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ANALYSIS TOWARDS THE URGENCY OF ESTABLISHING INDONESIAN MARINE LAW TO ANTICIPATE TRANSNATIONAL ORGANIZED CRIME

Isplancius Ismail¹

Abstract

Indonesia is an island State that geographically consists of 70 percent of marine areas and 30 percent of the land. But there is no Indonesian marine policy, nor has any law governing marine comprehensively since ratified UNCLOS in 1982 by Law No. 17 of 1985. While the mindset of people still tend to the land. The enforcement of sovereignty and rule of law in Indonesian waters under the United Nations Convention on the Law of the Sea (UNCLOS 1982) and the regulations of Indonesia against the violations of law known as Transnational Organized Crimes has not yet been done optimally. The problem is what efforts should be made by the State to anticipate the transnational organized crime. The method used in this study is normative approach and analyzed qualitatively to produce the conclusion that efforts should be made are resulting integrated marine policy, Indonesian Marine Law, and disseminating people to change the mindset to sea.

Indonesia adalah negara kepulauan yang secara geografis terdiri dari tujuh puluh persen wilayah laut dan tiga puluh persen wilayah darat. Namun, tidak ada kebijakan yang mengatur mengenai kemaritiman di Indonesia maupun sebuah peraturan perundang-undangan yang mengatur mengenai maritim secara komprehensif sejak diratifikasinya UNCLOS 1982 dengan Undang-Undang Nomor 17 tahun 1983. Kecenderungan yang terjadi adalah kebanyakan orang terfokus pada wilayah darat. Penegakan kedaulatan dan pengaturan hukum wilayah perairan Indonesia menurut United Nations Convention on the Law of the Sea (UNCLOS 1982) dan peraturan perundang-undangan Indonesia melawan pelanggaran hukum yang dikenal dengan Tindak Pidana Transnasional yang Terorganisir belum dilakukan secara optimal. Permasalahannya adalah langkah apa yang harus dilakukan oleh Pemerintah untuk mengantisipasi tindak pidana transnasional yang terorganisir. Metode dalam kajian ini menggunakan pendekatan normatif dan pendekatan kualitatif untuk menghasilkan kesimpulan bahwa tindakan yang harus diambil adalah menghasilkan kebijakan maritim yang menyeluruh, Hukum Maritim Indonesia, dan mengubah persepsi masyarakat terhadap laut.

Keywords: *Urgency establishing marine law, transnational organized crimes, law enforcement.*

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I. INTRODUCTION

The position of Indonesia geographically is a cross between the two continents (Asia and Australia) and two oceans (Pacific and Hindia) which is bordered by 10 countries (India, Thailand, Malaysia, Singapore, Vietnam, Philippines, Palau, PNG, Australia and Timor Leste) and consists of the dimensions of land, sea and sky and as the largest archipelago country which has received international recognition. The Indonesian archipelago consists of large islands and small islands as much as 17,504 named and not named and has an area of 2,012,402 km² land area and water area covering an area of 5,877,879 km². The Indonesian archipelago has 185 basis points with the amount of more than 200 million people, made up of hundreds of tribes and have an important and strategic position both in terms of the development of the national territory and relations between nations². These conditions give the open positions and an opportunity for other countries come in and do activities in Indonesian waters with the implications or even further to create a conflict of interests between Indonesia and neighboring countries and other countries that use the land and water Indonesia thus could be a potential threat to both political and military, that if its let could also threaten the country's sovereignty .

Indonesian border dimension can be divided into three border areas such as marine and river waters ,land border, and the border areas of air space. The third dimension is physically different but essentially have the same interests, namely the establishment of the authority of the State and nation. In the Land border area, the population of each country that occupies border areas of life there is competition, rivalry and friction influence, conflict of interest between the two communities separated by State border that might happen to open conflict between the two countries. While in the waters border there is the possibility of smuggling, theft and breach of natural resources area. The law violations can include piracy, human smuggling or illegal immigration, smuggling of goods such as timber, sugar, rice, oil, firearms, narcotics, psychotropic substances, illegal fishing, marine pollution, illegal explo-

² Joko Sulistyanto, Papers on Sovereignty and the Enforcement in Indonesian Waters Under the Convention of International Law and Legislation Affairs, presented in national seminar of the framework of UNCLOS 1982-2013 at Faculty of Law Unsoed Purwokerto, at September 2013.

ration and exploitation of natural resources in the entire region as well as other violations of Indonesian sea³. The violation can be categorized as transnational organized crime. The problem faced today is that there is no Indonesian marine policy, nor Indonesia marine law and mindset of people that still tends to land (land based) and so this paper will discuss on how to establish the Indonesian marine law to anticipate transnational organized crime in relation with the enforcement of sovereignty and law in Indonesia.

II. ESTABLISHING INTEGRATED INDONESIAN MARINE LAW

Indonesia as an archipelago country has a sea area that is 70 percent larger than the land area is only 30 percent⁴. Knowing that Indonesia does not have any specific law governing marine therefore in setting the policies on marine is still conducted by the policy of President of the Republic of Indonesia. This is done by forming the Indonesian Ocean Council under Presidential Decree / Decree in 2007,⁵ chaired directly by the President.

To carry out everyday tasks this Ocean Council chaired by the Minister of Marine and Fisheries of the Republic of Indonesia who is also a member. Members of the the Indonesian Ocean Council are the Minister of Home Affairs, Minister of Foreign Affairs, the Minister of Defense, Minister of Transportation, Minister of Energy and Mineral Resources, Ministry of Finance, the Minister of Education and Culture, Ministry of Tourism and Creative Economy, Ministry/Head of Bappenas, Minister of Environment, Minister of Research and Technology, Chief of Police, Chief of Naval Staff, Expert Team, university representatives, and Advisor to the Minister Ecology and Marine Resources MKP as Secretary. In order to implement the law of the sea 1982 it is required comprehensive steps and integrated to increase the utilization, conservation of

³ *Ibid.*

⁴ Ministry of Forestry, *Deskripsi Peta Ekoregion Laut Indonesia* [Description of Ecoregion Mapping Inndonesian Sea Waters], Deputy of Environmental, Jakarta, Indonesia, 2013.

⁵ Presidential Decree of Republic of Indonesia No. 21 of 2007 concerning Indonesian Marine Board.

marine protection and management of national marine areas to be integrated, harmonious, effective and efficient. The management of marine need integrated sectors and thus it is necessary to perform Indonesian Ocean Council. Indonesian Ocean Law was established by Presidential Decree No. 21 of 2007 whose job is to give consideration to the President to decide public policy in the field of marine. The functions are to conduct research and give advisory and policy recommendations to the President in the marine field, consult with government and non-government agencies as well as representatives of community groups in the context of integrated policy and solve problem, monitor and evaluate policies, strategies and development of marine, and other matters under the request of the President⁶. The future vision is that Indonesia expected to be a powerful maritime State, progressive and independent. Thus, the mission will be carried out by the Indonesian Ocean Council is to integrate the policy in the field of marine.

The marine policy in Indonesia today refers to provisions of the 1945 Constitution that marine development should be addressed as much as possible for the welfare of the people; Law No. 17 of 1985 on the ratification of UNCLOS in 1982 that the rights and obligations to set up, manage, and utilize marine resources of national for the maximum benefit of the people where it is also proposed in the legal draft on Marine in 2013 which included in national legislation programe; Law No. 17 of 2007 concerning RPJPN years 2005-2025 that sustainable development in the spirit of the pro -poor, pro - growth, pro -jobs and pro -environment; World Ocean Conference 2009 about the commitment of the Indonesian nation in the effort to develop, manage and conserve sustainable national and international marine resources; Indonesian marine Policy covering maritime culture, governance at sea, maritime economy, defense, security and safety at sea and marine environment and the marine development to be a maritime State by means of changing the mindset, preparing policy materials and clearing house.⁷

⁶ Dedy H. Sutisna, Secretary of Indonesian Marine Board, paper presented at Reflection of UNCLOS on "*contemporary Issue and Enforcement of Indonesian Maritime Law*" seminar. In collaboration with Faculty of Law Unsoed, at September 26 2013.

⁷ *Ibid.*

III. CONTEMPORARY ISSUES IN UNCLOS 1982 IMPLEMENTATION

Law No. 6 of 1996 already contained the provisions of the Law of the Sea 1982 concerning with the territorial but there are important provisions that have not been implemented into the laws and government rules and regulations, especially concerning the implementation of rights and obligations of merchant ships, warships and foreign government ships. Besides, Indonesia has not either deposited the data of boundaries and jurisdiction in marine areas to the United Nations Secretary General. Indonesia also faced difficulties to determine its maritime zone with some countries, especially with East Timor and Malaysia after the independence of East Timor and after International Court of Justice decided Malaysia won Sipadan and Ligitan islands towards Indonesia. Indonesia also has not set the outer boundaries of the territorial sea to neighboring countries such as Malaysia, Papua New Guinea, East Timor, Australia, India, Singapore, Thailand and the Philippines.⁸ The problems created the legal uncertainty in setting the boundaries of the sovereignty and jurisdiction of Indonesia for the defense and security, exploration and exploitation of natural resources, marine scientific research and the rule of law in the waters of Indonesia, particularly in anticipating illegal fishing as one of transnational organized crime .

Indonesia also has not yet set a comprehensive national legal instruments to govern marine scientific research activities in accordance with the provisions of Chapter XIII of the Convention on the Law of the Sea 1982. Although the issue of fisheries research and development has been set in the Fisheries Act No. 45 of 2009 and the issue of research and development of coastal and small islands have also been regulated in Law No. 27 of 2007, but the substance of its provisions have not described basic principles, neither the lack of regulation on the transfer of marine technology pursuant to Part XIV of the Convention on the Law of the Sea 1982 though Indonesia already has Law no 5 of 1999

⁸ Ade Maman Suherman, *Beberapa Isu Kontemporer dan Implementasi UNCLOS dalam Perspektif Rezim Hukum Negara kepulauan* [Contemporary Issues in Perspectives and Implementation of UNCLOS in Archipelagic State Legal Regime], Paper presented at National Seminar Nasional "The Reflection of UNCLOS" in collaboration of Ministry of Marine and Fisheries Republic of Indonesia and Faculty of Law Unsoed, Purwokerto, at 26 September 2013.

concerning prohibition of Monopolistic Practices and Unfair Business Competition because the ban does not apply to agreements relating to intellectual property rights in the field of marine technology. Transnational organized crime issues such as migrant smuggling, human trafficking, appeared increasing in illegal fishing in Indonesian waters. The issue of law enforcement for this crime need to be considered by the government for how and where to seize evidence and keep confiscated evidence including detention and whether it has been thought the detention of offenders in water and many other issues related to transnational organized crime should be anticipated.⁹

United Nations Convention on Transnational Organized Crime (UNTOC) which Indonesia ratified by Law No. 5 of 2009 on the Ratification of the United Nations Convention Against Transnational Organized Crime mentions a number of crimes that are included in the category of transnational organized crime, namely money laundering, corruption, illicit trade of plants and wildlife, crimes against art culture, human trafficking, migrant smuggling and illicit production and trafficking of firearms.¹⁰

Illegal Unreported and Unregulated Fishing (IUU fishing) can be said to be the central issue of the marine problem. Regarding the essence of the issue, the international community concerned to have a meeting to organize together from various countries, as has been stated in the Port State Measures Agreement To Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing¹¹. Pacific Ocean is an area that frequency of violations really quite high in compared with other regions. The violations were primarily performed by actors from several countries including Thailand, Vietnam, China and Philippines.

Definition of Illegal Fishing refers to the notion that issued by the

⁹ *Ibid.*

¹⁰ United Nations Convention Against Transnational Organized Crime (UNTOC) adopted by UNGA no. 55/25 at November 15th, 2000. Held in Italy on Desember 12th-15th, 2000 and entry into force at September 29th 2003. This Convention is annexed with three Protocols, such as: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; The Protocol against the Smuggling of Migrants by Land, Sea and Air; and The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

¹¹ Suherman, *Loc. Cit.*

International Plan of Action (IPOA) - Illegal, Unreported, Unregulated (IUU) Fishing, initiated by FAO in the context of the implementation of the Code of Conduct for Responsibility Fisheries (CCRF) to explain the meaning of Illegal Fishing as follows: that illegal fishing activities undertaken by a particular country or foreign vessels in waters that are not its jurisdiction without the permission of the State that has jurisdiction or the unlawful fishing activities or activities conducted by a national of foreign vessels in waters under the jurisdiction of a State without the permission of the State. Illegal fishing is also significant fishing activities conducted by flagged vessels of the countries that joined as members of regional fisheries management organization, that is the Regional Fisheries Management Organization (RFMO) but the operation of ships is on the contrary to conservation measures as regulated in the UN Convention related to the conservation and management of near stock Ruaya fish and Far stock Ruaya Fish (UNIA) and fisheries management that has been adopted by the RFMO. However, the RFMO members are often slow to act on a national level so that it becomes a handicap for sustainable fisheries management at the regional level¹².

For the implementation of the Convention on the Law of the Sea 1982 into national law required the transformation. The position of Ratification Act number 17 of 1985 on the ratification of UNCLOS in 1982 has been strengthened by the presence of laws, namely Law No. 21 of 1992 on Navigation; Law No. 6 of 1996 on Indonesian Waters; Government Regulation Number 36 of 2002 on the Right and obligations of Foreign Ships in implementing the Peace cross through Indonesian waters; Government Regulation No. 37 of 2002 on Rights and Obligations of Foreign Ships and Aircraft traffic flow in exercising the right of archipelagic islands through a predetermined islands; Government Regulation Number 38 of 2002 on List Geography Coordinate List on Point of island base line; Fisheries Act No. 45 of 2009; Regulation of the Minister of Marine Affairs and Fisheries No. 17 of 2006 on Business fisheries, and Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands. All rules and regulations are legal products of Indonesian government to create the law order in Indonesian waters by

¹² RFMO of Tuna, globally, there are five of RFMO Tuna which are negotiated to ensure long term conservation and management of Tuna Stock. Indonesia is a member of the *Commission for the Conservation of Southern Bluefin Tuna (CCSBT)*.

establishing a national regulation on navigation, the rights of foreign ship traffic, marine resource management, particularly the utilization of resources and marine fish through scientific activities and transfer of marine technology. However, there are many legal issues that have not been fully regulated and can satisfy all parties. There are several issues of the legal vacuum that have not been regulated so that gives the probability for a criminal action in the territorial waters and need to be improved and adapted to the provisions of the convention in order that all forms of law violations in Indonesian waters can be well overcome.

IV. SOVEREIGNTY AND MARITIME LAW ENFORCEMENT

In fact, the security enforcement at sea has two dimensions: sovereignty enforcement and law enforcement so we need a new perspective that the two dimensions are interrelated to each other. If viewed as a system, the maritime security is a series ranging from perception or understanding of all components of the nation, as well as the organizational structure and mechanisms of implementation of safety procedures at sea involving a variety of agencies that have jurisdiction in the enforcement of sovereignty and the rule of law at sea. Security systems at sea should be built with the principle synergize the power possessed by the various agencies in the delivery of marine safety enforcement. The synergy of these two aspects manifested with unity reflected in the organizational structure, personnel procedures organizers mechanism and security at sea. Enforcing sovereignty in the sea has two dimensions of understanding, namely sovereignty and sovereign rights in the marine of a country that has been governed universally in UNCLOS 1982.¹³ Third United Nations Conference on marine law held in New York in December 1973 is the largest multilateral international agreement in the history that attended by more than 3000 delegates from 157 countries. The series of conferences was held for nine years, which later signed on December 10, 1982 in Montego Bay, Jamaica. The Convention entered into force on 14 November 1994 which is one year after the 60th State, Guyana signed it. The Convention for the Indonesian people has a significant meaning because for the first time the principle of an

¹³ Sulistyanto, Loc. Cit.

archipelago stated in Juanda Declaration 1957 recognized by the international community as part of the new convention on the law of the sea.

Several articles of the Convention relating to law enforcement at sea is on Article 29 of the warships restrictions: For the purposes of this Convention warship means a vessel owned by the armed forces of a country that uses external signs that show distinctive nationality of the ship, under the command an officer commissioned by the government of his country, and whose name appears in the appropriate service list or similar lists, and operated by a crew which is under regular armed forces discipline; Article 73 of the Enforcement Regulations of the coastal State legislation: 1. The coastal State may, in the exercise of its sovereign rights for exploration, exploitation, conservation and management of biodiversity resources in the exclusive economic zone taking such an act, including boarding, checking, capturing and conducting judicial proceedings, as may be necessary to ensure compliance with legislation which it is adopted in accordance with the provisions of this Convention; 2. Captured ships and their crews should be released immediately after being given a guarantee money or other forms of guarantee; coastal States imposed penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, if no contrary agreement between the countries concerned or any other form of corporal punishment; In case of arrest or detention of foreign vessels, coastal State must immediately notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed. The Rights of inspection provided for in Article 110 and the pursuit immediately (Right of hot pursuit) regulated under Section 111 then the authority to force compliance implementation arrangements in article 224 of the Convention.¹⁴

To guarantee the respect to the laws and regulations in the marine field, the Indonesian government is currently running two law enforcement activities at sea and they are: surveillance or sea patrols and reconnaissance or observation from the air (maritime surveillance) conducted by the Air Force and Navy -owned aircraft. The legislation relating to sovereignty and law enforcement in the territorial waters

¹⁴ Articles 29, 73, 110, 111 and 224 regulated on the law enforcement of the Sea.

of Indonesia, among others: Law. 5/1983 on ZEE, Law no. 6/1996 on Indonesian Waters, Law no. 19/2004 on Forestry, Law no. 17/2006 on Customs, Law no. 17/2008 on Shipping, Law no. 45/2009 on Fisheries, Law no. 36/2009 on the Protection and Environmental Management, and Law. 6/2011 on Immigration.

Indonesia has had a lot of laws regulating the problem of managing marine and coastal resources, but in fact it still looks high degree of adherence to follow these regulations, as reflected by the widespread practice of arrest biota forbidden in almost all coastal areas in Indonesia, but also occurs in very remote areas. Law enforcement activities in the waters of Indonesia faces constraints that are very basic. These constraints in nearly all aspects of law enforcement activities, starting from monitoring activities to the activities of the prosecution and detention of criminal suspects forbidden. In general, the constraints encountered in law enforcement at sea include: limited budget, limited trained human resources, limited facilities and infrastructure, weak inter- agency coordination and communication between law enforcement agencies.

V. CONCLUSION

Based on the description mentioned above it can be concluded that transnational organized crime appeared in Indonesian waters caused by several factors including the absence of an integrated marine policy, the absence of a comprehensive law governing marine, and the mindset still tends to land so that law enforcement in Indonesian waters cannot still be done optimally. The efforts must be carried out by Indonesian government is to establish the comprehensive Indonesian marine law as a legal standing, result an integrated marine policy and continue disseminating mindset to sea to anticipate transnational organized crime.

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