Illegal, unreported and unregulated fishing and transnational organized fisheries crimes: Perspectives of legal and policy measures of Indonesia

Zaki Mubarok

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ILLEGAL, UNREPORTED AND UNREGULATED FISHING AND
TRANSNATIONAL ORGANIZED FISHERIES CRIMES:
PERSPECTIVES OF LEGAL AND POLICY MEASURES OF INDONESIA

Zaki Mubarok

Supervisors:
Professor Stuart Kaye
Professor Alistair McIlgorm

This Thesis is presented as part of the requirement for the conferral of the degree:
Doctor of Philosophy (PhD)

This research has been conducted with the support of the Australia Awards Scholarship

UNIVERSITY OF WOLLONGONG
AUSTRALIAN NATIONAL CENTRE FOR OCEAN RESOURCES AND SECURITY
(ANCORS)
SCHOOL OF LAW
FACULTY OF LAW, HUMANITY AND ARTS
MARCH 2019
ABSTRACT

It has been identified that Illegal, Unreported and Unregulated (IUU) fishing activities have severe impacts on, and continue to be a prominent problem to, marine ecosystems. In a 2012 report, FAO disclosed that 87.3% of fish stocks were fully exploited or overexploited. In accordance with the recent report, it is estimated that the economic losses from the practice are approximately between $10 billion and $23.5 billion per year, which is equal to between 11 and 26 million tons of fish catch. The FAO report revealed that fish stocks decreased from 90 per cent in 1974 to 71.2 per cent in 2013 while 68.8 per cent of were considered overfished.

Indonesia has a significant IUU fishing problem. According to the data provided by the Ministry of Marine Affairs and Fisheries of Indonesia (MMAF), Indonesia suffers around Rp.
101 trillion (US$ 8.8 million) annually due to IUU fishing activities alone. The economic losses Indonesia has suffered from those illicit activities are from the practices of tax evasion, illegal fuel and this has affected local fishermen’s income. In response to this matter, Indonesian authorities have committed to eradicating the activities by imposing stringent measures.

When probing IUU fishing, related transnational crimes activities have also been discovered including human trafficking and slavery as well as drugs and weapons smuggling. As such, Indonesia has developed several legal and policy measures to overcome IUU fishing and transnationally organized fisheries crimes. Nonetheless, there persist some challenges. This paper examines Indonesia’s policy and legal practices in combating IUU fishing and transnationally organized fisheries crimes from the views of domestic and relevant international law and practices by observing the advantages and disadvantages of such policy and making analysis through the lens of environmental law. At the end, it attempts to analyse if fisheries crime offers a better approach to combat IUU fishing.
ACKNOWLEDGMENT

I would like to express my sincere gratitude to the God Almighty, Allah SWT and Prophet Muhammad for the blessing. Appreciation and gratitude are also extended to the Australia Awards Scholarship (AAS) that has been very supportive for providing me the second scholarship. I will be forever thankful to my supervisors, Professor Stuart Kaye and Professor Alistair McIlgorm for supporting me during the research in the last three and half years. I am deeply impressed by Prof Stuart in assisting me to achieve the academic goals and to expand the network. Thanks to all staff of ANCors, particularly Myree Mitchell and AAS Liaison Officer, Wendy in rendering me assistance.

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Thank you to my parents, Abah Busro and Ibu Siti Sofiati as well as my brothers and sisters, Mbak Dewi, the late Mbak Ida, Kak Anis, Ifa, Fajar and Elok as well as my nephews and in-laws for unwavering support and love.

At the end, I must be grateful and thankful to my little family. Vivin, my wife who has been very encouraging and patient in accompanying me passing this academic journey. My kids, Sydney, Aliya and little Kay, you are all my live.
CERTIFICATION

I, Zaki Mubarok, declare that this thesis submitted in fulfilment of the requirements for the conferral of the degree of Doctor of Philosophy, from the University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. This document has not been submitted for qualifications at any other academic institution.

Zaki Mubarok
June 2019
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<td>ABNJ</td>
<td>Areas Beyond National Jurisdiction</td>
</tr>
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<td>AIS</td>
<td>Automatic Identification System</td>
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<tr>
<td>ARF</td>
<td>ASEAN Regional Forum</td>
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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>BKPM</td>
<td><em>Badan Koordinasi Penanaman Modal</em> (Investment Coordinating Board)</td>
</tr>
<tr>
<td>BPS</td>
<td><em>Badan Pusat Statistik</em> (Central Bureau of Statistics)</td>
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<tr>
<td>BTC</td>
<td>Bali Tuna Conference</td>
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<tr>
<td>CCAMLR</td>
<td>Commission on the Conservation of Antarctic Marine Living Resources</td>
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<tr>
<td>CCSBT</td>
<td>Conservation of Southern Bluefin Tuna</td>
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<td>CCPCJ</td>
<td>The UN Commissions on Crime Prevention and Criminal Justice</td>
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<td>COPs</td>
<td>Conference of Parties</td>
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<td>CMMs</td>
<td>Conservation and Management Measures</td>
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<td>DAFF</td>
<td>Department of Agriculture, Forestry and Fisheries</td>
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<td>DELC</td>
<td>Division of Environmental Law and Conventions</td>
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<td>ECOSOC</td>
<td>The UN Economic and Social Council</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>FSU</td>
<td>Fisheries Support Unit</td>
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<td>FMAs</td>
<td>Fisheries Management Areas</td>
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<td>GDP</td>
<td>Gross Domestic Products</td>
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<td>GMF</td>
<td>Global Maritime Fulcrum</td>
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<tr>
<td>GT</td>
<td>Gross Tonnes</td>
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<tr>
<td>ICTBF</td>
<td>International Coastal Tuna Business</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>IOTC</td>
<td>Indian Ocean Tuna Commission</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>INTERPOL</td>
<td>International Police</td>
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<td>IORA</td>
<td>Indian Ocean Rim Association</td>
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<tr>
<td>IPOA-IUUF</td>
<td>International Plan of Action on Illegal, Unreported and Unregulated Fishing</td>
</tr>
<tr>
<td>ISNT</td>
<td>Informal Single Negotiating Text</td>
</tr>
<tr>
<td>ITLOS</td>
<td>International Tribunal on the Law of the Sea</td>
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<td>IUUF</td>
<td>Illegal, Unreported and Unregulated Fishing</td>
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<td>KBBI</td>
<td><em>Kamus Besar Bahasa Indonesia</em> (Indonesia Formal Dictionary)</td>
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<tr>
<td>LOSC</td>
<td>Law of the Sea Convention</td>
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<tr>
<td>MCS</td>
<td>Monitoring, Control and Surveillance</td>
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<td>MLRA</td>
<td>Marine Living Resources Act</td>
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<td>MMAF</td>
<td>Ministry of Marine Affairs and Fisheries</td>
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<td>NMMU</td>
<td>Nelson Mandela Metropolitan University</td>
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<tr>
<td>MAOC(N)</td>
<td>Maritime Analysis and Operation Centre (Narcotics)</td>
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<tr>
<td>MoU</td>
<td>Memorandum of Understanding</td>
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<tr>
<td>MPAs</td>
<td>Management Protected Areas</td>
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<td>MSRA</td>
<td>Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006</td>
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<tr>
<td>NCB</td>
<td>National Central Bureau</td>
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<tr>
<td>NPOA-IUUF</td>
<td>National Plan of Action on Illegal, Unreported and Unregulated Fishing</td>
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<td>Acronym</td>
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<tr>
<td>NOAA</td>
<td>National Oceanic and Atmospheric Administration</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>OBOR</td>
<td>One Belt and One Road</td>
</tr>
<tr>
<td>ODA</td>
<td>Official Development Assistance</td>
</tr>
<tr>
<td>PERMEN-KP</td>
<td>Peraturan Menteri Kelautan dan Perikanan (Ministerial Regulation of Marine and Fisheries)</td>
</tr>
<tr>
<td>PSC</td>
<td>Port State Control</td>
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<tr>
<td>PSMA</td>
<td>Port State Measures Agreement</td>
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<td>PPATK</td>
<td>Financial Transaction Report and Analysis Centre</td>
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<td>RFMOs</td>
<td>Regional Fisheries Management Organizations</td>
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<tr>
<td>SCOI</td>
<td>Standing Committee on Observation and Inspection</td>
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<td>SIPI</td>
<td>Licence for Fishing</td>
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<tr>
<td>SIKPI</td>
<td>Licence for Fish Transporting Vessel</td>
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<tr>
<td>SIUP</td>
<td>Fisheries Business Licence</td>
</tr>
<tr>
<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea</td>
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<tr>
<td>SOP</td>
<td>Standard Operating Procedures</td>
</tr>
<tr>
<td>SPB</td>
<td>Sailing Approval Letter</td>
</tr>
<tr>
<td>SRFC</td>
<td>Sub-Regional Fisheries Commission</td>
</tr>
<tr>
<td>TEC</td>
<td>Transnational Environmental Crime</td>
</tr>
<tr>
<td>The U.S</td>
<td>United States</td>
</tr>
<tr>
<td>TIP</td>
<td>Trafficking in Persons</td>
</tr>
<tr>
<td>TKI</td>
<td>Tenaga Kerja Indonesia (Indonesian workers working overseas)</td>
</tr>
<tr>
<td>TOFC</td>
<td>Transnational Organized Fisheries Crimes</td>
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<tr>
<td>TOC</td>
<td>Transnational Organized Crimes</td>
</tr>
<tr>
<td>TZMKO</td>
<td>Territoriale Zee En Marietieme Kringen Ordonnantie (Territorial Sea and Maritime Zone Ordinance)</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
<tr>
<td>UNTOC</td>
<td>United Nations Convention against Transnational Organized Crime</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNICPOLOS</td>
<td>United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea</td>
</tr>
<tr>
<td>UNICRI</td>
<td>United Nations Interregional Crime and Justice Research Institute</td>
</tr>
<tr>
<td>VMS</td>
<td>Vessel Monitoring System</td>
</tr>
<tr>
<td>WCPFC</td>
<td>Western and Central Pacific Fisheries Commission</td>
</tr>
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<td>WWF</td>
<td>World Wildlife Fund</td>
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ILEGAL, UNREPORTED AND UNREGULATED FISHING AND TRANSNATIONAL ORGANIZED FISHERIES CRIME: PERSPECTIVES OF LEGAL AND POLICY MEASURES OF INDONESIA

PART I
INTRODUCTION

1. Introduction.

It is conceived that fisheries constitute an essential sector for human life as fish is a part of the diet of millions of people and contributes significantly as an income source.¹ The Food and Agriculture Organization (FAO) disclosed that 56.6 million people around the globe were involved in the leading sector of capture fisheries and aquaculture in 2014. However, compared to the previous years of 2012 and 2013, the number of people working in the said sector showed a decline in 2014. Further, in the same year, there was an approximate reduction of 1.5 million fishermen which gave rise to the total decrease of those employed in capture fisheries from 83 per cent in 1990 to 67 per cent in 2014. This was a different case to the overall engagement in aquaculture which was considered more stable and even showed an increase from 17 to 33 per cent in the same period. In 2014, Asia assumed the most substantial proportion of people engaged in fisheries and aquaculture being 84 per cent, followed by Africa with nearly 10 per cent and Latin America and the Caribbean (about 4 per cent).²

In the broader sphere of ocean resources, the Organization for Economic Co-operation and Development (OECD) estimated in 2010 the overall contribution of oceans to the world value-added economy to reach US$1.5 trillion per annum.³ This considerable contribution to global revenue should be secured from destructive practices and nature’s phenomena such as illegal fishing and climate change, respectively. This challenge has existed for a long time, and international society has taken measures to address critical ocean problems for more than half a century. Historically, the awareness to preserve ocean resources emerged after the Second World War. The concern that ocean resources, despite their renewability in many cases, are not unlimited and, for that reason, they have to be adequately managed if their roles

¹ Food and Agriculture Organization (FAO), The State of World Fisheries and Aquaculture 2010 (Rome, 2010) 6.
are to be sustained in providing contributions to food, employment, and social aspects in increasing global population growth.4

In addition, the resources have a large-scale advantage for human health and nutrition. As the primary source of animal protein, fish delivers the protein for one billion of the globe’s poorest people.5 The provisioning service of food from capture fisheries and culturing activities are regarded as one of the ultimate services granted by the oceans to human communities. The ocean creatures categorized as ocean-based sources of food include marine mammals, plants, invertebrates, and fish.6 Considering the crucial concerns, it is worth mentioning that fish stocks play a key role in ensuring the contributions of ocean resources be provided without any hindrance.

Unfortunately, fisheries resources have shown a general trend of decline from 90 per cent in 1974 to 71.2 per cent in 2011 based on the reports composed by FAO, amongst others, in 2011, 2012 and 2014.7 This deterioration, as part of ocean problems, is not only related to environmental concerns, but it also extends to criminal activities. Within a study of transnational environmental crimes, it is not too challenging to find academic literature to review the interplay between illegal fishing and transnationally organized crimes, because this subject has received close attention from the international community and scholars in recent years.8 In a book titled ‘Handbook of Transnational Environmental Crime,’ Eve de Coning offers a thoughtful discussion on fisheries crimes. At the very outset of the article, she presents several cases of illegal fishing conducted by fishing vessels such as the Songhua,

4 Food and Agriculture Organization (FAO), Code of Conduct for Responsible Fisheries <http://www.fao.org/docrep/005/v9878e/v9878e00.htm>. The discussion of historical perspective can be found in the preface of the 1995 Code of Conduct for Responsible Fisheries (CCRF) as background to depict how essential it is to adopt CCRF.
8 Seokwoo Lee, Anastasia Teleietsky, and Clive Schofield, ‘Slipping the Net: Why Is It So Difficult to Crack Down on IUU Fishing’ in Myron H. Nordquist, John Norton Moore, Robert C. Beckman and Ronan Long (eds), Freedom of Navigation and Globalization (Leiden: Brill Nijhoff Publishing, 2015), 88, 111. The connection between IUU fishing and TOC has been firstly raised in the ninth meeting of the United Nations Open-ended InformalConsultative Process on Ocean, and the Law of the Sea (UNICPOLOS) held in 2008. Delegates required deeper and further research on the interplay between IUU fishing and TOC. Three years later after the UNICPOLOS meeting (in 2011), UNODC organized an expert group meeting to discuss the presence of TOC in the fishing industry. UNODC has been productive in taking the initiative to hold meetings and initiating some publications on the subjects such as Organized Crime Involvement in Trafficking in Persons and Smuggling of Migrants, Transnational Organized Crime in the Fishing Industry and Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes: Research Report.
the *Kunlun* and the *Yongding* that are allegedly part of criminal organizations utilizing the weak enforcement of fisheries law in the Southern Ocean.⁹ These illegal fishing vessels having committed crimes repeatedly are known as ‘repeat offenders’ employing ‘flag hopping, fish laundering, ports and flags of convenience’ and involving Illegal, Unreported and Unregulated (IUU) fishing.¹⁰

Within the internal arena, Indonesia also faces illegal fishing and other transnationally organized crimes related to this activity. The report of the International Organization Migration (IOM) depicts the detrimental effect of illegal fishing on various aspects including Indonesia’s economy, environment, and small-scale fishers.¹¹ When she joined the World Bank, Sri Mulyani gave an overview of Indonesia’s coral reefs which were regarded as threatened at 65 per cent as a result of overfishing practices. Illegal and unreported fishing makes Indonesia’s loss of revenue some US$ 20 billion. The poverty rate in coastal areas also remains high.¹² Illegal fishing impinges heavily upon those small-scale fishermen living in coastal areas due to the decline in fish stocks. As a consequence of overfishing, Indonesia’s people have become less interested in opting to be fishers as an occupation, in particular, traditional fishers. It is evident that based on the data from the Central Bureau of Statistics of Indonesia, the number of traditional fishers experienced a decrease from 1.6 million to 864 000 households between 2003 and 2013.¹³

In general, as revealed by Telesetsky, countries have regarded IUU fishing as a management problem of fishery resources rather than as an egregious crime.¹⁴ More complexity in the

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¹³ MMAF, International Organization for Migration and Coventry University, above n 11.

¹⁴ Anastasia Telesetsky, ‘Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime’ (2014) 41(4) *Ecology Law Quarterly* 943. The article tests a legal framing theory by arguing that insufficient attention has been given to understanding large-scale IUU fishing as a transnational organized criminal activity.
fisheries sector, drawn from some cases of organized crimes, demonstrates that illegal fishing does not bring fisheries management problems *per se*. Transnational crimes such as human trafficking and drugs smuggling do occur in the fishing activities of Indonesia. In early 2018, the Indonesian navy seized ‘FV Sunrise Glory’, a fishing vessel attempting to smuggle one tonne of crystal methamphetamine, concealed in 41 sacks of rice, just off the Batam Island waters. When boarded and inspected, the vessel was flying a Singaporean flag. However, after further investigation, this vessel had changed the flag or been ‘reflagged’ because the navy also discovered a Taiwanese flag on board.15

Another case of human trafficking has been practiced within a fishing company located in Benjina and Ambon, Eastern Indonesia in 2015. This case drew the attention of the international community as a very large number of 1300 of fishers were working in inhuman conditions. Some media called this practice human slavery because human rights were violated including excessive work hours, abuse of physical and mental conditions and even homicide. The rescued fishermen originated from Myanmar, Cambodia, Thailand, and Laos. The foreign fishing vessels employed them when poaching fish in Indonesia waters by reflagging. In this case, IOM played a crucial role in undertaking the investigation of the victims.16 In perceiving and addressing IUU fishing and fisheries related crimes in Indonesia, the analysis on the subject matter should be tagged on the general framework of maritime policy under Jokowi’s administration. This overview would deliver a more comprehensive understanding of the policies taken by Susi Pudjiastuti, Minister of Marine Affairs and Fisheries, on her priority to launch a war against IUU fishing and its related transnational organized crimes (TOC).

A total area of 5 193 250 square kilometres of marine waters17 covers approximately 78 per cent of the whole of Indonesia’s territory.18 The country offers abundant marine and fisheries resources including capture fisheries that are explorable to the advantage of the Indonesian people. In that sense, in spite of it being obviously an illegal act, it is not much of a surprise

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17 MMAF, International Organization for Migration and Coventry University, above n 11.

that once foreign fishing vessels poach fish in Indonesia waters and violate domestic and international relevant laws in the form of IUU fishing, it contributes to fisheries-related crimes taking place. This marine and biodiversity richness has led the top policymakers of the country to take strategic steps and to be creative in securing the resources from the poachers and other violations by way of ocean governance.

With such a vast area of marine waters and their complexity, Indonesia has complicated ocean governance.\(^{19}\) The complication extends to IUU fishing and fisheries crimes for the reason that the ocean governance holds a pivotal role in addressing both fisheries problems and in setting a mechanism for prevention of those activities experiencing further expansion. The intricate issues may come from the inadequacy of the elements of ocean governance such as legal and policy frameworks in closing the gaps that persist between the two levels, national and international.

In the domestic sense, when Minister Susi Pudjiastuti takes a hard stance against illegal fishing perpetrators through, among others, sinking and/or burning illegal domestic and foreign fishing vessels, the question of the legality of such robust measure prevails.\(^{20}\) The legal view shall be taken into account in this respect since, as a member of the international community and party to ocean-related international conventions, Indonesia shall conform with relevant domestic and international laws. For instance, fishing vessels flying foreign flags carry national jurisdiction of a state over the boat, in accordance with Article 94(1) of the Law of the Sea Convention (LOSC).\(^{21}\) It may raise a legal question when such vessels suffer a severe penalty from Indonesia authorities. Such legal inquiry also applies when finding the link between IUU fishing and TOC.

In developing an in-depth analysis of the nexus between IUU fishing and TOC, two dimensions of national and international dimensions need to be examined as those two are intertwined. The interconnectedness can be explained through the interdisciplinary

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knowledge of international law and international relations. The collaborations between the two schools of thought have been a long-standing subject of academic discussion by scholars after the end of World War II. In this sense, international relations practitioners need to understand the concept of international legal argument in international treaties being binding, amongst states. Likewise, in establishing good relations with other parties, international lawyers should comprehend the ideal notion of diplomacy as the core of international relations.

Within the realm of the subject matter of this thesis, the discussion falls under related international legal instruments such as LOSC, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to The Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the 1995 United Nations Fish Stock Agreement), Port State Measure Agreement (PSMA) and the United Nations Convention Against Transnational Organized Crime (UNTOC), the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the 1993 FAO Compliance Agreement), the Cape Town Agreement on the Safety of Fishing Vessels

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24 *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature 22 November 2009, the Agreement was registered with the Secretariat of the United Nations on 26 January 2017 under No. 1-54133 (entered into force on 5 June 2016) (‘the 2009 Port State Measure Agreement’).

(the 2012 Cape Town Agreement) and other relevant legally binding mechanisms in the form of “hard law” as well as international legal cases.

The other international frameworks include voluntary mechanisms, or “soft law”, containing moral and political commitments that are non-legally binding in character such as IPOA-IUUF (International Plan of Action on Illegal, Unreported and Unregulated Fishing), joint declarations, action plans, and memoranda of understanding. Meanwhile, international relations play a strategic role in endorsing Indonesia’s interest before international forums or in international organizations such as FAO, the United Nations Office for Drugs and Crimes (UNODC), and ASEAN through the formulation of appropriate domestic policy measures and legal instruments.

Under the Regime of President Joko Widodo (preferably known as Jokowi), ocean affairs receive more attention from policymakers and have become a top national agenda after the doctrine of Global Maritime Fulcrum (GMF) was declared. This policy makes Minister Susi, whose institution assumes the primary responsibility of sustainably securing marine resources, pledge to fight at all costs any illicit activities such as illegal fishing and transnationally organized crimes relevant to it. In this sense, the adequacy of legal and policy domains turns out to be significant factors in making the said objective be pursued. Those two dimensions would become more relevant in conjunction with international legal instruments and practices. This thesis attempts to examine the existing legal and policy frameworks of Indonesia to prevent, deter and eliminate IUU fishing and its connection with Transnational Organized Fisheries Crime (TOFC) within the context of relevant practices of international laws and policies and to provide a critical discussion of the inclusion of any pertinent measures of a broader scope, or the interplay between IUU fishing and fisheries crimes.

This thesis comprises eight different parts. Part one is the introduction consisting of the discussion on domestic and global problems of IUU fishing and TOFC. Part two provides the general overview of the search for archipelagic status by Indonesia. This part is imperative in terms of the history of Indonesia as an archipelagic state and its struggle to obtain archipelagic status. From the past, some lessons can be drawn to inspire the current efforts of Indonesia to promote the issue of transnational organized fisheries crimes at the global level. This part also provides the maritime journey of Indonesia. Part three presents the examination
of GMF to revisit Indonesia as a maritime nation. Part four examines policy perspectives on IUU fishing and TOFC ultimately. This part is divided into two sections applying backgrounds (international and domestic) and proposed policy measures as a response to the loopholes identified. Part five encompasses international and domestic legal frameworks on IUU fishing and TOFC followed by identifying the loopholes and proposing legal measures to fill these gaps. Part six examines IUU fishing and fisheries crimes through the lens of environmental law. Part seven offers the discussion on the advantages and disadvantages of combatting illegal fishing from the perspective of TOC. Part eight presents the conclusions.

1.1 The Deteriorating Global Level of Fish Stocks.

The global community faces a major challenge in fostering the benefits that the ocean can offer without compromising the capability of the ocean to deliver continuously its advantages for future generations, in particular sustainably managing ocean exploration and exploitation. The decline in fish stocks status has been a major concern of many countries particularly the concern for food security and sustainable development.\(^\text{26}\) As revealed by the report of FAO in 2012, the proportion of fish stock overexploitation has surged, particularly in the late 1970s and 1980s, which accounted for 10 per cent of the world’s marine catch in 1974 to 26 per cent in 1989. Since 1990, the amount of overexploited fish stocks had continued to increase but at a slower pace.\(^\text{27}\) Although this matter is subject to international attention, the level of marine fish stock globally demonstrates a general decline and therefore it needs improvement. This inference can be drawn from the other comparisons presented by FAO in 2014 relating to the state of the global marine fish stock from 1974 to 2011, as illustrated in Figure 1.


The FAO further reported in 2014 that prior to experiencing a general decline, the global marine fisheries reached a production peak of 86.4 million tonnes in 1996. In 2011, global production was 82.6 million tonnes while in 2012 the production was 79.7 million tonnes. It was recorded in 2011 that the region with the highest output of 21.4 million tonnes or 26 per cent of the world’s marine catch was the Northwest Pacific. The second highest was the Southeast Pacific region with 12.3 million tonnes or 15 per cent, followed by the Western Pacific and the Northeast Pacific with 11.5 million tonnes or 14 per cent and 8.0 million tonnes or 9 per cent, respectively.29

The portion of biologically sustainable levels of fish stock demonstrated a decrease from 90 per cent in 1974 to 71.2 per cent in 2011 while 28.8 per cent of stocks were considered to be overfished. In the same year, 2011, the fish stocks that were fully fished and underfished accounted for 61.3 per cent and 9.9 per cent respectively.30 Furthermore, the stock of fish continued to decline to a level of 68.8 per cent in 2013, leaving approximately 31.4 per cent

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29 Ibid.
30 Ibid.
overfished or biologically fished at the unsustainable level.\textsuperscript{31} It can be inferred from this data that fish stocks, in general, decreased during that period. If this problem is not taken seriously, it could result in there being no fish remaining in the ocean, and it may be a threat to the life of mankind. The primary issue affecting the declining level of fish stock has been identified as the practices of IUU fishing. This activity leads to severe destructive impacts and continues to be a prominent problem for marine ecosystems.\textsuperscript{32} From an economic viewpoint, based on the assessment by the United Nations in 2010, it was estimated that the worldwide losses from the practice of IUU fishing were approximately between US$10 billion and US$23.5 billion per year, which was equal to between 11 and 26 million tonnes of fish catch.\textsuperscript{33}

\textbf{1.2 Transnational Organized Crimes in the Fisheries Sector.}

It is evident that developing countries are those most affected by IUU fishing practices. This destructive activity particularly impinges upon several poor countries where the income of the people is highly dependent on fisheries for foods and exports.\textsuperscript{34} Developing states in Africa and the Asia Pacific constitute the main instances of the countries facing the grave impacts of IUU fishing. One recent example of economic losses in the waters of Sub-Saharan Africa accounted for almost US$1b in one year, equal to nearly 25 per cent of the total amount of fisheries annual exports.\textsuperscript{35} Meanwhile, in the Asia Pacific alone, the cost as a result of IUU fishing practices, is approximately US$4.5 billion to US$5.8 billion a year.\textsuperscript{36}

As a form of transnational and organized activity, IUU fishing is intertwined with other crimes. In many cases, transnational organized crimes such as people smuggling, human trafficking, forced labour, and drug trafficking can be found when IUU fishing takes place. One example is an abalone fishery case in South Africa. As assessed by UNODC, this case had a link with an international criminal organization. The connection was shown when

\begin{flushright}
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid 9.
\textsuperscript{36} Robin Lungren et al., \textit{Status and Potential Fisheries and Aquaculture in Asia and the Pacific 2006} (FAO Regional Office for Asia and the Pacific, RAP Publication 2006/22) 46.
\end{flushright}
abalone from South Africa was exported to other countries, and in return, drugs were imported to South Africa. Ostensibly, the investigation disclosed that abalone plundering is part of the criminal chain related to theft and illegal drugs in the country.\textsuperscript{37}

Another area of enquiry making a clear nexus between IUU fishing and organized crime is when organized criminal groups such as Russian criminal syndicates, Chinese Triads, and other Asia gangs commonly engage in practicing IUU fishing. Russian syndicates illegally ship around two million metric tonnes of seafood to Europe and other countries such as the United States and Japan, earning up to US$4 billion annually in the 1990s. It was conceivable that the criminal groups were also associated with the illegal harvesting of abalone which generated up to US$80 million a year in revenue.\textsuperscript{38} In pursuing their objectives, the criminal syndicates employed illegitimate methods. For instance, when poaching razor clams in Scotland, the organized gangs violated laws by using unlicensed vessels and electro-fishing, a stunning method by operating electrical shock, to collect shellfish.\textsuperscript{39}

An expert group meeting, organized by UNODC on 8-9 March 2011,\textsuperscript{40} gave rise to the publication of Transnational Organized Crime in the Fishing Industry focusing on three main topics of trafficking in persons, migrant smuggling and trafficking of drugs. This research attempts to address two main concerns, firstly, whether TOC and other crimes do occur in the fishing industry, and secondly, what the vulnerabilities of the fishing sector are to TOC or other criminal activities.\textsuperscript{41} The research on both fundamental questions is highly relevant for convincing the countries involved, pertaining to the presence of TOC in the fisheries sector as well as to examine the interplay between TOC and IUU fishing.

From the above-mentioned publication, the study held a view that TOC such as trafficking in persons, migrant smuggling, illegal drugs trafficking and psychotropic substances in all its


\textsuperscript{39} Phelps Bondaroff, Tuesday Reitano and Wietse van der Werf, The Illegal Fishing and Organized Crime Nexus (the Global Initiative against Transnational Organized Crime and the Black Fish, 2015) 31.


\textsuperscript{41} UNODC, Transnational Organized Crime in the Fishing Industry, above n 37.
forms involved most of the fishing-industrial sector. Based on the findings, other related types of criminal activity such as corruption, piracy, poaching of marine living resources and other security related crimes have been considered as having links with the fishing industry. Meanwhile, for the second question, the study disclosed that the fishing industry poses various vulnerabilities related to:

1. Opportunities;
2. Governance and Rule of Law;
3. Sea Surveillance and Transhipment;
4. Lack of Transparency;
5. Jurisdiction of Criminal Law Enforcement;
6. Shortage of Safety Regulation and On-board Fishing Vessels’ Working Conditions;
7. Circumstances of Socio-Economics; and

These vulnerabilities provide a comprehensive and general overview of the potential problems in the fisheries sector. Should the problem occur in the fishing industry concerning TOC, one or more above-mentioned vulnerabilities can be referred to as the main background for a more in-depth analysis.

1.3 The Measures of Indonesia to Cope with IUU Fishing and TOC.

Indonesia encounters the same challenges as the other countries pertaining to IUU fishing practices. According to the accessible data presented by MMAF (Ministry of Marine Affairs and Fisheries) of the Republic of Indonesia, each year Indonesia suffers many losses amounting to approximately Rp. 101 trillion (US$8.8 million) as a result of these activities with the highest losses resulting from tax revenue, fuel subsidy and local fishermen’s income. The illegal fishermen also produce and hold counterfeit licenses to avoid tax payment. These unlawful fishermen fill their boats with fuel supposed to be allocated to traditional fisherman and subsidized by Indonesia Government leading to the loss of state revenue. In practice, they employ destructive fishing gear reducing the local fishermen’s

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42 Ibid 126.
43 Ibid 131-136.
catch as well. The flag states most identified in conducting IUU fishing activities in Indonesia are of various nationalities such as Vietnam, Malaysia, Thailand, the Philippines and China.\(^45\)

Indonesia has shown a prompt response in addressing this fish poaching through the imposition of stringent measures, such as, among other methods, burning and/or sinking illegal fishing vessels and establishing particular-designated tasks forces. From January to April 2014, the Indonesian maritime police seized 16 (sixteen) ships committing illegal fishing in Indonesian waters, eight of them were Vietnam-flagged vessels. The Directorate General of Marine and Fisheries Resources Surveillance of Indonesia’s MMAF confiscated 130 fishing vessels between 2007 and April 2014.\(^46\)

The burning and/or sinking of illegal fishing vessels continued to occur from 2015 onwards. As pointed out by Nilanto Prabowo, former Director General for Product Competitiveness of the MMAF, from 2015 to 2017 the number of fishing vessels found committing illegal fishing and which were sunk was 363. Nevertheless, this robust measure did not prevent the poachers completely breaching related national and international laws and regulations.\(^47\)

Policy and institutional regulators have also been fortified when MMAF established a Task Force to Prevent and Eliminate IUU Fishing through the stipulation of Ministerial Decree Number 26A/KEPMEN-KP/2015.\(^48\) This ministerial decree employs the objective of addressing the problem through more coordinated and integrated efforts amongst departments within the ambit of MMAF.

Another initiative also taken by the Indonesian Government is to form a special task force at national level through a cross-sectoral approach by involving other agencies such as the Navy, National Police, Maritime Security Agency (Badan Keamanan Laut), Attorney General’s Office, PT Pertamina (a State-owned Oil Enterprise) and other relevant institutions through the enactment of Presidential Regulation Number 115/2015 concerning the Task

\(^45\) Ibid.
\(^46\) Ibid.
\(^48\) After the enactment of this ministerial decree, better coordination within the MMAF in addressing IUU fishing problem is established. This document is not made available online as it is considered as an internal classified document.
Force to Combat Illegal Fishing.\(^{49}\) This team has the abbreviated name of Satuan Tugas 115 (Task Force 115). The number 115 is derived from a set of regulations founding this task force within the legal framework. The primary duties of this task force are not only to combat illegal fishing but also to develop fisheries governance through a strategic roadmap,\(^{50}\) and presumably in that sense, this team falls under the coordination of the Minister of Marine Affairs and Fisheries. The involvement of different agencies carries the mission to make the efforts more integrated and coordinated in combating IUU fishing and fisheries crime.

The measures employed by MMAF to foster fisheries resources in Indonesia’s waters finds full support by President Joko Widodo who pays a lot of attention to maritime issues and reinforced Indonesia as a maritime nation by declaring Indonesia as the GMF in the early stage of his presidency in June, 2014\(^{51}\) and invoking the slogan Jalesveva Jayamahe (In Our Seas We Are Triumphant).\(^{52}\) This vision has been translated further through Presidential Regulation 16/2017 concerning Indonesia’s Ocean Policy. President Jokowi also introduced this doctrine at the 9\(^{th}\) East Asia Summit in Myanmar resting on five main pillars.\(^{53}\) The endeavour of MMAF in combatting IUU fishing and fisheries crimes falls under the Second pillar.

The ministry’s sound policy to fight against illegal fishing by sinking or/and blowing up fishing vessel receives ample support from the international community. At the global level, outstanding acknowledgments of Minister Susi’s commitment have been presented by several organizations. In September 2016, the World Wild Fund (WWF) conferred Leaders for a Living Planet Award to Minister Susi. This award shows recognition for remarkable personal


contributions to nature conservation and sustainable development. In 2017, as a sign of maritime contribution, Minister Susi received an Annual Peter Benchley Ocean Award being recognized for 2017 Excellence in National Stewardship. She was recognized by the committee for her encouragement in aggressively protecting the economy and environment of Indonesia from the operations of pirate fishing by foreign fleets through among other things, blowing up illegal fishing boats seized for poaching, freeing labourers working like slaves on those foreign fishing boats and leading to the release of illegally trapped whale sharks.

In 2016, foremost legal structures to safeguard Indonesia’s marine resources and to eliminate IUU fishing have been constructed by the Indonesian Government through the ratification of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) by enacting Presidential Regulation 43/2016. This ratification implies state’s consent to be bound by the Agreement in having effective law enforcement against poachers for fishing vessels when intending to offload the catch in the nearest port through port state jurisdiction. As pointed out by Emma Witbooi, the PSMA is considered as a significant leap to uphold current efforts in combatting IUU fishing. Indonesia’s ratification to PSMA is complemented by its endorsement, along with the Norwegian Government to apply the 2014 FAO Voluntary Guidelines for Flag State as a “soft law” instrument aiming to improve the implementation of Flag State responsibilities. Nevertheless, the realization of the guidelines by both countries remains to be seen in the near future.

1.4 Indonesia’s Persistent Diplomacy in Bilateral and Multilateral Forums.

TOFC or fisheries crimes is a progressively major issue not only in terms of maritime security but also in its relationship to ‘the sustainability of marine living resources’. As part of IUU fishing, to some extent, TOFC can be deemed as a core business of IUU fishing. It can be argued that in achieving their illegal objectives, IUU fishing perpetrators commonly cross borders and poach fisheries resources illegally by using organized networks. Therefore, it is necessary to act hand-in-hand with the other countries and the international community to address this problem. The Indonesian Government has a deep awareness of organized criminal groups conducting IUU fishing by raising this matter in international forums.

The role of diplomacy is prevalent in shaping international norms and garnering the commitment of countries to converse and agree on common concerns. In bilateral and multilateral agendas, determined position has been shown by Indonesia on the issues of IUU fishing and its connection with transnational organized crimes. When negotiating texts in the bilateral meeting with Australia during the 9th Ministerial Forum, both the Minister of Foreign Affairs of Indonesia and the Minister for Foreign Affairs and Trade of Australia agreed to raise this issue and came to the conclusion to combat IUU fishing and acknowledged the connection between illegal fishing and TOC groups. They also committed to implement active efforts in eradicating this practice, among others, from the perspective of UNTOC. The ministers reiterated further their assurance to prevent and fight IUU fishing as referred to in the Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation (Lombok Treaty).

On a multilateral level, the mandate and function of the Commission on Crime Prevention and Criminal Justice (CCPCJ), is amongst other things to combat national and transnational

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crime,\cite{61} and can be deemed to be one of the appropriate formal forums under the UN system to invite attention from the countries to discuss this matter further. Although the resolutions and decisions of this Commission are non-legally binding in character and hold no authority to compel governments to take particular actions they undoubtedly, to a large extent, carry political and moral weights. In the 2013 sessions of CCPCJ and on International Drug Control held in the United Nations, Andi Rachmianto echoed Indonesia's commitment to have a closer collaboration and impose more robust efforts with the international society in fighting ‘arising crimes’ such as cybercrime, illegal transfer of traditional properties, illegal transfer of forest goods and IUU fishing activities.\cite{62}

A similar concern on IUU fishing was again raised in the same forum by Indonesia’s representative. During the 25th session of CCPCJ which took place in Vienna in May 2016, the Minister of Marine Affairs and Fisheries, Susi Pudjiastuti reaffirmed Indonesia’s view that ‘fisheries crimes and other fisheries-related crimes’ are related to IUU fishing. The terminology ‘crime’ is here attributed as depicting delinquency committed in the fisheries activities including organized crimes such as forced labour, human trafficking and weapons smuggling. Based on its investigation, Indonesia found several fishing vessels that engaged in ‘transnational organized criminal groups’ also were involved in those illicit activities. She reiterated further that fisheries crimes and fisheries-related crimes should be treated equal to the other transnational organized crimes. She was of the view that effective measures through international cooperation can be garnered if this approach was employed.\cite{63} In this important forum, when conveying Indonesia’s concerns, Minister Susi emphasized the transnational aspect of IUU fishing in its relationship to criminal organization networks. She was on the right path in making this statement which was observed by the other delegates since Indonesia saw this problem from the domestic point of view.

At the United Nations Ocean Conference held in the UN Headquarters on 5-9 June 2017, the Indonesian delegation, led by Luhut Panjaitan, Coordinating Minister for Maritime Affairs of Indonesia, raised, before the delegates of member countries, the notion of the inclusion of


\cite{63} Susi Pudjiastuti, above n 50.
IUU fishing as an organized crime activity. At this prestigious worldwide conference, Minister Susi also strongly recommended declaring IUU fishing as a crime transnationally organized. Peter Thomson, President of the United Nations General Assembly, rendered support for this proposal and called upon all parties, governments, Non-Governmental Organizations and scientist to take a role in this campaign. Until the end of the conference, the proposal remained undecided by countries. Despite the fact that the President of the General Assembly has verbally lent his support, no General Assembly resolution was adopted to confirm this inclusion as his statement was made in his personal capacity, without representing the UN as an institution.

The responses of countries in perceiving this environmental and security connection are diverse. Although IUU fishing and the other related crimes have a global dimension and countries should bear the responsibilities in cracking down on the problems, it should pass through several processes to make those subjects accepted as international norms. This issue should also conform to some facets such as the global legal system to make countries convinced of their common interest. State representatives examined the early effort to link those IUU fishing and transnational organized crimes including environmental crime in the 9th meeting of the United Nations Open-ended Informal Consultative Process on Ocean and the Law of the Sea (UNICPOLOS) held in 2008. In this forum, some delegates challenged the notion to include IUU fishing as a threat to maritime security, yet the general perception was expressed that illegal fishing threatens the economy, livelihood and marine environment leading to the deterioration of sustainable development.

In the 9th UNICPOLOS meeting, some countries were of the view that illegal fishing should be part of transnational crime but on the other hand, other delegations observed that the connection between illegal fishing and several other crimes conducted at sea was inadequate to designate illegal fishing as TOC. Those opposing delegates maintained that flag states have exclusive jurisdiction when operating on the high seas, including IUU fishing. The flag state

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65 Lee, Teleetsky and Schofield, above n 8.
exclusivity can be waived when maritime security threats take place. Unfortunately, in international law, there is no such recognition of IUU fishing being a maritime security, so that flag state responsibility plays a key role in combatting this activity when committed at sea. Different approach and view were taken by the UN Secretary General concerning IUU fishing and maritime security. In his report on Oceans and the Law of the Sea in 2008, the UN Secretary General classified seven particular threats to maritime security including IUU fishing which has been conceived as a major challenge to peace and security in light of food insecurity. The lack of consensus amongst the delegates in the 9th UNICPOLOS forum to have common ground that there exists the connection between fishing illegally and transnational activity indicates that states have different perceptions and practices in perceiving the proposal.

Three years later following the UNICPOLOS meeting and the UN Secretary General report, the subject received more attention from countries and international organizations when the position of transnational organized crimes in the fishing industry was discussed at the Expert Group Meeting organized by UNODC. This meeting was intended to be a small and focused group of discussion attended by government and international organization representatives, practitioners and/or experts having expertise on the topic. This setting carries more weight in terms of identifying the true challenges in the field and proposing recommendations to overcome the identified problems. The initiative taken by UNODC is timely based on several findings pointing out that it is a common practice for transhipment as a method of transporting or transferring illicit drugs to West Africa.

1.5 Policy and Legal Discussions.

The observance of related policy and legal frameworks is required to further examine the nexus between IUU fishing and transnationally organized crimes. When analysing the interplay between both subjects, the discussion on fisheries activities and TOC is also highlighted. The frameworks should be deepened further by making an analysis from the perspectives of domestic and international domains. Each dimension may influence one another as they are not stand-alone subjects.

Domestically, the adoption of Presidential Regulation Number 115/2015 marks a different approach taken by Indonesia in perceiving and overcoming illegal fishing and TOC. This task force involves other concerned agencies. The measure should be praised as this problem is not merely an issue of one sector of marine and fisheries but rather a cross-sectoral problem that necessitates the engagement of other institutions following the various crimes that take place in the field. In the case of Indonesia, when other crimes such as human trafficking and people smuggling become more involved in the fisheries sector\(^2\) the single-door system is no longer relevant and is less effective in solving this criminal interconnectivity. As opposed to the single-door policy, the concept of multi-door needs to be introduced in this respect. This approach has come about through the formation of Satgas 115. To establish this concept and to prevent avoidable confusion in its execution, more details and further arrangement of the work and further procedure needs formulating and adopting.

When Indonesia attempts to justify and reconcile IUU fishing to be included as TOC, it is worth noting that related international law should be referred to as the principal instrument allowing action in conformity with international legal dimension. The reference also raises the objective of garnering support from the international community. In the realm of transnational crimes, the international convention which should be the main reference is UNTOC. Indonesia became a signatory to this Convention on 15 December 2000\(^2\) and has expressed its consent to be bound by this Organized Crime or Palermo Convention through the stipulation of Law Number 5/2009 concerning the Ratification of United Nations Convention against Transnational Organized Crime.\(^74\)

It can be conceived further that without referring to an international convention such as UNTOC, IUU fishing operations demonstrate transnational character in the field. It can be argued that in carrying out this activity, the overseas fishing vessels would cross the border to

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poach fish in the waters of other countries. The exploitation of foreign fishing vessels from China, Russia and Japan in the territorial waters of Angola demonstrates the real challenge of the transnational issue. Nonetheless, classifying IUU fishing as transnational organized crimes would pose a severe challenge because it comprises three different aspects of illegal, unreported and unregulated. Illegal constitutes a crime, unlike unreported and unregulated. The last two terms would be complicated to be part of crimes in a case where the obligation to report and regulate in place does not exist. Within legal overview, the primary challenge for Indonesia’s proposal derives from the provisions of UNTOC requiring some classifications for any crimes to be TOC. In this Convention, some standards need to be confirmed when crimes are regarded as transnationally organized crimes.

Although IUU fishing becomes a nationwide agenda in Indonesia, only limited current research has been conducted to employ a more effective way to address IUU fishing problems. In 2007, an Indonesian scholar, Dikdik submitted his thesis regarding IUU fishing from the perspective of legal and institutional frameworks. His focus was primarily the examination of Indonesia’s legislation and international law nexus. He identified some inadequacies such as Indonesia’s decision not to join as a full member of RFMOs and the activities of illegal Indonesia-flagged vessels fishing in the high seas under the authority of existing RFMOs. He concluded that domestic legal and institutional structures should be developed further to fight against IUU fishing and should not be inconsistent with international instruments.

While it is true that Dikdik provides a significant contribution to Indonesia to possess a better legal and institution foundation to address IUU fishing, his thesis however no longer follows the current development of the issue and should be updated with existing measures. For instance, his legal reference was still Law Number 31/2004 concerning Fisheries as a basis for his analysis of legal and institution issues. When writing his thesis, this Law was newly adopted by Indonesia. In 2009, however, this Law has been amended by Law Number 45/2009 since there were some significant developments to overcome fisheries issues such as imposing firmer law enforcement on illegal fishing and paying more attention to traditional

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76 Dikdik M. Sodik, Combating Illegal, Unreported and Unregulated Fishing in Indonesian Waters: The Need for Fisheries Legislative Reform (PhD Thesis, the University of Wollongong, 2007) 5.
77 Ibid.
fishers. It is also important to note that Dikdik’s thesis did not touch upon the issue of transnational organized crime in relation to IUU fishing activities. Nonetheless, his overview of domestic and international legal and institution frameworks provides a worthy understanding of the issue and can be utilized as an essential foundation for further research on IUU fishing.

In dealing with IUU fishing and transnational organized crime, there are some relevant laws and regulations enacted within the framework of Indonesia’s legislation. These include Law number 45/2009, as the amendment to Law number 31/2004 concerning Fisheries and Law Number 32/2014 concerning Ocean Affairs which forbids the practices of IUU fishing. Although fisheries crimes are regulated in fisheries law, the connection between IUU fishing activities and transnational organized crime is not provisioned. Meanwhile, Law number 8/2010 concerning Countermeasure and Eradication of Money Laundering links money laundering and crimes in marine and fishery. Criminal acts listed in Article 2 of Law Number 8/2009 are intended to conform with Article 6 paragraph 2(b) of the Palermo Convention. In terms of serious crime, Article 2 of Law number 8/2010 includes any criminals on the list who are imprisoned for 4 years or longer.

Apparently, the term ‘serious crime’ is justified in the domestic legal sense. Nevertheless, it is also important to take a look at the fisheries-related laws. In Law Number 45/2009, as the amendment of Law Number 31/2004 concerning Fisheries, and Law Number 32/2014 concerning Ocean Affairs, IUU fishing is not clearly defined or explained, particularly in Article 1 of said laws. The only reference to IUU fishing can be found in the National Plan of Action on IUU Fishing adopted by Ministerial Decree Number KEP.50/MEN/2012 on the National Plan of Action (NPOA) to Prevent and Combat Illegal, Unreported and Unregulated

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78 Undang-Undang Perikanan Nomor 31 tahun 2004 sebagaimana diubah dengan Undang-Undang Nomor 45 tahun 2009 tentang Perikanan [Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries] (Indonesia) art 71 (1)(2) [author’s trans] (‘Indonesia Fisheries Law’).
80 Transnational Organized Crime Convention art 6 paragraph 2(b). It is stated herein that Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with Articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list, a comprehensive range of offences associated with organized criminal groups.
81 Indonesia Money Laundering Law art 2.
Fishing of 2012-2016. Unfortunately, this NPOA-IUU Fishing Plan no longer exists since it has expired in 2016.

Within the ambit of international legal instruments, as described previously in this Part, there are some international instruments that will be examined to enrich the discussion. Moreover, this thesis identifies some significant “toolkits” to overcome IUU fishing and fisheries crimes in which Indonesia is not state party: the 1993 FAO Compliance Agreement, the 2012 Cape Town Agreement and the ILO Work in Fishing Convention (C188). The Compliance Agreement has the objective to enforce ‘the effectiveness of international fisheries conservation and management measures’ which is specifically to fill a legal gap in fisheries arrangement of re-flagging, the Cape Town Agreement emphasizes the protection of the laborers operating on fishing vessels, and the Work in Fishing Convention sets the minimum standard for fishers to working in fishing vessels such as accommodations, minimum age, medical examination, work agreement, payment, recruitment and placement, medical care and other issues.

Furthermore, the decline of fish stocks and the different modus operandi of fish poaching means countries need to be more advanced than they are in initiating breakthroughs on the legal aspect. Prosecuting the perpetrators of IUU fishing and fisheries crimes requires more robust policy to prevent our marine living resources from total depletion. Learning from the U.S v. Bengis, et al case, exterritorial jurisdiction principle can be applied to the U.S nationals who commit a crime or breach regulations of other country. This principle of jurisdiction needs to be reviewed by the Indonesia Government for possible adoption in its domestic legal system.

86 Convention concerning Work in the Fishing Sector (Work in Fishing Convention, 2007 (No. 188)), adopted on 14 June 2007 (entered into force on 16 November 2017) (‘the Work in Fishing Convention Number 188’).
87 United States v. Bengis, Title 631 F.3d 33, (NY, 2011) (‘Bengis Case’).

Indonesia’s existing legal and policy frameworks are inadequate to combat IUU fishing and TOFC despite some improvements. From the perspective of policy, it is important to prepare and conclude the NPOA on IUU Fishing 2017-2021, apply a multi-door policy and formulate its detailed arrangements, amend the duties of Task Force 115, secure the cooperation to combat IUU fishing and fisheries crimes with the other countries and make practical guidelines as the follow up to Presidential Regulation Number 115/2015.

In virtue of a legal overview, it is suggested that Indonesia amends the existing laws and regulations particularly Fisheries Law No 45/2009 as the amendment of Law No 31/2004, or make a law regarding the prevention, deterrence, and elimination of IUU fishing and provide its consent to be bound by the 1993 FAO Compliance Agreement, the 2012 Cape Town Agreement and the Work in Fishing Convention Number 188. Another proposed measure is to consider enacting a regulation similar to, or incorporating, the elements of the Lacey Act.


The purposes of this thesis are to provide analysis of domestic legal status and policy overview within the context of relevant international legal and policy instruments and practices in combatting IUU fishing and TOFC.

Towards this end, this thesis will address the following objectives:

1) To identify and explore national and international legal and policy frameworks regarding IUU fishing and TOFC;
2) To identify possible legal and policy challenges in the years to come if Indonesia endorses IUU fishing and TOFC;
3) To analyse and to address gaps in the context of mainly domestic legal and policy frameworks and mechanisms of the topics concerned.

This research will involve a comprehensive analysis of the following:

1) The analysis of IUU fishing and fisheries crimes under the Jokowi’s Doctrine of GMF;
2) The extent of Indonesia’s set of legislation and policies pertaining to the prevention, deterrence, and elimination of IUU Fishing and its connection with TOFC;
3) Laws and policies of the United States and South Africa on fisheries relating to IUU Fishing and TOFC compared to those of Indonesia;
4) International legally and non-legally binding frameworks relevant to marine and fisheries resources sustainability and transnational organized crime;
5) The connection between IUU fishing and fisheries crimes that are organized transnationally.
6) The advantages and disadvantages of combating IUU fishing through the method of fisheries crimes;

This thesis primarily focuses on legal and policy analysis of the issues involved and other matters insofar as they are relevant and necessary. This thesis will not discuss the extensive application of other transnational organized crimes except for those pertaining to fisheries.

4. Significance of the Research.
This research is of national and international significance. From a domestic perspective, the results of my research will make a significant contribution to the development of relevant laws and regulations such as Law Number 31/2004, as amended by Number 45/2009 regarding Fisheries and Law Number 8/2010 on Countermeasure and Eradication of Money Laundering. Additionally, it will contribute to other relevant national regulations and policies regarding IUU Fishing and fisheries transnationally organized crime. The topic of this thesis is of utmost importance for ocean affairs’ development, specifically on the issues of IUU fishing and fisheries crimes in Indonesia as these have been listed currently, and in the past, as the main focus of the policy of MMAF.

IUU fishing and fisheries crimes are not merely a domestic problem but also an international responsibility as the perpetrators may come from different countries. In that sense, international collaboration is needed to overcome transnational dimension of the issues. Academics have conducted some research connecting IUU fishing and fisheries transnationally organized crime, and this research will further analyse the relationship between these matters within the domain of legal and domestic policy frameworks of Indonesia. In international sphere, this thesis may contribute to the discussion of fisheries crimes as it offers the examination of advantages and disadvantages of using the method of TOFC in addressing IUU fishing.

5. Research Questions.
This thesis will address the following principal research questions:
1) What is the position of IUU fishing and fisheries crimes under Jokowi’s Doctrine of GMF including the Ocean Policy?
2) What are the legal and policy frameworks of Indonesia in addressing IUU fishing and fisheries crimes?

3) What are the gaps that exist in Indonesia’s legislation and policy regarding IUU fishing and its connection with fisheries’ transnationally organized crime?

4) What are the lessons learned that could be drawn from legal and policy measures of the United States and South Africa concerning the matter?

5) What measures are necessary to combat IUU fishing and fisheries’ transnationally organized crimes within the scope of domestic legal and policy frameworks?

6) What are the advantages and disadvantages of combatting IUU fishing through the method of fisheries crimes?

7) What is the connection between IUU fishing and fisheries crimes that are organized transnationally?

8) Do fisheries crimes constitute a better approach to combatting IUU fishing?

9) What are the recommended measures to be taken to promote fisheries crimes?

6. Conclusion.

It is evident that the world is highly dependent on the ocean. As one part of the ocean’s contribution, fisheries provide food, health, employment and social aspects to the global community. Unfortunately, fisheries resources face severe problems such as the general decline in the level of fish stock based on the reports composed in 2011, 2012 and 2014. The practice of IUU fishing makes the level of fish stocks deteriorate. Another issue that the fisheries sector is facing relates to criminal activities. Academic debates concerning the connection between the fisheries sector and crimes have been shared amongst scholars. Some fishing vessels such as the Songhua, the Kunlun and the Yongding present clear examples of illegal fishing and the involvement of transnationally organized crimes. Qualifying as repeat offenders, they commonly engage in flag hopping, fish laundering, ports and flags of convenience and IUU fishing. Criminal syndicates, such as those from Russia and China, are involved in the practice of IUU fishing. From the research of UNODC, it is evident that TOC in virtually every form is involved in the industrial fishing sector.

In a domestic sense, Indonesia experiences the problem of illegal fishing and transnational organized crimes. Illegal and unreported fishing costs Indonesia some US$ 20 billion per annum. This practice also severely affects small-scale fishers due to the decline in fish stock numbers. The number of fishers is also suffering a decrease because of this activity. In the
field, some cases have proved that the fisheries management problem is not the only problem arising from illegal fishing. One recent example of drug smuggling in the fishing activities was the seizure of ‘FV Sunrise Glory’ by the Indonesian Navy in 2018. This vessel was carrying one tonne of crystal methamphetamine when boarded and inspected.

Under the administration of Jokowi, ocean affairs including illegal fishing and its related crimes are receiving greater attention. The Doctrine of GMF, declared by President Jokowi in the early stages of his presidency to strengthen Indonesia as a maritime nation, paves the way for illegal fishing and TOC to be the primary focus of the MMAF. A prompt response to cope with the problem has been shown by the ministry through, among responses, burning and/or sinking illegal fishing vessels and establishing task forces. The Task Force 115 has the main duties of combatting illegal fishing and fisheries crimes as well as developing fisheries governance through a strategic map. This task force involves other ministries or agencies in achieving its objectives.

Although Indonesia imposes severe measures in addressing IUU fishing, it does not prevent illegal fishers poaching in Indonesian waters. An approach to link illegal fishing and transnational crimes has been introduced and endorsed by Indonesia on many occasions. Along with this effort, Indonesia has also become an active supporter of the concept of fisheries crimes. In international forum, Minister Susi has held the view that fisheries crimes and other fisheries-related crimes relate to IUU fishing. As such, fisheries crimes and other fisheries-related crimes should be treated as equal to the other transnational organized crimes. The response of countries in perceiving this proposal is varied. The divergent views amongst delegates divided them into two schools of thought. One side was of the opinion that illegal fishing should be part of transnational crimes, the other side refused the inclusion of illegal fishing as TOC.

This thesis focuses on domestic legal and policy aspects to overview the nexus between IUU fishing and transnational organized crimes. The problems may come from the inadequacy of those two elements in addressing the loopholes that exist at national level by taking into consideration international legal and policy instruments. In the domestic sense, the examination goes to legal and policy instruments. Domestic legal framework provides various related regulations such as Fisheries Law, Ocean Affairs Law and Money Laundering Law. Moreover, the policies to address IUU fishing and its related crimes are also subjected
to be reviewed in this thesis. In addition, legal instruments such as LOSC, UNFSA, PSMA, UNTOC, the Compliance Agreement, the Cape Town Agreement and ILO Convention on Work in Fishing Number 188 have become highly relevant in approaching this problem.

This thesis holds a view that the existing domestic legal and policy frameworks need to be reviewed and improved. With regard to the policy measures, some recommendations can be taken into consideration such as the conclusion of NPOA on IUU Fishing 2017-2021, the formulation of detail arrangements on a multi-door approach, the amendment and duties of Task Force 115, the cooperation with other countries on IUU fishing and fisheries crimes and the composition of practical guidelines of Presidential Regulation of 115/2015. Further, in terms of the legal aspect, the amendment of Fisheries Law would be a positive step. Within the context of international law, Indonesia needs to provide its consent to be bound by FAO Compliance Agreement of 1993, Cape Town Agreement of 2012, Work in Fishing Convention and consider adopting the elements of the Lacey Act.

Towards this end, this thesis sets three main objectives. In fulfilling the objectives, deeper research on the matters of the GMF, relevant sets of legislation, other states practice such as the U.S and South Africa, the benefits and drawbacks, the interplay between IUU fishing and TOC and the assessment on IUU fishing as TOC from the international relations perspective. This thesis may signify the development of related laws and regulations. In regard to the research questions, nine research questions need to be addressed. Chiefly, the questions reflect the scope of the research with an extended set of questions.
 PART II

THE SEARCH FOR ARCHIPELAGIC STATUS: THE CASE OF INDONESIA

1. Introduction.
As explained in the previous part, Indonesia and the rest of the globe face a severe problem of fish stock and transnational crimes committed in the fisheries sector. The initiatives taken by Minister Susi to combat these intricate issues are in conjunction with Jokowi’s vision of GMF. It highlights the pivotal role of the ocean as the main drive of the nation’s development. Several research questions are established as guidelines to the structure of the thesis. In observing the comprehensive overview of Minister Susi’s policies and Jokowi’s GMF as well as the research questions, the history of Indonesia in the maritime sphere needs to be discussed in this part before going further into a deeper elaboration.

This part provides an overview of the trail of Indonesia when struggling to assert archipelagic status. It will introduce the fundamental pretexts to assume the status by presenting some background such as the geography and strategic locations of Indonesia. Moreover, it is also important to include the maritime spirit that has influenced the history of the country. This section examines the spirit of a sailor nation, the existence of old kingdoms to shape the ‘old Indonesia’ and the key role of the Bajau People in the region during olden days. After taking into consideration the historical maritime glory, this part discusses the conceptual discussion of Indonesia as a maritime nation. The Juanda Declaration that changed the rules stated in TZMKO (Territoriale Zee En Marietieme Kringen Ordonnantie) laid a fundamental argument in promoting Indonesia’s proposal as an archipelagic state. This declaration also enabled Indonesia to be covered under one blanket which was in contrast with the rules stipulated in the TZMKO. This regulation enacted by the colonial regime allowed foreign vessels to exercise the rights of freedom of navigation when passing through the high seas located between the Islands of Indonesia. Undoubtedly, this rule posed a potential threat to domestic defence and security.

This part also examines the international legal case of Anglo-Norwegian Fisheries for the reason that it supports Indonesia in obtaining archipelagic status from the perspective of the international legal framework. History tells us that Indonesia should pass several stages in a painstakingly long process before becoming an archipelagic country. In this sense, this part
presents the challenges faced by Indonesia and like-minded states in UNCLOS I, UNCLOS II and UNCLOS III.

2. Geographical Context.
The geographical location of a country greatly influences its policy makers to determine the course of the country in seizing the opportunities and coping with the challenges so that potential threats can be anticipated and curtailed. Additionally, its advantages can be augmented and presented for the greatest benefit of the people. In assessing the GMF, geographical context would be useful in delivering a background overview of how the top leaders of Indonesia frame Indonesia’s policy based on their perception of the country’s physical reality. The geographical features, such as mountains, oceans, valleys and deserts to name a few, form a complete characteristic of a country. In addition, the geographical location also serves as input for a state to perceive itself in a region.

The strategic central location of Indonesia, between the Indian and Pacific Oceans and between the Asian and Australian Continents, functions as the background in making an assessment on the geopolitical architecture of Indonesia.\(^{88}\) This comprehension also comes from the comparison between the land and marine waters that form the country. From the following map of Indonesia updated in 2017 (Map 1), located between the geographic coordinates of 6.1750°E latitude and 106.8283°E longitude in Asia and geographical alignment of latitude 5° 00’N and longitude of 120° 00’ E,\(^ {89}\) it appears roughly that the land dominates marine waters. Nonetheless, it can be drawn from the data disclosed by *Badan Informasi Geospasial Indonesia* (Indonesia Geospatial Information Agency/BIG) in 2013 that as the biggest archipelagic country in the world, Indonesia covers 1,922,570 square kilometres of land and 3,257,483 square kilometres of marine waters.\(^ {90}\) This means that with a total area of 5,250,053 square kilometres, the majority (62.05%) of Indonesia’s area is covered by marine waters.

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\(^{88}\) Laksmana, ‘the Enduring Strategic Trinity’, above n 19, 96.


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Map 1: The Map of Indonesia as updated by the Indonesian Government on 14 July 201791

In some literatures, the total area of Indonesia seemingly presents a different number. For instance, the data published by the Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesia Fishing Industry\textsuperscript{92} is not the same as the report issued by BIG. This may occur as the extent of the total area of a country is dynamic due to natural phenomena such as climate change and erosion or agreement with other countries on maritime boundary delimitation.

The total area of Indonesia demonstrates a broader cover after the Coordinating Ministry of Maritime Affairs of Indonesia released an updated Indonesian map on 14 July 2017. As Arif Havas Oegroseno states, there are some concerns that lead the government to take this policy. First of all, Indonesia has concluded two agreements on the maritime boundary delimitations with Singapore in both the western and eastern sides and the Philippines in the Exclusive Economic Zone (EEZ). Both agreements have been ratified by the parties concerned. Secondly, this measure follows the arbitration award of the South China Sea case adjudicating that small rocks in the middle of the sea, that are unable to sustain human life, cannot legally secure sovereign rights of 200 m nor the continental shelf. As such, it affirms that small islands of the neighbouring countries can only extend 12 m from baseline. Thirdly, the water column north of Natuna needs updating for the reason that the continental shelf around the area has been named as North Natuna Block, South Natuna Block, East Natuna Block and Southeast Natuna Block since the 1970s. Fourthly, Indonesia reconfirmed its claim in the Malacca Strait by simplifying the border line making law enforcement more seamless.\textsuperscript{93}

The conclusion of bilateral agreements on maritime boundaries between Indonesia and Singapore, as well as Indonesia and the Philippines, also leads to the total area of marine waters being larger than as announced by BIG in 2013. In 2017, the Governor of Aceh, Irwandi Yusuf revealed that Indonesia had potential to extend its territories after an island was discovered to the west of Sabang (tip of Sumatra Island). Locals are familiar with the

\textsuperscript{92} MMAF, International Organization for Migration and Coventry University, above n 11.

\textsuperscript{93} Cabinet Secretary of Indonesia, \textit{Tegaskan Batas Wilayah NKRI, Pemerintah Terbitkan Peta Mutakhir (Confirming Indonesia Border, the Government Issues a New Map)} <http://setkab.go.id/tegaskan-batas-wilayah-nkri-pemerintah-terbitkan-peta-mutakhir/>.
island and call it Karang Melati.\textsuperscript{94} It falls under the duty of BIG to keep the map updated regularly and precisely calculate the total area of Indonesia.

The policy to revise the map sparked controversy from China. Spokesperson of the Ministry of Foreign Affairs of China argued that the naming of North Natuna Sea “makes no sense at all and is not conducive to the effort of the international standards of the name of places”.\textsuperscript{95} The response from China was not surprising, since the updated map brings a direct message of China’s claim of its nine-dash line in the most part of the South China Sea. The Deputy of Maritime Sovereignty of the Coordinating Ministry of Maritime Affairs, Arif Havas was of the view that the naming of North Natuna Sea was in accordance with common practice.\textsuperscript{96} So, it is a matter of consistency with the name that has applied for decades. Legally speaking, China does not have the right to refuse Indonesia’s naming. It comes from an arbitration ruling that China’s claim in the South China Sea is baseless for the reason that a rock cannot be used to draw a boundary of 200 m from its baseline. As such, Indonesia has the right to name the waters above Natuna Island (as is seen from the map), the North Natuna Sea.

It can be observed further from the map that Indonesia comprises 5 (five) main islands; Kalimantan, Papua, Sumatera, Sulawesi and Java with a total population of 237,642,326 based on data published by Badan Pusat Statistik (BPS/Central Bureau of Statistics) in 2010.\textsuperscript{97} Despite the fact that the largest single island, not shared with any other country, is Sumatera with 425,000 square kilometres\textsuperscript{98} covering 25.2 per cent of the overall territory of Indonesia, this island is only occupied by 21.3 per cent of the total population. In contrast, the most populated island belongs to the smallest island of the five, Java. The inhabitants of the island occupy 57.5 per cent of the total population although it only covers 6.8 per cent of the total area.\textsuperscript{99} This reliable data illustrates that the population of Indonesia is unevenly


\textsuperscript{99} Badan Pusat Statistik (Central Bureau of Statistics of Indonesia), above n 96.
distributed and most of Indonesia’s people are mainly concentrated on the island of Java. During Suharto’s administration, known as Orde Baru (New Order), attempts to overcome the population distribution were made by migrating people from Java to other islands such as Kalimantan, Sulawesi or Sumatera through the Transmigrasi (Transmigration) program. They were provided with land and a house for living. However, once the reformation era commenced post the collapse of the Suharto regime, this program no longer served as a priority for the government.


3.1 Indonesia as Bangsa Pelaut (a Sailor Nation).

Presenting the history of Indonesia in the maritime domain builds a deep and analytical background which enriches the current discussion on Jokowi’s doctrine of GMF. When revoking the old slogan Jalesveva Jayamahe (In Our Seas We Are Triumphant) in his inaugural speech as Indonesia’s President, Jokowi was attempting to make his people rekindle Indonesia’s ancestry when sailing and conquering ocean waves in pursuit of victory. The spirit of Indonesia as bangsa pelaut (a sailor nation) was embedded in the history of Indonesia long before Jokowi took the post as head of state and declared it a maritime nation. For children living during the 80s and 90s, the lyrics of the folk song Nenek Moyangku Seorang Pelaut (My Ancestors are Sailors) became famous and awakened the nationalism and pride of our ancestors. The complete lyrics are as follows:

Nenek Moyangku Orang Pelaut (My Ancestors are Sailors)
Gemar Mengarung Luas Samudra (Love to Cruise the Ocean)
Menerjang Ombak Tiada Takut (Navigating the Waves without Fear)
Menempuh Badai Sudah Biasa (Accustomed to Confronting the Thunderstorm)
Angin Bertiup, Layar Terkembang (Wind Blows, Sail Spreads)
Ombak Berdebur di Tepi Pantai (Waves Roar at the Beach)
Pemuda Berani, Bangkit Sekarang (Valiant Youngsters, Emerge Now)
Ke Laut Kita, Beramai-Ramai (To the Oceans, We Go Together).

The song illustrates Indonesia’s maritime culture, rooted in the past. In the prehistoric caves of the Islands of Muna, Seram and Arguni, pictures of traditional sailing boats were found as evidence that Indonesia’s ancestors were sailors. Rudi Wahyono, the Director of Energy, Environment and Maritime Centre, highlights that the discovery of prehistoric sites on

100 Riwoanto Tirtosudarmo, Transmigration and Its Centre-Regional Context: the Case of Riau and South Kalimantan Provinces, Indonesia (PhD Thesis, the Australian National University, 1990) 245.
several islands and the history of kingdoms on some islands suggests the supremacy of Indonesia in the maritime sphere.\(^3\)

3.2 The Influence of Old Kingdoms in Shaping Nusantara.
Before further analysing the historical context of Indonesia maritime past, it is worth giving a brief account of the term Nusantara. Although this term is widely used in different countries including Indonesia, Malaysia and Singapore,\(^4\) it does not come with an agreed universal definition. From an etymological approach, Nusantara derives from two Sanskrit words, Nusa and Antara. The former means ‘island’ while the latter implies ‘in between’ or ‘including’.\(^5\) The combination of those two terms presents divergent interpretations among scholars. The translation can refer to ‘between the islands of nations’ or ‘the islands lying in between’,\(^6\) but Hans-Dieter Evers opted to draw the meaning as ‘other islands’ taken from an old Javanese-English dictionary.\(^7\)

This concept takes a more domestic-oriented sense in Kamus Besar Bahasa Indonesia (Indonesia Formal Dictionary/KBBI) which is defined as ‘a reference to the whole territory of Indonesia.’\(^8\) Considering the geography of old kingdoms, where the concept of Nusantara was initially introduced, the interpretation can be extended to ‘islands and maritime areas around them’ as it has a close meaning to Nusa and Antara. Translation adopted in KBBI would limit the scope of Nusantara while in fact old literature, such as Nāgarakṛtāgama and Pararotan, suggests broader land and maritime areas. As a non-Indonesian academic, Anwar enriched the scholarship discussion by extending Nusantara to:

...unified geographical region of indigenous communities that covers the entire part of Southeast region of Asia. In fact, its geopolitical coverage is almost identical to Southeast Asia. Even though in the 13th and 14th centuries (during the time of the Kertanegara and Majapahit kingdoms) it centered on Java, in our contemporary times, the term ‘Nusantara’ has become shared among the indigenous communities in the region.\(^9\)

\(^3\) Fitrizam Zamzami, ‘Indonesia Terlahir sebagai Negara Maritim (Indonesia was Born as Maritime Nation)’, Republika (online), 9 December 2014 <http://www.republika.co.id/berita/koran/teraju/14/12/09/ngawom-indonesia-terlahir-sebagai-negara-maritim >.


\(^5\) Ibid 4.


\(^7\) Zoetmulder and Robson, above n 104, 4.

\(^8\) Dictionary of Indonesia Language (Kamus Besar Bahasa Indonesia), Arti Kata Nusantara (the Meaning of Nusantara) <https://kbbi.web.id/nusantara >.

\(^9\) Anwar OdM., above n 106.
From Anwar’s perspective, *Nusantara* was enlightened by two kingdoms which originated from the island of Java (Indonesia), Kertanegara and Majapahit. However, this concept experiences a wider scope of the meaning by covering the Southeast Asian region following the expansion of the kingdom’s territory.

The awareness of Majapahit’s reign should be appreciated when initiating a literature tradition through historical transcripts. *Nāgarakrĕtāgama* is a poem created in the 14th century during the Majapahit Reign and *Pararotan* is a chronicle written in the 14th century in the Majapahit Kingdom.110 According to the Memory of the World Register submitted by Indonesia to the United Nations Educational, Scientific and Cultural Organization (UNESCO), *Nāgarakrĕtāgama* (1350-1389 AD) also known as *Desyawarnana* conveys the testimony of a king who ruled the kingdom in the 14th century in Indonesia. This literature suggests that Majapahit highly respected the modern notions of freedom of religion, social justice, safety of individual and with the well-being of people to be held in high regard. As part of world heritage, it also affirms the principles of democracy and transparency practiced in the period when the kingship was held as the main political and government system. This valuable literature records that the wide territory of Majapahit expanded to Sumatera, the Malay Peninsula, Kalimantan and eastern Indonesia.111 It has been further confirmed in the *Nusantara*, from the translation of the original Sanskrit language at *Pupuh* (Chapter) XII-XIII that:

> The detail of each island of the states subordinated under *Nusantara* are, firstly Melayu: Jambi, Palembang, Toba and Darmasraya, Kandis, Kahwas, Minangkabau, Siak, Rokan, Kampar dan Pane Kampe, Haru serta Mandailing, Tamihang, negara Perlak dan Padang…Dwipatara.112

As conceived by Slamet Mulyana, *Dwipatara*, or archipelago partners, refers to nations that are adjacent to Majapahit territory.113 *Pupuh* XIII(1) further clarifies that the *Dwipatara* include Siam (Thailand) together with Ayudyapura, Darmanagari, Marutma, Rajapura, Singanagari, Campa, Cambodia and Yawana. Majapahit commenced to campaign on overseas expansion around in 1347. It is commonly known that the role of Gajah Mada as

110 Ibid.
prime minister, in order to assume a pivotal role in taking charge of this operation, vowed to abstain from *Palapa*, which can be interpreted as fruit, religious ritual or even sexual intercourse, until he had conquered *Nusantara* under Majapahit’s rule.\(^{114}\)

Furthermore, some subjects and information depicted in *Nāgarakrĕtāgama* were also illustrated in *Pararaton* and the character was almost identical. *Pararaton* describes *Nusantara* as follows:

> He, Gajah Mada Patih Amangkubhumi does not want to enjoy a palapa (breaking the fast). He, Gajah Mada said, if you have beaten Nusantara, I (will) give up the fast. If you have beaten Gurun, Seram, Tanjungpura, Haru, Pahang, Dompo, Bali, Sunda, Palembang, Tumasik, so I (will) enjoy a palapa (breaking fast).\(^{116}\)

It can be seen that *Pararaton* delivers the narrative about *Nusantara*. The central figure depicted in *Pararaton*, Gajah Mada Patih Amangkubhumi, is said to be the same person in *Nāgarakrĕtāgama*. However, when it comes to describing *Nusantara*, *Nāgarakrĕtāgama* clarifies more detail than *Pararaton*. While *Nāgarakrĕtāgama* presents areas that are similar to Southeast Asia, *Pararaton* extends Nusantara to a group of states within the region.

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\(^{116}\) Raden Mas Mangkudemja and Harjana Hadipranata, *Serat Pararaton: Ken Arok I* (Departemen Pendidikan dan Kebudayaan Indonesia, 1979) 111.
including Tumasik, Palembang, Sunda, Bali, Dompo, Pahang, Haru, Tanjungpura, Seram and Guru.¹¹⁷

During the period of old kingdoms such as Srivijaya, Majapahit and Demak, Indonesia received high respect in Asia from neighbouring countries. Srivijaya based its political vision on the shipping lanes and seaborne trade by conquering strategic locations and then establishing maritime power bases. In the 13th century, Srivijaya, under the rule of King Kertanegara, deployed a maritime expedition to the Kingdoms of Malay and Champa to connect the friendship and to restrain the expansion of the Mongol Empire to Southeast Asia. As Wolters pointed out, Srivijaya Kingdom played a prominent role in bridging sea trade lanes between east and west when dominating this strategic maritime spot.¹¹⁸

The history of the Kingdom of Demak supplemented and enriched the maritime identity of Indonesia. As the greatest Islamic Kingdom of Java in the 16th century, Demak played a major role as a centre of development in political, religious and economic terms. Based on research by Keat Gin Ooi, religious drive and economic affairs made Demak expand its territory and became a respected Islamic kingdom not only in Java but also within the entire Southeast Asia region. Rulers of Demak frequently launched attacks on Melaka in attempts to defeat the Portuguese. When Adipati Unus (Duke Unus) took charge, he launched a naval assault on Melaka in 1513 with the assistance of a kingdom in Palembang. Unfortunately, the Portuguese defeated the armada and killed Adipati Unus.¹¹⁹

3.3 The Role of Bajau People in the Maritime Journey of Indonesia

It is also evident that Orang Bajau (Bajau People) performed a prominent role in shaping the identity of Indonesia’s vision as a maritime nation. Their practice as Suku Laut (Ocean Tribe) has contributed various aspects, such as maritime culture and seaborne trade, to the forming of Indonesia as a maritime nation. When depicting Indonesia’s historical outlook, only a few select articles can be discovered concerning maritime culture or other ocean affairs which have been attributed to Suku Bajo in shaping Indonesia’s identity. To the best of the writer’s knowledge, when making any assessment on Indonesia as a maritime nation research into the

¹¹⁷ Anwar OdM., above n 106, 4.
Bajau people receives less attention than research into the maritime power during Majapahit and Srivijaya reigns. One recent publication in 2017 that comprehensively assesses how the concept of archipelagic state came into effect\textsuperscript{120} and the journey of Indonesia as an archipelagic state does not even touch upon the history of \textit{Orang Bajau}. Presenting Bajau People as background in the book would bring about more seriousness to the appreciation that Indonesia has a long and deeply-rooted tradition in the maritime culture.

Adrian Lepian delivers a good understanding of the Bajau people regarding their maritime crusade across the region. He praises Bajau people living throughout Southeast Asia as the most traditional maritime peoples of all the others\textsuperscript{121} such as the Madurese, Balinese, Malay and Buginese.\textsuperscript{122} Bajau People have various names including \textit{Bajo}, \textit{Bajjo}, \textit{Bajjau} or \textit{Orang Sama}. The latest refers to their own preference by which they call themselves. In a book chapter titled ‘Legal and Illegal Indonesian Fishing in Australian Waters’, James Fox points out the first time an officer of the Dutch East Indian Company witnessed Bajau People with some 40 small boats gathered Trepang on the south coast of Rote Island was in 1728.\textsuperscript{123} The record shows that they had an advanced economic system as they traded their catch such as pearls and \textit{teripang} with other parts of the region.\textsuperscript{124}

The dispersion and settlement of Orang Bajau cover a wide area ranging from the southern Philippines region, eastern Sabah, Sulu, Macassar, eastern Kalimantan, Sulawesi, Maluku, East Timor and Nusa Tenggara. From the following Map 3, it can be elicited that they are concentrated and live in the whole island of Sulawesi, unlike some other islands such as Kalimantan or Borneo Malaysia. Therefore, they influence the maritime culture of Sulawesi Island society through their skill in navigating the ocean. Bajo people contributed to the establishment of Macassar (State of Gowa) as a political and economic powerhouse in eastern Indonesia during the 16\textsuperscript{th} and the beginning of the 17\textsuperscript{th} centuries. Gowa then became the influential kingdom of Bugis people, the Bone. The Bajo people engaged in many tasks such


\textsuperscript{121} Adrian B. Lapian, ‘Peta Pelayaran Nusantara dari Masa ke Masa (Nusantara Sail Route from Time to Time)’ (1996) \textit{2 Journal Buletin Al-Turás} 40.

\textsuperscript{122} Arsip Nasional Republik Indonesia (National Archives of the Republic of Indonesia), \textit{The Malay and Indonesia World} \textless{}https://sejarah-nusantara.anri.go.id/hartakarun/category/5\textgreater{}.

\textsuperscript{123} James J. Fox, ‘Legal and Illegal Indonesian Fishing in Australian Waters’ in Robert Cribb and Michele Ford (eds), \textit{Indonesia Beyond the Waters’ Edge: Managing an Archipelagic State} (ISEAS Publishing: 2009) 195, 195.

\textsuperscript{124} Lapian, above n 121.
as explorers, messengers and in naval exploits. They linked different trade partners and bridged economic relations in sea trade with the other countries.\textsuperscript{125}

\textsuperscript{125} Anthony Reid, `The Rise of Makassar` (1983) \textit{Review of Indonesian and Malaysian Affairs} 124-129.
Map 3: Area of Sama-Bajau People in Some Parts of Indonesia, Malaysia, the Philippines and Timor Leste\textsuperscript{126}

The findings of Natasha Stacey about the dispersion of the Bajau People, as illustrated in Map 4, can be true since most of them originated from, and occupied, those areas. In Chapter 2 of her thesis concerning the history of Bajo settlement, she presents the origin and dispersion of the Sama-Bajau. It can be learned further that there exist three different ethno-linguistic groups of Bajau People: the Moken, the Orang Laut and the Sama-Bajau. It is interesting to assume that each group has distinct geography, language and culture and has adapted to the ecosystems and the environment of both the maritime and islands of Southeast Asia.\textsuperscript{127}

However, alternative evidence suggests that the Bajau People roamed over other parts of the region, not only the area depicted in Map 4. Further information from the following map illustrates the dispersion of the sea nomads (Bajau People) throughout Southeast Asia. Unfortunately, the original source lacks information about the period in time that the journey took place. It can be seen from the map that sea nomads headed to the north, south and west part of Sulawesi. They continued to traverse the waters of not only Sulawesi and its vicinity but also to the Malaysian Peninsula, Singapore and the western part of Borneo.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{dispersion_of_sea_nomads.png}
\caption{Map 4: The Dispersion of Sea Nomads Across the Region\textsuperscript{128}}
\end{figure}

\textsuperscript{127} Ibid.
\textsuperscript{128} Lapian, above n 121.
Mohammed Nassir Ismail, a Singaporean university lecturer, testifies that he is a descendant of Orang Selat (People of Straits), one of the clans of Orang Laut (Bajau people) known in Singapore’s history. His ancestor is believed to have come to the waters of Singapore in the 16th century. By the 19th century, roughly more than 1000 Orang Laut resided in Singapore. Nassir recites the spirit of the gotong-royong upheld by the villagers of Kampung Kucai where he lived until he was 18 years old. This spirit means ‘if someone faces a problem, all the villagers will be ready to render assistance.’ Within the Indonesia community, this spirit has been acknowledged for centuries as a cultural identity. The spirit still exists today as a means of making strong ties amongst the people living in the villages. Nonetheless, this principle is not popular in the city because individualism comes to the fore. In comparison, gotong-royong, predominantly becomes the principle of city dwellers. Their continued dispersion throughout the region bears testament to the movement of indigenous people along the maritime route. The boat journey taken from their original residence to different countries in Southeast Asia along with traditional navigation proves that they were tough sailors.

It can be observed from the above discussions that the concept of Nusantara receives wide acknowledgment in the region. It is important to maintain that the maritime identity of Indonesia has been deeply rooted for centuries, pioneered by the existence of old kingdoms such as Majapahit and Srivijaya. The discovery of Nāgarakšitiśāgama sheds some light on the concept of Nusantara and the political system of Majapahit, including its international relations with adjacent kingdoms. Majapahit built fleets to regularly visit many parts of Nusantara to acquire formal submissions or to receive tributes. Further, it is also evident that Bajau People contribute to the shaping of a maritime culture and identity for Indonesia as Bangsa Pelaut through their courage to navigate the waves across the ocean far away from the place where they came from.

4. The Conceptual Design of Indonesia as an Archipelagic State.

After examining the historical setting of the maritime sphere of Indonesia, the following section seeks to uncover the conceptual discussion of Indonesia as an archipelagic state. This becomes imperative in order to deliver a deeper understanding and larger picture about the circumstance of the vision for Indonesia as a GMF. This section focuses on the concept of the

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130 Cribb, above n 114.
archipelagic state and how the delegations from Indonesia struggled to get its status as archipelagic country. Having said that, this section also elaborates on some historical events such as the Juanda Declaration.

4.1 Juanda Declaration.

*Deklarasi Juanda* (the Juanda Declaration) possibly constitutes the foremost concept in promoting the ambitious doctrine of GMF. It can be understood that this declaration does not only lay down a foundation for Indonesia as an archipelagic state, but, as Nugroho Wisnumurti points out, it also carries a very significant breakthrough in promoting the domestic interests of Indonesia within the scopes of law, politics, economy, culture as well as the protection of the unity and integrity of Indonesia.¹³¹


The history of Indonesia’s maritime integrity commenced when the cabinet Prime Minister Djuanda Kartawidjaja¹³³ made a declaration on 13 December 1957. It revealed that:


¹³² Tri Patmasari, Sobar Sutisna and Chaerul Hafidin, ‘The Indonesian Archipelagic Baselines: Technical and Legal Issues and the Changing of Environment’ (Presentation by BIG (Badan Informasi Geospasial), Monaco, 2008) [https://www.icho.int/mtg_docs/com wg/ABLOS/ABLOS_Conf5/Presentations/Session6-Presentation2-Patmasari.pdf].
…all waters, surrounding, between and connecting the islands constituting the Indonesian state, regardless of their extension or breadth, are integral parts of the territory of the Indonesian state and therefore, parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian state. Innocent passage of foreign ships in these internal waters is granted as long as it is not prejudicial to or violates the sovereignty and security of Indonesia. The delimitation of the territorial sea (the breadth of which is 12-miles) is measures from baselines connecting the outermost points of the islands of Indonesia.\textsuperscript{134}

This declaration was made by the Indonesian Government after the country proclaimed and gained independence in 1945. It was a response to the divided areas of the country as inherited by the Netherlands Indies politically and legally when they adopted the 1939 Ordinance on Territorial Sea and Maritime Districts (\textit{Territoriale Zee En Marietieme Kringen Ordonnantie/TZMKO}) (\textit{Staatsblad} 1939 No.442).\textsuperscript{135} The Juanda Declaration extended territorial sea from 3 to 12 nautical miles and highlighted that ‘for the purpose of territorial unity, and in order to protect the resources of Indonesia, all islands and the seas in between must be regarded as one total unit.’\textsuperscript{136}

With the separate areas inherited by the colonial regime, it was challenging to protect marine resources from violation and to enforce the law if crime was committed on the different islands divided by the ‘kantung’ (pocket) of the high seas. As seen in Map 6, the pockets existed prior to the Juanda Declaration as Indonesia was not just under one blanket. This condition also created vulnerability in national security when foreign fishing vessels sailed in between Indonesian islands without strict regulations.

The Juanda Declaration was subsequently legalized by Law No. 4/prp 1960 concerning Indonesian Waters. This law permits foreign fishing vessels to exercise innocent passage

\textsuperscript{133} Djuanda or Juanda is the same person and the name is used interchangeably. The former is the old spelling rule in the Indonesia language while the latter follows a new rule.


through internal waters. Article 4(2) regulates that this Law supersedes Article 1(1) (1)-(4) of the 1939 TZMKO since it does not serve the interests and rights of Indonesia to protect its safety and security.


It may be of value to briefly examine this ordinance as a background to discussing the development of the concept of the archipelagic state in Indonesia. In the Ordonnantie, there exist some important arrangements as follows:

1. De Nederlandsch-Indische Territoriale Zee (Netherland Indies Territorial Sea). This territorial sea comprises two major regulations.
   (I) Marine waters area that extends to 3 nautical miles measured from the low water mark of the islands, or part of islands, under the territory of the Netherland Indies except otherwise stated by other provisions.

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137 Undang-Undang Nomor 4/prp Tahun 1960 tentang Perairan Indonesia [Law No. 4/prp 1960 concerning Indonesia Waters] (Indonesia) Article 3 [author’s trans].
138 Ibid.
(II) The sea area located to seaward of the area as defined in Paragraph I but lying within the anchorage limits depending on each specification.

2. *Het Nederlandsch-Indische Zeegebied* (Territorial Waters). This area covers territorial sea of the Netherlands Indies including coastal waters and the water areas of bays, straits and mouths of rivers and canals which are directed to landward of the territorial sea.

3. *De Nederlandsch-Indische Wateren* (Netherlands Indies Waters). This covers all waters located to landward of territorial sea of the Netherlands Indies and, in addition, to those parts of all rivers, canals, lakes and pools in the Netherlands Indies.

4. *De Nederlandsch-Indische Marietieme Districten* (Maritime Districts). The scope of this area includes the territorial sea of the Netherlands Indies and its internal waters.

Article 1 of the *Ordonnantie* also regulated further detail of other legal matters of the sea such as bays, islands, straits and fishing rights. In the case of a bay, it depends on the width of the bay. If it is not more than ten nautical miles wide, the measurement of territorial waters is drawn from a straight line across the opening of the bay. If the opening is more than ten miles, then the same straight line shall be drawn as close as possible to the entrance at the first point where it is not more than ten nautical miles. With regard to islands of a group of two or more islands, the maximum 3-mile rule from a straight line applies ‘connecting the outermost points of the low water marks of the islands on the outer edge of the group, at the point where distance between these points is not more than six miles.’

For straits connecting two high seas, if it is not more than six nautical miles and the Netherlands is not the only coastal state, a middle line between the territorial waters of the states should be drawn. Meanwhile, fishing rights will be granted only to indigenous people in the maritime districts and the holder of a licence to be approved by naval commander. It is worthwhile to also highlight that the TZMKO introduced the right of visit and the right of hot pursuit.

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144 Ibid articles 3 and 4, para 1.
145 Ibid articles 15, 16 and 17.
The questions regarding the measurement of 3 nautical miles applied by the Netherlands Indies may arise in this regard. There exist some reasons following behind the policy of 3 nautical miles:

1) The motherland needed Indonesia to be divided. As Denny Indrayana puts it, the Netherland Indies employed the tactic of divide et impera (divide and conquer) as an attempt to fragment Indonesia. This strategy would make Indonesia easier to conquer and rule than the amalgamated land and waters as one national structure. If Indonesia was united, it would threaten the supremacy of colonial rule over the whole occupied territory of Indonesia.

2) At the time of application of law of the sea, the Netherlands Indies applied the same rule as its Dutch motherland, to Indonesia as the colony.

As confirmed by J.J.G Syatauw, prior to World War II, Indonesia applied the same laws and regulations of the Dutch as laid down in the TZMKO. This Ordonnante represented principles of the law of the sea ratified by the Netherlands and adopted definitions of some provisions generally contained in the law of the sea. It is obvious that J.J.G Syatauw’s reference to the law of the sea was not directed to the 1982 Law of the Sea Convention because his book was published in 1961. Furthermore, the breadth of territorial sea was not agreed to by the state parties to the convention until it was provisioned in the 1982 Law of the Sea Convention.

The UN convened the first Conference on the Law of the Sea in Geneva on 24 February 1958 – 27 April 1958 and successfully adopted four conventions including the Geneva Convention on the Territorial Sea and the Contiguous Zone and one optional protocol on the settlement of dispute. Although this first conference was praised for concluding four conventions, the issue on the breadth of territorial waters remained unresolved. Provisions concerning territorial sea encompass Articles 1-13, but no specific article defines the actual extent of territorial sea. This Convention referred to territorial sea as ‘the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea’. Therefore, it depends on the

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147 Syatauw, above n 142, 170.
150 Ibid art 1(1).
state parties of this Territorial Sea Convention to extend its territorial waters breadth from the baseline. The Dutch rule to apply the 3-nautical mile limit as territorial waters can be derived from the popular notion of the so-called ‘cannon-shot rule’. In brief, the territorial sea width was calculated from the coast seaward up to a distance where a shot from a cannon could reach. This 3-nm range became customary international law as the width of territorial sea until the new regime of 12-nm was adopted in the LOSC.151

3) The third reason is that colonials had less sense of belonging to tanah air (motherland). The proclamation of independence by Soekarno-Hatta on 17 August 1945 marked a new page in Indonesia’s history. As a newly independent state at the time, Indonesia brought a strong and visionary perspective on national unity and integrity. Nationalism and territorial sovereignty came to the fore after having been colonized by the Dutch for hundreds of years.152 Facing the reality of the rule of 3-nm from baseline as territorial waters, with divided islands as the heritage of the Netherlands Indies, Indonesia had interest to protect and prevent the entire region from the possible intrusion of foreign countries when sailing through the high seas in between the islands.

It was a different story for the Netherlands Indies. As a former colony to Indonesia, it has a lower sense of belonging and pride to tanah air (homeland) of Indonesia. The formation of Vereenighde Oost-Indische Compagnie (East India Company/VOC) in 1602153 can be seen as the colonial’s measure to conquer Indonesia with an economic-motivated agenda. In history, this company, as their initial motive, intended to be a competitor of the Portuguese in establishing a direct line for exotic spices to Europe. This company made the Dutch more progressive and the colonialization became more commercial through direct contact with the locals and indigenous people. The exploitation was not limited to spices, but also to other inhuman practices such as slavery which was a common trade.154

In that sense, instead of having responsibility to develop and protect Indonesia, the main

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152 BBC, ‘Indonesia Profile-Timeline’, BBC News (online), 9 January 2018 <http://www.bbc.com/news/world-asia-pacific-15114517>. The timeline for the Netherlands Indies colonialization presents many versions. BBC is of the view that Dutch colonists bring the whole of Indonesia under one government as the Dutch East Indies from 1670-1900. Indonesia declared its independence in 1945. Within the range, colonialization occurred for 275 years.


objective of the Netherland Indies was rather to exploit its natural resources to their own economic advantage.

4.2 The Concept of Archipelagic State and Territoriale Zee En Marietieme Kringen Ordonnantie/TZMKO.

It is appropriate to commence the discussion in this section by referring to Article 25A of Undang-Undang Republik Indonesia 1945 (Constitution of the Republic of Indonesia of 1945) which reads: ‘the Unitary State of the Republic of Indonesia is an archipelagic state with Nusantara trait, the boundaries and rights of whose territory shall be established by law.’ The legal position of constitution as the supreme law within the hierarchical system of Indonesia’s laws and regulations gives a strong message that Indonesia is committed to positioning the maritime domain as its main priority. It can be conceived that Article 25A delivers three major concepts: being unitary state, archipelagic state and Nusantara. By assigning those three concepts in one provision, it demonstrates that there is one integral system that forms Indonesia. Those concepts cannot be separated since each influences the others. Within the adoption of those elements lies the essential foundation that is based on geographical features, Indonesia’s marine waters dominate its land. The affirmation that Indonesia is an archipelagic state has been established also in the Article 2, Law Number 6/1996 on Indonesia Waters. It can be conceived that Article 25A of 1945 Constitution strengthens archipelagic state of Indonesia as stated in the Law Number 6/1996 and upgrades into a higher level of “law” into “constitution”.

The admittance of the archipelagic state and Nusantara as essential elements should be more than sufficient to declare Indonesia as a maritime nation. Nonetheless, it was not until Jokowi’s presidency in 2014, that the maritime domain received more attention than under the previous administrations. Considering the painstaking and long process that has been experienced by the Indonesian delegates when proposing the archipelagic concept as the accepted principle in LOSC, the principle should become a main reference as a vision that

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155 Undang-Undang Dasar tahun 1945 [The 1945 Constitution of the Republic of Indonesia] (Indonesia) Article 25A [author’s trans]. This Constitution has been amended 4 (four) times since its enactment upon the Declaration of Independence in 1945. The fourth amendment gave rise to the adoption of Article 25A. Before becoming Article 25A, it was Article 25E adopted at the second amendment.

156 Indonesia Laws and Regulations Making Law art 7(1).

determined the course of the nation in the future long before the inauguration of Jokowi as the seventh president. Nevertheless, the previous regimes also paid attention to maritime affairs. One instance was the adoption of *Hari Nusantara* (Nusantara Day) on 13 December by President Megawati to rekindle the Juanda Declaration.\(^{158}\)

### 4.2.1. Anglo-Norwegian Fisheries Case and the Archipelagic Doctrine.

As an influential concept for the development of Indonesia, the archipelagic state has a long history, in fact before the LOSC came into effect in 1982. Historical writings show that territorial waters and archipelagos proved to have a strong connection. The year 1888 saw the initial development of the link between the two when Aubert, a Norwegian jurist, brought this the question of the territorial waters of archipelagos to the attention of the *Institut de Droit International* (the Institute of International Law).\(^{159}\) Nonetheless, it was not until the 1920s that the territorial waters were adopted as a subject of discussion at formal forums such as the International Law Association\(^ {160}\) American Institute of International Law in 1925 and the Stockholm session of the International Law Association in 1927.\(^ {161}\)

This regime of archipelagic state entered into a legal process in the case of the *Anglo-Norwegian Fisheries Case* adjudicated by the International Court of Justice (ICJ). Primarily, ICJ made a decision, delivered on December 18, 1951, that straight baselines are admissible to be applied when configuring a particular area of waters connecting the outermost points and include the waters between its islands in the internal waters of Norway.\(^ {162}\) In summaries of judgements, advisory opinions and orders of ICJ, it was further clarified that the case brought before the court by the United Kingdom of Great Britain and Northern Ireland against Norway, questioned the legality of the Norwegian Government in accordance with international law to delimit the zone where the fisheries were reserved to its own nationals. The judgment found that ‘neither the method employed for the delimitation by the Decree, nor the lines themselves fixed by the said Decree, are contrary to international law; the first

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\(^{158}\) *Keputusan Presiden Nomor 126 Tahun 2001 tentang Hari Nusantara* [Presidential Decree Number 126 Year 2001 concerning Nusantara Day] (Indonesia) [author’s trans].


finding is adopted by ten votes to two, and the second by eight votes to four.\textsuperscript{163} Norway drew the line on the basis of the 1935 Decree. The decision, taken by ICJ in this case, gave rise to the International Law Commission to allow a state with a fringe of islands in the immediate surroundings of its coast to apply straight baselines.\textsuperscript{164} The approach of straight baseline laid a stronger foundation for the concept of an archipelagic regime to be a subject of international consideration and inspired Indonesia to claim archipelagic waters by drawing straight baselines.

5. The Struggle of Indonesia to Obtain Archipelagic Status.

After the periods of the old kingdoms and the Netherland Indies, the declaration of Indonesian Independence on August 17, 1945 highlighted the subsequent phase of Indonesia’s maritime journey. At the time of declaration, the territories of the former colony had been inherited by Indonesia in accordance with the international legal principle of \textit{uti possidetis juris} (as you possess in law). The inheritance also includes the three miles of territorial waters surrounding islands regulated under TZMKO leaving Indonesia incapable of claiming waters in between its islands.\textsuperscript{165} This circumstance made Indonesia divided by ocean, whereas it should function as a means to unite.

As conceived by Etty Agoes, Indonesia which had very much concern over the situation was prompted to issue the Juanda Declaration on the basis of the following rationale:\textsuperscript{166}

1. As an archipelagic state comprising thousands of islands, geographically Indonesia required its own specific arrangement based on its traits and features;
2. The archipelago and its interconnecting waters should be regarded as a unifier for the territorial integrity of Indonesia;
3. Article 1, paragraph 1 of the 1939 TZMKO, regulating the limit of territorial sea, should be considered as no longer valid with the interest of Indonesia concerning safety and security matters;
4. It is the right of each state to take the necessary efforts to preserve the unity and safety of its territory.

\textsuperscript{163} Ibid \textit{(Summaries of Judgements, Advisory Opinions and Orders of the International Court of Justice)}.
\textsuperscript{165} Hasjim Djalal, ‘Indonesia’s Archipelagic Sea Lanes’, above n 157, 59.
Juanda Declaration also contains a political dimension to overcome a critical condition of disintegration. The declaration was part of a strategy to address the issue, by introducing a concept that would represent a symbol of unity. At the time of the declaration, political disintegration erupted when the government announced an emergency situation on 14 March 1957. This later turned into a war declaration on 17 December 1957. This declaration was imperative to solidify the nation building that at the time was vulnerable, and the Nusantara concept or archipelagic regime embodied in the Juanda Declaration provided a clear response to this challenge.

In early days of the declaration, this concept evoked protest from major countries such as the United States, Australia, France, the United Kingdom, the Netherlands, Japan and New Zealand. On January 13, 1958, the Government of Japan, through the Japanese Vice Minister for Foreign Affairs, Katsum Ohno, protested the declaration to the Indonesian mission in Tokyo, that the claim of Indonesia could not be admitted under international law and as such, it was not legally binding upon Japanese nationals, vessels or airplanes. The United States and the United Kingdom countered Indonesia’s proposal expeditiously and resolutely. Those two countries accused Indonesia of breaching the sacrosanct maxim of freedom of navigation and free transit as no single power could possess the ocean, as reflected in Grotian tradition. Both countries filed the protests almost concurrently. Britain made a statement on 3 January 1958, three days after the U.S rejection. Indonesia’s declaration was perceived by the U.K as illegitimate and as such, invalid to its vessels, individuals and airplanes. Likewise, on 3 January 1958, the Australian Embassy expressed its concern through a diplomatic note to the Government of Indonesia stating that Indonesia had intention to assert the sovereignty over the high seas. In that respect, as maintained in the note, Australia was of the view that the claim constituted a breach of international law and

167 Kwiatkowska and Agoes, above n 136.
169 Leo Suryadinata and Mustafa Izzuddin, the Natunans: Territorial Integrity in the Forefront of Indonesia-China Relations (ISEAS-Yusof Ishak Publishing, 2017) 6.
172 Dino Patti Djalal, Geopolitical Concepts and Maritime Territorial Behaviour in Indonesian Foreign Policy (Master Thesis, Simon Fraser University, 1990) 64.
the Australia Government did not bind itself to such action. Indonesia persistently defended its stance in international forums, most importantly during the negotiations to formulate the provisions of the law of the sea.

5.1. UNCLOS I.

The first UN Conference on the Law of the Sea was convened in Geneva on 24 February – 27 April 1958. As considered by Tullio Treves, this conference considered its duty to examine the law of the sea from the legal, technical, biological, economic and political aspects and to frame the result of its work in international conventions or other instruments. In the final result, the conference drew up four conventions signed on April 29, 1958 on the general regimes on the Territorial Sea and Contiguous Zone, on the High Seas, on the High Seas Fishing and Fishery Conservation and the Continental Shelf.

In this initial and influential conference to determine the future of the ocean, it was generally believed that Indonesia was the first state to raise the archipelago issue before the delegates of UNCLOS I. The Indonesian delegation of Indonesia made a statement concerning its country’s unilateral legal decision on the archipelagic regime, as follows:

Indonesia consists of some 13,000 islands scattered over a vast area. To treat them as separate entities each with its own territorial waters, would create many serious problems. Apart from the fact that the exercise of state jurisdiction in such an area was a matter of great difficulty, there was the question of the maintenance of communication between the islands.

If each of Indonesia’s component islands were to have its own territorial sea, the exercise of more effective control would be made extremely difficult. Furthermore, in the event of an outbreak of hostilities, the use of the modern means of destruction in the interjacent waters would have disastrous effect on the population of the islands and on the living resources of the maritime areas concerned. That is why the Indonesian Government believes that the seas between and around the islands should be considered as forming a whole with the land territory, and, the country’s territorial seas should be measured from baselines drawn between the outermost points of the outermost islands.

Indonesia was clear in making its statement heard by the other delegations when delivering the possible condition of the country along with the disadvantages that Indonesia would face if its territorial sea was not drawn from baselines in between the islands’ outermost points.

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176 Nandan and Shabtai, above n 164, 400.
As a response to this, the head of the U.S delegation, Arthur Dean retained that country’s position by making a reference to the universal doctrine of freedom of navigation in which any state could unilaterally appropriate no part of it. He had reason to believe that the restriction to the free use of the high seas through a 12-mile blanket around the archipelago should not be deemed as advanced measures. The argument delivered by Arthur Dean is as follows:

The committee should bear in mind that whatever was added to an individual state’s territorial waters must inevitably be subtracted from the high seas, the common property of all nations. For example, if islands were treated as an archipelago and a twelve-mile belt was drawn round the entire archipelago according to the formerly used by ships of all countries would be unilaterally claimed as territorial waters, or possibly even internal water. It would be a misnomer to describe such restrictions on the free use of the high seas as “progressive” measures. This delegation was ready to listen with understanding to the views of others, but hope that the views of the maritime powers would likewise receive full and fair consideration.178

The U.S directed the objection against the general application of the archipelagic regime and not the proposal of Indonesia per se. The conversion of high seas into territorial sea brought the potential denial of free access navigation to maritime countries and applied to some areas such as Dover Strait, Malacca Strait, Hormuz Strait, Bering Straits and all passages within the Indonesian Archipelago.179 Some countries claimed their territories portions as archipelagos such as Yugoslavia, Denmark, Finland, Egypt, Saudi Arabia and Iceland. The Faroes and Svalbard groups, as outlying island groups, also wanted to be treated as an archipelago.180 The lack of legal aspects concerning archipelagic doctrine prompted countries to make a unilateral declaration at the time. The potential enlargement of the proportion of their territories drew their interest to make such a claim.

Until the end of the first Conference on the Law of the Sea, the delegates failed to reach an agreement on the archipelagic concept. This failure can be explained by two rationales. First, there was a lack of support from western maritime powers such as the U.S, Britain, France and the Netherlands. On the other hand, there were only two major powers who supported the archipelagic concept, Russia and China.181 Therefore, more support by major powers was crucial and could put gravitas to the adoption of this doctrine at the conference. Secondly, the

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178 Dino Patti Djalal, above n 172, 63.
180 Hamzah, above n 159.
181 Dino Patti Djalal, above n 172.
cold war setting, to some degree, possibly influenced the reluctance of the western bloc to lend support to the archipelagic doctrine as it had received endorsement from the eastern bloc. It was argued that Russia and China were supposed to have the same concerns as the western bloc regarding the potential restriction on their fleet of vessels when passing through the passage of the archipelagic states. However, the two countries held a different position. Thirdly, China and the Soviet Union supported Indonesia’s claim to maintain their good relationship with Indonesia and both had limited interests at the time.\(^{182}\)

In his written article, available from the UN library, Judge of the International Tribunal for the Law of the Sea (ITLOS), Tullio Treves testified that the Conference failed to reach consensus on several proposals including ‘ranging from 3 to 200 miles maximum limits, a proposal for a 6 miles breadth of the territorial sea plus a 6 miles fishery zone immediately adjoining it which was accepted by the Committee on the whole but which did not obtain the necessary two-thirds majority in plenary’. The UN General Assembly had concerns over this unresolved question, including the fishing limits, and saw this worthy of a further measure to reach an agreement and made them the main agenda item of the Second UN Conference on the Law of the Sea.\(^{183}\)

5.2. UNCLOS II

The subsequent conference on the Law of the Sea was held in Geneva from 17 March to 26 April 1960 with eighty-seven countries participating. As the continuation of the previous conference, this conference tabled the unsettled items for further discussion, pursuant to Resolution 1307 (XIII) of the General Assembly of the United Nations Convening the Conference (Convening of a Second United Nations Conference on the Law of the Sea).\(^{184}\)

The primary debates among the delegates in this conference were still on the issues of:\(^{185}\)

a) The breadth of the territorial sea bordering each coastal state;

b) The establishment of the fishing zone by coastal states in the high seas, contiguous to, but beyond the outer limit of the territorial seas of the coastal states.

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\(^{183}\) Treves, above n 174, 2.


As stated previously, the archipelagic concept still faced a tough challenge from some countries. Indonesia together with the Philippines maintained their claim for this doctrine. Nevertheless, UNCLOS II repeated the same story as UNCLOS I in that it failed to reach an agreement concerning the proposal of both countries, even when the delegation of the Philippines attempted to propose a breakthrough to solve the problem. Indonesia and the Philippines turned to their domestic regulation as an effort to strengthen their position before the international community. Nonetheless, those two proponents of the archipelagic doctrine approach differed concerning the time for the enactment of the said regulations.

Indonesia made the archipelagic state doctrine codified as Indonesia law through the enactment of Law Number 4/prp 1960 concerning Indonesia Waters. This law entered into force on 18 February 1960, or one month prior to the first Conference on the Law of the Sea. The adoption of this law illustrated the persistence of Indonesia in realizing its vision to cover the country under one blanket. It also delivered the messages not only of domestic but also external disagreements. Internally, some domestic elites were in doubt of endorsing this vision further after the refusal and failure of UNCLOS I. The Chief of the Indonesian Navy, Admiral Subijakto was of the view that the doctrine was impractically motivated by exaggerated political sentiments. He was not convinced that the Indonesian Navy was able to safeguard the newly declared maritime boundary because of its limited capability. Externally, the enactment of the law can be viewed as a strategy to strengthen Indonesia’s position in making negotiations with the other delegations.

Similarly, the Philippines enacted the Republic Act No. 3046 of 17 June 1961: An Act to Define the Baseline of the Territorial Sea of the Philippines after its delegation faced a tough challenge from some major countries at UNCLOS I. In this act, the Philippines held the position that:

Whereas all the waters within the limits set forth in the Treaty of Paris and other relevant treaties have always been regarded as part of the territory of the Philippine Islands; Whereas all the waters around, between and connecting the various islands of the Philippine archipelago, irrespective of their width or dimension, have always been considered as necessary appurtenances of the land territory, forming part of the inland or internal waters of the Philippines; Whereas all the waters beyond the outermost islands of the archipelago but within

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188 Jayewardene, above n 186, 133.
189 Dino Patti Djalal, above n 172.
the limits of the boundaries set forth in the aforementioned treaties comprise the territorial sea of the Philippines; Whereas the baselines from which the territorial sea of the Philippines is determined consist of straight lines joining appropriate points of the outermost islands of the archipelago; therefore, All waters within the baselines provided for in section one hereof are considered inland or internal waters of the Philippines.190

This Republic Act was amended later by Republic Act No.5446 of 18 September 1968: An Act to Amend Section One of Republic Act 3046.191 The regulations govern a strict arrangement for navigation, passage and marine resources access in the waters because internal waters have the same legal regime as the regime of land territory.192 Major maritime powers such as the U.S, the U.K and Australia then expressed their dissatisfaction with the right of passage through the archipelagic waters of the Philippines particularly for their warships.193 The U.S acted as a vocal dissenter of the archipelagic doctrine and argued that the concept would allow belligerent countries to close off the straits giving rise to ‘United States warships steaming to quell trouble in a localized flare up...[and be] subjected to additional travel time – as much as 2-3 days – to avoid penetrating the waters of a non-belligerent state’.194

The Philippines continued to affirm their stance through legal framework by ratifying a new Constitution encompassing this claim to the Treaty Limits which reads:

The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historical or legal title, including the territorial sea, the airspace, the subsoil, the sea-bed, the insular shelves, and the submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.195

This Constitution came into effect on 17 January 1973 or 11 months before the relevant countries consented to convene UNCLOS III as the subsequent conference of UNCLOS II. The adoption of this Constitution came at the right time to convey the message that the
Philippines persistently would pursue its vision as an archipelagic state despite protests from the opposing countries.

5.3. UNCLOS III

5.3.1. First Session.

This third conference of UNCLOS received more enthusiasm from states compared to the previous conferences of UNCLOS I and II. In this last conference of UNCLOS, the delegations and specialized agencies participating consisted of 160 participants and eight organizations, respectively which meant the total number was three times larger than UNCLOS I and II. On 17 December 1970, the UN General Assembly adopted Resolution 2750C (XXV) that decided to convene the third conference on the Law of the Sea in 1973 aiming to encompass a comprehensive Law of the Sea Convention. The first session from a total of eleven sessions held from 1973-1982 of UNCLOS III took place in New York on 3-15 December 1973. This UN General Assembly Resolution 2750C (XXV) also strengthened the existence of the Committee of the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction (UN Seabed Committee).

In the sessions of the UN Seabed Committee, the Indonesian delegation paid close attention to the maxim of “Common Heritage of Mankind” and the challenging issues of maritime zones and straits. There were two main rationales for having the matters as top priority. First of all, the issues were primary concerns of the developing states. Secondly, Indonesia had a profound interest in the maritime zones and strait passage since archipelagos came under the agenda of maritime zone and the strait passage arrangement had a direct impact on the Malacca Strait passage lane.

The work of the third conference on the law of the sea chiefly comprised three committees. The first committee had the task of discussing the issue of the legal regime for the deep seabed beyond the limit of national jurisdiction, the second committee dealt with the topics of ‘territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, land-locked countries, shelf-locked States and States with narrow shelves or short coastlines and the transmission from the high seas’. The last committee was charged with the

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topic of the preservation of the marine environment. As testified by Mochtar Kusumaatmadja, the most challenging task in this New York session was that the delegations to the conference should commence the discussion right from the beginning because the agenda item had to be further discussed due to the emergence of newly independent states that were entitled to have representatives as the member of delegates in the forum.

In this forum, there were four countries that consistently advocated the archipelagic state regime, namely, Indonesia, the Philippines, Fiji and Mauritius. Hasjim Djalal maintained Indonesia’s assertion to obtain the legal status of an archipelagic state in order to foster the country's territorial integrity, unity, political stability as well as cultural, social and economic cohesiveness as it is conceived that land, waters and people were of one unified element. Amongst the scholars, Daniel Patrick O’Connell, was known as an influential academic and main supporter of the archipelagic concept. He had paid close attention to this issue since 1969. As pointed out by O’Connell:

So long as the territorial sea was restricted to three, or even six, miles, the area of waters to be enclosed within a group of islands was relatively restricted, but when a closing line for bays of twenty- four miles has become the rule, and when a twelve-mile territorial sea is becoming a conservative standard, arithmetic has ceased to have relevance to the question. Archipelago claims can no longer be regarded as legal aberrations, since they are likely to be made by almost all the newly independent nations which consist of island groups.

O’Connell attempted to comprehend the archipelago concept from the background of the newly independent state and their geographical features. This perspective was correct in the sense the rules that the colonial regimes and the newly independent states had followed should be distinguished. The colonial governments, such as the Netherlands Indies, applied the same principles as its motherland because Indonesia functioned as a ‘long-arm’ administration of the central government in Amsterdam. At the same time, the geographical

204 O’Connell, above n 173, 1.
features of the Netherlands were vastly different from that of Indonesia. As a country with a group of islands, the top leaders of the country should find a way of protecting the country through archipelagic doctrine.

5.3.2. Second Session.
The second session of the UNCLOS III was convened in Caracas, Venezuela from 20 June – 29 August 1974.205 Before going into further negotiations, the meeting adopted the course of the meeting by mirroring the structure of the Sea-Bed Commission. The First Committee had the task of discussing the regime and mechanism for the regulation of the use of the seabeds beyond national jurisdiction. The Second Committee was in charge of the traditional matters of the law of the sea such as the territorial sea, the exclusive economic zone, the continental shelf, the high seas, the straits, the archipelagos and fishing. The Third Committee had the duty to address the issues of sea pollution, transfer of technology, scientific research and conservation. The delegations to this session focused on the declaration presentation rather than negotiations of the texts.206

Nevertheless, in accordance with a report composed by Elisabeth Mann Borgese in 1974, as archived in the University of Dalhousie, when delivering the general statements, the real issues that emerged were between on the one hand, a few countries that were persistent in holding the basic notion of freedoms of navigation and the fragmented and limited national and international regimes, and on the other hand, most of the countries that supported ‘a strong and rational regime for the ocean, the management of which would be shared by coastal nations, regional organizations and the International Authority.’ At least 24 developing countries challenged the freedom of navigation if the freedom only served the interests of major powers in navigation and fisheries. The developing countries further requested that the management of living resources and all other activities on the high seas should fall under effective international arrangement.207

Meanwhile, the Second Committee paid attention mostly to the exclusive economic zone. Aguilar made a summary on the work of the Committee stating that:

The proposal for a territorial sea belt of twelve miles and an economic zone of up to two hundred miles had received support from the majority of delegations, even though final agreement depended on the resolution of a number of concurrent problems such as passage through straits, the outer limits of the continental shelf, the regime of islands and archipelagic states, and the rights of landlocked nations. Whereas there was near-unanimity among the majority of nations with regard to international ocean space, no such agreement existed in the Second Committee concerning national ocean space.208

In regard to the archipelagic concept, Indonesia, along with other like-minded states that supported the doctrine, formally submitted draft articles concerning the archipelagic states. The basis of the proposal referred to the previous submissions by four states in the preparatory meetings convened in Geneva and New York. The Head of the Indonesian delegation delivered a speech in the general debate session that highlighted several concerns including the main rationale of Indonesia's stance and the grounds and objectives of draft articles that had been submitted. The speech also pointed out the main legal basis of archipelagic states which was primarily illustrated in the Juanda Declaration and Law Number 4/Prp. of 1960 concerning Indonesian Waters and which took into considerations the interests of the other supporting countries.209

The other interesting development that occurred at this conference was India’s proposal on ‘archipelago of state’. This notion at a glance seemed to be the same idea as the archipelagic state, but it offered a different approach. On the one hand, the archipelagic state concept suggested the legal framework of the whole territory as an archipelago without admitting the existence of islands outside the territory. On the other hand, the archipelago of state concept proposed the application of the principles of archipelagic state to the archipelago of a state in which most of the territory is a continent. The developing countries from the African Continent made an objection to this notion. Problematic circumstances occurred when coastal states, as a prominent group with a significant number of members, consented to make a proposal encompassing draft articles on several issues such as an economic zone of 200 nautical miles and continental shelf. It was quite complex as Indonesia would have to decide either as the co-sponsor of the proposal or as a state with a different position.210 Opposing or supporting the proposal offered by coastal states brought the same risk for Indonesia when

210 Ibid 99.
attempting to garner the support of as many countries as possible in this regard. Finally, however, Indonesia decided to join the coastal states.

Finally, although this session discussed several important matters, it did come to agreement on the anticipated articles. All proposals submitted by the delegations have been compiled and considered by the head of the conference as the Main Trends of the Law of the Sea. The persistence of Indonesia and the other proponents to endorse the concept of archipelagic state gave rise to the adoption of the archipelagic state concept in the minutes of the meeting, encompassing the Main Trends of the conference.

5.3.3. Third – Eleventh Sessions.

The third conference on the Law of the Sea opened its third session on 17 March to 9 May 1975 in Geneva with the undertaking to, amongst other things, ‘achieve tangible and lasting results which would lead to a Convention on the Law of the Sea’. The Main Trends served as guidance for negotiations. This document also made the link between the Carcass session and the subsequent sessions including this Geneva conference. The following sessions of the fourth to the eleventh were convened on 15 March 1976 and concluded on 10 December 1982. There were five sessions during UNCLOS III that were resumed; seventh, eighth, ninth, tenth and eleventh sessions.

As a Singapore ambassador to the U.N and the President of the third U.N Conference on the Law of the Sea from 1981-1984, Tommy T.B. Koh generally asserted that UNCLOS III attempted to address the issues that remained unresolved by the Hague Codification Conference of 1939 and UNCLOS I and II such as the territorial sea limits and the right of exclusive fishing. The delegations of the third conference also negotiated the continental shelf, contiguous zone, straits for international navigation, archipelagos, high seas, the protection and preservation of the marine environment from pollution, marine scientific

211 Martin, above n 206, 32.
215 Codification Division Publications, above n 199.
research and seabed and ocean floor. The appeal by Arvid Pardo concerning the link between ocean space and ecological unity was also examined.216

At the end of the Geneva session, President Amerasinghe made an announcement regarding the dissemination of the Informal Single Negotiating Text (ISNT) with a note from the President that the text would serve as the procedural reference and a basis for negotiation.217 The conclusion of ISNT proved a step forward as an achievement from the previous Caracas Conference in the sense that the Geneva Conference produced a single text while the Caracas drafts provided alternative provisions. The Geneva Conference also reached agreement to confirm universal support of the 12 nautical miles for the territorial sea regime and 200 nautical miles for the economic zone.218 With regard to archipelagic concept, Mochtar Kusumaatmaja disclosed that there was no resistance from countries, including the U.S, against this concept, which demonstrated the general acceptance by countries in this Geneva Conference. Compared to the struggle to secure a 200 nautical mile economic zone, the archipelagic concept faced its challenges in the sense that fewer countries paid interest or attention to it and were interested only in the economic zone that involved a large number of coastal states.219

Although the delegations admitted the archipelagic concept in ISNT, it did not mean that the other representatives gave their approval. In this respect, mapping of the countries both in favour and against the concept was necessary to plan and execute a precise strategy. Based on the assessment made by the Indonesian delegation, countries involved in the negotiation process were clustered into four groups:220

1. Neighbouring countries in the region including ASEAN members and Australia.
2. Countries with interest in fisheries such as Japan, and in underwater cable for communication. Japan as a far-distant fishing nation had long been recognized as having exploited Indonesian waters before Indonesia became an archipelagic state without any benefit to Indonesia.

220 Ibid 105.
3. Maritime countries. Their interest was to ensure that their maritime navigation did not face any obstruction. Most of them were in western countries.

4. Maritime major powers with military strategy interest. The U.S and Soviet Union were part of this group. Indonesia set the highest priority to obtain the support of ASEAN member countries for the reason that their endorsement, as their closest neighbours, was necessary to convince the other clusters.

During the last nine sessions of the third conference on the Law of the Sea, Indonesia and the other archipelagic countries intensified efforts to approach and pursue countries and relevant institutions around the globe with the main objective of securing their support. As a prominent diplomat that actively represented Indonesia in the negotiation forum to promote the archipelagic concept, Prof. Hasjim Djalal documented some notable achievements. Amongst others are the following:221

1. The declaration to support the archipelagic concept by the participants attending the meetings of the Developing Countries on the Law of the Sea held in Nairobi, Kenya in 1974;

2. The statement of the Organization of African Union to support the archipelagic principles during its meetings held in Addis Ababa (1974) and Mogadishu (1975);

3. Indonesia established a sort of ‘alliance’ with the African countries in which most of them sought the recognition of 200 miles EEZ around their coastline (the so-called economist countries or group);

4. Indonesia reached several informal understandings with some American countries which had interest in receiving acknowledgment of the 200 miles Territorial Sea concept (territorialist countries or group);

5. Indonesia to cooperate with the so-called strait countries or group, in particular, Malaysia, Oman, Egypt, Greece, Tanzania and Spain to make the maritime regime of navigation accepted through straits used for international navigation. In addition, Indonesia and some countries such as Malaysia and Singapore had reached an understanding on the management of the safety of navigation and the protection of the environment of the Straits of Malacca and Singapore in 1971;

221 Hasjim Djalal, *The Regime of Archipelagic States in Historical Perspective* (2018) 7-8. The writer obtained this document at the Global Scholars Forum in Perth, 23-25 February 2018 where the writer and Prof Hasjim Djalal were both speakers at the forum.
6. Indonesia cooperated with the marginist countries or group that sought to obtain the extension of the continental shelf beyond the depth of 200 metres of water as stipulated in the Geneva Convention in Continental Shelf of 1958. This would extend to 100 miles beyond a depth of 2,500 metres of water and beyond 200 miles throughout the natural prolongation of the land territory of the states along the way to the outer edge of the continental margin. This marginist group includes Australia, New Zealand, India, Norway, Canada, the U.S, the Soviet Union and others;

7. Indonesia maintained good, non-confrontational relations in regard to the Land-Locked and Geographically Disadvantaged States which originally opposed both EEZ and Continental Margin claims. This approach was taken to make those states’ opposition to the archipelagic doctrine as low as possible;

8. Fostering intensive communication with maritime powers such as the U.S, the Soviet Union, the U.K, Japan, China, India, Canada, Latin America and Caribbean countries so that the maritime powers gradually understood and supported the concept in the sense that the definition of archipelagic state and legal regime of archipelagic waters could be addressed. The navigation of transit through the archipelagic waters and other problems could be settled.

All the strategies in advancing the concept of Archipelagic States bore fruit. The UNCLOS was finally adopted in Montego Bay, Jamaica on 10 December 1982. Indonesia received recognition as an archipelagic state and founded its legal basis to proclaim sovereignty over the archipelagic waters. LOSC for the first time recognized the concept of archipelagic states through the definition of an archipelagic state in Article 46 which reads ‘a State constituted wholly by one or more archipelagos and may include other islands’. Article 47 articulates that ‘the states comprising one or more mid-ocean archipelagos may, under certain conditions, draw straight baselines joining the outermost islands and drying reefs of the archipelago’. The archipelagic baselines are used to measure the breadth of the territorial sea contiguous zone, exclusive economic zone and continental shelf (Article 48). Furthermore, archipelagic waters are waters enclosed within archipelagic baselines. The

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222 Law of the Sea Convention art 46.

archipelagic state has the right to exercise sovereignty over such waters, its seabed, subsoil and the airspace above. As provisioned in this Constitution of Ocean, Indonesia can claim:

1. Sovereignty over 12 nautical miles territorial sea surrounding the archipelagic waters (Articles 1(3) and 3);
2. Up to 24 nautical miles from archipelagic baselines as contiguous zones (Article 33(2));
3. The sovereign rights and other jurisdiction over 200 nautical miles from its archipelagic baselines (Article 57);
4. The sovereign rights over the continental shelf to the outer edge of its continental margin (Article 76);
5. The delimitation of internal waters within its archipelagic waters by drawing closing lines (Article 50).

Law of the Sea Convention also employs certain rights of other countries in certain parts of its archipelagic waters such as traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring countries in specific areas falling within archipelagic waters. Nonetheless, bilateral agreements should be concluded to regulate terms and conditions to exercise such rights and activities. In connection to this, Indonesia and Malaysia have consented to be bound by the Treaty between Malaysia and the Republic of Indonesia relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying Between East and West Malaysia (the Treaty) concluded in 25 February 1982.

It can be learnt that the Treaty was a result of ‘give and take’ negotiation between the two states. In the Treaty, both parties consider the support of Malaysia to the legal regime of the archipelagic state of Indonesia and the policy of Indonesia to recognize and respect the existing rights and other legitimate interests traditionally practiced by Malaysia in some areas of Indonesia agreed upon by the two countries. Meanwhile, with regard to passage and

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224 *Law of the Sea Convention* art 49.
225 Ibid art 51(1).
227 Ibid. See the considerations of the Treaty: ‘CONSIDERING the policy of the Government of Malaysia to support the legal regime of archipelagic State of the Government of the Republic of Indonesia’ and
transit through archipelagic waters, the Convention governs the regimes of innocent passage\(^2\) and the archipelagic sea lanes passage through archipelagic sea lanes\(^3\) and air route there above.\(^4\)

6. Conclusion.

The importance of archipelagic status in shaping Indonesia as a maritime nation cannot be underestimated. Before obtaining acknowledgment as an archipelagic country, various elements supported the notion that its maritime realm has reinforced Indonesia as a maritime nation. The geographical location suggests that Indonesia is located strategically at the juncture of the Indian and Pacific Oceans and between the Asian and Australian Continents. The total area of Indonesia is covered mainly by marine water of approximately 62.05\%. This area potentially increased after the Coordinating Ministry of Maritime Affairs updated the map following the bilateral maritime boundary conclusion with Singapore and the Philippines and as a response to regional dynamics.

Moreover, maritime culture and spirit are deeply rooted in Indonesian history. The old mantra of *Jalesveva Jayamahe* and a famous song titled ‘Indonesia as a Sailor Nation’ present clear examples that the ocean flows in the blood of Indonesian people. Old kingdoms based originally in Java, such as Majapahit, Srivijaya and Demak, played a prominent role in expanding their territory and forming trade relations with other countries through sea routes. Old examples of literature such as *Nāgarakrĕtāgama* and *Pararaton* testified that the Majapahit Kingdom under *Patih Gajah Mada* (Prime Minister Gajah Mada) ruled the region known as *Nusantara* covering Sumatera, Malay Peninsula, Kalimantan and eastern Indonesia in the fourteenth century. This maritime tradition experienced a decline after the colonials such as the Portuguese and the Dutch arrived and occupied the strategic ports in the region. Since then, maritime culture turned into land-based agricultural culture. Aside from the role of ‘old states’, *Suku Laut* (Ocean Tribe) also contributed to maritime culture and seaborne trade. Based initially in Sulawesi, they roamed across the region including to the territories known today as Malaysia and Singapore.

\(^{2}\)‘CONSIDERING the policy of the Government of the Republic of Indonesia to recognize and respect the existing rights and other legitimate interests traditionally exercised by Malaysia in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between East and West Malaysia’.

\(^{3}\) Law of the Sea Convention art 52.

\(^{4}\) Ibid art 53.

\(^{5}\) Ibid art 53(2).
After an examination of the historical context, this part discusses the conceptual design of the archipelagic state. In 1957, Prime Minister Juanda made a declaration that territorial seas should be measured 12 nautical miles from baselines connecting the outermost points of Indonesia’s islands and all waters, surrounding, between and connecting the islands should become part of the Indonesian state. This Declaration has three strategic plans; firstly, foundation of an archipelagic state, secondly, a breakthrough to achieve national interest and thirdly, protection of Indonesia's integrity and unity.

A fact of interest is that in 1951, ICJ in the *Anglo-Norwegian Fisheries Case* a decision was made that the internal waters of Norway could be measured from the straight baselines when configuring a particular area of water connecting its outermost points. This decision inspired Indonesia to claim archipelagic waters by drawing straight baselines. By the time of the Juanda Declaration, major countries expressed their concern and sent their protests to Indonesia.

Indonesia continued to hold this position in international negotiations including in the Law of the Sea Conferences. In the LOSC I and II, delegations failed to reach agreement on an archipelagic state. Indonesia and the other like-minded states such as the Philippines, Fiji and Mauritius maintained the claim for an archipelagic state. Finally, the delegations in UNCLOS III successfully adopted provisions on an archipelagic state. In the domestic legal framework, Indonesia as an archipelagic state has been basically adopted in Article 25A of the Indonesia Constitution of 1945. This provision strengthens archipelagic state of Indonesia as stated in the Law Number 6/1996 and upgrades it from “law” into “constitution”.
1. Introduction.
As described in the previous part, Indonesia has a long history in maritime journeys. The geographical condition of Indonesia comprising thousands of islands covered mostly by waters and the victory of old kingdoms having their capitals in Indonesia influenced Indonesia’s persistent struggle to be an archipelagic state before countries’ delegates in LOSC conferences. After gaining this status, the maritime vision was not getting the government’s first priority, not until Jokowi took charge and made a declaration of GMF.

What follows is an account of an overview of the doctrine of GMF introduced in 2014. In making a comprehensive assessment of this Jokowi’s doctrine, it is imperative to touch upon an aspect of the history. A brief history in this part functions as a bridge to the subsequent section on the decline of maritime tradition that Indonesia has experienced. As the historical context is not a sole contributor to the journey of Indonesia’s maritime history, this section also examines the succinct perspective on the archipelagic state and maritime power since those concepts solidify national identity as a maritime nation. The following section presents the emergence and affirmation of Indonesia as a maritime nation. Before arriving at the conclusion that Indonesia is qualified as a maritime nation, it discusses the original concept of maritime nation by prior examination of the concepts of sea power and maritime power.

The next section delivers the analysis on GMF and how this doctrine covers the issue of marine resources preservation. It is worth noting that when examining Jokowi’s doctrine, this part provides analysis of the newly adopted document of Ocean Policy. This document delivers further detailed programs to make Jokowi's vision materialize including how to preserve marine and fisheries resources in Indonesia. Having said that, this section also offers a critical review of Government policy to combat IUU fishing under the Ocean Policy.

The discussion concerning the intersection between archipelagic state and maritime nation highlights an interesting overview of Indonesia’s vision as it involves the conceptual design of Indonesia based on three considerations:
a) how the country was shaped in the past based on historical experiences;
b) how Indonesia faces the current challenges in domestic and international domains; and
c) how does the country best prepare to cope with issues or problems that may arise in the future?

For Indonesia, the maritime identity lies as an ultimate foundation in supporting the nation to have self-confidence to be a country with an ocean-oriented future by looking at all the elements that the ocean can serve and by promoting all potentials that contribute to the prosperity of the people.

2.1 Maritime Trails of Indonesia: Historical Outlook.
The historical trails of Indonesia suggest that the country’s maritime concept and practice existed long before the introduction and adoption of archipelagic principles. From the fifteenth until the seventeenth century, cities with essential ports in Nusantara developed and reached a golden age as they engaged in maritime global trade networks. The emergence of old kingdoms such as Majapahit, Srivijaya and Demak, as previously discussed in this section, illustrated in the past that the maritime vision was projected by the kings that ruled the dominant kingdoms in Indonesia.

2.2 The Decline of Maritime Culture.
The history of the maritime supremacy of old kingdoms and their prominent roles in establishing maritime culture declined severely in the sixteenth century. Nusantara as the centre of maritime power in the region reached a drastic turning point after the arrival of Europeans. In the early period, the Portuguese and Spanish as pioneers came to Indonesia with the subsequent wave from the Netherlands and England. Gradually they seized and even destroyed the leading political and economic institutions and instruments in Nusantara and took power over maritime purview in the region. The occupation of Malacca under the Portuguese rule in 1511, Manila under the Spanish regime in 1571 and Batavia under the rule of the Netherlands in 1691 also severely affected some centres of economy, political power

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232 UNESCO, above n 111.

and prominent cultural creativity in the Asia Region such as Phnom Penh, Hoi An, Malacca, Patani, Brunei, Banten, Jepara, Gresik, Pegu, Ayutthaya and Macassar.\(^{234}\) The occupation also gave rise the decline of the power and influence of the Majapahit Kingdom in the region.

Pramoedya Ananta Toer depicted the collapse of Majapahit, as the leading maritime powerhouse in Nusantara and as a major maritime kingdom in the North, had contributed to the cessation of ‘the dialogue of civilization between North and South’. As a consequence, the next phase of history suggested that not only has Nusantara lost its national identity that was capable of restraining the influence from the South but also it became the occupied territory of maritime nations coming from the South such as the Portuguese, English and the Dutch. In the journey, this circumstance forced the people of Nusantara to ignore the ocean and to pay more attention to the inland-agricultural civilization.\(^{235}\)

The interaction of the Nusantara region was highly dependent on the sea lane. Before the colonists sailed to Nusantara and occupied some strategic ports in the region, maritime connectivity dominated the community interrelationship in the region. The main trade routes from the East to the West encompass:

1. Land Route: Silk road from China, Turkistan (Central Asia), India *en route* to the Mediterranean Sea and Arabian Peninsula; and
2. Sea Route: South China Sea, Malacca Strait, Calcutta, Persia Gulf, the Mediterranean Sea *en route* to Egypt and Europe.

It brought about a different approach and practices that were frequently taken by sailors or traders in the Nusantara region in which the sea lanes were the only route connecting the region due to the fact that the land route caused higher risks than that of the sea route at that time. Reid asserted that the land route in Southeast Asia was difficult to pass through because of the natural conditions such as heavy dense forests and frequent rainfall.\(^{236}\) Hence, it can be conceived that two main factors serve as the primary reasons for maritime culture and trade in Nusantara experiencing severe degradation in the 16\(^{th}\) century, as follows:


\(^{236}\) Reid, *Southeast Asia During the Trade Period of 1450-1680*, above n 234, 74.
1. The wave of fleets from European countries to occupy strategic territories including ports in the region. Reid asserted there exist two main factors contributing to their arrival:  
   a. Externally, the economic crisis in Europe. They attempted to discover new and promising lands to be exploited.  
   b. Internally, problems within their governments or kingdoms and conflict between the power of the king and the middle class due to economic issues.

2. The decline of old kingdoms as a consequence of the colonialization in Nusantara by European countries;  
3. High dependency on the sea as the main route connecting networks in Nusantara placed the maritime culture and trade in trouble. This circumstance led to the development of land-based agricultural orientation as the sea no longer served as the main route for sea trade.

2.3 The Rise of Indonesia as a Maritime Nation.

2.3.1. Sea Power or Maritime Power?

The doctrine of Indonesia as a maritime state did not find its formal admittance in the domestic domain, until the declaration made by Jokowi in 2014. This concept is not ‘an old wine in a new bottle’ but it is rather a strategic policy to rekindle the maritime spirit that had fallen by the time the colonials came to seize the freedom of inhabitants in the region. The vision appears to be a reference to the heroic speech of Soekarno, a founding father and first President of Indonesia, in 1953 in the inaugural ceremony of the Naval Institute of Indonesia, later known as Akademi Angkatan Laut (Naval Academy of Indonesia). As a true orator, he encouraged Indonesians to become a respected sailor nation by stating:  

Try your best to reshape Indonesia as a sailor nation. A sailor nation in the widest extent meaning. Not only as laborers on the vessels, but also a sailor nation that possesses merchant ships, a sailor nation that has warships, a sailor nation that is as busy as the waves in the ocean.  

The atmosphere created by this speech coincided with the notion of making Indonesia unified through the Declaration of Juanda in 1957.

From the conceptual discussion, some interesting questions with regard to maritime debates prevail such as the grounds for a nation to be entitled to a status of a maritime nation and the

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237 Ibid 310.  
elements that make a nation deserve to be a maritime nation. Although possibly this fundamental issue does not often come to the practitioners or policy makers attention, this basic concept matters to scholars in the sense that this discussion can lay a strong foundation to keeping the direction on the right path along with achieving an excellent strategy.

In some works of literature, the elements that contribute to the concept of a maritime state have been translated into numerous thoughts. One of the most theoretical perspectives was introduced by Alfred Thayer Mahan in his famous book, ‘The Influence of Sea Power upon History: 1660-1783’. This classic book was written in 1890. Even though his brilliant concept in this literature was very old it was and will be relevant for national power in the late 20th century, the 21st century and the future to come. Prominent scholars draw on Mahan’s theoretical framework to analyse the phenomena of each national maritime power and how the major maritime countries play their roles and grow their influence regionally and globally. As a naval officer and strategist, Admiral Mahan held a comprehensive overview in his seminal work outlining six key elements concerning the sea power of nations. It covers:
1. Geographical location;
2. Physical conformation including natural resources and climate;
3. The extent of territory;
4. Population numbers;
5. People’s character; and
6. The character of government including national institutions.
As conceived by James R. Holmes, Mahan’s writings were more appropriate to analyse great maritime powers such as Great Britain or the United States. Hence, it has less relevance for fledgling powers in the region such as Japan. If it is deemed not to be adequately applied to

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239 Ronald D. Parker, ‘Mahan for the Twenty First Century: His Principles Still Apply to National Power’ (Report and analysis, United States Marine Corps University, 2003) iii.
a country such as Imperial Japan, the appropriate application to other countries with moderate or less maritime power such as Indonesia should also be questioned.

A different angle was introduced by Geoffrey Till perceiving sea power as not simply the possession of military capabilities in the maritime realm. The power extends to the interrelation of the inputs and the outputs. As he puts it:

The inputs are navies, coast guards, the marine or civil-maritime industries as more than military maritime capabilities. Sea power is not simply about what it takes to use the sea. It is also the capacity to influence the behaviour of other people or things by what one does at or from the sea. This approach defines sea power in terms of its consequences, its outputs not the inputs, the ends and not the means.²⁴⁴

In Till’s perspective, the output should be given more priority than the input. The means will be meaningless if not taking into account the final results. This concept of sea power extends to soft power such as the ability to influence the attitude of others and not the hard power per se.

The sea power concept evolves along with the time and the development of knowledge and global grouping, in particular with the rise of the other major powers such as China. An Indonesia Navy officer, Lieutenant Colonel Salim took the view that naval historians have presented a list including the strength of the economy, the prowess of technology, the culture of socio-politics, the geographic location, the dependence on maritime trade and sea resources and lastly, the policy and perception of government.²⁴⁵ China can be a clear example of how its sea power has developed to strengthen its regional and global vision. This country, to some degree, has all the qualifications that are on the list. From the economic side, as revealed by the International Monetary Fund (IMF), China is rated as the number one economic superpower in the world. Compared to the U.S, China’s GDP (Gross Domestic Product) of 17% outnumbered the U.S GDP of 16% in 2014.²⁴⁶ Its maritime technology was certainly quite advanced according to some research. China has practiced a cultural change through sea routes from as early as the fifth century to the places known today as India, Cambodia, Java, Sumatera, Malaysia, Japan, Sri Lanka and Mecca. Meanwhile, the government-sponsored emigration and privately organized emigration of China’s population

to other countries throughout history\(^{247}\) illustrates that China has the vision to expand its influence on different parts of the world.

In the modern school of thought, sea power employs a combination of the capability of a country for international commerce and the exploration of marine resources. This military power at sea holds a key responsibility to render control over trade and possible disputes and to influence events on land from the sea. This concept obviously occupies a broader scope than that of sea power as a mere military perception.\(^{248}\) It appears that this concept highlights the crucial roles of trade and natural resources. However, the commerce and exploration activities need security protection that military institutions such as the navy are able to offer. This concept also enables military power at sea to have the capability not only to perform its duties at sea but also to have direct and indirect engagement with occurrences on land. An aircraft carrier, for instance, can put pressure on other countries that pose a threat to the region, or flag state of the carrier since the standard technology of the ship enables missiles to be launched and fighters to take off from its deck.

Nonetheless, sea power is not always identical to maritime power. Maritime power embraces a broader ambit than sea power. Salim holds the view that sea power extends to the total ability of a state to employ the sea, including all its resources, to pursue and accomplish national interests. In this sense, sea power supports maritime power. Therefore, it is proper to suggest that sea power is not an independent form of military power and it has the same capacity as air and land powers to determine the military strategy.\(^{249}\) This notion has been upheld by Deborah Sanders when taking the position that maritime power is a multifaceted concept that goes far beyond the rigid military characteristics.\(^{250}\)

### 2.3.2. What Makes Indonesia Qualify as a Maritime Nation?

Taking into consideration the interplay between modern sea power and maritime power debates, Indonesia needs to take the elements and look at how those factors can contribute to setting Indonesia up as a maritime nation. The concept of sea power and maritime power also

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\(^{248}\) Ibid.

\(^{249}\) Salim, above n 245.

\(^{250}\) Ibid.

sheds some light on the belief that Indonesia deserves to be a maritime nation based on several reasons:

1. The history.
   The previous section tells the maritime history that shapes today’s Indonesia. The prominent role of old kingdoms based in Indonesia such as Majapahit in the 14\textsuperscript{th} century, Srivijaya in the 13\textsuperscript{th} century and Demak in 16\textsuperscript{th} century demonstrates that maritime culture is deeply rooted in the history of Indonesia. In the Southeast Asia Region, the term \textit{Nusantara} receives wide acceptance in Indonesia, Malaysia and Singapore. Ancient literature written during Majapahit Reign, \textit{Nāgarakrĕtägama} supports this acknowledgment. This book suggests that Majapahit territory had already reached Sumatera, Malay Peninsula, Kalimantan and eastern Indonesia. When Jokowi invoked the old mantra \textit{Jalesveva Jayamahe} by the time of the affirmation of Indonesia as a maritime nation and the declaration of Indonesia as GMF in 2014, he asked the nation to bear in mind that Indonesia’s victory lies on the sea by recalling the achievement of “old Indonesia” in the region.

2. Archipelagic state.
   The status of Indonesia as an archipelagic state significantly influences the self-confidence of Indonesia as a maritime state. Prior to the Juanda Declaration, the ocean functioned as a barrier to integration from one island to the others due to the existence of high seas in between. Foreign vessels could access the waters and exploit the resources without providing benefits for Indonesia. This geographical setting also made Indonesia vulnerable to internal and external threat.

   Internally, separatism would find a perfect setting to initiate this mission. Each large island such as Kalimantan, Sumatera, Sulawesi, Papua and Java had more opportunity to declare their independence because they had less sense of belonging to the central government. As regarded by Indonesia scholars, the original character of Indonesia with a high level of diversity of ethnics, economies and religions would obviously contribute to spark the idea of an independent state.\textsuperscript{251} The government also would find it difficult to assume full control over the islands that were separated by high seas. Externally, foreign vessels would freely pass through the high seas to exercise the old maxim of freedom of navigation without taking

\textsuperscript{251} Habir, Gunawan and Andika, above n 135, 53.
into consideration the interest of surrounding states. If this arrangement applied to Indonesia at that time, Indonesia would be more exposed and tenuous to potential threats from other states.

After the Juanda Declaration, Indonesia turned into a solid maritime nation with a vast archipelago. The enactment of Law No. 4/Prp of 1960 enforced the declaration to obtain domestic and international recognition. This law comprises four rudimentary paragraphs:

1. The straight baselines connecting the outermost points of the outermost islands to measure a territorial sea;
2. Waters located within those baselines, including the sea-bed, its subsoil and the airspace above them shall be under the sovereignty of Indonesia;
3. Territorial sea shall be 12 nautical miles from baselines; and
4. Innocent passage through internal waters is legal insofar as not being prejudicial to the interest of the state and does not bother its security and good order.²⁵²

The method to draw a straight baseline from outermost points enables Indonesia to claim a land and sea area of about 5 193 250 square kilometres from the previous land area of about 2 207 087 square kilometres. Meanwhile, the territorial waters have increased by about 3 166 163 square kilometres.²⁵³ The straight baselines cover Indonesia solidly under one blanket. The territorial expansion also leads to the increased leverage of Indonesia in front of the international community. After the adoption of LOSC 1982, particularly with regard to the application of Part IV of the Convention, Law No. 4/Prp of 1960 has been amended by Law No. 6/1996 concerning Indonesian Waters. The amendment came from the considerations of security and defence, unity, economy and the protection of the environment from pollution and sustainability and management in Indonesia waters.²⁵⁴

3. The concept of maritime power.

It is evident that a maritime nation needs maritime power to achieve its vision. Following the notion of Deborah Sanders, maritime power extends to a general term of maritime duties that a state should perform. In her book titled ‘Maritime Power in the Black Sea’, Sanders highlights the capability to use the maritime domain to attain a political effect. Domestic political issues such as the development of the economy, the defence industry investment and

²⁵² Agoes, above n 166, 123-124.
²⁵⁴ Undang-Undang Republik Indonesia Nomor 6 Tahun 1996 tentang Perairan Indonesia [Law of the Republic of Indonesia Number 6 Year 1996 concerning Indonesia Waters] (Indonesia) [author’s trans].
political stability influence and shape the maritime power as such. Having said that, maritime power encompasses political, economic and social dimensions.255

As a maritime nation, Indonesia should focus on those three major interrelated components in order to envisage the maritime vision in the larger picture. Bruce and Scott hold a view that in the 21st century, maritime power does not cover fighting wars or the deployment of force at, or from, the sea *per se*, but it encompasses the capacity and ability to undergo various maritime tasks such as maritime resources preservation, maritime traffic safety and control, maritime border protection, maritime sovereignty protection, search and rescue duty and prevention of misuse of the ocean.256 As the largest archipelagic state in the world, Indonesia bears a great responsibility to ensure that all those tasks can be accomplished seamlessly. If Jokowi envisages Indonesia as a GMF, Indonesia should ensure that the components of maritime power, including marine resources preservation, be set as the highest national priority.


Indonesia entered the new phase in its history when making the commitment as a GMF. The terrestrial concept that was previously adopted by Indonesia was deemed and proven to be less relevant to building Indonesia when perceiving the geographical footprint of the country. President Jokowi and his vice president, Jusuf Kalla introduced this long-awaited concept to push forward ocean affairs on their inauguration to assume the post as Indonesia’s top leaders which took place before the People's Consultative Assembly members at the compound of the Assembly and House of Representatives on October 20, 2014. In his inauguration remarks, President Jokowi reinvigorated the maritime domain by proclaiming Indonesia as a maritime nation. He was of the view that ‘ocean, seas, straits and bays are the future of Indonesia’. He mentioned that those elements of oceans had been neglected for too long.257

The East Asia Summit convened in Myanmar on 13 November 2014 was observed by Jokowi as a fitting forum to launch the doctrine before international community representatives

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attending the summit. The rationale comes from Jokowi’s acknowledgment that the strategic role of this summit was to foster three critical aspects of security, stability and economic prosperity in the region.²⁵⁸ Chiefly, this doctrine rests on five areas, namely;

1. Rebuild Indonesia’s maritime culture. As a country consisting of 17,000 islands, Indonesia should be aware of, and see the oceans as, part of the nation's identity, its prosperity and its future are determined by how we manage the oceans.
2. Maintain and manage marine resources, with a focus on building marine food sovereignty through the development of the fishing industry.
3. Provide priority to the development of maritime infrastructure and connectivity by constructing sea highways along the shore of Java, establish deep seaports and logistical networks as well as developing the shipping industry and maritime tourism.
4. Through maritime diplomacy, Indonesia invites other nations to cooperate in the marine field and eliminate the source of conflicts at sea, such as illegal fishing, violations of sovereignty, territorial disputes, piracy and marine pollution.
5. Indonesia has an obligation to develop its maritime defence forces. This is necessary not only to maintain maritime sovereignty and wealth but also as a form of our responsibility to maintain the safety of shipping and maritime security.²⁵⁹

Those five pillars encompass different characteristics, but each aspect forms one notion of establishing a maritime nation and strengthening each other. The political manifesto and optimism of Jokowi to bring Indonesia to a maritime nation through the doctrine of GMF during his campaign and after being elected as the 7th President of Indonesia²⁶⁰ find its justification in two rationales, firstly the vast archipelago of Indonesia. As the largest archipelagic state in the world, Indonesia comprises five main islands and approximately 35 groups of smaller islands and islets. The total number of islands of Indonesia, that have been acknowledged in many works of literature, including in a book titled ‘Indonesia’s Delimited Maritime Boundaries’ approximate 19 000.²⁶¹ Based on the record of Indonesia’s Government, there exist 17 504 islands under Indonesia’s territory. However, this number has been updated by the 30th UN Group of Expert on Geographical Names (UNEGGN) lodged by the Indonesia delegation during the 11th UN Conference on Standardization of Geographical Names (UNCSGN) from 7-18 August 2017 in New York. As of July 2017, 16 056 islands have been verified by the UN. This total number includes 2590 islands that were registered in the 30th UNEGNN.²⁶² Arif Havas Oegroseno, Deputy Minister of the Coordinating Ministry for Maritime Affairs Office disclosed that there remain 1 448 islands that need to be validated

²⁵⁸ Witular, above n 53.
²⁵⁹ Ibid.
and verified. Following this process, those islands would be named and registered in the UN in the future. This naming procedure prevents an island from duplication.263

Secondly, Indonesia also lies in the strategic juncture of the often so-called posisi silang (known as crossroad) of two important continents, Asia and Australia, and in the global intersection of two influential oceans, the Indian Ocean and the Pacific Ocean.264 Some opportunities would prevail because of this characteristic such as rich biodiversity and major seaborne trade. Thirdly, other advantages of Indonesia in terms of its geographical nature come from the length of its coastline and its vast marine area. It has been claimed that Indonesia has 54 716 kilometres of seaside.265 Most of Indonesia’s entire area is covered approximately by 78% of marine waters266 constituting 5 193 250 square kilometres.267 These three factors determine the key role of Jokowi’s regime to manage the ocean and its resources through the lens of environmental concerns.

3.2. The Preservation of Marine Resources.

3.2.1 Ocean Policy.

On 20 February 2017, President Jokowi issued Presidential Regulation 16/2017 concerning the Ocean Policy of Indonesia. For the purposes of the Presidential Regulation, Article 1(1) reads:

Indonesian Ocean Policy is the general guidelines on ocean policy and its implementation through programs and activities of ministries or non-ministerial government institutions in the area of ocean affairs that is adopted to accelerate the implementation of Global Maritime Fulerum.268

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264 Lakshmana, ‘the Enduring Strategic Trinity’, above n 19.
266 Hutomo and Moosa, ‘Indonesian Marine and Coastal Biodiversity’, above n 18.
267 MMAF, International Organization for Migration and Coventry University, above n 11.
268 Peraturan Presiden Republik Indonesia Nomor 16 tahun 2017 tentang Kebijakan Kelautan Indonesia [Presidential Regulation Number 16 year 2017 concerning the Ocean Policy of Indonesia] (Indonesia) article 1(1) [Unofficial trans]. The document can be accessed at the website of the Coordinating Ministry of Maritime Affairs of the Republic of Indonesia: https://maritim.go.id/konten/unggahan/2017/07/Kebijakan_Kelautan_Indonesia_-_Indo_vers.pdf. The English translation of both documents can be found at https://maritim.go.id/ konten/unggahan/2017/07/offset_lengkap_KKI_eng-vers.pdf. All direct quotations of, and references to, both documents in this paper are taken from the English translation. (‘Indonesia Presidential Regulation on Ocean Policy’).
This Ocean Policy comprises two documents of the National Document on Indonesia Ocean Policy and the Plan of Action of the Indonesian Ocean Policy.\textsuperscript{269} In the nature of a government document, this policy serves as the common guidelines for government institutions at any level concerning maritime-related programs and policies as well as a reference for the public sector.

Most importantly, the long-awaited definition of GMF is provided in this Ocean Policy. It took three years to make this doctrine defined in a legal instrument. Prior to the adoption, this vision of Jokowi had been translated in different perspectives and there was a lack of detailed guidelines. The term “global” in this doctrine encompasses the ambitious projection of Indonesia’s maritime future. While Indonesia is struggling to assume a strategic and central position as a maritime nation in the region, it is questionable whether Jokowi’s vision can be achieved at the regional level considering the presence of maritime powers such as China and Japan. Indonesia needs to secure the recognition in the region beforehand to make the global vision materialize. With the enactment of Presidential Regulation 16/2017, Article 1 of the regulation defines GMF as Indonesia’s vision to become a maritime country that is sovereign, advanced, independent, robust and capable of contributing positively towards the peace and security of the region and the world as referred to as in its national interest.\textsuperscript{270} From the definition, it can be observed that two dimensions are involved, being internal and external. It demonstrates the internal dimension when projecting a vision of standing on its own feet and being a robust maritime nation without depending on other countries. In the meantime, aside from a domestic overview, Indonesia commits itself to mediate peace and security in the region and the world by looking at its national interest as a reflection of an external dimension.

In this comprehensive national document of Ocean Policy, GMF has been extended from an initial five main areas to seven pillars encompassing:

1. Marine and Human Resources Development;
2. Maritime Security, Law Enforcement and Safety at Sea;
3. Ocean Governance and Institutions;
4. Maritime Economy Development;
5. Sea Space Management and Marine Protection;

\textsuperscript{269} Ibid art 2.
\textsuperscript{270} Ibid art 1(2).
6. Maritime Culture;
7. Maritime Diplomacy.\textsuperscript{271}

The document also sets out further details of the program activities to implement Jokowi’s vision through a short-term five-year Plan of Action 2016-2019 covering 76 strategic policies and 425 activities designed to attain 330 targets. The following Figure 2 illustrates that three main elements of National Medium-Term Development Plan, Law No. 32/2014 on Ocean and \textit{Nawa Cita} contribute to the formation of Ocean Policy. Two factors that influence Indonesian Ocean Policy are seven Policy Pillars of GMF as stated above and six Principles comprising \textit{Wawasan Nusantara}, Sustainable Development, Blue Economy, Integrated and Transparent Management, Participation and Equality and Equitability.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Road Map of Indonesia Ocean Policy Towards Global Maritime Fulcrum\textsuperscript{272}}
\end{figure}

Some debates remain concerning the proper translation of ‘Kelautan’ into the English language. The national document refers to ‘ocean’ as providing a general overview of ‘kebijakan kelautan’ in national policy. It is argued that the word ‘ocean’ has a more accurate meaning than ‘maritime’ or ‘sea’. The rationale continues in internationally recognized legal or non-legal documents such as LOSC as a global constitution of ocean covering all aspects of ocean affairs. Nevertheless, Evan Laksamana introduces the alternative to the term by proposing ‘sea’ as a more appropriate term to translate ‘kelautan’. He invokes LOSC as the main reference since the term ‘sea’ is rooted in the Convention. It is very interesting to note that both meanings take different perspectives from the same source. The former highlights ‘ocean’ as a reference to the Constitution of Ocean, whereas the latter emphasizes ‘sea’ as stated in the LOSC. The two meanings can find their justification. However, the technical term of ocean may shed some light concerning the correct term to use. National Oceanic and Atmospheric Administration (NOAA) of the U.S Department of Commerce distinguishes Seas and Oceans. Seas are regarded as smaller than oceans in terms of their scope. Seas are also located where the land and oceans meet and are so typical to partially be enclosed by land. Therefore, the term ‘ocean’ would be more appropriate than ‘sea’ because it covers a wider meaning than ‘sea’ and carries a more general and comprehensive concept of ocean policy.

Apart from the technical term, ocean policy receives substantive feedbacks from scholars. In general, they praise the conclusion of ocean policy as a significant and comprehensive document to make GMF more executable in the field by government apparatus. As Laksamana puts it, the ocean policy acts as an effective ‘bureaucratic umbrella’ streamlining the existing programs and policies. This policy has more inward dimension than outward looking projections. Furthermore, the document describes that the role Indonesia would play in the region continues to be ‘the missing middle’ rather than a ‘force’ between Indian and Pacific Oceans. The perception of the major powers interaction in the region, to some

276 Laksmana, Indonesian Sea Policy, above n 274.
degree, influences the formulation of this policy. Arif Havas Oegroseno conceived that the
document projects the interest of Indonesia and its adaptive strategy to counteract strategies
of key powers in the region. Some conceptual strategies such as One Belt and One Road
(OBOR) Initiative introduced by China, Open and Free Indo Pacific and the U.S role in the
region present a clear narrative concerning the policies of major powers in pursuing their
national interests to the greatest possible extent.

3.2.2 IUU Fishing under Ocean Policy: A Critical Review.
This ocean policy, in which the implementation is under the supervision of the Coordinating
Ministry of Maritime Affairs, highlights five main clusters comprising:
1. Maritime Boundary, Ocean Space and Maritime Diplomacy;
2. Maritime Industry and Sea Connectivity;
3. Services and Industry of Marine Natural Resources and Marine Environment 
   Management;
4. Maritime Defence and Security; and
5. Maritime Culture.
Shafiah Muhibat suggests that these five clusters can be grouped into internal and external
dimensions. The group that has external elements is classified into the first cluster of
Maritime Boundary, Ocean Space and Maritime Diplomacy as well as the fourth cluster of
Maritime Defence and Security. On the other hand, the three remaining clusters are
inclined to cover internal dimensions. The first cluster sets four priorities in the negotiation
and agreement of the maritime boundary, the reinforcement of maritime diplomacy, the
conclusion of toponyms and the management of maritime space. The fourth cluster comprises
three main programs: marine defence, maritime security and IUU fishing as depicted in
Figure 3. It is worth noting that IUU fishing, as the last element of this cluster, has the most
detailed programs with 13 activities.

277 Arif Havas Oegroseno, ‘Indonesian Ocean Policy’ (Public lecture at the Centre for International Law,
National University of Singapore, August 29, 2017).
Affairs: Journal of the National Maritime Foundation of India 58.
Each program in this fourth cluster is broken down into activities, target, output, range of time, focal point, relevant institution and financial resource. The total seven priority programs of this fourth cluster comprise:

1. The development of robust maritime defence and security;
2. The development of oceanic national character to support national defence;
3. The enhancement of integrated capability and performance of the whole area of national jurisdiction and beyond national jurisdiction in accordance with international law;
4. The enhancement of Indonesia’s active role in the cooperation of maritime defence and security at regional and international levels;
5. The enforcement of sovereignty and law in Indonesian waters and jurisdiction;
6. The optimization of the system of command, control, communication, digitalization, intelligence, surveillance and reconnaissance; and
7. The elimination of fisheries crimes.

In the matrix as described in the annex to the Presidential Regulation 16/2017, MMAF has a role as a focal point for the last program of fisheries crimes elimination. Meanwhile, MMAF is involved in some activities of the third, fifth, sixth and seventh programs.

It is very interesting to perceive that IUU fishing falls under the fourth cluster of maritime defence and security. It may suggest that the government takes this view based on the following three rationales:

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1. IUU fishing has the same aspect as maritime defence and security.
2. IUU fishing should be addressed from the perspective of maritime defence and security. As such, it is more a security problem than a fisheries management issue.
3. The measures to address maritime defence and security need to be integrated with the policy to combat and eliminate IUU fishing.

All these three reasons shape the Government’s perspective to take robust measures to eliminate IUU Fishing.

The approach taken by the Government gives rise to three following challenges:
1. The policy to observe IUU fishing from the defence and security points of view leads to the conceptual debate of the whole term of IUU fishing and appropriate measures to respond. While illegal fishing has a different meaning and context from unreported and unregulated fishing, it appears to make inappropriate generalizations when imposing a defence and security approach to combat unreported and unregulated fishing.
2. It would be understood if the defence and security approach is taken to combat illegal fishing and transnational organized crimes involvement such as drug trafficking, people smuggling, money laundering, terrorism and other crimes transnationally organized in the fisheries sector. However, not reported or misreported and unregulated fishing should be perceived within a different context because they do not pose a threat to national security.
3. This ocean policy document also renders MMAF responsible for combatting fisheries crimes. In this ocean policy, the lack of narrative on the interplay between IUU fishing and fisheries crimes gives rise to the perception that IUU fishing and fisheries crimes have the same context. In reality, from a conceptual perspective, those two practices are not always identical.

Taking into consideration the three challenges, it would be more proper if illegal fishing, involving transnational crimes, falls under this fourth cluster, yet the elements of unreported and unregulated fishing should be under the third category, Services and Industry of Marine Natural Resources and Marine Environment Management. The comprehensive discussion concerning IUU fishing and fisheries crimes from the legal and policy frameworks perspective will be presented in the subsequent chapters of this thesis.

4. Conclusion.
This part continues to comprehend the national vision to project Indonesia as a maritime nation and to encourage the country to play a greater role in the maritime domain of the
world. In Indonesia’s national history, maritime journey has experienced a fluctuation. The story of old kingdoms in the past illustrates that ancestors of Indonesia had a deeply-rooted maritime culture and occupied a vast area in the region, widely known as Nusantara. However, after the wave of arrivals from western countries such as the Portuguese, Spanish, Dutch and English to colonize the influential ports and cities in the region, the maritime tradition and culture started to decline. Not only did the colonials destroy the maritime connectivity but also the centres of economy and political governance in Southeast Asia. The colonialization profoundly affected the sea trade in the region for the reason that the only route to connect the major cities at the time was through the sea lanes. The traders found it challenging to access the land route due to extremely dense forests and frequent rainfall.

Indonesia started to revitalise the maritime spirit and reaffirm the nation as a maritime nation when Joko Widodo assumed power as the seventh president of Indonesia. However, this part offers a critical review of the concept of maritime nation and whether or not Indonesia previously qualified as a maritime nation. In the course of conceptual discussion on the maritime issue, there exist the concepts of sea power and maritime power. The former was introduced by A.T Mahan in 1890 focusing on six essential elements to establish a dominant sea power of a nation. It appears that Mahan's overview was directed at large maritime powers such as the U.S and Great Britain with the main objective to establish a great naval power. Sea power has evolved and expanded into a broader scope encompassing non-hard power elements such as influence. In the modern school of thought, sea power combines international trade and marine resources exploration. Sea power has the same level as air and land power in lending support to military power. When focusing on the qualifications as a maritime nation, this part presents the argument that Indonesia deserves to be a maritime nation for three reasons: the history, archipelagic state status and its meeting the requirements of a maritime nation as set by scholars.

This political commitment as a maritime nation has been translated further by projecting Indonesia as a GMF. The doctrine of GMF previously rested on five pillars but has expanded into seven major elements. A number of factors can be drawn to examine the rationales behind this vision. Firstly, Indonesia is the largest archipelagic country in the world. Secondly, Indonesia’s holds a strategic position in the region. Thirdly, Indonesia has the second longest coastline in the world with its vast marine area. The adoption of Ocean Policy has translated the doctrine into more detailed programs. This policy serves as the main
reference to the Government institutions and public sector. Most importantly, the definition of a GMF is provided by embracing two different dimensions, internal and external. Internally, Indonesia should stand on its ‘own feet’, and externally Indonesia has a commitment to contribute to regional and global peace and security.

In order to make the implementation of ocean policy integrated, seven priorities have been grouped into five clusters. It is worth noting that IUU fishing holds a distinct position in this document since this activity falls under the fourth group of maritime defence and security. Therefore, it can be observed that IUU fishing has defence and security dimensions. The measures needed to overcome IUU fishing include harmonization and integration with defence and security policies and IUU fishing should be eliminated by using the perspective of defence and security. In short, security and defence approaches come to the fore and play a more prominent role than fisheries management to combat IUU fishing. The inclusion of IUU fishing in this fourth cluster poses three challenges. Firstly, illegal fishing has a different context to unreported and unregulated fishing. Secondly, the defence and security approach should be imposed to address illegal fishing involved with transnational organized crimes. Thirdly, IUU fishing and fisheries crimes are not always identical. Therefore, it is recommended that the fourth cluster covers only illegal fishing with transnational crimes dimension and the elements of unreported and unregulated fishing should fall under the third category.
PART IV
POLICY PERSPECTIVES OF IUU FISHING AND TRANSNATIONAL ORGANIZED FISHERIES CRIMES

1. Introduction.

In the commencement, Part III delivers the discussion on the maritime history of Indonesia. The same subject is also elaborated in Part II. Nevertheless, each encompasses a different focus. For Part II, it offers a more comprehensive overview on Indonesia’s struggle to be admitted as an archipelagic state. In this context, the maritime history lays a backdrop that maritime culture and journey are deeply rooted in the nation’s history that supports the proposal to assume the archipelagic status. Meanwhile, for Part III, historical overview signifies the notion that maritime trail of Indonesia had ascended and descended before Jokowi’s doctrine of GMF was introduced. Part III goes further by examining marine resources preservation including the IUU fishing issue under GMF and ocean policy. At the end, a critical review of IUU fishing in ocean policy provides a comprehensive discussion of how the Government of Indonesia perceives IUU fishing in its policy structure.

This part mainly analyses the policy frameworks of Indonesia to address the problems of IUU fishing and Transnational Organized Fisheries Crimes (TOFC).

Firstly, it outlines the international and national backgrounds of the subject matter. The backgrounds present a more precise and more comprehensive understanding of how decision makers should interpret the policies. At international level, it delivers the conceptual developments by discussing IPOA-IUU fishing, United Nations General Assembly resolutions, Agenda 21, the Johannesburg Declaration and its plan of implementation, the Rio Declaration, Goal 14 and the Reykjavik Declaration.

This part discusses the state practices of two countries, the United States and South Africa in their determination to sustain the marine ecosystem through policy efforts. State practices can be beneficial in eliciting lessons learned from both positive and negative points of view alike. In general, according to Anastasia Telesetsky, countries ‘have not remained indifferent’ in addressing IUU fishing and have embraced ‘a polycentric governance’ method, by using

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282 Term Transnational Organized Fisheries Crimes in this thesis is used interchangeably with fisheries crimes and Fisheries related Crimes or Crimes associated with the Fisheries sector due to the lack of any agreed definition on the subject matter.
management practices that have arisen and intersected in some distinct stages. The main reason to involve the two countries is chiefly because their policies contribute to some positive outcomes.

In the domestic light, this part presents measures and challenges. Indonesia has developed a number of policies such as a moratorium and transhipment prohibition. Nevertheless, some challenges including resistance from fishers and the NPOA on IUU Fishing, which has expired, still remain. The policy issues are then examined, focusing on inter-agency cooperation and inter-country collaboration. The subsequent section proposes some measures to cope with the problems.

2. International and Domestic Backgrounds.

From the perspective of policy, international and domestic backgrounds are imperative to provide comprehensive understanding on IUUF and TOFC. In determining appropriate policies, policymakers should observe and consider relevant domestic and international instruments so that the policies taken will be adequately coherent with the developments at national and international levels. This general overview also applies to the discussions on protection of a sustainable marine ecosystem. Particular attention is paid to IUU fishing as a major global problem threatening ocean ecosystems and sustainable fisheries as well as undermining conservation and management measures at both domestic and international levels.

2.1. International and Comparative Settings.

2.1.1. The Conceptual Developments.

In discussing policy perspective from an international background, it is important to firstly touch upon the description of IUU fishing and give a brief history of the activity in respect of this thesis objective as an illustration of how the current situation has developed. The following is the explanation of IUU fishing:

Illegal Fishing refers to activities conducted:
   (a) by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
   (b) by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and

283 Telesetsky, above n 14, 961.
Unreported Fishing refers to fishing activities which:
(a) have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
(b) undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unregulated Fishing comprises fishing activities:
(a) in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
(b) in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.285

Even though the terms ‘Illegal’, ‘Unreported’, and ‘Unregulated’ were formally adopted in IPOA-IUU in 2001,286 concerns and notions about IUU fishing activity commenced in the early 1990s. After the adoption of LOSC,287 negotiations were established through the development of legally binding and non-legally binding instruments to fight against unsustainable fishing activities and to encourage the preservation of fisheries resources.288 The 1995 United Nations Fish Stocks Agreement (UNFSA)289 and the 2009 Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA)290 are examples of hard mechanisms while IPOA-IUU291 and the 1995 FAO Code of Conduct for Responsible Fisheries (‘Code of Conduct’)292 are prominent instances of ‘soft law’ as they are non-legally binding instruments. Those hard and soft instruments play significant roles as a policy and legal reference in combatting IUU fishing in domestic and international levels. Albeit non-legally binding, it does not mean that the instruments are less important than those with legal binding character. Non-legally binding instrument may offer

286 Ibid.
287 Law of the Sea Convention.
289 The 1995 United Nations Fish Stocks Agreement.
290 The 2009 Port State Measure Agreement.
a better and elastic approach for countries to accept and follow the provisions set by countries on common ground issues particularly when certain states have some concerns and are reluctant if the articles prompts legal ramifications toward them. Those voluntary mechanisms can be a reference for countries in their national document. One instance is Malaysia’s NPOA on IUU fishing. This instrument states that “the IPOA-IUU defines IUU fishing according to the definitions below. Malaysia also uses these definitions in her NPOA-IUU”. While it is the authority of Malaysia to establish the explanation of IUU fishing in IPOA-IUU fishing as a definition in its NPOA-IUU fishing, however it should be properly understood that the narrative “the IPOA-IUU defines IUU fishing” is incorrect since IPOA-IUU fishing generates non-legally binding provisions and there is no a definition as such.

At the international level, marine ecosystems have been a global problem and a concern of world leaders. They agreed to call immediate action to address IUU fishing through United Nations General Assembly (UNGA) resolution number A/RES/66/68 adopted on December 6, 2011. This resolution accentuates the grave concern over IUU fishing and acknowledges it as one of the continuing most significant challenges to marine sustainability. It is necessary for countries to have the effective control over their fishing vessels in order to prevent and deter them from conducting IUU fishing.

UNGA also adopted two resolutions recognizing the possible link between illegal fishing and transnational organized crimes through UNGA Resolution 67/79 and UNGA Resolution 68/71. In addition to these resolutions, countries set several mechanisms as a solid commitment to sustaining marine ecosystems and combatting IUU fishing such as Agenda 21, the Future We Want, Code of Conduct for Responsible Fisheries, IPOA-IUU fishing and the other relevant non-legally binding instruments.

The first formal meeting to identify the elements of IUU fishing took place at the United Nations Conference on Environment and Development (UNCED) in 1992. The delegates at the conference reached some agreements including what is known as Agenda 21. Chapter 17

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293 Department of Fisheries of Malaysia, *Malaysia’s National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Malaysia’s NPOA-IUU)* (Department of Fisheries, Ministry of Agriculture and Agro-based Industry of Malaysia, 2013) 3.
294 United Nations General Assembly Resolution A/RES/66/68 adopted on 6 December 2012, paragraphs 43 and 44.
of Agenda 21 encompasses some aspects identified as main hurdles to the sustainable management of fisheries in areas under national jurisdiction, and water columns beyond national jurisdiction. For the high seas fisheries, the identified problems, among others, are ‘unregulated fishing, overcapitalization, excessive fleet size, vessel flagging to escape controls, insufficiently selective gear, unreliable databases and the lack of sufficient cooperation between States’.

Countries whose vessels fly their flags fishing in high seas are encouraged to strengthen cooperation bilaterally, sub-regionally and globally to manage especially highly migratory species and straddling stocks. The cooperation should also settle problems in fishing activities including in biological information, fisheries statistics and upgrading data management. Meanwhile for areas under national jurisdiction, major issues affecting fisheries are ‘local overfishing, unauthorized incursions by foreign fleets, ecosystem degradation, overcapitalization and excessive fleet sizes, under evaluation of catch, insufficiently selective gear, unreliable databases, and increasing competition between artisanal and large-scale fishing, and between fishing and other types of activities’. In this area, three measures recommended to be focussed on encompass management-related activities, data and information as well as international and regional cooperation and coordination.

In 2002, world leaders attended the World Summit on Sustainable Development in Johannesburg, South Africa. In this forum, they agreed to adopt the Johannesburg Declaration and its Plan of Implementation. In this political document the depletion of fish stocks and the loss of biodiversity was recognized. The leaders acknowledged the importance of Agenda 21 and the Rio Declaration on Environment and Development in playing a pivotal role in setting up a new scheme for sustainable development. Under the

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297 Transforming Our World: The Agenda for Sustainable Development, General Assembly Resolution 70/1, UNGAOR, 17th Sess, Agenda Item 15 and 116, UN Doc A/RES/70/1 (21 October 2015), para 17.45 Hereinafter referred to as Agenda 21. (‘Agenda 21’).
298 Ibid.
299 Ibid para. 17.71.
300 Ibid para. 17.77-17.90.
In the Plan of Implementation of the Johannesburg Declaration, it was necessary to ensure the sustainable development of the oceans by conducting, coordinating and cooperating effectively at regional and global levels amongst related institutions. This was to be done amongst other things, by calling countries to ratify and accede to LOSC, promoting the implementation of Chapter 17 of Agenda 21, establishing proper coordination mechanisms on oceans and coastal matters in the United Nations systems, encouraging the implementation of the ecosystem approach as referred to in the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem\textsuperscript{304} and the Conference of Parties to the Convention on Biological Diversity.\textsuperscript{305} This would thus enhance regional coordination and cooperation amongst related regional bodies including Regional Fisheries Management Organizations (RFMOs) and take into account the open-ended informal consultative process initiated by the United Nations General Assembly through Resolution 54/33.\textsuperscript{306}

This plan of implementation further requires countries, \textit{inter alia}, to foster or restore stocks to the maximum sustainable yield as a matter of urgency, and not later than 2015 to their best extent, ratify or comply with the United Nations and related fisheries agreement or arrangement notably United Nations Fish Stocks Agreement and the 1993 Food and Agriculture Organization Compliance Agreement. Additionally, countries are encouraged to apply the 1995 Code of Conduct for Responsible Fisheries, Implement International Plan of Actions under the Food and Agriculture Organization including IPOA-IUU fishing and eliminate subsidy practices contributing to IUU fishing and over-capacity.\textsuperscript{307}

The United Nations continues to maintain and secure sustainable development globally through the adoption of the General Assembly Resolution A/RES/70/1 of 25 September 2015 concerning the 2030 Agenda for Sustainable Development.\textsuperscript{308} The Agenda is determined to be ‘a plan of action for people, planet and prosperity’. There are 17 goals and 169 targets for sustainable development in this document demonstrating the determination of a new

\begin{enumerate}
\item\textsuperscript{303} Ibid paras 8-9.
\item\textsuperscript{304} FAO, UN Doc C200/INF/25, appendix I.
\item\textsuperscript{305} United Nations Environmental Program, UNEP/CBD/COP/5/23, annex III.
\item\textsuperscript{306} Report of World Summit on Sustainable Development, A/CONF.199/20, para 30.
\item\textsuperscript{307} Ibid para 31.
\item\textsuperscript{308} Agenda 21, UN Doc A/RES/70/1.
\end{enumerate}
universal agenda. Those goals and targets came into effect on 1 January 2016 and are proposed to be applied until 2030 in this area of urgent attention needed for humankind and the world.\textsuperscript{309}

The agenda most related to ocean affairs lies in Goal 14, that is, Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development. In this goal, there are 7 (seven) targets to achieve on the issues of marine pollution, marine and coastal ecosystem, ocean acidification, fishing activities, conservation of coastal and marine areas, fisheries subsidies and economic benefits to small island developing states and least developed states.\textsuperscript{310} Particular attention concerning IUU fishing is given to Agenda 14.4 on fishing activities. By 2020, member countries of the United Nations should: a) apply management measures when harvesting fish; b) eliminate overfishing, IUU fishing and destructive fishing activities; and c) apply management plans based on science aiming to revive fish stocks, at least to the maximum sustainable yield level.\textsuperscript{311}

IUU fishing and transnational organized fisheries crimes have been an emerging issue in UNODC. As guardian of the UNTOC and its supplementary protocols, UNODC issued a publication on the connection between illegal fishing and TOC. In this report, a different outlook is taken by referring to only illegal fishing, without unreported and regulated fishing, as it is deemed as having the equivalent perspective as fisheries crime but with a broader depth.\textsuperscript{312} This report presented many cases depicting the close relationship between ‘fishing industry and other transnational criminal activities’. It also discovered human trafficking activities in the fishing industry in addition to crimes such as the trafficking of cocaine and other illicit drugs found to be transported by fishing vessels.\textsuperscript{313}

UNODC and World Wildlife Fund (WWF) co-organized an Expert Group Meeting on Fisheries Crime on 24 to 26 February 2016 in Vienna. There were three primary objectives of this meeting. First was to identify the most effective means to address ‘transnational organized fisheries crimes’ through law enforcement and criminal justice including

\textsuperscript{309} Ibid preamble.
\textsuperscript{310} The relevance of Agenda 2030 and sustainable marine resources including IUU fishing practices is discussed in Goal 14.
\textsuperscript{311} Ibid para 14.4.
\textsuperscript{313} Ibid 40.
Twentythird Unreported a offence fisheries management issue I collating addressing the problem was Fisheries Crime Working Group reforms conferences and other international The measures domestically and internationally organized, and can have severe adverse social, economic and environmental impacts both domestically and internationally. In this forum, fisheries crime was explained as ‘serious offences within the fisheries resource sector that take place along the entire food products supply chains and associated value chains, extending into the trade, ownership structures and financial services sectors. The ‘serious’ term was not associated with the definition found in the UNTOC but instead it was meant to impact on the community extensively. Fisheries crime was also regarded as having connection with other criminal offences and generally be ‘transnational, largely organized, and can have severe adverse social, economic and environmental impacts both domestically and internationally’. The measures to eliminate IUU fishing have been systemically undertaken through UN conferences and other international forums. The two distinctive organizations, UNODC and FAO, assume leading roles in advocating member states to develop their domestic policy reforms. Nevertheless, as conveyed by Gunnar Stølsvik, Chairperson of the INTERPOL Fisheries Crime Working Group, in ASEAN Regional Forum Workshop on IUU Fishing, it was necessary to differentiate the roles of FAO (IUU fishing) and UNODC (fisheries crimes). This distinction is imperative to allow each organization to be more focussed in addressing the problem on the basis of each organization’s mandate. Nonetheless, collaboration and coordination between the two organizations should regularly be managed. In the international stage, the conceptual development of IUU fishing has evolved from a mere fisheries management issue under the auspices of FAO through IPOA-IUU fishing to developing new approaches, secondly was to discuss tools to promote international collaboration and inter-institution cooperation in ‘investigating and prosecuting fisheries crimes’, and thirdly was to elaborate the ways for international society to receive support from UNODC for ‘capacity building and opportunities to improve knowledge and skills to better address fisheries crime along the entire value chain’.  

315 Transnational Organized Crime Convention art 2(b). “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. 
the activities related to crimes. The international community puts a lot of efforts to address IUU fishing by setting it as international agenda. The UN has admitted the possible nexus between illegal fishing and TOC by adopting several resolutions, and the current development shows a more robust measure by aligning illegal fishing and TOC. FAO and UNODC assume a key role in pushing this further. Albeit very slow in the progress, this matter continues to get more attention from international society.

2.1.2. Practices of Other Countries as Lessons Learned.

2.1.2.1. The United States.

The Government of the United States (U.S) is greatly concerned over IUU fishing and regards it as a national priority since the management and conservation of fish stocks are undermined and the sustainable level of fisheries is threatened by this activity.318 Some policies such as the formation of the Presidential Task Force on Combating IUU Fishing and Seafood Fraud, Ratification to Port State Measure Agreement as well as port entry and access restrictions to port services have been endorsed by the U.S Government to tackle IUU fishing. In addition, the U.S Government also has powerful tools through the stipulation of the Magnuson-Steven Reauthorization Act and the Lacey Act in its domestic legislation system.319

The establishment of Presidential Task Force on Combatting IUU fishing marks a further serious step taken by the U.S Government to combat IUU fishing. This task force was formed under a Presidential Memorandum on Establishing a Comprehensive Framework to Combat Illegal, Unreported and Unregulated Fishing and Seafood Fraud on 17 June 2014. This team is an inter-agency coordinating unit comprising 14 government institutions, co-chaired by the Department of Commerce and the Department of State. It has the authority to reveal recommendations through the National Ocean Council and circulated in the Federal Register. It has come up with 15 recommendations for agencies ‘to take concrete and specific measures to combat IUU fishing and seafood fraud’ along the supply chain.320

320 Presidential Task Force on Combating IUU Fishing and Seafood Fraud, *Action Plan for Implementing the Task Force Recommendations* (the U.S Government, 2014) 3. Co-chaired by the Departments of State and Commerce through NOAA, the Task Force is made up of 12 other agencies. They include: the Council on Environmental Quality; the Departments of Agriculture, Defence (Navy), Health and Human Services (FDA), Homeland Security (Customs and Border Protection, Immigration and Customs Enforcement, U.S. Coast
In shaping the formulation of those recommendations, it is important to note that the task force took several steps. Most importantly, it has engaged public participation to obtain the public’s opinion and develop the recommendations. Interestingly, this process involved not only domestic but also relevant countries having an interest in fisheries and marine coastline. The following measure is finding potential loopholes by reviewing the coordination amongst existing related institutions in combatting IUU fishing and seafood fraud. The application of recommendations principally falls into 4 (four) categories: Firstly, the fight against IUU Fishing and seafood fraud at international level. Secondly, the strengthening of law enforcement and the promotion of enforcement means. Thirdly, establishing and extending cooperation with non-federal entities to investigate and eradicate seafood deception and the transaction of IUU seafood products in the U.S. Fourthly, disseminating information available on seafood products through a mechanism of traceability.

In those 15 recommendations, the Task Force sets the reasons, implementing steps and timeframes. The recommendations are as follows:

1) Following up Port State Measures Agreement by passing its implementing legislation and promoting its implementation;

2) Best practices for catch documentation and data tracking as well as other measures such as boarding and inspection on the high seas, MCS (Monitoring, Control and Surveillance), port state control, promoting the adoption of monitoring in Regional Fisheries Management Organizations (RFMOs);

3) Promoting maritime domain awareness including analysing and monitoring the threat of IUU fishing;

4) Using Free Trade Agreements to address IUU fishing and seafood fraud;

5) Eliminating fishery subsidies contributing to excess fishing capacity. Overfishing and IUU fishing;

6) Building capacity for the management of sustainable fisheries and the elimination of IUU fishing;

7) Diplomatic priority when combatting IUU fishing and seafood fraud;

Guard), the Interior (U.S. Fish and Wildlife Service), and Justice; Federal Trade Commission; Office of Management and Budget; Office of Science and Technology Policy; U.S. Agency for International Development, National Security Council; and Office of the U.S. Trade Representative.

322 Ibid 3.
8) Sharing and analysing information and resources ‘to prevent IUU fishing or fraudulently labelled seafood from entering U.S commerce’;
9) Promoting Custom Mutual Assistance Agreement by exchanging information and encouraging ‘foreign customs administrations’;
10) Standardizing and clarifying regulations when identifying the species, common name and origin of seafood;
11) Working with state and local enforcement institutions to disseminate sharing of information and develop means of addressing IUU fishing and seafood fraud;
12) Broadening agency enforcement authorities;
13) Establishing a regular forum with related stakeholders;
14) and 15) Traceability program. The two recommendations encompass one program with two stages. The first phase is identifying and developing, within six months, any information and operational standards of traceability while the second phase is establishing a risk-based traceability program as a continuation of the first phase.

In the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) of 2006, there is an acknowledgment for international cooperation to combat IUU fishing affecting sustainable fisheries around the globe. This Act amended the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act). This Moratorium Act was amended by the Shark Conservation Act to upgrade conservation of sharks at domestic and international levels. It is required by the Moratorium Act that NOAA report to Congress biennially. This report should list countries that have incomparable regulatory measures to those of the U.S.324

In the Report to Congress pursuant to Section 403(a) of the MSRA, during 2013 and/or 2014 there existed four countries identified as engaging in IUU fishing based on Conservation and Management Measures (CMMs). The countries are Colombia, Ecuador, Nicaragua and Portugal. This is an improvement from the 2013 report identifying ten countries, namely: Columbia, Ecuador, Ghana, Italy, Korea, Mexico, Panama, Spain, Tanzania and Venezuela.325 In 2017 the report to Congress, three countries have been identified for having vessels to be engaged in IUU fishing from 2014 to 2016 by the U.S Government, Ecuador,

Mexico and Russia while three others, Costa Rica, Italy and Panama, held a status ‘Countries “of interest” Not Identified’. Following up this listing, either positive or negative responses will be obtained by those states after having consultation with the U.S. For countries receiving a negative response, they will be denied entry to the U.S ports and navigation in the U.S waters.

It is important to highlight that the U.S Government has adopted a more rigorous definition of IUU fishing than as stated in IPOA-IUU fishing. This definition is incorporated in Section 403 of MSRA as an amendment to the Moratorium Protection Act by adding, amongst others, a new section 609 on IUU fishing. Through this definition, the U.S has extended implementation of the MSRA of 2006 to areas beyond the US national jurisdiction and to fisheries activities in which there are no international regulations in place. Section 609(e)(3) defines IUU fishing, at the minimum, as:

a) Fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including catch limits or quotas, capacity restrictions, and bycatch reduction requirements;
b) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement that has adverse impacts on such stocks; and
c) Fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold-water corals located beyond national jurisdiction, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement.

Another essential regulatory framework of the U.S is the Lacey Act. This Act was adopted in 1900 and amended in 1981. Through this Act, the U.S Government has jurisdiction to bring before the court its nationals committing IUU fishing activities, even when operating on board foreign fishing vessels. In this Act, ‘It is unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of a foreign law’. This Act is considered an effective tool in

326 Ibid 24-33.
327 Telesetsky, above n 14, 976.
328 Mary Ann Palma, ‘Combating IUU Fishing: International Legal Developments’ in Quentin Hanich and Martin Tsamenyi (eds), Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region (ANCORS, University of Wollongong, 2009) 71, 83.
329 Ibid 82.
addressing IUU fishing by providing ‘long arm national jurisdiction’ as applied in the Bengis case.\textsuperscript{331}

Despite the fact that the U.S Government applies a rigorous policy and enforcement to eliminate IUU fishing, the administration does not have a specific policy to respond the concept of TOFC. The Presidential Task Force on Combatting IUU Fishing and the Seafood Fraud in its regular report presented to Congress identifies countries whose fishing vessels engage in IUU fishing. The presidential level of the IUU fishing task force shows a matter of urgency for the country to address the problem. The gradual steps taken by the government through consultation should be observed as a positive measure to be learned. Unfortunately, the IUU fishing and seafood fraud task force in the report does not acknowledge crimes associated to fisheries or TOFC as an important issue that should be settled down appropriately.

\section*{2.1.2.2. South Africa.}

In South Africa, fisheries are conceived as an important sector concerning employment for both unqualified and semi-unqualified workers, particularly in the Western Cape. The Department of Agriculture, Forestry and Fisheries of South Africa estimate that there are around 27 000 labourers directly employed in, and 100 000 workers indirectly dependent on, the industry of fishing.\textsuperscript{332} The central government institution with the responsibility of governing fishing activities nationally in South Africa is the Department of Agriculture, Forestry and Fisheries (DAFF).\textsuperscript{333} In virtue of regulation framework, according to Vrancken, ‘fisheries legislation has a long history in South Africa Law’.\textsuperscript{334}

South Africa has enacted the Marine Living Resources Act (MLRA) 18 of 1998 regulating the utilization of marine resources as the main reference for fisheries law. The principles and objectives of MLRA are, among others, related to optimum utilization, conservation, precautionary approaches, ecological balance, protection of the ecosystem, preservation of marine biodiversity, marine pollution, engagement in the process of decision-making,

\textsuperscript{331} Palma, ‘Tightening the Net’, above n 59, 163.
\textsuperscript{332} The Department of Agriculture, Forestry and Fisheries of South Africa, \textit{The Strategic Plan for the Department of Agriculture, Forestry and Fisheries 2013/14 to 2017/2018} (Directorate of Communication Services, 2013) 17.
national obligation under international law, fishing industry restructuration, equal access promotion, fisheries management, and fish allocation through a multi-species approach.\textsuperscript{335} This Act together with the more general National Environmental Management Act 107 of 1998 (the 1998 National Environmental Management Act) provide the main regulation for the enforcement of administrative and/or criminal infringements as well as punishments for the violations on fisheries.\textsuperscript{336}

The preamble of the 1998 National Environmental Management Act states that the environment should be protected through reasonable legislative and other measures that, among others, promote conservation as well as secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.\textsuperscript{337} Under Part 3 of Judicial Matters, this Act provides legal standing to enforce environmental laws\textsuperscript{338} and private prosecution\textsuperscript{339} and criminal proceedings.\textsuperscript{340}

Countries in Africa including South Africa have problems with illegal foreign fishing vessels, mainly from China. As revealed by Greenpeace, there was a dramatic increase in the number of Chinese fishing vessels catching fish in Africa, from only 13 in 1985 to 462 in 2013. The investigation discovered that 114 of these illegal fishing vessels operated in Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone waters over eight years.\textsuperscript{341} As disclosed by Van As, South Africa faces illegal fishing and transnational organized crimes issues by Chinese boats, as occurring on high seas.\textsuperscript{342} In a recent case, Chinese vessels were fined R1.3 million (around US$91 000) by South African authorities for undertaking unlawful fishing such as the possession of fishing devices without licences. As the offenders are highly

\textsuperscript{335} This Act has been amended through the Marine Living Resources Amendment Act 68 of 2000, National Environmental Management: Protected Areas Act 57 of 2003 and Marine Living Resources Amendment Act 5 of 2014. See Chapter 1 (Introductory Provisions) for objectives and principles. There are 4 (four) additional objectives and principles as the amendment to Act 5 of 2014, namely: national obligation under international law, equal access promotion, fisheries management and fish allocation through a multi-species approach.

\textsuperscript{336} National Environmental Management Act 107 of 1998 (South Africa) Preamble.

\textsuperscript{337} Ibid.

\textsuperscript{338} Ibid art 32.

\textsuperscript{339} Ibid art 33.

\textsuperscript{340} Ibid art 34.


organized, financially capable and transnationally operated in committing the crimes, such trials infrequently occur.\textsuperscript{343}

South Africa also encounters IUU fishing like the other countries. This activity in South Africa occurs not only in small-scale fisheries but also in the commercial fishing sphere.\textsuperscript{344} According to an assessment from DAFF, marine living resources are regarded as fully exploited and high-value species are extensively overexploited in the commercial fisheries. The decline of Abalone and Patagonian stocks is a good example of the result of IUU fishing activities. The sustainability of other fish species such as Hake and Pilchards, known as an important commodity in the South Africa fisheries industry, are also affected by IUU fishing in the current cases. In addition, lobsters and sharks were also reported as targets of poaching.\textsuperscript{345}

For the execution of the provisions of MLRA, including combatting IUU fishing, fishery control officers are the primary government officials having authority to enforce the law.\textsuperscript{346} South Africa is determined to fight against IUU fishing and fisheries crimes through some initiatives such as cooperation between international police and PescaDOLUS (independent research network) and enhanced collaboration between the Monitoring, Surveillance and Control Unit of the Department of Agriculture, Forestry and Fisheries (DAFF) and the South African Police.\textsuperscript{347}

As championed by the Centre for Law in Action of the Nelson Mandela Metropolitan University (NMMU), the Department of Trade and Industry and Fisheries of Norway has approved the establishment of a law enforcement academy through a project called FishFORCE in the university. After initiating previous work between PescaDOLUS and the Norwegian Government, the Centre for Law in Action proposed a further collaboration with the Government through the project aiming to fight against fisheries crimes. This cooperation was affirmed by the signing of the agreement on June 6\textsuperscript{th}, 2016 during the conference on


\textsuperscript{344} Coning and Witbooi, above n 319, 209.

\textsuperscript{345} The Department of Environmental Affairs of Republic of South Africa, State of the Environment: State of South Africa’s Fisheries (Directorate of Communication Services, 2012) 3.

\textsuperscript{346} Marine Living Resources Act 1998 (South Africa) Chapter 6, Section 51.

\textsuperscript{347} Coning and Witbooi, above n 319, 212.
Operation Phakisa and the Ocean Economy in Port Elizabeth. The project is in the form of an academy providing training for related government officials such as ‘Fisheries Control Officers, police officers and prosecutors’ in South Africa, along the coastlines of East Africa and Namibia. Further collaboration will be extended to countries around the Indian Ocean Rim, including Indonesia.  

2.2. Domestic Background.

2.2.1. Recent Developments: Indonesia’s Measures to Combat IUUF and TOFC.

As an archipelagic country in Southeast Asia, Indonesia lies between the continents of Asia and Australia surrounded by two oceans, the Indian Ocean in the southern part and the Pacific Ocean in the northern part. Indonesia is also located in a strategic location, astride or along major sea lanes from the Indian Ocean to the Pacific Ocean. Indonesia's coastline is determined as the second longest in the world after Canada. In total, Indonesia is covered by 5.8 million square kilometres of marine water comprising 3.1 million kilometres of waters in the territorial zone (<12 miles) and 2.7 million kilometres in the EEZ (12-200 miles). In proportion, it is assessed that Indonesia’s territory encompasses more than 50% marine waters. By occupying that total area, Indonesia is acclaimed as the largest archipelagic country in the world and the world’s third largest EEZ. Considering the comparison between EEZ and territorial waters, the scope of sovereign rights to explore marine living resources and non-marine living resources means EEZ offers enormous potential for Indonesia.

In light of biodiversity, as disclosed by Sudirman, the former Director General of Marine, Coasts and Small Islands, the MMAF of Indonesia, Indonesia is situated at the centre of the Coral Triangle. This area is ‘home to the richest marine biodiversity on Earth.’ In terms of coral ecosystems, Indonesia is prominent for the diversity encompassing 18 per cent of coral reefs in the world, more than 70 genera and 500 coral species, 2500 fish species, 2500


mollusc species, 1500 Crustacea species and various marine biota. In retaining the sustainability of the fisheries sector, the waters of Indonesia are managed in eleven Fisheries Management Areas (FMAs) (Figure 4). This division can be discerned as an effort to make management of fisheries more focussed and easier to control. It can be understood that each FMA has its own characteristics and challenges so the solutions to address the problems arising should also be specific. From a broader perspective, this method of division is aimed at making ocean resources management in Indonesia's jurisdiction more integrated and coordinated. MMAF reveals the estimated potential, allowable catch and the sustainable level of fish resources on certain species in each FMA through the enactment of the Ministerial Decree Number 47/KEPMEN-KP/2016 as amended by the Ministerial Decree Number 50/KEPMEN-KP/2017. This ministerial decree adoption supports the Indonesia Government’s policy to prevent and revive the fisheries resources from overexploitation and depletion based on the reliable data.

Figure 4: Indonesia’s Fisheries Management Areas
Due to its strategic position at the juncture of two oceans, Indonesia has problems in maritime affairs such as maritime security and marine ecosystem. Indonesia should also delineate its maritime zone and delimitate its borders with neighbouring countries as opposing countries

352 Irianto et al, above n 349.
and adjacent states. All three aspects of maritime security, marine ecosystem and neighbouring states are significantly interrelated in shaping proper ocean governance and the maritime policy of the country.

From the point of view of the marine environment, the diversity of Indonesia’s ocean resources and marine ecosystem offer not only opportunities but also challenges. From fisheries activity, the potential of Indonesia's marine resources makes Indonesia one of the leading nations in fisheries production particularly from marine fisheries. The latest report of FAO, on the circumstance of global fisheries and aquaculture 2014, revealed that Indonesia was in 2012, the second largest producer of capture fisheries with China first and the U.S in third position.\(^\text{353}\) It is also acknowledged that according to a report submitted to RFMOs in 2014, Indonesia was the world’s largest tuna fishing nation contributing more than 620,000 metric tonnes.\(^\text{354}\) As a top tuna fishing nation, Indonesia contributed 15 per cent of global tuna production in 2009, followed by the Philippines, China, Japan, Korea, Taiwan, and Spain. Nevertheless, in exporting tuna for global trade, Indonesia only contributed about four per cent in 2010.\(^\text{355}\)

As mandated by FAO IPOA-IUU Fishing, countries are encouraged to establish NPOA on IUU Fishing for implementation at their national level. Indonesia has established NPOA IUU Fishing based on Ministerial Decree Number KEP.50/MEN/2012 on NPOA to Prevent and Combat Illegal, Unreported and Unregulated Fishing of 2012-2016. This NPOA-IUU Fishing aims to be a reference for related departments under the MMAF to prevent and eliminate IUU fishing.\(^\text{356}\) Principally this document consists of Indonesia’s state of capture fisheries, IUU fishing, plan of action and schedule to prevent and combat IUU fishing from 2012-2016. This document covers IUU fishing practices as referred to as IPOA-IUU Fishing.

In the case of Indonesia, illegal fishing is most commonly conducted by foreign fishing vessels, mainly from neighbouring states. Those vessels have entered not only into Indonesia’s EEZ but also into its archipelagic waters. Concerning fishing gear, those illegal vessels mostly use purse seine and trawl. Moreover, when fishing, the vessels are not


\(^{354}\) Grantly Galland, Anthony Rogers and Amanda Nickson, ‘Nutting Billions: A Global Valuation of Tuna’ (the PEW Charitable Trusts, 2016) 3.


\(^{356}\) MMAF, *National Plan of Action on IUU Fishing*, above n 83, 3.
equipped with either a Licence for Fishing (SIPI) or License for Fish Transporting Vessel (SIKPI). Additionally, they are fishing in different areas determined by a fishing licence, using prohibited fishing gears, counterfeit fishing licences, vessels’ document manipulation, fishing without Sailing Approval Letter, deactivating Vessel Monitoring System (VMS) transmitter and other monitoring devices, unloading fish without a licence, landing catch without informing specific ports and fishing by Indonesia’s fishing vessels in another country’s jurisdiction without securing approval from Indonesia’s government and the government of the country concerned.357

Furthermore, unreported fishing numbers in Indonesia are generally related to data. Fishing vessels ‘have not reported the actual catches or improperly / incorrectly reported’ generally to evade tax. This activity encompasses conducting transhipment without reporting to the relevant authorities, ‘fishing vessels and fishing carrier vessels do not report at the port base in accordance with the licence granted’ and transports its catch to foreign countries358 while unregulated fishing activity, that generally occurs in Indonesian waters, is in the form of sports fishing.359

As part of the national commitment to combat IUU fishing, MMAF has also developed a number of policies to fill loopholes such as a moratorium on fisheries licences for ex-foreign fishing vessels. These licences encompass Licence for Fishing, Licence for Fish Transporting Vessel and Fisheries Business Licence360 for vessels of more than 30 gross tonnes.361 This policy is divided into two phases. Phase one is stipulated through Ministerial Regulation Number 56/PERMEN-KP/2014 concerning Moratorium of Fisheries License for Ex-Foreign Fishing Vessels in Indonesia’s Fisheries Management Area. The duration of this ministerial regulation was six months, from November 3rd, 2014 until April 30th, 2015.362 After being reviewed by MMAF, this first stage continued to the second stage through Ministerial Regulation Number 10/PERMEN-KP/2015 as Amendment to Ministerial Regulation Number

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357 MMAF, National Plan of Action on IUU Fishing, above n 83.
358 Ibid.
359 Ibid.
360 Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 56/PERMEN-KP/2014 tentang Penghentian Sementara (Moratorium) Perizinan Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia [Minister of Marine Affairs and Fisheries Regulation Number 56/PERMEN-KP/2014 on Moratorium of Fisheries Licence for Commercial Fishing in Indonesia’s Fisheries Management Area] (Indonesia) [author’s trans] (‘Indonesia Ministerial Regulation on Moratorium’).
362 Indonesia Ministerial Regulation on Moratorium.
Moratorium policy is not only addressing the problem of IUU Fishing as such but also pertains to non-tax state revenue (Pendapatan Nasional Bukan Pajak/PNBP) from the operation of foreign fishing vessels. The policy to temporarily halt fishing licences for foreign fishing vessels was a response to low non-tax state revenue received which amounted to only 8000 IDR (around US$0.61) per gross ton annually. At the same time, it was identified that fishing vessels imported a thousand tons of fish to the US and European countries. The Indonesian Government only obtained 300 billion IDR (US$22 million) annually of non-tax revenue from 5329 large vessels. If this sum is compared to the state's expenditure to subsidize the fisheries industry by means of diesel fuel, accounted for 1.2 trillion IDR (US$91 million), an enormous gap is found. By temporarily ceasing the licence, it is argued that fish stocks can revive, and non-tax state revenue can be increased.

As a part of moratorium policy, MMAF then reviewed fisheries licences of fishing vessels borne by foreign countries. The investigation conducted by Task Force 115 found that 1132 fishing vessels owned by 187 foreign fishing companies operated in Indonesia. Most of them were from China (374) followed by Thailand (216), Japan (104), the Philippines (98), and the balance are from other countries. These vessels were found to be violating related laws and regulations leading to the revocation of 291 fishing licences, the suspension of 61 fishing permits and the issue of notices to 95 permitted fishing vessels. In an effort to promote transparency and combat IUU Fishing in the broader context, MMAF will submit the data of


364 Indonesia Ministerial Regulation on Moratorium.


those vessels to the Global Record of Fishing Vessels initiated by FAO and the International Maritime Organization (IMO).\textsuperscript{367}

In auditing ex-foreign fishing vessels, the illegal fishing task force investigated ‘the legal compliance status of companies, the pattern of vessel ownership, their modus operandi (types of violations, including fisheries crime), the roots of the problem and flaws in policy and regulation’. After completing its analysis and evaluation in October 2015, MMAF decided to revoke ‘15 out of 187 fishing business licences, 245 out of 1041 fishing licences, and 31 out of 91 reefer licences’. Some licences were also suspended, and some companies have been sent written notices.\textsuperscript{368} During the investigations, the task force highlighted those vessels that had breached related regulations such as operational regulations or tax avoidance.\textsuperscript{369} Following the announcement of this revocation, MMAF identified that 414 fishing vessels have disappeared from Indonesia waters. It was suspected that the vessels had returned to their country of origin\textsuperscript{370} wanting to avoid the liability of the violations. In that regard, Task Force 115 has submitted the request to International Police to track down their whereabouts.\textsuperscript{371}

MMAF recognizes that transhipment and some fishing gears contribute to unsustainable fishing practices including IUU fishing. Through the enactment of Ministerial Regulation Number 57/PERMEN-KP/2014, transhipping in Indonesia waters is banned. This regulation amended the legal basis for trans-shipment as stated in Article 37A of Ministerial Regulation Number PER.30/MEN/2012.\textsuperscript{372} The policy sparked pros and cons from the fisheries industry relating to the costs and freshness of fish. The Indonesian Longline Tuna Association argued that this policy elevates the price of tuna as fishing vessels must land their catch at the nearest port thus leading to higher fuel consumption. In addition, there would be more time taken travelling to the ports influencing the freshness of the fish.\textsuperscript{373}


\textsuperscript{368} United Nations Environment Program (UNEP), \textit{Catching Crime: Fighting illegal fishing has led to a more sustainable industry, increasing food supplies and well-being} (May 2016) <http://web.unep.org/ourplanet/may-2016/articles/catching-crime>.


\textsuperscript{370} Afrida, above n 361.

\textsuperscript{371} Ibid.

\textsuperscript{372} \textit{Indonesia Ministerial Regulation on Moratorium}.

Nevertheless, the non-transshipment policy increases national ports utilization and prevents fish from Indonesian waters being transported to foreign fishing ports illegally. By landing them in Indonesian ports, increased supply of fish means that one part of food security to Indonesia’s people is secured. With regard to fishing gears, MMAF has adopted Ministerial Regulation number 2/PERMEN-KP/2015. This regulation prohibits the use of trawls and seine nets since those fishing gears are considered unsustainable and environmentally unfriendly to the marine ecosystem, particularly for coral reefs and seafloor. Previously through this ministerial regulation, the Government regulates those type of gears to cease operation from 9 January 2015. Nevertheless, after taking into account the views of traditional fishers, this ministerial regulation was suspended until September 2015, giving fishers around eight months to prepare and adapt to new fishing gear.

In the fisheries industry, another severe problem found in its strong relations to IUU fishing is fisheries crimes. Indonesia is facing this problem as the fishery is a very vulnerable sector in the country. Based on statistical data, Indonesia constitutes the second largest marine producer in capture fisheries in the world amounting to 5,420,247 tonnes and is second only to China. Indonesia’s contribution to global capture fisheries has increased from 3 per cent in 1990 to 6 per cent in 2011. Transnational organized crimes such as human trafficking and slavery occur in the fisheries industry in Indonesia. It is of international concern as Indonesia is placed in Tier 2 according to the Report of the U.S Trafficking in Persons (TIP) 2015. In every province of Indonesia, cases of trafficking are found. The report revealed that forced labour of foreign and Indonesian nationalities working in foreign and Indonesian

374 Peraturan Menteri Kelautan dan Perikanan Nomor 2/PERMEN-KP/2015 tentang Larangan Penggunaan Alat Penangkapan Ikan Pukat Hela (Trawls) dan Pukat Tarik (Seine Nets) di wilayah Pengelolaan Perikanan Negara Republik Indonesia [Minister of Marine Affairs and Fisheries Regulation Number 2/PERMEN-KP/2015 concerning the Prohibition of Trawls and Seine Nets in Indonesia Fisheries Management Areas] (Indonesia) [author’s trans].
375 Ibid.
379 Department of State of the United States of America, Trafficking in Persons Report 2015 (U.S Department of State Publication, 2015) 55. According to the report, Tier 2 means countries whose governments do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards.
fishing vessels occurred in Indonesia waters and primarily they worked in the fishing industry of Thailand.\textsuperscript{380}

One prominent case of modern slavery was practiced by PT. Pusaka Benjina Resources in Benjina Island, Maluku, Indonesia. Associated Press reported that more than 300 workers were evacuated to Tual, Maluku after being investigated on 4 April 2015.\textsuperscript{381} In 2015, a team investigating this case found that over 1450 crew members, mostly from Myanmar and Cambodia, were underpaid though they were employed more than the agreed regular hours ‘without clean water and proper food’. They were tortured and hindered from returning home. In responding to this, MMAF adopted Ministerial Regulation Number 35/PERMEN-KP/2015 requiring business people in the fisheries industry to respect and implement human rights values.\textsuperscript{382} Relevant institutions such as the Investment Coordinating Board (BKPM) and MMAF revoked the company’s business licence.\textsuperscript{383}

\textbf{2.2.2. Challenges.}

The measures championed by the MMAF to combat IUU fishing have resulted in positive outcomes. As claimed by the United Nations Environment Program, local fishers and government have benefitted from the above-mentioned policies. They can now more easily catch and sell fish in the local markets than in previous years. There was an increase of 62.53 per cent for fishes landed by local fishing vessels in local fishing ports. Fish consumption also increased annually from 37.89 kg per person in 2014 to 41.11 kg in 2015. In addition, according to the Central Bureau of Statistics of Indonesia, in 2015 the fisheries sector also experienced an increase to 8.37 per cent of GDP compared to 7.35 per cent in the previous year.\textsuperscript{384} Nonetheless, some challenges persist when enforcing these policies.

\textsuperscript{380} Ibid 187.


\textsuperscript{384} UNEP, above n 368.
Firstly, the NPOA on IUU Fishing was due to expire in 2016. The only explanation that refers explicitly to activities of IUU Fishing as set out in IPOA-IUU Fishing within the national document can be found in NPOA-IUU Fishing.385 Most importantly, action plans contained in existing NPOA-IUU Fishing possibly no longer meet up with the dynamics and actual challenges that Indonesia and the world are currently facing.

Secondly, the foremost challenge also comes from fisheries stakeholders such as fisheries industry both inside and outside the country as they are affected by trawl and purse seine prohibition. A massive wave of demonstrations was held by fishermen in several regions to stage protests against the prohibition of unsustainable fishing gears such as trawl and seine nets as stipulated in Ministerial Regulation number 2/PERMEN-KP/2015. Traditional fishermen argued that their livelihoods would be affected due to the ban if no alternative solution was provided. They revealed 80 per cent of them were still accustomed to traditionally using that type of fishing gear. Fishermen also opposed a regulation adopted by MMAF to limit the size of lobster and crab they could catch and sell. This limitation prompted controversy as fishermen in some areas exported their catch overseas.386 According to Ministerial Regulation Number 1/2015, it is not allowable for anyone to catch lobster and crab under certain dimensions and when producing eggs.387

By way of destructive fishing nets, the Indonesian Government has banned these devices since 1980 through Presidential Decree Number 39 Year 1980 on the Elimination of Trawl Net.388 However, law enforcement of this regulation has not been as effective as it should be owing to several reasons such as the lack of patrol vessels and legal apparatus to oversee the implementation.389 This circumstance allowed fishermen to violate the existing regulation for years as though it was legitimate.

385 MMAF, National Plan of Action on IUU Fishing, above n 83.
Thirdly, the moratorium policy may create a shortage of fish in the market and unemployment for people working in the fish processing factories. In sustaining fish stocks, some areas, particularly in Management Protected Areas (MPAs), are commonly closed or have limited fishing activity in some seasons. This method is enacted to allow a chance for the revival of fish stocks. In determining MPA, along with rules authorities should take into account the relevant stakeholders, mainly small-scale fishermen who depend heavily on fishing for their livelihood. Their concerns should be heard to achieve the best decision. Moratorium policy imposed on ex-foreign fishing vessels above 30 gross tones offered some advantages and disadvantages. The former relates to fish stock availability and non-tax revenue while the latter is related to unemployment in fisheries factories and fish availability in the market. Benefits taken from this policy have been elaborated in the previous section.

Fourthly, from an institutional aspect, there is a clear separation of international organizations in addressing IUU fishing and fisheries crimes. IUU fishing is developed under the regime of IPOA-IUU, which is administered by FAO while fisheries crimes fall under UNODC as it is related to mainly the issues of crime. There are three major aspects under the auspices of UNODC, namely: crime, drugs and terrorism. For crime, matters covered are corruption, human trafficking, justice and person reform, money-laundering and organized crime.390

Fifthly, the Deputy Head of Task Force 115 conceived that law enforcement agencies of Indonesia which are responsible for fighting against IUU fishing experience inadequacies in the area of coordination as well as capacity to spot, react and punish. The other shortcoming comes from corruption in the government institutions. The challenges identified concerning law enforcement in the marine and fisheries in Indonesia are as depicted in the following figure 5:

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Coordination is sometimes easy to mention but challenging to undergo. This problem also occurs in government institutions. The success of goals in an organization can be determined by having good coordination amongst stakeholders. In the case of fisheries, law enforcement holds an important role in combatting IUU fishing, fisheries crimes and fisheries-related crimes. In the above chart, insufficient coordinated measures amongst law enforcement agencies are identified as one of the factors affecting deficiencies of law enforcement.


The prevailing policies mainly involve different institutions since good cooperation between MMAF and the other institutions significantly determines the overall success of a policy’s implementation. In general, Indonesia’s measure to fight against those practices is divided into two phases. The first phase is prior to the establishment of special teams while the second phase is post-foundation of those task forces. It can be asserted from both periods that the former sees less foreign fishing vessels sunk compared to the latter.

3.1. Policy Issues.

3.1.1. Inter-Agency Collaboration.

Indonesia’s abundant marine resources attract other countries to catching fish in Indonesia’s waters under its national jurisdiction. Fishermen using small boats and large fishing fleets poach fisheries resources in EEZ, territorial waters and even in the internal waters of the country. They come and catch fish illegally in the forms of IUU fishing. As revealed by Susi Pudiastuti, ‘the finding discovered that at a certain time on a certain day, over 70 vessels of 50 to 70 gross tons entered Indonesian waters.’

Indonesia has determined to fight against IUU fishing and TOFC at all costs as Indonesia has a profound interest to secure those resources. After assuming the post of Minister of Marine Affairs and Fisheries in 2014, Susi Pudiastuti has been very active in combatting IUU fishing and TOFC. During the second Bali Tuna Conference (BTC) and the fifth International Coastal Tuna Business Forum (ICTBF), Minister Susi delivered Indonesia’s commitment to eradicating IUU fishing in areas within and beyond national jurisdiction. She identified IUU fishing as a major constraint as it is not only linked to 1.5 million tonnes of ‘illegal capture of fishery products’ and economy impact but also connected to environmental considerations.

When investigating IUU fishing, Indonesia acknowledged that the activity caused fisheries crimes and other fisheries-related crimes to occur. Several fishing vessels engaged by transnational organized criminals were also involved in illegal activities such as human trafficking, tax fraud and other related crimes. In overcoming this issue, Indonesia’s Government has firmly committed to fight against IUU fishing and fisheries crimes by using an integrated approach involving relevant institutions such as the Navy, Maritime Police, Maritime Security Agency and the other relevant institutions. The law enforcement agencies such as fisheries control officers/civil servant investigator of fishery and the officers from the Navy and Maritime Security Agency hold a strategic role to prevent, deter and eliminate IUU fishing and fisheries crimes to occur. Under the Indonesia Fisheries Law, the authority to investigate crimes in fisheries shall be performed only by three authorities: civil servant

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394 Pudiastuti, above n 50.
investigator of fishery, Navy officer investigator and/or Police investigator. With regard to the maritime jurisdiction, only two authorities that reserve the right to enforce law up to Indonesia’s EEZ, those are, Navy Investigator and Civil Servant Investigator of Fishery. Nonetheless, if the crimes in fisheries occur in the fishery port, the investigation shall be performed firstly by civil servant investigator of fishery. When enforcing the crimes on fisheries, those three agencies as stated in Article 73(1) may coordinate and the Minister of Marine Affairs and Fisheries shall establish a coordination forum. One example of the coordination and cooperation undergone between MMAF and the Navy to arrest illegal fishing vessels was when Minister of Marine Affairs and Fisheries took in charge the operation to combat illegal fishing by using the Navy warship in North Natuna on 14-15 April 2019.

In 2014, Indonesia adopted Law Number 32/2014 concerning Ocean Affairs in which there are some provisions regarding the establishment of Badan Keamanan Laut (Maritime Security Agency) along with its duties and authorities. Article 63 states that Maritime Security Agency is authorized to (a) conducting hot pursuit, (b) ceasing, observing, apprehending, escorting, and passing the vessels to the related authority for the interest of legal process, (c) integrating security and surveillance information system in Indonesia’s jurisdiction and waters. Further details of Maritime Security Agency arrangement are stipulated in the Presidential Regulation Number 178/2014 concerning Maritime Security Agency. Article 28 of Presidential Regulation provides legal foundation to form Law Enforcement Unit (Unit Penindakan Hukum) comprising of related maritime law enforcement agencies. It is unclear if the Law Enforcement Unit is a coordination forum as mandated under Article 73(5) of Fisheries Law. If it is intended as a coordination forum, the Minister of Marine Affairs and Fisheries has the only authority to establish the forum.

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395 *Indonesia Fisheries Law* art 73(1).
396 Ibid art 73(2).
397 Ibid art 73(3).
398 Ibid art 73(4).
399 Ibid art 73(5).
401 *Undang-Undang Nomor 32 tahun 2014 tentang Kelautan* [Law number 32/2014 concerning the Ocean Affairs] art 63 (Indonesia) [author’s trans] (‘Ocean Affairs Law’).
It can be observed from Article 63(c) of Law Number 32/2014 that Indonesia Maritime Security Agency does not have the authority to investigate subject to legal proceedings, only patrolling in the search of perpetrators. After being apprehended, personnel of Maritime Security Agency shall pass the perpetrators to the related institution based on violations committed for further investigation. For instance, if the vessels are caught for illegal fishing, then they should be handed to Civil Servant Investigator of Fishery. This limited power of Maritime Security Agency is in conformity with Article 73(1) of Fisheries Law stipulating three agencies to enforce the law such as fishing vessels sinking/burning excluding Maritime Security Agency.

Before Susi assumed the post, previous ministers of marine affairs and fisheries had sunk fishing boats. According to the Director General of Marine Resources Surveillance of MMAF, Indonesian authorities had seized 16 (sixteen) ships committing illegal fishing in Indonesian waters from January to April 2014 and confiscated 130 Thai fishing vessels between 2007 and April 2014.403 Between 2007 and 2012, MMAF had sunk 33 of 38 illegal foreign vessels. Most of them were Vietnamese fishing vessels caught fishing in Natuna Island waters.404

Although MMAF has undertaken the stringent measure of sinking vessels conducting illegal fishing, it has not prevented illegal fishers completely breaching the sovereignty and sovereign rights of Indonesia. They have continued poaching in Indonesia waters. During the regime of former President Susilo Bambang Yudhoyono, the government did not widely broadcast this policy. One possible reason was the foreign policy of Indonesia to have ‘a million friends and zero enemies’.405 Literally, Indonesia’s concept of international policy is to make as many friends and as few enemies as possible. Hence, the publicity of sinking illegal fishing vessels may harm bilateral, regional and multilateral relations between Indonesia and other countries. In addition, as a member of ASEAN (Association of Southeast Asian Nations), Indonesia also preferred to foster good relations with neighbouring states within the principle of the ASEAN Way as values shared by ASEAN member countries to

403 Fardah, above n 44.
405 Evi Fitriani, ‘Yudhoyono’s Foreign Policy: Is Indonesia a Rising Power?’ in Edward Aspinal, Marcus Mietzner and Dirk Tomsa (eds), The Yudhoyono Presidency: Indonesia's Decade of Stability and Stagnation (Institute of Southeast Asian Studies, 2015), 73, 77.
emphasize the principles of consultation and dialogue as well as non-interference in domestic issues.\textsuperscript{406}

A different approach is being performed by Minister Susi. Seemingly, she prefers to publicize the sinking through media and casts aside the traditional ASEAN Way in combating IUU Fishing. She is also inclined to sink those vessels during the commemoration of national public holidays such as Indonesia Independence Day as a message to the other countries to respect Indonesia’s territory.\textsuperscript{407} After Susi took charge as Minister of Marine Affairs and Fisheries, the number of vessels sunk increased significantly. According to the Jakarta Post, there were 18 illegal fishing vessels sunk during the period October 2014 to March 2015\textsuperscript{408} and 38 illegal foreign fishing vessels were sunk by Indonesian authorities on 18 August 2015.\textsuperscript{409}

From 2014 until April 2017, a total number of 317 illegal fishing vessels from other countries have been sunk by Indonesia’s authorities including ‘\textit{FV VIKING}, a notorious stateless vessel sought worldwide by INTERPOL and 13 countries’. The most significant number of these fishing vessels belongs to Vietnam which accounted for 142, followed by the Philippines (76), Malaysia (49), Thailand and Indonesia (both 21), Papua New Guinea (2), one from Belize, one a Chinese's fishing vessel and 4 stateless vessels (Figure 6).\textsuperscript{410} Most of the vessels were detained in Natuna waters and the remainder were arrested in Kalimantan, Sulawesi and Papua. When arresting those fishing vessels, Susi recognized that the most challenging task was when dealing with China's fishing vessels as their coastguards escorted them.\textsuperscript{411} The rationale for most foreign fishing vessels arrested in Natuna is that the EEZ of Natuna Island waters are adjacent to the South China Sea and Indonesia has maritime boundaries with neighbouring countries. This issue becomes more complicated as EEZ of Natuna Island overlaps the disputed area of the Nine Dash Line, claimed by China.


\textsuperscript{408}‘RI to Sink Boats from China, Thailand, Malaysia on Wednesday’, \textit{The Jakarta Post} (online), 19 May 2015 <http://www.thejakartapost.com/news/2015/05/19/ri-sink-boats-china-thailand-malaysia-wednesday.html>.

\textsuperscript{409} ‘Lagi, 38 Kapal Illegal Fishing Ditenggelamkan (Again, 13 Illegal Fishing Vessels were Sunk)’, (online) <https://bisnis.tempo.co/read/693058/lagi-38-kapal-illegal-fishing-ditenggelamkan>.

\textsuperscript{410} MMAF, ‘Laut Masa Depan Bangsa: Kedaulatan, Keberlanjutan dan Kesejahteraan (Ocean is the Nation’s Future: Sovereignty, Sustainability and Prosperity)’ (White Paper, 2017) 42.

Minister Susi also initiated an established task force under the ministerial decree to eliminate IUU fishing. The duties of this Task Force are:

1. To conduct the analysis and evaluation of 1132 ex-foreign vessels (legal due diligence) and develop legal consequence analysis (per company and vessel);

2. To develop, monitor and/or implement recommendations resulting from analysis and evaluation;

3. To conduct fisheries licence governance reform (national and regional level);

4. To monitor enforcement practices on IUU Fishing and provide technical assistance for enforcement officers on a cases basis;

5. To develop integrated and comprehensive enforcement guidelines on IUU Fishing;

6. To strengthen coordination among enforcement agencies by developing an online case tracking system for IUU fishing. 412

Another task force was formed under Presidential Regulation, known as Task Force 115. This team assumes the duties as follows: 413

1. To strengthen the enforcement capacity and effectiveness to combat IUU fishing by establishing a joint enforcement task force which includes MMAF, Navy, Police, Coast Guards and Public Prosecutors;

2. To utilize the existing forces including warships, airborne, and other appropriate technology for surveillance and enforcement purposes;

3. To patrol regularly (including airborne surveillance) conducted by a joint task force to detect IUU fishing activities.

412 Husein, above n 391.

Figure 6: Illegal Fishing Vessels Sunk by Indonesia Authorities as of April 2017.
Nevertheless, as referred to in Regulation 115/2015, the task force carries duties of focussing on developing and enforcing the law in its effort to combat illegal and unreported fishing.\footnote{Task Force Presidential Regulation art 2.} Principally, the task force under ministerial decree focuses its work on combatting IUU fishing within the ambit of the ministry while Task Force 115 pays its attention to a broader scope involving different institutions and under the direct supervision of the President of the Republic of Indonesia.

As stated in the title, the task force, established by Presidential Regulation, focuses on combatting illegal fishing. This means that this team does not bear the responsibility to fight against unreported and unregulated fishing. Nevertheless, Article 2 states that the task force also has the duty to address unreported fishing.\footnote{Ibid.} To put it simply, inconsistency is found in this Presidential Regulation. If this illegal fishing term is meant to be part of unreported fishing, it is arguably not a correct term as the concepts of illegal and unreported are distinguished under IPOA-IUU Fishing,\footnote{FAO, International Plan of Action on Illegal, Unreported and Unregulated Fishing, above n 285.} though those terms overlap in their application to some extent. Furthermore, this task force also does not have a specific task in addressing and combatting fisheries related crimes as they focus only on illegal fishing. Therefore, it is necessary for this Presidential Regulation to be amended by identifying transnational organized fisheries crimes as part of this task force’s duties.

### 3.1.2. Inter-Country Cooperation

Sinking illegal foreign fishing vessels is deemed as being a deterrent effect. This is aimed at frightening foreign poachers and preventing them further from illegally catching fish in Indonesia waters. To some extent, approaches that Minister Susi has taken make regional relations inconvenient as most of the fishing vessels sunk are from countries around Indonesia. Nevertheless, it is crucial to garner support from regional and international communities in addressing the matter as the problem is transboundary in character and it cannot be solved by Indonesia alone. Bilateral, regional and international initiatives have been taken by Indonesia in combatting IUU fishing. Meanwhile, transnational organized fisheries crimes are a relatively new issue endorsed by the government in bilateral, regional and international negotiations although these crimes have existed for a long time.
MMAF has collaborated with other countries concerning issues of marine affairs and aquaculture. Bilaterally, Indonesia has signed binding and non-binding legal instrument documents with numerous states on areas of common concern. Probably the most relevant and current joint initiative between Indonesia and its counterpart in addressing IUU fishing and fisheries crimes is the cooperation between the Government of the Republic of Indonesia and the Government of the Kingdom of Norway. On 24 November 2015, Indonesia and Norway committed to combatting IUU fishing, fisheries crime and fisheries-related crimes as well as to promote sustainable fisheries governance through the signing of a joint statement between the Minister of Marine Affairs and Fisheries of Indonesia and the Minister of Trade, Industry and Fisheries of the Kingdom of Norway.417

Both ministers agreed to cooperate and coordinate at levels of operation and policy to prevent, deter and eliminate IUU fishing, fisheries crimes and fisheries related crimes pursuant to relevant ‘international best practice in line with LOSC and the principle of due legal process’. They also intend to promote measures for responsible fisheries through ‘information sharing, capacity building activities, and sharing best practices on combatting IUU fishing, fisheries crimes and fisheries related crimes with a particular focus on multidisciplinary and inter-agency cooperation’. Lastly, they also agreed to explore joint efforts in international institutions to fight against IUU fishing and fisheries crimes as well as ‘to promote sustainable fisheries governance’.418

Minister Susi has signed various memoranda of understanding including with Timor Leste (East Timor). Having cooperation with this country is strategic for Indonesia as the countries share maritime boundaries. Indonesia’s Minister of Marine Affairs and Fisheries and Timor Leste’s Minister of Fisheries and Agriculture signed a Memorandum of Understanding to accelerate coordination on the activities of the elimination of fish poaching, fisheries conservation management and technology information exchange.419

Russia is also deemed as a strategic partner in diminishing IUU Fishing. Minister Susi has visited Russia and paid a visit to Deputy Prime Minister Arkady Dvorkovich. During the

417 ILO, Joint Statement between Indonesia and Norway, above n 59.
418 Ibid.

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meeting, they discussed the issue of IUU fishing. Susi revealed Indonesia’s plan to establish 15 incorporated fishery stations in different areas across the country and to operate sea radars made by Russia. The radars are aimed to support small patrol ships in decreasing fish poaching cases.420

In regional forums, Indonesia also actively seeks support from regional organizations, ultimately ASEAN member states and their dialogue partners.421 Indonesia together with the United States and Timor Leste organized and chaired the ASEAN Regional Forum (ARF)422 Workshop on IUU Fishing on 19-24 April 2016 in Bali, Indonesia. This event was a continuation of the previous ARF Workshop on Improving Fisheries Management conducted in Honolulu, Hawaii, on 22-23 March 2016 co-chaired by Indonesia and the U.S. The objectives of the said workshops were to establish a foundation for promoting dialogue and collaboration in eliminating illegal fishing in the region and endorsing Indonesia’s measure to create a regional instrument on the prevention, deterrence and elimination of IUU fishing.423 The participants of the Bali workshop highlighted measures to prevent, deter and eliminate IUU fishing and its connection to transnationally organized crimes. Primarily, it was expected that the participants of the workshop could pay more attention to the issue concerned and eventually make genuine efforts in overcoming the problem.424

Regional initiative on IUU fishing is continued to be promoted further by the Regional Conference on the Establishment of a Regional Convention against IUUF and its Related

420 Ibid.
421 Association of Southeast Asian Nations (ASEAN), Overview <http://asean.org/asean/about-asean/overview/>. ASEAN, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam then joined on 7 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN.
422 ASEAN Regional Forum, About ASEAN Regional Forum <http://aseanregionalforum.asean.org/about.html/>. ASEAN Regional Forum (ARF) is a forum established by ASEAN in 1994 for open dialogue and consultation on regional political and security issues, to discuss and reconcile the differing views between ARF participants in order to reduce risk to security. ASEAN undertakes the obligation to be the primary driving force. The ARF recognizes that the concept of comprehensive security includes not only military aspects but also political, economic, social and other issues. It comprises 27 members: the 10 ASEAN member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Burma, Philippines, Singapore, Thailand and Vietnam), the 10 ASEAN dialogue partners (Australia, Canada, China, the EU, India, Japan, New Zealand, ROK, Russia and the United States), one ASEAN observer (PNG) as well as the DPRK, Mongolia, Pakistan, Timor-Leste, Bangladesh and Sri Lanka.
424 Ibid.
Crimes in Bali on 19 May 2016 hosted by the Indonesian Government.425 During the discussions, participants shared similar views that IUU fishing *per se* was not a TOC. However, the linkage between IUU fishing and TOC was recognized. It was highlighted that there were criminal activities leading to and connected with IUU fishing. This connection has created persistent challenges in combating IUU fishing that need to be comprehensively addressed.426

It was also the view that the existing definition of IUU fishing remains as it is. Such new terminology as ‘fisheries crimes’ or ‘fisheries-related crimes’ should be discussed and studied further by considering the existing international laws. The participants emphasized that this initiative should not overlap with existing regional instruments and mechanisms. It should complement and strengthen such existing regional and international instruments and mechanisms. In this regard, a gap analysis was advised. This initiative should encompass information sharing, capacity building, law enforcement cooperation and also use of internet-based technology for monitoring, controlling and surveillance. A further study on the matters raised in this Conference was discussed at the Second Conference in October 2016 held in Yogyakarta, Indonesia.427

By virtue of law enforcement, Indonesia and International Police (INTERPOL) span the cooperation to combat illegal fishing and fisheries crimes through Project Scale. This project was launched on the occasion of the First INTERPOL Conference on International Fisheries Enforcement held on 26 February 2013 at the General Secretariat of INTERPOL in Lyon, France. Three parties are committed to support this project: the Government of Norway, the United States Department of State and the Pew Charitable Trusts. This Project aims to, amongst other aims, increase awareness and make an assessment on the affective needs of vulnerable countries concerning fisheries crimes as well as ‘facilitate regional and

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425 The Conference was attended by representatives of Australia, China, Laos, Malaysia, New Zealand, Papua New Guinea, the Philippines, Singapore, Thailand, Timor-Leste, and Vietnam. The Conference was also attended by market states and organizations such as the Republic of Korea, the U.S, and the European Union, FAO, UNODC, and the Sub Regional Fisheries Commission (SFRC) of West Africa. The file is with the author’s thesis.

426 Chair’s Conclusion of the Regional Conference on the Establishment of a Regional Convention against IUUF and Its Related Crimes, on 19 May 2016 in Bali, Indonesia. The file is with the author of this thesis.

427 Ibid
international operations to suppress crime, disrupt trafficking routes and ensure the enforcement of national legislation.  

The first meeting of the Fisheries Crime Working Group was founded after the conference. This working group has the objectives to enhance the building of capacity, the exchange of information and the support of operations to combat fisheries crimes. Through this project, as of May 2016, INTERPOL has issued 17 Purple Notices and 17 Blue Notices as requested by several countries including Indonesia.

In a recent case, Indonesia has sent an inquiry to INTERPOL in tracing the vessel Hai Fa for catching and exporting hammerhead sharks, deactivating AIS (Automatic Identification System) and VMS as well as sailing back to China unseaworthy and without port clearance. The District Court of Ambon Region and Appellate Court of Maluku Province ruled the Captain of the Hai Fa guilty and imposed a fine amounting to US$ 15 000. In response to this, INTERPOL issued a purple notice on 9 September 2015.

### 3.2. Proposed Measures

This section will focus on the proposed measures of how to address this transnational problem. First, international cooperation is needed amongst like-minded states in the form of bilateral and regional collaborations. Secondly, domestic efforts are necessary in addressing the gaps identified in the internal system.

#### 3.2.1. Stronger Bilateral and Regional Cooperation.

The South African and Norwegian Governments together are greatly concerned to combat IUU fishing and fisheries crimes. Both countries and other organizations such as Stop Illegal Fishing and PescaDOLUS agreed to have a joint initiative by convening the First International Symposium on Fisheries Crime held on 12 and 13 October 2015 in Cape Town,

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428 INTERPOL, Project Scale (15 August 2016) <http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Scale>.


431 INTERPOL, International Notices System <https://www.justice.gov/interpol-washington/file/798736/download>. According to INTERPOL, Purple Notice means seeking or providing information on modus operandi, objects, devices and concealment methods used by criminals, Red Notice means seeking the location and arrest of wanted persons with a view to extradition or similar lawful action.
South Africa. This event was co-funded by the Department of Agriculture, Forestry and Fisheries of South Africa and the Ministry of Trade, Industry and Fisheries of Norway. This symposium was attended by 198 participants, representing 31 countries.432

The initiative to establish the FishFORCE Academy in the Nelson Mandela Metropolitan University taken by South Africa and Norway should be observed as an advanced measure not only for South Africa, Norway and the African region but also for the international community at large. This program can be a pilot project for law enforcement in clamping down on fisheries crimes and fisheries-related crimes in the African continent in the years to come as concern from the fishery industry grows as more than 50% fish stock has been depleted due to overfishing in the waters from Nigeria to Senegal as well as profoundly affecting the local economy in countries such as Senegal which has amounted to $300 million dollars annually.433 This program can offer an alternative for sharing and building the capacity of how to address the said crimes in more effective means and ways. In the region, one prominent inadequacy is the lack of law enforcement devices such as patrol boats, as occurring in Sierra Leone.434 With this drawback, FishFORCE can be used to enhance the quality of enforcement through what is called intelligence-led investigations.

Indian Ocean Rim Association (IORA)435 can be a proper forum to disseminate and enlarge the work of FishFORCE through the mechanisms of bilateral and regional cooperation. It was a perfect time for Indonesia and South Africa to cooperate in this forum as both countries were chair and vice chair of this forum in 2017. IORA asserts fisheries management as one of the priority areas and member countries of IORA are eager to develop ‘management and conservation’ of fish resources in the region. This association also has serious concerns on overfishing and climate change affecting fish stock and food security.

432 Stop Illegal Fishing and PescaDOLUS, Record of the First International Symposium on Fish Crime (The Norwegian Ministry of Trade, Industry and Fishing, 2016) paras. 4-5.
434 Ibid.
435 Indian Ocean Rim Association (IORA), Membership (2 January 2019) <http://www.iora.int/en/about/member-states>. IORA is an international organization with 21-member states: Australia, Bangladesh, Comoros, India, Indonesia, Iran, Kenya, Madagascar, Malaysia, Mauritius, Mozambique, Oman, Seychelles, Singapore, Somalia, South Africa, Tanzania, Thailand, UEA and Yemen.
In IORA, the Fisheries Support Unit (FSU)\textsuperscript{436} can be used to discuss how to strengthen the cooperation between FishFORCE and IORA coastal states and the measures that can be rendered to them. Collaboration between both sides can also be generated through maritime safety and security areas as this issue pinpoints a key priority in IORA. To this extent, FishFORCE and IORA share the common ground in addressing traditional and non-traditional security issues in the ocean such as illegal fishing, human trafficking, people smuggling, piracy and weapons smuggling. In the near future, the possibility to conduct joint patrols amongst IORA members should be implemented in which FishFORCE can render its support as such.

Indonesia is a potential country in which FishFORCE and South Africa can extend cooperation, and \textit{vice versa}. Indonesia’s strong commitment to clamp down on fisheries poaching would be a good opportunity for FishFORCE and South Africa to also have mutual collaboration. The cooperation between both parties should be formulated through a legally binding document such as a Memorandum of Understanding (MoU) or other mutually agreed agreement.

In its areas of cooperation, the parties should agree, amongst other things, in preventing, deterring and eliminating IUU fishing, transnational organized crimes and fisheries-related crimes. Additionally, other areas such as education and training within the scope of marine and fisheries are worthy of inclusion. In order to ensure its effective implementation, a regular meeting under a joint committee should be established. Members of the commission can be government officials and academics as this combination is committed to producing better decisions or policies as their basis relies upon proper scientific evidence.

A robust bilateral relationship between the two countries has been laid through the signing by the two Presidents, of the Joint Declaration on a Strategic Partnership for a Peaceful and Prosperous Future between the Government of the Republic of Indonesia and the Government of the Republic of South Africa.\textsuperscript{437} To be more operational and technical on the

\textsuperscript{436} Ibid.

\textsuperscript{437} Ministry of Foreign Affairs of Indonesia, \textit{Joint Declaration on a Strategic Partnership for a Peaceful and Prosperous Future between the Government of the Republic of Indonesia and the Government of the Republic of South Africa} <http://treaty.kemlu.go.id/apisearch/pdf?filename=ZAF-2008-0009.pdf>. The joint declaration was concluded on 17 March 2008 in Tshwane, South Africa. Through this strategic partnership, both Presidents pledged to work jointly to strengthen bilateral cooperation in all fields. They will also intensify cooperation in
cooperation, the parties signed MoU between the Government of the Republic of South Africa and the Government of the Republic of Indonesia on the Establishment of a Joint Commission for Bilateral Cooperation.\(^{438}\) On the sidelines of the Asian-African Ministerial Meeting as part of the 60\(^{th}\) Anniversary of the Asian-African Conference, both parties agreed to renew this MoU on 20 April 2015 in Jakarta. The Minister of Foreign Affairs of Indonesia and the Minister of International Relations and Cooperation of South Africa have come to an agreement to explore cooperation in the maritime sector and the blue economy.\(^{439}\)

From the above-mentioned commitment by those two ministers, the cooperation between the MMAF of Indonesia and the Department of Agriculture, Forestry and Fisheries of South Africa is widely open. If the parties agree to conclude such a memorandum of understanding or agreement on marine and fisheries, the work of a joint committee under the agreement should be linked to a joint commission under the said memorandum of understanding. The cooperation between Indonesia and South Africa may include other parties such as the Government of Norway and UNODC.

More technically, within the framework of policy, both states may exchange views and share best practices on how to develop and formulate sound policies in determining effective ways of eliminating IUU fishing, fisheries crimes and fisheries-related crimes. In managing living marine resources, Indonesia promulgates Law on Fisheries while South Africa adopts MLRA. Both parties can raise the issue on how to impose stringent measures in combatting IUU fishing through higher administrative penalties and punishments. Furthermore, FishFORCE can provide higher education in university and training since the academy is under the auspices of NMMU.\(^{440}\) This facility can be accessed by the personnel of MMAF as part of capacity building. In addition, a joint program can also be developed between NMMU and a university in Indonesia to bridge research activities for scholars from both countries.

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3.2.2. Policy Framework Measures.

Policy framework plays an essential role in fostering living marine resources at a sustainable level. In attaining this goal, problems of IUU fishing and transnational organized fisheries crimes should be addressed with comprehensive and integrated measures. Through the vision of Indonesia as GMF, fisheries resources have become a national agenda. The determination of the Minister of Marine Affairs and Fisheries of Indonesia to clamp down on fish plundering by sinking illegal foreign fishing vessels has been a fascinating subject of discussion, particularly when posing the fact that fisheries resources have been depleted globally together with the other severe economic, social and environmental impacts.\(^{441}\) In this regard, the following proposed recommendations can be considered to fill the loopholes in the policy development.

Firstly, in the NPOA-IUU fishing of 2017-2021, GMF should be envisioned in the document. This vision is the basic footing on which to project measures taken in the future to combat IUU fishing. It is important also to include fisheries transnationally organized crimes in this NPOA-IUU Fishing. Not only has this issue been endorsed by Minister Susi on many occasions but also in order to respond to the problems Indonesia currently faces. All policies taken by Minister Susi in implementing sustainable fisheries practices should be elaborated detailing actions along with timeframes to achieve specific targets.

This document supposedly has become the main guidelines and domestic commitment in combatting IUU fishing and fisheries crimes. It is important to also include cases such as Hai Fa\(^{442}\) Benjina as lessons learned for policymakers when dealing with similar cases. Before it is extended for another 5 (five) year term, this document should be reviewed specifically regarding the implementation of plans of action. The review’s result should be encompassed in the subsequent five years document as additional background to determine more precise policies and measures.

Secondly, it is vital to enforce relevant policies aiming to foster and preserve the environment from unsustainable practices. However, the Government should also consider applying the

\(^{441}\) Palma, Tsamenyi and Edeson, above n 26, 9.

rule by using a persuasive approach particularly to traditional fishers since it is related to their daily livelihood and income. Some traditional fishermen were imprisoned due to breaching trawl and purse seine regulations, but they argued that violating the regulation was the only choice they had to feed the family. Learning from this case, and before applying certain policies, MMAF should invite relevant stakeholders to discuss and formulate environmentally friendly policies on one side and accommodate small-scale fishermen interests on the other. MMAF should be able to convince them that the regulation is for the sake of their interest and there will be no more fish if the marine ecosystem is completely destroyed. Public engagement in formulating policies can be drawn from the Presidential Task Force of the U.S.

Thirdly, in some regions, moratorium and non-transhipment policy led to the closure of fish processing companies because of lack of supply from the ocean. Minister Susi rebutted this claim by saying that those fish processing companies were closed long before the moratorium policy came into effect. The Indonesian Chamber of Commerce asserted that unemployment reached 600,000 to one million in the fisheries sector and export has declined by almost 37% due to the policy. Taking into account those impacts and as this policy has affected fisheries sectors, it is preferable that MMAF might undergo a comprehensive study examining the advantages and disadvantages before applying the policy. During the examination, public consultation should be considered as one good option to gather ideas from the public. Although pros and cons cannot be avoided in responding to a particular policy, this public meeting can be used to minimize adverse impacts arising from revealed policy.

Fourthly, there is a need to distinguish the roles of FAO (IUU fishing) and UNODC (fisheries crimes). This distinction is imperative for each organization to increase focus on how to address the problem. In making those two international organizations more coordinated,


regular collaboration and discussion between the two should be organized more frequently. It is also important to bring to the fore the primary responsibilities of UNODC and FAO in advocating member states develop their domestic policy reforms on mutually agreed upon issues. UNODC and FAO may render technical assistance for member states.\footnote{447 UNODC, \textit{UNODC: A Brief Overview,} above n 390.}

Fifthly, deficiencies of law enforcement encompass four aspects, namely; coordination, single door, lack of three abilities and corruption. Commitment and awareness are of utmost importance to overcome this coordination hurdle. However, a proper coordination mechanism also plays an essential role. Through Presidential Regulation Number 115/2015 concerning Task Force to Eliminate Illegal Fishing, related government institutions such as MMAF, Ministry of Finance, Ministry of Foreign Affairs, Ministry of Transport, Indonesia Navy, Indonesia Police, Attorney General Office, Agency of Maritime Security, Centre for Indonesian Financial Transaction Reports and Analysis and Agency for State Intelligence are involved in countering illegal and unreported fishing activities. This task force has the authority, amongst other things, to determine the target of law enforcement, gather data and information through coordination as well as establish and order members of the task force to conduct law enforcement operations.\footnote{448 Task Force Presidential Regulation art 3.}

This Presidential Regulation constitutes a major leap towards a strengthened coordination and to address issues not only including inadequate coordination among law enforcers, but also other drawbacks of a single door policy, lack of those three capabilities and corruption.Single door policy is asserted as an approach practiced by the previous regime. The investigation conducted by Indonesian authorities found that the \textit{modus operandi} of IUU fishing broadly encompasses ‘overfishing, tax fraud, money laundering, human trafficking’ and so forth. As such, it is essential to have a different mechanism through a ‘multi-disciplinary legal or multi-door approach’.\footnote{449 Husein, above n 391.} Within this context, the former policy of single-door is deemed to be less effective in combatting IUU fishing, therefore the latter is introduced as an advanced robust and comprehensive measure to tackle the problem.

As elaborated by Husein, the rationale for taking the approach of multi-door is mainly based on the assessment that crimes committed in fisheries sectors are cross-sectoral while the
prevailing regulations on fisheries in Indonesia are asserted inadequately in bringing about the perpetrators before the justice system and activities of IUU fishing generally involving other crimes. He also explained that there are some advantages of having the approach, namely of widening the overview, multi-legal approach, cross-sectoral enforcements from different institutions, more coordinated measures and utilizing the principle of ‘follow the suspect and follow the asset’. The principle can be a powerful tool to trace the mastermind and not only the perpetrator in the field which could lead to it having a stronger effect on the persons committing crimes and the company operating it might be liable.

The OECD perceives that the clue to solving the problem is by tracing where the money is disbursed. This organization also holds a view that following the suspect and asset principles needs to be promoted based on the following three reasons:

1. By following the revenue from IUU fishing, the true perpetrators, along with their networks, can be traced and brought before the courts;
2. The flow of profits resulting from IUU fishing should be halted since the more operators of IUU fishing that make money, the more difficult it is for them to be stopped; and
3. Investigation of the financial transactions can be used as evidence that IUU fishing activity occurs. The investigation should be integrated in the whole strategy of combatting crime by having the cooperation of related fisheries institutions.

Multi-door approach presents a holistic view in discerning and combatting IUU fishing. This approach should also be viewed as a robust measure to impartially eliminate illegal activities in the fishing activities from capturing the fish, then processing, up to selling them to the market. A publication from UNODC in 2011 is a good example in depicting transnational organized crime and criminal activities occurring in the fishing operations. The study focuses on the engagement of the fishing industry in the types of activities that are most related. These include transnational organized crime such as trafficking in persons, people smuggling and illegal drugs and psychotropic materials trafficking, including their connection to the other types of crimes such as ‘marine living resource crime, corruption, piracy and other security-related crimes’. From the research, it was evident that trafficking in persons was

450 Ibid.
452 UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 12.
connected to those crimes and the ruthlessness of the trafficked persons to be forced labourers on fishing vessels was probably the most upsetting fact. They became ‘prisoners of the sea’, vulnerable to severe cases of abuse. Fishing vessels were discovered as a means of transporting illegal drugs and weapons, terrorism and smuggling illicit migrants.453

Sixthly, the formulation of guidelines. It is not mere anecdotal evidence that criminals indeed commit crimes in the fishing industry. Law enforcement apparatus would face this circumstance when enforcing laws and regulations. By using a multi-door approach, they can undertake systematic investigations and mutual cooperation amongst various governments and law enforcement authorities. This measure offers full protection against environmental damage as those institutions would have a coordinated position.

Nonetheless, it is necessary to formulate the work of the law enforcement agencies with more details through a set of guidelines following up on Presidential Regulation 115/2015. The guidelines aim to support the implementation of the regulation. It may involve a review of the policy implementation to combat those three activities and it may provide answers as to how the measures should be put into effect. It is also important to upgrade the capacity building of law enforcement officers and to ensure that all enforcement authorities explicitly incorporate the multi-door approach into their routine operations.

4. Conclusion.

In overcoming IUU fishing and fisheries crimes, numerous policies have been taken by the Indonesian Government such as sinking fishing vessels undertaking IUU fishing and establishing two task forces. As a political document mandated by IPOA-IUU fishing, NPOA-IUU fishing can be considered as a political commitment in combatting IUU fishing. During the leadership of Minister Susi, some policies have also been introduced, such as a moratorium on fisheries licences for ex-foreign fishing vessels for vessels of more than 30 gross tonnes in order to promote sustainable fisheries management, addressing IUU Fishing in Indonesia Fisheries Management Areas and increasing non-tax state revenue.

As follow up to the moratorium policy, MMAF then reviewed fisheries licences of fishing vessels constructed by foreign countries. Indonesia also applied a non-transhipment policy

453 Ibid 3-4.
through the enactment of Ministerial Regulation Number 57/PERMEN-KP/2014. In the fisheries industry, transnational organized crimes such as trafficking in persons and slavery occur in the fisheries industry of Indonesia. It has become the international community's concern as Indonesia is placed in Tier 2 according to the 2015 Report of TIP. In an effort to garner support from the international community, Indonesia has committed to having stronger bilateral, regional and multilateral cooperation, not only with states but also with INTERPOL.

There are some loopholes in Indonesia’s policy regarding IUU fishing and its connection with transnationally organized fisheries crimes:
1. NPOA on IUU fishing expired in 2016 and the transnational aspects of IUU fishing and fisheries crimes were not covered in that document.
2. The moratorium policy and the prohibition on transhipment and destructive fishing gear sparked resistance from related stakeholders such as the fisheries industry and small-scale fishermen.
3. The moratorium policy may lead to creating unemployment and a lack of fish supply in the market.
4. A gap also occurs in international organizations handling IUU fishing (FAO) and fisheries crimes (UNODC) as those issues are separated based on the mandate of each organization.
5. Constraints in law enforcement efforts, namely; coordination, single door policy, lack of the three abilities and corruption.

In the above explanation, lessons learned can be drawn from the state practices of the U.S and South Africa. The U.S and South Africa have much interest in IUU fishing. The U.S Government has established the Presidential Task Force on Combating IUU fishing and the Seafood Fraud ratified PSM Agreement as well as port entry and access restriction. The Magnuson-Steven Reauthorization Act and the Lacey Act can be discerned as powerful tools to combat IUU fishing. Two lessons can be learned from the U.S. It is essential to learn that when formulating the recommendations, the Task Force involved public participation to obtain their opinions. The Task force issues 15 (fifteen) recommendations.

In the case of South Africa, the strengthened cooperation has been initiated between DAFF and the South Africa police. A project called FishFORCE in NMMU has also been established after securing funding from the Norwegian Government. Through this project, a
law enforcement academy is devoted to providing capacity building on the issues of fisheries crimes and fisheries-related crimes at sea. Future collaboration is possible to be extended to member countries of IORA including Indonesia.

Some efforts proposed to be undertaken to eliminate IUU fishing and TOFC within the scope of the domestic national policy framework are:

1. Stronger cooperation in the region within the framework of relevant regional organizations including ASEAN and IORA should be encouraged. However, bilateral cooperation also plays an important role.
2. The NPOA-IUU fishing should be reviewed before it is extended another five years. It is a good opportunity to include a vision of Indonesia as GMF and encompass in the document, transnationally organized fisheries crimes.
3. It is also important to note that communication and consultation with the public may curtail resistance from stakeholders on the publicized policies. It is much better if MMAF conducts a comprehensive study examining advantages and disadvantages. As learned from the U.S Task Force when formulating the policy, during examination, public consultation could be considered as one good option to gather concerns from the public. This public dialogue can diminish the adverse impacts arising from the policy.
4. Paying attention to the different roles of FAO and UNODC. The former has the mandate to address IUU fishing while the latter has the duty to address crimes related to fisheries. It is imperative also for the two organizations to meet more regularly.
5. The other effort should be that of addressing four deficiencies of law enforcement through commitment and awareness enhancement as well as utilizing the multi-door approach.
6. Referring to the title of Presidential Regulation Number 115/2015, the task force established by that regulation focuses on combatting illegal fishing meaning it does not have a specific task in addressing and combatting fisheries related crimes. Therefore, it is necessary for this Presidential Regulation to be amended by positioning transnational fisheries crimes and unregulated fishing as part of this task force’s duties. The last proposal is to formulate guidelines to implement Presidential Regulation Number 115/2015 in a more detailed fashion.
PART V
LEGAL FRAMEWORKS OF IUU FISHING AND FISHERIES CRIMES

1. Introduction.
After examining the policy frameworks, this part examines the legal approach of the IUU fishing and fisheries crimes. Legal and policy approaches contribute to being important elements of ocean governance. Policy measures would be more effective if legal instruments present to support the policy’s application. To begin with, this part introduces an overview of international and domestic settings. International law instruments such as LOSC, UNFSA, PSMA and UNTOC are presented to discuss the topics covered by this thesis.

This part then presents a brief overview of several cases concerning prompt release adjudicated by ITLOS and the application of Article 72 of LOSC. A comprehensive review of the submission of Sub-Regional Fisheries Commission (SRFC) regarding Illegal, Unreported and Unregulated Fishing to ITLOS is delivered. This part also discusses an overview of domestic legislation encompassing relevant laws and regulations and fishery courts. This part uncovers some legal issues and proposes some efforts to solve the problems. In the sense of domestic legislation, Indonesia has a number of legal instruments. Those international legally binding mechanisms will be elaborated in this part along with domestic legal instruments as primary tools in assessing the loopholes to be filled in.

This thesis identifies the conceptual challenges concerning the interplay between IUU fishing and transnational organized crimes. It looks at different perceptions, practices, and approaches and the domestic legal system to observe and address fisheries violations. When taking a robust stance against IUU fishing, Indonesia does not adopt a particular definition or explanation on IUU fishing and fisheries crimes in its domestic legal system. This thesis finds in international law that Indonesia needs to express its consent to be bound by related conventions. It is worth noting that the U.S has a strong law to punish its nationals who conduct IUU fishing. Finally, this part proposes some recommendations.

2. International and Domestic Contexts.
In most societies, the existence of rules is necessary for members to perform their daily routines in an orderly manner. Those rules are extended to the communities responsible for the management and conservation of marine resources. As part of ocean governance, legal framework plays an important role in ensuring that marine resources are sustainably utilized.
The governance holds certain norms, values and regulations that people should respect and abide by, on how to foster and prevent ocean resources from destruction and depletion. Yoshifumi Tanaka asserts that increasing human exploration in the oceans has led international rulers to manage their activities in the oceans. As one of the oldest branches of public international law, the international law of the sea takes a strategic role in managing the ocean through its legally binding strength.\textsuperscript{454}

2.1. International Overview.

In order to make international instruments more comprehensible, the following Figure 7 depicts the general framework of the international instrument on fisheries. The instrument is divided into two main clusters; hard law and soft law. Hard law encompasses the 1982 LOSC, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the 1993 FAO Compliance Agreement), the 1995 United Nations Fish Stocks Agreement (the 1995 UNFSA), \textsuperscript{455} PSMA\textsuperscript{456} and the Cape Town Agreement. Meanwhile, soft law examples include IPOA-IUU\textsuperscript{457} and the 1995 FAO Code of Conduct for Responsible Fisheries (‘Code of Conduct’), the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem, and SDG 14.4.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{454} Tanaka, \textit{The International Law of the Sea}, above n 148, 3.
\item \textsuperscript{455} The 1995 United Nations Fish Stocks Agreement.
\item \textsuperscript{456} The 2009 Port State Measure Agreement.
\item \textsuperscript{457} FAO, \textit{International Plan of Action on Illegal, Unreported and Unregulated Fishing}, above n 285.
\end{itemize}
\end{footnotesize}
### Hard Law


- The 1995 UN Fish Stocks Agreement (UNFSA), in force 2001

- The 2009 Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, in force 2016

- The 2012 Cape Town Agreement, not yet in force.

### Soft Law

- The 1992 UNCED; Agenda 21; Rio Declaration on Environment and Development

- The 1995 Rome Consensus on World Fisheries (FAO)

- The 1995 FAO Code of Conduct for Responsible Fisheries

- The 1999 Rome Declaration on Implementation of the Code of Conduct (FAO)

- The 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem

- The 2002 Johannesburg Declaration on Sustainable Development

- The 2002 WSSD Plan of Implementation

- Technical Guidelines

  - International Plans of Action
    - IPOA-Seabirds, 1999
    - IPOA-Sharks, 1999
    - IPOA-Capacity, 1999
    - IPOA-IUU, 2001

### Figure 7: International Fisheries Instruments

[458] High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, (London, IUU Fishing Coordination Unit: 2006) 42. The shown table has been updated by putting the Cape Town Agreement.
2.1.1. Legally Binding Instruments.

As delivered in this thesis, Indonesia has expressed its consent to be bound by LOSC (Law No. 17/1985), UNFSA (Law No. 21/2009), PSMA (Presidential Regulation 43/2016) and UNTOC (Law Number 5/2009) as its commitment to combat IUU fishing and transnational organized crimes. However, Indonesia is not a State Party to either the 1993 Compliance Agreement or the 2012 Cape Town Agreement. Those legally binding instruments will be discussed further in this section.

From historical overview, it can be learned that the Conference of Geneva on the Law of the Sea of 1958 resulted in 4 (four) important conventions; namely, the Geneva Conventions on the Territorial Sea and the Contiguous Zone, on the High Seas, on the Continental Shelf and on Fishing and Conservation of the Living Resources of the High Seas while the Geneva Conference of 1960 did not produce any convention. Those conventions have entered into force. Although the conventions were praised as a great achievement, some issues remain unresolved such as the fundamental questions on the territorial sea width, fishing rights beyond coastal states’ territories, fisheries resources conservation, continental shelf due to the new technology of underwater exploration and coastal states’ responsibility on pollution. More importantly, some post-colonial states, excluding Indonesia, had not been involved in drafting the Geneva Conventions, leading to the request to convene the Third United Nations Conference on the Law of the Sea (LOS III).

459 Convention on the Territorial Sea and Contiguous Zone.
464 David Harris, Cases and Materials on the International Law (Sweet and Maxwell, 2004) 380-381.
The member states of the third conference agreed to adopt LOSC on 10 December 1982. This Convention, known as the Constitution of the Ocean, is an umbrella for all international regulations governing ocean affairs. After completing negotiations for almost nine years, this Convention came into force on 16 November 1994 encompassing in general the provisions of marine-related issues such as the management of marine resources and spaces. In the preamble, the fisheries aspect is covered through member states’ recognition of ‘the equitable and efficient utilization of their resources, the conservation of their living marine resources, and the study, protection and preservation of the marine environment’. The principles are related to the conservation and management of marine living resources in the regimes of EEZ, continental shelf and high seas while territorial seas, internal waters and archipelagic waters fall under the sovereignty of coastal states.

As referred to in Articles 56(1) and 77(1) of the LOSC, as well as international custom, the coastal states have sovereign rights in the EEZ and continental shelf. In Article 56 (1), it is important to emphasize that the sovereign rights are limited only to the economic exploitation and exploration of EEZ (limitation ratione materiae). The coastal state has exclusivity in the sense that no state can conduct activity within the continental shelf without the express consent of coastal states if those states do not explore the continental shelf or exploit its natural resources. According to Tanaka, it can be argued that sovereign rights, along with express consent principle, also apply to the activities in EEZ. Coastal states have an obligation to the promotion of the objective of optimum utilization of the living resources in EEZ and the determination of its capacity to harvest the total allowable catch.

Nevertheless, other states such as developing states, land-locked states and geographically disadvantaged states have rights to access the surplus of the allowable catch in the case where the coastal state does not have the capacity to harvest total allowable catch through the

466 Harris, above n 464, 381.
467 Palma, Tsamenyi and Edeson, above n 26, 58.
468 Law of the Sea Convention Preamble.
469 Ibid arts 56(1) and 77(1).
471 Law of the Sea Convention art 77(2).
473 Law of the Sea Convention art 62(1).
conclusion of agreements or other arrangements.\textsuperscript{474} It is an obligation also for coastal states in the EEZ to ensure proper conservation and management efforts to prevent the living resources from over-exploitation based on the best scientific evidence. There shall be cooperation between coastal states and related international organizations at subregional, regional and global levels.\textsuperscript{475} When fishing in the EEZ, nationals of other states shall abide by the conservation measures and other laws and regulations of the coastal states.

These laws and regulations shall not be in contravention to the LOSC and may relate to the licensing of fishermen, fishing vessels and equipment, the determination of the species that may be caught, the regulation of the seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used, establishing the age and size of fish, the specific information concerning fishing vessels, the conduct of specific fisheries research programs, the assigning of observers or trainees on board, the landing of all or any part of the catch, terms and conditions of joint ventures or other cooperative arrangements, the requirements for training of personnel and technology transfer, and procedures of enforcement.\textsuperscript{476}

Because of the establishment of the EEZ regime, fishermen from distant fishing states catch fish on the high seas and overexploit some fish resources. There is a serious concern about the current fish stocks circumstance on the high seas. As stated in the United Nations Secretary General’s Report submitted to the resumed Review Conference on the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the overall status of highly migratory stocks has declined, although some fish stocks have improved since the previous assessment in 2010. In detail, there was a dormant fish stock level of 69 per cent, with deterioration of 20 per cent and improvement of 11 per cent in fish stocks.\textsuperscript{477}

\textsuperscript{474} Ibid arts 62(1)(2), 69 and 70.
\textsuperscript{475} Ibid art 61(2).
\textsuperscript{476} Ibid art 62(4).
\textsuperscript{477} Report submitted to the resumed Review Conference in accordance with paragraph 41 of General Assembly resolution 69/109 to assist it in discharging its mandate under article 36 (2) of the Agreement, UNGA, UN Doc A/CONF.210/2016/1 (1 March 2016) para 16.
On the high seas, one of the six principles applied is freedom of fishing. However, this freedom is not limitless and is subject to conditions laid down in Section 2, Part VII.478 Furthermore, Article 116 stipulates that all states have the right for their nationals to engage in fishing on the high seas subject to: a) treaty obligations; b) the rights and duties as well as the interests of coastal states provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and c) the provisions of section 2, Part VII.479 The duty of all states is to take, or to cooperate with other states in taking such measures for their respective nationals as may be necessary for the conservation of living marine resources of the high seas as contained in Article 117.480 States also have an obligation to cooperate with other states in the conservation and management of living resources on the high seas through the establishment of subregional or regional fisheries organizations.481 In addition, there is a duty for states to cooperate on the management of straddling stocks,482 highly migratory species,483 both anadromous484 and catadromous.485 The provisions related to the duty to cooperate pave the way for the formation of RFMOs.

The practice of reflagging, flags of convenience and the issue of genuine connections have all contributed to IUU fishing activities. In evading the prevailing regulations applied by RFMOs, vessels alter their flag from a state party to a non-state party member. Reflagging remains a key problem since ‘the requirements for the flag state to exercise control over their vessels are weak and subject to manipulation as well as being based on state consent’. Flag of convenience refers to the states that do not demand their vessels conform to the RFMO’s rules when fishing in their agreed area or accommodate the regulations set in the relevant international legally binding instruments.486 The practice is a challenge to halt since it depends more on each state’s domestic policy and awareness of preserving fisheries resources.

478 Law of the Sea Convention art 87(1)(e).
479 Ibid art 116.
480 Ibid art 117.
481 Ibid art 118.
482 Ibid art 63.
483 Ibid art 64.
484 Ibid art 65.
485 Ibid art 66.
When fishing on the high seas, a flag state has ultimate responsibility in managing and conserving marine living resources and combating IUU fishing. At the global level, two recognized legally binding instruments concerning flag states responsibilities are the 1993 FAO Compliance Agreement and the 1995 UNFSA. Nevertheless, LOSC also has the provision of flag responsibility.\(^{487}\) The FAO Compliance Agreement was adopted on 24 November 1993 and entered into force on 24 April 2003\(^ {488}\) while UNFSA was adopted on 4 August 1995 and entered into force on 11 December 2001.\(^ {489}\)

In the FAO Compliance Agreement, it is imperative for a flag state ‘to exercise effectively its jurisdiction and control over vessels flying its flag, including fishing vessels and vessels engaged in the transhipment of fish’.\(^ {490}\) In the preamble, the practice of flagging and reflagging is identified as one of the factors undermining the international conservation and management measures for living marine resources.\(^ {491}\) It covers state responsibility including genuine linkage as stated in Article III\(^ {492}\) and the records of fishing vessels.\(^ {493}\) Under the Indonesia Fisheries Law, the genuine link has been regulated under Article 63. In this provision, fishing vessels owned by Indonesian individuals are to be registered as Indonesian fishing vessels when operating in the Fisheries Management Area of Indonesia and on the high seas.\(^ {494}\) If the fishing vessels are purchased from overseas, a document of release published by the original flag state shall be lodged for registration.\(^ {495}\) Such registration also serves as a record of the fishing vessels. As a non-party to the Agreement, Indonesia is encouraged to adopt laws and regulations consistent with the provisions of the Agreement.\(^ {496}\)

\(^ {487}\) Law of the Sea Convention art 94.
\(^ {488}\) David Balton, The Compliance Agreement in Helen Hey (ed), Development in International Fisheries Law (Kluwer Law International, 1999) 34. As of 14 October 2014, 40 countries had expressed their consent to be bound by the Compliance Agreement by means of acceptance.
\(^ {489}\) Jean-Jacques Maguire et al, FAO Technical Paper: The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species (Information Division of FAO, 2006) 2. As of 2 September 2016, the UNFSA was signed by 59 states and entities.
\(^ {491}\) Ibid.
\(^ {492}\) Ibid art III(2).
\(^ {493}\) Ibid art IV.
\(^ {494}\) Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 12/PERMEN-KP/2012 tentang Usaha Perikanan Tangkap [Minister of Marine Affairs and Fisheries Regulation Number 12/PERMEN-KP/2012 on Capture Fisheries Business] art 36(1) (Indonesia) [author’s trans] (‘Indonesia Capture Fisheries Business Ministerial Regulation’).
\(^ {495}\) Ibid art 36(3).
\(^ {496}\) The 1993 FAO Compliance Agreement art VIII(1).
The Compliance Agreement provisions are intended to apply to all fishing vessels undertaking their activities on the high seas with particular arrangement for fishing vessels of less than 24 meters.\textsuperscript{497}Ministerial Regulation 12/2012 only governs fishing vessels of a minimum 30 gross tonnage and having at least 15 meters LOA (Length Overall).\textsuperscript{498} It is also important to highlight that as a non-member state of the Compliance Agreement,\textsuperscript{499} non-mandatory for Indonesia to exchange information\textsuperscript{500} and to be part of international cooperation\textsuperscript{501} with developing countries under the Agreement.\textsuperscript{502} As of October 2018, 42 states have become Parties to the Compliance Agreement.\textsuperscript{503} Despite the limited number of acceptances to the Agreement, Indonesia suffers a potential loss in not cooperating with Parties to the Agreement in terms of the exchange of information including evidentiary materials regarding activities of fishing vessels which help flag states to recognize fishing vessels reported to have been involved in activities undermining international conservation and management efforts.\textsuperscript{504}

The cooperation also occurs for port states in promptly notifying flag states and in launching an investigation when their fishing vessels have been used for activities that “undermines the effectiveness of international conservation and management measures” where there are reasonable grounds to believe that the fishing vessels have engaged in such measure.\textsuperscript{505} Indonesia may use this provision when their fishing vessels are in contravention of Article III concerning flag state responsibility if it consents to be bound by the Agreement. Furthermore, as a developing state, Indonesia can also receive assistance including technical assistance to fulfil the obligations under the Agreement if Indonesia becomes a State Party.\textsuperscript{506} It is evident that the problem of fishing vessels flying the Indonesian flag committing illegal fishing on the high seas arises from a variety of reasons. From an international legal framework point of view, the Compliance Agreement can be used as a tool to diminish illegal fishing practices on the high seas inasmuch as it provides mechanisms to curb activities that are inconsistent with

\textsuperscript{497} Ibid art II.
\textsuperscript{498} Indonesia Capture Fisheries Business Ministerial Regulation art. 3(3).
\textsuperscript{499} The 1993 FAO Compliance Agreement art VIII.
\textsuperscript{500} Ibid art VI.
\textsuperscript{501} Ibid art V.
\textsuperscript{502} Ibid art VII.
\textsuperscript{504} The 1993 FAO Compliance Agreement art V(1).
\textsuperscript{505} Ibid art V(2).
\textsuperscript{506} Ibid art VII.
international conservation and management measures. Indonesia’s consent to be bound by this Agreement creates an image as a sustainable fisheries nation that Indonesia has been attempting to establish globally.

The United Nations Fish Stocks Agreement (UNFSA) stipulates the principles of the conservation and management of those straddling fish stocks and highly migratory fish stocks and lays the foundation that the management shall be based on the precautionary approach and the best available evidence.\textsuperscript{507} In achieving this objective, the UNFSA sets out the mechanism for cooperation in the conservation and management of the resources through the promotion of the optimum utilization of resources of fisheries\textsuperscript{508} within areas under and beyond national jurisdiction.\textsuperscript{509} The approach to ensuring effective conservation and management of such fish stocks are the cooperation, either directly or indirectly, through appropriate subregional or regional fisheries management organizations or arrangements.\textsuperscript{510}

The effective control of flag states and international cooperation are dual objectives as set out in the UNFSA.\textsuperscript{511} Article 18(1) stipulates that flag states assumes the obligation to ensure their fishing vessels conform to sub-regional and regional conservation and management measures and prohibit the vessels engaging in any activity undermining the effectiveness of such efforts.\textsuperscript{512} During the Review Conference on the UNFSA, some signs of progress developed by flag states in undertaking effective control over vessels flying their flags were appraised. Nevertheless, there was also a concern expressed by delegations on the increasing number of fishing vessels undertaking IUU fishing in several regions.\textsuperscript{513} The following provisions are, among others, related to compliance and enforcement including cooperation mechanisms\textsuperscript{514} along with detailed arrangements such as necessary procedures for boarding and inspection.\textsuperscript{515} The role of the port state is acknowledged to promote the effectiveness of such measures.\textsuperscript{516}

\textsuperscript{507} Ibid art V(b)(c).
\textsuperscript{508} The 1995 United Nations Fish Stocks Agreement.
\textsuperscript{509} Ibid art 3.
\textsuperscript{510} Ibid art 8.
\textsuperscript{511} Yoshifumi Tanaka, \textit{A Dual Approach to Ocean Governance: The Cases to Zonal and Integrated Management in the Law of the Sea} (Routledge, 2016) 97.
\textsuperscript{512} The 1995 United Nations Fish Stocks Agreement art 18(1).
\textsuperscript{513} Report submitted to the resumed Review Conference, UN Doc A/CONF.210/2016/5, para 112.
\textsuperscript{514} The 1995 United Nations Fish Stocks Agreement arts 19, 20 and 21.
\textsuperscript{515} Ibid art 22.
\textsuperscript{516} Ibid art 23.
Another robust tool to address IUU fishing is the FAO PSMA. This Agreement was approved by the FAO Conference at its Thirty-Sixth Session in Rome on 18-23 November 2009 under Paragraph 1 of Article XIV of the FAO Constitution, through Resolution 12/220 dated 22 November 2009. This Agreement entered into force on 5 June 2016 after reaching 25th instrument of ratification, acceptance, approval or accession on 6 May 2016. As of 30 August 2016, 47 countries and the European Union have consented to be bound by this Agreement.\textsuperscript{517} Indonesia has ratified this PSMA through Presidential Regulation Number 43/2016.\textsuperscript{518} This is the only legally binding international instrument combatting IUU fishing emphasizing port state responsibility. The role of flag states is also recognized ensuring the successful implementation of the PSMA.\textsuperscript{519}

Compared to that of law enforcement at sea, port state measure is acclaimed as the most efficient and cost-effective way to fight IUU fishing, particularly for developing states.\textsuperscript{520} In general, there are three major stages covered by this FAO PSM - before entering a port, during docking at a port and after inspections. In the first stage, the port state can ban vessels from entering its port if sufficient evidence of IUU fishing activities is found.\textsuperscript{521} However, in the case of \textit{force majeure} or distress, fishing vessels shall be permitted to enter port to receive assistance.\textsuperscript{522}

When anchored at the port, if the vessel is proven to have engaged in IUU fishing, port states are obliged to prohibit landing and transhipping as well as processing and packing of fish in addition to the other port services.\textsuperscript{523} After the refusal, notification is delivered to the flag state, RFMOs and related international organizations.\textsuperscript{524} This measure aims to widely disseminate information as soon as possible, so that other states can be aware of the situation and take concrete, real-time action. As for the last resort, if there is convincing evidence that the vessel was engaged in IUU fishing, the vessel is banned from activities including refuelling, logistics, maintenance and dry docking.\textsuperscript{525}

\begin{footnotes}
\item[517] The 2009 Port State Measure Agreement.
\item[518] PSMA Presidential Regulation.
\item[519] The 1995 United Nations Fish Stocks Agreement art 20.
\item[521] The 2009 Port State Measure Agreement art 9.
\item[522] Ibid art 10.
\item[523] Ibid art 11(1).
\item[524] Ibid art 11(3).
\item[525] Ibid art 18(1)(b).
\end{footnotes}
The other significant treaty in preventing illegal fishing and TOC particularly on the high seas is the 2012 Cape Town Agreement. This agreement was adopted by the IMO, and it brings the main mission to enhance:

The standard of design, construction and equipment, including safety protections, of fishing vessels 24 metres or more in length. The agreement also outlines regulations for crew and observer protections and calls for harmonized inspections, those that consider fisheries, labour, and safety issues.\(^{526}\)

The Cape Town Agreement of 2012 updates and amends the Torremolinos International Convention (the Convention) for the Safety of Fishing Vessels of 1977 and the 1993 Torremolinos Protocol (the Torremolinos Protocol). The Convention has been twice amended previously while the Protocol has updated and amended the Convention in view of technological progress since 1977.\(^{527}\) The International Labour Office (ILO) notes that the International Convention for the Safety of Life at Sea, 1974 as amended (the SOLAS Convention) is the most important legal instrument to enhance the safety of life and vessels at sea, but fishing vessels are generally exempted from SOLAS. The Torremolinos Protocol deals with this gap by regulating the safety of fishers’ lives at sea but the status of the Torremolinos Protocol has not come into force, except for European Union members through the adoption of Directive 97/70/EC of 11 December 1997.\(^{528}\)

The condition for the Cape Town Agreement to come into force is ‘12 months after the date on which not less than 22 states the aggregate number of whose fishing vessels of 24 m in length and over operating on the high seas is not less than 3600 have expressed to be bound by it’.\(^{529}\) This threshold is lower than the conditions set in the Convention and the Torremolinos Protocol in order to achieve more consent by states. Technical arrangements of the Agreement will apply to new fishing vessels of a length of at least 24, 45 and 75 metres. However, some articles will apply only to existing fishing vessels of at least 24 and 45


metres.\textsuperscript{530} The 24 meters or longer fishing vessels regulated under the Cape Town Agreement comes for the rationale that the fishing vessels in this size usually operate on the high seas. The vessels at the smaller than 24 meters generally carry out commercial fishing within EEZ and are subject to national regulations.\textsuperscript{531} As of 20 March 2018, nine countries have ratified the Cape Town Agreement (Congo, Denmark, France, Germany, Iceland, Netherlands, Norway, Saint Kitts and Nevis and South Africa) consisting of 1144 fishing vessels in total of at least 24 meters.\textsuperscript{532} A minimum number of states expressing consent to be bound by this agreement has not been reached to allow it to come into force. As was the case for its successors, the Convention and the Protocol, the biggest challenge of this Agreement remains its limited number of state parties.

The link between IUU fishing and the safety of fishers working on board and forced labour has been acknowledged by the FAO Committee on Fisheries. There are three relevant agreements encompassing the connection, those are: PSMA, the Cape Town Agreement and the ILO Work in Fishing Convention Number 188.\textsuperscript{533} Fishing operators who engage in illegal fishing are less likely to provide their crews with proper labour conditions, safety equipment or training. They are inclined to have inadequate modifications and their vessels often lack inspection or safety certifications in order to reduce operational costs.\textsuperscript{534} Fiercer competition amongst vessel owners due to declining fish stocks may undermine fishers’ safety.\textsuperscript{535} As such, it is in Indonesia’s interest to consent to the Cape Town Agreement for the reasons that Indonesia can play three following different roles:

1. Coastal state.

As a coastal state, Indonesia has a profound interest in conserving and managing the coastal areas in its territorial sea and EEZ. Under international law, ‘States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.’\textsuperscript{536} The sovereign right applies in the EEZ of the coastal state. Indonesia reserves the right to enforce full sovereignty

\textsuperscript{530} Ministry of Transport of New Zealand, above n 527, 3.
\textsuperscript{534} The PEW Charitable Trusts, \textit{The Cape Town Agreement Explained}, above n 531, 2.
\textsuperscript{535} ILO, \textit{Caught at Sea: Forced Labour and Trafficking in Fisheries}, above n 528, 6.
\textsuperscript{536} \textit{Law of the Sea Convention} art 193.
in its internal waters, archipelagic waters and territorial sea. The ratification and application of the Cape Town Agreement would enable the marine environment to be safer and less chance for the incidents to occur in Indonesia’s coastal waters since the safety standards of fishing vessels operating in the waters is higher.

The incidents such as capsizing, fire or foundering may potentially lead to pollution spread over the coastal waters. Another advantage is enhancing the transparency of the domestic and foreign fishing vessels that navigate in Indonesia’s waters with regard to the operations, standards of safety and working conditions. The principle of ‘no more favourable treatment’\(^{537}\) regulated under the Cape Town Agreement authorizes a coastal state to inspect foreign fishing vessels although the flag state is not a state party to the Agreement.

2. Flag State.
Indonesia plays a decisive role on fishing in Areas Beyond National Jurisdiction (ABNJ), and the Cape Town Agreement can be used as a tool to have more control over Indonesian fishing vessels when operating on the high seas. As of December 2018, Indonesia has become member of three RFMOs, those are, the Western and Central Pacific Fisheries Commission (WCPFC) in 2013,\(^{538}\) the Conservation of Southern Bluefin Tuna (CCSBT) in 2007\(^{539}\) and the Indian Ocean Tuna Commission (IOTC) in 2007.\(^{540}\) Indonesia made a declaration on Article 3 paragraph 1, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the WCPFC upon ratification to the Convention in which ‘the application on the Convention shall only cover the Indonesia’s Exclusive Economic Zone adjacent to and within the Pacific Ocean as defined in the Article 3 of the Convention, and shall not be

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\(^{537}\) The 2012 Cape Town Agreement art 4(7).

\(^{538}\) Peraturan Presiden Republik Indonesia Nomor 61 Tahun 2013 tentang Pengesahan Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Konvensi tentang Konservasi dan Pengelolaan Sediaan Ikan Buruaya Jauh di Samudera Pasifik Barat dan Tengah) [Presidential Regulation Number 61/2013 on the Ratification of Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean] [Cabinet Secretariat (Indonesia) trans] \(<http://sipuu.setkab.go.id/PUUdoc/173870/Perpres0612013.pdf>\> (‘Indonesia Presidential Regulation on the Ratification of WCPFC’).


extended to the archipelagic, territorial and internal waters’.\textsuperscript{541} As recorded by each RFMO (as of 30 December 2018), Indonesia flagged-fishing vessels registered in WCPFC, CCSBT and IOTC amounted to 20,\textsuperscript{542} 101\textsuperscript{543} and 329,\textsuperscript{544} respectively. With the total number of 454 fishing vessels, the ratification of the Cape Town Agreement is of utmost importance for Indonesia’s fishing fleet to apply and ensure certain safety standards.

Once the Agreement is ratified, the operators of commercial fishing vessels will be required to spend the expenditures to manage the safety and the working conditions of the crews. It is therefore to force fishing vessels to abide by the rules of the Agreement thus taking into account a growing concern about ‘human trafficking, including severe violation of minimal working and living conditions, on board fishing vessels’.\textsuperscript{545} Those fishing vessels should be inspected in a more regular fashion to conform with the provisions of the Agreement. This measure also makes illegal fishing harder to commit since the operators are watched closely by Indonesia Government.

3. Port State.

The Committee on Fisheries of FAO had come into a conclusion that the Cape Town Agreement was to become a significant instrument to eliminate IUU fishing inasmuch as the fishing vessels of member countries, as part of the Agreement, would fall under the ambit of Port State Control (PSC).\textsuperscript{546} By agreeing to be bound by the Cape Town Agreement, Indonesia can use the Agreement to complement the PSMA, to which Indonesia is a State Party (Presidential Regulation Number 43/2016), being an instrument to curb illegal fishing through having the authority to conduct inspection at ports owing to the no favourable treatment to vessels of non-Parties.\textsuperscript{547}

\textsuperscript{541} Indonesia Presidential Regulation on the Ratification of WCPFC.
\textsuperscript{542} The Western and Central Pacific Ocean, WCPFC Record of Fishing Vessels (December 2018) <https://www.wcpfc.int/record-fishing-vessel-database?flag=Indonesia&field_vessel_submitted_by_ccm_value=All&type=All&name=&ircs=&win=&vid=&imo=&auth=tranship_hsf=All&fishing_methods=All>.
\textsuperscript{544} Indian Ocean Tuna Commission, Record of Currently Authorized Vessels (December 2018) <http://www.iotc.org/vessels/current>.
\textsuperscript{545} Witbooi, above n 57, 296.
\textsuperscript{547} The 2012 Cape Town Agreement art 4 (7).
As one of the safety at sea instruments, the Agreement also carries the potential to improve the transparency of the identity of fishing vessels, ownership and movement since it could serve as a means to extend the IMO identification number and automatic identification system on merchant vessels to fishing vessels. One possible reason for the extension of IMO identification number is because the Cape Town Agreement falls under the auspices of IMO. This application of IMO number would assist Indonesia as port state in identifying the foreign fishing vessels when docking in Indonesia’s ports.

It is worth mentioning that the Cape Town Agreement provides leniency in its application. In the case a State Party to the Agreement has concluded not to implement all of the provisions regulated under Chapters VII, VIII, IX and X on existing vessels, the State Party may, according to a plan, progressively apply the measures provided for in Chapter IX over a period of a maximum of 10 years and the Chapters VII, VIII and X over a period of no more than five years. Furthermore, the exemption may be applied to vessels of a State Party if the requirements are deemed to be unreasonable and impracticable in view of the vessel type, the conditions of weather and the absence of navigational hazards in general, provided, among others, the vessels only operate in its EEZ. The following table depicts the complete guidance on the implementation of the Cape Town Agreement by state parties:

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</table>

Table 1: The Guidance on the Application of the 2012 Cape Town Agreement

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549 *The 2012 Cape Town Agreement* art 1(4).
550 Ibid art 3(3).
Despite the fact that consent by countries to the Cape Town Agreement has so far failed to reach the minimum 22 countries required for it to enter into force, Indonesia still needs to strengthen its leadership role in combating IUU fishing and transnational organized crime in the fisheries sector by ratifying the Agreement.

Furthermore, the role of the ILO Convention concerning Work in the Fishing Sector (Work in Fishing Convention, 2007) (No. 188) to eliminate IUU fishing and fisheries crimes also comes into the fore. As admitted by FAO, a number of international institutions have been attempting to establish instruments that can be used to address crimes associated with the fisheries sector including ILO that develops the Work in Fishing Convention Number 188 to combat the crimes.\(^{552}\) This convention adopted on 14 June 2007 in Geneva\(^{553}\) has come into force in 2017 after Lithuania expressed its consent on 16 November 2016 meeting the minimum requirement of 10 ratifications to enter into force in November 2017. It is acknowledged that this convention constitutes to be the first international treaty dealing with fishers’ conditions on board in the effort to fight against the abuses of human rights,\(^{554}\) and it is conceived also as a “toolkit” to combat IUU fishing.\(^{555}\) The adoption of the Convention is

<table>
<thead>
<tr>
<th>VI</th>
<th>Protection of Crew</th>
<th>Applied</th>
<th>Upon ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>VII</td>
<td>Appliances of Lifesaving</td>
<td>Applied</td>
<td>Up to 5 years after ratification</td>
</tr>
<tr>
<td>VIII</td>
<td>Emergency Procedures</td>
<td>Applied</td>
<td>Up to 5 years after ratification</td>
</tr>
<tr>
<td>IX</td>
<td>Radio Communications</td>
<td>Applied</td>
<td>Up to 10 years after ratification</td>
</tr>
<tr>
<td>X</td>
<td>Navigational Device</td>
<td>Applied</td>
<td>Up to 5 years after ratification</td>
</tr>
</tbody>
</table>


\(^{555}\) Palma, Tsamenyi and Edeson, above n 26, 15.
supplemented by the Work in Fishing Recommendation 2007 (R199). Like other ILO recommendations, it is a voluntary mechanism as it does not have a legal character. Nonetheless, it is indicative of those scopes that are regarded as the most necessitating legislation: youngsters protection, medical examination, service condition, accommodation, protection of health, training, payment, medical care and social security.

The prompt response to protect its fishers working on board has been demonstrated by Indonesia through inter-ministerial coordination to discuss the ratification and the stipulation of several relevant national regulations. The related ministries such as MMAF, Ministry for Foreign Affairs, Coordinating Ministry of Maritime Affairs, Ministry of Transport, Ministry of Legal and Human Rights and the Ministry of Labour made the overview on the ratification of the ILO Work in Fishing Convention. They have come into a decision on March 4th, 2019 that Indonesia is not prepared to provide its consent to the convention. Their particular concerns are as follows:

1. The application of Ministerial Regulation Number 42/PERMEN-KP/2016 concerning the Work Agreement for Fishing Vessels Crew on Board as the adoption to some provisions of the Work in Fishing Convention experiences some gaps to address;
2. Indonesia needs to pay more focus on the protection of domestic fishing vessel crews;
3. The lack of ratification from the other countries;
4. The strengthened coordination should come forward amongst government institutions, fishing companies and fishing vessel crews in making the ILO Convention on the Work in Fishing implemented;
5. The regular meetings will be conducted to oversee the government institutions preparedness in ratifying the convention.

With regard to the legal aspect, MMAF takes the side of fishers’ human rights values in the stipulated regulations. The prevailing Ministerial Regulation Number 35/PERMEN-KP/2015 concerning System and Certification of Human Rights on Fisheries Business sets out the objective to ensure that fishing company pays a respect to all stakeholders of fisheries commercials including fishing vessel crews and local community by preventing and

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558 The report of the meeting is for internal purpose only, so the document is kept as author’s file.
overcoming activities that may constitute to human rights breach.\textsuperscript{559} In this regulation, every business people in fisheries sector shall follow fisheries human rights system\textsuperscript{560} through the statement to respect the rights to:\textsuperscript{561}

1. Receive the remuneration and sufficient and adequate time to take a rest;
2. Obtain a good living standard including accommodation, food and drink;
3. Receive the medical treatment;
4. Get the social insurance;
5. Obtain the protection from the working risk;

The work agreement for the labour and the crew of fishing vessels shall be concluded and applied to ensure that a good standard of salary is fulfilled.\textsuperscript{562} In addition, the forced labour practices are also banned.\textsuperscript{563} The technical arrangement of the work agreement and the certification of human rights is further governed in Ministerial Regulation Number 42/PERMEN-KP/2016 concerning the Work Agreement for Fishing Vessel Crew on Board\textsuperscript{564} and Ministerial Regulation Number 2/PERMEN-KP/2017 concerning the Conditions and Mechanism of Fisheries Human Rights Certification.\textsuperscript{565}

The intention of Indonesia Government to ratify the ILO Work in Fishing Convention and to protect fisheries working on board has been shown by a series of inter-agency meeting and the enactment of a set of legislation. However, it comes into some considerations that more time is needed to ratify the convention. Therefore, the legal gaps still persist although System and Certification of Human Rights on Fisheries Business Ministerial Regulation is in place. Unlike the convention, the national regulation does not address the matters in detail and the scope of the two is not always identical. For instance, the ministerial regulation requests fisheries entrepreneur to respect the right of fishers, among others, to have an access on

\textsuperscript{559} \textit{Indonesia Ministerial Regulation on System and Certification of Human Rights} art 2(2).
\textsuperscript{560} Ibid art 4(a).
\textsuperscript{561} Ibid art 5(2)(b).
\textsuperscript{562} Ibid art 5(2)(c).
\textsuperscript{563} Ibid art 5(2)(d).
Meanwhile, it is a compulsory for fishers to secure a lawful medical certificate attesting the ability to do their duties. This provision can be exempted from the application after having consultation with the competent authority. However, the exemption cannot be rendered to ‘a fisher working on a fishing vessel of 24 metres in length and over or which normally remains at sea for more than three days.’ The domestic regulation governs a very general provision on medical issue which is different with the convention regulating in a more detailed arrangement. The loose the word “respect” in the regulation also brings a distinguishable gravity in the convention that chooses the word “shall”. The most notable distinction between the regulation and convention that can be discovered is the former applies only to fishing business in Indonesia and fishing vessels flying Indonesia flag or foreign fishing vessels that capture the fish in Indonesia while the latter covers ‘all fishing vessels engaged in commercial fishing operations’ including ‘24 metres in length and over’ which are typical for fishing on the high seas operation.

The legal loopholes that exist for not ratifying the ILO Work in Fishing Convention brings the potential for the fishers working in the fishing vessels flying Indonesia’s flag. However, the ratification cannot be extended to protect Indonesia fishers working in the foreign fishing vessels particularly when operating on the high seas as it applies the flag state jurisdiction. Considering the total number of 454 Indonesia fishing vessels on the high seas (as presented in the previous section on the Cape Town Agreement), Indonesia may lose the chance to protect its fishers and most importantly, to prevent IUU fishing and fisheries crimes to take place. As such, it is advisable Indonesia should attempt to its best effort ratifying the convention. If the country perceives that related domestic issues overshaows its preparedness to express its consent, some leniencies on the application of the convention particularly for fishing vessels less than 24 metres can be opted as reference as provisioned in Article 4(1).

Furthermore, in order to provide more comprehensive information concerning Indonesia’s commitment on the international legally binding instrument, the following is the list of

566 Ibid art 5(2)(b).
567 Work in Fishing Convention art 10.
568 Indonesia Ministerial Regulation on the Conditions and Mechanism of Fisheries Human Rights Certification art 3(1).
569 Work in Fishing Convention art 2.
570 Work in Fishing Convention art 4(1).
international legally binding instruments related to living marine resources to which Indonesia has provided its consent to be bound.\textsuperscript{571}

Table 2: International Legally Binding Instruments related to Living Marine Resources Ratified by Indonesia

<table>
<thead>
<tr>
<th>No</th>
<th>Convention</th>
<th>Year of Ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Convention on the High Seas</td>
<td>1958</td>
</tr>
<tr>
<td>2</td>
<td>Convention on the Continental Shelf</td>
<td>1958</td>
</tr>
<tr>
<td>3</td>
<td>Convention on Fishing and Conservation of the Living Resources of the High Seas</td>
<td>1958</td>
</tr>
<tr>
<td>4</td>
<td>Convention on the Law of the Sea (UNCLOS)</td>
<td>1985</td>
</tr>
<tr>
<td>6</td>
<td>Convention for the Conservation of Southern Bluefin Tuna (CCSBT)</td>
<td>2007</td>
</tr>
<tr>
<td>7</td>
<td>Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC)</td>
<td>2007</td>
</tr>
<tr>
<td>9</td>
<td>Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC)</td>
<td>2013</td>
</tr>
<tr>
<td>10</td>
<td>Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measure/ PSM Agreement).</td>
<td>2016</td>
</tr>
</tbody>
</table>

2.1.2. Case Law.

Law enforcement in combatting IUU fishing and fisheries crimes notably determines the compliance of states in managing and conserving fisheries resources. Article 73 of LOSC provides laws and regulations enforcement exerted by coastal states in EEZ:

\textsuperscript{571} Ministry of Foreign Affairs of Indonesia, \textit{The List of International Treaty registered in the Ministry of Foreign Affairs of Indonesia} <http://treaty.kemlu.go.id/index.php/treaty/index?fullPage=1&Treaty%5Bwork_field%5D=45>.
1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels, the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.\(^\text{572}\)

Some essential principles are applied in Article 73 such as sovereign rights in EEZ, prompt release and posting the reasonable bond or other security, the exclusion of imprisonment with certain conditions when violating fisheries laws and regulations, as well as prompt notification to the flag states after the arrest and detention of fishing vessels. Article 73(1) has provided the coastal states the ability to exercise the right of hot pursuit as stated in Article 111(2)\(^\text{573}\) for foreign fishing vessels that attempt to escape from law enforcement efforts.

Further application concerning prompt release of vessels and crews is regulated under Article 292 of LOSC stating that:

> Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.\(^\text{574}\)

In the case of a detained vessel and crew which is not promptly released upon the posting of the reasonable bond, flag states may bring the case before any court or tribunal as mutually agreed upon by the parties. Nevertheless, particular arrangement is paid in the case where the parties cannot reach an agreement within ten days through application to the court or tribunal under Article 287 or ITLOS. As such, the consent of the detaining state is compulsory. When signing, ratifying or acceding LOSC, the state party shall be free to choose one or more 4 (four) means for dispute settlement on the interpretation and application of LOSC through a

\(^\text{572}\) *Law of the Sea Convention (LOSC)* art 73.

\(^\text{573}\) *Ibid* art 111(2). The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

\(^\text{574}\) *Ibid* art 292(1).
written declaration. The choices of procedure are: a) ITLOS, b) ICJ, c) arbitral tribunal in accordance with Annex VII, and d) a special arbitral tribunal in accordance with Annex VIII for one or more of the categories of disputes therein.\textsuperscript{575}

Several submissions to ITLOS evoke Article 292. As of 2 January 2019, a total of 25 cases have been submitted to the Tribunal and most cases related to prompt release (nine cases).\textsuperscript{576} One of the cases applying Article 73 is illustrated by the Case of the “Camouco” (Panama v. France) on Prompt Release. The French government arrested the Panamanian-flagged Camouco and the Seychelles-flagged Monte Conforco in August and September 1999. Those vessels were proven to have been involved in illegal fishing in the EEZ of France. The case then, was brought before ITLOS under Article 73 and 292 of the LOSC. Another instance of prompt release is the “Volga” Case (Russian Federation v. Australia). Australian authorities arrested a Russian fishing vessel for violating sovereign rights near the Heard and McDonald Islands in Australia’s EEZ. The case was also brought before the Tribunal concerning the applications of Article 73 and 292 of LOSC.\textsuperscript{577}

Legal question on the amount of bond determined by the arresting state as stated in Articles 73 and 292 of LOSC was addressed in those two cases.\textsuperscript{578} In the “Camouco” Case, the judges of the Tribunal identified the relevant aspects to assess ‘the reasonableness of bonds or other financial security’ as follows:

The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.\textsuperscript{579}

The list was not intended to include all factors, nor does the Tribunal aim to set inflexible rules. Those factors are a complement to the adjudication of the M/V “Saiga” Case, in the following:

\textsuperscript{575} Ibid art 287(1).
\textsuperscript{577} Sodik, above n 76, 60.
\textsuperscript{579} Camouco (Panama v France) (Judgement) (International Tribunal for the Law of the Sea, Case No 5, 7 February 2000) [67].
In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.580

In 2015, ITLOS received submission from the SRFC regarding Illegal, Unreported and Unregulated Fishing.581 The background for the submission was the consideration that the principle of exclusive jurisdiction of flag states contained in LOSC was inadequate in making sure of the compliance with, and enforcement of, rules.582 This intergovernmental organization after particular considerations from participants contending and in favouring Articles 16 and 21 of the Statue of the ITLOS and Article 138 of the Tribunal, through its judges, came to the decision that the Tribunal have jurisdiction to entertain the request submitted to it by SRFC. The jurisdiction of the Tribunal is limited to the EEZ of the SRFC Member States.583 Article 16 reads ‘The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure’584 while Article 21 of the Statute reads ‘The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal’.585

Furthermore, Article 138 of the Rules states:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. Request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply mutatis mutandis articles 130 to 137.

SRFC has submitted the 4 (four) following original questions to obtain the advisory opinion of ITLOS:

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third-party States?

580 M/V “SAIGA” (Saint Vincent and the Grenadines v. Guinea) (Judgment) (International Tribunal for the Law of the Sea, Case No 2, 1 July 1999) [82].
583 Request for Advisory Opinion (submitted by the Sub-Regional Fisheries Commission) (Advisory Opinion) (ITLOS, Case No 21, 2 April 2015) [69].
584 Statute of the International Tribunal for the Law of the Sea art 16.
585 Ibid art 21.
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where a fishing licence is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?\(^{586}\)

For the first question, the Tribunal referred to Articles 192 and 193 of LOSC in which the flag state shall undertake necessary measures to ensure that its vessels abide by the protection and preservation measures adopted by the member states of the SRFC.\(^{587}\) The flag state shall also exercise its jurisdiction and control effectively in administrative matters over its vessels particularly by correctly marking such vessels.\(^{588}\) Furthermore, the flag state has an obligation to impose adequate sanctions over its fishing vessels flying its flag when committing IUU fishing to prevent violations and to deprive offenders of the benefits acquired from their IUU fishing activities.\(^{589}\) It is important to note that the sanction is not only for the purpose of a prevention measure but also to remove the advantages taken by the perpetrators.

In the sense that the second question is related to the flag state’s liability, the Tribunal evoked Draft Articles 1, 2 and 31 (paragraph 1) of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, as the rules of general international law.\(^{590}\) The Tribunal made a reference to due diligence obligations from Articles 125 to 140 as well as distinguishing between due diligence obligations and result obligations.\(^{591}\) A further important explanation is the definition of ‘due diligence obligations’ as provided by the ICJ in the Pulp Mills on the River Uruguay case, as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would, therefore, be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.\(^{592}\)

\(^{586}\) Request for Advisory Opinion (ITLOS, Case No 21, 2 April 2015) [2].
\(^{587}\) Ibid [136].
\(^{588}\) Ibid [137].
\(^{589}\) Ibid [138].
\(^{590}\) Ibid [144].
\(^{591}\) Ventura, above n 582, 62.
\(^{592}\) Request for Advisory Opinion (ITLOS, Case No 21, 2 April 2015) [133].
In the case that a flag state has undergone all necessary and appropriate efforts to conform with “due diligence obligations” to make sure that its fishing vessels do not undertake IUU fishing, the flag state is not liable.\(^{593}\)

The third question is more complicated and open to multi-interpretation in which the Tribunal needed to further illuminate the term of international agency and the scope of the question. It was reiterated that when the international organization has concluded a fisheries access agreement with an SRFC member state, the international organization assumes the responsibility of its member states. Hence, the international organization shall ensure that its member states’ fishing vessels do not breach the fisheries laws and regulations of the SRFC member states and do not undertake IUU fishing activities.\(^{594}\) This is also to confirm the international organization’s liability if its member states constitute a breach of fisheries access agreement in the SRFC Member States.

The fourth question pointed particularly to shared stocks in the EEZ of the SRFC member states, particularly small pelagic species and tuna. The Tribunal was of the view that Articles 61, 62, 73 192 and 193 of the LOSC are relevant to the question.\(^{595}\) Those articles are primary references for the conservation and management of marine living resources. The SRFC member states have the right to reach agreement with the other members of SRFC to coordinate and ensure the conservation and development of their shared stocks. Nonetheless, they also have an obligation to make sure of the sustainable management of shared stocks in their EEZ by developing several measures.\(^{596}\)

### 2.2. Domestic Overview.

#### 2.2.1. Recent Developments: Indonesia’s Efforts to Address TOFC and IUU Fishing.

Along with a policy viewpoint, the legal instrument plays a key role in ensuring the conservation and management of living marine resources from degradation, particularly the depletion of fisheries resources. Within the ambit of the domestic legal instrument, marine resource management in Indonesia has been governed through a complex regulatory

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\(^{593}\) Ibid [148].

\(^{594}\) Ibid [172].

\(^{595}\) Ibid [180].

\(^{596}\) Ibid [207].
As an umbrella of laws and regulation, Article 33(3) of the 1945 Constitution of the Republic of Indonesia reads ‘Land and water and natural resources therein shall be controlled by the State and shall be utilized for the greatest benefit of or welfare of the people’. In this article, the government asserts the mandate to explore the natural supplies including marine resources for the prosperity of the people. In other words, the state is obliged to preserve the resources from deterioration in order to make it of benefit to the people.

After Indonesia declared its independence in 1945, Indonesia’s legislative system was deemed to be ‘one of the most formidable legislative frameworks in the world’. Pursuant to Article 7 of Law Number 12/2011 concerning the Formulation of Laws and Regulations, the 1945 Constitution occupies the supreme law, followed by People’s Consultative Assembly Decree. The third position is Laws or Government Regulations in Lieu of Law while the fourth level is Government Regulation. The last three positions are Presidential Regulation, Provincial Regulation and Regional/Municipal Regulation. In addition, the other regulations such as regulation of the House of Representatives and ministerial regulation are recognized in the legislative system. The following is the hierarchy of Indonesia's laws and regulations in accordance with Article 7(1), as depicted in Figure 8:

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598 *Undang-Undang Republik Indonesia tahun 1945* [the Constitution of the Republic of Indonesia 1945] (Indonesia) art 33 (2) [Simon Butt].
Indonesia pays particular concern to fisheries, embedded in its domestic legal system in the form of laws and regulations. The primary legal instrument governing fisheries resources is Law No. 45/2009 as an amendment to Law No. 31/2004 concerning Fisheries. The main objective of Law No. 45/2009 is to better address the problem of illegal and unreported fishing. This law addresses challenges of new technology invention, better coordination amongst related institutions involved in fisheries management and ‘matters of jurisdiction and the competency of regency-level court’s traditional scope of authority’. Further, it also aims to engage local administrations more. The amended Law 31/2004 was not conceived to have increased sustainable income through fisheries management, surveillance and optimal law enforcement. As a primary law, Fisheries Law does not govern technical aspect of fisheries. The specific issues of fisheries such as fishing vessel registration and licensing, licensing of fisheries business, fish monitoring system and the other aspects are regulated

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600 *Indonesia Laws and Regulations Making Law* article 7(1).
602 Ibid.
603 *Indonesia Fisheries Law* para “Considering”.
under ministerial regulations, ministerial decrees, governmental regulations and director general decrees.

It is commonly observed that the perpetrators of criminal acts are inclined to conceal, or camouflage money and assets acquired from these activities. This means authorities have difficulty in tracing these assets thus criminals can spend it legally or illegally. In anti-money laundering, the perpetrators and their illegal assets can be spotted through a tracing mechanism. By confiscating the illegal assets and detaining the criminals, the crime rate can be diminished. This principle can be applied to the assets from illegal fishing and as well as fisheries crimes. Indonesia has enacted Law Number 8/2010 concerning Countermeasures and Eradication of Money Laundering. Under this law, any assets shall be classified as being the result of criminal acts if they are acquired from illegal activities such as, among others, corruption, bribery, immigrant smuggling, human trafficking, labour smuggling, taxation crimes, environmental crimes, crimes in marine and fishery or other crimes dealt with by imprisonment for 4 (four) or more years.

In terms of punishment, Article 3 of Law Number 8/2010 reads:

Anyone, who places, transfers, forwards, spends, pays, grants, deposits, takes abroad, changes the form, changes to the currency or securities or other deeds towards the Assets of which are recognized or of which are reasonably alleged to be as the result of criminal action, as set forth in Article 2 section (1) with the purpose to hide or to disguise the origin of Assets, shall be subject to be sentenced due to the criminal action of Money Laundering with imprisonment of no longer than 20 (twenty) years and fined no more than Rp10,000,000,000.00 (ten billion rupiah).

Different degrees of punishment apply depending on the gravity in committing such crime in either a passive or active manner. Moreover, if it is committed by corporations, the sentence shall be subject to the corporation and/or corporation control personnel. A fine of no more than Rp 100 000 000 shall be imposed on the corporation as the primary sentence. An additional sentence shall be enforced in the case of: ‘a) announcement of judge’s verdict; b) suspension of the overall or partial business activity of the Corporation; c) revocation of the business licence; d) dissolution or restriction of the Corporation; e) Confiscation of the

605 Indonesia Money Laundering Law art 2.
606 Ibid art 3.
607 Ibid art 6. Sentence shall be subject to the Corporation in the event that the criminal act of Money Laundering: committed or ordered by the Corporation Control Personnel, committed in the framework of the objectives and purposes of the Corporation, committed to according with the function of perpetrator or the person who give the order; and is committed to give benefit for the Corporation.
Corporation's assets for the State; and/ or f) Corporation takeover by the State’. An independent institution, Financial Transaction Report and Analysis Centre (Pusat Pelaporan Analisis dan Transaksi Keuangan/ PPATK), was established by the Indonesian Government to prevent and eliminate money laundering.

To protect labourers working in the fisheries sector from human rights violations, MMAF has enacted Minister of Marine Affairs and Fisheries Regulation Number 35/PERMEN-KP/2015 concerning System and Certification of Human Rights on Fisheries Business. This regulation requires business people in the fisheries industry to respect and implement human rights values. One prominent case of human rights abuse was found in the Benjina Case which occurred on Benjina Island, Maluku, Indonesia. Associated Press reported that more than 300 workers were evacuated to Tual, Maluku after being investigated on 4 April 2015.

2.2.2. Sinking and/or Burning Illegal Fishing Vessels: Standard Operating Procedures.

In the case of burning and/or sinking of illegal fishing vessels, the authority can undertake this “distinctive measure” on the basis of sufficient preliminary evidence. Further technical and detailed arrangements are regulated under the Director General of Marine and Fisheries Resources Surveillance Regulation Number 11/PER-DJPSDKP/2014 concerning Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels. In this regulation, a Distinctive Measure is a measure undertaken by Fisheries Civil Servants Investigators and/or Fisheries Supervisors when executing their duties on board to protect themselves and enforce fisheries legislation.

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608 Ibid art 7.
609 Ibid art 37.
610 Indonesia Ministerial Regulation on System and Certification of Human Rights.
611 McDowell and Mason, above n 381.
612 Indonesia Fisheries Law art 69(4).
614 Ibid art 1.
Two conditions shall be met when burning and/or sinking foreign fishing vessels in accordance with Article 6. These conditions are subjective and/or objective.\textsuperscript{615} The subjective conditions include:\textsuperscript{616}

1. Master and/or crews of foreign fishing vessels resist, and/or their maneuver endangers the fisheries patrol vessel and its crews when halting, checking and/or taking the identified vessel to the nearest port;
2. It is not possible to take or escort the identified vessel to the nearest port due to weather condition;
3. Identified foreign fishing vessels are severely damaged and can endanger the safety of perpetrators and fisheries patrol vessels.

Meanwhile, the objective conditions consist of cumulative and/or alternative conditions:\textsuperscript{617}

1. Cumulative conditions comprise:
   a. The fishing vessel is not equipped with valid licenses;
   b. Obviously catching and/or transporting fish in the Fisheries Management Areas of Indonesia; and
   c. Foreign fishing vessels with all foreign crews.
2. Alternative conditions shall include:
   a. Foreign fishing vessels captured which are not highly valued; and/or
   b. The vessels cannot be taken into the closest port, with due considerations of:
      1) The vessel is endangering navigational safety and/or quarantine concerns;
      2) The vessel is carrying communicable diseases and/or poisonous and dangerous materials;
      3) It is impossible to be escorted to the nearest port due to the number of captured vessels; and/or
      4) High cost of taking or escorting the vessels.

Some procedures should be followed prior to imposing the Distinctive Measure, such as warning crews to leave the vessel, evacuating them, attempting to detach the flag, documenting and taking note of the vessels’ position, where it was burnt and/or sunk.\textsuperscript{618} The Distinctive Measure can be carried out in EEZ in the event that subjective conditions are

\textsuperscript{615} Ibid art 6.
\textsuperscript{616} Ibid art 7.
\textsuperscript{617} Ibid art 8.
\textsuperscript{618} Ibid art 10.
fulfilled.\footnote{Ibid art 12.} Unfortunately, the Director General’s regulation is silent on the steps following the imposition of the Distinctive Measure with regard to notification to the flag state of the fishing vessels.

Nevertheless, sending a notification is stipulated under the Vienna Convention on Consular Relations of 1993, Article 36 (b) which reads ‘the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner’.\footnote{Vienna Convention on Consular Relations, 596 UNTS 261 (entered into force 19 March 1967) art 36(b).} Therefore, flag states shall be informed through diplomatic channels if the fishing master and crew are arrested or detained for fishing illegally. If a foreign fishing vessel is arrested or detained in another State’s EEZ, the coastal state has a duty to promptly notify the flag state through appropriate channels of the measures taken and any penalties imposed.\footnote{Law of the Sea Convention art 73(4).}

Nevertheless, the time extended to send notification remains unclear and therefore bilateral agreement should be agreed to regulate a maximum time in which to send the notification. One instance of a bilateral agreement is between Indonesia and Australia through the signing of the Arrangement on Consular Notification and Assistance on 10 March 2010. Section 6 of this arrangement reads ‘the competent authorities of the receiving State will without delay and within three working days inform the consular post or diplomatic mission of the sending State that a national of the sending State has been arrested, detained, or apprehended’.\footnote{The Arrangement between the Government of Republic of Indonesia and the Government of Australia on Consular Notification and Assistance, (signed and entered into force 10 March 2010) art 30, <http://treaty.kemlu.go.id/apisearch/pdf?filename=AUS-2010-0180.pdf>}

It can be conceived that burning and/or sinking illegal foreign fishing vessels is regulated under Indonesia’s domestic law. Several steps and conditions must be followed before imposing such a measure as sinking and/or burning a vessel. Moreover, international law identifies that fishing masters and crews have rights, including the right to receive assistance, if they are detained. Due to gaps in both Indonesian domestic and international law regarding the duty to notify in a timely manner, the bilateral agreement should be negotiated between
Indonesia and relevant states to provide prompt and proper legal assistance to foreign fishing masters and crews of vessels caught fishing illegally in Indonesian waters.

2.2.3. The Establishment of Fishery Courts.

To enhance prosecutorial effectiveness, the Government of Indonesia has adopted fishery tribunals under Article 71(1)(2), Law Number 31/2004 as amended by Law Number 45/2009.\textsuperscript{623} This establishment is an important decision to respond to fishery cases based on Fisheries Law and other related laws and regulations. In the initial phase, five fishery tribunals have been established under the district courts of North Jakarta, Medan (North Sumatra), Pontianak (West Kalimantan), Bitung (North Sulawesi) and Tual (Southeast Maluku).\textsuperscript{624} As of 21 October 2014, the total number of fishery courts had reached 10 (ten) locations with additional courts at Tanjung Pinang (Riau), Ranai (Riau), Ambon (Maluku), Sorong (Papua) and Merauke (Papua). The last three courts were established by Presidential Decree Number 6/2014 and are in the eastern part of Indonesia.\textsuperscript{625} The composition of that tribunal comprises 3 judges (one career judge and two \textit{ad hoc} judges).\textsuperscript{626}

The formation of a fishery tribunal can be attributed to the following rationales: \textsuperscript{627}

1. The judicial process in ordinary court generally takes quite a long time to proceed. In the meantime, as a matter of fact, cases in fisheries crimes requires a faster course because of the type of crime and proof.
2. In light of the penalty, the prevailing non-fisheries laws and regulations do not cover all violations and crimes undertaken in fisheries. To some extent, this circumstance leads to fisheries law violations being punished inappropriately.
3. The competency and capability of ordinary courts are deemed to be a constraint in presiding over the proceedings of fishery tribunals. It can be discerned from the fact that to some degree, a large number of violations in fisheries crimes have received improper punishment.

\textsuperscript{623} Indonesia Fisheries Law art 71 (1)(2).
\textsuperscript{624} Ibid art 71 (3).
\textsuperscript{626} Indonesia Fisheries Law art 78.
It is worth mentioning that two *ad hoc* judges can be derived from experts without a law background but they must have expertise and experiences in fisheries issues regardless of whether they are from academia or university, non-government organizations or professional organizations. In creating effective and efficient judicial proceedings in fisheries violations, the duration for handling the case from investigation until the final decision has lessened to about 2.5 months. Those wrongdoers can also be brought before the court *in absentia* to speed up the process. In accordance with the data provided, there were 138 cases in 2010 and 66 cases in 2011 handled by fishery courts.

The perpetrators were sanctioned using both administrative law and penal code. One interesting example is the verdict of Tanjung Pinang District Court Number 22/Pid.Sus-PRK/2015/PN Tpg of 2016. A Vietnamese, Le Duc Long, was found guilty of breaching fishing in the EEZ of Indonesia with a fine amounting to Rp. 1 500 000 000. In the case the defendant, unable to afford the fine, will be imprisoned for 6 (six) months. This ruling prompted further discussion concerning the legality of the imprisonment. According to Article 73(3) of LOSC, imprisonment or any other form of corporal punishment is prohibited in the absence of agreements to the contrary by the States concerned. This provision conforms with Article 102 of Fisheries Law. Nevertheless, in the case that the defendant cannot pay, or decides not to pay the penalty, then it falls under civil law as to the ramification of his/her illegal conduct.

In 2015, Deputy of Task Force 115 revealed that compared to other areas, the highest rate of violations occurred in the Aru Island, Maluku (Eastern part of Indonesia) involving 350 vessels. 95% of those vessels employed masters and crews with incomplete documents, had more than one flag, inactivated the Vessel Monitoring System (VMS) and transshipped illegally. He referred to the case of Benjina in which several criminal acts such as forced

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628 Ibid.
629 Asian Development Bank, above n 627, 21.
631 Supreme Court of Indonesia, *Verdict of District Court of Tanjung Pinang Number 22/Pid.Sus-PRK/2015/PN Tpg of 2016* (31 October 2017) <http://putusan.mahkamahagung.go.id/putusan/70f5f7d2159427455668c2f070189427>. 
632 *Indonesia Fisheries Law* art 102.
labour, human trafficking, illegal migrant and illegal labour all occurred.\[633\] It arises from the fact that crime in fisheries cannot be addressed in isolation as it provokes other crimes. Pursuant to Article 71 (1), the fishery court has authority to investigate, hear and adjudicate criminal acts in fisheries, therefore, this court will have difficulty when handling fisheries cases along with the other related cases in the chain from production to marketing. This intricate problem can simply be resolved by amending fisheries law, particularly the related articles on fishery court.

One possible option to resolving the problem is leaving the authority to adjudicate fishery crimes to the ordinary court. However, bearing in mind past rationales when establishing fishery courts, including limitations faced by the ordinary court as mentioned above, this option should be further reconsidered. One advantage in returning fisheries cases to the ordinary court is that it has the authority to adjudicate all aspects of crime. Another possible solution is to strengthen the existing fishery courts with the right to process non-fisheries crimes in their internal judicial system. Again, this solution prompts another question concerning the scope of fisheries crimes in its position as *lex specialis*. The fisheries courts are also governed under fisheries law, so it may create another problem if the courts have jurisdiction to adjudicate crimes other than fisheries violations.

From the latest data revealed by the Supreme Court of Indonesia, 814 fisheries cases had been submitted to the relevant courts to be adjudicated over the six years, from 2010 to 2016.\[634\] However, there exist the gaps between IUU fishing and fisheries crime cases reported in the media and those that are brought before the justice system. As claimed by Gilles Blanchi, Chief Technical Advisor of European Union-United Nations Development Program SUSTAIN, hundreds or more cases of IUU fishing have been reported by the media, but the numbers that reach the court fall drastically. He further reiterated that all related institutions should cooperate and coordinate properly to ensure the cases appeared before the court.\[635\] In handling cases of fisheries crimes, it is also essential to take fast and strategic

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measures as the crimes are dissimilar to other crimes. For instance, once an illegal fishing vessel is seized, according to Article 73B (6) the perpetrators shall be brought before the court in less than 30 (thirty) days, which is significantly faster than handling other criminal cases.

Recognizing that coordination amongst institutions responsible for law enforcement is one of the main hurdles, a project has been funded by the European Union, called EU-UNDP SUSTAIN, to build the capacity of courts in Indonesia including fishery courts and to strengthen coordination amongst law enforcement personnel. The project’s term is five years with the total amount of EUR 10 million in funds. Internally, the Supreme Court of Indonesia has taken the initiative to convene training for fishery judges designated in the district courts and appellate court in collaboration with UNDP (United Nations Development Programme) and EU. It is convinced that training plays a crucial role in upgrading the capacity of fishery judges when adjudicating fisheries cases. Some crucial aspects such as international law and practices should be part of the training materials to avoid misjudgements and multi-interpertation in their rulings.

3.1. Legal Issues.
3.1.1. Legal Frameworks.

In general, Fisheries Law sets heavy fines and imprisonment in punishing individuals and corporations committing IUU fishing. However, according to Gregory Rose, relevant domestic laws and regulations under MMAF do not address transnational criminal activities in fisheries. The lack of transnational crimes provisions in the Fisheries Law, to some extent, can be understood since the Fisheries Law governs primarily fisheries issues. However, with the current challenges of transnational crimes in the fisheries sector, the Fisheries Law needs to cope with those issues accordingly. The inclusion of the crimes shall not be directed to regulate all aspects of the crimes transnationally committed, but it is intended to connect the crimes with the prevailing regulations of fisheries instead. In Indonesia legal system, human trafficking has been regulated under Law Number 21/2007.

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636 *Indonesia Fisheries Law* art 73b(6).
concerning the Elimination of Human Trafficking. The connection with the Fisheries Law can be done by acknowledging it as a crime occurring in the fisheries sector and adopting it as the provision. The proper and coordinated response conducted by relevant authorities when facing the problem on the ground can be addressed in this Law.

In Fisheries Law, the criminal act is divided into crime and offence. Those committing a crime will be treated as criminals with a minimum of four years’ imprisonment and a heavy fine. For example, a minimum five years imprisonment and a maximum IDR two billion imposed for those practicing the use of unsustainable fishing gear. If it falls under the category of offence, a maximum two years imprisonment will be imposed and/or a lesser amount of fine than that under the category of crime. In respect of law enforcement in EEZ, imprisonment will not be imposed, except when a bilateral agreement is concluded between Indonesia and relevant states.

Moreover, in Fisheries Law, the definition or explanation on IUU fishing does not exist. The only reference to IUU fishing is NPOA-IUU Fishing which has terminated in 2016. The explanation or definition on the term may serve as a proper guideline when it is needed as a reference in the domestic level. In the IPOA-IUU fishing, the explanation on the term IUU fishing is provided. However, it is not intended to be a legal definition as this instrument is voluntary. Thus, it is meant to be a loose reference. It depends on the countries to modify or adopt fully or partially as it does not have a legally binding character. Therefore, IUU fishing should be defined to govern each activity in the terminology. For instance, in Section 609(e)(3) of MSRA of 2006, the U.S Government sets the definition of IUU fishing and even extends its jurisdiction to seamounts, hydrothermal vents, and cold-water corals located beyond national jurisdiction. This definition is not identical to IUU fishing as set out in IPOA-IUU fishing.

640 Indonesia Fisheries Law art 103.
641 Ibid art 85.
642 Ibid art 102.
643 MMAF, National Plan of Action on IUU Fishing, above n 83.
Despite no specific definition or explanation on IUU fishing, some provisions curbing IUU fishing are found extensively in the Fisheries Law such as the prohibition of unsustainable fishing gear.\textsuperscript{645} A licensing system comprising License for Fishing (\textit{Surat Izin Penangkapan Ikan}/SIPKI) and License for Fish Transporting Vessel (\textit{Surat Izin Kapal Pengangkut Ikan}/SIKP) is mandatory with an exception for small-scale fishermen.\textsuperscript{646} Individuals who has committed a breach to Articles 27 and 28 shall be treated as a criminal and receive both punishment of imprisonment and fine.\textsuperscript{647} It has provided “no flag of hopping” rule.\textsuperscript{648} As the main focus of MMAF policy in addressing IUU fishing, more stringent measures apply through the authority for the investigator and/or fisheries inspector to undertake distinctive measures by burning and/or sinking foreign fishing vessels based on sufficient preliminary evidence.\textsuperscript{649} The authority to investigate is allocated to the Fisheries Civil Servant Investigator, Navy Investigator and/or Police Investigator.\textsuperscript{650}

While Fisheries Law covers mainly aspects of fisheries, Law Number 32/2014 governs any issues related to Ocean Affairs. In this law, the issue of IUU fishing and fisheries crimes are not addressed explicitly. As occurred in the Fisheries Law, the Marine Law does not cover the definition or explanation of IUU fishing. Nevertheless, both central and local governments, along with the respective authority, shall undertake marine management measures to the best extent for the people’s prosperity through the utilization of marine resources by adopting the blue economy principle. This utilization encompasses, among others, coastal and small islands resources as well as the fisheries sector.\textsuperscript{651} Consideration of the people’s prosperity in this regulation is in line with the principle stated in Article 33(3) of the 1945 Constitution.

The authority of provincial government is further governed in Law Number 23/2014 concerning Local Government. The provincial government has the responsibility to combat IUU fishing and fisheries crimes as it reserves the rights, among others, to explore, exploit, conserve and manage ocean resources other than oil and gas from baseline to 12 m. In terms of marine security and national sovereignty, the province, along with national administrations

\textsuperscript{645} Ibid art 9.
\textsuperscript{646} Ibid arts 27 and 28.
\textsuperscript{647} Ibid art 93.
\textsuperscript{648} Ibid art 63(3).
\textsuperscript{649} Ibid art 63(4).
\textsuperscript{650} Ibid art 73.
\textsuperscript{651} Ibid art 14.
should share the responsibility. Meanwhile, with regard to the distribution of authority to issue Fisheries Business Licence (SIUP), the rule is as follows:

1. The province reserves the right to issue SIUP for fishing vessels between 5-30 gross tonnes (GT);
2. The central government or MMAF assumes responsibility for issuing SIUP for:
   a. Fishing vessels of no more than 30 GT engaging in foreign investment and/or with foreign fishermen working on board; and
   b. Fishing vessels of over 30 GT.

The link between both IUU fishing and transnational organized crime emerged firstly during the ninth meeting of UNICPOLOS and at the Conference of Parties (COP) to the UNTOC in 2008. Those meetings did not reach agreement on the issue and further research was necessary. Currently, there are some important contributions in analysing the correlation between IUU fishing and transnational organized crime. As the Global Initiative against Transnational Organized Crime puts it: “The majority of IUU fishing violates or contravenes some law, regulation or agreement, or the spirit of these legal instruments, and therefore could be categorized as (an environmental) crime, and as we shall see, due to its transnational and highly organized nature, it constitutes a form of transnational organized crime.

However, the said inclusion is challenged by Palma. She conceives that the categorization of IUU fishing as environmental crime is neither collectively nor explicitly stated in international law unlike illicit logging, illicit wildlife trafficking, and illegal trafficking of poisonous waste. She further suggests conducting more in-depth research to address the connection between ‘fisheries and environmental law and transnational organized crime’. Her subsequent perspective regarding the issue is relevant to this research to generate some

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655 Palma, Tsamenyi and Edeson, above n 26, 262.
656 Bondaroff, Reitano and Werf, above n 39, 87.
ideas, such as the measures to fortify national laws and regulations in overcoming the matter. It can encompass efforts such as defining the sorts of activity that are categorized as fisheries crime, incorporating clauses pertaining to illegal acts as part of fisheries laws and regulations, and/or revising relevant laws and regulations having connection with crime to connect with fisheries legislation, and, therefore, link it ‘as predicate offence to money laundering’. This sort of offence is defined as any offence whose proceeds may become the subject of money laundering offences as defined under the UNTOC (art. 2(h)).

The connection between criminal acts in the marine and fisheries sector as the predicate offence to money laundering is provided under the domestic legal framework of Indonesia through the adoption of Law number 8/2010 concerning Countermeasure and Eradication of Money Laundering. Before the adoption of this Money Laundering Law, Indonesia had enacted Law Number 15/2002 concerning the Crime of Money Laundering which was then amended by Law Number 25/2003. After Indonesia ratified the Palermo Convention on 15 December 2000, the Indonesian Government adopted Law Number 8/2010 as a replacement of Law Number 15/2002 amended by Law Number 25/2003 incorporating related provisions of the Palermo Convention.

Article 2 of Law Number 8/2010 has connected money laundering with assets acquired from various criminal acts including marine and fishery or other criminal acts which are treated with imprisonment for four years or more. Criminal acts listed in Article 2 of Law Number 8/2009 are intended to conform to Article 6 (2)(b) of the Palermo Convention which reads:

Each State Party shall include as predicate offenses all serious crime as defined in article 2 of this Convention and the offenses established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups.

Even though the application of this provision, particularly money laundering in marine and fisheries, needs to be tested further, the connection may pave the way as a landmark in combatting fisheries crimes within the milieu of transnational crime.

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658 Ibid.
659 Transnational Organized Crime Convention art 2. “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention.
660 UNTOC Ratification Law of Indonesia.
661 Transnational Organized Crime Convention art 2.
662 Ibid art 6 paragraph 2(b).
As asserted by Palma, organized crimes in most countries merely involve predicate offences of drug trafficking, trafficking in people, weapons smuggling, goods smuggling, piracy, armed robbery and terrorism and occasionally illegal logging. She claimed that the Philippines is the only state that has adopted fisheries breach as predicate offences for transnational crimes. In its anti-money laundering regulation of Republic Act 10365 which amended Republic Act 9160, it is possible for the Philippines related authorities to freeze, seize, recover money from the proceeds of crime, cooperate with other countries, create financial intelligence units, require customer identification, keep the record and report suspicious transactions. By possessing these authorities, it is possible to trace the proceeds of crimes of fisheries in the Philippines. 663 With the adoption of Law Number 8/2010, Indonesia can apply the same measures as the Philippines in addressing fisheries crimes.

Supplementary to the domestic legal framework information, the following table is the list of laws having a connection with marine resources management compiled from various sources. 664

Table 3: List of Legislations Affecting Marine Resources Management

<table>
<thead>
<tr>
<th>No</th>
<th>Legislations</th>
<th>Subject</th>
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<tbody>
<tr>
<td>I. National Level</td>
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<tr>
<td>A. Ocean Jurisdictional Claims</td>
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<tr>
<td>1.</td>
<td>Law No. 6/1996</td>
<td>Indonesian Waters</td>
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<td>2.</td>
<td>Law No. 5/1983</td>
<td>Indonesian Exclusive Economic Zone</td>
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<td>3.</td>
<td>Law No. 1/1973 Indonesian Continental</td>
<td>Indonesian Continental Shelf</td>
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<tr>
<td>B. Ocean Resources and Activities on the Sea</td>
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<td>4.</td>
<td>Law No. 4/2009</td>
<td>Minerals and Coal Mining</td>
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<td>5.</td>
<td>Law No. 17/2008</td>
<td>Shipping</td>
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<tr>
<td>C. Terrestrial Spatial and General Planning Laws</td>
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<tr>
<td>7.</td>
<td>Law No. 10/2009</td>
<td>Tourism</td>
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<tr>
<td>D. Coastal and Marine Resources Management</td>
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<td>8.</td>
<td>Law No. 45/2009 as the amendment of Law No</td>
<td>Fisheries</td>
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663 Palma, ‘Tightening the Net’, above n 59, 164.
664 Coral Triangle Initiative Project, above n 610, 11. The information taken from the said document has been updated by referring to relevant laws and regulations <https://www.adb.org/sites/default/files/linked-documents/46421-001-sd-02.pdf>.
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<td>9.</td>
<td>Law No. 1/2014</td>
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<td>10.</td>
<td>Law No. 18/2013</td>
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<td>11.</td>
<td>Law No. 16/1992</td>
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<td>12.</td>
<td>Law No. 32/2014</td>
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**E. General Legislation of Environmental Management**

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<td>13.</td>
<td>Law No. 32/2009</td>
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<td>14.</td>
<td>Law No. 5/1990</td>
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**F. Legislation of Decentralization**

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<td>15.</td>
<td>Law No. 9/2015</td>
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<td>16.</td>
<td>Law No. 33/2004</td>
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**II. International Level**

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**3.1.2. Challenges.**

The nexus between IUU fishing and TOC is an interesting subject since amongst countries there exist conflicting views pertaining to this matter and it needs further clarification such as the discussion about the complete terms of IUU fishing and transnational organized crime. A critical discussion on the issue is on the standardization of the punishment mechanism for breaching fisheries regulations. Countries are different in perceiving and imposing fisheries violation in terms of sanction. Some encompass them as criminals, while others charge them with an administrative penalty or both. In the case of Indonesia, Fisheries Law provides both administrative and criminal sanctions for IUU fishing perpetrators.

It is important to note that when discussing the connection between the domestic legal frameworks and the international legal instrument concerning IUU fishing and TOC, the main reference is the Palermo Convention as the only legal definition of TOC is provided in

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665 Palma, Tsamenyi and Edeson, above n 26, 260-263.
666 Ibid 262.
667 *Indonesia Fisheries Law* chapter of sanctions.
Article 2 of the Convention which reads ‘Organized criminal group shall mean a structured
group of three or more persons, existing for a period of time and acting in concert with the
aim of committing one or more serious crimes or offences established in accordance with this
Convention, in order to obtain, directly or indirectly, a financial or other material benefit’. Serious crime is further defined as ‘conduct constituting an offence punishable by a
maximum deprivation of liberty of at least four years or a more serious penalty’. As
conceived by Telesetsky, the term “maximum” in the definition of “serious crime” set out in
Article 2 creates a quandary. It can be translated into two ways. First, there must be at least a
maximum imprisonment of four years to qualify as “serious crime” and secondly, it is
possible to interpret it as longer imprisonment of four years if it is considered as a “more
serious penalty”. The word “penalty” also presents unclear if it refers to a monetary fine or
imprisonment. It is conceived as “transnational in nature” if:

(a) It is committed in more than one State;
(b) It is committed in one State but a substantial part of its preparation, planning, direction or
   control takes place in another State;
(c) It is committed in one State but involves an organized criminal group that engages in
criminal activities in more than one State; or
(d) It is committed in one State but has substantial effects in another State.

The definition of ‘organized criminal group’ and ‘serious crime’, as well as conditions for
‘transnational in nature’, constitute the most important reference of TOC. In Article 2 of
UNTOC, Anastasia Telesetsky highlighted two sorts of crime. Initially, particular
transnational crimes encompassing “organized criminal group” and then “serious crime”
embracing “organized criminal group”. She was of the view that IUU fishing activities
involving a minimum of three individuals would be regarded as “organized criminal group” if
it is referred to the Convention.

With regard to the international perspective for a felony to be an organized crime, the
European Union sets out six characteristics, in which at least points 1, 3, 5 and 11 must be
present, namely:

1) Collaboration of more than 2 people;
2) Each with his/her own appointed tasks;
3) For a prolonged or indefinite period of time (refers to the stability and (potential)
durability);
4) Using some form of discipline and control;

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668 Transnational Organized Crime Convention art 2.
669 Telesetsky, above n 14, 968.
670 Transnational Organized Crime Convention art 3.
671 Telesetsky, above n 14, 966.
5) Suspected of committing serious criminal offences;
6) Operating at an international level;
7) Using violence or other means of intimidation;
8) Using commercial or businesslike structures;
9) Engaged in money laundering;
10) Exerting influence on politics, the media, public administration, judicial authorities or the economy;
11) Determined by the pursuit of profit and/or power.  

If IUU fishing and fisheries crimes need to conform to a minimum of four characteristics, it can be asserted that those may fall under the category of organized crime.

In assessing Indonesia’s effort to include IUU fishing and fisheries crime as TOC, there are several aspects to be examined. Following some categories under the Palermo Convention, three main factors are involved; organized crime, serious crime and crime transnational in nature. Obviously, IUU fishing and fisheries crime can be executed by more than three or more persons as these activities may involve big business. IUU fishing activity is also transnational in nature as persons committing this action will be border-crossing in achieving their goals and causing destruction to the other countries. In Indonesia, IUU fishing is also undertaken by vessels flying foreign flags. However, to conform to the category of organized crime, there should be an aspect of ‘serious crime’ in that regard.

To some extent, the definition of ‘serious crime’ promotes different responses from different countries. This distinction leads to hesitancy for several countries to include IUU fishing as TOC under the Palermo Convention. This distinction occurs as those countries take the view that IUU fishing shall be treated from a fisheries management perspective. One instance is Norway’s policy. In the inaugural fisheries crime symposium in 2015, the view most emphasized came from the representative of the Norwegian Ministry of Trade, Industry and Fisheries. He reaffirmed Norway’s commitment to fight against fisheries crimes and treat illegal fishing as a TOC. Norway promoted two approaches; fighting against IUU fishing with administrative sanctions and combatting fisheries crimes with criminal sanctions. From this perspective, there is a clear distinction between IUU fishing and fisheries crimes in terms of prevailing legal and policy instruments leading to the imposition of sanctions. In this sense, IUU fishing is not deemed a crime and therefore it should be addressed under civil

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673 Stop Illegal Fishing and PescaDOLUS, above n 432, para 6.
law. However, when it comes to fisheries crimes, criminal law shall be applied to combat the unlawful activities.

Another example is South Africa. In its regulations, breaching most of the provisions of MLRA will be enforced as a criminal offence and incur a penalty of a maximum two years imprisonment and a fine of not more than ZAR 2 million, respectively. Some offences in fisheries such as ‘prohibited gear, interference with and storage of gear and the use of driftnet’ are treated under administrative law and involve no imprisonment.674 Seemingly, the South African Government has a different approach in terms of the legal framework in addressing IUU fishing and almost certainly fisheries crimes.

In comparison, within the context of Indonesia’s legal instrument, as previously explained, Fisheries Law has sanctions by penalty of fine and/or imprisonment depending on the category, either offence or crime. Nonetheless, most unlawful acts are considered as crimes with a minimum of four years imprisonment and a severe fine. This four-year imprisonment complies with the definition of ‘serious crime’ of the Palermo Convention. Money Laundering Law also provides the possibility to trace and seize and other relevant measures to bring before the court any crimes and violations as a predicate offence from marine and fisheries activities.

The other hurdle to overcome is ununiformed terms introduced in combatting IUU fishing and transnational organized crimes. In international forums, prominent figure such as Minister Susi refers to fisheries crimes and other fisheries-related crimes related to IUU fishing.675 Meanwhile, when delivering presentation in CCAMLR (Commission on the Conservation of Antarctic Marine Living Resources), Eve de Coning prefers to use transnational organized fisheries crime676 whilst INTERPOL emphasizes the fight against transnational fisheries crimes in its effort to launch INTERPOL’s Global Enforcement under Project Scale program.677

674 Coning and Witbooi, above n 319, 211.
For the purpose of explanation, as depicted in the figure 9, FAO maintains the view that IUU fishing, fisheries-related crimes and crimes associated with the fisheries sector should have different classification. Nonetheless, those three are all interlinked. Fisheries-related crimes are not conceived as IUU fishing but closely linked with the fishing activity and they may not be part of fishing operation. Some examples of the crimes are tax crimes, money laundering and fake fishing licences. With regard to crimes associated with the fisheries sector, the crimes do not have a direct correlation with fishing activity, but they are committed on the fishing vessels, ‘or during a fishing operation, and using the fishing operation as a cover, opportunity or means to commit such crimes’. Crimes such as drug trafficking, people smuggling, and piracy are some instances falling under associated crimes with the fisheries sector. The elucidation of FAO may enlighten the different perception in perceiving any crimes that take place in the fishing activities or fisheries sector but cannot be classified as IUU fishing by making simplification into two categories. Nonetheless, it does not limit the introduction of different interpretation or term as they are not aimed as legal definitions.

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678 FAO, above n 552.
679 Ibid.
From the above elaboration, some future challenges can be drawn. Firstly, Indonesia has not yet provided its consent to be bound by the 1993 FAO Compliance Agreement and the 2012 Cape Town Agreement. Those agreements are of utmost importance in combatting IUU fishing and its relations to transnational organized crime. This can be understood since transnationally organized crime practices involving drugs, weapons, and other illicit goods commonly take place on the high seas. Palma acknowledges that flag states can be used to probe the possible linkage between transnational organized crime and fishing while the goods resulting from those illegal activities can be traced and forbidden to be exported and imported.

Secondly, perceptions, practices, approaches and the domestic legal system vary amongst states in observing and addressing IUU fishing and fisheries crimes. The division between schools of thought of fisheries management and crimes in approaching those activities still exists among countries. It is also worth noting that unregulated fishing for some countries is not regarded as a crime since fishing in areas or fish stocks for which there are no applicable conservation or management measures does not constitute a breach of law. Although this is a fundamental concept, the distinction should not undermine current measures in reviving depleted fish stocks, combatting crimes occurring along the value chain of fisheries and addressing unsustainable practices in the global marine ecosystem. In its domestic system, Norway is inclined to make a separation between IUU fishing and fisheries crimes in terms of the sanction. On the other hand, Indonesia is in a position to combat both IUU fishing and fisheries crimes by using administrative and imprisonment sanctions.

Thirdly, even though relevant domestic laws and regulations, particularly fisheries law and anti-money laundering laws, have complied with the provisions of UNTOC for IUU fishing to be TOC, there are some loopholes in the law that need to be to be essentially addressed. In Law Number 45/2009 as the amendment of Law Number 31/2004 concerning Fisheries and Law Number 32/2014 concerning Ocean Affairs, no definition of IUU fishing is found.

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681 Palma, Tsamenyi and Edeson, above n 26, 5.
particularly in Article 1 of said laws. Moreover, although elements of fisheries crimes are also regulated in the Fisheries Law, the connection between fishing and transnational organized crime is not provided.

Fourthly, a further loophole is the international community has various terms for overcoming fisheries poaching even though the goal is the same. The most familiar terms would not be IUU fishing per se, but could refer to transnational organized fisheries crimes, fisheries related crimes, crimes associated with fisheries sector and fisheries crimes. This dissimilarity emerges due to the lack of an agreed definition in international legally binding agreements that could have been referred to as a common starting point. The terms of transnational organized crime, fisheries-related crimes and fisheries crimes were introduced as a breakthrough to overcome depleted fishery resources. Those three terms share the same notion from the fact that fisheries poaching encompasses other transnational crimes. However, those terms leave the unanswered question of which the most correct term to use.

3.2. Proposed Measures.
3.2.1. Domestic Strides.

682 Indonesia Laws and Regulations Making Law art 1 (Indonesia). In the said law, the structure of Indonesia’s laws and regulations is defined. Article 1 shall refer to definitions of terms used in the body of laws and regulations.
683 UNTOC Ratification Law of Indonesia.
684 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 12 to 15 December 2000, 2237 UNTS 139 (entered into force 25 December 2003) (‘Protocol to Prevent, Suppress and Punish Trafficking in Persons’). The Protocol was ratified by the Government of Indonesia by Law Number 14/2009. Through this Law, Indonesia makes declaration and reservation. For the former, ‘The Government of the Republic of Indonesia declares that the provisions of Article 5 paragraph (2) letter c of the Protocol will have to be implemented in strict compliance with the principle of the sovereignty and territorial integrity of a state’. With regard to the latter, ‘The Government of the Republic of Indonesia does not consider itself bound by the provisions of Article 15 paragraph (2) and takes the position that disputes relating to the interpretation and application of the Protocol which cannot be settled through the channel provided for in paragraph (1) of the said Article may be referred to the International Court of Justice only with the consent of the Parties to the disputes’ <http://ph.kemlu.go.id/files/uu_14_2009.pdf>.
Convention against Transnational Organized Crime. Nevertheless, the Government of Indonesia has not established its consent to be bound by the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.

As elaborated in the above-mentioned challenges, there are several measures to propose. Firstly, while states attempt to discover the best formula in accommodating the discrepancies between fisheries management and crimes in view of IUU fishing and fisheries crimes, it is important to highlight that both IUU fishing and fisheries crimes are regarded as having a connection with other criminal offences and are generally transnational, largely organized, and can have severe adverse social, economic and environmental impacts both domestically and internationally. Moreover, fisheries crime is part of IUU fishing. Therefore, IUU fishing and fisheries crimes should be used altogether in international forums.

Secondly, in responding to the current dynamics, it is necessary for the Indonesian Government to review and amend the existing legal frameworks on fisheries, particularly Law Number 45/2009 as the amendment of Law Number 31/200 concerning Fisheries. The said law should define IUU fishing in the article regulating the definition. It is also possible to consider providing the definition of fisheries crimes. Another option that can be taken into account is that MMAF can propose a specific law or regulation concerning IUU fishing as lex specialis to the Law on Fisheries. In the proposed law or regulation, fisheries crimes that are transnationally organized should be provisioned.

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685 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplemetning the United Nations Convention against Transnational Organized Crime, opened for signature 12 to 15 December 2000, 2241 UNTS 507 (entered into force 28 January 2004) (‘Protocol against the Smuggling of Migrants by Land, Sea and Air’). The Protocol was ratified by Indonesia through Law Number 15/2009. The Indonesian Government makes declaration and reservation. Indonesia declares that ‘the provisions of Article 6 paragraph (2) subparagraph c, Article 9 paragraph (1) subparagraph a, and Article 9 paragraph (2) of the Protocol will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of a state’. Meanwhile, for reservation, ‘The Government of the Republic of Indonesia, does not consider itself bound by the provision of Article 20 paragraph (2) and takes the position that dispute relating to the interpretation and application of the Protocol which have not been settled through the channel provided for in paragraph (1) of the said Article, may be referred to the International Court of Justice only with the consent of all the Parties to the dispute’ <http://www.imigrasi.go.id/phocadownloadpap/Undang-Undang/nomor%2015%20nahun%202009.pdf>.

Thirdly, in determining the most correct term to use, there is a silver lining to the resolution of this issue. In February 2016, the UNODC and World Wildlife Fund (WWF) co-organized an Expert Group Meeting on Fisheries Crime, in Vienna. In this forum, fisheries crime was defined as a serious offence within the fisheries resource sector that takes place along the entire food products supply chains and associated value chains, extending to the trade, ownership structures and financial services sectors. Nevertheless, the ‘serious’ term is not associated with the definition found in the UNTOC. It is instead meant to have an extensive impact on the community. It seems that the panel of experts has agreed to offer a solution be agreeing on the explanation of fisheries crimes. Although this is still a working document, this consensus may pave the way for states as a reference when formulating the possible legally binding agreement. Nevertheless, this fisheries crimes description needs further testing from legal perspective as described in Part VII of this thesis.

Fourthly, it is important for the Government of Indonesia to consent to be bound by the 1993 FAO Compliance Agreement. In this Agreement, the control of flag states is imperative in ensuring their fishing vessels ‘exercise effectively its jurisdiction and control over vessels flying its flag, including fishing vessels and vessels engaged in the transhipment of fish’ and avoid ‘the practice of flagging or reflagging fishing vessels as a means of avoiding compliance with international conservation and management measures for living marine resources’.

It should come also to Indonesia’s concern to express its consent to the Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977 by means of accession. As recognized by Witbooi, the 2012 Cape Town Agreement can be utilized to press the fishing vessels to abide by the rules contained in the Agreement taking into account the growing concern of ‘human trafficking, including severe violation of minimal working and living conditions, on board fishing vessels’. The third international treaty that is recommended for Indonesia to provide its consent is the ILO Work in Fishing Convention

687 Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting 2016, E/CN/14/2016/CRP.2, 3.
688 The 1993 FAO Compliance Agreement.
689 Ibid.
690 The 2012 Cape Town Agreement art 3.
691 Witbooi, above n 57, 296.
Number 188 as this convention can be an instrument to combat IUU fishing and crimes associated with fisheries sector.

3.2.2. Enacting a Law Similar to, or Incorporating, the Elements of the Lacey Act.

Indonesia needs to consider enacting a regulation similar to the Lacey Act Amendments of 1981. This act was adopted by the US in 1900\(^692\) and has been amended several times.\(^693\) The Lacey Act bans, among other things, imports, exports, transport, sale, receipt, acquisition, or purchase of any fish, wildlife or plants that are taken, possessed, transported or sold in violation of any law, treaty, regulation of the US or Indian tribal law.\(^694\) It is also illegal to conduct the same measures when this happens in foreign trade and to breach any law or regulation of any foreign law.\(^695\) The basic idea is exercising national jurisdiction on the basis of the principle of active nationality, through the enactment of laws that will impose punishment on its nationals if those persons conduct IUU fishing activities, even in the case that they are on board foreign vessels.\(^696\)

This Act is considered as a cornerstone of the U.S-based litigation. The objective is: ‘to protect those species of fish and wildlife whose continued existence is presently threatened by the gradual drying up of the international market for endangered species, thus reducing the poaching of any such species in the country where it is found’. When Lacey introduced this Act at the beginning of the twentieth century, he had a threefold objective in proposing this Act; (1) to permit the introduction and protection of game, song and wild birds, (2) In the prevention of ‘unwise introduction of foreign game and birds’, and (3) To complement state laws for the fortification of game and birds.\(^697\)

According to Elinor Colbourn, Assistant Chief Environmental Crimes Section of the US Department of Justice, there are some advantages of the Lacey Act. First, it is considered to encompass very flexible in terms in its application from administrative penalties to transgressions to offences and it is automatically applied to new laws. Secondly, it can be


\(^{694}\) *Lacey Act*, Title 16 U.S.C. § 3372 (1900), ss (a)(2).

\(^{695}\) Ibid, ss (a)(4).


\(^{697}\) Spapens, White and Huisman, above n 693, 129.
used to combat illegal and unreported fishing (if there is any requirement for reporting) undertaken in foreign states where the fisheries products are exported to the U.S. Thirdly, it can support other countries in applying their laws and regulations by imposing punishment to the perpetrators importing fish taken illegally from elsewhere, to the US.\textsuperscript{698} Some countries, such as Papua New Guinea, Tonga, Marshall Islands, Nauru, Solomon Islands and the Federated States of Micronesia have adopted and applied this Lacey Act authorizing them to govern the importation of fisheries products.\textsuperscript{699}

The U.S Government has employed the Lacey Act in several fisheries cases, such as the United States v. Lee, et al in 1991, the United States v. Northern Victor Partnership in 1996, the United State v. McNab, et al in 2003, the United States v. Neptune Fisheries, et al in 2004, the United States v. Pego, et al in 2005, and the most famous case, the United States v. Bengis, et al in 2004. The Government of the US has paid considerable attention to prosecute fisheries cases based on the following rationales: (1) Violations in fisheries sector are deemed to have a massive impact posing a direct peril to marine ecosystems and (2) Violations may lead to loss of significant benefits to the industry and persons particularly to legal fisherman.\textsuperscript{700}

On June 14, 2013, the United States District Court of the Southern District of New York adjudicated the U.S v. Bengis, et al case. The defendants (Arnold Bengis, Jeffrey Noll and David Bengis) were accused of engaging in the harvesting of illegal South Coast and West Coast rock lobsters in South Africa to be exported out to the United States. This activity breached both the U.S and South Africa domestic laws. Arnold Bengis was the Managing Director and Chairman of Hout Bay Fishing Industries operating in Cape Town, South Africa. Meanwhile, Jeffry Noll and David Bengis were the presidents of the two U.S-based companies that imported and sold the fish within the U.S territory on behalf of Hout Bay. The defendants had allegedly captured and exported the lobsters to the U.S. between 1987-2001.


\textsuperscript{700} Colbourn, above n 698.
The capture and distribution of the lobsters was regulated under the MLRA of South Africa Law and the Convention on the Conservation of Marine Living Resources.  

After further investigation, the defendants were tried by both South African and the United States courts. In 2002, Bengis entered a plea of guilty in violation of MLRA on over-fishing of lobster off the South and West Coasts. Hout Bay Company paid a specified fine to the South African Government. Two fishing vessels and contents of a container were also confiscated. Further, South African authorities, in collaboration with the U.S Government, investigated and prosecuted the defendant for violating the U.S law. Arnold Bengis and Jeffrey Noll pleaded guilty to: (i) conspiracy to violate the Lacey Act and to commit smuggling in violation of 18 U.S.C. §371; and (ii) violations of the Lacey Act, 16 U.S.C. § 3372 (a)(2)(A) while David Bengis pleaded guilty to conspiracy. It is interesting to note that the term “fish of wildlife” as provisioned in the Lacey Act is defined to include crustaceans, such as lobsters.  

The court concluded that the defendants pay US$29 495 800 for violating the U.S law. That amount of restitution should be reduced by the US$7 049 080 the defendants had already paid to South Africa. Therefore, in total, the defendants were to pay the amount of US$22 446 720. What can be learned from the Lacey Act, along with those fisheries cases, is the application of extraterritorial jurisdiction in combatting IUU fishing and the possible enforcement of various laws such as fisheries and customs regulations can address crime on fisheries.

MMAF pays close attention to prevent, deter and eliminate IUU fishing and fisheries crimes. Under the administration of the 7th President Joko Widodo, and the leadership of Minister of Marine Affairs and Fisheries, Susi Pudjiastuti, the vision on maritime affairs will come to the fore in the years to come. The spirit to preserve and conserve living marine resources should be complemented with stringent measures in any aspects including legal frameworks. One good option is either enacting a law like the Lacey Act or incorporating the elements of the Act into the existing laws and regulations such as fisheries law and other environment-related

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701 Bengis Case (2011).
703 Bengis Case (2011).
laws. The Department of Justice of the U.S has participated in and coordinated speaking engagements in some countries such as Indonesia, China, Belgium, Switzerland, Vietnam, Malaysia, and the United Kingdom, to disseminate the Lacey Act.\textsuperscript{705} The engagement of the U.S Government can be a good opportunity to learn more about the application of the Act including the challenges that may occur during its implementation.

It is necessary to undertake further research concerning the possible application or adoption of the elements of the Lacey Act in the domestic legal system particularly with regard to the extraterritorial jurisdiction principle. Guidance with regard to such possible adoption is set out in Article 2 of the Money Laundering Law. This provision stipulates that the proceeds of crimes are the assets acquired from the criminal acts of, among others, trafficking in persons, terrorism, embezzlement, fraud, environmental crimes, crimes in marine and fishery or the other crimes with the punishment of four years or more in prison which are committed inside or outside the territory of the Republic of Indonesia and such criminal acts are considered as crimes according to the Indonesian Law.\textsuperscript{706} Article 2 is further strengthened by Article 10 stating that anyone who is in or outside the territory of Indonesia participating to commit attempts, assistances, or conspiracy to conduct the criminal act of Money Laundering shall be subject to be sentenced with equal sentence as set forth in Articles 3, 4, and 5.\textsuperscript{707}

In those two articles, a further step is taken in addressing money laundering by punishing Indonesian nationals when the crime is committed inside or outside the country. The only deficiency is the jurisdiction to impose sanctions on Indonesian nationals in violations of the laws and regulations of foreign countries as well as international treaties. The same measure, taken by Money Laundering Law, can be applied to address IUU fishing and fisheries crimes with a possible extension of extraterritorial jurisdiction. If Indonesia has this type of Act, it would not only secure its natural resources but also assume its role in keeping environmental exploitation at a sustainable level.

\textsuperscript{706} Indonesia Money Laundering Law art 2.
\textsuperscript{707} Ibid art 10.
4. Conclusion.

Indonesia has included provisions on natural resources in the constitution. The 1945 Constitution has provided for the role of the state and the benefit to the Indonesian people with regard to natural resources arrangements. Under the Constitution, there are several main laws concerning IUU fishing and Fisheries Crimes such as Law No. 45/2009 on Fisheries, Law No. 32/2014 on Ocean Affairs and Law No. 8/2010 on Countermeasures and Eradication of Money Laundering. More technical aspects such as fishing vessel registration and licensing and other aspects are regulated under ministerial regulations, ministerial decrees, governmental regulations and director general decrees.

One of the ultimate objectives of Fisheries Law is to overcome the problems of IUU fishing. In this Law, criminal acts consist of crime and offence. The punishment for persons committing crimes is higher than that under the category of offence. The minimum punishment for criminal acts is four years while for offence the maximum is two years. Some provisions to curb IUU fishing are found in this law. Meanwhile, Law Number 32/2014 does not explicitly cover issues of IUU fishing and TOFC. After ratifying the Palermo Convention, Indonesian authorities agreed to adopt Money Laundering Law Number 8/2010. The connection between criminal acts in marine and fisheries and predicate offences is provided in this law. An independent institution, PPATK, was established by the Indonesian Government to prevent and eliminate the crime of money laundering

In the Fisheries Law, there is a mandate to establish fishery courts under Article 71(1)(2) of Fisheries Law in an effort to have an effective prosecution. There were 10 (ten) fishery courts across the country as of 21 October 2014. The composition of those tribunals comprises three judges. The courts face difficulty when handling fisheries cases along with other related cases in its sphere. This complex problem can simply be resolved by amending fisheries law. The possible option to resolving the problem is either in rendering the authority to adjudicate fisheries crimes to the ordinary court or in strengthening the existing fishery courts with the right to process non-fisheries crimes in their internal judicial system.

From the legal aspect, there persist some loopholes regarding IUU fishing and its connection with transnationally organized fisheries crime:
1. The relevant domestic laws and regulations under MMAF do not clearly address transnational criminal activities in fisheries. Fisheries law also does not define IUU fishing nor fisheries crimes.

2. With regard to fishery courts’ duties, including related-crime aspects of fisheries crime will make it difficult for the courts in adjudicating the crimes.

3. Furthermore, within the international community, the opinion of perceiving and imposing violations on fisheries regulation differs. Some countries view them as criminals while others treat them under civil law.

4. Moreover, various terms in addressing fisheries poaching such as TOFC, fisheries-related crime and fisheries crime as the legal definition of fisheries crime are not provided in the international legally binding instruments.

5. Indonesia is not a state party to the FAO Compliance Agreement and the Cape Town Agreement.

Indonesia can draw some lessons from legal instruments of the U.S and South Africa. The U.S Government has evoked the Lacey Act in several cases including the notable Bengis Case. The defendants could be prosecuted because of collaboration between the U.S and South African Governments. Authorities in South Africa have a strong commitment not only to prosecute the defendants based on its domestic regulations but also to cooperate with the U.S Government to bring the perpetrators before the U.S court. This Act makes the implementation of extraterritorial jurisdiction and the application of the customs regulation in combatting fisheries crimes possible. As inspired by the Lacey Act, some countries have adopted this kind sort of Act into their domestic legal system.

Several proposals can be considered to combat IUU fishing and transnationally organized fisheries crimes within the scope of the domestic legal framework, as follows:

1. IUU fishing and fisheries crimes should be discussed together in international forums;

2. It is necessary to review and amend the existing legal frameworks on fisheries, particularly Law Number 45/2009 concerning Fisheries. The said law should define IUU fishing. It is also possible to consider providing its connection with TOC.

3. Indonesia should provide its consent to be bound by the 1993 FAO Compliance Agreement, the 2012 Cape Town Agreement and the ILO Work in Fishing Convention Number 188.
4. Indonesia should consider enacting a regulation similar to or incorporating the elements of the Lacey Act. The objective is to protect those species of fish and wildlife whose continued existence is presently threatened by gradual drying up of the international market for endangered species, thus reducing the poaching of any such species in the country from which it emanates. Lessons learned from the Lacey Act, are extraterritorial jurisdiction and the possible enforcement of other laws such as customs regulations to address crime in fisheries.

Further research is necessary on the possible application or adoption of the elements of the Lacey Act in the domestic legal system, particularly regarding extraterritorial jurisdiction principle. There is evidence that can be produced for that possible adoption as set out in the Money Laundering Law. In the relevant articles, Indonesia’s authorities punish its nationals when money laundering is committed inside or outside the country. The only deficiency is the jurisdiction to impose sanctions when violating domestic laws and regulations of foreign countries and international treaties.
PART VI
THE EXAMINATION OF IUU FISHING AND FISHERIES CRIMES THROUGH THE LENS OF ENVIRONMENTAL LAW

1. Introduction
From the last two parts, it can be drawn that legal and policy loopholes exist at the domestic plane. This part continues to deliver a deeper understanding on the identified problems of IUU fishing and fisheries crimes from the view of environmental law approach. At the outset, in order to secure a comprehensive overview of the issue, this part elaborates on the larger picture of environmental law by encompassing the discussion from the historical perspective and the profile of environmental law followed by the transnational nature of crimes committed on the environment. The next section examines IUU fishing and fisheries crimes from the view of environmental law. In the subsection of this topic, it presents a marine environment overview to provide a general understanding that this thesis focuses on marine-related affairs, not on a broad scope of the environment.

It is worth noting that the basic understanding on the nexus between IUU fishing and fisheries crimes should be delivered in this part to shed some light regarding the distinction and the interplay between the two concepts. After taking into consideration the previous discussion, the subsequent discussion of this part is devoted to the relationship between the law of the marine environment, fisheries crimes and UNTOC.

2. Environmental Law.
2.1. The History of Environmental Law.
It is widely acknowledged that the environmental challenges our planet is currently facing need integrated and comprehensive solutions. To materialize these solutions, countries must play a critical role in preserving the Earth from environmental degradation. In this sense, countries should go hand-in-hand in addressing the environmental problems due to their transnational character. Climate change, pollution of marine ecosystems, biodiversity loss and depletion of fish stocks are actual examples of environmental problems that various countries across the globe have been experiencing transnationally.

The conclusion of treaties and other international agreements along with the establishment of regional and international institutions over the next few decades mark the adoption of new standards on the protection and promotion of human rights principles and environmental conservation. Non-Government Organizations and corporations have been identified as the most active proponents in endorsing both subjects. This development then influences the emergence of legally binding instruments on domestic and international stages. Even though globalization gives rise to some adverse effects such as pollution, it can also be asserted that it is a significant factor in raising awareness concerning environmental issues inasmuch as information dissemination on climate change and other environmental problems would become easier to access.

From the historical outlook, environmental law has been envisaged as an important subject worldwide since the last decade of the 20th century. Nonetheless, in the book titled Principles of International Environmental Law, the authors introduce that international communities began to recognize the transboundary ramifications of environmental activities affecting areas beyond national jurisdiction in the late nineteenth century. Furthermore, in the 1930s, the Trail Smelter case concerning air pollution was adjudicated in the arbitral tribunal as an acknowledgment to border-crossing consequences. The International Convention for the Prevention of Pollution by the Sea by Oil was initiated in the 1950s and came into force on 26 July 1958. A further step was taken concerning pollution when like-minded states discussed and consented to be bound by the International Convention on Civil Liability for Oil Pollution Damage in 1969. The adoption of this Convention validates that sufficient

712 Philippe Sands et al, Principles of International Environmental Law (Cambridge University Press, 2012) 4. In this case, the tribunal came to the decision that Canada be responsible for the damage resulting from a Canadian smelter of zinc and lead ores which then requested compensation from the United States.
713 International Convention for the Prevention of Pollution by the Sea by Oil, 327 UNTS 3 (entered into force on 26 July 1958) (‘the 1954 Oil Pollution Convention’). This Convention was amended in 1962 and 1969.
714 International Convention on Civil Liability for Oil Pollution Damage, adopted on 29 November 1969, 973 UNTS 3 (entered into force on 19 June 1975) (‘CLC Convention’). This convention was replaced by 1992 Protocol adopted on 27 November 1992 and entered into force on 30 May 1996. The CLC Convention places the liability for persons suffering from oil pollution on the owner of the ship from which the polluting oil escaped or was discharged. Subject to a number of specific exceptions, this liability is strict; it is the duty of the owner to prove in each case that any of the exceptions should in fact operate. However, except where the owner has been guilty of the actual fault, they may limit liability in respect of any one incident. The Convention applies
financial reparation should be granted to persons suffering from oil pollution damage as a result of a maritime accident encompassing ships carrying oil.  

Despite the fact that some signs of progress had been made prior to 1970 on the development of international environmental law, the concept of sovereignty in terms of political and legal control over the natural resources by states was still considered dominant, the same control applies over their people, trades and other activities within their jurisdiction.  

It was in 1996 that ICJ on the Legality of the Threat or Use of Nuclear Weapons admitted that ‘the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment.’ This recognition is imperative with regard to the presence of environmental concern over the dangerous risk of nuclear weapons. The advisory opinion also constitutes the acknowledgment of general international environmental law as stated in the following report:

> The existence of general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states or areas beyond national control is now part of the corpus of international law relating to the environment.

This statement contributes to the legal development of environmental law particularly in its complexity and technical aspect. It also leads to the integration into other areas such as intellectual property, human rights, investment, trade and armed conflict laws. In intellectual property rights, one instance that can be discerned is the nexus between the technology of environment and patent law, trademarks, property rights in biodiversity and international protection of intellectual property.

Further essential reference by virtue of international environmental law evolution is the Stockholm Declaration agreed by delegations attending the UN Conference on the Human Environment held 05-16 June 1972 in Stockholm, Sweden. This declaration consists of 26

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716 Ibid.


718 Ibid.


principles chiefly dealing with natural resources conservation, pollution, economic and social development, environmental degradation, demographic policies, application of scientific technology in controlling environmental problems, education on environmental issues, limited sovereignty, international cooperation and elimination and destruction of nuclear weapons and all other means of mass destruction. Another commitment resulting from the Conference was Action Plans comprising 109 recommendations.\textsuperscript{721} Although it is a non-legally binding instrument, the Declaration has contributed to the progress of international environmental law. Particular attention is paid to Principle 21 which is based on the Charter of the United Nations and the principles of international law concerning states’ responsibility. In this principle, it is ‘to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.’\textsuperscript{722} The responsibilities that states should bear in Principle 21 are based on the \textit{Trail Smelter} arbitration conceived as ‘a milestone for further development of transboundary environmental protection.’\textsuperscript{723} Principle 21 offers the balance between a state’s sovereignty and commitment to preserving and protecting the environment.

In the development of international environmental law, its grouping is interesting in the sense that scholars may have divergent points of view in classifying its evolution. As introduced by Phillipe Sands, the commencement of the Stockholm Declaration until the conclusion of the United Nations Conference on Environment and Development (UNCED) is categorised as the third period of modern international law. The role of the UN in this period was critical in endorsing and coordinating the cooperation on environmental endeavours internationally. Globally, particular products were prohibited for the first time in this period. Furthermore, the first period was identified when fisheries agreements were agreed bilaterally in the nineteenth century and concluded with the establishment of new international organizations in 1945. Meanwhile, the second period commenced when the United Nations was created and continued until the conclusion of the UN Conference on the Human Environment in 1972.\textsuperscript{724}


Moreover, the inauguration of the international agenda for sustainable development was marked by the conclusion of UNCED held at Rio in 1992. This conference also led to the adoption of several prominent international agreements and plans of action. The 1992 Rio Declaration on Environment and Development constitutes a significant leap in achieving a more sustainable world order. As complementary to other measures in strengthening the notion of sustainable development, the Rio Declaration offers an ‘ideal perspective’ as it encompasses, among other things, ‘definitions, paradigmatic descriptions, guidelines, action frameworks and ethical interpretations of the concept.’

The 1992 Rio Declaration is conceived as the fourth era established through the integration of environmental issues from the perspectives of international law and policy into all aspects of human activities. The states worked together to formulate a more specific TEC from the perspective of a legally binding approach. The period between the Rio Conference and the ensuing years is determined as a crucial transformative development from the modern era into the post-modern period. The compliance with international obligations has resulted in the escalation of international jurisprudence.

The indicators set for determining the range of time can be challenging as Phillipe Sands explains further the 4 (four) ways to trace the progress of the issue through observing the trends in general and the topics. These are firstly, international environmental law is inclined to develop as a response to incidents and has scientific evidence basis, rather than as ‘anticipatory legal frameworks’ to environmental degradation. Secondly is the imperative role of science and technology development as a catalyst to the establishment of new norms of law. Thirdly, the interplay amongst governments, non-state actors and international institutions have contributed to the development of international environmental law rules and principles. Fourthly, it is more common lately – during the period 1990s to 2000s – for international tribunals to adjudicate environmental cases contributing to the ‘definition and application of the subject’. Since Sands’ overview on clustering the time period was

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730 Ibid.
written in 2003, the possible subsequent period is open to discussion particularly with the current progress in international environmental law.

Another approach taken by Peter Sand is placing the historical evolution of international environmental law into three major phases, those are, the traditional, the formative modern and the post-modern. The traditional period is divided into prior to and post 1945, while the second modern period started from the 1972 Stockholm Declaration to the 1992 UNCED in Rio de Janeiro. The development after the Rio Conference is part of the post-modern era.³³¹ Meanwhile, Edith Brown Weiss is of the view that the evolution of international environmental law should be divided into three different periods: (1900 – 1972), (1972 – 1992) and (1992 – 2012). The first period is called ‘early glimmers’. The second is referred to as ‘development of basic framework’, and the third is categorized as ‘maturation and linkage’. Most notable progress is evident during the second phase in which the 1972 Stockholm Conference was conceived as the initial multilateral conference focusing on environmental issues.³³² Therefore, this second phase lays down a fundamental framework for developing environmental law. Despite some discrepancies, both evolutions introduced by Sand and Weiss share the same notion that the 1972 United Nations Stockholm Conference and its Principle 21 play a critical role in promoting further environmental concerns in international society through multilateral agreements.

International environmental law has developed further since the Rio Declaration. International adjudications on the subject constitute further important steps in determining the legal aspects of the issue. Some principles of environmental law have been formalized internationally in the UN system such as through the United Nations Environment Programme (UNEP) having its headquarters in Nairobi, Kenya. This first international intergovernmental organization had the mandate to focus on the issues of environmental protection and was created as ‘a subsidiary body by the General Assembly in 1972’, after the conclusion of the Stockholm Declaration.³³³ This organization was not intended to be another

UN specialized body, and therefore cannot enjoy the UN organization status such as FAO or UNODC.  

Nevertheless, in the UNEP, the Division of Environmental Law and Conventions (DELC) has been established to contribute to the development and application of environmental law through exercising its daily duties or by facilitating multilateral meetings aimed at developing ‘multilateral environmental agreements, principles and guidelines’ to address the global environmental crisis. This UN body has been regarded as the most active organization in developing multilateral agreements and endorsing the implementation as well as undertaking coordination amongst related treaty secretariats and on the meetings of state parties. It is expected that UNEP should not act on itself, rather it should develop and coordinate environmental aspects of the programs executed by the other UN bodies. Nevertheless, the work of UNEP also encourages new cooperation and ‘mind-sets within civil society and the private sector’.

2.2. International Environmental Law Profile: Legally Binding or Non-Compliance?

In general acceptance, the laws that govern international society are international laws. International law which is also called public international law, by definition, is ‘the body of rules legally binding on states and other subjects of international law in their relations with each other’. In accordance with the traditional school of thought, the consent to be bound rendered by sovereign states constitutes the legitimacy for international law to prevail. Without their consent, in principle countries are not bound by any international treaties. The discussion on the character of international law can be drawn once it is compared to laws at the domestic level. Although international law does not introduce international police or army as a law enforcer and has the challenging tasks of imposing the sanctions against any breach, the binding nature is not derived from the presence of jail, police and the court but the basis is

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734 Weiss, above n 732, 4.
735 UNEP, the Division of Environmental Law and Conventions (DELC), 1 August 2017 <http://www.unep.org/divisions/dele/about-dele>.
the consent of states either expressly or implied and the interest of the states.\textsuperscript{740} Domestic and international laws are not an ‘apples-with-apples’ comparison in the sense of their enforcement inasmuch as domestic society and the international community have dissimilar members. The former comprises individuals while the latter consists of sovereign states.

In reality, the treaties agreed upon by the state parties on environmental issues are not always legally binding. The discussion on the legal nature of international environmental law comes to the fore as on the one hand, the legal instrument should be legally binding but on the other hand environmental issues do not receive a fitting legal acknowledgment from the international community. This intersection creates an interesting development in international law. It is commonly understood that the general practice of environmental agreements is still on a voluntary basis to comply with the obligations. In its development, it has tended to ‘develop non-compliance mechanism designed to secure compliance by the parties with the terms of a treaty or decisions of the Conference of the Parties (COP)’.\textsuperscript{741} This tendency shows that the international community acknowledges the fact that countries continue to be reluctant to consent to be bound by international treaties on environmental issues. For those countries that are inclined to be part of voluntary decisions or agreements, environmental issues seemingly are less important than ‘high profiles issues’ such as politics or security matters.

It can also be observed that some countries are averse to receiving serious consequences when breaching environmental decisions or agreements bilaterally or multilaterally. In that sense, the objective of treaties accommodating a non-compliance approach is to assist state parties in conforming to their obligations rather than to find their disobedience and render punishment. As explained in the UNEP Training manual on International Environmental Law:

Non-compliance procedures are best understood as a form of dispute avoidance or alternative dispute resolution, in the sense that a resort to binding third-party procedures is avoided. The treaty parties will instead seek to obtain compliance through voluntary means and in the process reinforce the stability of the regime as a whole.\textsuperscript{742}

In this regard, the highest priority for encompassing the non-compliance approach is to seek member countries’ best measures to follow and apply the decisions that have been agreed

\textsuperscript{740} Aust, \textit{Handbook of International Law}, above n 738, 3.
\hfill \textsuperscript{742} Ibid.
together with the other countries, particularly in their domestic system including in both legal and policy frameworks.

It is interesting to assert that in environmental law, breaching of environmental agreements or decisions is not legally sanctioned. International institutions which are mandated as supervisory bodies to environmental treaties function to oversee the compliance through consultation and practical support to replace punishment measures which are usually avoided by states. The sufficient available information holds a pivotal role in determining the success of the supervision of the application and operation of the agreements. One important instance that can be referred to in terms of non-compliance mechanism is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol). This protocol is regarded as one of the most successful treaties to address global environmental problems. As stated in the preamble, it is determined to:

…protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries.

This Montreal Protocol was adopted on 16 September 1987 and entered into force on 1 January 1989. The state parties have amended the protocol six times, among other aims, to control new chemicals and the establishment of a financial instrument paving the way for the developing countries to conform. Non-compliance provision is regulated under Article 8 which reads ‘The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance’.

The non-compliance instrument adopted in the Montreal Protocol can be comprehended as one of the key points in having a successful environmental treaty in its negotiation and

743 Ibid.
746 Ibid.
747 Ibid, art 8.
implementation as it offers a more flexible way for countries to accommodate their national interest. The main idea of the approach is to render assistance for non-compliant member countries to return to compliance and to jointly reach the main objectives. This “soft law” mechanism relies heavily on strong awareness from countries to eventually address common problems. Raising awareness itself is an important and challenging task as it would influence and “provoke” the states to be part of negotiations and then to ratify the agreement with the final goal of devoting their full cooperation and commitment in applying the provisions of the agreement.

2.3. Transnational Environmental Crimes.
In this subparagraph, the discussion focuses mostly on environmental crimes that are transnationally organized. Two interesting issues that can be elaborated on further in this respect are environmental crimes and transnational environmental crimes. This separation arises as environmental crimes are not necessarily transnational, crossing national boundaries in their operation. This sort of crime employs a wide range of particular offences in which the crimes or misdemeanours committed encompass trade in environmental goods or harming the environment in general within the domestic scope. For instance, deforestation can take place continuously in some provinces of Indonesia such as Central Kalimantan, Jambi, West Kalimantan and Riau\(^\text{748}\) without involving the non-Indonesian perpetrators. The timbers chopped down from illegal activity may be perpetrated and distributed for the domestic market only because of restrictions on export and import regulations imposed on illegal logging by several countries.

Another example in which environmental crimes are not always transnational is the distinction between human smuggling and human trafficking. As shown in the following comparison, there exist three major differences in terms of transnationality, purpose, consent and victimization between the two.\(^\text{749}\)


Table 4: Human Smuggling vs. Human Trafficking

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Human Smuggling</th>
<th>Human Trafficking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transnationality</td>
<td>Required</td>
<td>Not Required</td>
</tr>
<tr>
<td>Purpose</td>
<td>Transportation</td>
<td>Exploitation</td>
</tr>
<tr>
<td>Consent</td>
<td>Voluntary</td>
<td>Involuntary</td>
</tr>
<tr>
<td>Victimization</td>
<td>Country/Border</td>
<td>Person</td>
</tr>
</tbody>
</table>

For the first comparison, while people smuggling cases require the presence of transnationality, the transnational prerequisite is not compulsory for human trafficking cases. Trafficking may take place in different places within a country and the victims may not be removed to another country. Likewise, it is called smuggling, if the actions are transnational. Further, the purposes are also distinct between human trafficking and people smuggling. For the former, the aim is to transport from one to another place while for the latter the humans, as victims, are subject to exploitation. Additionally, people movement is made possible with their consent whilst the traffickers do not need the consent of the victims to be given. Nevertheless, apart from the transnational character discrepancy of the two crimes, cross-border crimes present a significant economic loss in the world.

Financial losses resulting from environmental crime under various sectors committed transnationally are estimated to be US$ 91-259 billion. This amount is twice that of Official Development Assistance (ODA) given globally. The total of this amount comes from societal loss suffered since ‘the commercial activity takes place in a parallel criminal illegitimate economy’.

It is recorded that during the past decade, environmental crimes have risen by about 5 – 7 %, or a twofold increase compared to the rate of world GDP growth. Based on the 2017 report of Transnational Crime in the Developing World revealed by Global Financial Integrity, the revenues resulted from the 11 following environmental crimes reaching the total of US$1.6 trillion to US$2.2 trillion per annum generated from corruption, finance violence and other crimes. The following table also proves that some environmental crimes such as IUU fishing, illegal logging and illegal wildlife trade are regarded as

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transnational crimes in operation. The estimated retail value of transnational crimes is enormous as illustrated as follows:752

Table 5: The Retail Value of Transnational Crime

<table>
<thead>
<tr>
<th>No</th>
<th>Transnational Crime Estimated</th>
<th>Annual Value (US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Counterfeiting</td>
<td>$923 billion to $1.13 trillion</td>
</tr>
<tr>
<td>2</td>
<td>Drug Trafficking</td>
<td>$426 billion to $652 billion</td>
</tr>
<tr>
<td>3</td>
<td>Human Trafficking</td>
<td>$150.2 billion</td>
</tr>
<tr>
<td>4</td>
<td>Illegal Logging</td>
<td>$52 billion to $157 billion</td>
</tr>
<tr>
<td>5</td>
<td>IUU Fishing</td>
<td>$15.5 billion to $36.4 billion</td>
</tr>
<tr>
<td>6</td>
<td>Illegal Logging</td>
<td>$12 billion to $48 billion</td>
</tr>
<tr>
<td>7</td>
<td>Crude Oil Theft</td>
<td>$5.2 billion to $11.9 billion</td>
</tr>
<tr>
<td>8</td>
<td>Illegal Wildlife Trade</td>
<td>$5 billion to $23 billion</td>
</tr>
<tr>
<td>9</td>
<td>Small Arms and Light Weapons Trafficking</td>
<td>$1.7 billion to $3.5 billion</td>
</tr>
<tr>
<td>10</td>
<td>Trafficking in Cultural Property</td>
<td>$1.2 billion to $1.6 billion</td>
</tr>
<tr>
<td>11</td>
<td>Organ Trafficking</td>
<td>$840 million to $1.7 billion</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>$1.6 trillion to $2.2 trillion</strong></td>
</tr>
</tbody>
</table>

It can be observed from the table that counterfeiting and organ trafficking assume the highest and lowest positions accounting for $923 billion to $1.13 trillion and $840 million to $1.7 billion, respectively. A significant gap is shown between drug trafficking and human trafficking. IUU fishing takes the fifth position amounting to $15.5 billion to $36.4 billion, one level down from illegal logging. This report notes that this estimate does not cover unregulated fishing nor any IUU fishing in inland fishing. The estimated percentage of illegal and unreported fishing represents approximately 14 to 33 per cent of the global marine capture value. Corporations operating IUU fishing are exposed as being intertwined with other transnational crimes.753 The exclusion of unregulated fishing as an estimated value should be questioned as this table presents three elements of IUU fishing. This table also poses a challenge regarding the value of fisheries crimes. If it is referred to as a working document of the UNODC/WWF Fisheries Crime Expert Group Meeting,754 fisheries crimes

753 Ibid xiii.
754 *Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting 2016*, E/CN/14/2016/CRP.2, 2.
losses would be enormous as the crimes would encompass other crimes such as human trafficking, people smuggling and other relevant transgressions.

In the light of the definition of environmental crimes, there is a lack of agreed legal reference adopted by the international community. The Environmental Investigation Agency has generally defined environmental crimes as ‘illegal acts which directly harm the environment.’ These sort of crimes encompass IUU fishing, illegal trade in harmful waste, illicit logging and its related trade in stolen timber, illicit trade in wildlife and smuggling of ozone-depleting substances (ODS). The inclusion of IUU fishing as environmental crimes can be challenging as unreported and unregulated will not fall under crime activities if there is no obligation to report and no regulation in place. Meanwhile, according to the joint assessment between UNEP and INTERPOL, the crime activities in the environment are commonly understood as ‘a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade or theft of natural resources, including serious crimes and transnational organized crimes’. From the definition stressed in the joint assessment, it can be learned that the general view is presented at the outset and then narrowed into a more specific explanation at the end. As such, non-transnational environmental crimes which occur at the domestic level can fall under this definition of the general term. With regard to the transnationally organized crimes, the definition has definitely encompassed this transnational issue as part of environmental delinquencies along with the serious crimes.

The core notion of transnational crimes is the activities violating the criminal law that are transboundary in character encompassing different states. This breach is not the problem of a single country as it embraces numerous countries where the crimes occur involving a broad range of various sectors. One of the critical factors is international coordination and cooperation in addressing the problem. As awareness arises amongst countries on the need to overcome environmental degradation, the international mechanisms for legal collaboration amongst countries have increased significantly in the first ten years of the 21st century. This decade is considered as an important development for multilateral legal collaboration to fight

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757 Nellemann, above n 750, 7.
against Transnational Environmental Crime (TEC). Prior to this century, the last decade of the 20th century is regarded as a landmark in globalizing environmental law through the UN Conference on Environment and Development held in Rio in 1992 which set the agenda for sustainable development,758 the adoption of the Convention on International Trade in Endangered Species of Wild Fauna and Flora759 and the Convention on Biological Diversity.760 International institutions playing a pivotal role in transforming environmental crime into global concerns through their work and decisions, are amongst others, the UNODC, the United Nations Commissions on Crime Prevention and Criminal Justice (CCPCJ), the UN Economic and Social Council (ECOSOC), the UN Security Council, the UN General Assembly, the World Customs Organization,761 INTERPOL and UNEP.

With regard to the application of TEC, an interesting notion is introduced by Prof. Greg Rose. He points out that TEC is a crime in violation of law in the domestic sense, rather than at an international level. TEC is a different concept with sole non-compliance. The breaches of any law are not constituted to be criminal and punishable when they are not imposed by criminal laws,762 and vice versa. Hence, it depends on the state whether its domestic law system includes the violations of environmental regulations as crimes. Nevertheless, this area of interest is a growing concern over legality and criminality rather than a mere aspect of non-compliance and environment preservation.763

In respect to transnational concern, it is evident that environmental crime crossing borders will not come into the sense of criminality without the intention and accomplishment of the

759 Convention on International Trade in Endangered Species of Wild Fauna and Flora, agreed at a meeting of representatives of 80 countries in Washington, D.C., the United States of America, on 3 March 1973 (entered into force 1 July 1975). CITES is an international agreement to which States and regional economic integration organizations voluntarily adhere. States that have agreed to be bound by the Convention (‘joined’ CITES) are known as Parties. Although CITES is legally binding on the Parties – in other words, they have to implement the Convention – it does not take the place of national laws. Instead, it provides a framework to be respected by each Party, which has to adopt its domestic legislation to ensure that CITES is implemented at the national level. For many years CITES has been among the conservation agreements with the largest membership, with now 183 Parties.
760 Convention on Biological Diversity opened for signature at Rio de Janeiro by all States and regional economic integration organizations from 5 until 14 June 1992 and remained open at the UN HQ until 4 June 1993, 1760 UNTS 79 (entered into force 29 December 1993).
761 INTERPOL-UN Environment, above n 751.
persons committing the crime. The perpetrator may consist of a single poacher to ‘complex multi-layered transactions across multiple jurisdictions by organized criminal syndicates’. In this context, the number of persons involved is in general terms distinguished from the definition as prescribed in Annex I of UNTOC concerning organized criminal groups. In practice, the classification made by Gregory Rose may ensue since it is not necessary for the involvement of three or more persons in a structured group to undertake transnational environmental crimes. However, criminals would need a network and therefore shall be more than one individual in committing an organized crime as they cannot design the plan and execute it without any assistance from or intervention with the others.

The question regarding the minimum number of persons as three or more to be classified as a criminally organized group, as set in the Palermo Convention, can be an interesting subject for further discussion. According to the travaux préparatoires of the Palermo Convention, the number of persons necessary to be involved and identified as ‘transnational organized crime’ differed amongst delegations during the negotiations. Some delegations supported the minimum of three persons, however other delegations such as from Azerbaijan was of the view to have a minimum two persons. The other countries also proposed omitting the minimum number of persons and made a general classification to only a ‘group’. Finally, it was a political decision reached by delegations attending the conference through consensus to determine the appropriate number of persons required to fall under the definition of an organized criminal group. Andreas Schloenhardt holds the view that the definition in Article 2(a) pays particular attention to ‘sophisticated and large-scale criminal organizations’, so the minimum number of three is agreed to be an extensive criminal group under the Palermo Convention.

Furthermore, the following figure 10 illustrates the causes and impacts of major environmental crimes including the losses suffered.

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765 Transnational Organized Crime Convention art 2(c), Annex I. Organized criminal group as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
Figure 10: Major Environmental Crimes, Drives and Impacts

It can be observed from the above figure that the most significant losses occur in illegal logging and trade accounting for a maximum US$152 billion and minimum US$50.7 billion while trade and dumping of hazardous waste assumes the lowest position of US$10-12 billion per annum. IUU fishing and wildlife poaching and trafficking share the same losses as the maximum loss, but they differ in their minimum loss. The illegal extraction and trade in minerals suffer the second significant annual loss accounting for US$12-48 billion. It is interesting to note that the above intersection shows that illegal exploitation and trade in oil

768 INTERPOL-UN Environment, above n 751, 5.
would potentially become more prevalent in the years to come. It has been identified that there exist seven causes of environmental crime, namely; corruption, lack of legislation, lack of enforcement, mafias, corporate crime, conflict and increasing demands. The occurrence of those drivers may take place in a local, national, regional and international combination but for the lack of legislation which occurs only nationally. Amongst these chief impacts, IUU fishing assumes third position for the minimum and maximum economic loss. Three identified problems at stake are fish stocks, revenue loss for fishermen and state, as well as the threatened lives of targeted species such as sharks, tuna and toothfish.

In figure 10, it is apparent that fisheries crimes are not counted as main environmental crimes. There can be some rationales for the absence of fisheries crimes such as possibly the inclusion of fisheries crimes in IUU fishing under the term illegal fishing and the difficulty in calculating the financial loss for this type of crime. In this respect, in order to discern the apparent position of IUU fishing and fisheries crimes in environmental crimes, the following section discusses IUU fishing and fisheries crimes from the perspective of environmental law. This section also covers the interplay between IUU fishing and fisheries crimes in a more detailed fashion.

3. Environmental Law Perspective on IUU Fishing and Fisheries Crimes.

3.1. Marine Environment.

The protection of the marine environment has been an essential issue amongst scholars having concern over the general topic of environment. The marine environment in common place meaning encompasses the whole ocean. The concern can be understood as humans depend heavily on the ocean. In accordance with the first global integrated assessment, seven-tenths of the planet are covered by the ocean. On average, the ocean is 4,000 meters deep comprising 1.3 billion cubic kilometres of water. In total, with approximately 7 billion people living on the earth, this means that one-fifth of a cubic kilometre of the ocean is occupied by each one of us. This portion also then produces 50% of the oxygen production annually for human beings to breathe and the total amount of fish and seafood that humans consume. This allocated portion of one fifth also suffers from marine litter, oil pollution, and waste from industry. It is projected by the year 2050, the population will increase to 10

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billion people occupying the Earth leading to the shrinking of each human’s portion to one-eighth of a cubic kilometre.\(^77^1\) This prediction sends a strong and clear warning that the ocean will face a difficult task accommodating the needs of humans, animals and other living creatures while at the same time experiencing environmental degradation. In that sense, it is the duty of humankind to conserve and manage the ocean in a sustainable manner for the generations to come through any ways possible including legal frameworks.

The main international legal framework regulating the marine environment should be referred to LOSC. As the Constitution for the Ocean, it encompasses constitutional nature perceived as the primary reference to the entire laws related to the sea and is superior to any other relevant conventions on marine affairs.\(^77^2\) More specifically, LOSC provides a broad range of mechanisms for marine environmental protection. The related provisions can be discovered in Part XII dealing with the protection and preservation of the marine environment. Furthermore, the articles concerning the conservation of marine living resources are regulated in the other parts of the Convention, particularly in Part V regarding the Exclusive Economic Zone and Part VII governing High Seas.\(^77^3\)

Within the general ambit of the marine environment, LOSC has governed the issue into two different legal aspects being marine environment protection and marine living resources conservation.\(^77^4\) In Part XII, it is the obligation of states to protect and preserve the marine environment.\(^77^5\) This obligation has been viewed as part of international custom taking into account the significant number of state parties of LOSC and the acknowledgment of marine environment protection in the numerous agreements.\(^77^6\) In the subsequent article, LOSC provides states with the sovereign rights over their natural resources to be exploited with due consideration of their environmental policies and duty in protecting and preserving the marine environment.\(^77^7\)

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\(^77^1\) The United Nations, *World Ocean Assessment I*, above n 6, 1.


\(^77^3\) *Law of the Sea Convention* Parts V, VII and XII.

\(^77^4\) Tanaka, ‘Principles of International Marine Environmental Law’, above n 770, 34.

\(^77^5\) *Law of the Sea Convention* art 192.

\(^77^6\) Tanaka, ‘Principles of International Marine Environmental Law’, above n 770, 34.

\(^77^7\) *Law of the Sea Convention* art 193.
The sovereign right of states in this article can be referred to the sovereign right as stated in the Preamble to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter: ‘in accordance with the Charter of the United Nations and the Principles of international law’. Furthermore, from this Part XII, it can be observed that obligation is the highest priority, prior to the right to explore. As such, states are required to comply with the obligation before securing their rights. The nexus between the obligation in Article 192 and the sovereign right provisioned in Article 193 was integrated into Principle 21 of the 1972 Stockholm Declaration.

With regard to the conservation of marine living resources, two fundamental approaches as the basis of identified legal aspect are the approach to zonal management and the approach to specific species. Tanaka discloses further that each jurisdictional regime follows the distinctive rules of the marine living resources conservation governed under the former approach while in accordance with the latter approach, the conservation efforts are based on the category of each marine species. Therefore, in the LOSC, some specific articles can be seen to conserve and develop the fish stocks shared within the EEZ of two or more coastal states, straddling fish stocks in the EEZ, area beyond and adjacent to it, species that migrate widely, marine mammals, anadromous stocks and catadromous species as well as sedentary species.

Nevertheless, those two approaches are conceived to be inadequate in responding and addressing marine living issues due to lesser concern on the environment once the delegations drafted and negotiated the LOSC. In actual fact, it can be understood, as at the time of negotiations state parties of LOSC negotiated draft texts based on the best scientific evidence and the most updated circumstance at the time of negotiations. With the

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781 Law of the Sea Convention art 63 (1).
782 Ibid art 63 (2).
783 Ibid art 64.
784 Ibid art 65.
785 Ibid art 66.
786 Ibid art 67.
787 Ibid art 68.
788 Tanaka, The International Law of the Sea, above n 780.
789 Lawrence Juda, ‘Considerations in Developing a Functional Approach to the Governance of Large Marine Ecosystems’ (1999) Ocean Development and International Law 93.
advancement of methodology and technology, the degradation of the marine environment has become more apparent and threatening. As such, it is the duty of state parties of LOSC to work conjointly in developing the most suitable mechanism in addressing marine environmental challenges in particular marine living resources.

3.2. IUU Fishing and Fisheries Crimes under Domestic Environmental Law.

In the domestic legal platform, the Government of Indonesia stipulates Law number 32/2009 concerning the Protection and Management of Environment.790 This law sets the objectives, among others: to ensure the continuity of humankind life and the preservation of ecosystem as well as to realize the sustainable goals.791 Unfortunately, this law does not cover specific provisions on fishery and far from addressing its surrounding problems such as illegal fishing and its related crimes. It can be understood from two perspectives:

1. This law focuses on the environmental aspect as the environment is defined as “the surroundings or conditions in which a person, animal, plant lives or operates;”792

2. Fishery has its own legal mechanism under the Law number 45/2009 on Fisheries.

Nevertheless, albeit now much, this environmental law regulates marine ecosystem as the environment of fish such as marine pollution,793 conservation on coastal and ocean794 and wastewater discharge to the ocean.795 A more specific regulation on marine ecosystem protection is provisioned in Articles 50, 51 and 52 of the Law Number 32/2014 on Ocean Affairs. Another related legal instrument is Government Regulation Number 21/2010 concerning the Protection of Maritime Environment.796 This regulation focuses only on the prevention and mitigation of maritime pollution from shipping activities,797 leaving pollution from fishing vessel unregulated. Hence, it is recommended to provide a legal mechanism to regulate the pollution discharged from fishing vessels. The strategic policy that MMAF can play is by establishing the rule for fishing vessels and other activities related to fisheries.


791 Ibid art 3.


793 Indonesia Environmental Law art 13.

794 Ibid art 57.

795 Ibid art 123.


797 Ibid art 1.

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including fish processing unit to ensure that their activities such as oil discharge, toxic liquid, sewage, garbage and gas omission to water and air do not harm marine environment as prerequisite to apply SIPI (license for fishing), SIUP (Fisheries Business License) and SIKPI (License for Fish Transporting Vessel). In addition, it can be concluded that illegal fishing and fisheries crimes are deemed as not having a direct connection with domestic environmental law.

### 3.3. The Interplay between IUU Fishing and Fisheries Crimes

The discussions concerning IUU fishing, fisheries crimes and their nexus with transnational organized crimes have been introduced by scholars, government institutions, research centres, non-governmental organizations and international organizations having concerns on the issues. In its evolution, the term IUU fishing was initially mentioned at a CCAMLR meeting in 1997 under Agenda Item 1 (IUU Fishing in the Convention Area), at the Standing Committee on Observation and Inspection (SCOI), 28-31 October 1997. It should be understood that IUU fishing is designed to address non-compliance issues on fisheries management regulations, particularly by vessels practicing flags of hoping.

In seeking a more profound understanding of transnational crimes and fisheries connection, the following presentation by Eve de Coning depicts an obvious interplay between IUU fishing, fisheries crimes and transnational crimes.

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798 Telesetsky, above n 14.

799 World Wild Fund for Nature (WWF), UNODC/WWF Fisheries Crime Expert Group Meeting: WWF Meeting Report, 25-26 February 2016, Vienna, [https://www.wildlex.org/sites/default/files/literatures/MON-092632.pdf]. The Fisheries Crime Expert Group Meeting (EGM) was jointly organized by WWF International (WWF) and the UN Office on Drugs and Crime (UNODC). The Norwegian Ministry of Trade, Industry and Fisheries provided funding support and had previously funded a suite of initiatives aimed at describing and developing the concept of fisheries crime and related concepts.


The Nexus between IUU fishing and Fisheries Crimes

Figure 11: The Interplay between IUU Fishing, Fisheries Crimes and Transnational Crimes

From the figure 11, it can be observed that fisheries crime is part of IUU fishing. Within fisheries crime itself, other crimes involved include money laundering, human trafficking, corruption and document fraud. Those transnational crimes are separated from IUU fishing activities if they refer to the explanation of IUU fishing in the IPOA-IUU fishing.\textsuperscript{803}

It can be observed further from the above interaction that not all aspects of fisheries crime are part of IUU fishing. In brief, paragraph 3.3 of IPOA-IUU embodies the following activities as IUU fishing:

- fishing in areas under national jurisdiction conducted by State or foreign fishing vessels contrary to domestic regulations; fishing in waters managed by regional fisheries management organizations (RFMOs) in contravention of conservation and management adopted by that RFMO by vessels flying the flag of members and cooperating non-members, non-members, vessels without nationality, and fishing entities; misreporting, underreporting and non-reporting of catch in national waters and RFMO areas; and fishing in areas where and for fisheries in which there are no applicable regulations.\textsuperscript{804}

\textsuperscript{803} FAO, \textit{International Plan of Action on Illegal, Unreported and Unregulated Fishing}, above n 285.
\textsuperscript{804} Palma, ‘Tightening the Net’, above n 59, 147.
Furthermore, Palma argues that the above characterization of IUU fishing employs mainly management of fisheries and compliance issues and as such those undertakings presumably do not include criminal activities.\textsuperscript{805} It is also worth noting that paragraph 3.4 IPOA-IUU fishing reads:

Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA).\textsuperscript{806}

It can be inferred from paragraph 3.4 of IPOA-IUU that unregulated fishing activities are ostensibly not always in contravention of any international laws or in other words, some unregulated fishing undertakings are legal. This case also applies to unreported fishing. As asserted by Eve de Coning, unregulated and unreported fishing could turn into illegal fishing in the sense that those activities have been provisioned as crime activities\textsuperscript{807} in the relevant regulations. Nevertheless, Palma’s claim that IUU fishing is not regarded as a crime cannot be generalized to all those terms since illegal fishing is clear-cut outlaw behaviour. This is if breaching national and international laws and regulations, including without permission of the coastal states, national and foreign fishing vessels constitute committing illegal activities.\textsuperscript{808} The same rules apply when fishing in RFMOs management areas.\textsuperscript{809}

In addition, the term illegal fishing can be disputed on its broad ‘literal interpretation’ suggesting ‘any activity carried out by any vessel (whether fishing or not)’ in the waters of a country and without securing its approval or being in breach of its laws and regulations.\textsuperscript{810} This term also creates inconsistency and confusion between the term ‘fishing’ and its explanation as ‘any activity’. This concern may lead to a challenge when evoking this description as a reference in the domestic and international sense, particularly when attempting to prosecute the perpetrators of illegal fishing although IPOA-IUU Fishing is not a legal instrument and it is merely a voluntary instrument.

\textsuperscript{805} Ibid.
\textsuperscript{806} FAO, \textit{International Plan of Action on Illegal, Unreported and Unregulated Fishing}, above n 285.
\textsuperscript{807} Coning, ‘Fisheries Crimes’, above n 738.
\textsuperscript{808} \textit{International Plan of Action on Illegal, Unreported and Unregulated Fishing} paragraph 3.1.1.
\textsuperscript{809} \textit{International Plan of Action on Illegal, Unreported and Unregulated Fishing} paragraphs 3.1.2 and 3.1.3.
\textsuperscript{810} Coning, ‘Fisheries Crimes’, above n 738.
In its conference edition report, UNODC made an analysis, available to the public, of the crimes committed along the value chain of the fisheries sector by illustrating the past and present cases. It highlighted that fisheries crime is chiefly motivated by economic factors and/or organized in nature. Common economically motivated crimes committed by the perpetrators of fisheries crimes include fraud, forgery and corruption to evade taxes, customs and duties. To make their goals achieve, they usually construct and involve networks when committing those crimes.

Transnational organized crime in the fisheries sector is real. The European Maritime Analysis and Operation Centre (Narcotics) (MAOC(N)) has received reports undertaken by countries under the coordination of this institution. As seen from the following figure the total amount of cocaine seized had reached 52.3 kilotons through maritime operations conducted between 2007 – 2010.

![Pie chart showing cocaine seizure proportions by type of vessel](image)

**Figure 12: Cocaine Seizures 2007-2010 – Per cent of total Cocaine Seizure according to the Type of Vessel (total = 52,300 tonnes)**

It can be seen from the above pie chart that most of the cocaine seized was taken from fishing vessels (44.5%). The second and third proportions were confiscated from sailing boats and merchant’s vessels accounting for 27.2% and 18.3%, respectively. The smallest amount accounted for 10% was taken from ‘go-fast boats’. This data suggests that fishing vessels have the potential to carry far copious amounts of cocaine (on average 1,150 kg) than other

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813 Ibid 81.
boats or vessels. This case shows that it is not about fishing per se, but it is related to transnationally organized crimes.

From the above discussion on the explanation of IUU fishing and its relations with fisheries crimes, it can be learned that illegal fishing can be classified as fisheries crimes, thus as unreported and unregulated fishing. The classification of ‘illegal fishing’ as fisheries crimes would not be as problematic as that of ‘unreported’ and ‘unregulated’ fishing. For the latter two concepts, if there is no obligation to report and no regulation in place, then the penalty or punishment cannot be imposed under civil and/or criminal codes. In practice, it is recognized that the fishing vessels are conducting IUU fishing by breaching conservation and management rules; however, those vessels do not automatically contravene the rules in their operation. In short, it can be asserted that IUU fishing involves activities that are not necessarily illegal.814

3.4. The Correspondence of Marine Environmental Law, Fisheries Crimes and the Organized Crime Convention.

This section is devoted to responding to a challenge expressed by Palma to undertake deeper research concerning the correlation between ‘fisheries and environmental law and transnational organized crime’. This suggestion comes from her view that IUU fishing should not be related to environmental crime as it is not clearly narrated in any relevant provisions of international law, unlike illegal logging and illegal wildlife trafficking.815 However, this section is intended not to cover all related aspects of the connection between those three topics nor to present a comprehensive overview of it. This section is part of a mosaic of this thesis which also discusses the relations between marine environmental law, fisheries crimes and the Organized Crime Convention.

As deliberated on in the previous sections, the environmental issue also covers the general topic of the marine environment. The primary legal reference for the marine environment, among others, should be LOSC. In its preamble, it reads:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and

814 UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 96.
815 Palma, Fisheries Crime: Bridging the Conceptual Gap and Practical Response, above n 657.
efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.\textsuperscript{816}

Further, the coverage of the marine environment has been extended to a number of articles including in particular Part XII dealing with ‘Protection and Preservation of Marine Environment’.\textsuperscript{817} However, this part governs a few articles pertaining to the conservation of species. It can be found that Article 192 is devoted to the obligation of a state to ‘protect and preserve the marine environment’.\textsuperscript{818} Further regulation positions Parties to LOSC to assume ‘the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment’.\textsuperscript{819} In his assertion, Robin Churchill conceives that natural resources in Article 193 include marine living resources.\textsuperscript{820} It is worth mentioning that crimes may take place in marine living resources. To some extent, the crimes are also organized transnationally.\textsuperscript{821} The admittance of the international community on the possible link between illegal fishing and transnational organized crimes through the UN General Assembly Resolution 67/79\textsuperscript{822} shows that more in-depth research and measures are necessary to prevent this crime going further. The publication of the issue paper on ‘Combatting against Transnational Organised Crime at Sea’ by UNODC casts some light on the problems of interlinked emerging crimes at sea with the reference to UNODC materials and LOSC. The crimes include amongst others, piracy and armed robbery at sea, trafficking in persons and smuggling of migrants, illegal drug trafficking as well as organized crime conducted in the fishing industry.\textsuperscript{823}

Before further elaboration on the interplay between marine living resources and transnational organized crimes, it is essential to discuss the clear concept of marine living resources crime. Although it lacks the accepted legal definition, marine living resources crime is attempted to be defined as ‘criminal conduct that may impact negatively on the marine living environment’.\textsuperscript{824} It is asserted that the term marine living resources crime was ‘modelled on the definition of ‘environmental crime’ proposed at the time by UNODC’. It is claimed

\textsuperscript{816} Transnational Organized Crime Convention, Preamble.
\textsuperscript{817} Ibid Part XII.
\textsuperscript{818} Ibid art 192.
\textsuperscript{819} Ibid art 193.
\textsuperscript{820} Churchill, above n 772, 17.
\textsuperscript{823} UNODC, Combating Transnational Organized Crime Committed at Sea: Issue Paper, above n 312, 1.
\textsuperscript{824} Ibid 96.
further to be an early effort to introduce the concept of fisheries crimes. Marine living resources crime was conceived to be used in distinguishing the offences of criminal fisheries from the administrative law usually applied to combat IUU fishing. This concept has then evolved and been encapsulated fully in the term fisheries crimes, which involves all crimes related to the value chain in the fisheries sector, including ‘those that may impact negatively on the marine living environment’.

The encapsulation of marine living resources crimes into fisheries crimes, as claimed above, would face a challenge when referring to the overview accessible in a report by WWF International in 2013. As principal authors behind that comprehensive report, Gregory Rose and Martin Tsamenyi cover a wide range of research on marine living resources crimes. In order to have a deeper understanding, the geographical and biological ambitions of marine living resources have been presented in that regard. The former encompasses:

> Resources present in the marine environment, which extends across all oceans, seas, semi-enclosed seas that form part of the Earth's saltwater bodies. It excludes rivers, lakes, glaciers, ice flows or other freshwater bodies. Simply put, this means the range of jurisdictions for which jurisdictional powers and norms are prescribed under the United Nations Convention on the Law of the Sea. These include the high seas and all zones of national jurisdiction (the exclusive economic zone and continental shelf) or national sovereignty (internal waters, territorial sea and archipelagic waters) up to the low-water mark or the freshwater boundary.

In respect of the latter, ‘the biological scope of living resources includes ecosystems, organisms, specimens of organisms and the genetic material of organisms’.

Looking deeper into the geographical account presented above, it can be inferred that the fisheries aspect is part of marine living resources. It has a broader spectrum than merely fisheries crimes. To a greater extent, marine living resources encompass a range of marine environments to cover, with some exclusion on the water flow on land or any freshwater bodies, those areas put simply as mentioned in the above explanation. In addition, the possible negative impact on the marine living environment as the result of all crimes related within the value chain of the fisheries sector shows that fisheries and the marine living environment are not identical despite some areas of intersections between them. Therefore, fisheries are not always identical to marine living resources. In that sense, it seems unlikely to

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826 Rose and Tsamenyi, ‘Universalizing Jurisdiction over Marine Living Resources Crimes’, above n 821, 85.
827 Ibid.
occur that marine living resources crime will make its transformation into fisheries crimes.

Moreover, it is important to highlight that both marine living resources and fisheries crimes have the same transnational dimension when performing their illegal operations. In 2011, UNODC identified that there exist in the fishing industry, marine living resources crimes along with the presence of transnational organized crimes.829 Nonetheless, Bricknell asserts that marine living resources crimes should not all be conceived as transnational organized crimes. This notion comes from the fact that it is not necessary to commit the crimes in a transnational and organized manner. Bricknell classifies offenders of illegal fishing in Australia into three groups; the repeated offenders, the opportunist and the ignorant. The last group, the ignorant, is found to be the most significant contributor to illegal fishing or marine living resources crimes. Mainly, they ignore fisheries laws and regulations and have a lack of awareness on the amended legislation.830

In making the link between marine living resources and transnational crimes, UNODC provides a clear discussion on, amongst other issues, (1) the trafficking of fishermen with the objective of forced labour; (2) the trafficking of children in the fishing industry; (3) groups of transnational organized crimes involved in marine living resources crimes pertaining to limited volume and costly species such as abalone; (4) the high calibre of ‘logistical coordination and legal sophistication’ practiced by several operators of transnational fishing involved in marine living resources.831 These four issues are clear examples of how the fishing industry is vulnerable to the illegal activities being transnational in character. The transitional and organized features of marine living resources crimes are also extended to fisheries crimes. This characteristic is embedded in other environmental crimes such as wildlife and forest crimes.832

It can be elicited from the UNODC report that the engagement of syndicates of transnationally organized crimes within marine living resources seems to be increasing.833

829 UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 128.
830 Samantha Bricknell, ‘Environmental Crime in Australia’, (Research and Public Policy Series No 109, Australian Institute of Criminology, 2010) 75.
831 Lee, Telesetsky and Schofield, above n 8.
833 UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 128.
This circumstance should be a matter of utmost concern to all countries. Legal overview and international institutions in the years ahead should also give this matter the utmost prominence. Even though it is evident that marine living resource crimes have a transnational character, the current legal instrument of the Organized Crime Convention does not include the crimes as one of its protocols. The way to get marine living resources and criminal aspects transnationally organized is by upholding marine living resource crimes as a possible additional protocol to the Organized Crime Convention.

In the Organized Crime Convention, Article 3 limits the scope of application of the Convention to the prevention, investigation and prosecution of four categories of crimes as listed in Articles 5 (criminalization of participation in an organized criminal group), 6 (criminalization of the laundering of proceeds of crime), 7 (measures to combat money-laundering) and 23 (criminalization of obstruction of justice) as well as serious crime in the sense that the transgression is transnational in operation and involves a group of organized criminals. Based on Article 3, the application of this Convention could be extended to address the marine living resources crime along with transnationally organized crime syndicates.

Qualifying those two categories of transnational and organized crime groups would possibly not be an issue for marine living resources crime. Nonetheless, for the serious crime classification, it would be challenging for fisheries offences, as part of marine living resource crime, to conform to a minimum four years gaol sentence. For instance, as ‘home to the largest fishing fleet in the world, China has one of the most explicit codes regarding illegal fishing’. In Chinese Criminal Law, Article 340 articulates that a breach of laws of marine resources constitutes a crime qualifying for a maximum sentence of three years in prison. Referring to this article, it is clear that marine living resources under Chinese regulation will

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834 Transnational Organized Crime Convention.
836 Transnational Organized Crime Convention art 3(1)(a).
837 Ibid art 3(1)(b).
838 Ibid art 3.
839 Telesetsky, above n 14, 973.
not fall under the category of “serious crime” as provisioned in the Organized Crime Convention.

Nevertheless, as regarded by Anastasia Telesetsky, in Chinese Law, ‘there are a number of crimes that seem equally relevant to IUU fishing by organized groups, including smuggling or tax evasion, which might qualify as “serious crimes” if they include a transnational component’. For instance, a smuggler of fish resulting from IUU practices can be sentenced to less than three years or more than 10 years gaol depending on the gravity of the violations. However, the individual is charged based on the dues owed, not by virtue of the IUU fishing activity. Article 340 of Chinese Criminal Law shows the complexity when marine living resources crime is seen to be part of the Palermo Convention as it does not comply with the term “serious crime”. It can be argued that fisheries management approach dominates countries, with no more than four years of imprisonment on a fisheries offence. If new international norms can be shaped in viewing marine living resources violation as crimes, the subsequent step to secure the position of an additional protocol to the Palermo Convention would be smoother.

The other limitation in criminalizing the marine living resources crimes derives from different maritime jurisdictions. Article 3(2) of the Palermo Convention defines an offence which is transnational in character. As referred to in Article 3(2)(a), a marine living resource crime is transnational in nature if its operation crosses the border of one state to the other state/s in territorial waters. It occurs because ‘the marine living resource crime would not be committed of another state if it was committed in exclusive economic zone or the high seas’ in accordance with international law. Likewise, it applies to paragraph (b) in which transnational crime would occur only if it was committed in the territorial waters of the other state/s.

From the legal overview, the management of marine living resources standards have been regulated in the LOSC, the 1993 FAO Compliance Agreement, the 2009 Port State

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841 Telesetsky, above n 14, 973.
842 Transnational Organized Crime Convention art 3(2).
844 Law of the Sea Convention.
845 The 1993 FAO Compliance Agreement.
Measure Agreement\textsuperscript{846} and the 1995 UN Fish Stocks Agreement.\textsuperscript{847} Nonetheless, in accordance with in-depth research on the criminal aspect of marine living resources, countries have yet to adopt a legal regime particularly regarding the punishment of marine living resources crimes at the global level. International institutions dealing with marine, environmental and other general issues pay particular attention to standard settings instead of the enforcement of criminal law.\textsuperscript{848} This shortage leaves the question hanging regarding the seriousness of countries in addressing this urgent marine environmental problem.

Relevant international institutions such as FAO, IMO, UNODC, OECD, ILO, INTERPOL and other related institutions have been advised to intensify their efforts in managing and addressing this problem as a matter of urgency.\textsuperscript{849} An integrated approach should be taken to law and policy by combining marine living resources and criminal aspects. The presence of transnational crimes such as human trafficking or people smuggling in the fishing industry cannot be neglected by those relevant international institutions. In that sense, those institutions should establish a regular coordination forum to work out the best possible ways of supporting marine environmental problems and bringing this attention before the states in their regular forums. The institutions should also keep informed to present research on marine environmental degradation to increase the awareness of, as well as to convince, the countries on this crucial issue. In doing this, they are expected to receive more acknowledgment from countries that marine living resources should be revived and prevented from further degradation by criminalizing those breaching marine living resources laws and regulations.

4. Conclusion.

In looking for more in-depth research on IUU fishing and fisheries crimes, legal and policy perspectives both national and international have been presented in the previous parts. This part goes further in the examination of environmental law. It is discovered that environmental law has evolved into a relevant subject from the last decade of the 20\textsuperscript{th} century. The Trail Smelter case has been referred to in various researches concerning environmental history to illustrate the ramifications of transboundary as a result of environmental activities. Some international conventions on the environment indicate the importance of the cooperation of states in addressing this problem. The Stockholm Declaration along with its Principle 21

\textsuperscript{846} The 2009 Port State Measure Agreement.
\textsuperscript{847} The 1995 United Nations Fish Stocks Agreement.
\textsuperscript{848} Rose and Tsamenyi, ‘Universalizing Jurisdiction over Marine Living Resources Crimes’, above n 821, 85.
\textsuperscript{849} UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 139.
brings an important development to international environmental law. This principle suggests the balance between the state’s sovereignty and commitment to preserving and protecting the environment in this regard.

Scholars’ overviews on the evolution of environmental law are not similar. For instance, Phillip Sands classifies the development into four phases with the Stockholm Declaration until the conclusion of UNCED as the third period marked as the beginning of modern international law. This period laid the foundation of cooperation on the environment amongst states. It is important to highlight that fisheries’ role at the initial period of evolution, through the conclusion of the bilateral agreements, constitutes the first commitment of states in having concern over environmental problems. Different stages offered by Peter Sand comprise three periods. He includes the 1972 Stockholm Declaration until the 1992 UNCED as the second phase. The subsequent period is post-modern. In addition, Edith Brown Weiss introduces a different approach emphasizing a three-year grouping consisting of ‘early glimmers’, development of basic framework and maturation and linkage. She includes the Stockholm Conference in the second phase and acknowledges it as the initial multilateral conference on the environment. The establishment of UNEP in 1972, through its Division of Environmental Law and Conventions, contributes to the further development of international environmental law.

The discussion continues on the character of international environmental law, whether legally binding or non-compliance. This topic is critical for examining IUU fishing and fisheries crimes at the end of Part VI. The basic understanding of the legal nature of international environmental law should be comprehended as such as it is commonly understood that public international law encompasses legal strength. It is different from domestic law due to the non-existence of a law enforcer in international society. Treaties on the environment are not always legally binding. This non-compliance mechanism is intended to receive compliance from countries in the form of treaties or decisions of COP. This non-compliance approach carries an advantage to secure states best effort to comply with the decisions made. The 1987 Montreal Protocol can be regarded as one of the most successful agreements on the environment.

The financial loss generated from 11 identified environmental crimes was estimated to be in the range of US$1.6 trillion to US$2.2 trillion annually. The loss of IUU fishing reached
US$15.5 billion to US$36.4 billion. Although this data was disclosed in 2017, unfortunately, it does not cover fisheries crimes. In light of its definition, the international community has not reached any agreement. Nonetheless, academics or relevant organizations make their interpretation. The Environmental Investigation Agency defines environmental crimes simply as illegal acts which directly harm the environment. This Agency includes IUU fishing as environmental crime although this inclusion poses a challenge since unreported and unregulated fishing can be legal if there is no obligation to report and no regulation in place. In its application, TEC is a crime in violation at domestic level, and it depends on the domestic legal system of relevant countries.

More in-depth research pertaining to the primary driver and financial loss from environmental crimes shows that there persist seven chief causes of TEC. While lack of legislation occurs at national level only, the other major drivers take place at the combined local, national, regional and international levels. Fisheries crimes, unfortunately, are not regarded as environmental crime. Two possible reasons could be firstly, the complication to measure the impact of fisheries crimes and secondly, illegal fishing is regarded as being covered in fisheries crimes.

It also examines the apparent position of IUU fishing and fisheries crimes from an environmental law overview including their relationship with TOC. As background, the marine environment and relevant provisions of LOSC are provided. It is projected that by the year 2050, the global population will increase to 10 billion people leading to the shrinking of mankind’s liveable portion to one-eighth of a cubic kilometre per person. This circumstance would escalate the burden the ocean has to bear in the future.

With regard to the legal provisions of environmental marine law, LOSC encompasses marine environment regulations in its Parts V, VII and XII. In respect to the connection between IUU fishing and fisheries crimes, it can be seen that fisheries crime is part of IUU fishing. Within fisheries crime itself, other crimes are involved. These transnational crimes are separated from IUU fishing activities if they refer to the definition of IUU fishing in IPOA-IUU fishing. From the explanation of the IUU fishing term in the IPOA-IUU fishing, IUU fishing mainly concerns the management of fisheries and compliance issues and as such, those undertakings presumably do not include criminal activities. It is important to note that illegal fishing is clear-cut outlaw behaviour. However, unregulated and unreported fishing could be classified
as illegal in the sense that those activities have been provisioned as criminal activities in certain regulations.

Another challenge comes from a broad explanation of illegal fishing that may lead to inconsistency and confusion between the term “fishing” and its explanation as “any activity”. In addition, this creates a challenge when suggesting this description as a reference in both the domestic and international sense, specifically when attempting to criminalize the perpetrators of illegal fishing. In the meantime, research shows that the existence of transnational organized crimes in the fisheries industry is a reality in which most of the cocaine seized from maritime operations was taken from fishing vessels.

To make the discussion more specific, this part analyses the connection between marine environmental law, fisheries crimes and the Palermo Convention. It can be shown that fisheries aspects are part of marine living resources. Both marine living resources crimes and fisheries crimes have the same transnational dimension when performing their illegal operations. Even though it is evident that marine living resource crimes are transnational in nature, the current legal instrument of the Palermo Convention does not include the crimes as one of its protocols. The analysis that has been made shows the difficulty in conforming to “serious crime” classification under Article 2 of the Convention. Another obstacle comes from the jurisdictional issue in which marine living resources crimes would fall under transnational classification if they are only committed in the territorial sea of the other state/s. Though some international legal instruments have been adopted to address marine living resources crimes, countries have yet to adopt a legal regime particularly regarding the punishment of marine living resources crimes at the global level. Relevant international institutions pay particular concern with standard setting instead of enforcement of the criminal law on the perpetrators of environmental crimes.
PART VII
ADDRESSING IUU FISHING BY USING THE METHOD OF TRANSNATIONAL ORGANIZED FISHERIES CRIMES

1. Introduction.
The previous part delivers, among other things, the discussion on the nature of environmental law, the analysis of IUU fishing and fisheries crimes and how marine environmental law relates to fisheries crimes and the Organized Crime Convention. In brief, the concept of environmental law suggests that the compliance approach is more to the fore than a legally-binding character. It is evident also that the interplay between IUU fishing and fisheries crimes needs to be comprehended clearly by the public and decision makers so that the two activities are not regarded as the same concept. In addition, for some reason fisheries crimes do not fall under the Palermo Convention provisions. The discussion in Part VI provides a further foundation on which to make an assessment of the policy to combat IUU fishing from a transnational crimes perspective.

This analysis now goes on further by discussing the advantages and disadvantages of perceiving and overcoming IUU fishing through fisheries crimes methods covered in this Part VII. The primary objective of this part is to deliver a balanced understanding for interested parties who pay a great deal of attention to the matter, such as government institutions, international organizations or individuals. Prior to the conclusion, this part presents an analysis if the policy is doable, to be applied by taking into consideration the previous discussions.

2. Transnational Organized Fisheries Crime Method to Address IUU Fishing: Advantages and Disadvantages.
The attempts to combat IUU fishing have been exercised through many methods. One approach that has been taken is linking IUU fishing with environmental law and transnational environmental crime. This makes sense as IUU fishing operations are chiefly transnational and have significant impacts on the marine environment. Nonetheless, the measures to address the problem face a number of challenges. As stated in the Australian Institute of Criminology report, acknowledgment of environmental issues raises obstacles in regard to its original link to criminal activities unlike the other sorts of crime which affect properties or
persons.\textsuperscript{850} Apparently, this perspective comes from people’s unawareness and to some extent their lack of knowledge on the long-term and potential threat of environmental degradation. Different state practices within each domestic legal system also contribute to this circumstance. The nature of high returns and low risk in environmental crime differs from the other types of transnational crimes, such as human trafficking or drugs smuggling.

In this sub-section, the discussion focuses on the advantages and disadvantages of fighting IUU fishing particularly in the efforts to revive the level of fish stocks through a fisheries crimes approach and the transnational issue. The main objective of having this discussion is to propose a balanced and comprehensive overview when devising the policy to take part in endorsing such a measure. For the Indonesian Government, this discussion is imperative as the Government, in its policy, has laid down the highest priority on IUU fishing and fisheries crimes. By offering the advantages and the disadvantages, the Government is expected to take a more comprehensive view. If the policy is revealed based on a mere assumption or one-sided perspective by counting, let’s say, the advantages, the implementation of policy on the ground may end up a failure.

2.1. Advantages.

In the general process of decision making within an organization, several steps should be taken by decision makers. This occurs at many levels, from small institutions or enterprises up to the large multinational corporations, both in the private and public services. Nevertheless, there should be distinctions made between private corporations and government institutions in the sense of their final goals and the stakeholders of both, as well as to some extent their working culture. It is evident that some private companies pursue the highest possible profits as their top priority\textsuperscript{851} while government institutions are non-profit making in their orientation apart from state-owned companies. Stakeholders of a corporate organization encompass an individual or group that may ‘affect or be affected by the actions of a business as a whole’. They can be both internal (the entities within the corporation such as managers, investors and employers) and external (the entities that are not part of the

\textsuperscript{850} Bricknell, above n 830, 2.

corporation’s structure, but they pay attention to or are implicated by the corporations.\textsuperscript{852} When formulating a strategic policy to accomplish the objectives of an institution, all levels of management are supposed to take into account the advantages and the disadvantages. As perceived by James A. Anderson, ‘public policies in a modern, complex society are indeed ubiquitous. They confer advantages and disadvantages; cause pleasure, irritation, and pain; and collectively have important consequences for our well-being and happiness’.\textsuperscript{853} Therefore, the advantages and disadvantages dimensions are embedded when a decision is made in particular in public policy. In a government institution such as the MMAF, the decision-making process concerning public policy is inevitable. The decisions disclosed by the MMAF affects society in both its social and daily life.

The policy to combat IUU fishing has been a cornerstone for the MMAF particularly after Minister Susi Pudjiastuti assumed the chief position in the ministry.\textsuperscript{854} When addressing this problem, some transnational crimes such as corruption, human trafficking, document, tax and customs fraud, money laundering and other illicit activities were also discovered along the value chain of fisheries.\textsuperscript{855} There are some benefits when eliminating IUU fishing from fisheries crimes and TOC, as follows:

\textbf{2.1.1. Eradicating Transnational Organized Crimes in Fishery Activities.}

TOC are a global phenomenon. Its nature to involve different jurisdictions and groups needs different countries to strengthen cooperation in addressing the problem. Nonetheless, transnational crimes should not be seen as identical with international crimes although both crimes cross borders and have an international dimension. The latter may or may not involve


\textsuperscript{855} UNODC, \textit{Fisheries Crimes: Transnational Organized Criminal Activities in the Context of the Fisheries Sector} (United Nations Publication: 2016) <https://www.unodc.org/documents/about-unodc/Campaigns/Fisheries/focus_sheet_PRINT.pdf>. In order to facilitate an understanding of fisheries crime and its scope, including serious crime and transnational organised fisheries crime, and to identify criminal justice and law enforcement tools to address such crime, the United Nations Office on Drugs and Crime (UNODC) and the World Wildlife Fund (WWF) co-hosted an Expert Group Meeting on Fisheries Crime on 24 to 26 February 2016 in Vienna. The multi-disciplinary expert meeting brought together international participants from national agencies, research institutions, law enforcement bodies, intelligence agencies as well as legal experts and NGOs with expertise in the emerging field of fisheries crime.
more than one state and encompass crimes committed against humanity.\(^{856}\) Genocide, crimes against humanity, war crimes and the crime of aggression are instances of international crimes.\(^{857}\) Both the former and the latter have their references. With regard to the latter, in paragraph 6 of the preamble of the Rome Statute of the International Criminal Court, every country has the duty to apply its criminal jurisdiction for which it shall bear the responsibility for committing international crimes.\(^{858}\) Meanwhile, transnational organized crimes are regulated under UNTOC or the Palermo Convention.

Under the Palermo Convention, three separate protocols have been drafted and established as annexes to the said convention. First of all, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, are supplementing the UNTOC or the Organized Crime Convention. Secondly, Protocol against the Smuggling of Migrants by Land, Sea and Air, are supplementing the UNTOC. Thirdly, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplements the UNTOC.\(^{859}\) Nonetheless, in its first report on the Transnational Organized Crime Assessment, UNODC has assessed some transnational organized crimes including trafficking in persons, smuggling of migrants, cocaine, heroin, firearms, environmental resources, counterfeit products, maritime piracy and cybercrime in order to have a better understanding of the networks as well as their related operations.\(^{860}\)

Hence, what can be implied from those two documents is that TOC are not only supplements to the UNTOC and its protocols but also to the other crimes that are classified as transnational and organized in the field. The possible rationales for the inclusion of three different transnationally organized crimes as annexes to UNTOC are firstly that a more robust mechanism can be rendered to address the problem through a legally binding agreement in the form of protocols. Next, the convention along with the protocols specifies some procedures to follow in coping with the transnational crimes in a more effective manner. State parties to the convention shall agree to the application of the provisions such as


\(^{858}\) Ibid para 6.

\(^{859}\) Transnational Organized Crime Convention.

criminalizing corruption and money laundering, extradition, mutual legal assistance, joint investigation, enhancing cooperation and witness protection. Lastly, it is an agreement amongst state parties to place priority on the three crimes as urgent matters since most state parties of the convention are likely to experience the same problems and the issue has become one of international concern.

As the world economies grow, globalization is spreading. This globalization is a double-edged sword offering advantages and disadvantages. In some respects, it makes international trade freer resulting in lower prices on goods, but on the other hand, the transformations also exacerbate negative behaviour. Some instances such as corruption and exploitation are now more globalized. In the larger picture, globalization also leads to the spread of transnational organized crime. The financial transactions from transnational organized crimes including drug trafficking reached 1.5% of world GDP or US$870 billion in 2009. The most significant contribution of revenue for transnational organized crimes is generated from illegal drugs accounting for some 20% (17%-25%) of total crime earnings, approximately 50% of transnationally organized crime proceeds and 0.6% to 0.9% of the world’s GDP.

The cross-border crimes committed are not only on land but also at sea. The United Nations General Assembly Resolution 65/37 was adopted on 7 December 2010 concerning transnational organized crime committed at sea. In this resolution, it has been noted with concern that transnational organized crimes undertaken at sea are identified as persistent problems. Those crimes include migrant smuggling and persons trafficking, illicit drugs, maritime security and safety such as armed robbery and terrorism at sea.

More concern has been expressed with regard to the possible nexus between organized crime and illegal fishing. Through the United Nations General Assembly Resolution 64/72 adopted on 4 December 2009 on sustainable fisheries, member states noted the possible correlation between illegal fishing and internationally organized crime in some parts of the world. It encourages member states, including through relevant international forums and organizations,

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861 Transnational Organized Crime Convention.
to conduct a further study on illegal fishing, the possible connection and to make it widely available taking into consideration the different legal systems under international law applied to international organized crime and illegal fishing. This resolution is an important stride in attempting to link a specific issue on illegal fishing with transnational organized crime. The resolution also suggests that when developing the research, different legal regimes are emphasized. This is understood as illegal fishing is under the guidance of FAO while transnational organized crimes shall be ruled under the authority of UNODC.

In bridging the connection between transnational organized crime and the fishery sector, UNODC disclosed the 2011 report on transnational organized crime in the fishing industry focusing on trafficking in persons, smuggling of migrants and trafficking of illicit drugs. It is evident that fishers have misused fishing vessels when carrying out illegal activities such as smuggling people, trafficking illegal drugs (chiefly cocaine), trafficking illegal weapons and terrorism. The fishers are recruited by criminals due to their knowledge and skills and their role is mostly to support the mastermind in committing transnationally organized crimes in the fishery sector including fishing vessels. It is typical for fishing vessels in West Africa to practice transhipment as a means of trafficking illegal drugs. This illicit practice has significant impacts on the society, the economy and the environment leading to West Africa losing approximately US$1.3 billion a year.

A different approach to overviewing transnational crime activities in the sector of fisheries is introduced through fisheries crime. Through this concept, the involvement of perpetrators of transnationally organized crimes in the fisheries sector is strengthened. Although legal reference of fisheries crimes remains undefined, criminal activities in this model share the same conception of criminal acts in transnational organized crimes. Fisheries crimes can be deemed as a multi-layered phenomenon engaging cross-sectoral crimes, including economic crimes, committed across the entire value chain, from capturing fish up to the end process presented to the consumers. Transnational crimes involved in fisheries crimes include

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866 UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 4.
867 UNODC, Drug Trafficking as a Security Threat, above n 71, 11.
amongst other things, marine resources transhipment, fishing illegally, corruption, money laundering, and relevant documentation fraud, tax and customs. 869 In the field, the engagement of transnational organized crime in the fishing industry has two dimensions. Firstly, the direct involvement of major transnational organized criminal groups 870 and secondly, it is likely that the transnational fishing companies operate legal and illegal businesses concurrently. The illegal catches are laundered by selling them with legally caught fish products.871

From the discussion in this section, it can be concluded that transnational organized crimes are present in the fisheries sector. The data and information in research papers and publications published by the international organization such as UNODC are sufficient to clarify that the fisheries sector is vulnerable to be utilized as a means to perpetrate transnational organized crimes. In combatting this sort of crime, studies have been taken including how to link such crimes with illegal fishing, but the measure faces some challenges. Firstly, IUU fishing arises from a voluntary or soft law instrument, that is, IPOA-IUU Fishing with the objective to address non-compliance by using fisheries management regulations. Secondly, not all activities in IUU fishing are necessarily illegal. Thirdly, the explanation of IUU fishing in the IPOA-IUU does not include criminal activities such as corruption, money laundering, people smuggling, drug trafficking or any other similar crimes.872 As such, fisheries crimes can be conceived as a breakthrough to fill the loopholes that exist when connecting the problem of border crossing organized crimes occurring along the value chain of the fisheries sector with the end goal of combatting and eliminating the said crimes in a more integrated and effective manner.

Furthermore, the fisheries crimes method also offers a double impact in attempting to revive the depletion of fish stocks and at the same time fighting against TOC. It comes from the notion that despite being ill-defined, fisheries crimes cover various illegal activities in the fisheries sector. Aldo Lale-Demoz introduces an interesting perspective that in addressing fisheries crimes, criminal law enforcement measures should be imposed to complement the traditional approach of fisheries management. He suggests that a national framework of

869 UNODC, Fisheries Crimes: Transnational Organized Criminal Activities, above n 855, 1.
870 UNODC, Stretching the Fishnet, above n 811, 12.
871 UNODC, IUU Fishing, above n 458, 23.
872 UNODC, Transnational Organized Crime in the Fishing Industry, above n 37, 96.
sustainable development plays a leading role in enforcing the law against fisheries crimes.\textsuperscript{873} This advice is understood as an effort to expedite the current issue of crimes on fisheries as international legal framework is silent on the legal definition of fisheries crimes.

\subsection*{2.1.2. Facilitating International Collaboration.}

In his remarks to the Security Council Debate on Organized Crime as a Threat to International Peace and Security on February 24\textsuperscript{th}, 2010, the former UN Secretary-General, Ban Ki-moon praised states for having respectable collaboration in fighting against organized crimes including the General Assembly’s measures to combat drugs, on the Process of Kimberly against Blood Diamonds and the UN Global Initiative on Human Trafficking. Nonetheless, he invited countries to pay more attention and actions to overcoming emergent threats such as cybercrime, money laundering, illegal dumping of poisonous waste and environmental crime.\textsuperscript{874} Further, ‘With transnational threats, States have no choice but to work together. We are all affected – whether as countries of supply, trafficking or demand. Therefore, we have a shared responsibility to act’, he said.\textsuperscript{875}

The mechanism for cooperation has been governed under the UNTOC. The need to strengthen cooperation in bilateral, regional and multilateral stages is affirmed throughout the Convention. The UNTOC establishes an effective instrument and the essential legal framework for international collaboration in fighting against transnationally organized criminal activities and the connection with terrorism.\textsuperscript{876} This Palermo Convention is designed to fight against particular criminal activities as well as to address the problems that the states are facing on international cooperation.\textsuperscript{877} Moreover, the Convention aims to have promoted cooperation in more effectively preventing and combatting transnational organized crimes.\textsuperscript{878} In most cases, the statement of purpose or similar is structured in the early stage of a convention. In any convention, it brings the gravity to provide the main rationales for why the said convention should be negotiated and agreed upon by the states. Hence, within the main

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{875} UNODC, \textit{The Globalization of Crime}, above n 860, 19.  \\
\textsuperscript{876} \textit{Transnational Organized Crime Convention} art 10.  \\
\textsuperscript{878} \textit{Transnational Organized Crime Convention} art 1.
\end{footnotesize}
\end{flushleft}
body of the UNTOC, cooperation amongst state parties is deemed important in making the prevention and fight against transnational organized crimes successful.

The research that has been taken illustrates that cross-border organized crimes and other sorts of criminal activity in the fishing industry are multidimensional and complicated. It involves different international legal frameworks and institutional mandates to tackle, amongst other things, human trafficking at sea, crimes by using fishing vessels, crimes by fishers and the interplay between marine living resources crimes and corruption.\(^{879}\) The relevant legal frameworks involved include the LOSC, the Palermo Convention, the United Nations Fish Stocks Agreement and the Compliance Agreement. In regard to the institutional overview, it encompasses international organizations such as FAO, UNODC, IMO and INTERPOL. As such, if IUU fishing is viewed as merely a fisheries management problem which is under FAO’s mandate, then the cooperation on law enforcement would encounter difficulties when addressing the crimes occurring along the value chain of fisheries activities. In that sense, a transnational crimes approach can facilitate international cooperation in addressing the problems through the engagement of different institutions particularly UNODC as guardian of the Palermo Convention.

### 2.1.3. Tightening Cooperation on Money Laundering and Confiscation of Assets.

Money laundering is commonly related to transnational crimes. It is largely connected to the earnings from traditional and more modern crimes. With regard to the latter, such as illicit drugs and weapons smuggling and marketing, the perpetrators make a great deal of money. Their illegal profits need to be laundered in the activities that do not draw the attention of related government authorities from the other countries.\(^{880}\) Apart from cleansing their dirty money and making it ‘legal money’, it is most likely that they also intend to camouflage their ‘illegal investment’ in the legitimate sectors aiming to generate more revenue and security. Both the legal and illegal fishing industries are found to be connected to money laundering practices. The illegal funds can be invested in operations or infrastructure. It is known that fish sales are in cash which is difficult to trace, and crews are also paid in cash.\(^{881}\) Moreover, in accordance with the 2008 Solomon Islands Report, environmental crimes (including

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\(^{879}\) UNODC, *Transnational Organized Crime in the Fishing Industry*, above n 37, 139.


\(^{881}\) Bondaroff, Reitano and Werf, above n 39, 50.
marine living resource crimes such as IUU fishing) assumed the 3rd most common predicate offence of money laundering in the Pacific.  

The method of laundering the money to other countries shows that the transnational nature of this crime cannot be overlooked, and countries need to establish proper mechanisms or instruments at every stage, bilateral, regional and multilateral. It is evident that if countries work together enhancing coordination, it will limit the distribution of money which in turn will restrict expansion of the operation. The Palermo Convention pays particular attention for countries to eliminate money laundering through joint collaboration amongst member states. Three aspects are brought to the fore for related authorities to cooperate, those are, on the legal frameworks, enforcement of the law and regulation of financial matters.

When money has been laundered through investment schemes, the criminals will obtain benefits in many forms such as property, equipment or other instrumentalities. These proceeds of crime should be subject to confiscation and seizure. In the sense that the money laundering takes place in other countries, international cooperation should be an apt measure to curb the expansion of the crime. It is essential to note that international cooperation determines the successful recovery of assets that have been transmitted to, and concealed in, different overseas jurisdictions. The process to take place includes evidence gathering, provisional measures implementation and confiscation of the proceeds and instrumentalities of organized crimes. It is highly recommended that the conclusion of bilateral or multilateral agreements to promote the effectiveness of international cooperation on the subject of confiscation be considered.

In bolstering international cooperation on the confiscation of crime proceeds, Article 13(1) of UNTOC provides two conditions when a state party requests another state party assuming jurisdiction over a crime under the Convention for confiscation. A state party, when referring to Article 12(1), shall, to the best extent within its domestic legal instrument: a) submit to the relevant authorities in order to secure an order of confiscation or b) submit to related authorities to obtain, to the best extent, an order of confiscation issued by a court of the

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883 *Transnational Organized Crime Convention* art 7(4).
885 *Transnational Organized Crime Convention* art 13(9).
territory of the requesting party. The said article adequately accommodates the initial procedure when a state party has adjudicated a particular transnational crime and its court makes a verdict to confiscate proceeds of crimes and other instrumentalities. However, the challenge comes from Article 13(7) when a state party may decline the request from another party to cooperate if the crime is not provisioned by the Palermo Convention.

In point of fact, it is the true character of any international treaty when the state parties to the convention only consent to regulate issues agreed upon by them as covered in that agreement. Although illegal fishing is transnational in nature and money laundering occurs in the fishing industry, this issue is not part of the Palermo Convention. Therefore, there is no obligation to abide by the rules stated in Articles 12 and 13 with regard to illegal fishing. However, it is still possible to refer to the same clauses through bilateral or multilateral agreement between like-minded states without referring to the Palermo Convention. In practice, perceiving IUU fishing from a crime overview may face hurdles in different domestic legal systems of countries. Another possible way around this is to relate fishing industry with criminal conduct or fisheries crimes method. If countries have the same views that fisheries crimes exist, then it would be easier to include in the Palermo Convention.

2.1.4. Extradition and Mutual Legal Assistance.

2.1.4.1 Extradition

The mechanism for international cooperation, is amongst others, extradition and mutual legal assistance which have been regulated in Article 16 and Article 18 of UNTOC, respectively. When the perpetrators face trial as responsible for the crimes committed, they can be extradited to their country of origin. If this cooperation does not exist, then it would be difficult to execute this policy. It is most likely for that reason, that state parties of the UNTOC should strengthen cooperation on extradition through either evoking the Convention or concluding the bilateral or multilateral treaties as the legal basis. As matter of course, state parties should inform the Secretary-General of the UN whether or not they take the Convention as a legal reference when depositing the instrument of ratification, acceptance, approval of, or accession. If they do not refer to the Convention, then they should seek to

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886 Ibid art 13 (1).
887 Ibid art 13 (7).
888 Ibid art 16.
889 Ibid art 16 (5)(a)(b).
890 Ibid art 16 (5)(a).
conclude the said treaties, where appropriate. Nevertheless, it is worth noting that state parties are compelled to admit the offences under the Palermo Convention as being extraditable crimes between themselves if those state parties prefer not to conclude a treaty. Furthermore, to name but a few, other issues which are stipulated in the Palermo Convention for bridging cooperation include the investigation of the offences\(^{891}\) and law enforcement.\(^{892}\)

Indonesia has adopted legal framework on extradition through Law Number 1/1979 on Extradition. This extradition law revokes the Royal Decree of May 8, 1883, no.2 (State Gazette 1883-188) on ‘Extradition of Aliens’ (\(Koninklijk Besluit van 8 Mei 1883 No. 26 (Staatsblad 1883-188)\) on ‘\(Uitlevering van Vreemdelingen\)’).\(^{893}\) The latter decree is a legacy from the colonial government of the Netherlands. This decree has been perceived to be no longer in accordance with recent development of relevant laws and regulations on extradition. Moreover, the existence of legal framework for extradition, adopted in 1883, indicates that the extradition has been long admitted in the legal system and practiced in the field. In the bilateral sphere, Indonesia has concluded 8 (eight) treaties on extradition with other states, as follows:\(^{894}\)

**Table 6: Extradition Treaty between Indonesia and Other Countries**

<table>
<thead>
<tr>
<th>No.</th>
<th>Treaty</th>
<th>Date and Venue of Signature</th>
<th>Ratification Status</th>
<th>Entry into Force</th>
</tr>
</thead>
</table>

\(^{891}\) Ibid art 20(2).

\(^{892}\) Ibid art 27.


\(^{894}\) Ministry of Foreign Affairs of the Republic of Indonesia, *Data Collection of International Treaties concluded by Indonesia*, Treaty Room <http://treaty.kemlu.go.id/index.php/treaty/index>. The information has been translated and modified as necessary. As of November 2017, the information provided is valid.
<table>
<thead>
<tr>
<th>No.</th>
<th>Treaty</th>
<th>Date and Venue of Signature</th>
<th>Ratification Status</th>
<th>Entry into Force</th>
</tr>
</thead>
</table>

In the above list of extradition treaties, Indonesia has laid the foundation to conclude the treaty not only to the state parties but also to the non-state parties to the Palermo Convention. It can be observed that Malaysia, the Philippines, Thailand, Australia, the Republic of Korea, India and Viet Nam are parties to the Convention while the Independent State of Papua New
Guinea is not on the list as a state party to the Palermo Convention.\(^{895}\) The provisions agreed upon are the translation of common grounds between the state parties. Although Papua New Guinea and the member states of the Convention assume a different level of responsibility under the Palermo Convention, they are bound by the same level of legally binding agreements. The provisions to some level, are also the same, such as Article 2 (1) concerning Extraditable Offences on the Extradition Treaties between Indonesia and Papua New Guinea\(^{896}\) and India\(^{897}\). The article reads: ‘An offence shall be an extraditable offence, if it is punishable under the laws in both States, by imprisonment for a period of at least one year or by a more severe penalty’.\(^{898}\)

Extradition is regarded as one of the oldest categories of international cooperation. Its history can be traced back to ancient times.\(^{899}\) However, it has been conceived by Cherif Bassiouni that its original objective was not designed as a tool for cooperation to preserve common interest in the society, but instead to surrender the fugitives.\(^{900}\) Although it has been practiced for a long time, it has not come to the point in which it receives a positive commitment from any country in the world. It is subject to the presence of a legally binding instrument accompanied by certain restrictions on some offences and classes of persons that may not be extraditable due to jurisdiction matters. The courts would evoke some reasons in making a decision to extradite such as identity, dual criminality, supporting evidence sufficiency and extradition treaty existence.\(^{901}\)

The nexus between extradition and ocean issues is proved to carry an old tradition. In 1624, the pioneer of freedom of navigation and the Dutch jurist, Hugo Grotius introduced his view postulating the principle of *aut dedere aut punire* (either extradite or punish) or *aut dedere aut judicare* (either extradite or prosecute) in more modern practice.\(^{902}\) The latter has replaced *punire* with *judicare* as the option to extradition in order to open the possibility that a


\(^{898}\) Ibid art 2(1).


criminal suspect may be found not guilty.\textsuperscript{903} It is required by this formula, which was in particular aimed at pirates at the time, that states \textit{dedere or judicare} when the crimes are against \textit{hostis humani generi} (enemies of humanity).\textsuperscript{904}

Hugo Grotius, or \textit{Huigh de Groot} in Dutch, asserted that ‘when appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal’.\textsuperscript{905} This maxim obtained momentum when international society was taking efforts to fight against piracy between the 17\textsuperscript{th} and 18\textsuperscript{th} centuries.\textsuperscript{906} This principle not only laid down individual responsibility for international crimes but also it obliged the state to be responsible when sponsoring piracy and when its vessel was apprehended. It is important to note that Hugo Grotius also introduced the universal jurisdiction theory for piracy.\textsuperscript{907} It is further clarified that the universal jurisdiction application is not objected for any and all states that could exercise their jurisdiction over any and all pirates. It is more properly said that the admittance of universal application of the jurisdiction of flag state is within its rights to defend against piracy and then to hunt them down to launch prevention and prosecution measures, consecutively.\textsuperscript{908}

Within the regime of transnational environmental crime, some scholars such as Debbie Banks\textsuperscript{909} and Stephen F. Pires,\textsuperscript{910} believe that IUU fishing is classified as an environmental crime or wildlife crime. If this activity is regarded as a crime by some academics, the subsequent questions would be whether or not the perpetrators of IUU fishing can be extradited? What about fisheries crimes? If fisheries crimes can enjoy extradition treatment? In making a response to the subject matters, it is worth noting that the classification of IUU fishing as a crime, no matter whether environmental or wildlife, would pose some issues in

\textsuperscript{904} Mahmoud Cherif Bassiouini and William A. Schabas (eds), \textit{Chronology of Relevant Historic Dates and Events: The Legislative History of the International Criminal Court} (Brill Nijhoff, 2016) 19.
\textsuperscript{906} Bassiouini, \textit{International Extradition}, above n 900.
\textsuperscript{907} Bassiouini and Schabas (eds), \textit{Chronology of Relevant Historic Dates}, above n 904, 19.
\textsuperscript{909} Banks et al, above n 755.
respect of unreported and unregulated fishing. Both terms would be complicated to be included as criminal activities if there is no duty to also report when the regulation is not adopted. The problem of extradition arises as since the outset, that is, in the terminology itself.

With regard to fisheries crimes, the lack of legal definition in international law potentially also brings a challenge. Although legal reference it not a prerequisite, however, without a legal reference, countries may perceive or construe the issue differently. Perhaps, the character not to have legal definition follows its larger umbrella of environmental crimes. To some extent, different state practices when addressing environmental issues form legal framework contributing to this ill-defined concept of fisheries crimes. \(^9\) Hence, the perpetrators of fisheries crimes can be extradited if two conditions are met, those are, first of all, if member states do not disagree for fisheries crimes to be additional protocol of the Palermo Convention and secondly, like-minded states agree to be bound by the extradition treaty, notwithstanding challenging with limited success, at the bilateral, regional or multilateral levels of making the fisheries crimes extraditable crimes.

In the absence of a legally binding agreement, Ahmad Farooq delivers an overview that the reciprocity principle can be applied. The extraditable crimes:

  Offences that are punishable under the laws of both parties and either enumerated among the extraditable offenses or found according to the formula for ascertaining extraditability in the applicable treaty. In the absence of a treaty, if extradition is based on reciprocity, the offense must be mutually recognized as extraditable. Where extradition is based on comity, it will depend exclusively on the applicable national law. In addition to designating extraditable offenses, the criminality of the relator's alleged conduct must satisfy the requirement of double criminality, i.e., the offense charged must constitute a crime in the two legal systems. \(^10\)

It can be drawn from the previous explanation in this extradition section that Indonesia has concluded an extradition treaty with Papua New Guinea, a non-state party to the Palermo Convention. Although fisheries crimes are not covered by the Palermo Convention it is likely

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\(^9\) UNODC, *Fisheries Crimes: Transnational Organized Criminal Activities*, above n 855, 1. Fisheries crime is an ill-defined legal concept referring to a range of illegal activities in the fisheries sector. These activities – frequently transnational and organized in nature – include illegal fishing, document fraud, drug trafficking, and money laundering.

however, for Indonesia to include the crimes in the fisheries sector as extraditable offences under a bilateral legally binding agreement.

2.1.4.2 Mutual Legal Assistance
Extradition is intertwined with mutual legal assistance as it is the continuation of extradition which can be observed from the purposes of extradition and mutual legal assistance. The former is purposed for a requested state to send a fugitive to the requesting state with the aim of being tried and therefore punishment can be executed. Meanwhile, in regard to the latter, its purpose is to get the requesting state to render assistance to the requested state in terms of the judicial process such as obtaining the witness’, victim’s or expert’s testimonials by taking other kinds of proof or by confirming judicial or other official records.\(^913\) Mutual legal assistance is provisioned in bilateral treaties concerning extradition between Indonesia and India. It reads ‘Each Contracting State shall, to the extent permitted by its laws, afford the other the widest measure of mutual assistance in criminal matters in connection with the offence for which extradition has been requested’.\(^914\) It can be observed that the two parties are bound to provide mutual legal assistance for the extraditable offences covered by the said treaty.

The Palermo Convention governs a specific provision concerning mutual legal assistance. Article 18 stipulates that state parties shall afford one another to their best extent mutual legal assistance in terms of investigation, prosecutions and judicial proceedings pertaining to all offences covered by the Palermo Convention.\(^915\) In particular, the measure shall be extended to; 1) the crimes established under articles 5, 6, 8, and 23 that are transnational and organized; 2) the offences stipulated under any of the Protocols of the Palermo Convention in which the states have provided their consent to be bound and 3) transnational serious crimes encompassing an organized criminal group as referred to in Article 2(b) as well as in a larger picture and 4) the offences under articles 5, 6, 8 and 23 involving ‘organized criminal group, where there are reasonable grounds to suspect that victims, witnesses, proceeds,


\(^915\) Transnational Organized Crime Convention art 18(1)(2).
instrumentalities or evidence of such offences are located in the requested State party.\textsuperscript{916} Nonetheless, the measures will come into effect in the case that the request is communicated in an effective manner and the communication continues to be taken during the implementations.\textsuperscript{917} As such, the way of communication plays a pivotal role in determining the mutual legal assistance to be successfully executed. The requesting and requested states should understand each other’s needs.

As guidance to have effective mutual legal assistance, the general principles have been tabled, namely; 1) sufficiency of proof; 2) dual criminality; 3) double criminality and the Palermo Convention in mutual legal assistance issues and 4) limits on transmission or use of information acquired by mutual legal assistance.\textsuperscript{918} Particular attention is paid to number three to make it distinguishable from number two. The latter solely explains dual criminality (the conduct is conceived as crimes in both requested and requesting states) while the former refers to Article 18 (9) as a further scenario concerning the non-existence of dual criminality allowing a state to refuse the request. In that case, the requested state may, when it perceives appropriate, afford assistance in any circumstance possible, regardless of whether or not the conduct in question would establish an offence in the requested state under its domestic legislation.\textsuperscript{919} Moreover, Revised Manual Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters outlines the sort of assistance that can be included in the Mutual Assistance Treaty as follows:\textsuperscript{920}

- Taking evidence or statements from persons;
- Assisting in the availability of detained persons or others to give evidence or assist in investigations;
- Effecting service of judicial documents;
- Executing searches and seizures;
- Examining objects and sites;
- Providing information and evidentiary items;
- Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

There are some exceptions in applying for mutual legal assistance. First of all is the matter of political offence. Chiefly, the requested party can refuse the request for legal assistance on political grounds. Secondly and thirdly are fiscal offence and military law, respectively.

\textsuperscript{916} UNODC, 	extit{Legislative Guides}, below n 941, 162.
\textsuperscript{917} UNODC, 	extit{Manual on Mutual Legal Assistance and Extradition}, above n 899, 65.
\textsuperscript{918} Ibid 70.
\textsuperscript{919} 	extit{Transnational Organized Crime Convention} art 18(9).
However, it is important to note that mutual assistance shall not be refused on the grounds of secrecy of bank and similar financial institutions.921 The different rule concerning fiscal offence applies to extradition. It may not be refused for the sole reason that the offence is conceived to involve fiscal matters.922 Fourthly is if the request would prejudice the sovereignty, security and public order923 or other essential public interest.924 Fifthly, it is prohibited to undertake the requested action in national law. Sixthly is the application of de minimis, while seventh is nemo bis in idem debet vexari (double jeopardy). The respective eighth and ninth are incorrect procedure and human rights.925 The 10th is if the request has been made on the grounds of ‘person’s race, sex, religion, nationality, ethnic origin or political opinions or that person’s position may be prejudiced for any of those reasons’.926

Indonesia has adopted Law 1/2006 concerning Mutual Legal Assistance in Criminal Matters. In addition to the refusal of mutual legal assistance by requested state parties, Indonesia has made an exception for killing, or its attempt, towards the head of state/head of government and terrorism as an exception to political offence.927 Therefore, Indonesia will render the relevant legal assistance to the other countries in the case of terrorism or if their head of state/government is killed or attempted to be killed. This provision may face a hurdle in its execution in the sense that the other countries govern them as political offences when making a bilateral agreement or applying the reciprocity principle.

In bilateral and regional stages, Indonesia has made a serious effort in making mutual legal assistance come into effect. There exist six bilateral treaties between Indonesia and other countries and Indonesia is in the process of discussion or negotiation with four other countries. The latter includes the United Arab Emirates, France, Brazil and Iran (as of 5

921 Transnational Organized Crime Convention art 18(8).
922 Ibid art 16(15).
924 UNODC, Revised Manuals on the Model Treaty, above n 920, 86.
925 Boister, above n 923.
926 UNODC, Revised Manuals on the Model Treaty, above n 920, 86.

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December 2017). With regard to the former, the countries with which Indonesia has concluded legal assistance treaties are as follows:

Table 7: Mutual Legal Assistance Treaty on Criminal Matters between Indonesia and Other Countries

<table>
<thead>
<tr>
<th>No.</th>
<th>Treaty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and the Socialist Republic of Vietnam</td>
</tr>
<tr>
<td></td>
<td>Jakarta, 27-06-2013</td>
</tr>
<tr>
<td>2</td>
<td>Treaty between the Republic of Indonesia and the Republic of India on Mutual Legal Assistance in Criminal Matters</td>
</tr>
<tr>
<td></td>
<td>New Delhi, 25-01-2011</td>
</tr>
<tr>
<td>3</td>
<td>Agreement between the Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters</td>
</tr>
<tr>
<td></td>
<td>Hong Kong, 03-04-2008</td>
</tr>
<tr>
<td>4</td>
<td>Treaty on Mutual Legal Assistance in Criminal Matters</td>
</tr>
<tr>
<td></td>
<td>Kuala Lumpur, Malaysia, 29-11-2004</td>
</tr>
<tr>
<td>5</td>
<td>Treaty between the Republic of Indonesia and the Republic of Korea on Mutual Legal Assistance in Criminal Matters</td>
</tr>
<tr>
<td></td>
<td>Seoul, 30-03-2002</td>
</tr>
<tr>
<td>6</td>
<td>Treaty between the Republic of Indonesia and the People's Republic of China on Mutual Legal</td>
</tr>
<tr>
<td></td>
<td>Jakarta, 24-07-2000</td>
</tr>
</tbody>
</table>


929 Ministry of Foreign Affairs of the Republic of Indonesia, *Data Collection of International Treaties*, above n 894.
In the Southeast Asian region, 10-member countries of ASEAN signed the Treaty on Mutual Legal Assistance on Criminal Matters on 29 November 2004. Nevertheless, these countries have provided their consent to be bound by the treaty through different ratifications ranging from 2005 to 2013. State parties to the treaty agree to render the following assistance:

   a) Taking of evidence or obtaining voluntary statements from persons;
   b) Making arrangements for persons to give evidence or to assist in criminal matters;
   c) Effective service of judicial documents;
   d) Executing searches and seizures;
   e) Examining objects and sites;
   f) Providing original or certified copies of relevant documents, records and items of evidence;
   g) Identifying or tracing property derived from the committing of an offence and instrumentalities of crime;
   h) The restraining of dealings in property or the freezing of property derived from the committing of an offence that may be recovered, forfeited or confiscated;
   i) The recovery, forfeiture or confiscation of property derived from the committing of an offence;
   j) Locating and identifying witnesses and suspects; and
   k) The provision of such other assistance as may be agreed, and which is consistent with the objects of this Treaty and the laws of the Requested Party.

The scope of assistance or areas of cooperation contained in a treaty is not always identical to the UNTOC. The comparison between Article 2(1) of the Treaty on Mutual Legal Assistance in Criminal Matters and Article 18(3) of the Palermo Convention shows that some issues in the Convention are not covered by the Treaty such as ‘making arrangements for persons to give evidence or to assist in criminal matters’. This distinction can be justified as Article 18(3)(i) provides ‘Any other type of assistance that is not contrary to the domestic law of the requested State Party’. This article opens the possibilities for the state parties to the relevant treaties to conclude the ambit of mutual assistance other than those stated in the Palermo Convention.

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932 Treaty on Mutual Legal Assistance on Criminal Matters art 1(2).
933 Transnational Organized Crime Convention art 18(3)(i).
From above explanations on mutual legal assistance, it can be observed that the status of the conduct as a crime holds an essential role in assuming mutual assistance. As applied in the extradition treaty, the lack of criminal aspect on unreported and unregulated fishing makes it challenging to secure mutual legal assistance. It would be a different story when a fisheries crimes approach is taken. Although mutual assistance is regulated under the Palermo Convention, it is unnecessary to include fisheries crimes as protocol to the Palermo Convention for giving mutual legal assistance. Mutual legal assistance can be extended to countries by using bilateral, regional or multilateral treaties or the reciprocity principle provided that the countries so agree.

### 2.1.5. The Enhancement of Cooperation on Joint Law Enforcement Investigation.

One important aspect to address and combat illegal activities should be through law enforcement. At the domestic level, the cooperation amongst law enforcement agencies such as police, attorney, armed forces and other relevant agencies contributes through their duties, to the success in enforcing the law. On the international stage, law enforcement would need international cooperation since the crimes are undertaken by crossing into national jurisdiction of the other countries. A coordinated transnational response is required to fight against transnational organized crimes. As its networks span the world, transnational measures to combat the criminals should also be extended to make sure that organized crime networks are unable to easily relocate their operation to states or regions where loose criminal justice comes from vulnerable collaboration.934

When facing IUU fishing and fisheries crimes, it would be challenging for countries to enforce domestic and international law alone without the cooperation of other countries because of their transnational character. For countries having the same concerns on the prevention, deterrence and elimination of IUU fishing and fisheries crimes, bilateral or multilateral cooperation can be strengthened through legally or non-legally binding agreements. Indonesia and Australia are committed to laying a strong bilateral foundation in addressing marine problems. 2017 saw an important step for both countries when the two top leaders, Indonesia’s President Joko Widodo and Australia’s Prime Minister Malcolm Turnbull signed a Joint Statement on Maritime Cooperation. Among other things, the collaborations agreed upon are:

1) Enhanced Economic Partnership.
2) People-to-People Links.
3) Maritime Cooperation

Australia and Indonesia further recognized that IUU fishing is a complex and growing problem and reaffirmed their commitment to support efforts to combat it. The leaders agreed the two leaders would develop an Action Plan to implement the Joint Declaration.935

The joint statement then was followed by the Joint Declaration on Maritime Cooperation signed by Retno Marsudi, Minister of Foreign Affairs of Indonesia, and Julie Bishop, Minister for the Department of Foreign Affairs and Trade of Australia on 26 February 2016. Both leaders ‘will seek to deepen and broaden maritime cooperation’ with, amongst others, the following objectives:

1) To improve the management and sustainability of living marine resources.
2) To strengthen cooperation to combat IUU fishing and crimes in the fisheries sector.
3) To promote the development of improved maritime infrastructure and greater regional connectivity to help facilitate maritime trade, investment, services, and tourism.
4) To build closer cooperation between our maritime civil law enforcement agencies through information sharing, capacity building and the conduct of bilateral cooperative activities.
5) To combat transnational organized crime committed at sea, through closer cooperation and information sharing between law enforcement and justice agencies.936

Dating back to previous years, Indonesia and Australia agreed to sign the Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation (Lombok Treaty) on November 13th, 2006. It came to the concern of both countries that there was the need to cooperate between relevant institutions and agencies, including prosecuting authorities, in preventing and combating transnational crimes, in particular crimes related to people smuggling and trafficking in person, money laundering, financing of terrorism, corruption, illegal fishing, cybercrimes, illicit trafficking in narcotics drugs and psychotrophic substances and its precursors, illicit trafficking in arms, ammunition, explosives and other dangerous materials and the illegal production thereof; and other types of crime if deemed necessary by both Parties.937

The initiatives taken by both leaders of Indonesia and Australia should be praised. It has laid a strong foundation for the years to come on the issues of common interest. Nevertheless, it should be highlighted that the joint statement and the joint declaration are not intended as binding instruments between the two countries. The choice of words also determines less importance of the statements such as using ‘will’ instead of ‘shall’. Therefore, to some degree, these instruments will not be as effective as any legally binding mechanisms because neither country is bound by the provisions including the cooperation on maritime civil law enforcement agencies through information sharing and Combating Transnational Organized Crime Committed at Sea between law enforcement and justice agencies.

Considering that the cooperation between law enforcement and justice offices holds a vital role in the investigation and prosecution process, the cooperation should be formulated in the instrument with a legally binding character. This formulation can be achieved through an instrument such as the Organized Crime Convention. Again, the hurdle comes from the absence of IUU fishing or fisheries crimes in the Convention. If both IUU fishing and fisheries crimes are treated as crimes, these issues reserve the right to refer to legally binding provisions including concerning law enforcement cooperation as stated in Article 27 of the Convention. This article reads ‘States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offenses covered by this Convention’. In this provision, it is a must for state parties to strengthen cooperation in order to make law enforcement effective. UNODC explains this further through methods of law enforcement cooperation. Travaux Préparatoires of this Convention suggest some flexibility in its application concerning ‘the extent and manner of cooperation’. For instance,

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Treaty was signed on 13 November 2006 in Lombok, Indonesia and entered into force on February 7th, 2008. The Treaty provides a framework for security cooperation between Australia and Indonesia, including provisions on defence, law enforcement, counter-terrorism, intelligence, maritime security, aviation safety and security, the proliferation of weapons of mass destruction, emergency cooperation, cooperation in international organizations on security-related issues and community understanding and people-to-people contact. The implementation of this treaty is strengthened further by Joint Understanding on a Code of Conduct between the Republic of Indonesia and Australia in Implementation of the Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation signed on 28 August 2014 in Bali, Indonesia.


940 Transnational Organized Crime Convention art 27.
the cooperation can be denied if it violates domestic laws and policies.941

On the practical level, it is frequently discovered that the investigators need to detect and gather the proof from victims living in the other countries or to collect information aiming to verify and support the testimonials from witnesses.942 This condition can be met when states, parties to the Organized Crime Convention, cooperate in establishing a joint law enforcement investigation. This measure can also be extended when curbing fisheries crimes. Although fisheries crimes operate as transnationally organized, the international society has tended to pay it insufficient attention since it is not adequately comprehended as a crime. As a result, there is a shortage of ‘a coordinated criminal law enforcement response’.943 By treating this issue as a transnationally organized crime, countries would obtain the advantage to strengthen and enhance their law enforcement investigation.

2.1.6. Pathway to the Transfer of Sentenced Persons.

It is common nowadays that the flow of people crossing national boundaries increases the possibility to imprison or impose other forms of liberty deprivation to nationals of foreign countries when they commit a crime. This circumstance then promotes further concern pertaining to the proper approach to cope with such sentenced persons.944 Some scenarios remain such as deporting the crime-committed individuals to their original country or sending them to the local correctional institutions to serve their sentences and then be expelled to their home country following the completion of the punishment. The former may face drawback such as the avoidance of the sentence by the convicted persons because of the internal rule or policy of the receiving state, or they can be rehabilitated particularly in the case of local regulations of the sending state allowing the latter.945

The violation of fisheries laws and regulations along its value chain, when undertaken in a transnational and organized fashion, makes it possible to receive transnational treatment including the transfer of sentenced persons. Nevertheless, it is not possible without the crime

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943 UNODC, Fisheries Crimes: Transnational Organized Criminal Activities, above n 855, 2.
945 Department of Justice of the Government of Western Australia, Rehabilitation Program <http://www.correctiveservices.wa.gov.au/rehabilitation-services/rehab-programs.aspx>
attached to it, the adequacy of the domestic legal framework of the relevant states and international cooperation. The transfer of convicted persons is discerned to be an important tool of cooperation to thwart and combat crime being the purpose of the 1998 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime.946

Under the Organized Crime Convention, the arrangement on the transfer of a sentenced person has been regulated under Article 17:

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offenses covered by this Convention, in order that they may complete their sentences there. 947

In comparison with the other provisions in the Convention, such as mutual legal assistance948 and extradition,949 the arrangement on the transfer of sentenced persons is relatively shorter and does not go into much detail. The choice of language such as the word ‘may’ rather than ‘shall’ in most subparagraphs is ‘softer’ than is used in mutual legal assistance and extradition. It is arguably for the reason that the Convention provides not only mandatory but also non-mandatory instruments to facilitate international cooperation.950 The use of a softer term is the result of the negotiation process amongst negotiating states which is likely to receive more acceptance from the states in order to provide its consent to be bound by the Convention. Another limitation is it only contains the suggestion for state parties to conclude bilateral and multilateral treaties if they wish to transfer the sentenced persons from the sending states to the receiving states.

As of January 2018, Indonesia has neither established bilateral nor multilateral agreement with other states nor adopted laws regulating the transfer of sentenced persons although many offers have been received from several countries to conclude such agreement,951 such as Malaysia, Thailand, China/Hong Kong, the Philippines, France, Nigeria, Iran, Bulgaria,

947 Transnational Organized Crime Convention art 17.
948 Ibid art 18.
949 Ibid art 16.
Rumania, Brazil, Australia, Syria, India and England. This is a true challenge in particular when considering the data provided by the Ministry of Foreign Affairs of Indonesia that 4 227 883 Indonesia nationals live overseas. Indonesian workers working overseas (Tenaga Kerja Indonesia/TKI) provide 60% of that total number. The rest belongs to students, professionals, crews of ships and others.

The Ministry of Foreign Affairs of Indonesia reveals further that the number of Indonesian workers involved in the judicial process has increased. There exist 4415 Indonesian workers imprisoned in other countries with the majority serving their sentences in Malaysia for cases of immigration and fighting. Of these, around 283 of them are serving their sentences in Australia due to people smuggling, drugs and immigration breaches. The other countries where Indonesia nationals have been imprisoned are Brunei Darussalam, the Philippines and Thailand with 40 convicts, respectively. Likewise, foreign nationals imprisoned in Indonesia also confirm quite a significant number accounting for 682 foreigners as of March 1st, 2013. Most of them are of Malaysian nationality with as many as 144 persons in total. As a response, Indonesia has initiated making a law on the transfer of convicted persons. A draft academic paper was concluded in 2013 and a bill circulated to the experts and public to garner their input. However, for the time being, it seems that the adoption process from bill into law has shown slow progress and needs to be pushed forward. If Indonesia has it enacted into law, the bilateral or multilateral treaties will find legal basis for conclusion with the other countries.

The stipulation of law on transfer of sentenced persons as well as its bilateral and multilateral agreements would bring more gravitas to Indonesia's priority to endorse fisheries crimes and IUU fishing before international forums. Several concerns should be taken into account. Firstly, it bestows more protection to Indonesians working in the sector of fisheries as fishing vessel’s crews or other employment related to fisheries. They can be subject to legal proceedings and their transfer is necessary for the sake of rehabilitation, resocialization and

953 Ibid 2.
954 Ibid 3.
reintegration. The last three aspects interplay when sentences are applied, with the offenders’ rehabilitation important ensuring they receive resocialization and reintegration into the society.956

Secondly, it would complement Indonesia’s strong commitment to endorse fisheries crimes in relation to the Organized Crime Convention. By putting the domestic regulation and concluding bilateral agreement of transfer of convicted person in place, Indonesia would conform not only with Article 17 as its main reference to the transfer of sentenced persons but also Article 31(3) concerning the Prevention which reads ‘States Parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention’.957

Thirdly, by concluding the transfer of sentenced persons agreement, Indonesia has demonstrated its desire to protect the human rights of not only its nationals committing crimes overseas but also citizens of foreign countries. In international law, the transfer of convicted persons has a robust legal basis under the law of international human rights. In the International Covenant on Civil and Political Rights, Article 10(3) specifies that ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status’.958 It can be inferred that reformation and social rehabilitation as human right values are highlighted as the primary objective of prisoner treatment. In a case where Indonesian nationals are imprisoned in other countries, their family members would find it more difficult in paying them a visit due to financial and time constraints. Likewise, it applies also to foreign nationals committing a crime in Indonesia. The perpetrators of illegal fishing and fisheries crimes can be Indonesian or foreign nationals committing crimes outside their home country.

Fourthly, on a more technical matter, the transfer of sentenced persons program can provide the sending and receiving states with the means to cooperate on how to formulate and find agreement on some technical matters such as the scheduling of arrival and means of

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957 Transnational Organized Crime Convention art 31(3).
transportation, information on the crimes committed and their daily activities which may be necessary information for the sending state to prevent them from possible return to the sending states.\textsuperscript{959} This is important in particular in the case of sex predators and perpetrators of child pornography whose operation is transnational and their movement is usually undetected.

However, some conditions can be discussed when negotiating the agreement of transfer of sentenced persons before transferring the convicted individuals to the home country. These are namely; final judgement, minimum sentence remaining to be served, dual criminality, ties to the administering state, states’ consent, sentenced persons’ consent, human rights, mental health, discretion consideration and cumulative effect.\textsuperscript{960} With regard to the application of dual criminality, the European Union through Framework Decision 2008/909/JHA sets some exceptions for offences without verification of the dual criminality of the act such as terrorism, trafficking in persons, corruption, fraud and so forth provided that ‘they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing State’.\textsuperscript{961}

\textbf{2.2. Disadvantages.}

In perceiving IUU fishing and fisheries crimes from the perspective of criminality, it offers not only advantages but also disadvantages. As the advantages have been presented and discussed in the previous section, this part focuses on the downsides of the efforts in the interplay of crimes with fisheries offences. Chiefly, it would be broken into two studies, those being, having elaborate discussion with the Organized Crime Convention as a primary reference and without the reference to the Organized Crime Convention.

\textbf{2.2.1. Dual Criminality as Precondition Required for Extradition and Mutual Legal Assistance.}

Extradition, by signing bilateral agreements on extradition in order to remove safe hides of severe criminals, has long been practiced by states since as far back as the late 19th century. It

\textsuperscript{960} Ibid 25-42.
is formal, and in most cases involves a treaty-based process with the main objective to send or return the offenders to the state where they are sought in relation to unlawful activities. It can be on a voluntary basis without legally binding agreement except that this would rarely happen. Extradition cannot be performed on the convicted person without the presence of dual criminality since it is deeply embedded in the principle of extradition law. Dual or double criminality is based on mutual obligations and the reciprocal account of the crimes committed which is between the states. The principle of *nulla poena sine lege*, which literally means ‘no punishment without law’, applies in this context.

Extradition and Mutual Legal Assistance have been stipulated in Articles 16 and 18 of the Organized Crime Convention respectively. Article 16 (1) of the Organized Crime Convention outlines dual criminality as prerequisite to extradition of the sentenced persons for the offences under the Convention or an offence governed in the Article 3 (1)(a) or (b) ‘provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party’. It is identified in Article 16(1) that there are two main divisions of crimes in which double criminality is required, those are, in general, offences stipulated in the Convention and particular offences regulated in Article 3 (1)(a) or (b). In conforming with Article 16(1), it is not necessary for double criminality to apply to all crimes listed in the article but it should apply to one of the crimes as prescribed because the choice of word is ‘or’ which means ‘alternative’ or it can be applied to one of the crimes instead of ‘and’ which is ‘cumulative’ or it should apply and take effect to all crimes.

It is admitted that different states may employ different definitions with regard to dual criminality. In this sense, the United Nations Convention against Corruption emphasizes the conduct-based approach instead of technical terms as follows:

> In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which

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962 UNODC, *Legislative Guides*, above n 941, 143.
963 UNODC, *Revised Manuals on the Model Treaty*, above n 920, 10.
966 *Transnational Organized Crime Convention* art 16(1). The general crimes under the convention are the three protocols while article 3 stipulates some particular crimes provided that transnational, involve an organized criminal group and comply with serious crime definition of the Organized Crime Convention.
assistance is sought is a criminal offence under the laws of both States Parties.967

Therefore, if one state has a broader scope in its definition then the requested state, as far as the offence can be included in the laws of both countries, this signifies that the offence that can be extradited.968

It is interesting to note that dual criminality requirement will be no longer necessary when the offences merely involve organized criminal groups and the extraditable individuals are identified in the requested state without considering the presence of the transnational element of the crimes committed.969 It is likely that the legitimacy to extradite the offenders in the absence of transnational requirement without taking into account the transnational nature of the crime comes from the notion that the locus of the offence is in the territory of the administrating state, but the offender has absconded to the requested state. Thus, the consideration is that the offender has committed the crime in the requesting state before leaving the country. The transnational concern is not present in this case because its operation is not transnational, but in crossing national borders.

The same case applied to extradition concerning double criminality is also pertinent to mutual legal assistance practices. It is provided in Article 18(9) in which state parties to the Organized Crime Convention may refuse to render mutual assistance in the case that double criminality does not exist. Nevertheless, the state party may render assistance when possible.970 In practice, double criminality is not always the case as a requirement for legal assistance. Some states do not demand dual criminality, but the other state party may request the condition of double criminality in their mutual assistance treaty.971 This different perception and practice may occur as the principle of double criminality has not been conceived as an international custom and a binding rule for the states, except when it is concluded through statutes and treaties between countries.972

969 Ibid 46.
970 Transnational Organized Crime Convention art 18(9).
971 Boister, above n 923.
In the region of Southeast Asia, ASEAN published the ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases with the assistance of UNODC and the Australia Government. Within the regional context of mutual legal assistance to address the trafficking of persons, ASEAN adopts the dual criminality approach as a prerequisite for mutual legal assistance. Although double criminality can be perceived as a legal barrier to mutual legal assistance practice, this principle can also be conceived as a compelling rationale for countries to criminalize the trafficking in persons as defined in international law.

It can be observed from the above elaboration that under the Organized Crime Convention, Articles 16(1) and 18(9) govern dual criminality as a requirement for extradition and mutual legal assistance. Hence, one of the hurdles in treating IUU fishing and fisheries crimes under the Organized Crime Convention would be the double criminality issue. The long-standing distinction of schools of thought around fisheries management and crime in perceiving IUU fishing and fisheries offences exists in the discussion. For those countries who are the followers of the former school of thought, their legal system does not allow the perpetration to be a serious crime. Conversely, for the latter school of thought, the legal system would admit the offenders to be criminals for whom extradition is legitimate. This fundamental problem would be difficult to resolve.

A possible breakthrough comes from bilateral cooperation by concluding a legally-binding agreement or between like-minded states to negotiate and adopt multilateral treaties regulating extradition and mutual legal assistance. Through this arrangement and legal instrument, state parties or member states can formulate and adopt extradition and mutual legal assistance with the exception of illegal fishing and fisheries crimes. Nevertheless, the basic principle of double criminality is that the committed offence should be treated under the criminal law of the administering state and the requested country should not be absent. In order to promote international cooperation, it is recommended for states to construe or formulate dual criminality in a more flexible fashion. It is further explained that the requested

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973 ASEAN, ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases (ASEAN Secretariat, 2010) 44.
state should put more focus on the total gravity of the alleged crimes albeit with some differences of its component establishing extradition or mutual legal assistance.\textsuperscript{975}

\subsection*{2.2.2. Challenges for International Convention as the Basis for International Cooperation.}

In fighting against IUU fishing and fisheries crimes, the international community holds a key role in contributing to the success of legal process application such as extradition and mutual legal assistance. States should cooperate in finding the best possible way to negotiate and conclude any instruments including “soft and hard laws” as a means to establish, secure and strengthen commitment amongst themselves. Some international conventions relevant to crimes in the fisheries sector include but are not limited to Law of the Sea Convention, the foremost the Organized Crime Convention,\textsuperscript{976} the United Nations Convention against Corruption,\textsuperscript{977} the 1993 Compliance Agreement, the 2012 Cape Town Agreement and the International Labour Organization (ILO) Convention concerning Work in the Fishing Sector of 2007.\textsuperscript{978}

As a main tool to combat transnational crimes, the Organized Convention has been pointed out for its lack or its weakness to address transnational organized crimes. Some examples are its limited strategy in fighting against corruption and the increasing nexus of transnational organized crimes and political power.\textsuperscript{979} It shows that there are many challenges to overcome in the implementation of legally binding instruments such as the Organized Crime Convention. Apart from its shortfall, there are a number of considerations Indonesia should pay attention to once endorsing the Organized Crime Convention as the legal basis for international collaboration as the nature of treaty application.

\subsubsection*{2.2.2.1. The Scope of the Convention.}

It is usual for a treaty to define its scope of activities in a particular article or paragraph. This also applies to the Organized Crime Convention. The scope of this Convention has been


\footnotesize\textsuperscript{976} Transnational Organized Crime Convention.

\footnotesize\textsuperscript{977} United Nations Convention against Corruption.

\footnotesize\textsuperscript{978} Convention concerning Work in the Fishing Sector (Work in Fishing Convention, 2007) (No. 188), adopted on 14 June 2007 (entered into force 16 November 2017).

provided through its three protocols and in Article 3(a)(b). The crimes that have been regulated in the Convention include 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 Component and Ammunition. Each protocol has its own arrangement and state parties to the Organized Crime Convention have their own decisions consenting to be bound by the protocol. One instance that can be drawn is Indonesia.

As a state party to Transnational Organized Crime, Indonesia has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air. Nonetheless, Indonesia has not provided its consent to be bound by the last protocol of the Organized Crime Convention, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Component and Ammunition.

From the scope of the Convention, it can be observed that IUU fishing or offences in the fisheries sector are not listed in the Convention. If fisheries offences are approved by state parties as to be transnational organized crimes under the Convention, two approaches can be followed, which are, by amending Article 3(1)(a) or making a new protocol supplementing the Organized Crime Convention. From the two processes, it would be more accessible to be regulated under a protocol for the reason that the member countries may have to ratify or may not have provided their consent. However, the process to be included would pose a number of challenges to conform to several classifications as transnational organized crime under the Convention.

2.2.2.2. Monist and Dualist Schools of Thought.

A further challenge that can be observed is the application of monism/dualism. This application relates to national practices in perceiving international legal order in its
relationship with the domestic legal framework. Both schools of thought approach international treaties from a different perspective. The traditional scholarship on the implementation of convention or the other legally binding agreements are attentive to the discussion of monism and dualism legal frameworks. This promotes general debate amongst scholars because the definition is not agreed.

In international law, the burning question to examine the profound concern on the relationship between national law and international law has been translated into the concepts of monism and dualism. These two dominating concepts remain in the sphere of the law of treaties when a country determines to make a national commitment to express its consent to be bound by international treaty through any means of ratification, acceptance, approval or accession, or by other means if so decided. It is evident that on the one hand, the dualist approach would play a role in this sense since the constitution of the relevant country does not accord a special status to international treaties. The legal effect of international treaties would take place only if domestic legislation has been promulgated to incorporate the provisions of the treaty into a country’s national legal system. On the other hand, the monist doctrine proposes that international treaties can be part of national law when they have been concluded pursuant to the constitution and have come into force for the related countries. Nonetheless, a set of legislation is still needed in many cases except for ‘self-executing' treaties.

Despite being recognized as distinct legal systems with different focuses and purposes, the intersection of both schools of thought suggests that their existence appears to give rise to no substantial distinction in force. As regarded by Prof. Sompong Sucharitkul;

The intimate relationship between international law and national or domestic law is therefore boundless and infinite. Their inter-connection is complex and intense to such an extent that there seems to be very little difference in practice between “monism” and “dualism”, nor indeed between the different theories of “monism” or “dualism”.

The small distinction between monist and dualist doctrines can be further explained in Anthony Aust’s suggestion that dualism is not the opposite of monism since many domestic constitutions encompass both, or something in between, along with their variations of the components of dualism and monism.990

The proponents of monism discern the national legal order and international legal framework as being of the same legal system.991 In relation to this, one of the prominent scholars asserts that international law has a vital position in the system of unitary law, and in that sense, the domestic legal system should always be in conformity with international law. In order to make this monism takes effect, it is the active role of domestic legal actors to transform international law provisions into domestic legal norms in conformity with national laws and regulations.992 The essential of the monism tenet comes from the notion that a treaty may, without legislation, become part of national law when the treaty has been adopted in conformity with the constitution of the relevant state and the treaty has a binding force for the state.993 In practice, ‘the key distinguishing feature of monist legal systems, as defined herein, is that at least some treaties are incorporated into the domestic legal order without the need for any legislative act, other than the act authorizing the executive to conclude the treaty’. Some countries practicing the monist system are, to name a few, Austria, Chile, China, Columbia, Egypt, France, Germany, Japan, Mexico, Netherlands, Poland, Russia, South Africa, Switzerland, Thailand, and the United States.994

Conversely, the dualists are of the view that the international legal regime may merge into the domestic legal order when the relevant state expresses its consent to be bound by a particular treaty. In other words, the most important feature of dualism, distinguishing it from monism, is that the formal status of a treaty can be granted in the domestic legal system in the case where the legislature enacts a regulation to integrate the treaty into the national law.995 In the case where both systems have a problem in their application, the municipal court would refer to basing its decision on municipal legislation. This dualism tenet holds an important position

990 Aust, Handbook of International Law, above n 738, 75.
994 Sloss, above n 985, 7.
in the era of positivism observing a nation-state as the only political authority unit and legal obligation source. As such, international law needs to be embedded into the domestic system in order to have legal effect.\textsuperscript{996} The executive in many dualist states has the constitutional power to employ a legally-binding international commitment on behalf of the state without securing legislative approval in advance. However, their executives will consult with the legislative branch prior to concluding ‘important’ agreements.\textsuperscript{997} Some states that have adopted the dualist system include Australia, Canada, India and the United Kingdom.\textsuperscript{998}

Apart from both legal systems, there are many states in which their national constitutions employ both dualist and monist components.\textsuperscript{999} More complications arise from the debate by international law academics that differ in perceiving the classification of states over their domestic legal system in responding to the legal effect of the international treaty on its municipal law. One instance corresponding to this matter is South Africa. In David Sloss’ assertion, South Africa applies the monist principle in its domestic legal system.\textsuperscript{1000} Nevertheless, other scholars are of the view that South Africa combines both monist and dualist schools of thought. Professor G. Ferreira and Professor A. Ferreira-Snyman make their view clear that South Africa does not follow a particular monist or dualist school but instead, a mixture of the two. They base their argument on the provisions of Sections 231 and 232 of the Constitution of the Republic of South Africa of 1996.\textsuperscript{1001} Another example is Indonesia. As observed by Simon Butt, Indonesia does not seem to make a particular preference in entering international law into domestic law. The Constitution of Indonesia (Undang-Undang Dasar 1945) does not offer any direction on the status of international law within Indonesia’s domestic legal system.\textsuperscript{1002} The only legal reference in the Constitution is Article 11 which reads:

(1) The President, with the approval of the National Parliament, declares war and peace and creates agreements with other nations.

(2) When creating international agreements that give rise to consequences that are broad and


\textsuperscript{997} Sloss, above n 985, 4.

\textsuperscript{998} Ibid 3.

\textsuperscript{999} Aust, Modern Treaty Law and Practice, above n 933, 182.

\textsuperscript{1000} Sloss, above n 985, 7.

\textsuperscript{1001} G. Ferreira and Professor A. Ferreira-Snyman, ‘The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism’ (2014) \textit{PER Potchefstroom} 4 1471, 1472-1473.

fundamental to the life of the people, create financial burdens for the State and/or require amendments to legislation or the enactment of new legislation, the President must obtain the agreement of the National Parliament.

(3) Further provisions on international agreements are to be regulated by statute.\textsuperscript{1003}

 Indonesian law through Law on International Agreement adopted in 2000 focuses on the procedural matter of international agreement within the context of domestic and international practices.\textsuperscript{1004} A high-ranking officer of the Indonesian Ministry of Foreign Affairs holds a view that the mixed policy in between the two concepts of the dualist model of the Germans and the Netherlands’ monist model, has been the approach of Indonesia as its recent practice. This approach is demonstrated through the dual sense extending to the law accepting a treaty by the Indonesian Government.\textsuperscript{1005}

The discussion on monist and dualist legal systems would always be interesting since countries have their preference in deciding their legal system. The complication continues when some countries such as Indonesia and South Africa are seen to not follow a particular tenet but take the middle road of both schools instead. In this sense, it also applies to the state parties to the Organized Crime Convention. State parties of the Convention are heterogenous in employing tenets of monist, dualist or both. Furthermore, it is stated in Article 27 of the Vienna Convention on the Law of Treaties concerning Internal Law and Observance of Treaties that ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46’.\textsuperscript{1006} This article is based on the contractual onus legally binding the state parties. It is not allowable for parties to avoid responsibilities for the performance of the treaty particularly to justify their failure to apply a treaty by invoking their domestic laws and regulations.\textsuperscript{1007} This article is understood as an extension of its previous Article 26 regulating \textit{pacta sunt servanda}.\textsuperscript{1008} Pursuant to the Manual on Legal Assistance and Extradition published by UNODC, monist and dualist approaches are related to Article 27 of the Vienna Convention on the Law of Treaties

\textsuperscript{1003} \textit{The Constitution of the Republic of Indonesia} 1945 art 33 (2).
\textsuperscript{1004} Undang-undang Nomor 24 tahun 2000 tentang Perjanjian Internasional [Law Number 24/2000 concerning International Treaties] (Indonesia) [author’s trans].
\textsuperscript{1006} \textit{United Nations Convention on the Law of Treaties} art 27.
\textsuperscript{1008} Aust, \textit{Modern Treaty Law and Practice}, above n 933, 180.
asserting that ‘non-incorporation of the provisions of the Convention into domestic laws does not mean that a state is not bound by the provisions of the Convention once it is ratified’.\textsuperscript{1009}

However, linking monism and dualism under the interpretation of Article 27 is incorrect in this context. It comes from the argument that regardless of monism or dualism that state parties follow, both schools of thought apply different means of being bound by treaties. Monism would be a state party when expressing its consent while a treaty would bind dualist countries after ratifying it through relevant domestic regulations. For dualism, legally binding rules extend their legal effect after internal laws have enacted them. As such, within the framework of the Organized Crime Convention, dualism can be a challenge in the sense that the time needed for it to be an integral part of domestic law system will vary amongst states.

\textbf{2.2.2.3. Reservation to a Treaty.}

The performance of state parties in implementing a treaty including the Organized Crime Convention is related to the provisions of reservation and declaration. Article 2 of the UN Convention on the Law of Treaties defines reservation as ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’.\textsuperscript{1010} Reservation can be observed as a limitation to the obligation of a treaty the state party should render because it is purported to exclude or modify the legal effect of the treaty. Further arrangement on reservation is regulated under Articles 19, 20, 21, 22 and 23. Article 19 concerning Formulation of Reservations reads:

\begin{itemize}
  \item A State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation unless:
  \begin{itemize}
    \item (a) The reservation is prohibited by the treaty;
    \item (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
    \item (c) The reservation is incompatible with the object and purpose of the treaty.\textsuperscript{1011}
  \end{itemize}
\end{itemize}

Some international conventions encompassing reservation in the provision include the Organized Crime Convention and International Convention on the Protection of the Rights of

\textsuperscript{1009} UNODC, \textit{Manual on Mutual Legal Assistance and Extradition}, above n 899, 25.
\textsuperscript{1011} Ibid art 19.
All Migrant Workers and Members of their Families. Meanwhile, some international agreements are prohibiting reservations such as:

1. Statute of the International Criminal Court;

2. Law of the Sea Convention;

3. Disarmament treaty such as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction;

4. Environmental treaty such as the Stockholm Convention on Persistent Organic Pollutants.

In the Organized Crime Convention and its protocols, the regulation on reservation has been stipulated in some articles such as Article 35 of the Organized Crime Convention. Article 20 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Article 15 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and Article 16 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. These articles regulate the same arrangement on dispute settlements. Therefore, state parties may make a reservation merely on how to resolve a dispute that may occur during the application of the Convention and its Protocols. They are not allowed to make a reservation on the other articles but solely on the settlement of disputes. Some parties have made reservations in particular on Article 35(2) including, amongst others, Algeria, Azerbaijan, the Bahamas, Bahrain, Bangladesh,

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1012 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature in accordance with Article 86(1), 2220 UNTS 3 (entered into force on 1 July 2003).
1013 Rome Statute of the International Criminal Court, above n 801, art 120. Article 120 stipulates ‘no reservations may be made to this Statute’.
1014 Law of the Sea Convention art 309. Article 309 regulates that no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.
1015 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction opened for signature 13 January to 15 January 1993, 1974 UNTS 45 (entered into force 29 April 1997) art XXII. Article XXII states that articles shall not be subject to reservations and that the annexes shall not be subject to reservations incompatible with the CWC’s object and purpose.
1017 Transnational Organized Crime Convention art 35.
1018 Protocol against the Smuggling of Migrants by Land, Sea and Air art 20.
1019 Protocol to Prevent, Suppress and Punish Trafficking in Persons art 15.
1020 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms art 16.
Belize, Colombia, Egypt, Indonesia, China, Colombia, El Salvador and Fiji.  

It seems that the Organized Crime Convention does not admit state parties to modify or exclude the legal effect of the substance of the Convention along with the protocols. State parties may make reservation only on the choice of forum when state parties’ consent to address the problems arising from the interpretation and application of the Convention. If fisheries crimes or offences in fisheries are adopted to be additional protocols to the Organized Crime Convention, a reservation would likely be allowed on the matter concerning dispute settlements since the state parties to the Convention did not govern the reservation in a particular and independent clause but instead, specifically in disputes settlement provisions. The reference to this particular reservation on disputes settlement in Organized Crime can be invoked in Article 19(b) laying down the foundation ruling that a state may formulate a reservation unless the treaty ‘provides that only specified reservations, which do not include the reservation in question, may be made’. 

It is typical that a reservation can be made with regard to one or more particular articles such as on dispute settlement. A closer look at Article 19(b) discloses that this article deals with prohibited reservation despite it being implicitly revealed. The prohibition is taken e contrario from the article allowing for particular reservations. If the treaty in question governs specified reservations, it can be assumed that the other reservations are intended to be omitted. This comprehension can be asserted by the word “only” emphasizing the argument. Hence, the Organized Crime Convention follows the specified reservation rule and it is not allowable to make a reservation to provisions other than the particular permissible clauses.

2.2.3. Different Legal Approach of States in Discerning Environmental Crimes.

The efforts by countries to observe and relate fisheries offences with criminal aspects illustrates that environmental issues have become a crucial matter in the global sphere. Environmental protection is not simply nature related but also related to the universal preservation of nature which marks a significant contribution to the life of human beings in

\[1021\] Transnational Organized Crime Convention.


\[1023\] Aust, Handbook of International Law, above n 738, 70.

both short and long terms. United Nations Interregional Crime and Justice Research Institute (UNICRI) conceives that environmental crime and its connection with other sorts of crime contributes to a grave and increasing danger for the development and stability of the world and to international security. Environmental crimes along with the other organized crimes are an emerging threat that has also been conceived by the Secretary-General of the United Nations.

Despite the environmental problems faced by countries, environmental crimes often receive improper response from some of the countries. Several countries have perceived this type of crime as being a less important issue than the other crimes. This approach creates a minimum deterrence effect and the probability of the crime being repeated remains high. The main grounds given as reason for environmental crimes are that they chiefly carry low risks and high profits resulting from ‘poor governance and widespread corruption, minimal budgets to police, prosecution and courts, inadequate institutional support, political interference and low employee morale, minimal benefits to local communities and rising demand, in particular in Asia’.

The increase in environmental crimes in recent years has been contributed to by, among other things, the engagement of organized criminal groups operating across national jurisdictions. In the fisheries sector, the involvement of transnational organized crime has been discovered in many cases. Organized crime such as human trafficking takes place widely in the fisheries industry for the purpose of forced labour. Given the fact that fishing vessels have not been recognized as any part of the international regime in previous years in neither international safety standards such as the International Convention on the Safety of Life at Sea (SOLAS) nor in particular agreements on the working and living conditions of the fishermen under the auspices of ILO, the fishing vessels are not subject to inspection at ports in order to comply with relevant international agreements.

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1026 United Nations Secretary-General, above n 848.
1027 United Nations Interregional Crime and Justice Research Institute, above n 1025.
1028 Nellemann, above n 750, 9.
1029 United Nations Interregional Crime and Justice Research Institute, above n 1025.
However, in accordance with current developments, the safety of crews of fishing vessels is appropriately protected after the Convention concerning Work in the Fishing Sector of 2007 entered into force on 16 November 2017. This convention opens up the opportunity to ensure the safety of fishers on board and the safe operation of fishing vessels. With the conclusion of this Convention, fishing vessels flying the flag of state parties to the Convention shall comply with its provisions including the inspection by relevant officers. If this Convention can be effectively implemented, the operation of organized crime networks in the fisheries sector can be limited.

2.2.3.1. Malum prohibitum.
The legal construction invoked by states in defining, interpreting and responding to environmental crimes falls under specific institutional and cultural frameworks. The nexus between ‘harm’ and the criminalization including the sanction process is sometimes referred to as the relationship between economy and ecology. Rob White explores further that there exist two different schools of thought that can be considered in observing the connectivity between environment and crimes. Firstly, Illegality or *malum prohibitum*, the principle of which underlines behaviour that is unlawful according to the law, but in general, this behaviour is perceived as less serious than other sorts of social harms. The proponents of this tenet believe that damages to the environment are regarded as normal since it is the consequence of industrial development which also offers some benefits. This circumstance promotes a middle position between acceptable or problematic. As a result, the regulation holds a key role suggesting how to ‘control the problem’. One instance of this middle position is the regulation on maximum allowable pollution.

2.2.3.2. Malum in se.
The second principle is severe harm or *malum in se*. This school of thought upholds the view that the behaviour is wrong by nature, and it is therefore conceived as serious. In practice, this principle prohibits particular substances and/or actions. There exist two types of prosecution to this crime. First is the recognition of ‘ecocide as a *bona fide* crime’ and second

1031 *Convention concerning Work in the Fishing Sector* art 8.
is the existence of institutional constructions in which the crimes could be prosecuted with the proper available sanctions.1034

The two principles of *malum prohibitum* and *malum in se* can be observed as the basic reference for countries to formulate their legal system in responding to environmental crimes. A further specific explanation is presented with regard to the prosecution of the latter principle, *malum in se*. The acceptance of ecocide as *bona fide* crime seems to be followed by countries imposing strict criminal laws against environmental offences. Conversely, the latter prosecution relies on the available sanctions without referring rigidly to criminal laws. Within the perspective of IUU fishing and fisheries crimes, those two principles explain the complication that may emerge when endorsing fisheries offences as part of the environmental aspect with a crime’s perspective.

### 2.2.4. Fisheries Crime on the High Seas.

The other challenge when combatting fisheries crime is the jurisdictional issue of law enforcement on the high seas. This jurisdictional problem carries more complexity in addressing this transnational crime. Before delving deeper into this problem, it is necessary to touch upon the discussion about the term fisheries crimes that can be referred to as it relates to the jurisdiction that states may have when their related officers undertake law enforcement.

The lack of legal definition of fisheries crime creates difficulty in making a precise analysis on which activities may fall into the category of crimes in the fisheries sector. In its publication on Combating Transnational Organized Crime Committed at Sea, UNODC perceives that fisheries crime refers to illegal fishing only. This term is not intended to represent the collective terms of illegal, unreported and unregulated fishing with which it is frequently associated, but the independent term of illegal fishing is considered in this context.1035

As fisheries crime has developed further and gained more attention from countries, UNODC and WWF jointly convened the Fisheries Crime Expert Group Meeting in Vienna on 24-26 February 2016 in the twenty-fifth session of CCPCJ. This session was aimed at facilitating the comprehension of fisheries crimes and to identify proper criminal law enforcement tools

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to combat crime. The panel of experts had a shared understanding that fisheries crime is not only related to fishing activity, but also covers its planning including concerning financial, insurance, ownership and vessels’ registration. The other related crimes listed in this document comprise 25 unlawful activities as examples of fisheries crimes throughout the entire fisheries supply and value chains. Those crimes include (as listed in its Annex 2): 1036

1. Bribery and corruption;
2. Customs offences;
3. Arms trafficking;
4. Document forgeries, including falsification of permits, licences, catch documentation, etc;
5. Drugs trafficking
6. Fraud;
7. Human rights violations, especially crew conditions tantamount to slavery, kidnapping or human trafficking;
8. Illegal fishing/ violation of flag state and/or coastal state fisheries laws and regulations;
9. Insurance fraud and related offences;
10. Migrant smuggling;
11. Misrepresentation;
12. Mislabelling;
13. Money laundering;
14. Murder and grievous bodily harm;
15. Obstruction of justice;
16. Offences under international marine/environmental law (eg the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) and its annexes);
17. Organised crime and racketeering;
18. Tax violations;
19. Theft;
20. Violation of corporation law;
21. Violation of hygiene and food safety standards;
22. Violation of international labour law standards;
23. Violation of vessel safety laws and regulations (crew and vessel);
24. Violation of navigation laws;

It can be observed from the outcome document of this meeting of experts that fisheries crimes elements can be divided into two major parts; fisheries offences and related crimes including transnational organized crimes. The crimes committed in the fisheries activities together with those 25 crimes as listed constitute cross-sectoral illicit activities.

There exist two highly relevant legal references in the form of treaties that can be invoked when discussing the interplay between transnational organized crime at sea and maritime jurisdiction, these are, the LOSC and the Organized Crime Convention including its three protocols. Jurisdictional aspect in this context is so relevant in the sense of the response that states should have and the need to cooperate in enforcing the relevant laws when illicit

1036 Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting 2016, E/CN/14/2016/CRP.2, 4.
activities take place at sea. In the LOSC, the ocean space has been divided into three maritime zones, which are, 1) sovereignty (territorial sea, archipelagic waters and internal waters), 2) sovereign rights (EEZ and continental shelf) and 3) high seas (maritime zone outside of sovereignty and sovereign rights). Of particular importance is the attention paid to fisheries and criminal activities on the high seas for the specific purpose of this section. Criminals are attracted to undergo their operations in this area since they do not fall under the typical enforcement jurisdiction of states. On the high seas, freedom of high seas principle (mare liberum) is applied and exercised under the conditions set by LOSC and the other international law rules. This freedom comprises:

1. Freedom of navigation;
2. Freedom of overflight;
3. Freedom to lay submarine cables and pipelines, subject to Part VI;
4. Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
5. Freedom of fishing, subject to the conditions laid down in Section 2;
6. Freedom of scientific research, subject to Parts VI and XIII.

In this circumstance, the focus is paid to freedom of navigation and freedom of fishing. The freedom of navigation has been a customary rule. With regard to the jurisdiction of vessels and their crews, Article 92(1) states that:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

This Article 92(1) should be translated as that the flag state (the state of registry) assumes the sole jurisdiction over their vessels and their crew when sailing on the high seas.

It is worthwhile to invoke relevant rules concerning fishing on the high seas when observing law enforcement on fisheries crimes in the areas beyond national jurisdiction. Under the LOSC, freedom of fishing is granted to all countries. However, states shall co-operate in

1037 Law of the Sea Convention art 2.
1038 Ibid art 77(1).
1039 Ibid art 86. High seas is defined as all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a state, or in the archipelagic waters of an archipelagic state.
1040 Ibid art 2.
1041 Ibid art 87(1)(a).
1042 Ibid art 92(1).
1043 Boister, above n 923, 176.
managing the fisheries resources and are obliged to impose measures to control their nationals when fishing on the high seas. The right to fish on the high seas is limited to three conditions encompassing: 1) their treaty obligations; 2) rights and duties, as well as interest of coastal states, stipulated in Articles 63(2) and 64 to 67; and 3) the provisions of the section. Some fisheries arrangements on the high seas are not stand alone rules as these are also regulated in the EEZ in their relation to conservation of shared stocks such as straddling fish and highly migratory species in both maritime zones through cooperation in appropriate sub-regional, regional or international organizations. In order to put in place those duties and obligations on straddling fish stocks and highly migratory species, like-minded countries have established RFMOs.

As asserted by Stefán Ásmundsson, RFMOs are divided into three different categories, namely, general RFMOs, tuna RFMOs and specialized RFMOs. As of July 2016, there existed eight general RFMOs, five tuna RFMOs and at least three specialized RFMOs. A book published in 2010 reveals that more than forty RFMOs had been founded in which ten were created under FAO auspices and the remaining RFMOs were created through the conclusion of bilateral or multilateral agreements between states. More importantly, flag states that are not members or participants to RFMOs are not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks. In combating IUU fishing, RFMOs hold pivotal roles such as;

1. Establishing the list of vessels conducting IUU fishing;
2. Boarding and inspection;
3. Trade documentation and catch certification;

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1044 Law of the Sea Convention arts 63, 64, 66, 67, 116, 117 and 118 (duty to cooperate) and arts 63, 64, 66, 67, 116 and 118 (conservation and management obligations).
1045 Ibid art 117.
1046 Ibid art 116. Paragraph (c) of article 116 establishes that the right of States to fish in the high seas is subject to the other provisions of section 2 of Part VII, articles 117-120. A State that does not fulfil the obligations established in articles 117-120 does not have the legal right to authorize its nationals to fish on the high seas.
1047 Ibid arts 63 and 64.
1049 Stefán Ásmundsson, ‘Regional Fisheries Management Organisations (RFMOs): Who are they, what is their geographic coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialised RFMOs?’ (Paper presented at the Convention on Biological Diversity Meeting 2016) <https://www.cbd.int/doc/meetings/mar/soiom-2016-01/other/soiom-2016-01-fao-19-en.pdf> 2-6.
1050 Palma, Tsamenyi and Edeson, above n 26, 202.
1051 The 1995 United Nations Fish Stocks Agreement art 17(1). See also Preamble of the FAO Compliance Agreement.
1052 Palma, Tsamenyi and Edeson, above n 26, 210-238.
4. Trade restrictive measures of the fish derived from IUU fishing;
5. Port state measures. Some elements in the measures involved are ports designation, early entry notice, prior authorisation to land of tranship, fishing vessels inspection and the enforcement of port state;
6. Fishing capacity control.

The enforcement for violations undertaken by fishing vessels by RFMOs lies heavily on flag states responsibility with the combination of management measures adopted by RFMOs. For WCPFC, once the fishing vessels allegedly conduct any violation, RFMO members should investigate thoroughly and report the progress to the relevant RFMO as well as the actions imposed or planned to be taken to respond to the suspected violation.\textsuperscript{1053} The cooperation amongst members of RFMOs is required when a violation is taken in particular by the flag states against their fishing vessels.\textsuperscript{1054} If it is discovered that a serious violation is based on sufficient proof, the flag state would need to institute proceedings against the fishing vessel without delay and impose sanctions of adequate severity.\textsuperscript{1055} With regard to applying sanctions against fishing vessels conducting IUU fishing, it is required that members of ICCAT apply sufficient sanctions on their nationals and their fishing vessels conducting IUU fishing.\textsuperscript{1056} ICCAT is also concerned over those non-members recorded on the IUU vessels list to take all necessary efforts to combat IUU fishing, including, if necessary, the revocation of registration and licences of the relevant fishing vessels.\textsuperscript{1057}

Assessing fisheries crimes, in particular the listed 25 examples of unlawful activities as outcomes of the panel of experts\textsuperscript{1058} would pose challenges concerning law enforcement to be taken on the high seas. The complexity emerges from jurisdictional issues and random listing of crimes. However, the listings in the document are presented as examples only and are not regarded as a legal reference. As such, this section is not intended to cover nor assess all those instances of listed crimes. By virtue of jurisdictional matter, some references can be

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{1054} Ibid art 25(6).
    \item \textsuperscript{1055} Ibid art 25(3).
    \item \textsuperscript{1056} International Commission for the Conservation of Atlantic Tunas (ICCAT), Recommendation to Establish an IUU Vessels List, para 6(b) <https://www.iccat.int/Documents/Recs/compendiopdf-e/2002-23-e.pdf>.
    \item \textsuperscript{1057} Ibid para 8.
    \item \textsuperscript{1058} Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting 2016, E/CN/14/2016/CRP.2, 4.
\end{itemize}
\end{footnotesize}
cited from previous discussions. These are, freedom of navigation, freedom of fishing, duty to co-operate and flag state responsibility. These four principles lay down the basic references in dealing with fisheries crimes conducted on the high seas.

The operation of transnational crimes such as illicit trafficking in drugs, human trafficking and people smuggling can be extended to the high seas. Constitution of the ocean explicitly regulates illicit drugs trafficking but neither human trafficking nor people smuggling appear in the provisions. Article 108 of LOSC governs ‘all states to co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions’.1059 As such, any state may request other states to cooperate to combat the illicit traffic conducted by a ship flying its flag once the state has reasonable grounds to believe that the ship is engaged in illicit trafficking in narcotic drugs or psychotropic substances.1060 Apart from the LOSC, there exist some related treaties in force regarding drugs trafficking such as the 1961 Single Convention on Narcotics Drugs, the 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Drug Convention). The last convention is aimed at addressing trafficking problems.1061 It is important to note that in the 1988 Drug Convention, a state party to the Convention can take appropriate measures on the vessel of another party if the vessel engages in illicit trafficking on the high seas, with the authorization of the related flag state.1062

Furthermore, in the case of human trafficking and people smuggling, the ship can be boarded if the ship is stateless under Article 110 of the LOSC. This article governs warships or any other duly authorized government ships or aircraft to assume justification to board a ship if there is reasonable reason for suspecting that the ship is engaged in piracy, the slave trade, unauthorized broadcasting, without nationality and in reality, has the same nationality as the warship despite flying a foreign flag or refusing to show its flag.1063 The right of visit can also be extended to human trafficking cases because trafficking in persons is frequently associated

1059 Law of the Sea Convention art 118(1).
1060 Ibid art 118(2).
1063 Law of the Sea Convention art 110.
with slavery in modern practice. Unfortunately, the reference to slavery should be tested further as this connection has not been invoked to exercise a right of visit for suspecting a vessel is conducting trafficking in persons.1064

The other justification that can shed light on addressing human trafficking and people smuggling in Article 110 (1) is the exclusion ‘where acts of interference derive from powers conferred by treaty’.1065 It can be inferred from this article that states can secure the power to intervene in any case, including these two crimes, provided that they consent to be bound by bilateral or multilateral agreements concluded between those like-minded countries. In practice, states have signed various agreements concerning the right of visit governing migration on the high seas. It needs to be achieved through a reciprocal basis and joint patrol.1066

For state parties of UNTOC and Protocol of Migrants Smuggling, right of visit has been stipulated in Article 8(2) which reads:

A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:
(a) to board the vessel;
(b) to search the vessel; and
(c) if evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State. 1067

From this article, it can be observed that the authority to board, search and take proper measures against such foreign-flagged vessels by the requesting state shall come under the permission of the flag state. The problem to address people smuggling on the high seas emerges when the vessels are from states that are neither party to the protocol of Migrants Smuggling nor party to any bilateral or multilateral agreements. The provision regarding the authority of right of visit in people smuggling protocol is not regulated in the protocol of human trafficking. The lack of this provision shows a further loophole in the law enforcement when trafficking of persons takes place on the high seas.

1065 Law of the Sea Convention art 110 (1).
1067 Protocol against the Smuggling of Migrants by Land, Sea and Air art 8(2).
It can be concluded that various hurdles would be faced when observing fisheries crimes on the high seas. First of all, it is worth mentioning that the rules that apply on the high seas are freedom of high seas comprising six freedoms including freedom of navigation and freedom of fishing and flag state responsibility. The establishment of RFMOs is purposed to conserve and manage fisheries resources particularly straddling fish stocks and highly migratory species but it is not intended to limit the freedom of high seas including the freedom of fishing. It was the International Law Commission that put it precisely in its commentary to the draft articles for the 1958 High Seas Convention:

Any freedom that is to be exercised in the interests of all entitled to enjoy it must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.\(^\text{1068}\)

When fishing vessels are flying the flag of a member of the RFMOs, the flag state should be responsible for the violations committed by its fishing vessels. Therefore, it is principally subject to the regulations of the flag state for the sanctions. The problem then becomes what is called a flag of convenience or flag of non-compliance. In practice, it refers to some flag states ‘that are unable or unwilling to prescribe and enforce laws necessary to, for instance, ensure that the owners and operators of their fleet uphold minimum labour and safety standards, or refrain from engaging in criminal activities’.\(^\text{1069}\) If the fishing vessels are registered under a flag of non-compliance, they may face insufficient sanctions to have a deterrent effect or even fail to have any punishment imposed.

Secondly, the limitation to enforcing the law concerning non-fisheries violations such as human trafficking, people smuggling, and illicit drugs that has taken place on the high seas would relate to flag state responsibility. Again, this falls under the flag of convenience circumstance and the punishment may be inadequate. Thirdly, if trafficking in persons can be considered as a practice of modern slavery, then Article 110(1)(b) would apply\(^\text{1070}\) and the right of visit can be justified. Nonetheless, according to Natalie Klein, a warship or designated government vessel on service cannot seize the suspected vessel and prosecute on board, unlike ships and their crews in the piracy case. In relation to this, it is the

\(^{1068}\) ‘Report of the International Law Commission to the General Assembly’ [1956] (2) *Yearbook of the International Law Commission* art. 27.
\(^{1070}\) *Law of the Sea Convention* art 110 (1)(b).
responsibility of flag states to make effective efforts to prevent and punish ‘the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free’.  

Therefore, it can be inferred that even if trafficking in persons can be regarded as modern slavery, the authority to prosecute shall be the responsibility of the flag state. If the flag state is committed to prosecuting, the perpetrators will be put behind bars, and vice versa. Furthermore, while human trafficking may occur on the high seas, the only protocol to the UNTOC that regulates the right to visit the suspected ship is the protocol of Migrants Smuggling. Otherwise, like-minded states may conclude bilateral or regional agreements to govern the common concerns amongst them on matters such as people smuggling and human trafficking with respect to flag state jurisdiction.

3. Conclusion.
Part VII delivers discussion of the advantages and disadvantages in using the method of fisheries crimes and serves as suggestions or reference for policymakers, scholars, practitioners, and related institutions having concerns on the matter. This section also attempts to respond to the research question on the benefits and drawbacks of the criminal approach to combat IUU fishing.

1. Advantages
It is evident that fishing vessels have been misused by fishers to carrying out illegal activities. The fishers are recruited by criminals due to their knowledge and skills and their role is mostly to support the mastermind in committing transnationally organized crimes in the fishery sector including fishing vessels.

A different approach to overviewing transnational crime activities in the sector of fisheries is introduced through fisheries crime. Through this concept, the involvement of perpetrators of transnationally organized crimes in the fisheries sector is reinforced. Although the legal reference of fisheries crimes remains undefined, criminal activities within this concept share

the same concept of criminal acts in transnational organized crimes. Fisheries crimes can be deemed as a multi-layered phenomenon engaging cross-sectoral crimes, including economic crimes committed across the entire value chain, from the capture of fish until the end process presented to the consumers.

In the field, the engagement of transnational organized crime in the fishing industry has two dimensions. Firstly, the direct involvement of major transnational organized criminal groups and secondly, it is likely that the transnational fishing companies conduct both legal and illegal business at the same time. The illegal catches are laundered by selling them with legally caught fish products.

The fisheries sector is vulnerable to being utilized as a means to perpetrate transnational organized crimes. In combatting this type of crime, studies have been taken including how to link such crimes with illegal fishing. The method faces some challenges: first, IUU fishing emerges from a voluntary or soft law instrument, that is, IPOA-IUU Fishing with the objective to address non-compliance by using fisheries management regulations. Second, not all activities in IUU fishing are necessarily illegal. Thirdly, the explanation of IUU fishing in the IPOA-IUU does not cover criminal activities. As such, fisheries crimes can be conceived as a breakthrough filling the loopholes that exist when connecting the problem of border crossing organized crimes occurring along the value chain of the fisheries sector.

Furthermore, methods of fisheries crimes also offer double impacts in attempting to revive the depletion of fish stocks and at the same time fighting against transnational organized crimes. This comes from the idea that fisheries crimes cover various illegal activities in the fisheries sector. In addressing fisheries crimes, criminal law enforcement measures should be imposed to complement the traditional approach of fisheries management. Domestic framework of sustainable development plays the main role in enforcing the law against fisheries crimes. This advice is understood to be an effort to expedite the current issue of crimes in fisheries.

b. Facilitate International Collaboration.

The Organized Crime Convention has stipulated the mechanism for cooperation. The need to strengthen cooperation at bilateral, regional and multilateral stages has been affirmed throughout the Convention. The Palermo Convention was designed to fight against particular
criminal activities as well as to address the problems that the states are facing on international cooperation.

The relevant legal frameworks involved in tackling cross-border organized crimes and other sorts of criminal activity in the industry of fishing are, amongst others, the LOSC, the Palermo Convention, the United Nations Fish Stocks Agreement and the Compliance Agreement. In regard to institutional overview, it encompasses international organizations such as FAO, UNODC, IMO and INTERPOL. If IUU fishing is viewed merely as a fisheries management problem which is under FAO’s mandate, then the cooperation on law enforcement would find difficulties when addressing the crimes occurring along the value chain of fisheries activities. In that sense, a transnational crimes approach can facilitate international cooperation in addressing the problems through the engagement of different institutions particularly the UNODC as guardian of the Palermo Convention.

Money laundering is commonly related to transnational crimes and it is largely connected to the earnings of both traditional and more modern crimes. In accordance a report, environmental crimes (including marine living resource crimes such as IUU fishing) assumed the 3rd most common predicate offence of money laundering in the Pacific.

The method of laundering the money to other countries shows that the transnational nature of this crime cannot be overlooked, and countries need to establish proper mechanisms or instruments at every bilateral, regional and multilateral stage. It is evident that if countries work together enhancing coordination, it will limit the distribution of money which in turn restricts expansion of their operations. The Palermo Convention encourages countries to eliminate money laundering through joint collaboration amongst member states. Three aspects are brought to the fore to allow related authorities to cooperate; the legal frameworks, enforcement of the law and regulation on financial matters.

d. Extradition and Mutual Legal Assistance.
1) Extradition.
Amongst other mechanisms, the mechanism for international cooperation, extradition and mutual legal assistance has been regulated in Article 16 and Article 18 of UNTOC. When the perpetrators face trial as responsible for the crimes committed, they can be extradited to their
country of origin. If cooperation does not exist, then it would be difficult to execute this policy. It is most likely for that reason, that state parties of the UNTOC should strengthen cooperation on extradition through either evoking the Convention or concluding bilateral or multilateral treaties on the legal basis.

Indonesia has adopted a legal framework on extradition through Law Number 1/1979 on Extradition. In the bilateral sphere, Indonesia has concluded eight treaties on extradition with other states. In the list of the extradition treaty, Indonesia has laid the foundation to conclude the treaty not only to the state parties but also to the non-state parties to the Palermo Convention. It can be observed that Malaysia, the Philippines, Thailand, Australia, the Republic of Korea, India and Viet Nam are parties to the Convention while the Independent State of Papua New Guinea is not on the list as a state party to the Palermo Convention.

The classification of IUU fishing as a crime, regardless of environmental or wildlife, would pose some issues in respect of unreported and unregulated fishing. It would be complicated to include both terms as criminal activities if there is no duty to report and no regulation is adopted. The problem of extradition imposition for unreported and unregulated fishing would be problematic as such.

The perpetrators of fisheries crimes can be extradited if two conditions are met. The two conditions are, firstly, if member states do not disagree for fisheries crimes to be additional protocol of the Palermo Convention and secondly, if like-minded states agree to be bound by extradition treaty, notwithstanding being challenged with limited success, at bilateral, regional or multilateral levels, provisioning the fisheries crimes as extraditable crimes. In the absence of a legally binding agreement, the reciprocity principle can be applied.

2) Mutual Legal Assistance.

The Palermo Convention governs a specific provision concerning mutual legal assistance. As guidance, to have effective mutual legal assistance, the general principles have been tabled, among others, on dual criminality. There are some exceptions in applying for mutual legal assistance such as on a political offence and fiscal offence and military law. However, mutual assistance shall not be refused on the ground of banks’ or similar financial institutions’ secrecy.
Indonesia has adopted Law 1/2006 concerning Mutual Legal Assistance in Criminal Matters. There exist six bilateral treaties between Indonesia and other countries and it is in the process of discussion or negotiation with four other countries. The status of the conduct as a crime plays an important role in assuming mutual assistance. As applied in the extradition treaty, the lack of a criminal aspect on unreported and unregulated fishing makes it difficult to secure mutual legal assistance. It would be a different story if a fisheries crimes approach is taken. Although mutual assistance is regulated under the Palermo Convention, it is unnecessary to include fisheries crimes as the protocol to the Palermo Convention for mutual legal assistance. The mutual legal assistance can be extended to the countries by using bilateral, regional or multilateral treaties or the reciprocity principle, provided that the countries so agree.

e. The Enhancement of Cooperation on Joint Law Enforcement Investigation.
On the international stage, a coordinated transnational response is required to fight against transnational organized crimes. When presenting IUU fishing and fisheries crimes, it would be difficult for countries to enforce the domestic and international law alone without cooperation from other countries because of the transnational character. For countries having the same concerns on the prevention, deterrence and elimination of IUU fishing and fisheries crimes, they can strengthen bilateral or multilateral cooperation through legally or non-legally binding agreements.

Considering that the cooperation between law enforcement and justice offices plays an important role in the investigation and prosecution process, cooperation should be formulated in the instrument with a legally binding character. This formulation can be achieved through an instrument such as the Organized Crime Convention. At a practical level, it frequently occurs that the investigators need to detect and gather proof from victims living in other countries or to collect information aiming to verify and support the testimonials from witnesses. This condition can be met when states parties to the Organized Crime Convention cooperate in establishing a joint law enforcement investigation. This measure can also be extended when curbing fisheries crimes. By treating this issue as a transnationally organized crime, countries would obtain an advantage to strengthen and enhance their law enforcement investigation.
f. Pathway to the Transfer of Sentenced Persons.

The violation of fisheries laws and regulations when committed in a transnational and organized fashion makes it possible to receive transnational treatment including the transfer of sentenced persons. Nevertheless, it is not possible without ‘the crime label’ attached to it, to obtain international cooperation as well as the adequacy of the domestic legal framework of the relevant states.

Under the Organized Crime Convention, the arrangement on the transfer of sentenced persons has been regulated under Article 17. Compared to the other provisions in the Convention such as mutual legal assistance and extradition, the arrangement on the transfer of sentenced persons is relatively shorter and does not go into much detail. The choice of language is ‘softer’ than that used in mutual legal assistance and extradition.

Indonesia has neither established agreements with the other states nor adopted laws regulating the transfer of sentenced persons aside from offers from several countries. This hurdle is a real challenge. There exist 4415 Indonesia workers imprisoned in other countries. Indonesia has initiated the making of a law on the transfer of convicted persons. A draft academic paper has been concluded in 2013 and a bill circulated to the experts and the public to garner input from them.

The stipulation of law as well as its bilateral and multilateral agreements on the transfer of a sentenced person would bring more gravitas to Indonesia’s priority to endorse fisheries crimes and IUU fishing before international forums. Several concerns should be taken into account. Firstly, it gives more protection to Indonesians working in the sector of fisheries as fishing vessel's crews or other employment related to fisheries. Secondly, it would complement Indonesia’s strong commitment to endorse fisheries crimes in relation to the Organized Crime Convention. Thirdly, by concluding the transfer of a sentenced person agreement, Indonesia has expressed its will to protect the human rights of not only its nationals committing crimes overseas but also citizens of foreign countries. Fourthly, in a more technical matter, the transfer of sentenced persons program can arrange for the sending and receiving states to cooperate and how to formulate and find the agreement on some technical matters.
2. Disadvantages.
   a. Dual Criminality as Preconditions Required for Extradition and Mutual Legal Assistance.
   Extradition cannot be performed on the convicted person without the presence of double criminality since it is deeply embedded in the principle of extradition law. Dual or double criminality is based on mutual obligations and the reciprocal account of the crimes committed between the states. This criminality requirement will no longer be necessary when the offences merely involve an organized criminal group and the extraditable individuals are identified in the requested state without considering the presence of the transnational element on the crimes committed.

   The same circumstances applying to extradition in terms of double criminality are also pertinent to mutual legal assistance practices. It is provided in Article 18(9) in which state parties to the Organized Crime Convention may refuse to render mutual assistance in a case where double criminality does not exist. Nevertheless, the state party may render assistance when possible. In practice, double criminality is not always the case as the requirement for legal assistance.

   Articles 16(1) and 18(9) of the Palermo Convention govern dual criminality as the requirement for extradition and mutual legal assistance. Hence, one of the hurdles of treating IUU fishing and fisheries crimes under the Organized Crime Convention would be the double criminality issue. A possible breakthrough comes from bilateral cooperation by concluding a legally-binding agreement or between like-minded states to negotiate and adopt multilateral treaties regulating extradition and mutual legal assistance. Through this arrangement and legal instrument, state parties or member states can formulate and adopt extradition and mutual legal assistance with the exception of illegal fishing and fisheries crimes. In order to promote international cooperation, states construe or formulate dual criminality in a more flexible fashion. The requested state should pay more focus on the total gravity of the alleged crimes albeit with some differences of the component establishing extradition or mutual legal assistance.

   b. Challenges for International Convention as the Basis for International Cooperation.
   1) The Scope of the Convention.
   From the scope of the Convention, it can be observed that IUU fishing or offences in the fisheries sector is not listed in the Convention. If fisheries offences are agreed by state parties
to be transnational organized crimes under the Convention, two ways can be followed, these are, by amending Article 3(1)(a) or making a new protocol supplementing the Organized Crime Convention. Looking at the two processes, it would be more straightforward adopting a new protocol for the reason that the member countries may have to ratify or not provide their consent. However, the process to be part of it would pose a number of challenges to conform with several classifications as transnational organized crime under the Convention.

2) Monist and Dualist Schools of Thought.
A further challenge that can be observed is the application of monism/dualism. This implementation relates to national practices in perceiving international legal order in its relationship with the domestic legal framework as both schools of thought approach international treaties in a different manner. The essence of the monism tenet comes from the notion that a treaty may, without legislation, become part of the national law when the treaty has been adopted in accord with the constitution of the relevant state and the treaty has a binding force for that state.

Meanwhile, the dualists are of the view that the international legal regime may have merged into domestic legal order when the relevant state expresses its consent to be bound by a certain treaty. In other words, the most important feature of dualism, distinguishing it from monism, is that the formal status of a treaty can be granted in the domestic legal system in the case where legislature enacts a regulation to integrate the treaty into the national law. Within the framework of the Organized Crime Convention, dualism can be a challenge in the sense that the time needed to become an integral part of domestic law system will vary amongst states.

3) Reservation to a Treaty.
The performance of state parties in implementing a treaty, including the Organized Crime Convention, is related to the provisions of reservation. Reservation can be observed as limitation to the obligation of a treaty the state party should render because it is purported to exclude or modify the legal effect of the treaty. In the Organized Crime Convention and its protocols, the regulation on the reservation has been stipulated in some articles such as Article 35 of the Organized Crime Convention, Article 20 of the Smuggling of Migrants Protocol, Article 15 of Trafficking in Persons Protocol and Article 16 of Trafficking in Firearms Protocol. These articles regulate the same arrangement on dispute settlements.
Therefore, state parties may make reservation merely on how to resolve a dispute that may occur during the application of the Convention and its Protocols. They are not allowed to make reservation on the other articles apart from the settlement of disputes.

State parties may make the reservation only on the choice of forum when state parties’ consent to address the problems arising from the interpretation and application of the Convention. If fisheries crimes or offences in fisheries are adopted to be additional protocol to the Organized Crime Convention, the reservation would likely be allowed on the matter concerning disputes settlement since the state parties to the Convention did not govern reservation in a particular and independent clause but specifically in disputes settlement provisions instead. The Organized Crime Convention follows the specified reservation rule and it is not allowable to make reservation to provisions other than the particular permissible clauses.

c. Different Legal Approach of States in Discerning Environmental Crimes.

Despite environmental problems faced by countries, environmental crimes often receive improper response from some countries. This type of crime has been perceived by certain countries as a less important issue than the other crimes and is usually sanctioned with an administrative penalty. This approach has a minimum deterrence effect and the probability of repeating the crime remains high.

The two principles of *malum prohibitum* and *malum in se* can be perceived as the basic reference for countries to formulate their legal system in responding to environmental crimes. A further specific explanation as presented pertains to the prosecution of the latter principle, *malum in se*. The acceptance of ecocide as *bona fide* crime seems to be followed by countries imposing strict criminal laws against environmental offences. Conversely, the latter prosecution relies on the available sanctions without referring rigidly to criminal laws. Within the perspective of IUU fishing and fisheries crimes, the two principles explain the complications that may emerge when endorsing fisheries offences as part of the environmental scope within the crime’s perspective.

d. Fisheries Crime on the High Seas.

The other challenge when combatting fisheries crime is jurisdictional issue of law enforcement on the high seas. This jurisdictional problem carries more complexity in
addressing this transnational crime. The jurisdictional aspect in this context is highly relevant in the sense of the response that states should have and the need to cooperate in enforcing the relevant laws when the illicit activities take place at sea.

Under the LOSC, the freedom of fishing is granted to all countries. However, states shall cooperate in managing the fisheries resources and be obliged to impose the measures to control their nationals when fishing on the high seas. The right to fish on the high seas is limited to three conditions encompassing: 1) their treaty obligations; 2) rights and duties, as well as interest of coastal states, as stipulated in Articles 63(2) and 64 to 67; and 3) the provisions of the section. Assessing fisheries crimes, in particular, the listed 24 examples of unlawful activities arising from the Fisheries Crime Expert Group Meeting, would pose challenges in terms of law enforcement to be taken on the high seas. The complexity emerges from the jurisdictional issue and random listing of crimes.

The operation of transnational crimes such as illicit trafficking in drugs, human trafficking and people smuggling can be committed on the high seas. LOSC explicitly regulates illicit drugs trafficking but neither human trafficking nor people smuggling are in the provisions. Any state may request other states to combat the illicit traffic conducted by a ship flying its flag once the state has reasonable grounds to believe that the ship is engaged in illicit drugs or psychotropic drug trafficking. Apart from the LOSC, there exist some related treaties in force regarding drugs trafficking such as the 1961 Single Convention on Narcotics Drugs, the 1971 Convention on Psychotropic Substances and the 1988 Drug Convention.

It can be concluded that multiple hurdles would occur when observing fisheries crimes on the high seas. First of all, the rules applied on the high seas entail freedom of high seas and flag state responsibility. Secondly, the limitation to enforce the law concerning non-fisheries violations such as human trafficking, people smuggling, and illicit drugs taking place on the high seas would relate to flag state responsibility. It falls under the flag of convenience circumstance and the punishment may not be effective. Thirdly, if trafficking in persons can be considered as a practice of modern slavery, then Article 110(1)(b) would apply and the right of visit can be justified.

Even if trafficking in persons can be regarded as modern slavery, the authority to prosecute shall be the responsibility of the flag state. If the flag state is committed to prosecuting, the
perpetrators will be put behind bars, and/or *vice versa*. Furthermore, while human trafficking may occur on the high seas, the only protocol to the UNTOC that regulates right to visit the suspected ship is the Protocol of Migrants Smuggling. Otherwise, like-minded states may conclude bilateral or regional agreements to govern the common concerns amongst them on matters such as people smuggling and human trafficking with respect to flag state jurisdiction.
1. Introduction.

IUU fishing and transnationally organized fisheries crimes are both global and national problems. This practice also results in severe impacts on food security, sustainable development and the economy. The general trend of the level of fish stocks shows a decline based on the FAO assessment. This trend is not only occurring at a global level but also at the domestic stage. Africa and the Asian Pacific Regions are actual examples of how developing countries are severely affected by IUU fishing activities. Indonesia also faces the intricate problem of IUU fishing, and it is severely affected by this practice including the loss of state revenue, destroying the marine ecosystem and the plummeting level of fish stocks. As the largest archipelagic state in the world blessed with abundant marine resources and with a strategic location in the region, Indonesia is vulnerable to fish poaching. As the Minister of Marine Affairs and Fisheries of Indonesia, Susi Pudjiastuti has been very active and forceful in combatting IUU fishing. The efforts have come after President Joko Widodo envisioned Indonesia as GMF and adopted the National Ocean Policy. The vision and document provide strong support to put ocean affairs including IUU fishing at the top of the fishing agenda.

It is evident that IUU fishing is not a stand-alone problem in the fisheries sector. Along with this activity, some other crimes are also committed such as people smuggling, trafficking in persons, forced labour and drugs trafficking. The Indonesian government is greatly concerned to eliminate IUU fishing and fisheries crimes and echoes this matter before international forums. In the domestic sense, Indonesia has made some breakthroughs such as sinking and/or burning illegal fishing vessels and establishing Task Force 115. MMAF under the command of Minister Susi seems to be the frontrunner to combat IUU fishing and plays a prominent role as a proponent of the concept of transnational organized fisheries crimes on the global stage along with like-minded countries. In the influential conferences, Indonesia holds a persistent view and acts as a traditional supporter of IUU fishing as TOC.

This thesis has the objectives of primarily identifying and analysing domestic legal and policy frameworks in addressing IUU fishing and transnational organized fisheries crimes. This thesis attempts to discover loopholes and then offer the solutions to fill those gaps. Although focusing on the national level, it is appropriate to consider the international context.
of relevant laws and policies. In this respect, this thesis outlines domestic laws such as Fisheries Law, Money Laundering Law and Ocean Affairs Law by taking into consideration international “hard law” and “soft law” and relevant international cases on fisheries. In the light of policy, this thesis provides a review of the measures taken by the MMAF to keep the marine resources under Indonesia’s waters sustainable from IUU fishing and fisheries crimes practices. After a thorough review, this thesis discovers some loopholes and offers the measures to fill the gaps based on conceptual discussions on, amongst others, the terms IUU fishing and TOFC.

In this thesis, environmental law is taken as the primary approach to depict the complexity of the issues since this area of law has the character to emphasize the non-compliance approach instead of a legally binding agreement to overcome an environmental problem. This thesis also delivers the advantages and disadvantages of combating IUU fishing from the perspective of transnational organized fisheries crimes and holds the view that this policy should be promoted further with due regard to the challenges. In this sense, Indonesia and other like-minded states should be ready to negotiate with other countries that have differing views on the subject matter. Some lessons from the struggle of Indonesia and other states to secure archipelagic status can be applied to fisheries crimes policy.

2. The Reasons for the Research.

The number of researches around the globe focusing on the connection between the fisheries sector, including IUU fishing and transnational organized crimes, has risen in the recent years. UNODC as an international organization under the auspices of the United Nations dealing with transnational crime has been very active in raising public awareness of, or conducting research on, crimes that have a transnational dimension in the fisheries activity. The development of this issue shows signs of progress since it was initially raised in 2008 by delegates of the ninth UNICPOLOS meeting.

Indonesia was already a traditional supporter of IUU fishing as TOC before Susi Pudjiastuti assumed the post as the minister in 2014. During her tenure, Minister Susi has persistently advocated this policy and does not tolerate any activity that harms the sustainability of marine living resources in Indonesia. Nonetheless, this policy seems to receive less response from other countries than is expected. Countries are still reluctant to include IUU fishing as TOC under the UNTOC. The concept of transnational organized fisheries crimes or fisheries
crimes has been introduced by some countries including Indonesia to bridge the relationship between illegal fishing and crimes transnationally organized. To the best of this thesis’ overview, this effort is still attempting to garner the support from countries through a series of symposia in South Africa (2015), Indonesia (2016), Austria (2017) and Denmark (2018). Although this policy has been set as a national agenda, limited research has been undertaken to identify the main challenges. Taking into consideration these circumstances, this research attempts to understand the shortcomings of the existing legal and policy response. Through a deeper understanding, a solution can be offered to overcome the problems. This thesis also contributes to the development of domestic law such as the amendment of the Fisheries Law.

3. The Results of the Research.

Part One
This part ultimately provides a background to the thesis. It starts with the considerable contribution fisheries grant to humankind in terms of revenue, food, employment, protein and other related aspects. Unfortunately, the level of fish stocks shows a general declining trend and IUU fishing continues to be a major problem contributing to this trend. However, it is common to discover criminal activities such as people smuggling, human trafficking, forced labour and other crimes in this illicit practice. Indonesia is persistent in proposing IUU fishing as TOC and fisheries crimes before the international community. This part finds some challenges of this proposal such as the criteria of TOC that need to conform under UNTOC. Another challenge comes from the three different terms of Illegal, Unreported and Unregulated fishing. None of these terms can be simplified as a crime. Illegal fishing has a criminal dimension, but unreported and unregulated fishing would be difficult to classify as crimes in that there is the absence of the obligation to report and regulation is not in place. This part provides a brief overview on the gaps in policy and law and sets nine research questions.

Part Two
Part two is devoted to examining the struggle of Indonesia to acquire archipelagic status. In this part, the journey of Indonesia maritime history is chiefly divided into three phases; 1) During the old kingdoms; 2) the Juanda Declaration; and 3) The adoption of the LOSC 1982. The strategic location of Indonesia and its geographical features serve as the consideration in assessing the geographical architecture of the country. In history, Indonesia assumes an essential role as a maritime nation in the region. The maritime spirit is deeply rooted in
Indonesia’s history. Chiefly, the two kingdoms shaped *Nusantara* during the 13th and the 14th centuries, these being, Majapahit and Srivijaya. The Kingdom of Demak reached Malaka in the 16th century and regarded it as a respected Islamic kingdom in Southeast Asia. The role of the Bajau People was also imperative in spreading the maritime culture in the region.

Its history as a maritime nation lay down a strong foundation for Indonesia to claim archipelagic status. Through the Juanda Declaration, Indonesia was declared an archipelagic state and promoted its interests including unity and integrity. This declaration omitted the pocket of high seas in between islands by extending territorial sea from 3 to 12 nautical miles and claiming the waters inside ‘the blanket’ as internal waters. The rationales for the colonial to apply the three nautical miles rule were: 1) The Netherland Indies needed Indonesia to be fragmented; 2) It followed the same rule applied by the Dutch; and 3) The colonial had less sense of belonging to Indonesia. This part offers discussion on the concept of an archipelagic state and TZMKO and presents the case study of *Anglo-Norwegian Fisheries* as the legal basis of straight baselines connecting the outermost points. Indonesia conducted the search for archipelagic state during the negotiations of UNCLOS I, II and III. Finally, the last conference of the law of the sea adopted, amongst others, Articles 46, 47 and 48 governing archipelagic states. In domestic law, the status was legally confirmed under Article 25A of *Undang-Undang Republik Indonesia 1945*.

Two main lessons can be drawn from this part. Firstly, this part strengthens the notion that Indonesia deserves to be a maritime nation. Secondly, the struggle delivers the message that major marine countries refused the archipelagic concept when the Juanda Declaration was initially launched. However, this concept was finally adopted in the LOSC 1982. The long and painstaking process of obtaining the status can be beneficial as lessons learned for Indonesia when proposing fisheries crimes at international level. Thirdly, the Juanda Declaration enables Indonesia to protect its marine resources such as from the practice of fish poaching in a more integrated way due to the omission of the pocket of the high seas.

**Part Three**

This part mainly scrutinizes the GMF doctrine introduced by the 7th President of Indonesia, Joko Widodo. The previous part lays a foundation for the maritime vision that in fact has existed in the past. Part Three finds that the vision is revisited through both the declaration of Indonesia as a maritime nation and also as GMF. As a link, it touches upon a brief historical
outlook to illustrate that maritime culture experienced a decline in the 16th century due to three reasons; 1) The expansion of European countries; 2) The decline of old kingdoms; and 3) The dependency of the sea as the major route networks in Nusantara. This part also examines the belief that Indonesia deserves to be a maritime nation based on history, its status as an archipelagic state and the concept of maritime power.

The GMF declaration in 2014 initially was comprised five main pillars, but it has expanded to seven pillars. In 2017, Indonesia adopted a national ocean policy to accelerate the implementation of the doctrine. The document defines GMF as the vision of Indonesia to be a maritime country internally sound and externally playing a role as a contributor to peace and security in the region. Hence, it is not intended to be a dominant global maritime power although the name global is itself a paradox. Nonetheless, this long-awaited document sheds some light on the clear concept of Jokowi's Doctrine. The National Ocean Policy suggests that the preservation of marine resources is one of the pillars and it falls under the fourth cluster of maritime defence and security. Later, this group comprises maritime defence, maritime security and IUU fishing in which the elimination of fisheries crimes is one of the proposed programs. This thesis argues that the government employs this policy on the basis of three main rationales: 1) IUU fishing has the same dimension as maritime defence and security, and therefore; 2) IUU fishing should be addressed from the perspective of defence and security; and 3) The measures to combat IUU fishing need to be integrated with defence and security.

The policy to include IUU fishing promotes the following challenges:
1) IUU fishing consists of three different terms and it is improper to make the generalization that the entire term, including unreported and unregulated fishing, poses a threat to defence and security;
2) Some cases prove that transnational organized crimes may take place in the fisheries sector and in this regard, a defence and security approach can play a role to combat this practice including illegal fishing. Nonetheless, this approach should be reconsidered to eliminate unreported and unregulated fishing;
3) The inclusion of fisheries crimes under IUU fishing should be reviewed since IUU fishing and fisheries crimes are not always identical.
This thesis further argues that illegal fishing and transnational organized crimes can be categorized under the fourth cluster but unreported and unregulated should fall under the cluster dealing with non-defence and security matters.

**Part Four**

This part focuses on policy overview of IUU fishing and fisheries crimes. The primary reference to international policy concerning IUU fishing includes IPOA-IUU Fishing in this respect. In this chosen document, the term IUU fishing is more of an explanation and it is not intended as a legal definition. States have developed several policy instruments to overcome IUU fishing such as Agenda 21, the Johannesburg Declaration and its Plan of Implementation and the 2015 Agenda for Sustainable Development. 17 goals and 169 targets were agreed for sustainable development demonstrating the determination of a new universal agenda. The goals and targets commenced on 1 January 2016 and are projected to be applied until 2030. The most related agenda to ocean affairs lies in Goal 14, that is, Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development encompassing seven targets to achieve. Agenda 14.4 calls upon countries to have concern over sustainable fisheries including the elimination of overfishing, IUU fishing and destructive fishing activities. In regard to the possible connection between illegal fishing and transnational organised crimes, UNGA has adopted Resolution 67/79 and 68/71.

UNODC has been very active in promoting fisheries crimes such as publishing research and reports on the existence of TOC in the fisheries industry. In 2016, the Expert Group Meeting on Fisheries Crime was held by UNODC and WWF to identify effective ways of addressing TOFC and to promote the cooperation in prosecuting fisheries crimes, amongst others. The experts attending this forum gave an explanation on fisheries crimes and included activities regarded as the crimes in the annex. In the explanation, the panel regarded fisheries crimes as “serious crimes”. However, it is not intended to have the same scope as “serious crime” provisioned in UNTOC but instead, extends to having an extensive impact on the community.

This part delivers the lessons that can be learned from the practices of the U.S and South Africa in overcoming IUU fishing. The U.S Government conceives IUU fishing as its national agenda through the establishment of the Presidential Task Force in Combatting IUU Fishing and Seafood Fraud. The degree of presidential-level demonstrates that the President supervises the matter directly. The Government has two powerful tools to combat IUU
fishing, namely; the Magnuson-Stephen Reauthorization Act and the Lacey Act. It is important to highlight that the U.S publishes a set of recommendations for related domestic institutions to take concrete and specific policies in combatting IUU fishing and seafood fraud. This task force engages public participation inside and outside the country to formulate the recommendations. Meanwhile, South Africa has a set of legislation including the Marine Living Resources Act of 1998 and the National Environmental Management Act of 1998 as its main reference to combat IUU fishing. Recent measures have been taken to eliminate IUU fishing and fisheries crimes through international cooperation.

Indonesia makes a great effort to cope with IUU fishing and fisheries crimes through, to name a few, moratorium policy, NPOA-IUU Fishing, the sinking of illegal fishing vessels, the prohibition of transhipment, audit and evaluation of ex-foreign fishing vessels and the like. Nonetheless, this thesis identifies some challenges such as the expiration of NPOA-IUU fishing in 2016, protests from stakeholders, the potential lack of fish supply and unemployment due to moratorium policy, the clear separation of the mandates of FAO and UNODC and deficiencies of law enforcement. Having said that, this thesis suggests some measures. 1) The formulation of NPOA-IUU Fishing of 2017-2021. This document should, amongst others, encompass fisheries crimes and the GMF vision and set the target and the timeframe to achieve that target. It is worth emphasizing that the only explanation on IUU fishing in the domestic framework is found in this document; 2) MMAF should engage public participation inside and outside the country; 3) A comprehensive study needs to be taken before making a strategic policy; 4) It is necessary to make a distinction between the roles of FAO and UNODC; 5) It is vital to overcome the deficiencies of law enforcement; and 6) The formulation of SOP and guidelines to implement Task Force 115 duties and mandates.

Part Five
In the legal part, international legal frameworks along with challenges and the proposed measures are provided. The LOSC is the main umbrella for all international regulations governing ocean affairs. When fishing on the high seas, the flag state has ultimate responsibility in managing and conserving marine living resources and combatting IUU fishing. At the global level, two recognized legally binding instruments concerning flag states responsibilities are the 1993 FAO Compliance Agreement and the 1995 United Nations Fish Stock Agreement. Another robust tool to address IUU fishing, based on the coastal state's responsibility, is the PSM Agreement.
As a supplement to international legal frameworks, cases on prompt release and advisor opinion are presented. Some crucial principles applied are Articles 73 and 292 of LOSC. In the case of detained vessel and crews which are not promptly released upon the posting of a reasonable bond, flag states may bring the case before any court or tribunal as mutually agreed upon by the parties. As of 26 October 2016, a total of 25 cases had been submitted to the Tribunal. Most cases are related to prompt release (nine cases). Two cases applying those two articles are the Case of the “Camouco” (Panama v. France) and the “Volga” Case (Russian Federation v. Australia). Legal question on the amount of bond determined by the arresting state as stated in Articles 73 and 292 of LOSC was addressed in those two cases. The aspects to assess the reasonableness of bond or other financial security as inferred in the “Camouco” Case match the adjudication of the M/V “SAIGA” Case.

With regard to the advisory opinion of ITLOS, there are 4 (four) questions submitted by SRFC. For the first question, the Tribunal stated that the flag state shall undertake necessary measures, exercise its jurisdiction and effectively control administrative matters over its vessel and the flag state has an obligation to impose adequate sanctions over its fishing vessels flying its flag when committing IUU fishing. In responding to the second question, the Tribunal clearly made a reference to due diligence obligations from Articles 125 to 140 as well as distinguishing between due diligence obligations and result obligations. For the third question, it was reiterated that when the international organization has concluded a fisheries access agreement with an SRFC member state, the international organization bears the responsibility upon its member states. The tribunal responded to the last question by stating that member states of SRFC have the right to conclude agreement with the other members of SRFC to ensure the conservation and development of their shared stocks.

In the domestic sense, the foremost legal basis to preserve marine environment lies in Article 33(3) of the 1945 Constitution. Main legal reference on fisheries and its related crimes goes to Fisheries Law No. 45/2009, Money Laundering Law No. 8/2010 and the regulations at ministerial level. The assets are treated as the result of crimes if acquired from illegal activities including crimes in marine and fishery or for other crimes involving imprisonment for four years or more. This part also delivers the standard operating procedures to sink or/and burn illegal fishing vessels as a legal basis to justify this distinctive measure and to avoid the abuse or illegal action when imposing such policy. Indonesia also initiates fishery
courts to promote prosecutorial effectiveness. The establishment of the courts are based on three factors: 1) Fishery courts offer faster proceeding; 2) The lack of penalties on non-fisheries laws and regulations; and, 3) The lack of competence and capability of ordinary courts.

This part identifies the shortcomings in the legal aspects; 1) Perceptions, practices, approaches and domestic legal systems vary amongst states in observing and addressing IUU fishing and fisheries crimes; 2) Domestic law does not provide the explanation or the definition of IUU fishing and fisheries crimes; 3) Various terms of fisheries poaching such as IUU fishing, transnational organized fisheries crimes, fisheries-associated crimes and fisheries crimes; 4) Indonesia is not a state party to the 1993 FAO Compliance Agreement the 2012 Cape Town Agreement and the ILO Work in Fishing Convention Number 188. In this respect, this thesis suggests some points; 1) IUU fishing and fisheries crimes should be used concurrently in international forums; 2) The amendment of Fisheries Law should include IUU Fishing explanation or definition. Another way is to govern IUU fishing in a specific law as lex specialis to Fisheries Law; 3) Invoke the explanation of fisheries crimes adopted in the UNODC panel of experts as a starting point to promote a further discussion on fisheries crimes; 4) Indonesia should express its consent to be bound by the 1993 FAO Compliance Agreement, the 2012 Cape Town Agreement and the ILO Work in Fishing Convention Number 188; and 5) Indonesia needs to consider adopting the elements of, or enacting a regulation, similar to the Lacey Act.

**Part Six**

This part focuses primarily on environmental law in respect of curbing IUU fishing and fisheries crimes. From its history, the transboundary ramification from the environmental problem can be drawn from the *Trail Smelter* case and the Stockholm Declaration. Principle 21 of the Declaration offers the balance between the state's sovereignty and commitment in preserving and protecting the environment. Moreover, the 1992 Rio Declaration on Environment and Development constitutes a major leap forward in achieving a more sustainable order.

The discussion on the legal nature of international environmental law comes to the fore as on one hand, legal instrument should be legally binding but on the other hand environmental issues do not receive appropriate legal acknowledgment from the international community. It
is commonly understood that the general practice of environmental agreements is still on a voluntary basis to comply with the obligations. The agreements tend to develop non-compliance mechanism designed to secure compliance by the parties with the terms of a treaty or decisions of the COP. It shows that countries continue to be reluctant to consent to be bound by legally binding treaties on environmental issues. Some countries do not want serious consequences when breaching environmental decisions or bilateral or multilateral agreements. In this sense, the objective of treaties accommodating the non-compliance approach is to assist state parties in conforming to their obligations rather than to observe their disobedience and then render punishment. The non-compliance instrument adopted in the Montreal Protocol can be comprehended as one of the key points in having a successful environmental treaty in its negotiation and implementation as it offers a more flexible way for countries to meet their obligation.

Research has reported that the losses of transnational value from environmental crime under various sectors is estimated to be between of US$91-259 billion. IUU fishing takes fifth position amounting to between US$15.5 billion and US$36.4 billion excluding the losses from unregulated fishing and any IUU fishing in inland fishing. The report also poses a challenge regarding the value of fisheries crimes. Its losses would be enormous as the crimes would encompass other crimes such as human trafficking, people smuggling and other relevant transgressions. It is worth mentioning that transnational environmental crime is a crime in violation of law in the domestic sense, rather than at international level. The breaches of any law do not constitute criminality nor punishment when criminal laws do not impose them. Hence, it depends on the state whether or not its domestic law system includes the violations of environmental regulations as crimes.

More in-depth research pertaining to the major driver and financial loss of environmental crimes shows that there persist seven chief causes of TEC; corruption, lack of legislation, lack of enforcement, mafias, corporate crime, conflict and increasing demands. While lack of legislation occurs only at national level, the other significant drivers take place at combined local, national, regional and international levels. Fisheries crimes, unfortunately, are not regarded as an environmental crime. Two possible reasons could be: 1) The complication in measuring the impact of fisheries crimes and 2) Illegal fishing is regarded as being covered by fisheries crimes.
In respect of the connection between IUU fishing and fisheries crimes, it can be seen that fisheries crime is part of IUU fishing. Within fisheries crime itself, other crimes such as money laundering, human trafficking, corruption, document fraud are involved. These transnational crimes are separated from IUU fishing activities if the definition of IUU fishing in IPOA-IUU fishing is referred to. From the explanation of IUU fishing term in the IPOA-IUU fishing, IUU fishing mainly uses management of fisheries and compliance issues and as such, those undertakings presumably do not occupy criminal activities. It is important to note that illegal fishing is clear-cut outlaw behaviour. However, unregulated fishing activities are not always in contravention of any international laws. This is also the case of unreported fishing. Another challenge comes from the broad explanation of illegal fishing that may lead to inconsistency and confusion between the term “fishing” and its explanation as “any activity” as well as creating a challenge when suggesting this description as a reference in both the domestic and international sense, specifically when attempting to criminalize the perpetrators of illegal fishing.

It can be interpreted that fisheries aspects are part of marine living resources. Even though it is evident that marine living resource crimes are transnational in nature, the current legal instrument of the Palermo Convention does not include the crimes as one of its protocols. The difficulty falls when agreeing to “serious crime” under Article 2 of the Convention. Another hurdle is drawn from a jurisdictional issue in which marine living resources crime will fall under transnational classification if it is only committed in the territorial sea of other state/s. Though some international legal instruments have been adopted to address marine living resources crimes, countries have yet to adopt a legal regime particularly regarding the punishment of marine living resources crimes at the global level. Relevant international institutions pay meticulous concern to standard setting instead of to the enforcement of criminal law for the perpetrators of environmental crimes.

**Part Seven**

This section responds to the research question on the benefits and drawbacks of a crime approach to combat IUU fishing.

1. Advantages.

A different approach to the overview of transnational crime activities in the sector of fisheries is introduced through fisheries crime. Through this concept, the involvement of perpetrators
of transnationally organized crimes in the fisheries sector is reinforced. Although legal reference of fisheries crimes remains undefined, criminal activities in this area share the same concept of criminal acts as in transnational organized crimes. The engagement of transnational organized crime in the fishing industry has two dimensions: 1) The direct involvement of major transnational organized criminal groups; and 2) It is likely that the transnational fishing companies operate legal and illegal business concurrently. The illegal catches are laundered by selling them with legally caught fish products.

In combatting this sort of crime, studies have been taken including how to link such crimes with illegal fishing. The measure faces some challenges. Firstly, IUU fishing emerges from a voluntary instrument of IPOA-IUU Fishing with the objective to address non-compliance by using fisheries management regulations. Secondly, not all activities in IUU fishing are necessarily illegal. Thirdly, the explanation of IUU fishing in the IPOA-IUU does not cover criminal activities. As such, fisheries crimes can be conceived as a breakthrough to fill the loopholes that exist when connecting the problem of border crossing organized crimes occurring along the value chain of the fisheries sector with the end goal of combatting and eliminating the said crimes in a more integrated and effective manner. Furthermore, fisheries crimes method also offers double impacts in attempting to revive the depletion of fish stock and at the same time fighting against transnational organized crimes.

b. Facilitate International Collaboration.
The Organized Crime Convention has stipulated the mechanism for cooperation. The need to strengthen cooperation at bilateral, regional and multilateral stages has been affirmed throughout the Convention.

Money laundering is commonly related to transnational crimes and is largely connected to the earnings of traditional and more modern crimes. It is evident that if countries work together enhancing coordination, it will limit the distribution of money which in turn will restrict the expansion of their operations. The Palermo Convention pays particular attention on countries eliminating money laundering through joint collaboration amongst member states. Three aspects are brought to the fore for related authorities to cooperate; 1) The legal frameworks; 2) Enforcement of the law; and 3) Regulation on financial matters.
d. Extradition and Mutual Legal Assistance.

Amongst others, the mechanism for international cooperation includes extradition and mutual legal assistance which has been regulated in Article 16 and Article 18 of the UNTOC, respectively. When the perpetrators face trial as responsible for the crimes committed, they can be extradited to their country of origin. Indonesia has adopted a legal framework on extradition through Law Number 1/1979 on Extradition. In the bilateral sphere, Indonesia has concluded 8 (eight) treaties on extradition with other states. The perpetrators of fisheries crimes can be extradited if two conditions are met: 1) If member states do not disagree for fisheries crimes to be an additional protocol of the Palermo Convention and 2) If like-minded states agree to be bound by the extradition treaty regulating the fisheries crimes as extraditable crimes. In the absence of a legally binding agreement, the reciprocity principle can be applied.

With regard to mutual legal assistance, the Palermo Convention governs a specific provision concerning mutual legal assistance. As guidance, to receive effective mutual legal assistance, the general principles have been tabled: 1) sufficiency of proof; 2) dual criminality; 3) double criminality and the Palermo Convention in mutual legal assistance issues; and 4) limits on transmission or use of information acquired by mutual legal assistance. However, legal assistance can be refused for different reasons such as 1) The requested party can refuse the request for legal assistance on political grounds; 2) Fiscal offence; and 3) Military law. Mutual assistance shall not be refused on the grounds of banks, or similar financial intuitions, secrecy. Indonesia has adopted Law 1/2006 concerning Mutual Legal Assistance in Criminal Matters and has concluded six bilateral treaties.

As applied in the extradition treaty, the lack of criminal aspect in unreported and unregulated fishing makes it challenging to secure mutual legal assistance. It would be a different story if a fisheries crimes approach was taken. Although mutual assistance is regulated under the Palermo Convention, it is unnecessary to include fisheries crimes as receiving mutual legal assistance as protocol to the Palermo Convention. The mutual legal assistance can be extended to countries by using bilateral, regional or multilateral treaties or reciprocity principle provided that the countries so agree.

e. The Enhancement of Cooperation on Joint Law Enforcement Investigation.

On a practical level, it frequently occurs that the investigators need to detect and gather the
proof from victims living in other countries or to collect information aiming to verify and support the testimonials from witnesses. The condition can be met when states parties to the Organized Crime Convention cooperate in establishing a joint law enforcement investigation. This measure can also be extended when curbing fisheries crimes. By treating this issue as a transnationally organized crime, countries would obtain the advantage to strengthen and enhance their law enforcement investigation.

f. Pathway to the Transfer of Sentenced Persons.
The violation of fisheries laws and regulations when committed in a transnational and organized fashion makes it possible for it to receive transnational treatment including the transfer of sentenced persons. Nevertheless, it is not possible without ‘the crime label’ attached to it, and it needs international cooperation as well as adequacy of domestic legal framework of the relevant states. Under the Organized Crime Convention, the arrangement on the transfer of sentenced persons has been regulated under Article 17. The stipulation of law on transfer of sentenced person as well as its bilateral and multilateral agreements would bring more gravitas to Indonesia’s priority to endorse fisheries crimes and IUU fishing before international forums. Several concerns should be taken into account including: 1) It bestows more protection to Indonesians working in the sector of fisheries as fishing vessel’s crews or other employment related to fisheries; 2) It would complement Indonesia’s strong commitment to endorse fisheries crimes in its relations to the Organized Crime Convention; 3) Protecting the human rights of its nationals committing crimes overseas and citizens of foreign countries alike; and 4) The transfer of sentenced persons program can provide agreement on technical matters.

2. Disadvantages.
a. Dual Criminality as Preconditions Required for Extradition and Mutual Legal Assistance.
Extradition cannot be performed on the convicted person without the presence of double criminality since it is deeply embedded in the principle of extradition law. The same case applying to extradition in terms of double criminality is also pertinent to mutual legal assistance practices. It is provided in Article 18(9) in which state parties to the Organized Crime Convention may refuse to render mutual assistance in the case that double criminality does not exist. Nevertheless, the state party may render assistance when possible. In practice, double criminality is not always the case as the requirement for legal assistance.
It can be observed from the above explanation that under the Organized Crime Convention, Articles 16(1) and 18(9) govern dual criminality as the requirement for extradition and mutual legal assistance. Hence, one of the hurdles in treating IUU fishing and fisheries crimes under the Organized Crime Convention would be the double criminality issue. A possible breakthrough comes from bilateral cooperation by concluding a legally-binding agreement or between like-minded states to negotiate and adopt multilateral treaties regulating extradition and mutual legal assistance. In order to promote international cooperation, it is recommended that states construe or formulate dual criminality in a more flexible fashion.

b. Challenges for International Convention as the Basis for International Cooperation.

1) The Scope of the Convention.

From the scope of the Convention, it can be observed that IUU fishing or offences in the fisheries sector are not listed in the Convention. If fisheries offences are approved by state parties to be transnational organized crimes under the Convention, two approaches can be followed. The two approaches are by either amending Article 3(1)(a) or making a new protocol supplementing the Organized Crime Convention.

2) Monist and Dualist Schools of Thought.

A further challenge that can be observed is the application of monism/dualism. This issue relates to national practices in perceiving international legal order in its relationship with the domestic legal framework as both schools of thought approach international treaties differently. The most important feature of dualism as distinct from monism is that the formal status of a treaty can be granted in the domestic legal system in the case where the legislature enacts a regulation to integrate the treaty into the national law. Within the framework of the Organized Crime Convention, dualism can be a challenge in the sense that the time needed for legislature to become an integral part of the domestic law system will vary amongst states.

3) Reservation to a Treaty.

The performance of state parties in implementing a treaty including the Organized Crime Convention is related to the provisions of reservation. Reservation can be observed as a limitation to the obligation of a treaty the state party should render because it is purported to exclude or modify the legal effect of the treaty. In the Organized Crime Convention and its protocols, state parties may make reservation merely on how to resolve a dispute that may occur during the application of the Convention and its Protocols. They are not allowed to
make the reservation on the other articles but solely on the settlement of disputes. State parties may make the reservation only on the choice of forum when state parties’ consent to address the problems arising from the interpretation and application of the Convention. If fisheries crimes or offences in the fisheries are adopted to be additional protocol to the Organized Crime Convention, the reservation would likely be allowed on the matter concerning disputes settlement since the state parties to the Convention did not administer reservation in a particular and independent clause but instead specifically in disputes settlement provisions.

c. Different Legal Approach of States in Discerning Environmental Crimes.
Environmental crimes have been perceived by some countries as being a less important issue than the other crimes, and as such are usually sanctioned with an administrative penalty. This approach creates minimum deterrence effect and high probability of repeating the crime. The two principles of *malum prohibitum* and *malum in se* can be observed as the basic reference for countries on which to formulate their legal system in responding to environmental crimes. A further specific explanation is presented regarding the prosecution of the latter principle, *malum in se*. The acceptance of ecoicide as a *bona fide* crime seems to be followed by countries imposing strict criminal laws against the environmental offence. Conversely, the latter prosecution relies on the available sanctions without referring rigidly to criminal laws. Within the perspective of IUU fishing and fisheries crimes, those two principles explain the complication that may emerge when endorsing fisheries offences as part of the environmental aspect from the crime’s perspective.

d. Fisheries Crime on the High Seas.
The other challenge when combatting fisheries crime is the jurisdictional issue of law enforcement on the high seas. This jurisdictional problem carries additional complexity in addressing this transnational crime. Jurisdictional aspect in this context is highly relevant in the sense of the response that states should have and the need to cooperate in enforcing the relevant laws when the illicit activities take place at sea.

Under the LOSC, the freedom of fishing is granted to all countries. The right to fish on the high seas is limited to three conditions encompassing: 1) Their treaty obligations; 2) Rights and duties; and 3) Interest of coastal states as stipulated in Articles 63(2) and 64 to 67 and 3) the provisions of the section. Assessing fisheries crimes as listed, 24 examples of unlawful
activities annexed to the Fisheries Crime Expert Group Meeting document would pose challenges in terms of law enforcement to be taken on the high seas. The complexity emerges from the jurisdictional issue and random listing of crimes.

The operation of transnational crimes such as illicit trafficking in drugs, human trafficking, and people smuggling can be extended to the high seas. The LOSC explicitly regulates in the provisions, illicit drugs trafficking but neither human trafficking nor people smuggling. Any state may request another state to combat the illicit traffic conducted by a ship flying its flag once the state has reasonable grounds to believe that the ship is engaged in illicit drug or psychotropic drug trafficking. Apart from the LOSC, there exist treaties governing drugs trafficking such as the 1961 Single Convention on Narcotics Drugs, the 1971 Convention on Psychotropic Substances and the 1988 Drug Convention.

It can be concluded that multiple hurdles would occur when observing fisheries crimes on the high seas such as; 1) The freedom of high seas and flag state responsibility; 2) The limitation to enforce the law concerning non-fisheries violations such as human trafficking, people smuggling, and illicit drugs taking place on the high seas which would relate to flag state responsibility. Therefore, it falls under the flag of convenience circumstance and the punishment may not be effective; 3) If trafficking in persons can be considered as a practice of modern slavery, then Article 110(1)(b) would apply and the right of visit can be justified. Furthermore, while human trafficking may occur on the high seas, the only protocol to the UNTOC that regulates right to visit the suspected ship is the Protocol of Migrants Smuggling. Otherwise, like-minded states may conclude bilateral or regional agreements to govern the common concerns amongst them on matters such as people smuggling and human trafficking with respect to flag state jurisdiction.

4. Do Fisheries Crimes Offer a Better Approach to Combat IUU Fishing?
This section undertakes examination of the question whether or not transnational organized fisheries crimes constitutes a better policy to curb IUU fishing. In responding to this question, it is worth taking a look at the overviews provided in Parts VI and VII. As discussed in the said two parts, a comprehensive background concerning environmental law and the benefits and drawbacks of the transnational organized crime method have been presented. Environmental law analysis of its relevant topics sheds some light on the positions of countries when coping with marine environmental degradation. It can be learned that the
practices of countries in discerning environmental problems are rooted in their fundamental perceptions on environmental issues. Having said that, understanding this matter contributes to making their views clear and lessons can be learned from such points of view.

The transnational character of IUU fishing encourages Indonesia to argue that IUU fishing deserves to receive transnational treatment and to be part of UNTOC. Countries are still reluctant to take the same position as Indonesia in this proposal for several reasons:
1. The different perceptions and practices of countries in perceiving illegal fishing in their domestic regulations;
2. The criteria set out in the Organized Crime Convention concerning “serious crimes”.

Nonetheless, it is not necessary to obtain transnational activity status if it is not regarded as a transnational organized crime as provisioned in the convention.

It seems Indonesia would join in any initiatives and would become a frontrunner in addressing the problems of fisheries poaching. In its development, some countries such as Indonesia, Norway and South Africa have promoted the concept of fisheries crimes. The lack of an agreed definition of fisheries crimes gives rise to the difficulty of including the practice under the convention. The explanation of fisheries crimes, including the related activities as annex to the document concluded in the panel of expert meeting, leaves some questions unanswered.

Although fisheries crimes pose some challenges, this thesis argues that the concept should be promoted further based on the following reasons:
1. Providing a breakthrough to address marine living resources problems including the degradation of marine stocks level;
2. Bridging the link between a mere fisheries management problem and transnational organized crimes as commonly discovered in the fisheries sector;
3. Eradicating Transnational Organized Crimes in Fishery Activities;
4. Facilitating International Collaboration;
5. Tightening Cooperation on Money Laundering and Confiscation of Assets;
6. Extradition and Mutual Legal Assistance;
7. The Enhancement of Cooperation on Joint Law Enforcement Investigation;
8. Pathway to the Transfer of Sentenced Persons.
The reluctance of countries in joining the efforts to use this concept should not be perceived as a major obstacle to making this idea an international norm. The Indonesian Government needs to consider the struggle Indonesia faced when obtaining the status of an archipelagic state. It was a painstaking process that had to pass through several stages from UNCLOS I to III and took 47 years from the Declaration made by Prime Minister Juanda in 1947 until the 1982 UNCLOS entered into force on 16 November 1994. In Part II, it is thoroughly demonstrated that the Indonesian delegations took some initiatives, as listed below, to garner supports from countries:

1. Fostering the relationship with like-minded states such as Fiji, the Philippines and Mauritius. Those countries including Indonesia had the same interests in having archipelagic status.
2. Securing the support of developing countries and international organizations such as the Organization of African Union;
3. Establishing ‘an alliance’ with those African countries that had different interests with the aim of lending support to the agenda of each side;
4. Concluding bilateral agreements with neighbouring countries.
5. Maintaining good and non-confrontational approaches with opposing countries.
6. Fostering intensive communication with maritime powers.

The approaches taken by the Government of Indonesia when struggling to obtain acknowledgment as an archipelagic country can be beneficial as lessons learned for Indonesia when proposing transnational organized fisheries crimes before the international forums.

The concept of archipelagic states to some degree brought about a higher level of complexity and was a more challenging case than the proposal to adopt fisheries crimes. Nonetheless, both cases have similarity in their process in terms of the initial resistance from some countries. The concepts also have evolved to a point where the resisting countries altered their policy to be less restrictive than their previous positions. The distinction occurred when the archipelagic concept was adopted under international convention, but the fisheries crimes are still in the process of garnering more support from countries. The point that should be kept in mind is that the link between IUU fishing and transnational organized crimes has received better acknowledgment and acceptance than the initial measure when it was first introduced in the ninth meeting of UNICPOLOS held in 2008. In the same year, the UN Secretary-General regarded IUU fishing as a major challenge to peace and security in respect to the food insecurity.
The evolution process that has been illustrated in Part I suggests that the UNODC played a strategic role in pushing this matter further by convening an expert group meeting to discuss the presence of TOC in the fishing industry. This organization also published some papers on the subject such as ‘Organized Crime Involvement in Trafficking in Persons and Smuggling of Migrants’, ‘Transnational Organized Crime in the Fishing Industry’ and ‘Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes: Research Report’ which raised public awareness.

In comparison with the archipelagic concept, the measure to combat IUU fishing by using the transnational organized crime method bears more conceptual challenges such as:

1. Unclear definition of Fisheries Crimes;
2. Dual Criminality as Preconditions Required for Extradition and Mutual Legal Assistance;
3. Challenges for International Convention as the Basis for International Cooperation;
4. Different Legal Approach of States in Discerning Environmental Crimes (*Malum rohbitum* and *Malum in se*);
5. Fisheries Crime on the High Seas.

Addressing the list of drawbacks would be more difficult to overcome if in the sense they involve the fundamental principles that a country follows. For example, countries with *malum rohbitum* principle would be reluctant to amend their set of legislation to be a follower of the *malum in se* school of thought. As such, the key to solving the problem is how to identify the major and minor problems and then to find ways to reconcile those different principles based on common ground. The archipelagic state provision in the LOSC is a result of compromise between parties.

**5. Next Steps.**

There are some recommendations to follow:

1. Revise the National Ocean Policy, in particular, the fourth cluster.
2. Extend the expired NPOA-IUU Fishing.
3. Try to find and introduce a more appropriate term to replace ‘fisheries crimes’ with a more acceptable term such as ‘fisheries-related crimes’ as an attempt to accommodate the discrepancies between states. The term ‘fisheries-related crimes’ will also be able to be more easily defined. Another option is to make fisheries crime go further without having a precise definition.
4. Another option to promote fisheries crimes is through the conclusion of a voluntary instrument such as IPOA-IUU Fishing.

5. Focus on domestic regulation to strengthen environmental regulation on the protection of marine living resources.

6. Try to identify the policy and legislation of major maritime powers with the largest fishing fleets such as the U.S, China and Russia in responding to IUU fishing and fisheries crimes. This identification aims to map their position and the appropriate approach that should be taken.

7. Diplomacy, through intensive approaches, should start to play a role in gathering more support from relevant stakeholders.

8. Set fisheries crimes or a more acceptable term as a national agenda item with a broader ambit of attention from top decision makers such as the President and lawmakers.

9. Make a timeline and also take steps to set a target.

10. Make a clear understanding between IUU fishing, fisheries crimes, transnational organized fisheries crimes, crimes related to fisheries, crimes associated with the fisheries sector.

11. Propose a preparatory meeting consisting of small-focused states.

12. Prepare to have an agreement with a compliance approach. The Stockholm Declaration and other environmental agreements can be good references.

13. Propose to adopt a middle ground to reconcile the divergent views and practices of countries in perceiving fisheries crimes.

6. Further Study.

1. How to be a major maritime nation. This thesis argues that Indonesia can be classified as a maritime nation. However, the doctrine of GMF envisages Indonesia to be a major maritime player in the global arena. By undertaking a further study, it can examine the elements that Indonesia should adhere to in envisaging a major maritime nation by taking into account domestic and regional strengths and weaknesses. Indonesia needs to understand and cope with the major maritime players in the region such as China and Japan before becoming a global maritime nation as envisioned in GMF.

2. The institutional framework. The reason to promote further research is to undertake more in-depth research on ocean governance as this thesis limits its subjects merely to policy and legislation. If the institutional aspect can be overviewed, three elements of ocean
governance (policy, legal and institution) can produce interesting discussions and comprehensive recommendations.

3. Legal overview in adopting the Lacey Act. It is necessary to have further study on adopting elements of the Lacey Act into the domestic legal system. The most important aspect of this study is to test whether or not long-arm jurisdiction as the main principle of this Act can be applied to Indonesia legal practice.

7. Conclusion.
This thesis concludes that current policy and legal measures reflect the inadequacy in combating IUU through the Fisheries Crimes approach and encompassing IUU fishing as TOC under UNTOC. Nonetheless, this thesis argues that the fisheries crimes approach should be considered as a breakthrough to overcome the depletion of fish stocks and the existence of transnational organized crimes in the fisheries sector. This research has uncovered the fundamental challenges that persist in the fisheries crimes. Having considered those drawbacks, it is worth mentioning taking the lessons that can be learnt from Indonesia’s struggle to obtain archipelagic status. The measures should also consider the character of environmental law that have been discussed thoroughly in this thesis.

With regard to IUU fishing as TOC, it should be understood that IUU fishing consists of three different activities and encompassing those three elements of illegal, unreported and unregulated fishing in the Organized Crime Convention would be exhaustive. Instead of promoting this matter, this thesis argues imposing the hardest possible measures to combat IUU fishing in the domestic sense by considering international law. This thesis proposes some steps that can be treated as recommendations complementary to the proposed measure to fill the loopholes discovered in the domestic policy and legal aspects. Finally, this thesis recognizes that further study can be undertaken on these three issues.
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