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## COMPARATIVE LAW ENFORCEMENT MODEL AT SEA: LESSON LEARNED FOR INDONESIA

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### Abstract

*Illegal, Unregulated, and Unreported Fishing (IUU Fishing) has grown significantly in the last few decades. This practice certainly has and will undermine global fisheries resources even further. As a result, the international community needs to establish measures to prevent the IUUF through international agreements. Presently, the international communities have formed various organizations, both regional and international (regional fisheries management organizations or RFMO), which shows its attention to the need for sustainable fisheries resources management and to prevent any illegal IUU fishing activity. Therefore, every country is currently seeking the law enforcement model to secure its maritime jurisdictions from any IUUF activity. However, each country has a separate law enforcement model, adjusting to their geographical and geopolitics condition. This article will examine the law enforcement model's comparison in several countries and seek the best law enforcement model and a lesson learned for Indonesia.*

**Keywords** : advisory opinion, Deep Seabed Mining, International Seabed Area

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### I. INTRODUCTION

Every country in the world has the same right to engage in fishing activities on the high seas.<sup>1</sup> However, coastal states have an advantage in terms of fishing activities that are different from non-coastal countries. The coastal state has the right to undertake fishing activities within the Exclusive Economic Zone (EEZ) as far as 200 miles from the country's outer coast.<sup>2</sup> The right is not owned by the non-coastal state, which could only conduct fishing activities at the high sea.<sup>3</sup> In this case, non-coastal states cannot engage in fishing activities in other states' EEZ areas without permission. Otherwise, the conduct will be considered illegal fishing activity. Arrangements on illegal fishing restrictions are set up thoroughly at the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982). Based on the recent data analysis of assessed fisheries stocks released by the FAO, the share of fish stocks within biologically sustainable has shown a decreasing trend.<sup>4</sup> 31.4 percent of

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<sup>4</sup> "State of the World Fisheries and Aquaculture," Food and Agriculture Organization, accessed on 28 June 2016, <http://www.fao.org/3/a-i7171e.pdf>.

fish stocks were estimated as fished at a biologically unsustainable level and therefore overfished.

Indonesia is the largest archipelagic country in the world,<sup>5</sup> blessed with enormous maritime biodiversity as well as fisheries resources that lie within 6,159,032 km. One year after the UNCLOS opened for signatories in 1982, Indonesia claimed its exclusive economic zone under Law Number 5 the Year 1983 on Economic Exclusive Zone. This enactment was even before Indonesia ratified the UNCLOS itself. It shows that EEZ is genuinely crucial for Indonesia. Not only it increased Indonesian maritime territory, but also it contributes a considerable number of national incomes in the fisheries sector. However, long after Indonesia enacted its regulation on EEZ, IUUF fishing is still happening in the Indonesian maritime zone because of the limited infrastructure such as patrol and vessels of law enforcement authorities.<sup>6</sup> IUU fishing in Indonesia mostly happened on the Indonesian maritime border due to the abundant fisheries resources and the limited patrol.

This article aims to elaborate the comparison between law enforcement in several countries related to the coastal state's rights and obligations regarding institutions, coordination, and legal framework in enforcing their national fisheries law in the EEZ. The comparison is especially in countries that often become illegal fishing places, such as the United States of America, Australia, Malaysia, India, and New Zealand.

The article will mainly update cases development related to illegal fishing in Indonesia. This article's scope further discusses comparative studies of fishing enforcement in several countries, mainly the United States, Australia, India, Malaysia, and New Zealand. These states are chosen because it has multi-agency law enforcement agency, same as Indonesia. India is discussed because they have a well-established Coast Guard. Indonesia recently established the Maritime Security Agency (BAKAMLA), also known as the Indonesian Coast Guard (IDN-CG). It aims to formulate what steps Indonesia can and enforce the law and reduce illegal fishing practices to realize its largest maritime nation.

This article will divide into seven sections. The first sections will mainly discuss the background on illegal fishing and Indonesia's interest

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<sup>5</sup> "Sea Around Us – Fisheries, Ecosystems, and Biodiversity," Sea Around Us Project, accessed on 1 April 2017, <http://www.seaaroundus.org/data/#/eez>>.

<sup>6</sup> Based on an interview with First Admiral Kresno Buntoro, Head of Legal Affairs, Indonesian Navy. He said that the Indonesian Maritime Security Agency, known as Badan Keamanan Laut (BAKAMLA), has a limited patrol ship. Currently, they are coordinating any institutions that have law enforcement authorities.

in combating IUU fishing. Further, section two will elaborate on the law enforcement mechanisms of a different country from the United States of America, Australia, India, Malaysia, New Zealand, and Indonesia to see the lessons learned that Indonesia could get from the comparison studies. Lastly, the article will be closed by the conclusion and recommendation based on the discussion.

## II. UNITED STATES OF AMERICA LAW ENFORCEMENT MODEL

The United States of America, in the mid-20th century, began to realize that technology had a significant impact on fishing activities. Larger, faster, and stronger foreign vessels also began to enter territorial waters and depleted fish stocks in the United States. The United States government realized that modern fishing methods could quickly eliminate fish stocks in the sea, and it takes a law that can control the fisheries activity. Various community groups form the law, which consists of fishers, marine scientists, and legislatures. They believe that national fisheries' richness can meet many generations' needs, as long as the fishing is well controlled. Fishers and oceanographic scientists in the United States are finally recognized as leaders in developing mechanisms to prevent overfishing and protect marine habitats.<sup>7</sup>

The Magnuson-Stevens Act (MSA) is the foundation of regulating the marine fishing and recreation industry in the United States, particularly in states close to fishery resources. The impact of creating the MSA itself resulted from domestic, export, distribution, and retail with an economic gain of \$ 116 billion and opening vacancies for more than one million people.<sup>8</sup>

Magnuson-Stevens Act (MSA) Illegal, Unregulated, and Unreported Fishing (IUU Fishing) regulate that Fishing activities that violate conservation and management measures include the relevant international treaties in which the United States is a member country, overfishing was the concern. The regulation also addresses Fisheries activities that have a detrimental impact on seascapes, hydrothermal vents, and cold-water corals outside of national jurisdiction. IUU Fishing precautions set out in MSA are ship certification which certified the vessel is free from IUU Fishing activities. The certificate is issued for ships that are never dragged into the IUU Fishing problem under

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<sup>7</sup> Warren G. Magnuson, "The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries," *Washington Law Review* 52, (1977): 427.

<sup>8</sup> National Oceanic and Atmospheric Administration Fisheries, *Fisheries Economics of the United States*, (Washington: NOAA Technical Memorandum, 2011), NMFS-F/SPO-118.

international and regional fisheries management agreements. The United States is a member country therein or not identified by international fisheries management organizations as ships participating in IUU Fishing activities.

The US territorial sea is the jurisdiction of US Coast Guard Maritime Security & Safety Teams (USCG-MSST). MSST was established to enhance the United States' maritime security. Its mission was to protect ships, ports, associated facilities, and cargo in national jurisdiction waters from damage, crime, and sabotage of terrorism.

The authority and function of MSST are to search, capture, and hold vessels or aquatic facilities. The complete functions and authority of MSST include 1. Handling, protecting, and responding quickly to the threat of terrorism over the sea; Law enforcement in the Safety Zone and the Security Zone; 2. Conducting high-speed pursuit (hot pursuit);<sup>9</sup> 3. Ride, search, capture, and hold ship or water facilities; 4. Deployment of logistics to US military forces at national and international levels; 5. Respond to criminal or terrorism at the port; 6. Assist the protection of water facilities; 7. Carry out other missions from USCG.

Such authority may be applied to the United States' territorial sea and applicable to the free sea even to another country's territorial sea with the coastal state's permission.<sup>10</sup>

After the MSST arrests and detains the perpetrators of criminal offenses, it will then be submitted to the prosecutor's office for prosecution. An example of a criminal offense in a maritime zone regulated in the United States Code-Title 18 is murder with a maximum fine of twenty years and/or imprisonment.<sup>11</sup>

In this case, Indonesia could learn how the United States can maximize the coast guard's role in law enforcement in EEZ. At present, Indonesia has BAKAMLA or known as Maritime Security Agency, which has the primary mandate in coordinating the multi-institution, which has law enforcement at sea mandate. There is a growing concern that the coast guard should mainly do law enforcement instead of the Navy, which the United States have done.

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<sup>9</sup> The high-speed pursuit set out in the United States Code-Title 46 has the same concept as Hot pursuit in UNCLOS 1982. The coastal state's right to enforce its national law against unlawful foreign ships in its territory, such as in inland waters, territorial sea, archipelagic waters, or additional zones. This action can only be carried out by warships or military aircraft, or ships or aircraft of government vessels authorized for law enforcement of the sea, further see Article 111 of the United Nations Convention on The Law of The Sea 1982.

<sup>10</sup> Michael McNicholas, *Maritime Security: An Introduction* (Cambridge: Butterworth-Heinemann, 2016), 438.

<sup>11</sup> The United States of America, United States Code-Title 18, Article 113 (a) number (1).

### III. AUSTRALIA LAW ENFORCEMENT MODEL

As a federated country, Australia has several divisions linked to jurisdictions that depend on which region of Australia the problem arises.<sup>12</sup> Consequently, to address the complexity as a product of the Australian federal system, the Governments of Australia, the States, and the Northern Territory in November 2000 agreed to cooperate in providing clarity for overlapping jurisdictions at different levels of government. The result of this cooperation is the establishment of the Crimes at Sea Act 2000. Although the treaty provides the authority to investigate and prosecute crimes within the relevant jurisdictions, the applicable international legal obligations, particularly UNCLOS 1982, should also be considered.<sup>13</sup> The responsibility for securing Australia's maritime territory is widespread in several institutions from both the Commonwealth and State departments. Such agencies may seek mutual ad hoc assistance, and state governments may seek assistance from the Commonwealth government.<sup>14</sup>

The central role of the Australian Defence Force, especially the Royal Australian Navy (RAN), can be seen in Australia's maritime strategic plan,<sup>15</sup> which in this case is focusing on the NAP to implement effective oversight of Australia's maritime law and enforcement without neglecting its primary function to defend Australia from armed attacks.<sup>16</sup>

The Australian Department of Defense (ADoD) has no obligations granted by national legislation, but at certain times the ADF may serve to enforce civil law under authorization by Commonwealth legislation. Under the current system, the ADF provides about 70-80% of law enforcement at sea.<sup>17</sup> The obligations of national legislation granted to ADoD were first formally given to Australia's Ocean Policy (AOP), which defines the ADF duties as a safeguard of Australia's national interests and sovereign rights. Also, it

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<sup>12</sup> See the Guide to Maritime Security Arrangement, Australian Government.

<sup>13</sup> Australia, *Australian Intergovernmental Agreement – Crimes at Sea 2000*, Attachment H, No. 2.

<sup>14</sup> Donald R. Rothwell dan David L. Vanderzwaag, *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges*, (New York: Routledge, 2006), 121.

<sup>15</sup> In 2009, ADF published a report, "Defending Australia in the Asia Pacific Century: Force 2030."

<sup>16</sup> "Defending Australia in the Asia Pacific Century: Force 2030," Australian Department of Defence, 2009,24. [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1516/DefendAust/2009](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/DefendAust/2009), accessed 25 May 2016.

<sup>17</sup> Donald R. Rothwell and David L. Vanderzwaag, *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges*, (New York: Routledge, 2006), 122.

provides the latest navigation, hydrographic, oceanographic information in waters with Australian jurisdiction.<sup>18</sup>

Each State and the Northern Territory have police forces, which are often assigned to Australian waters. On the other side, the Commonwealth government has its police force, the Australian Federal Police. The AFP was established and is governed by the Australian Federal Police Act 1979 (AFPA) and has enormous marine law enforcement functions.

From a geographical point of view, the AFP must provide services in the Australian Capital Territory, Jervis Bay, and the outer territories. There is an agreement with States and the Territories and provide service in both.<sup>19</sup> The AFP also has duties in overseas embassies, consulates, and other Australian diplomatic facilities and assists overseas law enforcement agencies abroad.<sup>20</sup> The AFP's primary functions include witness protection, cooperation with other police units, intelligence agencies, and security agencies in other countries.<sup>21</sup>

Various state police units also have broad powers since the state and territory criminal laws apply to the extent of the ZEE or continental shelf (whichever is further).<sup>22</sup>

The second law enforcement agency is Australian Border Force (ABF). The ABF is a new institution, established on 1 July 2015, that combines all operational functions at the border, including customs, border security, investigation, detention, immigration compliance, and authority outlined in the Australian Border Force Bill 2015. The ABF is led by the ABF Commissioner, who controls its entire operation.<sup>23</sup>

The primary operational function of the ABF is to carry out Operation Sovereign Borders, which was initiated in 2013, to block and return the ships carrying refugees before the vessel reached the coast of Australia.<sup>24</sup> Also, the ABF performs service and enforcement functions such as<sup>25</sup> facilitating the entry of legitimate persons and goods, investigation, law enforcement related to banned and immigration malpractice, and detention above sea level.

<sup>18</sup> Australia, *Australian Ocean Policy*, attachment 2, 42.

<sup>19</sup> M. W. D. White, *Australian Offshore Laws*, (Sydney: Federation Press, 2009), 95.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Australia, *Australian Crime at Sea Act*, 2000, Preamble, no. 14.

<sup>23</sup> Australia, *Australian Border Force Bill*, 2015, art. 3 (b).

<sup>24</sup> Claudia Tazreiter, Leanne Weber, *Fluid Security in the Asia Pacific: Transnational Lives, Human Rights and State Control*, (London: Springer, 2016), vi.

<sup>25</sup> "About the Australian Border Force," Australian Border Force, accessed on 20 May 2016, <https://www.border.gov.au/australian-border-force-abf/who-we-are>.

Structurally, ABF is divided into an Operation Group, responsible for all operational activities related to management activities of migrants, goods, and cargo within the border circle, and a Support Group.

The Australian Fisheries Management Authority (AFMA) is an Australian Government agency responsible for efficient and sustainable fishery resources management.<sup>26</sup> The AFMA was established under the Fisheries Administration Act 1991, governing the management of Australian fisheries.

The main objectives of the AFMA include:<sup>27</sup> a. Implementing efficient and cost-effective fisheries management; b. Ensuring exploitation of fishery resources and related activities is carried out in accordance with applicable law and apply sustainable ecological principles;<sup>28</sup> c. Maximizing state revenues with Australian fisheries management; and d. Ensuring the accountability of fishery companies and the Australian public in AFMA fisheries management.

If a criminal offense is committed within a border area (inside or outside), then the applicable criminal law is one of the states with jurisdiction over such border areas.<sup>29</sup>

Suppose a criminal offense is committed within the inner border area. In that case, as already mentioned, the criminal law imposed is a criminal law of the state, so the authority to carry out prosecutions generally depends on the state prosecutor's office. However, the prosecution may be conducted by the Commonwealth Director of Public Prosecutions (CDPP) / Prosecutor General of the Commonwealth.<sup>30</sup> Similarly, criminal acts committed in the outer border areas are technically criminal acts against the Commonwealth, so there is often a struggle for authority.<sup>31</sup>

While Indonesia's maritime law enforcement regime is mainly similar to Australia's, Indonesia could perhaps learn from the success that extreme coordination enabled by the Maritime Border Command and the Oceans Policy's guiding direction to better integrate and streamline this aspect of its security enforcement.

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<sup>26</sup> "About AFMA," Australian Fisheries Management Authority, accessed on 22 May 2016 <http://www.afma.gov.au/about/about-afma/>.

<sup>28</sup> The principle of sustainable ecology is the decision-making process that considers the short-term and long-term economic, environmental, social, and equity impacts, the conservation of biodiversity diversity, and ecological integrity, see the Australian Fisheries Management Act 1991, art. 3A.

<sup>29</sup> Australia, *Australian Crimes at Sea Act*, 2000, Part 6.

<sup>30</sup> Parliament of Australia, 35.

<sup>31</sup> Suresh R., *Maritime Security of India: The Coastal Security Challenges and Policy Options* (New Delhi: Viji Books India Pvt. Ltd., 2014), 193.



### III. INDIA LAW ENFORCEMENT MODEL

India has nine states and four united territories that have territorial waters. In addition to law enforcement's implementation in the sea, various organizations, regulations, and actions are undertaken related to law enforcement at sea, resulting in overlapping authority and inability to make effective decisions.<sup>32</sup> The problem was ultimately overcome by establishing formal coordination mechanisms between agencies, with the expectation of effectiveness and coherent coordination in ministries and state and territorial units. The coordination is now embodied in the Indian Coastal Security Scheme (ICSS) established by the Indian Ministry of the Interior, which is implemented in stages (phase I of 2005-2011 and phase II 2011-2015).

ICSS has divided the authority and jurisdiction of law enforcement agencies previously overlapping. The divisions are<sup>33</sup>: 1. Water police have jurisdiction at 0-12 nautical miles (territorial sea); 2. Indian Coast Guard (ICG) has jurisdiction at 0-200 nautical miles (ZEE); and 3. The Indian Navy has jurisdiction in > 200 nautical miles (free sea).

It has been explained that Indian marine law enforcement agencies' jurisdiction has been regulated in such a way based on certain maritime zones. However, the next question is where the authority to prosecute the crime perpetrators is whether the state's authority or India's Central Government. There is a little problem with the use of the word between UNCLOS 1982 and MZAA 1976. UNCLOS 1982 provides that coastal states carry out jurisdictional implementation. In MZAA 1976, the word "state" of the coastal state as India / Central Government alone without regulating its jurisdiction.<sup>34</sup> This is certainly different from the previously discussed State of Australia, which has governed the central and state governments' authority.

India adheres to the dualism model of applying international law in national law so that international law does not automatically become national law. However, there needs to be separate legislation by the Indian Parliament.<sup>35</sup>

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<sup>32</sup> *Ibid.*, 194. Indian Coastal Security Scheme in phase I and phase II aims to improve the Water Police's ability, both from infrastructure and human resources.

<sup>33</sup> Parliament of India, 35.

<sup>34</sup> Suresh R., *Maritime Security of India: The Coastal Security Challenges and Policy Options*, 213.

<sup>35</sup> Sunil Kumar Agarwal, "Implementation of International Law in India: Role of Judiciary, (article presented at The First Dean Maxwell & Isle Cohen Doctoral Seminar in International Law regarding the Implementing International Law in the Domestic Legal Order, Adelaide, 28 June 2010).

Although the Indian constitution does not explicitly mention international law applicable to national law, it is regulated on the willingness to respect international law and international obligations.<sup>36</sup>

Although India has ratified UNCLOS 1982 and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA 1988) and has carried out law enforcement efforts against piracy, the national law governing it was only formed in 2012.<sup>37</sup>

Regarding the powers of prosecution, The Piracy Bill 2012 authorizes officers appointed by the central or state government to detain a person, conduct investigations and prosecutions carried out by police officers based on the Indian Code of Criminal Procedure.<sup>38</sup> The authority of arrest is briefly seen in the regulation of prosecution at the appointed court. The appointed court has the authority to carry out the prosecution process on any person arrested by ICG or the Indian Navy, regardless of its nationality, charged with committing a criminal act of piracy.<sup>39</sup>

#### IV. MALAYSIA LAW ENFORCEMENT MODEL

To secure the Economic Exclusive Zone's safety and security with 453,186 square kilometers, one of the Malaysian government's main focuses is strengthening the law enforcement sector's institutional dimension. The attempt could indeed be seen in establishing the Malaysian Maritime Enforcement Agency (MMEA) under *Malaysian Maritime Enforcement Agency Act 633* on 1 July 2004. This agency was primarily established and employed in the Malaysian Maritime Zones (MMZ) to maintain law and order, preserve peace, safety, security, prevent and detect crime, apprehension, and prosecution of offenders to collect security intelligence.<sup>40</sup> Before the establishment of MMEA, there were twelve (12) authorized departments and agencies on managing and patrolling the MMZ,<sup>41</sup> and, accordingly, this condition resulted in the overlapping of jurisdiction and functions. In this regard, MMEA was also established to solve inefficiency from the various law

<sup>36</sup> Michael P. Scharf, Michael A. Newton, and Milena Sterio, *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge: Cambridge University Press, 2015), 90.

<sup>37</sup> *Ibid.*

<sup>38</sup> India, *Indian Piracy Bill*, 2012, art. 6 para (1).

<sup>39</sup> *Ibid.*, Article 6 para (2) a.

<sup>40</sup> Malaysia, *Malaysian Maritime Enforcement Agency Act* No. 633/2004, art. 3 para (2).

<sup>41</sup> Eris Tajudin, "Study of managerial challenges confronting a new agency: the case of the Malaysian Maritime Enforcement Agency," (MBA Professional Report, Naval Postgraduate School 2015).

enforcers at sea.<sup>42</sup> Hence, to ensure the clarity of MMEA's role and authority at sea amongst these existing agencies, certain functions are given to this agency by the law, such as:<sup>43</sup>

- a) to enforce law and order under any federal law;
- b) to perform maritime search and rescue;
- c) to prevent and suppress the commission of an offense;
- d) to lend assistance in any criminal matters on a request by a foreign State as provided under the Mutual Assistance in Criminal Matters Act 2002 [*Act 621*];<sup>44</sup>
- e) to carry out air and coastal surveillance;
- f) to provide platform and support services to any relevant agency;
- g) to establish and manage maritime institutions for the training of officers of the agency; and
- h) in general, to perform any other duty for ensuring maritime safety and security or do all matters incidental to it.

It should be noted that all of the MMEA's roles have encompassed the role of the twelve (12) departments as mentioned above/agencies about the supervision and law enforcement at sea task. As a result, it represents the fact that MMEA is granted a strong position to ensure maritime security and safety in practice and conduct law enforcement at sea. In other words, the authority of the agencies mentioned above is now being transferred to the MMEA. To that end, the MMEA is also given several powers/authority to do:<sup>45</sup>

- a) to receive and consider any report of the commission of an offense;
- b) to stop, enter, board, inspect and search any place, structure, vessel, or aircraft and to detain any vessel or aircraft;
- c) to demand the production of any license, permit, record, certificate, or any other document and to inspect such license, permit, record, certificate, or other document or make copies of or take extracts from

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<sup>42</sup> "MMEA's Background," Malaysian Maritime Enforcement Agency, accessed on 30 May 2018, <https://mmea.gov.my/eng/index.php/en/mengenai-kami/latar-belakang>.

<sup>43</sup> Malaysian Maritime Enforcement Agency Act, Article 6 para (1).

<sup>44</sup> Article 19 of Malaysian Mutual Assistance in Criminal Matters Act 2002 stipulates that a prescribed foreign State request to Malaysia for mutual assistance shall be made to Malaysia's Attorney General through the diplomatic channel. The initiative contains the purpose of the request, the person's identity or instances initiating the requests, and other relevant information, including the criminal matters. See Malaysian Mutual Assistance in Criminal Matters Act 2002, Article 19 para (3).

<sup>45</sup> Malaysian Maritime Enforcement Agency Act, art. 7.

- such license, permit record, certificate, or other documents;
- e) to investigate any offense which it has reason to believe is being committed, or is about to be committed or has been committed;
  - f) to exercise the right of hot pursuit;
  - g) to examine and seize any fish, article, device, goods, vessel, aircraft, or any other item relating to any offense which has been committed or it has reason to believe has been committed;
  - h) to dispose of any fish, article, device, goods, vessel, aircraft, or any other item relating to any offense which has been committed, or it has reason to believe has been committed;
  - i) to arrest any person whom it has reason to believe has committed an offense; and
  - j) to expel any vessel that it has reason to believe to be detrimental to the interest of or endanger the order and safety in the Malaysian Maritime Zone.

Therefore, it is essential to note that MMEA's roles are quite extensive and very specific regarding the preservation of maritime safety and security, supported by strong management and political status. However, having served as the current primary law enforcer at sea, MMEA granted both full powers to take any legal actions against all perpetrators/vessels and also challenging roles. Aside from taking responsibility for maritime security and safety on Malaysia's water, MMEA is conducting non-legal matters, promoting the awareness of security in the maritime zone around neighboring States.<sup>46</sup> Accordingly, these challenging roles are also supplemented by the strong position of MMEA in ensuring the safety and security of Malaysian Maritime Zones (MMZ) due to single chain of command and control within the agency<sup>47</sup>, and also the clarity of its roles and authority under national law. In addition, to assist the MMEA's works, the Malaysian government further established the Malaysian Maritime Enforcement Affairs Division to coordinate and streamline MMEA's operational, management, and policy planning.<sup>48</sup> It should be taken into account that both agencies are not operated in the same chain of command as the MMEA plays a more operational role, while MMEAD serves as the ministry or so-called supervisor for the MMEA. By equipping

<sup>46</sup> Iskandar Sazlan, "The Concept of a Malaysian National Maritime Security Policy," *Maritime Studies*, (2006): 15.

<sup>47</sup> Swati Parashar, *Maritime Counterterrorism: A Pan-Asian Perspective* (Delhi: Dorling Kindersley, 2008), 114.

<sup>48</sup> "Latar Belakang," Penguatkuasaan Maritim Malaysia, accessed on 25 October 2017, [http://bhepmm.mmea.gov.my/index.php?option=com\\_content&view=article&id=48&Itemid=56&lang=en](http://bhepmm.mmea.gov.my/index.php?option=com_content&view=article&id=48&Itemid=56&lang=en).

the MMEAs with the ministry-level agency, the MMEA's position is as strong as other existing law enforcers at sea in Malaysia.

As the MMEA operates within the Malaysia Maritime Zone, it is necessary to comprehend the definition and scope of MMZ. MMZ is defined as waters encompassing internal waters, territorial sea, continental shelf, exclusive economic zone, and the Malaysian fisheries waters and includes the air space.<sup>49</sup> Simply put, the agency operates in nearly all maritime areas that are provided under international law of the sea, except for the high seas and any other waters outside national jurisdiction. Moreover, functions/responsibilities given to the MMEA have varied under the rights and obligations of coastal states in each of above mentioned maritime zones in which the agency is operating.<sup>50</sup> Hence, in connection with the topic of this article, the discussion shall be focused on the MMEA's function, strategy, and practices in Malaysia's Fisheries Waters, and further, Malaysia's Exclusive Economic Zone because these areas are the most related to Malaysia's authority and/or jurisdiction over fisheries.

Malaysian Fisheries Zone (MFZ) is defined as maritime waters under Malaysia's jurisdiction over which exclusive fishing rights or fisheries management rights are claimed by law. It includes Malaysia's internal waters, Malaysia's territorial sea, and the maritime waters comprised in Malaysia's exclusive economic zone.<sup>51</sup> Nevertheless, unlike waters under national jurisdiction, it is more complicated for MMEA to secure EEZ because coastal states do not have sovereignty over the latter area. As stated by the *Yang di-Pertuan Agung*<sup>52</sup> vide PU (A) 115/1980, EEZs are water areas outside and located in the vicinity of Malaysia's territorial waters, which has the width of 200 nautical miles from the same baseline used in determining the territorial sea, except for waters bordered Malaysia and other littoral States.<sup>53</sup> In the EEZ, Malaysia has declared that they have the only sovereign right over exploration and exploitation, conservation and management of natural and non-natural resources, and other economic/commercial activities related to exploitation and exploration activities.<sup>54</sup>

With regards to the role of MMEA in the EEZ, this agency is further entitled to enforcement jurisdiction only on certain prohibited and unauthorized

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<sup>49</sup> Malaysian Maritime Enforcement Agency Act, art. 2.

<sup>50</sup> Irwin U.J. Ooi, "The Malaysian Maritime Enforcement Agency Act 2004: Malaysia's Legal. Response to the Threat of Maritime Terrorism," *Australian & New Zealand Maritime Law Journal* 21, (2007): 79.

<sup>51</sup> Malaysian Fisheries Act 1985, Article 2.

<sup>52</sup> *Yang di-Pertuan Agong* is the terminology of King in Malaysia.

<sup>53</sup> Malaysian Exclusive Economic Zone Act 1984, Article 3 para (1) and (2).

<sup>54</sup> *Ibid*, Article 4a.

activities in the EEZ, such as:<sup>55</sup>

- a) explore or exploit any natural resources, whether living or non-living;
- b) carry out any search, excavation, or drilling operations;
- c) conduct any marine scientific research: or
- d) construct or authorize and regulate the construction, operation, and use of: (1) any artificial island: (ii) any installation or structure for any of the purpose provided for in section 4 or for any other economic purpose; or (iii) any installation or structure which may interfere with the exercise of the rights of Malaysia in the zone or on the continental shelf.

There are several difficulties in enforcing law or rules on fisheries matters within the EEZ, one of which is the contention on maritime interdiction<sup>56</sup> towards fishing vessels. It should be noted that under international law, coastal states only have sovereign rights over some issues on environment and resources and the obligation to ensure the freedom of navigation of all states through their EEZ as well.<sup>57</sup> In this regard, some argued that coastal states have the right to interdict all fishing vessels which navigate through their EEZ. In contrast, some argued about non-interference in the freedom of navigation of transiting fishing vessels.<sup>58</sup> However, that should not be a problem for the MMEA since they have all the data on fishing vessels operating within Malaysia's EEZ, which can be used in distinguishing fishing vessels that need to be interdicted or not. And obviously, the firm and robust support from the Malaysian government.

To improve the strong position of the MMEA, transparency is implanted within the MMEA's working system. For instance, a clear mechanism of supervision and law enforcement on fisheries is established to support MMEA's power to investigate, detain, and prosecute a person allegedly committing an offense under the national law. The supervision task is undertaken through direct observation of the officers at sea and report from the public or, in particular, the sea users. Furthermore, regarding the public report, the Act further regulates the rights of people who have previously issued any information/report to request a report on the status of a related offense's

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<sup>55</sup> *Ibid*, Article 5.

<sup>56</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea, First Edition* (Cambridge: Cambridge University Press, 2009), 30.

<sup>57</sup> United Nations Convention on the Law of the Sea 1982, art. 56, art. 58.

<sup>58</sup> Mary Ann Palma-Robbles, "Fisheries Enforcement and the Concepts of Compliance and Monitoring, Control and Surveillance," in *Routledge Handbook of Maritime Regulation and Enforcement*, Robin Warner and Stuart Kaye, eds, (New York: Routledge, 2016), 51.

investigation.<sup>59</sup> The report's status shall be given to the informant not later than two weeks after the receipt of the request.<sup>60</sup> Should the MMEA fails to execute the obligation mentioned earlier, it poses severe consequences to the relevant staff. The strict regulations are intended to express the commitment of MMEA in realizing efficiency and transparency while carrying out their functions.<sup>61</sup> Whereby the investigation has been completed, and the person has been arrested, no prosecution shall be instituted against that person without the written consent of the Public Prosecutor.<sup>62</sup>

As previously discussed, the Act provides an additional mechanism involving external supervision to the informants. After failing to furnish the status report to the informant within the given period/time, the informant may report that failure to the Public Prosecutor.<sup>63</sup> Accordingly, the Public Prosecutor will direct the agency to furnish him with a detailed status report on the investigation conducted by the agency about the offense in the informant's information.<sup>64</sup> The officer of the agency who fails to comply with the Public Prosecutor's directive is committing an offense and shall, on conviction, be liable to imprisonment for not more than one month and/or to a fine not exceeding RM 1,000.<sup>65</sup>

Overall, institutional problems at sea that used to be faced by the Malaysian government has no longer existed due to the establishment of MMEA, the central agency in preserving maritime security and safety in Malaysia. Furthermore, the Malaysian government has fully committed to supporting the roles of MMEA at sea, not only in the regulation but also in the management and political aspect/level. However, it should be taken into account that this strong-institution needs to be further balanced with good transparency so that MMEA can perform well and responsibly.

## **V. NEW ZEALAND LAW ENFORCEMENT MODEL**

New Zealand, as a nation with similar environmental and strategic concerns as Australia, as well as significant cultural and political ties with its close neighboring country, features a very similar maritime law enforcement framework and agency make-up to Australia. However, specific vital issues in this framework ultimately prevent it from being as successful as Australia's.

<sup>59</sup> Malaysian Maritime Enforcement Agency Act, art. 9 para (1).

<sup>60</sup> *Ibid.*, art. 9 para (2).

<sup>61</sup> Irwin Ui Joo, "The Malaysian Maritime Enforcement Agency Act 2004: Malaysia's Legal Response to the Threat of Maritime Terrorism," 70.

<sup>62</sup> Malaysia, Malaysian Maritime Enforcement Agency Act, Art. 8.

<sup>63</sup> *Ibid.*, art. 9 para (4).

<sup>64</sup> *Ibid.*, art. 9 para (5).

<sup>65</sup> *Ibid.*, art. 9 para (7).



New Zealand's EEZ covers just over 4 million km<sup>2</sup>, which is approximately 15 times the country's land area. As outlined in its 2016 Defence White Paper, critical maritime security threats to New Zealand include IUU fishing activity, maritime incidents, border patrol, and organized crime (Defence White Paper). Key legal instruments in New Zealand's maritime law enforcement regime include the *1994 Maritime Transport Act*, *1996 Fisheries Act*, *1999 Maritime Crimes Act*, *2004 Maritime Security Act*, *1991 Resource Management Act*, and UNCLOS.

Maritime security enforcement in New Zealand is primarily undertaken by the Royal New Zealand Navy (RNZN), supported by the New Zealand Police Force. The latter is granted most of its enforcement powers by the *1961 Crimes Act*. However, serious jurisdictional confusion had been caused by section 8 of this Act, which technically gave New Zealand officers jurisdiction over any Commonwealth vessels (*R v Fineberg*).

Other agencies also assist with maritime enforcement, including the Ministry for Primary Industries, which also leads fishing and biosecurity enforcement; Maritime New Zealand, which is responsible for shipping safety; Customs and Excise, which exercises border and customs control (albeit much less strictly than the ABF due to much more lax border protection policies); and the National Maritime Coordination Centre (NMCC).

The NMCC, which falls under the New Zealand Customs Service, works with multiple other government agencies to coordinate New Zealand's maritime security operations, much like Australia's Maritime Border Command. However, unlike the success of the MBC, the NMCC has faced challenges due to overall low levels of personnel and equipment resources due to New Zealand's very small population compared to the vast area of its maritime zone, even more of a disparity than Australia. This has necessitated an extreme level of coordination from New Zealand's maritime security framework. However, agencies have struggled to maintain effectiveness despite the efforts of the NMCC to coordinate.<sup>66</sup>

In particular, the Ministry for Primary Industries was criticized in the 2016 *Simmons Report* for failing to prosecute those involved in IUU dumping activity and the 'flawed' decision-making and severe lack of coordination between the MPI and the other agencies it was working on within these investigations.

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<sup>66</sup> Joanna Mossop, "Maritime Security in New Zealand" in Natalie Klein, Joanna Mossop and Donald R. Rothwell, *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand*, (Routledge: Sydney, 2009) 54-75, 69-70.



## NZ Oceans Policy

These shortcomings in New Zealand's maritime law enforcement have been referred to as emblematic of a larger theme of maritime security as a 'less visible' priority for the New Zealand government compared to other marine policy areas like environmental protection.<sup>67</sup> This is further emphasized by New Zealand's lack of articulation of an oceans policy like Australia has. While such a policy has been recommended by various members of New Zealand's government since the late 1990s, especially considering the considerable importance of maritime policy for New Zealand's economic and tourism sectors, no progress has been made as of yet.<sup>68</sup>

Therefore, while on paper Indonesia could be seen to learn from New Zealand's maritime law enforcement framework much like it could from Australia's, key issues such as the lack of resources for its agencies, a lack of coordination within and between these agencies, and no articulated oceans policy leave reduce the effectiveness of such learning.

## VII. LESSON LEARNED FOR INDONESIAN LAW ENFORCEMENT MODEL

In securing the vast area of Indonesian marine territory, law enforcement at sea is also conducted by various agencies. The Indonesian model, in principle, is similar to the Australian model, but one element distinguishing them shall be the coordinating body/agency in the matters of maritime security. There are also some similarities between the Indonesian and Malaysian models, except for the vital roles and explicit authority embedded in Malaysia's MMEA. As for the previously-mentioned agency in Indonesia, according to Presidential Regulation Number 178 of 2014 on *Badan Keamanan Laut*/Maritime Security Board (shall be referred to as BAKAMLA), it was established to take responsibility for maritime security and maritime safety in Indonesia. Aside from this newly-established agency, there are other existing law enforcement agencies at sea in Indonesia, namely the Indonesian Navy (shall be referred to as TNI AL), Water Police (shall be referred as Polair), Ministry of Marine Affairs and Fisheries (MoMAF), Ministry of Transportation (MoT), Ministry of Environment and Forestry, Ministry of Energy and Mineral Resources, Directorate General of Immigration

<sup>67</sup> Peter Cozens. "Commentary: Some reflections on recent oceans policy and oceans governance issues in New Zealand", *Australian Journal of Maritime & Ocean Affairs*, 6:1, 41-48. 2014.

<sup>68</sup> Karen N Scott, "New Zealand: Developments in Maritime Security," *Asia-Pacific Journal of Ocean Law and Policy* 4, no. 2 (2019): 265-269.

(DGI), and Directorate General of Customs and Excises (DGC). As for this multi-stakeholders system, it is overlapping of jurisdiction has been the widely known and classic problem for Indonesian law enforcement, especially at sea.

As an archipelagic State with 16,056 islands<sup>69</sup> and indeed, a vast area of sea and a variety of public matters/interests at sea would be troublesome to assign only an agency to handle or administer all public matters relating to law enforcement at sea. To that end, these six agencies have owned their task forces (comprised of personnel, system, and facilities) on patrol at sea, namely BAKAMLA, TNI AL, Polair, MoMAF, MoT, and DGC of the Ministry of Finance.<sup>70</sup> In connection with the law enforcement on fisheries matters in the EEZ, further discussion shall be focused only on the BAKAMLA, TNI AL, and MoMAAF because they are the ones who are authorized to do so within Indonesia's EEZ.

The most established agency for law enforcement at sea matter is the Indonesian Navy (TNI AL). Like most states' Navy across the world, the primary role of TNI AL is to protect national sovereignty. Other roles are stipulated in the national regulations, such as the supervision and law enforcement in the waters within national jurisdiction and waters outside national jurisdiction (EEZ and the high seas), one of which is towards fisheries matters. Since Indonesia has ratified the United Nations Fish Stocks Agreement 1995, TNI AL also has jurisdiction over Indonesian flagged fishing vessels operating in the high seas.<sup>71</sup> According to Law Number 34 of 2004 on Indonesian National Armed Forces, the purposes of TNI AL are as follows:<sup>72</sup>

- a) National defense;
- b) Law enforcement and preservation of security in the waters within national jurisdiction in accordance to national law and international law, which has been ratified;
- d) Naval diplomacy in order to support the foreign policy of the government
- e) Development of maritime power; and
- f) Empowerment of maritime defense territory/area.

As the authorized agency to enforce Indonesian law under national

<sup>69</sup> 16,056 islands, along with their name, coordinates, and all necessary information, had been verified by the United Nations in 2017.

<sup>70</sup> Eka Martina Wulansari, "Penegakan Hukum Di Laut Dengan Sistem Single Agency Multi Tasks [Law Enforcement at Sea with Single Agency Multitask System]," *Jurnal Rechtsvinding Online*, (2014): 1.

<sup>71</sup> Dirhamsyah, "Maritime Law Enforcement and Compliance in Indonesia: Problems and Recommendations," *Maritime Studies*, (2005): 1-16.

<sup>72</sup> Indonesia. *Law on Indonesian National Armed Forces*. Law No. 34 of 2004, art. 9.

jurisdiction and the exclusive economic zone (limited to marine scientific research, economic and environmental aspects of marine resources and environment), TNI AL has the power to enforce fisheries law in all Indonesian marine territories, as well as to interdict foreign fishing vessels conducting illegal fishing in the EEZ. It must be considered that no foreign fishing vessels are allowed to fish within Indonesia's EEZ. Otherwise, they might be awarded with strict punishment, such as the sinking vessel penalty. However, in carrying out these functions, TNI AL needs to comply with national law and international law, mainly the ones that Indonesia has ratified. As for the sinking policy, for instance, the sinking is allowed to be executed by the Navy after Court's decision. In practice, TNI AL also needs to take the provisions of enforcement actions mechanism, such as the right of visit and hot pursuit, into account so that TNI AL can make the most of those rights for law enforcement purposes. Regarding the law enforcement role, TNI AL is one of two agencies that is granted the power to investigate fisheries crime in the Indonesian EEZ.<sup>73</sup> To that end, TNI AL personnel are allowed to detain all suspects for not more than twenty (20) days which can be extended for a maximum of ten (10) days.<sup>74</sup> After completing all the investigation processes, TNI AL further submits the case to Public Prosecutor.

Other than the Indonesian Navy, another agency assigned to enforce the law on fisheries matters within the exclusive economic zone is the Ministry of Marine Affairs and Fisheries, particularly the Directorate General of Marine and Fisheries Resources Supervision (PSDKP).<sup>75</sup> In general, PSDKP shall manage national fisheries and enforce national law to fishers and their vessels (both national and foreign vessels); control illegal fishing, and prevent disease spreading from import activities. Like TNI AL, PSDKP has the power to enforce and investigate fisheries crime in the EEZ, and accordingly, most of the personnel own the investigator license. However, it must be noted that the size/capacity of the PSDKP facilities is not as large as TNI AL. It further raises the question of PSDKP facilities' capability to conduct the right of hot pursuit or even interdiction against substantial foreign fishing vessels in waters outside national jurisdiction.<sup>76</sup> Moreover, it also leads to another

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<sup>73</sup> Indonesia. *Law on Fisheries*. Law No. 45 Year 2009 on the Amendment of Law No. 31 of 2004, art. 73 para (2).

<sup>74</sup> *Ibid.*, art. 73B para (2) and (3).

<sup>75</sup> Indonesia. *Presidential Regulation on Ministry of Marine Affairs and Fisheries*. Presidential Regulation No. 63 of 2015, art. 22.

<sup>76</sup> Sugiyarto, "Patroli di Natuna, Petugas KKP dari Indonesia Justru Ditangkap Pihak Vietnam [Marine Affairs Ministry Officer are Arrested by Vietnam in Natuna Patrol]," *Tribun News*, 24 May 2017 accessed on 29 October 2017, <http://www.tribunnews.com/regional/2017/05/24/patroli-di-natuna-petugas-kkp-dari-indonesia-justru-ditangkap-pihak-vietnam>.

question whether or not PSDKP need to be accompanied by the Indonesian Navy in doing the patrol within EEZ. However, the PSDKP

The last agency which needs to be elaborated on is BAKAMLA. Compared to the TNI AL and PSDKP, BAKAMLA shall be regarded as the newly-established law enforcement agency in Indonesia, which is established by Presidential Regulation Number 178 of 2014 to replace the previously-agency, *Badan Koordinasi Keamanan Laut* (Coordinating Board of Maritime Security).<sup>77</sup> Two primary duties of BAKAMLA are conducting security and safety patrol in Indonesian waters and jurisdiction areas. In carrying out these duties, BAKAMLA is granted several functions, which are:<sup>78</sup>

- a) Formulating national policy in safety and security aspect in the Indonesian marine area and under the jurisdiction of Indonesia;
- b) Conducting early detection system of safety and security;
- c) Conducting supervision, prevention, and enforcement to any offenses or law violation;
- d) Synergizing and monitoring the implementation of the marine patrol of relevant agencies;
- e) Providing technical and operational support to relevant agencies;
- f) Providing safe and search support; and
- g) Any other duties in the national security system.

Unlike previous agencies, two significant elements from the BAKAMLA function are first, formulating the national policy on maritime security and safety, and second, synergizing/monitoring the implementation of other relevant agencies marine patrol. By adding this provision, the Indonesian government adds another agency to conduct law enforcement at sea and synergize or coordinate all other agencies in terms of the marine patrol. However, in the first four (4) years of its existence, this agency has yet to actualize its two significant roles, mostly due to the lack of political will from the government and the lack of national funding. So far, for instance, the BAKAMLA has yet to own their office permanently and adequate personnel and facilities to support their roles. Nevertheless, BAKAMLA is still expected to fulfill its roles in the future. Their roles will be pivotal in allocating and managing the resources (including those from other agencies) effectively to preserve maritime security and safety within Indonesia's marine territory. Furthermore, in order to implement their given functions, BAKAMLA is also equipped with several powers which shall be implemented in an integrated

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<sup>77</sup> Indonesia. *Presidential Regulation on Maritime Security Board*. Presidential Regulation No. 178 of 2014, art. 45.

<sup>78</sup> *Ibid.*, art. 3.

and single chain of command, such as:<sup>79</sup>

- a) Conducting hot pursuit;
- b) Stop, check, arrest, bring and hand the ship over to the authorized agency for further legal process; and
- c) Synergize information system of security and safety in Indonesian waters and jurisdiction.

Based on the powers mentioned above, it can be concluded that BAKAMLA is entitled to the hot pursuit and interdiction power, yet not as full as the Navy and PSDKP. Furthermore, it should be noted that BAKAMLA does not have the authority to investigate and any further legal actions/proceedings. The national law is equipped with newly unexplained terms in Indonesia's penal law, which is the early investigation (*penyidikan awal*). In other words, BAKAMLA personnel roles are only limited to the conduct of interdiction.

## VIII. CONCLUSION

Based on the previous analysis, every country has its maritime law enforcement mechanism, which is suitable based on their geographical nature and domestic politics, and government structure. It could be a single agency and multitask or multi-agency with a single task. However, one of the essential commonalities from all those countries is the importance of a robust coordination mechanism. There could be some institution that has several maritime law enforcement institutions, such as Indonesia and Australia. Each institution has its scope and jurisdiction; for instance, there is an institution with explicit authority for fisheries and custom. With this multi-agency system, there should be a robust, coordinated mechanism to ensure unified and integrated data on maritime security in the country. However, creating a strong coordination system is often not such an easy task. As a lesson learned from all these countries, a strong legal basis and political commitment are crucial in ensuring a coordinated maritime security law enforcement system.

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<sup>79</sup> *Ibid.*, art.4

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