

## NEEDED TO REGIONAL COOPERATION TO COMBAT PEOPLE SMUGGLING IN INDONESIAN WATERS

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### Abstract

People smuggling is a growing global crime that exposes thousands of migrants to unacceptable risks and challenges the integrity of international borders. In the last two decades, globalization and conflicts have seen an increase international migration flows. People smuggling is not a new phenomenon in Indonesia. It has developed steadily over the last 10 years in response to the increased demands of asylum seekers and refugees attempting to reach Australia by boat. Among the convicted people smuggling organizers are a number of rejected asylum seekers who stayed on in Indonesia for years. Some smugglers are former refugees but now hold Australian citizenship, granted to them after regular resettlement. Indonesia recorded nine boat accidents involving 728 asylum seekers in 2012, while in the following year the number rose to 23 involving 615 victims. Operation Sovereign Borders and they turn-back-the-boats policy from Australia, from December 2013 to March 2014, there were seven occurrences of boats being turned back to Indonesian waters. The result of research show that first, Indonesian government need regional cooperation to handling treated people smuggling in Indonesian waters. Regional cooperation would be a win-win solution for both countries. And second, the regional cooperation should be in line with prevailing Indonesian legislation.

### Keywords

people smuggling, asylum seekers, regional cooperation

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## Introduction

People smuggling is not a new phenomenon in Indonesia. It has developed steadily over the last 10 years in response to the increased demands of asylum seekers and refugees attempting to reach Australia by boat (Antje Misbach, 2012). Among the convicted people smuggling organizers are a number of rejected asylum seekers who stayed on in Indonesia for years, feeling it was not safe to return to their homelands. Barred from legal work, some made their way into the criminal underground.

Some smugglers are former refugees but now hold Australian citizenship, granted to them after regular resettlement. Factors making them ideal middlemen for transnational crime include their reliable contacts with potential clients in the countries of origin, mostly areas of protracted conflict, and their new local knowledge, language skills and links in Indonesia and Australia.

Since 2011, however, the minimum sentence for people found guilty of assisting in people smuggling operations increased to five years and a fine of 500 million rupiahs (US\$51,550). According to verdicts collected from district courts across Indonesia, at least 37 Indonesians and two foreigners were convicted between mid-2011 and 2012. Despite this, whether stricter law enforcement and sentencing can reduce people smuggling between Indonesia and Australia remains questionable. The majority of convicted people smugglers are men aged between 20 and 50 years. Most hail from the lower strata of society self-employed casual employees, who work as drivers, fishermen or manual laborers. Rather than being the main organizers or recruiters, the majority occupied lower positions in smuggling networks, acting as helpers, transporters and facilitators in charge of organizing food, travel and accommodation for the clients. As the main organizers rarely appear in the field or participate in daily transactions, the facilitators at the lower ends of the smuggling networks usually do not know their bosses.

In fact, most will never see the main organizers, as all communication is carried out by phone and through middlemen. They may not even work for a particular boss on a regular basis, being recruited instead for a one-off job. This, of course, makes it harder for the police to monitor or observe smuggling networks. Employing casual and “disposable” smuggling facilitators for the more visible parts of the smuggling action,

such as transportation and accommodation on land, is a strategic choice made by the main smugglers.

### Definition of People Smuggling

According to 2000 United Nations Convention against Transnational Organized Crime (UNTOC) and its protocol against the smuggling of migrants, people smuggling or smuggling of migrants is :

*“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State of which the person is not a national or a permanent resident”.*

The Protocol also makes reference to the financial gain feature when it calls for States Parties to make the smuggling of migrants a criminal offence when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit (Matilde Ventrella, 2010).

The term *migrant smuggling* or *people smuggling* refers to the unauthorized movement of individuals across national borders for the financial or other benefit of the smuggler. Terminology around the issue to refer to people whose entry or stay in a country is unlawful and has been facilitated by a third party for profit. Such a law would provide guidance in several aspects of people smuggling, from prevention to the criminalization of smugglers. A specific law on people smuggling could also be used as deterrent to prevent syndicates from operating in Indonesia and as tool to prosecute them. Because of the absence of such a law, only executors at the outermost ring can be prosecuted.

### International Legal Framework

There are several international instruments that provide the international framework for responding to the smuggling of migrants. International legal framework is divided as follows:

- a. the United Nations Convention against Transnational Organized Crime (UNTOC)
- b. supplementary Protocols against the Smuggling of Migrants by Land, Sea and Air;

The international legal framework within which States must define their own laws in order to effectively address the problem of the smuggling of migrants comprises conventions and instruments of the United Nations and other international organizations. These instruments also provide a framework for States to cooperation with each other to combat the smuggling of migrants. International law are most particularly in attributing responsibility for internationally wrongful acts associated with migrant smuggling as well as State responses (Anne T, Gallagher, 2014).

In the other international legal instrument is the United Nations on The Law of the Sea (UNCLOS) 1982 . In article 110 UNCLOS 1982, recognizes that warships may visit and board a foreign vessel on the high sea when it is reasonably suspected that the foreign vessel is engaged in the slave trade (Natalie Klein, 2011). Slave trade interlinked transnational crimes by sea and estimated four million people every year as human cargo. People smuggling is perceived as a threat by States because of concerns about the lack of identification of those arriving in a State.

Another legal instrument for handling people smuggling is *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* in 2000. Bali Process is the first ministerial meeting marks and led by a Steering Group of four countries (Australia, Indonesia, New Zealand, and Thailand) as well as *United Nations High Commissioner for Refugees* (UNHCR) and *International Organization for Migration* (IOM). Australia and Indonesia, represented by their respective Foreign Ministers, also act as co-chairs of the Steering Group. Today, the Bali Process is comprised of 43 countries, mostly from the Asia Pacific region. In addition, several European and North American countries and a range of international organisations have observers status. The stated purpose of the Bali Process is to raise awareness of, encourage cooperative action and develop practical regional measures to prevent, intercept and disrupt people smuggling, human trafficking and transnational crime.

Specific objectives of the Bali Process include:

1. the development of more effective information and intelligence sharing;
2. Improved cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks;
3. Enhanced cooperation on border and visa systems to detect and prevent illegal movements;
4. Increased public awareness in

order to discourage these activities and warn those susceptible; 5 Enhanced effectiveness of return as a strategy to deter people smuggling and trafficking through conclusion of appropriate arrangements; 6. Cooperation in verifying the identity and nationality of illegal migrants and trafficking victims; 7. The enactment of national legislation to criminalise people smuggling and trafficking in persons; 8. Provision of appropriate protection and assistance to the victims of trafficking, particularly women and children; 9. Enhanced focus on tackling the root causes of illegal migration, including by increasing opportunities for legal migration between states; and 10 .Assisting countries to adopt best practices in asylum management, in accordance with the principles of the Refugee Convention.

### **Regional Cooperation and Implication for State Responsibility**

Regional cooperation is an essential element of measures to handling people smuggling. Indonesia had put in place a Regional Cooperation Model with Australia in 2000, which was later formalized by the International Organization for Migration (IOM). At the first Regional Ministerial Conference held in Bali 26-27 February 2002.

In 2009, Indonesia ratified the United Nations Convention against Transnational Organized Crime (UNTOC) (Law No. 5 of 2009). In the same year, Indonesia also ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC (Law No. 15 of 2009). By ratifying those two instruments, as part of international society, Indonesia must commitment to prevent and combat people smuggling. Indonesia has the responsibility to implement the principles of the UNTOC and incorporate them into our domestic law. Article 34 of the UNTOC mentions that parties shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of domestic law, to ensure the implementation of its obligations under this convention. As a party to the UNTOC, Indonesia has access to modules, workshops and technical assistance on how to draft legislation on transnational crime, including that on people smuggling. This is the advantage we can explore in drafting a specific law on people smuggling. Our experience in drafting the law on trafficking in persons can be used as a model too. Although during the drafting process we had not ratified the UNTOC, the law on trafficking in persons adopts some principles from the UNTOC and its protocol on trafficking in persons. We can use the same path by using the UNTOC, its protocol

on people smuggling, and supplementary documents to those two instruments as references. There is no indication that people smuggling in our region, including people smuggling, will decrease in the near future. This means that people smuggling syndicates still pose serious threats to Indonesia as key transit country en route to Australia. Because of the complexity of the issue, we need a comprehensive approach in addressing people smuggling. Indeed, a specific law will not serve as a sole solution to the problem. It will, however, serve as the backbone of such an approach. Until we have such a law, a comprehensive approach to addressing people smuggling will be difficult to achieve.

One important consequence of Indonesia's new law on immigration, Law No. 6 of 2011 enacted in May 2011 to criminalize people smuggling has been a substantial increase in convictions of both Indonesian and foreign people smugglers. In the past, people smugglers convicted in Indonesia often received lenient sentences for breaching immigration regulations, such as those prohibiting accommodating foreigners without legal documents. Sentences seldom exceeded more than two years imprisonment.

Indonesia's responses to asylum seekers and people smugglers have focused on increasing border protection methods and creating disincentives for arrivals. Yet despite the large amounts of money spent on such things as funding the IOM and UNHCR in Indonesia, arresting and prosecuting smugglers, operating detention centre and border surveillance; people smuggling continues. Indonesia's contributions to the UNHCR refugee fund for such things as detention centre and strengthening border protection methods could more appropriately be used to alleviate some of the root causes of the displacement of asylum seekers.

In Indonesia have 13 stakeholders to take a place on the prevention of people smuggling problem, including the Indonesian Navy, the Water Police, the Customs Office, the Immigration Office, the Transportation Ministry, the Marine affairs and Fisheries ministry. One of the important elements of cooperation that needs to be improved is the rule of law, such as by linking the Bali Process to increase human resources agencies of law enforcement. It is also considered necessary to develop a guidelines to assist the countries concerned to people smuggling. Handling the problem of people smuggling is done using three approaches, namely prevention, early detection, and protection. Countries of the Bali Process members agreed to

increase prevention efforts, either individually or jointly. Countries of origin, transit and destination have the same responsibility to prevent the crime of human smuggling and trafficking. The simplest method for prevention is through public awareness campaigns. Country of origin have to do awareness-raising campaigns to increase community resilience by people smuggling and trafficking. In addition, the country of origin must also ensure that the drivers of people smuggling can be reduced through improving the welfare and safety of their community. State Transit has a role to prevent any intermediary that enables this people smuggling. Community should be made aware that involvement in human smuggling and trafficking is criminal and unlawful acts.

While the country of destination has the responsibility to eliminate the pull factor for illegal immigrants. They can also provide assistance to the country of origin to develop strength socioeconomic origin. Early detection will enable the countries of origin, transit and destination to take appropriate steps better. Capable of early detection mechanism will provide the capability for the country of origin to determine early seeds of problems that led to people smuggling.

Approach to the protection of victims of trafficking also needs to be prioritized. Therefore, an increase in the capacity of law enforcement officials is absolutely necessary, especially to help them identify and take the appropriate legal steps to address the problem of human trafficking. Strengthening national legal framework of the Bali Process member states to criminalize people smuggling and human trafficking are also other elements that are also very important. Strong legal response to crime is believed to be a deterrent for criminals.

To that end, the mandate has been given to the Bali Process Regional Support Office (RSO) to develop guidelines that can help policy makers and practitioners to criminalize people smuggling and trafficking. Bali Process RSO established in Bangkok in September 2012 also tasked to develop programs and training modules in cooperation with the Jakarta Centre for Law Enforcement Cooperation (the Centre) in Semarang. Bali Process has become a regional consultation process is important in strengthening cooperation among its members in addressing people smuggling. Indonesia has always been committed to improving the cooperation and to achieve the main goal of the Bali Process, which is to eliminate people smuggling.



## Conclusion

Regional cooperation is an essential element of measures to handling people smuggling. Regional cooperation mechanism could become the model of reasonable solution to combat people smuggling in Indonesia waters. Indonesia shared responsibility with join Operation Sovereign Borders. But, to handling of people smuggling, Indonesian government should be in line with prevailing national laws.

## References

- Allum, Felia, and Stan Gilmour. (2012). *Routledge Handbook of Trnasnational Organized Crime*. New York : Routledge Publishing.
- Chetail, Vincent and Celine Bauloz. (2014). *Research Handbook on International Law and Migration*. Englad : Edward Elgar Publishing.
- Gallagher, Anne T. And Fiona David. (2014). *The International Law of Migrant Smuggling*. New York : Cambridge University Press.
- Klein, Natalie. (2011). *Maritime Security and the Law of the Sea*. New York : Oxford University Press.
- Klein, Natalie, Joana Mossep and Donald R. Rothwell. (2010). *Maritime Security: International Law and Policy, Perspectives from Australia and New Zealand*. New York : Routledge.
- Mallia, Patricia. (2010). *Migrant Smuggling by Sea, Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework*. New York : Martinus Nijhoff Publisher.
- Missbach, Antje. (2012). *People Smuggling Trials In RI*, Jakarta Post, 28 May 2012, acces dated: 2 September 2014, [www.thejakartapost.com/news/2013/05/28/people-smuggling-trials-ri.html](http://www.thejakartapost.com/news/2013/05/28/people-smuggling-trials-ri.html).
- Ho, Joshua H. and Sam Bateman. (2012). *Maritime Callenges and Priorities in Asia: Implications for Regional Security*. New York : Routledge Publishing.
- Ventrella, Matilde. (2013). *The Control of People Smuggling and Trafficking in the UK and Italy*. England : Ashgate Publishing.

## International Arrangement and National Regulation

- United Nations Convention against Transnational Organized Crimes (UNTOC).
- 2000 Protocol to the UNTOC, specially addressing the Smuggling of Migrants by Land, Sea and Air.



Bali Process in 2002.

Law No. 5 of 2009 on the ratification of the UNTOC.

Law No. 15 of 2009 on the ratification of the Protocol against the Smuggling of Migrants by Land, Sea and Air.

Law No. 6 of 2011 on Immigration.

Government Regulation No. 31 of 2013 concerning Implementing regulation of Law No. 6 of 2011 on Immigration.