

**CRIMINAL RESPONSIBILITY OF CORPORATE CRIME TOWARDS THE
CRIMINAL ACT OF ILLEGAL FISHING
(Study of Verdict No. 31/Pid.Sus/2013/PTR)**

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Abstract

Investigating the aspects or arresting the intellectual perpetrators of corporate crimes has not been typically done by the public prosecutor in the trial concerning the responsibility of corporate crime in criminal act of illegal fishing. Even though it has been stated clearly in law of state, the corporate crime of illegal fishing is not strictly enforced. Moreover, the criminal act of illegal fishing is considered as general crimes instead of special crimes. In this case, illegal fishing is supposed to be considered as special crimes that should be solved distinctively. This article particularly discusses the improper enforcement of corporate crime in illegal fishing conducted by law enforcement agents. Terribly, this concern would not bring deterrent effects for the perpetrators, particularly the intellectual perpetrators and their corporate.

Keywords: criminal responsibility, corporate, illegal fishing

A. Introduction

The archipelago which was popular on the ancient kingdom days was known as the maritime areas with outstanding biodiversity. The archipelago that was united by the Majapahit kingdom is now tangible as the country of Indonesian. This country inherits all the natural resources of the archipelago, especially fish, the most visible wealth of the sea, and the other sea creatures there. Indonesia is an archipelago that consists of 18,108 islands, in which some of them are unspoiled and anonym islands. Those islands are important part of this vast country and become the national asset. According to the mandate of Law constitution of 1945, these recourses, in this case is fish, contain long-term potential of natural resources that is used for a better prosperity of Indonesian people.¹

¹ Muh Fithyatul Kahfi, "Tinjauan Normatif Terhadap Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Perikanan, *Skripsi*, Makassar: Universitas Hasanudin, 2016, Hlm.01

In the past, Indonesia was fragmented by oceans on the concept of the ancient law that stated every island in Indonesia only had the sea as far as 3 miles from the coastline. The rest of it was outside the region and it is free for all people and all nations to sail there. It also could not be controlled or claimed as the territory of one certain kingdom.² This condition that makes the Indonesian government to set ideas that the archipelago can be united under the legal concept of new sea. This concept states that the whole territory of the sea around the Indonesian islands with 12 miles distance from the outer islands become the territory the nearest island. As the result, the concept of Exclusive Economic Zone is created. The concept of the exclusive economic zone that is declared by Indonesia government, represented by the late prime minister of Indonesia, Juanda Kartawijaya in United Nation forum, has changed the concept of the law of the sea around the world.³

The passage of the concept of an exclusive economic zone by the United Nations to make Indonesia have the region a vast ocean that can be used to support the prosperity of the people with the resources of the sea in this case in the form of fish were abundant, but this did not automatically generate prosperity that was increasing among the people, because the ways of the local fishermen fishing were still largely traditional or they did not fully understand how to catch fish with a balance of the environment or the ecosystem in true ways.

Ways of fishing up to now have experienced tremendous development as the rapid developments of technology have, so fishing massively in many ways to be done more, then the human began to think how to fish, thinking that the fishing massively and sustainably will eventually make a number of fish on the decrease and even running out because of the imbalance between consumption of fish every day the human consume with the number of reproductions made by fish. The most of people increasingly need food, including fish consumption, the use of fishery

² "Teritoriale Zeen En Maritieme Kringen Ordonantie 1939."

³ "United Nation Convention On The Law Of The Sea 1982."

resources which are originally only for the needs of the family, transformed into a commercial type of fisheries.⁴

Fishing for commercial purposes makes a lot of corporations in the field of fisheries appear to seek profits, both from within and outside the country, where they use large vessels with fishing gear that is modern enough to catch fish largely and massively, as an example fishing with trawl nets, catching as it certainly violates the rules in Indonesia, where since long time Indonesia has banned the use of trawl nets to catch fish.

Law violation in the form of Illegal Fishing is mainly acted out in the Exclusive Economic Zone (EEZ) and occurs in regions archipelagic waters, with types of fishing gear that is against the rule of law in Indonesia. For instance, illegal foreign vessels sails and catches fish in Indonesian waters using high productive tools compared to the tools used by the Indonesian local fishermen. Illegal foreign vessels usually uses Purse Seine and trawling which are able to catch large amounts of fish in one caught.

The crime action fisheries not only do foreign nationals but also a citizen of Indonesia itself, with several modes for instance, fisheries without permission, or having permission yet to break the rules as in the established provisions in the legislation relating to crimes of fisheries, including falsification, manipulation of documents, Transshipment at sea, do not turn on the transmitter and destructive fishing using chemical, biological, explosives, tools and or how to build that endangers the sustainability of fish resources.⁵

In the catch of the fishermen who violate the law may be much easier than catching who told them that is his corporation, because the issues where there is no mention explicitly that the corporation as a legal subject that can be punished within

⁴ Djoko Tribawono, *Hukum Perikanan Indonesia*, Bandung: PT. Citra Aditya Bakti, 2013, Hlm.20

⁵ Rohmin Dahuri, "Aspek Hukum Penanganan Tindak Pidana Perikanan", *Makalah Diklat Penanganan Tindak Pidana Perikanan Angkatan II*, Pusdiklat Kejaksaan Agung Republik Indonesia, 2013, Hlm.02

the law on fisheries.⁶ The impact of corporate crime is certainly larger and massive than the minor damage done by the traditional fishermen but in the Law No. 45 of 2009 concerning amendments to the Law No. 31 of 2004 on fisheries in which that can be punished is the one not corporate directly, then automatically the corporation will continue to commit crimes and criminal act just by changing people, even though the state losses caused by very large corporations.

For example, the experience of researchers themselves while on duty in the Natuna islands, many corporations in the field of fisheries was stealing fish in the Indonesia ocean in a serious stage, amid a sea like a "market" in which hundreds of ships from domestic and overseas who practiced illegal fishing and other fishery criminal acts massively, they were arrested, the ship was confiscated and under the policy of minister, Susi Pudjiastuti, even ships to be blown up, and even then they were not a deterrent, because who was punished were those actors in the field, employees who did not have the capital, so that the corporation still went on despite the fact that his efforts, many times his ship and his men were captured and executed criminal.

Public prosecutors rarely prosecute the corporation with corporate criminal liability that should be done, for example in this case, the high court verdict to convict Herlan Riau who committed the crime of illegal fishing in the waters of the Sea of South China, with the verdict, number 31/Pid.Sus/2013/PTR where this verdict only punishes the active doer, Herlan as a captain, while who told Herlan or the owner of the ship was not pursued further as untouched at all.

It is impossible if only a captain who just educated class high school of the township village in Sukabumi like the convict, Herlan who was the main character in the theft of this fish. The vessel must belong to the entrepreneur or the owner of certain corporate in the certain place, but this was not pursued further when it should be they who supposed to be most responsible for this criminal act of Illegal Fishing.

⁶ Chendry Bryan Martinus Supit, "Pertanggungjawaban Pidana Korporasi dalam Perundang-perundangan di Indonesia", *Jurnal Lex Administratum*, Vol.III/No.6/Ags/2015, Hlm.03

In the criminal code, the intellectual perpetrator is the corporation, not the field workers whose low education level.

In the verdict on only convict convicted of offense region and the fishing season as well as violations for using the tools that were prohibited, then they were fined and the vessel returned, even appealed by the prosecutor that the verdict appeal high court of Riau in addition upheld the verdict court Riau also add injunction to seize a ship to countries as well as the prosecution, it shows the weakness of law enforcement in matters illegal fishing, and very interesting to study further.

The amounts of foreign nationals who steal fish in Indonesian waters are as many as the amount of illegal fishing perpetrators in the country. However, the judge's ruling is still not far from the decision of a fine, or if not paid enough to be replaced by imprisonment of not more than six months. The verdict examples besides the rules mentioned before is the verdict number 181/PID.SUS/2013/PTR for convicted Mr. Pham Phu Quoc, a Vietnamese citizen who was caught in the EEZ of Indonesia in Riau Archipelago.

Mr. Pham Phu Quoc was arrested for violating Indonesian territory without a permit in fishing, and the use of equipment which is also prohibited by law, although mentioned in the verdict that the defendant knew very well that the facts in court that the defendant Mr. Pham Phu Quoc was just a worker or employee fish company in Vietnam who told him to steal the fish to the territory of Indonesia, but the punishment for this person as a ship captain was just fine if not paid to be replaced by imprisonment of 6 months in level of District Court, prosecutors feel this ruling too mild appeal high court of Pekanbaru, but the result was a fine of one billion if the District Court is not paid out in the verdict, then it was replaced with jail 4 months, precisely the appeal verdict increasingly relieved the accused of this, it would be interesting to make a scientific material.

Based on the announcement made the ministry of maritime affairs and fisheries on the progress of cases IUU (Illegal, Unregulated, and Unreported) Fishing on September 17, 2015 mentioned several companies involved in the actions in the

case of law violations in the fishery, mentioned in the report several corporations involved both from domestic and foreign or corporation in the country affiliated with foreign corporations in abroad, among others the Group Pusaka Benjina with a subsidiary of Heritage Benjina Resource, Pusaka Benjina Fleet, Heritage Benjina Nusantara, Pusaka Bahari, Group Mabiru Industries, Biota Indo Persada , Jaring Mas, the Bund Mina Nusantara, Ocean Pratama Jaya and Pacific Glory Lestary, these companies were not only violations in terms of fisheries, but also in terms of permits of building ships, in addition to the foreign company from China, Pingtan Marine enterprise (PME) Ltd. with the office center in China had proprietary relationships and transactions with local corporations in Indonesia, namely PT Avona Mina Lesatari, PT Dwikarya Mutual Abadi, PT Samudera Aru Antarticha Segara Lestari and PT Lines, four companies had been doing a serious violation.⁷

Based on the description above, in this article will discuss on the basis of considerations of what judges in the verdict on criminal acts of illegal fishing and how the judge's verdict if it is linked with corporate criminal liability as legal subjects criminal acts of illegal fishing.

B. Discussion

1. Rationale for Dropping the Judge in Verdict against the Crime of Illegal Fishing

Cases position in the verdict, number 31/PID.SUS/2013/PTR on the crime of illegal fishing which had been carried out by Herlan who had permanent legal force (*incraht van gewisde*) Appellate High Court, Pekanbaru were as follows: First; Herlan as a convict in such cases was as a helmsman KM Tanjongpura 02 was arrested for violations of illegal fishing on Sunday, August 12th, 2012 at 03.00 pm in the fishery management area of the Republic of Indonesia, which was in the waters of the Indonesian Exclusive Economic Zone in the sea of South China, in addition to

⁷ <http://www.kkp.go.id/pers/kkp-umumkan-perkembangan-kasus-iuu-fishing/> diakses pada 26 September 2016, Pukul 05:00 WIB

violations of illegal fishing within the jurisdiction of Indonesia, he was also committed violations in the case which had violated the provisions of the type, number and size of fishing gear. (Decision No.31/PID.SUS/2013/PTR, 2013:02).

The above actions by the public prosecutor prosecuted the law of Indonesia as stipulated in article 100 of the Indonesian Republic Law, No. 31 in 2004 on fisheries Jo. article 7 paragraph (2) letter a of the Indonesian Republic Law, No. 45 in 2009 on amendments to the Indonesian Republic Law, No. 31 in 2004 on fisheries.

Second; convicted in the case other than demanded by the public prosecutor with article 7, paragraph (2) letter a of the Indonesian Republic Law, No. 45 in 2009 on amendments to the Indonesian Republic Law, No. 31 in 2004 on fisheries, the accused then also charged with criminal prosecution had violated the track and the time the fishing season, as stipulated in article 100 of the Indonesian Republic Law, No. 31 in 2004 on fisheries, article 7 paragraph (2) letter c of the Indonesian Republic Law No. 45 of 2009 concerning amendments to Republic Act 2004 on fisheries.

Panel of judges in Ranai District Court in its verdict in the case above was case No. 21/Pid.Prkn/2012/PN.RNI dated January 23, 2013 were as follows:

1. Declaring the defendant, Herlan proven legally and convincingly guilty of committing the crime of violation "type, number and size of fishing gear" as mentioned in the first indictment of the prosecutor.
2. Imposing criminal defendant against himself punished by a fine of Rp 125.000.000,- (One Hundred and Twenty Five Million rupiahs) Subsidiary 4 (Four) month confinement.
3. Establishing evidences in the form of:
 - a. 1 (one) unit Tanjongpura KM 02, 101 GT, made of wood, Cummins engine 480 PK;
 - b. 1 (one) Radio Super Star 2400
 - c. 1 (one) GPS Samsung
 - d. 1 (one) Compass
 - e. Document ships include:

- = 1 (one) SPB
- = 1 (one) Copy of SIUP
- = 1 (one) SIPI
- = 1 (one) SLO
- = 1 (one) Measure Letter
- = 1 (one) SKPKPI
- = 1 (one) certificate of nautical expert of fishing boats Tk.II
- = 1 (one) certificate of competency
- = 1 (one) the temporary annual Pas
- = 1 (one) official statement of Activation Transmitter
- = 1 (one) PPP
- = 1 (one) Health Book
- = 1 (one) Certificate

Returned to its owner;

- 1 (one) set of fish net

Seized to be destroyed;

4. Charging the defendant, Herlan to pay court costs, Rp. 5000, - (five thousand rupiahs);

Based on verdict of the public prosecutor would mind returning the ship convicts according to the public prosecutor, it should have been confiscated for the state, so that the public prosecutor filed an appeal to the High Court of Pekanbaru by lodging an appeal which basically objected to the return of the evidence ship to the defendant that the evidence of ship should be confiscated to the State. Herlan defendant himself in his appeal for the counter basically stated that his actions only violation, so it was very naive if the evidence was seized for the state and requested that the High Court Pekanbaru passed verdict in a fair away.

The verdict of Pekanbaru Riau High Court then decided to receive a request from the public prosecutor to appeal the injunction as follows:

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- Receiving a request to appeal the public prosecutor;
- Strengthening the verdict of Ranai District Court, Number 21/PID.Prkn/2012/PN.Rni dated on January 23, 2013, petitioned the appeal;
- Burden the defendant to pay court costs in the judicial level, the level of appeal of Rp. 2,500 (two thousand five hundred rupiahs).

From the ruling of the High Court had been clear that an appeal from the public prosecutor was granted, namely the confiscation of the vessel, from this evidence by the District Court Ranai decided to be returned to the defendant but the level of the appeal decided to be confiscated to the state.

Basic considerations from the judge of District Court Ranai foreclosed became the basis in the verdict of Pekanbaru High Court regarding the above case that could be seen from the verdict, No. 21/PID.Prkn/2012/PN.Rni dated on January 23, 2013, that there were differences in the preamble to weigh considerations that the judges were different only in the preamble to weigh on the prosecution demanded that the defendant vessel was seized for the state, if at the district court level Ranai, the judge assemblies decided not agree with the prosecution's opinion that stated to demand that the ship be confiscated to the state, but the level of an appeal after the prosecution filed it, the verdict of the high court allowed the appeal of Pekanbaru prosecutors to seize the vessel for the country, but for the rest of the district court upheld the verdict of Ranai.

It can be simply concluded that adjudicating this case, the public prosecutor and district court judge of Ranai who handled the case did not address how that corporations were people who received massive transfers of fish from the ship of KM Tanjongpura 02 steered by this defendant could be pursued or criminally snared, although obviously nothing suspicious about the transfer of fish in the middle of sea on ships which had been prepared to wait, with a volume of hundreds of tons of worth billions of rupiah was revealed in court, but public prosecutors and judges apparently were still reluctant to explore more about the fisheries judge actions as mentioned above. So the verdict just ended at about sentencing concerned, the same as the model

of sentencing in criminal cases generally, although the fishery is a specific criminal case.

2. The Verdict of Judge in Related to Corporate Responsibilities As the subjects of Law on Criminal Act of Illegal Fishing .

The judges' verdict in the case as presented above was already true in law as demanded and argued by the public prosecution, which in essence was punishing active actors only, namely Herlan as a defendant who performed actions directly in the field in this case committed the crime of illegal fishing , but that should be understood was that in the case of illegal fishing should not only active participants that could be punished, but also had to determine the identity of the passive perpetrators having a larger role in the occurrence of the crime, namely the corporate, as contained in the facts in court contained in consideration of the judge in the verdict.

Such verdict contained considerations that one of them was the testimony of the defendant himself and witnesses who explained that the ship KM Tanjung Pura 02 steered by a defendant, did not work alone, but worked systematically, for the sake of greater specific concerns, rather than the concerns of fishermen fishing for looking for fish, because in fact at the trial was stated that KM Tanjung Pura 02, every two weeks, they transferred the fish in the amount of at least 18 tons to ship a container (tamper) with predetermined coordinates in the middle of the sea before. Although the defendant said he did not know what to do about the fish transfer in the South China Sea, of course it was suspected that something like this obviously involved a big, structured and systematic thing that a large corporation might be in this country or abroad.

It could be seen also on the involvement of foreign crews, namely a citizen of Thailand who became crews in KM Tanjung Pura 02 which were more numerous than domestic crews, that should have been suspected that there might be the involvement of foreign corporations in that regard, to the wealth Indonesia's nature in

terms of fish resources for corporate interests abroad belonging to foreign nationals, by means of citizen initiative Indonesia as executors.

There were four sections in dividing the accountability system, as follows: (1). Corporate Executive Boards as makers and administrators should be responsible for criminal acts; (2). The corporation as a maker, but the board should be responsible for the criminal acts; (3) The corporation as a maker, and corporations should also be responsible for the criminal acts; (4) The Board and corporations both as a criminal and the two others must bear the responsibility criminally.

As for the system of criminal liability corporation that was enacted in Law Number 45 in 2009 on the Amendment to Law Number 31 in 2004 on Fisheries was consistent with the development of the corporate responsibility in the second stage, namely the criminal liability borne by the board, it was enshrined in article 101 which reads "in the case of criminal offenses referred to in article 84 paragraph (1), article 85, article 86, article 87, article 88, article 89, article 90, article 91, article 92, article 93, article 94, article 95, and article 96 carried out by the corporation, and the demands imposed criminal sanctions against its officials and criminal penalties plus 1/3 (one third) of the sentence imposed.

Law makers in this case adopting a theory, the theory is called the disclosure curtain company (piercing the corporate veil) which is one of the very popular theories in the study of the law firm. What is meant by this theory is a process for burdening responsibility towards people or companies on a legal act carried out by a company offender regardless of the fact that the act is actually committed by companies, in this theory, this court will ignore the legal status of the company and imposes responsibilities to private parties and actors of the company by ignoring the principle of limited responsibility of the company as a legal entity that is usually enjoyed by them.⁸

⁸ Munir Fuady, *Doktrin-Doktrin Modern dalam Corporate Law dan Eksistensinya dalam Hukum Indonesia*, Bandung: PT. Citra Aditya Bakti, 2014, Hlm.29

Munir Fuady explained that there were several examples of facts that make disclosure theory curtain company (piercing the corporate veil) could be applied, among others, as follows: (1) Capitalization is not worth (too small); (2) Personal use of corporate funds; (3) A transfer of capital/assets of the company to shareholders; (4) The decision was taken without complying with certain formalities, for example, not committing the General Meeting of Shareholders for activities which required the General Meeting of Shareholders; (5) The theory of piercing the corporate veil applied for reasons of public order, for example, using the company to carry out the things that are inappropriate; (6). The theory of piercing the corporate veil is applied to the cases of criminal quasi, for example if the company is used as a license to sell liquor or gambling.

The provisions and criminal responsibility of corporate crime as stated in the provisions article 101 Fisheries Law adhere to the criminal prosecution and corporate accountability second stage, though the criminal prosecution and corporate accountability in Indonesia has been progressing as elaborated on the various provisions of the legislation.

In comparison to the constitution, No. 4 of 2009 on mining in article 163 paragraph (1) stated that if the perpetrators of crimes are in the form of a corporation, the criminal sanction is imposed on the board and the corporation, the board is sentenced to prison and fined, while the corporation with criminal penalties, is together as contained in constitution, No. 17 of 2008 on shipping on article 335, which states that if a corporation as the perpetrator, then in addition to the board, the corporation is also held responsibilities, the official is sentenced prison and fined, and for the corporation is given the fined sentences . This case is related to a phase of development of corporate criminal liability, third and fourth stages have recognized that corporate criminal liability may be charged.

There are several theories supporting that recognize corporations to be held accountable, among others, the identification theory of direct liability theory or

doctrine, theory is known as the doctrine of directly criminal liability.⁹ According to this doctrine, the corporation can commit criminal acts directly through senior officials and identified as companies or corporations act. Thus the actions of senior officials are deemed as corporation actions. In this theory of criminal liability will be totally borne by the corporation if a criminal act was committed by a person who is a "directing mind" of the corporation. Actually what means by the directing mind is action, or policy made by a board member or organ of the company/corporation or a manager that will determine the direction, activities and operations at the corporation. This theory can also be referred to the theory of "alter ego".

The existence of a theory called "doctrine of aggregation" notices an error number of people collectively, that is, people who act for and on behalf of the corporation or persons acting for the benefit of the corporation concerned. Furthermore, this doctrine says if there is a group of people who commit a crime but the person acting for and on behalf of the corporation or for a corporation, the corporation can be charged criminally accountable.¹⁰

Based on the descriptions above, there are apparent differences arising from the various theories that conflict to each other, but especially those of the law No. 45 of 2009 on the amendment to law number 31 of 2004 on fisheries imposed is the system of accountability in the second phase, namely the corporation as a maker, but the board should be criminally liable as stated in article 101 in the constitutions.

System settings corporate criminal liability under the fishery constitutions adopted today contains the weakness and enactments. The provisions contained in article 101 fisheries law suffered a setback, because the position of corporate positions as a crime of illegal, unreported, unregulated (IUU) fishing, but the corporation will not be punished, but Punishment Corporation transferred and charged to the board of the corporation.

⁹ Kristian, *Hukum Pidana Korporasi: Kebijakan Integral(Integral Policy) Formulasi Pertanggungjawaban Pidana Korporasi di Indonesia*, Bandung: Nuansa Aulia, 2014, Hlm.54

¹⁰ *Ibid.*, Hlm.70

It's very unfair if administrators corporations should be twice shoulder the burden of responsibility for the criminal prosecution and on the other side of the corporation itself obtain and store of wealth proceeds of crime fishery is never touched by the law, so as making corporate freely hoard property that is obtained by ways that are not justified by the applied laws and regulations.

Setback subjects of a criminal act fisheries as referred to in article 101 of law fisheries certainly cause problems and challenges that restore recovery of asset wealth of the country proceeds of crime of illegal, unreported, unregulated (IUU) fishing obtained and hidden actors administrators in corporations, both foreign actors or Indonesian citizens.

Criminal punishment to the board of the corporation is also not sufficient to provide assurance that the corporation does not undertake similar actions in the future. It is a fact that the corporation is also not a few who hide behind corporate puppet (dummy company) who deliberately build brands to protect the main corporation.

The value of losses incurred as a result of their actions illegal, unreported, unregulated (IUU) fishing, which reached 240 trillion rupiahs per year has not been a major consideration which makes Indonesia as if it has not been serious in handling the crime, this is because one of the pillars for normative juridical aspects of law enforcement which is still fragile. Based on analysis of this and then, the writers agree with their theories that support that corporations can be held accountable directly since it is also in accordance with the development of the criminal responsibility of corporations in the third phase and the fourth, but it should also be underlined that does not mean only the corporations who can be held accountable directly but administrators can be together with the corporation which should bear the criminal responsibility in this regard needs to be done because if burdened only corporate criminal liability only, while the board is not, this system will allow the board to be pass the buck.

The administrator will always be able to hide behind the back of the corporation to detach himself from responsibility by arguing that his action is not a personal act, but an act done for and on behalf of the corporation and for the benefit of the corporation. So based on this analysis, the author argues that the proper system of corporate criminal liability imposed on the Fisheries Law is the board and the corporation both as a criminal and the two others should bear the criminal responsibility.

C. Conclusion and Suggestion

1. Conclusion

- a. Considerations of the judge in the criminal act of illegal fishing still struggling in the realm of non-substantive have not been able to spawn a verdict that is able to ensnare the corporation as a criminal illegal fishing.
- b. Lack of understanding among law enforcement and assertiveness to enforce the rules on criminal illegal fishing correctly, making the crime of illegal fishing in the enforcement is not optimal and does not pose a deterrent effect and is not able to ensnare the corporation who masterminded the crime of illegal fishing so that the crime of illegal fishing is supposed to be a special criminal act to be practiced as handling general crimes.

2. Suggestion

1. Revise the constitution concerning fisheries by transferring about corporate crimes in the fisheries sector.
2. Strengthen the legal socialization among law enforcement officials, especially prosecutors and judges in the field of criminal illegal fishing.

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