

National Passive Principles in Illegal Fishing Disputes of Indonesian Citizens in Australian Waters

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Abstract

Illegal fishing remains a contentious issue globally, often leading to diplomatic tensions and strained relations between neighboring countries. This paper explores the application of national passive principles in the context of illegal fishing disputes involving Indonesian citizens in Australian waters. By examining relevant international laws, bilateral agreements, and case studies, this paper aims to elucidate the legal frameworks and practical implications of national passive principles in resolving such disputes. The analysis highlights the challenges faced by both Indonesia and Australia in enforcing maritime laws, particularly concerning illegal fishing activities. Moreover, it investigates the role of national passive principles, which prioritize the rights and responsibilities of states over their citizens engaged in illegal activities abroad. Through a comparative study of legal approaches and diplomatic strategies employed by both countries, this paper seeks to offer insights into the effectiveness of national passive principles in deterring illegal fishing and promoting



cooperation between nations. Furthermore, this paper discusses the socio-economic factors driving illegal fishing activities among Indonesian citizens, including poverty, lack of alternative livelihoods, and inadequate enforcement measures. It also examines the environmental impact of illegal fishing on marine ecosystems and the need for collaborative efforts to combat this transnational issue. In conclusion, this paper underscores the importance of international cooperation, legal compliance, and sustainable resource management in addressing illegal fishing disputes. It advocates for the continued implementation of national passive principles alongside strengthened enforcement mechanisms and community-based initiatives to achieve long-term solutions to illegal fishing in Australian waters.

KEYWORDS *Illegal Fishing, National Passive Principle, Indonesia-Australia Conflict Resolution, International Cooperation*

Introduction

In the waters of Australia's North Sea, traditional Indonesian fishermen often find themselves embroiled in legal proceedings for fishing without the requisite permits. While Australian law dictates the detention and prosecution of these fishermen, Indonesia asserts its jurisdiction under the passive national principle, invoking its national laws for its citizens abroad. This legal dynamic, highlights the intricate balance between national sovereignty and international cooperation in resolving such disputes.¹

¹ Balint, Ruth. "The last frontier: Australia's maritime territories and the policing of Indonesian fishermen." *Journal of Australian Studies* 23.63 (1999): 30-39; Tsamenyi, Martin. "Managing Indonesian Traditional Fishing Activities in Australian Waters: An Australian Perspective." *Maritime Studies* 1996.86 (1996): 18-26.

In the other side, the fishing industry is one of the oldest industries in the world with 59.6 million job vacancies² and is the main source of protein for developing countries, one of which is Indonesia. This also has an impact on fishing, both illegal and legal. This shows that fishing can occur at all scales, both international and national.³ The vast territorial waters of Indonesia have their own negative and positive impacts, including very abundant marine wealth and the sea area becomes a border area between countries. State borders in the territorial waters are often at risk of causing territorial conflicts,⁴ one of which is fishing by foreign ships. Fishing carried out in territorial waters, especially in state border areas by certain circles, is referred to as *transborder fishing*.⁵

Fish fishing carried out in the jurisdiction of another country without the consent or permission of that country can be understood as an illegal act of *fishing*.⁶ *Illegal fishing* is an activity of fishing, catching, taking, and harvesting fish or other marine life related to fishing, the act can be

² See Agriculture Organization of the United Nations. Fisheries Department. *The State of World Fisheries and Aquaculture, 2000*. Vol. 3. Food & Agriculture Org., 2000.

³ Mackay, Mary, Britta Denise Hardesty, and Chris Wilcox. "The intersection between illegal fishing, crimes at sea, and social well-being." *Frontiers in Marine Science* 7 (2020): 589000.

⁴ Agnew, David J., et al. "Estimating the worldwide extent of illegal fishing." *PloS one* 4.2 (2009): e4570. See also Sumaila, Ussif R., Jackie Alder, and Heather Keith. "Global scope and economics of illegal fishing." *Marine Policy* 30.6 (2006): 696-703.

⁵ Euan, Graham. "Transnational crime in the fishing industry: Asia's problem?." ? (RSIS Commentaries, No. 062). RSIS Commentaries. Singapore: Nanyang Technological University.

⁶ Banjarani, Desia Rakhma. "Illegal Fishing dalam Kajian Hukum Nasional dan Hukum Internasional: Kaitannya dengan Kejahatan Transnasional." *Jurnal Kertha Patrika* 42.2 (2020): 150-162; Jaelani, Abdul Qodir. "Illegal Unreported and Unregulated (IUU) Fishing: Upaya Mencegah dan Memberantas Illegal Fishing dalam Membangun Poros Maritim Indonesia." *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 3.1 (2014); Jamilah, Asiyah, and Hari Sutra Disemadi. "Penegakan Hukum Illegal Fishing dalam Perspektif UNCLOS 1982." *Mulawarman Law Review* (2020): 29-46.

categorized as theft.⁷ In this study, the author will examine *illegal fishing* actions that occur in the northern part of Australia, the sea area where Indonesian fishermen fish. In this case, it was discovered that the Australian government arrested traditional fishermen who fished in the Northern region of Australia on charges of illegal *fishing* or fish theft.⁸ The definition of who is included in the group of Traditional Fishermen is contained in Article 1 Number 5 of Law No. 7 of 2016 concerning the Protection and Empowerment of Fishermen, Fish Farmers, and Salt Farmers. In the article it is stated that " *Traditional fishermen are those who engage in fishing activities within waters, which represent traditional fishery rights deeply rooted in local culture and passed down through generations, often guided by indigenous wisdom and customary practices.*"⁹

The government as a state administrator according to the 1945 Constitution is obliged to protect citizens hereinafter referred to as Indonesian citizens including all the rights they have.¹⁰ This includes traditional fishermen arrested by the Australian government on charges of *illegal fishing* also have the right to protection from the Indonesian

⁷ Chapsos, Ioannis, and Steve Hamilton. "Illegal fishing and fisheries crime as a transnational organized crime in Indonesia." *Trends in Organized Crime* 22.3 (2019): 255-273.

⁸ Darmawan, Muhammad Rafi Ardin, Mansur Juned, and Rizky Hikmawan. "Countering Illegal, Unreported and Unregulated Fishing Through the Capacity Building Program in Indonesia-Australia Fisheries Surveillance Forum 2017-2019." *International Journal of Multicultural and Multireligious Understanding* 9.10 (2022): 50-57; As'ad, Istiqomah Febrian Alda, and Regina Farah Nafilah. "Indonesia as a Global Maritime Fulcrum: Examining the Model of Indonesia-Australia Maritime Cooperation and Its Impacts to Achieve Indonesia's Global Maritime Fulcrum Security Agenda." *Hasanuddin Journal of Strategic and International Studies (HJSIS)* 1.1 (2022): 17-30.

⁹ Republic of Indonesia. *Law Number 7 of 2016 concerning the Protection and Empowerment of Fishermen.*

¹⁰ Christoforus, Gorbachev. "Keabsahan Status Kepemilikan Pulau Pasir Oleh Australia Berkaitan dengan Kegiatan Nelayan Tradisional Berdasarkan UNCLOS 1982". *Thesis*. (Yogyakarta, Universitas Atma Jaya Yogyakarta, 2015). *See also* Visser, Leontine E., and Dedi S. Adhuri. "Territorialization re-examined: transborder marine resources exploitation in Southeast Asia and Australia." *Transborder governance of forests, rivers and seas*. Routledge, 2012. 83-98.

government.¹¹ This is also affirmed in Article 28 I paragraph (4) of the MPR Decree on Amendments to the 1945 Constitution which states that "*The protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government.*" Furthermore, Article 28 I paragraph (5) also states that "*To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed and regulated in law.*"¹²

Illegal fishing is included in one form of transnational crime¹³, the Government of Indonesia through the Ministry and Fisheries also provides an understanding of what *illegal fishing* is, in which he stated that *illegal fishing* is a form of fishery activity that is prohibited because it is not registered or asked for permission and obtained a permit first.¹⁴ In Indonesia, the regulation of illegal fishing is regulated in the Fisheries Law.¹⁵ Not only regulated by national law, crimes against *illegal fishing* are also regulated in International Law. International law has also regulated the jurisdiction of a state over its sea area, where the international law is the *United Nations Conventions on Law of the Sea 1982* (UNCLOS)¹⁶ which was subsequently ratified in Law No. 17 of 1985.

As explained in this background, the problems that the author wants to examine and discuss are related to how the realization of the implementation of the extradition agreement between Indonesia and Australia and how the manifestation of the passive national principle in

¹¹ Sudiarawan, Kadek Agus, Putu Edgar Tanaya, and Bagus Hermanto. "Discover the legal concept in the sociological study." *Substantive Justice International Journal of Law* 3.1 (2020): 94-108.

¹² Decree of the People's Consultative Assembly of the Republic of Indonesia concerning the Fourth Amendment to the 1945 Constitution

¹³ Bondaroff, Teale N. Phelps. *The Illegal Fishing and Organized Crime Nexus: Illegal Fishing As Transnational Crime* (Netherlands: Netherlands: The Global Initiative Against Transnational Organized Crime., 2015).

¹⁴ Banjarani, "Illegal Fishing in the Study of National Law and International Law: Its Relation to Transnational Crime."

¹⁵ Michael Barama, "Towards the Effectiveness of Law No. 45 of 2009 concerning Fisheries in its Implementation," *Unsrat Law Journal* 22, no. 6 (2016): 1-13.

¹⁶ S Supriyono dan S. U. W Prakasa, "Juridical Review of Illegal Fishing in Indonesia as Transnational Crime," *Law Research Review Quarterly* 7, no. 2 (2021): 167-82.

the extradition agreement to optimize law enforcement of Indonesian citizens who commit crimes in other countries, especially in *illegal fishing*.

Navigating Legal Waters: Understanding Illegal Fishing in Light of National and International Law

Illegal fishing or *illegal fishing* refers to fishing actions that are carried out illegally or violate laws and regulations, especially in the field of fisheries.¹⁷ Illegal fishing can be understood as an act of fishing by a foreign country's vessels including individuals in the territorial waters of another country without permission from that country. Illegal fishing is included in the form of transnational *crime*.¹⁸ The term transnational crime refers to a form of crime committed across countries,¹⁹ in which the author mentions four scope of aspects including:

1. Often occurs in different countries,
2. Preparation, planning, direction, and supervision
3. Involving the organization
4. Resulting in serious repercussions for other countries.²⁰

Illegal fishing *actions* that occur are also caused by various factors, 4 (four) main factors of illegal *fishing*, which are caused by:

1. Increasing market demand for fishery products
2. Fish management assistance does not have sufficient capacity
3. Weak state control over fishing vessels, as well as

¹⁷ Mackay, Hardesty, dan Wilcox, "The Intersection Between Illegal Fishing, Crimes at Sea, and Social Well-Being."

¹⁸ Seafish, *The Seafish Guide to Illegal, Unreported, and Unregulated Fishing (IUU)* (Grimsby: The Authority on Seafood, 2012).

¹⁹ Banjarani, "Illegal Fishing dalam Kajian Hukum Nasional dan Hukum Internasional: Kaitannya dengan Kejahatan Transnasional." *See also* Liddick, Don. "The dimensions of a transnational crime problem: the case of IUU fishing." *Trends in organized crime* 17 (2014): 290-312; Palma-Robles, Mary Ann. "Tightening the net: the legal link between illegal, unreported and unregulated fishing and transnational crime under international law." *Ocean Yearbook Online* 29.1 (2015): 144-165.

²⁰ Berdal, Mats R., and Mónica Serrano, eds. *Transnational organized crime and international security: business as usual?*. Lynne Rienner Publishers, 2002.

4. Lack of effective control exercised by the government

The term used to describe fishing actions that are carried out illegally, do not have a permit, and violate legal provisions is often referred to as IUU (*Illegal, Unreported and Unregulated*).²¹ It refers to a policy on fisheries management in which any fishing activity at sea is contrary to domestic and international fisheries conservation and management law.²²

Indonesian law regulates the challenge of *illegal fishing* in several regulations, including:

1. Law of the Republic of Indonesia No. 45 of 2009 concerning Amendments to Law No. 31 of 2004 concerning Fisheries
2. Law of the Republic of Indonesia No. 5 of 1983 concerning Indonesia's Exclusive Economic Zone
3. Law of the Republic of Indonesia No. 21 of 1992 concerning Shipping
4. Law of the Republic of Indonesia No. 6 of 1996 concerning Indonesian Waters

In addition to being contained in national regulations, *illegal fishing acts* are also regulated in international law²³, including:

1. 1982 United Nations Convention on the Law of the Sea 1982
2. Food and Agriculture Organization Compliance Agreement 1993.
3. United Nations Implementing Agreement 1995 (UNIA) 1995.
4. Code of Conduct for Responsible Fisheries (CCRF) 1995.
5. International Plan of Action to Prevent, Deter and Elimination Illegal, Unreported and Unregulated Fishing 2001 (IPO on IUU Fishing 2001).

In relation to fisheries management regulations as mentioned above, regulations on *illegal fishing* are inseparable from the existence of

²¹ Doulman, D. J. "FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing 2001: background and progress towards implementation." *FAO Fisheries Report (FAO)* 792 (2006).

²² Rosello, Mercedes. "Illegal, unreported and unregulated fishing control in the Exclusive Economic Zone: a brief appraisal of regulatory deficits and accountability strategies." *Croatian International Relations Review* 22.75 (2016): 39-68.

²³ Maryani, Halimatul, and Adawiyah Nasution. "Rekonsepsi Model Pemberantasan Illegal Fishing di Perairan Indonesia (Analisis Perspektif Hukum Internasional)." *Jurnal Legislasi Indonesia* 16.3 (2019): 379-391.

international conventions or international law including legal rules made by each country²⁴, including:

I. UNCLOS 1982

Regarding the utilization and management of fishery resources, the 1982 Convention on the Law of the Sea or hereinafter referred to as UNCLOS 1982 contains provisions governing fisheries laws applied in various maritime zone areas.²⁵ In chapter V it can be found about fisheries law regulations where it is stated that the regulation is under the exclusive economic zone (EEZ) regime, and divides the zone into the EEZ of two countries.²⁶ UNCLOS also mandates that the state can make optimal use of biological resources in the EEZ area as mentioned in Article 61.²⁷

II. Law Number 5 of 1983 concerning EEZ

The utilization of wealth in the EEZ area by foreign parties has a strong legal basis, as stated in Article 5 paragraph (3), that "*exploration and exploitation of a biological natural resource in a certain area in the Exclusive Economic Zone of Indonesia by a person or legal entity or a Foreign Government may be permitted if the amount of catch allowed by the*

²⁴ Situngkir, Danel Aditia. "Perjanjian Internasional dan Dampaknya Bagi Hukum Nasional." *Kertha Wicaksana* 13.1 (2019): 19-25. See also Gumilar, Hertantyo Rizki. "Illegal Fishing in Indonesia and the Role of International Maritime Law on Illegal Fishing Action." *Indonesian Journal of Environmental Law and Sustainable Development* 1.1 (2022): 29-46.

²⁵ Kurnia, Ida. "Penerapan UNCLOS 1982 dalam Ketentuan Perundang-undangan Nasional, Khususnya Zona Ekonomi Eksklusif Indonesia." *Jurnal Hukum Prioris* 2.1 (2008): 42-49.

²⁶ Djalal, Hasjim. *Indonesia and the Law of the Sea*. Jakarta: Centre for Strategic and International Studies, 1995. See also Agoes, Etty R. "Indonesia and the LOS convention: Recent developments in ocean law, policy and management." *Marine Policy* 15.2 (1991): 122-131.

²⁷ Rosnida, Rosnida. "Analisis Yuridis Batas Zona Ekonomi Eksklusif Indonesia-Australia Untuk Menghindari Penahanan Nelayan Tradisional oleh Australia." *JOEL: Journal of Educational and Language Research* 1.11 (2022): 1521-1528. See also Rahayu, Nadia Saidah, et al. "Policy on Maritime Border Disputes Between Indonesia and Australia: Stephen M. Walt's Neorealism Perspective." *Journal of Islamic World and Politics* 7.1 (2023): 80-93.

*Government of the Republic of Indonesia for that type exceeds Indonesia's ability to utilize it.*²⁸

III. Law of the Republic of Indonesia No. 45 of 2009 concerning Amendments to Law of the Republic of Indonesia No. 31 of 2004 concerning Fisheries

Indonesia also issued a separate law regulating the Management of Biological Resources, namely in Law of the Republic of Indonesia No. 5/1983. As mentioned in Article 110 point b reads: *"Provisions regarding investigations as stipulated in Article 14 and provisions regarding criminal fines in Article 16 paragraph (1) of Law Number 5 of 1983 concerning the Exclusive Economic Zone of Indonesia (State Gazette of the Republic of Indonesia of 1983 Number 44, Supplement to the State Gazette of the Republic of Indonesia Number 3260) especially related to criminal acts in the field of fisheries; revoked and declared void"*.

Illegal fishing which is defined as theft of fish or fishing within the territory of another country without permission from the country concerned is a transnational crime.²⁹ Sourced from IIU, an activity can be categorized as an act of fish theft if it meets 3 (three) things, namely: carried out by foreign citizens or ships in waters under the control of a country, without being accompanied by permission from the country concerned, and violating applicable legal provisions.³⁰ Based on these provisions, it can be understood that fishing by ships flagged by their own country (national ships) or ships with foreign flags carried out under the control of a country without prior permission from the relevant country can be categorized as fish theft or illegal fishing.³¹ *Northern Territory Australia* also provides an understanding related to fish theft, namely *fish*

²⁸ Wiryawan, Budi, and Akhmad Solihin. *Daerah Penangkapan Ikan: Dalam Perspektif Pengelolaan Perikanan Indonesia*. (Bandung: Nuansa Ilmu, 2015).

²⁹ Rosello, "Illegal, Unreported and Unregulated Fishing Control in the Exclusive Economic Zone: A Brief Appraisal of Regulatory Deficits and Accountability Strategies."

³⁰ Doulman, "FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing 2001: background and progress towards implementation."

³¹ Rosello, "Illegal, Unreported and Unregulated Fishing Control in the Exclusive Economic Zone: A Brief Appraisal of Regulatory Deficits and Accountability Strategies."

in Australian fishing zone without licence which can be interpreted as fishing activities in Australian waters without having a permit.³² The activities referred to here include fishing, taking, catching, and harvesting fish and marine life including other activities related to fishing activities.³³

Actualizing the Extradition Agreement: Indonesia-Australia Collaboration in Action

Various forms of international agreements can be carried out by various countries, including Indonesia.³⁴ An international agreement is an agreement that is held to give birth to a certain legal effect by the parties bound by it, which in this case is every country that binds itself to an international agreement.³⁵ In the Vienna Convention of 1986 can be found the definition of an International Treaty, which is an international agreement or agreement that is regulated and based on international law, written and signed by more than one country or international organization.³⁶ In general, international agreements are made to carry out an international cooperation.³⁷ Just like other agreements, international agreements also contain the subject and object of agreements, in which

³² Fishery Act, Northern Territory of Australia Regulation. *See also* Butterly, Lauren. "Fishing for Rights: The Water-Food Nexus and Indigenous Fishing in Australia's Northern Territory." *Jurimetrics* 59 (2018): 43.

³³ Banjarani, "Illegal Fishing dalam Kajian Hukum Nasional dan Hukum Internasional: Kaitannya dengan Kejahatan Transnasional."

³⁴ Risnain, Muh. "Rekonsepsi Model Pencegahan dan Pemberantasan Illegal Fishing di Indonesia." *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 4.2 (2017): 379-398; Mamonto, Enggra. "Kerjasama Indonesia dan Australia dalam Bidang Keamanan untuk Menangani Kasus Illegal Fishing di Perbatasan Kedua Negara." *WANUA: Jurnal Hubungan Internasional* 5.1 (2020): 64-72.

³⁵ Boas, Gideon. *Public international law: contemporary principles and perspectives*. Edward Elgar Publishing, 2012.

³⁶ Farida, Elfia. "Kewajiban Negara Indonesia Terhadap Perjanjian Internasional Yang Telah Diratifikasi (Convention on The Protection of The Rights of All Migrant Workers of Their Families)." *Administrative Law and Governance Journal* 3.1 (2020): 182-191.

³⁷ Rosello, "Illegal, Unreported and Unregulated Fishing Control in the Exclusive Economic Zone: A Brief Appraisal of Regulatory Deficits and Accountability Strategies."

case the subjects are all legal subjects at the international level, namely countries and international organizations.³⁸ As with the subject of international law, the national object here is all interests that concern the livelihood of the world community or the international community, especially in this case economic, political, social, and cultural issues.³⁹

International agreements generally carried out by various countries can be divided into bilateral and multilateral agreements.⁴⁰ Bilateral agreements are international agreements carried out by two countries only, usually these agreements are made with the aim of regulating the policies of only two countries.⁴¹ The nature of bilateral agreements is closed, which is understood to mean that other countries that are not party to the treaty do not have the right to determine the content of the treaty and interfere with the treaty made.⁴² Unlike bilateral agreements, multilateral agreements are agreements that are agreed to be made or carried out by more than one country with the aim of regulating the common interests of all parties to the agreement.⁴³ What these two treaties have in common is that they contain an international agreement that concerns state policy. For countries that have made agreements with other countries are not participating in it is prohibited to make or make other international agreements with other countries as well.

In addition to the international agreements mentioned above, there are other forms related to international agreements, including Treaties, Conventions, Agreements, *Memorandums of Understanding*,

³⁸ Slagter, Tracy H., and John D. Van Doorn. *Fundamental Perspectives on International Law*. Cambridge University Press, 2022.

³⁹ Brownlie, Ian. "The Peaceful Settlement of International Disputes in Practice." *Pace International Law Review* 7.2 (1995): 257.

⁴⁰ Mangku, Dewa Gede Sudika. "The Borderland of the Unitary state of the Republic of Indonesia with others countries." *South East Asian Journal* 9.4 (2016). See also Kingsbury, Damien. "Indonesia: Arbitrary polity, unitary state." *Routledge Handbook of Regionalism & Federalism*. Routledge, 2013. 401-412.

⁴¹ Boas, Gideon. *Public international law: contemporary principles and perspectives*. Edward Elgar Publishing, 2012.

⁴² Situngkir, "Perjanjian Internasional dan Dampaknya Bagi Hukum Nasional."

⁴³ Agusman, D. Dumoli. *International Treaty Law of Indonesian Theory and Practice Studies*. (Jakarta: Refika Aditama, 2017).

Arrangements, Carpentery Notes, and Modus Vivendi.⁴⁴ All forms of international agreements made or carried out certainly have their own goals. In general, an agreement is made to carry out a cooperative relationship,⁴⁵ which in this case is cooperation between countries, as well as an extradition agreement. Although the above explanation does not mention the form of extradition agreements, they are actually agreements made between countries, just like bilateral agreements. It is stated in Article 1 of Law No. 1/1979 that "*Extradition is the surrender of a state to a state requesting the surrender of a person suspected or convicted of committing a crime outside the territory of the surrendering state and within the territorial jurisdiction of the state requesting the surrender, because it is authorized to try and convict him.*" Based on the sound of the article, it can be understood that extradition is a process of surrendering suspects or prisoners who commit crimes in the territory of another country and are tried according to the laws of other countries which are then requested by their home country to be processed and tried based on the laws in force in their home country.⁴⁶

In the case of *illegal fishing* that occurs between Indonesia and Australia, of course, the submission of illegal fishing actors must be based on an extradition agreement between Indonesia and Australia.⁴⁷ The governments of the two countries, namely Indonesia and Australia, have made bilateral agreements to overcome problems that arise between the two countries, such as fisheries problems in border areas.⁴⁸ Indonesia and Australia have established various forms of cooperation outlined in the form of agreements, one of which discusses fishermen's activities in border areas, in this case traditional fishermen.⁴⁹ The agreement includes:

⁴⁴ Situngkir, "Perjanjian Internasional dan Dampaknya Bagi Hukum Nasional."

⁴⁵ Agusman, *International Treaty Law (Study of Indonesian Theory and Practice)*.

⁴⁶ Setyaningsih, Ni Putu Ari. "Penerapan Asas Nasionalitas Aktif Terhadap Tindak Pidana Pencucian Uang." *Jurnal Aktual Justice* 4.2 (2019): 127-146.

⁴⁷ Atmasasmita, Romli. "Ekstradisi dalam Meningkatkan Kerja Sama Penegakkan Hukum." *Indonesian Journal of International Law* 5.1 (2007): 1-15.

⁴⁸ Lasabuda, Ridwan. "Pembangunan wilayah pesisir dan lautan dalam perspektif Negara Kepulauan Republik Indonesia." *Jurnal Ilmiah Platax* 1.2 (2013): 92-101.

⁴⁹ Mamonto, "Kerjasama Indonesia dan Australia dalam Bidang Keamanan untuk Menangani Kasus Illegal Fishing di Perbatasan Kedua Negara."

Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australia Exclusive Fishing Zone and Continental Shelf, signed on November 7, 1974 or better known as MoU BOX 1974.⁵⁰

Although the two countries have made agreements related to border issues, it is not uncommon for the Australian government to still find that Indonesian citizens still enter the territory of Australian jurisdiction, both legally and illegally.⁵¹ Since the signing of the agreement between the two countries through *an MoU*, the Australian Government has also recognized the rights owned by traditional Indonesian fishermen.⁵² In addition to the MoU, the Extradition Agreement was also agreed and signed by the two countries, precisely on April 22, 1992. In the 1974 MoU BOX there are several points agreed by the two countries including:

1. Only traditional fishermen with traditional boats are allowed to fish in Australian territorial waters;
2. Utilization of fish resources in Australian waters is carried out around the *Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet areas*;
3. Traditional fishermen are also allowed to take drinking water at *East Islet and Middle Islet*;
4. Traditional fishermen are allowed to take seafood in the form of: lola, scallops, sea cucumbers, soft animals or often called mollusks, green snails.⁵³

⁵⁰ Rosnida, "Analisis Yuridis Batas Zona Ekonomi Eksklusif Indonesia-Australia Untuk Menghindari Penahanan Nelayan Tradisional oleh Australia."

⁵¹ See Suwikarma, I. Made Yudha, and Surya Nita. "Crime Prevention Conducted by the Task Unit of Patrol Ship Ditpolairud Baharkam Polri Against Transnational Crime Cases in the Indonesian Water Area (Case Study: Transnational Crime in the Riau Archipelago)." *International Journal of Social Science Research and Review* 6.6 (2023): 561-572; Trisna, Wessy. "Criminology Perspective on Marine Criminal Acts in Malacca Strait." *Environmental Policy and Law* 50.4-5 (2020): 351-355.

⁵² Rosnida, ""Analisis Yuridis Batas Zona Ekonomi Eksklusif Indonesia-Australia Untuk Menghindari Penahanan Nelayan Tradisional oleh Australia."

⁵³ Mamonto, "Kerjasama Indonesia dan Australia dalam Bidang Keamanan untuk Menangani Kasus Illegal Fishing di Perbatasan Kedua Negara."

The contents of the 1974 MoU BOX in its entirety regulate fishing activities in Australian territorial waters carried out by traditional fishermen.⁵⁴ The nature of traditional fishermen in the 1974 MoU BOX can be understood as those who catch fish traditionally with boats and traditional tools against fish species and organisms in Australian territorial waters.⁵⁵ However, this is contrary to what is contained in Law No. 31/2004 on Fisheries, because in the Law there is no term traditional fishermen, but what is used is the term small fishermen.⁵⁶ Since Indonesia and Australia have established cooperation with their extradition treaty, the difference in the use of the term should be equated.

Application of Passive National Principles in Dispute Resolution of Illegal Fishing

The Extradition Agreement signed by Indonesia and Australia on 22 April 1992 and the MoU governing traditional fisheries rights. The Indonesian government as a state organizer indirectly has a mandate to participate in protecting citizens, including their rights.⁵⁷ In relation to what the author researched, the government is also obliged to protect all rights owned by traditional fishermen, especially traditional fishery rights.⁵⁸ Fishermen who go to sea until they enter the territorial waters of

⁵⁴ Nurfebriansyah, Ahmad Rifki, and Widyawati Boediningsih. "Hak Penangkapan Ikan Tradisional Nelayan Indonesia di Kawasan Ashmore Reef." *Kertha Wicaksana* 17.1 (2023): 9-14.

⁵⁵ Mamonto, "Kerjasama Indonesia dan Australia dalam Bidang Keamanan untuk Menangani Kasus Illegal Fishing di Perbatasan Kedua Negara."

⁵⁶ Republic of Indonesia. *Law Number 31 of 2004 concerning Fisheries*

⁵⁷ Pramitha, Dewi Adithyanti. "Diplomasi Pertahanan Indonesia dengan Australia dalam Hubungan Comprehensive Partnership di Bidang Keamanan Maritim." *Jurnal Diplomasi Pertahanan* 3.2 (2017).

⁵⁸ Irawati, Irawati. "Tanggung Jawab Negara dalam Melindungi Hak Nelayan Tradisional Indonesia di Perairan Australia." *Mimbar: Jurnal Sosial dan Pembangunan* 27.1 (2011): 11-20. See also Dyspriani, Polite. "Traditional fishing rights: Analysis of state practice." *Division for Ocean Affairs and Law of the Sea Office of Legal Affairs. United Nations, New York, USA* (2011); Heazle, Michael, and John G. Butcher. "Fisheries depletion and the state in Indonesia: Towards a regional regulatory regime." *Marine Policy* 31.3 (2007): 276-286.

another country, as is the case with traditional fishermen who fish until they enter the territory of Australian jurisdiction and are then caught by Australian government authorities, are also entitled to protection.⁵⁹ Protection that can be done by the government on fishermen caught by Australia can be done by applying the passive national principle or often referred to as the principle of protection.⁶⁰

The passive national principle can be defined as a criminal rule of a state that applies outside the territory but harms the national interest (state).⁶¹ The Criminal Code also contains regulations for the application of the passive national principle, as mentioned in Article 4 of the Criminal Code. The passive national principle mentioned in the Criminal Code has the aim of protecting Indonesia's national interests.⁶² Relating to the national interest, it has been mentioned in Article 4, including crimes regulated in Articles 104, 106, 107, 108 and 131 of the Criminal Code, forms of crimes regarding stamp duty, brands issued by the government, forgery of letters, debt certificates, and so on. However, the provisions governing the application of the passive national principle are also expanded in the provisions of article 8 of the Criminal Code, which is related to Indonesia's interest in providing protection for its shipping.⁶³

The passive national principle according to international law is a principle by which a state can exercise jurisdiction over its citizens.⁶⁴ In the case of traditional Indonesian fishermen in Australian territorial waters,

⁵⁹ Mamonto, "Kerjasama Indonesia dan Australia dalam Bidang Keamanan untuk Menangani Kasus Illegal Fishing di Perbatasan Kedua Negara."

⁶⁰ Fatahillah, F. "Pertanggung Jawaban Negara Terhadap Tindak Pidana Internasional." *REUSAM: Jurnal Ilmu Hukum* 9.2 (2022).

⁶¹ Parthiana, I. Wayan. *Hukum Pidana Internasional dan Ekstradisi*. Yrama Widya, 2003.

⁶² Rifawan, Affabile, Ivan Darmawan, and Riki Relaksana. "A Review on the Governance of Protection System for Indonesian Citizens Abroad." *Jurnal Asia Pacific Studies* 1.2 (2017): 155-168; Ridwan, Ridwan. "Critical Study to the Enforceability of Passive National Principle in Indonesia Criminal Code." *Jurnal Dinamika Hukum* 15.2 (2015): 186-192.

⁶³ Rifawan, Darmawan, and Relaksana. A Review on the Governance of Protection System for Indonesian Citizens Abroad."

⁶⁴ Setyaningsih, "Penerapan Asas Nasionalitas Aktif Terhadap Tindak Pidana Pencucian Uang."

boats and fishing gear have been confiscated, damaged, even burned and sunk by Australian authorities.⁶⁵ For this action, the Indonesian government can also request the Australian government that the person be handed over to the Indonesian government for trial under applicable law in Indonesia. This is caused by losses incurred by the actions of unscrupulous Australian authorities which actually resulted in losses to Indonesian interests, namely the interests of traditional Indonesian fishermen. The application of the passive national principle in this case is also based on the MoU and Extradition Treaty that has been made between Indonesia and Australia.⁶⁶

Factors in the occurrence of *illegal fishing* cases as occurred between Indonesia and Australia are caused by the geographical conditions of Indonesia and neighboring Australia.⁶⁷ In addition to being based on the two agreements as mentioned above, Indonesia and Australia agreed on cooperation carried out to conduct joint patrols to prevent and supervise *illegal fishing* actions from both countries. The cooperation carried out certainly has aims and objectives for both parties.⁶⁸ The cooperation carried out is based on the basis of maintaining, protecting, and defending the sovereignty of each cooperating country, for the many cases of *illegal fishing* acts as they occur in border areas, especially in this case are unlicensed fishing activities carried out by traditional Indonesian

⁶⁵ Sobarini, Eryn. "Peluang Potensial dan Dampak Visi Poros Maritim bagi Hubungan Indonesia-Australia." *Jurnal Diplomasi Pertahanan* 7.2 (2021): 95-112. See also Scott, David. "Indonesia grapples with the Indo-Pacific: Outreach, strategic discourse, and diplomacy." *Journal of Current Southeast Asian Affairs* 38.2 (2019): 194-217.

⁶⁶ Nurfebriansyah and Boediningsih, "Hak Penangkapan Ikan Tradisional Nelayan Indonesia di Kawasan Ashmore Reef."

⁶⁷ Sobarini, "Peluang Potensial dan Dampak Visi Poros Maritim bagi Hubungan Indonesia-Australia."

⁶⁸ Vince, Joanna, Britta Denise Hardesty, and Chris Wilcox. "Progress and challenges in eliminating illegal fishing." *Fish and Fisheries* 22.3 (2021): 518-531; Sodik, Dikdik Mohamad. "Analysis of IUU fishing in Indonesia and the Indonesian legal framework reform for monitoring, control and surveillance of fishing vessels." *The International Journal of Marine and Coastal Law* 24.1 (2009): 67-100.

fishermen.⁶⁹ By taking this step, it is proven that there is a decrease in the number of *illegal fishing* acts.

The application of the passive national principle in resolving *illegal fishing* disputes against traditional fishermen who fish in Australian waters is intended to protect Indonesian citizens in this case traditional fishermen from criminal charges or punishments in the area where the crime occurred (abroad) to then be tried based on the law in force in their home country (Indonesia). The jurisdiction of protection proves that the state has an obligation to protect every citizen who is abroad.⁷⁰ Based on these provisions, Indonesia has the authority to implement its legal provisions to every citizen who is abroad. However, there are limitations to the application of this jurisdiction, which is limited by the sovereignty of each country where the Indonesian citizen is located.⁷¹ This is because each country has its own legal sovereignty.

The enactment of the passive national principle is also limited by the application of the national principle, where crimes committed by Indonesian citizens outside their jurisdiction cannot necessarily be prosecuted by applicable law in Indonesia. So in this case, it is necessary to have an agreement carried out by the relevant state which is positioned as the basic basis for the implementation of the passive national principle. The agreement that is generally made as a legal basis is an extradition agreement. In practice, an extradition agreement is a formal process of handing over a criminal offender or offender from the country where the offence or crime was committed to the country from which the offender originated.⁷² So the existence of the extradition agreement will facilitate

⁶⁹ Maryani and Nasution, "Rekonsepsi Model Pemberantasan Illegal Fishing Di Perairan Indonesia (Analisis Perspektif Hukum Internasional)."

⁷⁰ Setyaningsih, "Penerapan Asas Nasionalitas Aktif Terhadap Tindak Pidana Pencucian Uang."

⁷¹ Putri, Devita Kartika. "Urgensi Asas Subsider Pada Pengaturan Asas Universal dalam Rancangan Kitab Undang-Undang Hukum Pidana." *Masalah-Masalah Hukum* 51.2 (2022): 162-170.

⁷² Kalalo, Flora Pricilla. "Efektifitas Perjanjian Ekstradisi sebagai Sarana Pencegahan, Pemberantasan dan Penghukuman Pelaku Tindak Pidana Internasional." *Lex et Societatis* 4.1 (2016).

the extradition of criminal offenders or crimes who commit crimes or crimes abroad to their home countries.

Conclusion

In conclusion, the issue of illegal fishing underscores the complexities of transnational crime, particularly evident in cases involving Indonesian fishermen operating in Australian waters without proper permits. These incidents highlight the clash between national laws and international agreements. While Australian law dictates the detention and trial of these fishermen, Indonesia can invoke its national law under the passive national principle, asserting jurisdiction over its citizens abroad. This legal mechanism, grounded in bilateral agreements, exemplifies the practical application of the passive national principle in resolving illegal fishing disputes between Indonesia and Australia. This underscores the importance of international cooperation and legal frameworks in addressing such cross-border challenges while respecting the sovereignty and legal rights of both nations and their citizens.

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DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

None

ACKNOWLEDGMENT

None

HISTORY OF ARTICLE

Submitted : December 11, 2021

Revised : March 27, 2022; August 11, 2022; January 10, 2023

Accepted : January 20, 2023

Published : January 31, 2023