

DISEMBARKATION OPTIONS OF ILLEGAL MIGRANTS RESCUE AT SEA: INDONESIAN PERSPECTIVES

OPSI DISEMBARKASI PENYELAMATAN PENDATANG ILEGAL DI LAUT: PERSPEKTIF INDONESIA

Prof. Dr. HasjimDjalal, M.A.

Dewan Kelautan Indonesia
(hdh@cbn.net.id, h.djalal@gmail.com)

Abstract - The issue of rescuing distress people at sea, is a very important issue for Indonesia, particularly because it is an archipelagic country situated between two oceans and two continents and it becomes a major route for migrants due to its various maritime straits and the 'porous' coastlines. These geographical factors have also exacerbated some of the problems, particularly of some undocumented migrants and refugees passing through Indonesia, either by land, sea, or by air. The flow of illegal migrants to or through Indonesia has increased in recent years, particularly from Afghanistan, Bangladesh, Myanmar, Iraq, Iran, Sri Lanka, and Pakistan, that require comprehensive solution, either domestically, bilaterally, or regionally.

Keywords: disembarkation, illegal migrants, sea, Indonesia

Abstrak - Isu penyelamatan pendatang di laut merupakan isu yang sangat penting di Indonesia. Hal ini mengingat Indonesia merupakan negara kepulauan yang terletak antara dua samudera dan dua benua dan menjadi rute utama bagi para pendatang karena beragam selat maritim dan garis pantai yang 'keropos'. Faktor geografis ini memperluas permasalahan, khususnya berkaitan dengan pendatang dan pengungsi yang tidak memiliki dokumen yang berupaya melewati wilayah Indonesia, baik melalui darat, laut, atau udara. Arus kedatangan pendatang ilegal ke atau melalui Indonesia meningkat dalam tahun belakangan ini, khususnya dari Afghanistan, Bangladesh, Myanmar, Iraq, Iran, Sri Lanka, dan Pakistan, yang memerlukan solusi komprehensif, baik secara domestik, bilateral, dan regional.

Kata kunci: disembarkasi, pendatang ilegal, laut, Indonesia

The rise of illegal migrants, mostly due to:

- a. internal conflicts in their countries of origin, either because of political or socio-economic factors,
- b. the temptation for economic improvements and human rights protection in the countries of their destination, and
- c. as the result of criminal activities of the smugglers of those illegal migrants (Transnational Organized Crimes – TOC). The problems therefore are more

complicated if and when the TOC also engaged and was assisted by poor local fishermen in the transited countries (like Indonesia) who are willing to risk their life in their small boats to smuggle the illegal migrants to their country of destination.

It should also be noted that the problems of illegal migrants also create problems to the country of transits and could threaten the stability of the relevant states (in the Asia Pacific region), including Indonesia, especially if the illegal migrants also involve some potentials of terrorists' elements and activities and threats.

In the context of seeking a comprehensive solution to the increasing numbers of illegal or irregular migrants that enter or pass through Indonesia, the Government of Indonesia has undertaken various efforts in parallel, involving domestic, bilateral and regional authority. At national level, Indonesia has been increasing cooperation with international organizations, particularly UNHCR and IOM. Currently, Indonesia is working on legislation in the form of Presidential Regulation in dealing with asylum seekers and refugees. At bilateral level, Indonesia has discussed practical solution to this problem with the countries of origin of the illegal migrants, while at regional level Indonesia has initiated the Bali Process since 2002 to increase dialogues and cooperations, particularly among the relevant countries.

The Bali Process specifically develops the forum of dialog and cooperation between the countries of origin, transit, and destination of the irregular migrants, thus built up confidence among the countries in the region to constructively seek solution to the problems of irregular migration, including human smuggling, asylum seekers and refugees. Repatriation and resettlement are some of the solutions being developed in the context of Bali Process.

The Bali Process is a technical, voluntary, and non-binding forum, focused on capacity building, involving law enforcement officials as well as officials from Justice, Foreign Affairs, Immigration offices, and others. There are some 66 countries and various other international organizations around the world are involved in the Bali process, in addition to the various international and regional organizations as observers. Indonesia

has also initiated a special Conference on Irregular Movements of persons in Jakarta in August 2013, involving Ministers and Officers from 13 countries of origin, transit, and destination. The Conference produced the Jakarta Declaration in addressing irregular movements of persons, focusing on four steps, namely Prevention, Early detection, Protection, and Law Enforcement.

At international level, Indonesia has also actively participated in various meetings organized by the UN, such as the open-ended inter-governmental meetings on smuggling of migrants that took place every year at UNODC (United Nations Office of Drugs and Crimes) in Vienna, Austria.

In short, Indonesia has been facing problems with regard to asylum seekers and refugees, and illegal migrants, particularly due to its geographical location near the country of destination (Australia and New Zealand) and its vast and porous maritime space that are used by a lot of international shipping and communication between the Pacific and the Indian Oceans, as well as between the Asian continent and Australia.

In this context, a lot of incidents at sea has also taken place in or near Indonesian waters. For instance, in 2013, the UNHCR data indicated that 23 boats had sunk, sacrificing 616 lives, while in 2012 there were 9 boats had sunk, sacrificing 728 lives. It is suspected that actual incidents could be more than the data of the UNHCR.

Again, according to the UNHCR data, up to November 3, 2014, there were 10,804 asylum seekers and refugees in Indonesia, consisting of 6,348 persons seeking asylum and 4,456 refugees. Out of this amount, 8,363 are men and 2,441 are women. There were 3,122 children among them, including 1,074 children without parents or guardians.¹

Those refugees came from 22 countries, primarily from Afghanistan (1,704 persons or 38%), Myanmar 808 persons (18%), Somalia 358 persons (8%), Sri Lanka 334 persons (8%), and Iran 315 persons (7%). The asylum seekers came from 38 countries, the biggest number came from Afghanistan (3,820 persons or 60%), Iran (597 persons or 9%), Somalia (369 persons or 6%), Iraq (365 persons or 6%) and Sri Lanka (204 persons or 4%). Thus, the asylum seekers came primarily from Afghanistan and Iran.²

¹ UNHCR, 2014.

² Ibid.

Those asylum seekers and refugees are primarily held in the various (14) Immigration Detention Centres around Indonesia, which by the end of October 2014 amounted to 3,303 persons, consisting of 2,530 asylum seekers and 773 refugees, 578 of them are women and 444 are children. So far, in 2014, 617 refugees have left Indonesia (compared to 898 in 2013), while 1,177 refugees, primarily from Afghanistan, are being processed within the context of resettlement program. By the end of October 2014, 94 of them had been accepted in the destination/ resettlement countries, primarily Australia and New Zealand, and they are waiting for departure from Indonesia.

Some of the refugees are also hosted by various non-Immigration Detention Center, such as at various community housing. According to IOM data, up to 30 November 2014 there were 6718 immigrants that have obtained assistance from the IOM in various forums, 2,586 persons of them (38%) were located in various Immigration Detention Centres in the country and 2,849 (42%) of them are located in various community housings and 1,283 of them (26%) were still held in various interrogation centres before moving them out to Immigration Detention Centres or Community Housings.³

The Legal Framework

According to customary international law, the states, through the ships flying their flag, are obliged to help rescue people in danger of their lives at sea, including irregular movement of people at sea. This obligation falls upon states regardless whether they are party or not to specific international treaties or conventions.

The UNCLOS 1982, in Article 98, stipulates that states have to carry out 2 obligations, namely to require the captains of the ships flying their flag to help the rescue, and to establish an effective search and rescue mechanism for that purpose.

Specifically Article 98 reads as follows:⁴

- “1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

³ IOM, 2014.

⁴ The UNCLOS 1982, in Article 98.

- (a) To render assistance to any person found at sea in danger of being lost;
 - (b) To proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) After a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.”

It should be noted that the provisions contained in this Article are very similar to the provisions of Article 12 of the 1958 Geneva Convention on the High Seas, which was ratified by Indonesia in 1961. It could also be stated that the rules stipulated in Article 98 of UNCLOS have in fact become the rules of customary international law. Indonesia herself has ratified the UNCLOS 1982 by Law No. 17/1985, and the Convention itself has entered into force in 1994 after being ratified by 60 countries. Now, the Convention has been ratified by more than 160 countries around the world (the notable exception is the United States that up to now has not ratified the UNCLOS 1982).

It should also be noted that the application of Article 98 is for people in distress “found at sea”. Thus, in my mind, it could also covers the internal waters, archipelagic waters, territorial seas, Contiguous Zones, EEZ, and the High Seas beyond, whether or not a certain state have specific legislation or not with the various maritime areas. Indonesia, for instance, has not yet enacted specific legislation with regard to the Contiguous Zone; yet the provisions of Article 98 would also apply to the Contiguous Zone of Indonesia as inscribed in the UNCLOS 1982. It should be noted that practically all ASEAN countries, except Cambodia, have ratified the UNCLOS 1982 (as of now, Cambodia is still in the process of ratifying the UNCLOS 1982).

With regard to other international conventions that are of relevant in this context, some of them could be mentioned, such as the IMO Safety of Life at Sea (SOLAS) Convention, particularly regulation V/33.1, Chapter V, regulation 7; ICAO (International Civil Aviation Organization) Convention, particularly Annex 12, and the SAR (Search And Rescue) Convention 1979. All these conventions indicated that prompt assistance is essential in term of saving life at sea, thus it should be given a top priority, particularly because most states are already parties to these conventions.

Specifically, with regard to the IMO SAR Convention 1979, which entered into force in 1985 and revised in 1995 which entered into force in January 2000, the need for regional approach and coordination of SAR regions was emphasized. The obligation to assist stipulated in this Convention, applied individually, nationally, or in cooperation with other state or states.

With regard to its application, as indicated above, it is applied to cases of distress and incidents at sea, no matter where it happens. It is applied in territorial sea in accordance with Article 18 (2) of the UNCLOS, to straits used for international navigation (in accordance with Article 39 (1) c, to Archipelagic Waters in accordance with Article 54, to ZEE in accordance with Article 58 (2) in reference to the application of Article 98 to the EEZ, and to the High Seas in accordance with Article 98.

It should be noted also that there are various persons that need to be rescued at sea in view of dangers to their lives. They could include asylum seekers, undocumented migrants, refugees, and stowaways, regardless of their nationalities. Ships that rescue them should be able to deliver them ('disembark' them) to a place of safety. Specifically with regard to the asylum seekers, they should not be returned to their country of origin or to a place where their lives could be in danger (the principle of 'non-refoulement').

There are still some problems, however, with regard to certain issues. For instance, there are still problems with regard to stowaway, particularly since the 1957 Stow Away Convention, apparently still not yet in force. Illegal migrants also create some political problems. The problems of distress persons found at fixed installations at sea, is also not yet clearly regulated, just as the problems of search and seizure at sea beyond the territorial sea has not yet been clearly regulated.

Indonesian View

Indonesia is bound to respect the principle of rescue of the distress people found at sea, regardless of their nationalities. The Preamble to its 1945 Constitution, which stipulates the 'Pancasila' (5 principles) as the basis for the state, stipulates that Indonesia (1) believe in God, (2) just and civilized humanity, (3) national unity, (4) democracy, and (5) social justice. The principle of the 'just and civilized humanity' should therefore be observed in this case of helping and rescuing people in distress at sea.

Indonesia has had a number of experiences in this context. In 1980s Indonesia even offered one island in Riau province (Pulau Galang) to help cater for the 'boat people' of Vietnam that left Vietnam, some of them for political and economic reasons, that are stranded at sea on their way to their destination, particularly to Australia and the US. I understand that some of these people later on become successful businessman and loyal citizens in the new country of their destination.

The issue of rescuing distress people at sea, as indicated above, is a very important issue for Indonesia, particularly because it is an archipelagic country situated between two oceans and two continents and it becomes a major route for migrants due to its various maritime straits and the 'porous' coastlines. These geographical factors have also exacerbated some of the problems, particularly of some undocumented migrants and refugees passing through Indonesia, either by land, sea, or by air. The flow of illegal migrants to or through Indonesia has increased in recent years, particularly from Afghanistan, Bangladesh, Myanmar, Iraq, Iran, Sri Lanka and Pakistan, that require comprehensive solution, either domestically, bilaterally, or regionally.

In this context, it should be noted that unfortunately Indonesia has not yet enacted legislation with regard to the management of the Contiguous Zone around its archipelagic waters and territorial seas, for the application of control of its immigration, sanitary, fiscal, and customs regulations that are relevant to the problems of controlling migrants and refugees, in view of the general rules that the problem of rescue at sea as well as SAR activities should also pay 'due regard' to sovereignty of a state, in this case Indonesia.

In order to fulfill the obligations enumerated in Article 98 of UNCLOS 1982, Indonesia, through long process, has established national Search and Rescue Agency (BASARNAS). This is important in order to avoid impression as if Indonesian waters are 'black or dark areas' that are not safe for navigation. BASARNAS is a non-ministerial agency under and report directly to the President of the Republic of Indonesia. Some of the functions of the BASARNAS are:

- Conduct SAR operation, including at sea;
- Develop education process to build up capable human resources;
- Device legislation to promote SAR activities;
- Develop capabilities as well as necessary equipments and infrastructure;
- Socializing and informing the society of its functions and activities; and
- Work out coordination with other SAR activities, domestically, regionally, and internationally, as well as cooperation and coordination with the various other law enforcement agencies in the country.

There are other regulations in Indonesia that facilitate Search and Rescue at sea, such as:

- Government Regulation No. 36/2002 on Innocent Passage through Indonesian waters, namely through archipelagic waters and territorial seas. Article 3 (4) of the Regulation stipulates that: "in exercising the right of innocent passage through Indonesian waters, foreign ships shall not anchore, stop, or zig-zagging except necessary because of force majeure or in distress, or because of helping persons, ships or aircraft in condition of distress".
- Government Regulation No. 37/2002, with regard to navigation through the Archipelagic Sea Lanes Passage (ASLP) in Article 4 (6) stipulates similar provisions. These provision are based on Article 54 and 39 of the UNCLOS 1982.

Conclusion

- a. Helping persons found in distress at sea or in danger of being lost is the rule of international law, either customary or conventional.

- b. Those people can be ‘illegal migrants’, ‘undocumented migrants’, ‘refugees’, asylum seekers, etc., that enter a country, including by sea, and hoping to go to the country of their destination (in the case of Indonesia, primarily to Australia and New Zealand, and the US and Canada).
- c. In this context, some measures need to be contemplated, including the issue or questions of disembarkation in the sense of finding temporary place for those ‘illegal migrants’ before they can be processed and arranged for legal entry into the country of their destination. The process can take a long time before the UNHCR granting them the refugee status or the country of their destination can accept them. It should also be noted that the process of disembarkation should not create unnecessary burden, either political, economic, security, or financial which can burden the country of disembarkation. In fact, the issue of irregular migration should also be able to help the disembarkation country, particularly the ‘poor people’ to improve their economic condition. I understand that at this moment the Indonesian Government is still preparing a Presidential Regulation on Handling and the Procedures for the Asylum Seekers and the Refugees as well as the disembarkation process in the Indonesian territory in cooperation with local governments such as the Provincial and District authorities.
- d. In this context, the UNHCR and IOM, advanced countries, as well as the countries of potential destination,
 - 1) Could and should help the country where the disembarkation take place,
 - 2) Make it easier for the illegal migrants/irregular movement at sea to reach their destination. The undocumented migrants should, as far as possible, be transited more leniently.
 - 3) The disembarkation should not be too far away from the country of destination.
 - 4) Again, in this kind of situation regional cooperation and understanding are required as indicated by international law, particularly by the UNCLOS and other international conventions on maritime issues.

- e. Indonesia is bound to help save human life and in fact has done so. Yet a lot of problems remain, particularly because Indonesia is a 'transit country', and a country with a lot of domestic problems that limit its capacity to handle the case. Recently, there has been problems between Indonesia and Australia which refused to help and process the 'illegal migrants', and preferred to send them back into Indonesia, in fact by entering Indonesian waters without discussion with or permits from Indonesia. This move in fact has troubled Indonesia- Australia relations for some time.
- f. BASARNAS has done a lot, but it needs a lot more attention and capacity building in view of the very large and diverse maritime space of Indonesia in the crossroad between 2 continents and 2 oceans, thus has made Indonesia a certain main road for the purpose of migrants and refugees (BASARNAS has also indicated significant functions and activities in dealing with the accident relating to Air Asia flight QZ 8501 at the end of December 2014 in the Strait of Karimata, assisted by many countries, such as, Singapore, Malaysia, Australia, China, Japan, The United States, Rusia, and others)
- g. BASARNAS needs to intensify cooperation and coordination with other law enforcement agencies in Indonesia, such as Bakorkamla (National Coordinating Agency for Law Enforcement at Sea), which now has been elevated to become Bakamla (Maritime Agency for Security at Sea).
- h. There is a need for a more intensive cooperation between the country of origin of the migrants, the transited country/countries, and the country/countries of destination.

References

- Government Regulation No. 36/2002 on Innocent Passage through Indonesian waters.
- Government Regulation No. 37/2002, with regard to navigation through the Archipelagic Sea Lanes Passage (ASLP).
- International Organization for Migration (IOM). 2014.
- The UNCLOS 1982, in Article 98.
- United Nations High Commissioner for Refugees (UNHCR). 2014.