates the obligation of international law that result in harm to other countries. The damage that arises can be either material or immaterial. It is regulated in the Article 31 of ILC's Article on Responsibility of States stated that "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

In addition, Article 34 of ILC's Articles on Responsibility of States stated that the form of full reparation upon the damage that caused by a breach of International Law obligations is such restitution, compensation, and satisfaction or the combination of all of them. Stephen Allen said that the restitution is quite inconvenient to be used in certain cases; whereas, the compensation and/or satisfaction are more commonly used by the State.[37] The form or type of reparation consists of restitution, compensation, and satisfaction.

1) Restitution

Restitution is clearly regulated in the Article 35 of ILC's Article on Responsibility of States that stated, "A State responsible for

[37] Stephen Allen, 2013, *International Law*, London: Pearson Education Limited, p. 166.

an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

a. is not materially impossible;
b. does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

Restitution is one type of remedy for the damage which is caused by a violation of international obligations. The existence of the restitution action restores the situation as before the violation. However, the circumstances referred to as materially make sense and are not a disproportionate burden or not a compensation.

There is a distinction between restitution and compensation. According to Brownlie, compensation is a reparation in a narrow sense relating to the payment of a sum of money as a compensation value for damages.[38] While restitution only covers the repair and restoration of things before the incident.

However, at this time restitution is rarely used. Forms of reparation such as compensation or satisfaction are often used by a state in fulfilling state responsibility.

2) Compensation

[38] Ian Brownlie, 1992, *Principles of Public International Law*, Oxford: Clarendon Press, p. 458.

Compensation is also regulated in the Article 36 of ILC's Article on Responsibility of States which clearly stated that:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

The meaning of compensation is an action of responsibility of a state which is obliged to give the compensation for the damages caused by its action that is considered wrongful according to the international law as long as the damage does not proceed well through the restitution. Compensation should also cover all damages including loss of profit.

According to Rhona, there is a form of material compensation[39] consisting of:

1. The reimbursement of expenses at the time of a court decision is issued, even though the amount of reimbursement becomes greater than the value at the action of violation of the obligation is committed.
2. Indirect damages, as long as the damage is directly having relations with the unlawful act.

[39] Rhona K.M Smith et.al., 2008, *Hukum HAM*, First Edition, Yogyakarta: Pusham UII, p. 80.

3. The loss of profit that is expected as long as the profit may be in a situation or in normal development.
4. Payment of the damage on interest that lost due to unlawful acts.

3) Satisfaction

The form or other type of reparation is satisfaction. Satisfaction is regulated in the Article 37 of the ILC's Article on Responsibility of States which stated that:

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

The ILC's Article on Responsibility of States determines that action in the form of satisfaction may be made as long as restitution or compensation cannot be performed properly or unsatisfactorily. The action of satisfaction may be in the form of recognition of having committed an offense, excuse statement, or apology or other action that is considered respectful and appropriate.

B. The Responsibility of Indonesia on the Sinking of Foreign Ship against Illegal Fishing in Indonesia

1. The Convention on the Law of the Sea 1982

As an archipelagic country, Indonesia has ratified the Convention on the Law of the Sea 1982 by Law No. 17 Year 1985.[40] As one of the country which has ratified the Convention on the Law of the Sea 1982, Indonesia has issued legislations relating to the sea, such as Law Number 32 Year 2014 on the Sea, Law Number 31 Year 2004 on Fisheries, and Law Number 45 Year 2009 on the Amendment of Law Number 31 Year 2004 on Fisheries.

The United Nations Convention on the Law of the Sea (UNCLOS) is an international agreement which is the result of the conference on the Law of the Sea held by United Nations. UNCLOS consists of UNCLOS I, UNCLOS II, UNCLOS III. The three conventions were born to tackle the unsolved ocean issues. The continuity of UNCLOS II and UNCLOS III is also due to UNCLOS I still fails to implement the existing regulations in UNCLOS and has not reached a definite agreement, so that additional rules in UNCLOS were still needed.

The United Nations Convention on the Law of the Sea I was held from February 24th to April 27th, 1958, attended by 700 delegates from 86

[40] Dikdik Mohamad Sodik, 2011, *Hukum Laut Internasional dan Pengaturannya di Indonesia*, Bandung: Refika Aditama.

countries. The meeting produced four conventions. The first convention was on the Territorial Sea and the Contiguous Zone which was entered into force on September 10th, 1964. The matters contained in the first Convention are sovereign rights and rights of passage by territorial sea, the addition of an additional zone of 12 nautical miles from the shoreline, but fails to set the standards of territorial sea border. The second Convention was on the High Seas, and was entered into force on September 30th, 1962. The second convention deals with freedom of navigation, freedom of fishing, the freedom of laying cables under the sea and pipes, and freedom of flying over the open seas. The third Convention was on Fishing and Conservation of the Living Resources of the High Seas. The points discussed were the rights of coastal states to protect marine biological resources which also included the steps to settle the dispute in the event that it occurs. The Convention was entered into force on March 20th, 1966. The last convention was on the Continental Shelf that was entered into force on June 10th, 1964, which discussed the regimes governing waters and airspace, the laying and maintenance of submarine cables or pipelines, the regimes that govern navigation, fishing, research scientific, and competence of coastal states in the region.[41]

UNCLOS I was proceeded by UNCLOS II which was the result of a meeting that was held by the United Nations General Assembly from

[41] Wagiman and Anasthasya Saartje Mandagi, 2016, *Terminologi Hukum Internasional*, Jakarta: Sinar Grafika.

March 17th to April 26th, 1960. While UNCLOS III was a further convention and simultaneous convention which responded upon the Malta's Ambassador, Arvid Pardo to the United Nations. Pardo ended with a call for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction."[42] The convention was held until 1982 in Montego Bay, Jamaica and attended by more than 160 participating countries. December 10th, 1982 the Convention was signed by 119 countries. The entry into force of UNCLOS III was on November 16th, 1994 or one year after Guyana (the 60th nation) ratified this convention.

The Convention contains 320 articles and 9 annexes, and also contains several provisions such as borderline setting, navigation, island status and transit regime, Exclusive Economic Zone, continental shelf jurisdiction, deep seabed mining, exploitation regime, marine environmental protection, scientific research, and settlement dispute.

Indonesia through the Law No. 17 Year 1985 has ratified UNCLOS (United Nations Convention on the Law of the Sea). It is made in Article 102 of the Law on Fisheries following the rules specified in UNCLOS Article 73 paragraph (3) which states that the punishment given to criminal acts of fisheries that occur in the Exclusive Economic Zone may not include imprisonment, unless there is the agreement of both

[42] Washington College of Law, 2017, Law of the Sea and the UN Conventions, taken from http://wcl.american.libguides.com/c.php?g=563260&p=3877818, accessed on Sunday, April 25th, 2017 at 1.59 pm.

countries. This makes Article 93 paragraph 2 which provides criminal threats no longer than 6 years for fisheries crimes by foreign countries may not apply if there is no agreement of both countries, the punishment they get only a fine of 20 billion rupiah and deported to the country of origin.

At least from the legal aspects of strict action the sinking of ship by means of bombing is not contrary to the UNCLOS because the subjects covered by Article 73 paragraph (3) is a human not a ship, where human beings can be given fines or deportation without the granting of confinement while the ship could be confiscated or even sunk by the Indonesian Government, of course with the process in accordance with legal procedures in the country.

From the problems above if we see in the view of international relations, relations between Indonesia and countries which the ship has been sunk by Indonesia would have the potential to deteriorate and lead to conflict. This is because the relevant country often wants its citizens be tried according to the laws in force in their countries, laws which are supposed to protect the rights of its citizens. Besides, there are the pressure of the interests of some parties of the country.

2. Treaty of Amity and Cooperation 1976

For over 40 years since its establishment, ASEAN has held a series of technical agreements that are binding on member states. One of the

treaty is the Treaty of Amity and Cooperation (TAC) signed in 1976. The treaty is the product of the first ASEAN Summit in Bali, also known as Bali Concord I. TAC sets clearly the actions of States parties to respect other countries and establish procedures for peaceful resolution of disputes.

In the same year the Bali Concord I was also signed, stating that "Member States, in the spirit of ASEAN Solidarity shall rely exclusively on peaceful processes in the settlement of intra-regional differences." TAC was signed by the five founder countries of ASEAN, then Brunei joined on January 7th, 1984 and ratified the TAC on June 6th, 1987, followed by Vietnam which acceded TAC on July 22nd, 1995 and ratified TAC on May 30th, 1995; Laos which acceded TAC June 29th, 1992 and ratified July 17th, 1996; Myanmar which acceded TAC July 27th, 1995 and ratified July 10th, 1996, and Cambodia which acceded TAC January 25th, 1995 and ratified July 25th, 1995.[43]

Picture 2: Signing Ceremony in the Treaty of Amity and Cooperation

[43] Koesrianti, 2011, Analisa Kekuatan Mengikat Piagam Asean dan Perkembangan Mekanisme Penyelesaian Sengketa di ASEAN, *Yuridika*, Volume 26 No. 1, Januari-April 2011, p.55-56.

Source: Ministry of Foreign Affairs of the Kingdom of Thailand, taken from http://www.mfa.go.th/main/en/media-center/28/2690-The-6th-Meeting-of-ASEAN-Politica.html

From the agreement already made, ASEAN is more inclined to the use of peaceful dispute resolution mechanism. ASEAN member states refrain from using force of arms and commit to resolve disputes between them by peaceful means set forth in article 2 TAC.[44]

In their relations with one another, the ASEAN Member States have adopted the following fundamental principles, as contained in the Treaty of Amity and Cooperation in Southeast Asia (TAC) of 1976:[45]

1. Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
2. The right of every State to lead its national existence free from external interference, subversion or coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of differences or disputes by peaceful manner;
5. Renunciation of the threat or use of force; and
6. Effective cooperation among themselves.

Referring to fundamental principles above, ASEAN Member States have commitment to be one and respect each other. They will cooperative to face any issues which happen in ASEAN States. Related to

[44] *Ibid*.
[45] ASEAN, "About ASEAN", taken from http://asean.org/asean/about-asean/, accessed on Monday, February 28th, 2017 at 2.47 pm.

the fundamental principles number 4, the way to settle the disputes among states must be based on peaceful manner. It is to be noted for Indonesia that the policy of sinking of foreign ship may cause the conflict if Indonesia conducts the policy which does not convenient with the applicable laws, both of National Law and International obligations. Even though each state may enforce the National Law, a state has to respect other sovereignty states. Therefore, the effective cooperation is an important point for each state to maintain the relationship among states.

3. Law No. 45 Year 2009 on Amendment of Law No. 31 Year 2004 on Fisheries

Law No. 45 Year 2009 on Fisheries Article 69 paragraph (4) stated that "In carrying out the functions referred to in paragraph (1) the investigator and/or supervisor fishery can perform specific actions such as burning and/or sinking of the fishing vessel that foreign flagged based on sufficient preliminary evidence." The Article gives the right to investigator or supervisor of Indonesian fisheries to perform specific actions such as the sinking of the foreign ship with sufficient preliminary evidence, which means that evidence of the alleged criminal activity in the field of fisheries by the fishing vessel with a foreign flag is for example the crime of illegal fishing for catching or transporting fish when entering the fishery management area in Indonesia without permission.

After seeing the article on the sinking of ship, the main point is not on the sinking of the ship, but on the process of checking the license of the ships and other evidence as mentioned in the article that requires sufficient preliminary evidence.

C. The Perspective in Term of International Law toward State Responsibility and Sovereignty of Indonesia.

Indonesia is a State of Law. Based on 1945 Constitution, the statement was stated in the Article 1 paragraph (3) on 1945 Constitution. Even, from the history of state, State of Law (*Rechtsstaat*) is the state which is idealized by the Founding Fathers then issued in the general explanation of 1945 Constitution before Amendment. The article is in accordance with paragraph 4 in the opening of 1945 Constitution.[46]

As a state of law, all actions of state officials and citizens shall be in accordance with applicable laws. This is the nomocracy principle espoused in the 1945 Constitution. On the other hand, Article 1 Paragraph (2) also stated that sovereignty belongs to the people who carried out according to the Constitution. In the opening of 1945 Constitution Paragraph 4 also stated "... then drafted Indonesia's National Independence in the Constitution, which is formed in an arrangement Indonesian state sovereignty of the people...." Based on the principle of people sovereignty, the law which is applied and enforced

[46] Mahkamah Konstitusi, 2016, "Modul Pendidikan Negara Hukum dan Demokrasi", taken from https://pusdik.mahkamahkonstitusi.go.id/public/uploadedfiles/materi/Materi_2.pdf, accessed on Sunday, March 12th, 2017 at 4.51 pm, p. 16.

should reflect the will of the people and should guarantee their participation in the decision-making process of the state. Laws are made based on the principle of democracy.[47]

1. Boundaries between International Law and National Law

It is necessary when discussing practical matters of state responsibility, the boundaries between international law and national law need to be remembered. This difference is specifically to do with two things:[48]

a. Breach of duty or non-performance of several rule action by a country that is considered causing liability;
b. The authority or competence of the state body that made a mistake.

Regarding point (a), breach or negligence in the final analysis must constitute an offense, or omission meet, some rules of international law. It is not essential that the fact it took the issue of the rights and obligations under national laws between countries to make a claim. Furthermore, is not an answer to an international claim with a defense that there was no violation of national law if at the same time there has been a breach of a rule of international law, or as proposed by the International Law Commission, the fact that an action which can be characterized as

[47] *Ibid*.
[48] J. G. Starke, *op. cit., p. 395.*

intentional error “cannot be affected by the characterization of the same action as a legitimate act according to national law”.

Point (b), generally does not open the opportunity for a country to defend itself from claims by declaring that certain state agencies that actually perform actions such errors have exceeded the scope of its authority under national law. Preliminary investigation of the authority of the bodies concerned in accordance with national law is necessary, but although the agency concerned has acted outside the scope of its authority, if international law states that the state is responsible, then international law is addressing national law.

The conclusion of these two principles, (a) and (b), is that a state cannot use its domestic law as grounds to avoid an international obligation.

2. The Politics of International Law

Any policy made by each government is inseparable from the existence of political and legal interests. The Indonesian government creates policies for actors who conduct illegal fishing activities in the territorial waters of Indonesia by sinking the ships. Indonesian President, Joko Widodo emphasized that on land, at sea, and in the air the territory of Indonesia is the sovereignty of the Republic of Indonesia. Therefore, every inch of Indonesian territory is the honour of this nation.

In relation to matters above, therefore it is important to understand the form of international politics, namely how international politics conditions international law, and how the law "provides feedback" to shape political reforms, and examines mutually constitutive relations between international politics and international law.[49]

Christian Reus-Smit in his book The Politics of International Law expressed his opinion on the relationship of international law and international politics. Reus-Smit expressed his opinion through the existing approaches in understanding international politics and law, namely through the approach of realism, rationalism, and constructivism.

The first approach is the realism approach. Realist thinking sees politics as a struggle for material power among sovereign states, and the law has no relation or law as merely a reflection of the balance of power in force. The second approach is the rationalism approach. This approach is identical to the rationalist writings of the Neoliberal Institutionalists who define politics as a strategy game, where self-centered countries seek to maximize their own interests within the constraints of the environment. While international law is seen as a number of functional rules that are enacted to resolve the issues of cooperation under anarchy. The last approach is the constructivism approach. Constructivist scholars view politics as an action form of socially constitutive, and law as the core of

[49] Christian Reus-Smit, 2004, *Politik Hukum Internasional*, Bandung: Penerbit Nusa Media, p. 21.

normative structures that conditions the politics of legitimate statehood and rightful action.[50]

From the explanation above the author argues that the politics of a country becomes an important factor, and has no relationship with the law. In this case the law is considered weak because without politics, the law will have no power. The statement affirms the realist view on the relationship between politics and international law, namely that politics is more important than international law, whereas international law is only considered as a function of the political goals of the state and serves them in accordance with their interests.

3. Pros and Cons on the Sinking of Foreign Ship

The action of Marine and Fisheries Minister, Susi Pudjiastuti on sinking of foreign ship from marine fish thieves of Indonesian sea continues to reap the pros and cons. One of them is the Attorney General, Prasetyo who consider that the ships should not be sunk. Prasetyo said Indonesia sank the foreign ships, which still have economic values. To the press, Prasetyo also said that Susi did it because she was furious to see the number of foreign ships that enter Indonesian waters without a license and a lot of illegal fishing. Susi has also said that she was auctioning illegal

[50] *Ibid, p. 22-23.*

vessels which were caught and asked to not auction it because often times the ship was still returned to their owners.[51]

For suggestions and advices to the government, Prasetyo proposed that the foreign vessels caught was not auctioned, nor sunk. The way which is proposed by Prasetyo is to grant the vessels to Indonesian fishermen. "If granted to our fishermen, they will be more beneficial because there are many who do not have a ship."[52]

According to the Director General of Marine Resources and Fisheries, the Ministry of Maritime Affairs and Fisheries, Asep Burhanudin stated that if many ships were sunk by the Indonesian government, it will also pollute the sea of Indonesia. Maybe 10 to 20 ships to be sunk is enough.[53]

Asep said the sinking could provide a deterrent for foreign fishermen who steal fish in Indonesian waters. But foreign ships fishing illegally can also be used locally to improve catches. The government will optimize foreign ships for the benefit of fishermen.

Chairman of Farmers Group Fishermen, Winarno Tohir, assess that sinking of foreign ship is less elegant in terms of international relations. Moreover, foreign ships were mostly from neighboring

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[51] Aditia Noviansyah, 2014, "Jaksa Agung: Jangan Tenggelamkan Kapal Laut", taken from http://jakartagreater.com/jaksa-agung-jangan-tenggelamkan-kapal-asing/, accessed on Monday, March 06th, 2017 at 4.07 pm.
[52] *Ibid.*
[53] Wisnu Agung Prasetyo, 2014, "Kapal Sitaan Menteri Susi Diberikan ke Nelayan", taken from https://m.tempo.co/read/news/2014/12/09/090627257/kapal-sitaan-menteri-susi-diberikan-ke-nelayan, accessed on Monday, March 06th, 2017 at 5 pm.

countries. Winarno proposed that the ship is seized by the state, so it could then be auctioned off to the fishermen.

Winarno, who claims to have understand the characteristics of the fishermen in ASEAN, suggested that there was no sinking of foreign ships. Winarno added that it was too cruel as neighbors.

As the "peace loving country," Indonesia should settle every conflict which arises in a peaceful way. Based on Article 4 of the United Nations Charter, it is stated that to be a member state should be as Peace Loving Country and Article 2 paragraph (3) of United Nations Charter stated that every member states of United Nations has to settle every conflict which arises in a peaceful way. Therefore, the form of shooting and sinking of foreign ship are not the way to settle the conflict in a peaceful way and also not as the civilized nation. Also, the action could lead to a tense political relationship like what happened to the Philippines with Taiwan in 2013 and Taiwan with Vietnam in 2013. If it continues, war is not impossible.[54]

According to the International Law expert of Indonesia University, Hikmahanto Juwana, there are five reasons why the policy of sinking of

[54] Yordan Gunawan and Muhammad Arizka Wahyu, 2015, *Kebijakan Penenggelaman Kapal oleh Pemerintah Indonesia dalam Perspektif Hukum Laut Internasional*, *Proceeding* Seminar Nasional Peluang dan Tantangan Menghadapi Masyarakat Ekonomi ASEAN (MEA): Perspektif Hukum dan Perlindungan Sumber Daya Laut. Universitas Muhammadiyah Yogyakarta, Saturday, April 25th, 2015.

foreign ship should be supported. The statement is delivered through the written explanation.[55]

In his writings, Hikmahanto wrote that there are five reasons why policy of sinking of foreign ship will not defect the relations between countries. First, no country in the world justifies the actions of its citizens committing crimes in other countries. The foreign ships which have been sunk do not have license for fishing in Indonesian territory. It is considered a criminal act. It means that the foreign ships which have been sunk previously has gone through litigation and has a legal binding that the person is guilty. Second, the act of sinking is done in the sovereignty territory and sovereign rights of Indonesia (Exclusive Economic Zone). Third, the act sinking is done based on the Article 69 paragraph (4) of Law No. 45 Year 2009 on Fisheries. Before 2009, the process of sinking must go through a court decision with legal binding. Fourth, other countries should understand that Indonesia is harmed by such criminal acts. If this act is continue then the losses will be increased. The last reason is of course the process of sinking also pay attention to the safety of the crew.[56]

The existence of the pros and cons from the other parties regarding the Indonesian government's policy in sinking of foreign ships, could be an input for the Indonesian government. As a sovereign country, Indonesia should pay attention and respect to the sovereignty of other countries. The

[55] Detik News, 2014, "Ada 5 Alasan Kenapa Penenggelaman Kapal Asing Tak Bisa Diprotes", taken from http://news.detik.com/berita/2769424/ada-5-alasan-kenapa-penenggelaman-kapal-asing-tak-bisa-diprotes, accessed on Monday, May 1st, 2017 at 11.36 pm.
[56] *Ibid*.

government should not turn a blind eye if the policy created has the potential for international conflict. Although, on the other hand, President Joko Widodo's policy to sink a foreign ship which conduct illegal fishing in Indonesian waters can no longer be protested because this is part of the form of affirmation of Indonesian sovereignty.

4. Countries which their Ship was Sunk by Indonesia

In an online media, Susi Pudjiastuti as the Minister of Marine and Fisheries of the Republic of Indonesia already mentioned the data released by the Directorate General of Marine Resources and Fisheries of Ministry of Marine Affairs and Fisheries show that until the month of February 2016, there were 153 Fish Boats have been sunk, consisting of 20 fish ship flagged Malaysia, 43 from the Philippines, 1 from China, 21 from Thailand, 50 from Vietnam, 2 from Papua New Guinea, 1 of Belize, 1 Nigerian and 14 ships from Indonesia.[57]

1) China

Earlier, the Chinese Government has repeatedly taken an action and protested against the arrest of a fishing boat and crew of the ship for alleged of illegal fishing act in the waters of Natuna. Furthermore, eight crews and a ship from China was arrested by the Navy on Friday, May 27th, 2016, for the same reasons. Chinese

[57] Directorate General of Marine Resources and Fisheries of Ministry of Marine Affairs and Fisheries, *op. cit.*

Foreign Ministry issued a protest against the arrest. On Friday, June 17th, 2016 in which Navy secured a Chinese-flagged ship and its seven crews because it conducted illegal fishing in the waters of Natuna. Foreign Ministry issued a protest at the Chinese, who this time followed claims that the Navy had injured one crew. The claim was denied by the Military.[58]

Picture 3: China through the Ministry of Foreign Affairs spokesperson, Hua Chunying, repeatedly protested the arrest of the Chinese ship.

Source: BBC Indonesia, taken from http://www.bbc.com/indonesia/berita_indonesia/2016/06/160621_indonesia_susi_cina_pencuri

In response to protests from the Chinese Government, the Minister of Marine and Fisheries, Susi Pudjiastuti said she did not understand the attitude of the Chinese Government that protects criminals, even though they are citizens of their own country. She also

[58] BBC Indonesia, 2016, "Setidaknya 30 kapal asing 'akan ditenggelamkan setelah Lebaran", taken from http://www.bbc.com/indonesia/berita_indonesia/2016/06/160621_indonesia_susi_cina_pencuri, accessed on Thursday, March 16th, 2017 at 5.15 pm.

affirmed that the Indonesian government is not dealing with the state, but with those who committed illegal fishing.

2) Vietnam

Based on the data released by Ministry of Maritime Affairs and Fisheries, on January 1st to June 21th, 2016, Ministry of Maritime Affairs and Fisheries has arrested 57 foreign ships from various countries which are suspected of conducting illegal fishing in the waters of Natuna. From the data above, as many as 16 ships the decision has been *inchracht* convicted of a crime. While, the rest are still waiting for determination.[59]

Picture 4: The crew has arrested by the Ministry of Maritime Affairs and Fisheries
Source: taken from http://www.pontianakpost.co.id/dua-kapal-vietnam-ditenggelamkan

[59] *Ibid.*

Based on the results of data from the Ministry of Maritime Affairs and Fisheries, Susi said there is the items considered unique, namely from 57 foreign ships, most of the ship, as many as 49 ships, are flagged Vietnam. In addition, there are 4 ships flagged Malaysia, 1 flagged Singapore and 3 flagged China.[60]

Besides in Natuna waters, Vietnam also conducts illegal fishing in the waters of Datuk Island, West Kalimantan. Water Police Directorate of Regional Police of West Kalimantan has sunk two illegal fishing ships from Vietnam. Both foreign fishing ships were previously arrested by the Headquarters of Task Force of the Anti-illegal fishing with the Water Police Directorate of Regional Police of West Kalimantan in the Sempadi Island territory. The second Vietnam ship was sunk in the waters of Datuk Island that include, KM. Sinar-533/BV99253TS and KM Sinar-288/BV3240TS.[61]

Water Police Directorate of Regional Police of West Kalimantan AKBP Yuri Nur Hidayat said that the foreign ship flagged Vietnam was sunk after investigators of Water Police Directorate of Regional Police of West Kalimantan got a license of evidence destruction from the Head of Pontianak District Court No. 03/Pen.Pid.Prkn /2016 PN Pontianak on March 16th, 2016.[62]

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[60] *Ibid*.
[61] Meidy Khadafi, 2016, "Dua Kapal Vietnam Ditenggelamkan", taken from http://www.pontianakpost.co.id/dua-kapal-vietnam-ditenggelamkan, accessed on Thursday, March 16th, 2017 at 6.06 pm.
[62] *Ibid*.

3) Malaysia

Malaysian Ambassador to Indonesia Datuk Seri Zahrain Mohammed Hashim admitted that his government accepts the policy of Indonesia which sank the foreign ship that caught stealing fish in Indonesian waters. After meeting the Vice President of Indonesia Jusuf Kalla at his office in Central Jakarta on Thursday, May 12th, 2015, the Malaysian ambassador told to reporters that as a sovereign state, Malaysia respected the laws which is applicable in each country. In addition, he also said that the Malaysian Government was applying the same rules, sinking foreign ships which is proved as not have permission or conducted illegal fishing after passing lengthy trial process at various levels, until the court decision.[63]

"In Malaysia, we also sank (unlicensed foreign ships), but not detonated, but perforated," said Datuk Seri Zahrain Mohammed Hashim. As reported previously, the policies of President Joko Widodo who ordered the illegal foreign ship to be dealt with strictly, had received criticism from Malaysia.

[63] Dhoni Setiawan, 2015,"Dubes Malaysia Hormati Pemerintah Indonesia Tenggelamkan Kapal Asing Ilegal", taken from http://www.tribunnews.com/nasional/2015/03/12/dubes-malaysia-hormati-pemerintah-indonesia-tenggelamkan-kapal-asing-ilegal, accessed on Friday, March 17th, 2017 at 2.51 pm.

Malaysian online media, Utusan.com, stated that President Joko Widodo wants a confrontation with the neighboring country. In an article entitled "Maaf Cakap, Inilah Jokowi".[64]

4) Thailand

Thailand Media, Bangkok Post, in its editorial protested on the sinking of foreign ship of fish thieves committed by Indonesian Government. The Government of Indonesia through the Ministry of Foreign Affairs reacted strongly to the protests. Thailand Media considers that the sinking of foreign ship conducted by Indonesian Government as step wrong. Therefore, it could threaten security in ASEAN.[65]

To reporters, spokesman for the Foreign Ministry, Arrmanantha Nassir asserted that the Government of Indonesia has a high commitment to ASEAN, particularly on matters related to security and peace in the region. In addition, he also emphasized that there will be no action from Indonesia that aimed to disrupt security or stability in the region, especially ASEAN.

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[64] Utusan Online, 2014, "Maaf Cakap, Inilah Jokowi", taken from http://www.utusan.com.my/rencana/maaf-cakap-inilah-jokowi-1.28094, accessed on Friday, May 12th, 2017 at 5.51 pm.

[65] Victor Maulana, 2015, "Media Thailand Protes Penenggelaman Kapal, Ini Reaksi RI", taken from https://international.sindonews.com/read/947375/40/media-thailand-protes-penenggelaman-kapal-ini-reaksi-ri-1420625646, accessed on Friday, March 17th, 2017 at 4.01 pm.

Picture 5: The process on the sinking of Foreign Fishing Ship MV. Kour Son 77 by the Navy in the waters of Anambas, Riau Islands, Sunday (12/28/2014). Navy sank two foreign fishing ship from Thailand namely MV. Kour Son 77 and KM G. Chawat Chai 5 due to conducted illegal fishing in Indonesian waters. Source: taken from https://international.sindonews.com/read/947375/40/media-thailand-protes-penenggelaman-kapal-ini-reaksi-ri-1420625646

He said that what is done by Indonesian Government against foreign illegal fishing is a form of law enforcement that is used by Indonesia. Indonesia suffered losses due to theft of very large fish. Based on FAO data, 14 years ago, Indonesia suffered a loss of Rp 30 trillion as a result of illegal fishing. "The impact of illegal fishing is huge. We lost taxes, and not only those that took our fish, but they also used our subsidized fuel. We did not get any results," he said.[66]

Arrmanantha Nassir added that Indonesia always communicate with countries whose boat was arrested for stealing fish. Basically, they understand the policy of Indonesian Government in conducting arrests and blasting the ship is a form of law enforcement

[66] *Ibid.*

from Government of Indonesia. For the future, the Government of Indonesia should do more intensive communication with related countries, especially ASEAN countries to find the best way to resolve the problem of illegal fishing. Moreover, Indonesia has approved the Treaty of Amity and Cooperation.

Based on the previous explanation, Indonesia does not cause any harm to other countries. So, Indonesia does not need to make full reparation such as restitution, compensation, and satisfaction. In addition, Indonesia sank the ships based on the National Law in that the fishery investigator or supervisor may take special action in the form of sinking of foreign-flagged fishing ship based on the sufficient preliminary evidence. It can be viewed that there is no article that regulates or prohibits the sinking of fishing thief ship, although the existence of other penalty option is the grant or auction of the ship. But the existence of fishery mafia in Indonesia makes the punishment is diverted and even harm the state. Although this may allow for conflict or bad relations between each country, a good country should oppose all forms of crimes committed by citizens of other countries and respect each policy and the applicable laws of other countries.

Indonesia has signed Treaty of Amity and Cooperation which states that ASEAN countries should be friendly, and solve problems peacefully. It means that the Indonesian state must obey the treaty. Responding to the case of the sinking of foreign ship, the Indonesian

Government should coordinate with the representative of the country whose ships was sunk. Thus, good relations between the countries remain good.

In relation to the auction or grant of a ship, it should be realized that if a fish thief ship is to be auctioned, it will be possible to return to its original owner, so that it is necessary to improve the performance of legal process such as the trial process must be fast, and the supervision of the auction process must also be really strengthened.