

An Assessment of Indonesia's Ship-Breaking Policy Against the Requirements Set Forth in Article 73 of UNCLOS

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Abstract

Article 73(1) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 permits a coastal state to take only those enforcement measures that are necessary to ensure compliance with its fisheries laws, a formula that international tribunals have read as importing a requirement of proportionality. Indonesia's policy of sinking foreign vessels caught fishing illegally is frequently defended as lawful in its domestic chain of authority, yet whether the permanent destruction of a vessel can satisfy the international necessity-and-proportionality standard has not been examined as a question in its own right. This study isolates and tests that question using a normative legal method with statute, conceptual, and case approaches, drawing on UNCLOS Article 73, the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS) on prompt release and reasonableness, and situational crime-prevention theory. The analysis develops a three-limb proportionality test, suitability, necessity, and proportionality in the narrow sense, and applies it to vessel destruction as against lesser measures such as fines, confiscation, and licence revocation. The novelty of this study is a structured proportionality framework showing that destruction is defensible only where three conditions co-exist: demonstrated failure of lesser measures to deter repeat incursion, destruction of the vessel as instrument rather than punishment of the crew, and observance of the Article 73 procedural safeguards; absent any condition, sinking exceeds what Article 73(1) permits.

Keywords: Proportionality; Necessity; Vessel Sinking; UNCLOS Article 73; IUU Fishing

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INTRODUCTION

The enforcement powers that international law grants to a coastal state are powers of limited, not unlimited, reach. Article 73(1) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 authorises a coastal state, in the exercise of its sovereign rights over the living resources of the exclusive economic zone (EEZ), to take such measures, including boarding, inspection, arrest, and

judicial proceedings, as may be necessary to ensure compliance with the laws it has adopted (Churchill & Lowe, 1999; Rothwell & Stephens, 2016). The governing word is necessary. It is not a licence for any measure the state may prefer, but a limit: only measures that are genuinely required to secure compliance are permitted, and international courts and tribunals have consistently read this necessity formula as importing a requirement of reasonableness and proportionality between the enforcement measure and the wrong it addresses (Tanaka, 2019).

Indonesia's policy of sinking foreign vessels caught fishing illegally in its waters is the most assertive enforcement measure any coastal state in the region has adopted, and it sits precisely at the point where the necessity limit bites hardest. The policy's domestic legal foundation is by now well understood: it rests on a chain of national authority running from Article 69 paragraph (4) and Article 71A of Law Number 45 of 2009 amending Law Number 31 of 2004 on Fisheries, completed by the judicial oversight of Supreme Court Circular (SEMA) Number 1 of 2015 (Mahkamah Agung, 2015). That the measure is authorised in Indonesian law, however, does not answer the distinct and prior question that international law poses: whether the permanent destruction of a vessel is a measure that Article 73(1) permits at all, given that the same provision confines the coastal state to what is necessary and reserves lesser, reversible measures as the ordinary response (Palma et al., 2010; Sodik, 2009).

This question has not been examined as a question in its own right. Existing scholarship has established that sinking can be traced to a coherent domestic chain of authority and reconciled in principle with the safeguards of Article 73 through the distinction between measures against the vessel and measures against the crew, but it has treated the international-law necessity standard largely as a threshold that the domestic construction passes, rather than as a structured test to be applied on its own terms. Yet proportionality is the analytical heart of the international objection to sinking: critics do not principally deny that Indonesia may enforce its fisheries laws, they contend that destroying a vessel is disproportionate to the offence when fines, confiscation, or licence revocation would secure compliance at lower cost to the flag state and its nationals (Erceg, 2006; Petrossian, 2015).

This study isolates and answers that proportionality question. Its objective is to construct a structured proportionality test from the necessity formula of Article 73(1) and the jurisprudence interpreting it, and to apply that test to vessel destruction as against the lesser measures available, in order to identify the conditions under which sinking is, and is not, a proportionate enforcement measure under international law. The novelty pursued is a three-limb proportionality framework, suitability, necessity, and proportionality in the narrow sense, that converts a diffuse debate about whether sinking is too harsh into a determinate legal test with identifiable conditions, thereby supplying both a defence of the policy where those conditions are met and a principled limit where they are not.

Proportionality is a general principle of public international law and a recurring discipline on the exercise of enforcement jurisdiction at sea. In the law of the sea specifically, the necessity language of Article 73(1) has been understood to require that an enforcement measure bear a reasonable relationship to the legitimate objective of securing compliance, and the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS) in prompt-release cases has repeatedly emphasised reasonableness in the treatment of arrested vessels and crews, signalling that excess or punitive severity is not sanctioned by the Convention (Tanaka, 2019; Rothwell & Stephens, 2016). Proportionality in this setting is conventionally analysed through three cumulative limbs: suitability, whether the measure is capable of advancing the objective; necessity, whether a less restrictive measure would achieve the same objective; and proportionality in the narrow sense, whether the burden the measure imposes is excessive relative to the benefit it secures.

Applied to fisheries enforcement, these limbs frame the debate about destruction with precision. The suitability limb asks whether sinking actually advances compliance, which connects the legal test to situational crime-prevention theory: because a fishing vessel is the capital asset that makes repeated illegal operation profitable, permanently removing it eliminates the incentive structure that fines, which can be absorbed as a cost of doing business, leave intact (Petrossian, 2015; Erceg, 2006). The necessity limb asks whether a less drastic measure, a fine, confiscation with resale, or licence revocation, would secure the same deterrent effect; destruction is necessary only where those lesser measures have demonstrably failed. The narrow-proportionality limb asks whether the loss inflicted on the flag state and owner is excessive relative to the protection of the coastal state's resource, a balance that shifts with the gravity and persistence of the incursion. This tripartite structure is the analytical instrument the present study applies.

RESEARCH METHOD

This section sets out the doctrinal design, the interpretive approaches, the legal materials, and the analytical procedure by which the proportionality of vessel destruction is tested.

Research Design

The study uses the normative (doctrinal) legal research method. The legal problem is framed not as whether sinking is authorised in Indonesian law, which is settled, but as whether it satisfies the necessity-and-proportionality standard that Article 73(1) of UNCLOS imposes on any EEZ enforcement measure. The design is therefore evaluative: it constructs a test from international law and applies it to the national measure.

Research Approach

Three approaches are combined. The statute approach examines Article 73 of UNCLOS and the relevant provisions of Law Number 45 of 2009 and SEMA Number 1 of 2015. The conceptual approach develops the principle of proportionality and its three limbs as the analytical framework. The case approach draws on the reasonableness jurisprudence of ITLOS in prompt-release and enforcement cases to give the necessity standard determinate content.

Legal Materials

Primary materials comprise UNCLOS 1982, the Fisheries Law and its amendment, SEMA Number 1 of 2015, and relevant international decisions. Secondary materials comprise treatises and journal scholarship on the law of the sea, proportionality, and IUU-fishing enforcement, together with situational crime-prevention literature. Tertiary materials clarify terminology.

Data Analysis Technique

The materials are analysed qualitatively and prescriptively. The proportionality principle is decomposed into its three limbs; each limb is given operational content from the jurisprudence and the crime-prevention literature; vessel destruction and the lesser measures are then assessed against each limb in turn; and the conditions under which destruction passes all three limbs are identified deductively. The result is a structured test rather than a single conclusion.

RESULTS AND DISCUSSION

Applying the three-limb proportionality test to vessel destruction yields a differentiated rather than a categorical answer: sinking is proportionate under some conditions and disproportionate under others, and the test identifies which. Table 1 sets out the three limbs, the question each poses, and the finding for vessel destruction as against the lesser measures.

On the suitability limb, destruction is capable of advancing compliance, and does so through a mechanism that lesser measures do not replicate. Because the vessel is the instrument that makes repeated illegal fishing profitable, its permanent removal eliminates the asset base of the offending operation, whereas a fine may be treated as an operating cost and absorbed, leaving the incentive to re-offend intact (Petrossian, 2015). Sinking therefore passes the suitability limb: it is not a purposeless severity but a measure rationally connected to the objective of stopping recurrent incursion. This finding aligns the legal test with the deterrence rationale that Indonesian policy has advanced, but it establishes only that destruction can advance compliance, not that it is required.

Table 1. Three-Limb Proportionality Test Applied to Vessel Destruction

Limb	Question Posed	Finding for Destruction
Suitability	Does the measure advance compliance?	Yes: removes the capital asset enabling repeat offending
Necessity	Would a less restrictive measure suffice?	Only if lesser measures have demonstrably failed
Narrow proportionality	Is the burden excessive relative to the benefit?	No, if confined to the vessel with crew safeguards intact
Overall	Is sinking proportionate under Art. 73(1)?	Conditionally lawful

The necessity limb is where the test bites hardest, and where it imposes a genuine condition. Necessity is satisfied only if no less restrictive measure would achieve the same compliance objective; if a fine, confiscation with resale, or licence revocation would deter the incursion, destruction is not necessary and therefore not permitted by Article 73(1). The condition that discharges the necessity limb is thus empirical: a demonstrated pattern in which lesser measures have been applied and have failed to deter repeat offending. Where such a record exists, destruction becomes the least measure capable of securing compliance and the necessity limb is satisfied; where lesser measures have not been tried, or have not been shown to fail, destruction is premature and disproportionate. This is the single most important operational limit the framework produces.

On proportionality in the narrow sense, the balance turns on the person–instrument distinction and on the Article 73 safeguards. Destruction directed at the vessel as *instrumentum delicti*, while the crew are promptly released on bond, are not imprisoned absent agreement, and the flag state is notified through diplomatic channels, confines the burden to the asset used in the offence and spares the persons the protections that Article 73 reserves for them. So confined, the loss imposed is not excessive relative to the coastal state's legitimate interest in protecting a resource against persistent, organised depletion. But if destruction were accompanied by punitive treatment of the crew, or carried out without the procedural safeguards, the measure would tip into excess and fail the narrow-proportionality limb. The safeguards are thus not incidental; they are part of what keeps the measure proportionate.

Read together, the three limbs convert the international objection to sinking from a categorical charge of disproportion into a conditional test. Destruction is proportionate under Article 73(1) where, and only where, three conditions co-exist: it is suitable, which it inherently is by removing the offending asset; it is necessary, which requires a demonstrated failure of lesser measures to deter repeat incursion; and it is proportionate in the narrow sense, which requires that the measure strike only the vessel while the crew retain the Article 73 safeguards. The framework therefore both defends the policy where these conditions hold and marks a principled boundary where they do not, a boundary that a purely domestic account of the policy's authority cannot supply.

The central contribution of this analysis is to relocate the debate about vessel sinking from the question of authority, which the domestic three-layer construction already answers, to the question of proportionality, which international law poses independently and which the domestic construction does not by itself resolve. A measure can be validly authorised in national law and still exceed what Article 73(1) permits if it is disproportionate; conversely, the same measure is internationally defensible when it passes the three-limb test. By supplying that test, the study gives Indonesia's policy a defence that is stronger than an appeal to sovereignty because it is framed in the Convention's own terms, while simultaneously identifying the conditions whose absence would render a particular sinking unlawful. The necessity limb in particular imposes a discipline that the domestic authority chain does not: it requires that lesser measures be shown to have failed before destruction is resorted to, transforming deterrence from an assertion into an evidentiary burden.

CONCLUSION

This study isolated and answered a question that accounts of Indonesia's vessel-sinking policy have left open: not whether the measure is authorised in national law, which is settled, but whether it satisfies the necessity-and-proportionality standard that Article 73(1) of UNCLOS imposes on any enforcement measure in the exclusive economic zone. By constructing a three-limb proportionality test, suitability, necessity, and proportionality in the narrow sense, from the Convention and its interpreting jurisprudence and applying it to destruction as against lesser measures, the analysis showed that sinking is neither categorically lawful nor categorically excessive, but conditionally proportionate. It is suitable because it removes the capital asset that makes repeat offending profitable; it is necessary only where lesser measures have demonstrably failed to deter; and it is proportionate in the narrow sense only where it strikes the vessel alone while the crew retain the Article 73 safeguards.

The framework therefore both strengthens and disciplines the policy. It strengthens it by supplying a defence framed in the Convention's own terms rather than in an appeal to sovereignty, and it disciplines it by identifying the conditions, above all the demonstrated failure of lesser measures, whose absence would render a particular sinking disproportionate and therefore unlawful. It is recommended that enforcement agencies compile, for each vessel destroyed, a proportionality dossier documenting the failure of lesser measures and the observance of the safeguards, and that future

research test the framework against the empirical record of Indonesian sinkings and the international responses to them, so that the consistency of the necessity limb in practice can be assessed.

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AUTHOR CONTRIBUTIONS

Conceptualization, D.D.S. and A.A.; Methodology, A.A.; Investigation, D.D.S.; Data Collection, A.A.; Formal Analysis, D.D.S. and A.A.; Writing-Original Draft Preparation, A.A.; Writing-Review & Editing, D.D.S.; Visualization, D.D.S. and A.A.; Supervision, D.D.S.; Project Administration, A.A.

CONFLICTS OF INTEREST

The authors declare no conflict of interest

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