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Maritime Security Issues in Southeast Asia : An Indonesian Perspective *

Nugroho Wisnumurti ¹

In this globalize world the new threats to security are civil violence, transnational organized crime, terrorism and weapons of mass destruction, poverty, deadly infectious disease and environmental degradation. Transnational Organized Crime emerges into a serious threat to national and international security and stability with an increasingly adverse economic and social impact on States and civil society. This paper will discuss maritime security issues relevant to the situation in Southeast Asia, particularly in Indonesia and in the Straits of Malacca and Singapore. This article will focus on trafficking in persons in the context of maritime security and its challenges in the Straits of Malacca and Singapore. Moreover, it will also discuss Indonesia's effort to address those issues at the national and regional level.

Keywords: Transnational Organized Crime, Maritime Security, Trafficking in Person

Introduction

As observed by Secretary-General Kofi Annan in his report for the 2005 World Summit entitled "In larger freedom: towards development, security and human rights for all", in the borderless world we live in today, the threat to peace and security in the twenty-first century is no longer confined to just international war and conflict. In this globalized world, the threats to security now include the so-called "new threats", such as civil violence, transnational organized crime, terrorism and weapons of mass destruction, poverty, deadly infectious disease and environmental degradation.

Indeed, in the borderless world of today, transnational crime is emerging as a serious threat to national and international security and stability with an in-

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creasingly adverse economic and social impact on States and civil society. It is understood that transnational crime includes peoples smuggling, human trafficking, terrorism, illicit trafficking in firearms, sea piracy and sea robberies, money laundering, illegal fishing and trafficking in relation to illegal logging.

This paper will discuss maritime security issues relevant to the situation in Southeast Asia, particularly in Indonesia and in the Straits of Malacca and Singapore. and in this regard, the paper will focus on trafficking in persons in the context of maritime security, and the maritime security challenges in the Straits of Malacca and Singapore. It will also discuss Indonesia's efforts to address those issues at the national and regional level.

International legal instruments on transnational organized crime

The UN General Assembly at its fifty-fifth session in 2001 adopted important legal instruments which reflect an international consensus concerning transnational organized crime. They include the "UN Convention against Transnational Organized Crime" (UNCTO) and its supplements, the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime" and the "Protocol against the Smuggling of Migrants by Land, Sea and Air".¹ Additionally, the General Assembly at the same session adopted "Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime."² For the purpose of this paper, it is essential to look at the salient points of the three legal instruments which constitute part and parcel of the Convention against Transnational Organized Crime.

UN Convention against Transnational Organized Crime (UNCTO)

Under the UNCTO, transnational organized crime refers to offences established by the Convention and committed by an organized criminal group, i.e. "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 . . . in order to obtain, directly or indirectly, a financial or other material

¹ UNGA Resolution 55/25

² UNGA Resolution 55/255

³ UN Convention against Transnational Organized Crime, article 2, paragraph (a).

benefit.”³ An offence is 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; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (c) it is committed in one State but has substantial effects in another State.⁴

UNCTO stipulates that each Party to the Convention is under the obligation to criminalize, through legislative and other measures, the participation in an organized criminal group,⁵ the laundering of the proceeds of crime⁶, corruption⁷ and obstruction of justice.⁸ Each State Party is also under the obligation to establish its jurisdiction over the offences spelled out in the Convention when the offence is committed in the territory of that State Party; or when the offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.⁹ The convention contains provisions which reflect the principle of “*aut dedere aut judicare*” or obligation to extradite or prosecute, stipulating that each State Party shall establish jurisdiction over the offences of the Convention when the alleged offender is present in its territory and it does not extradite the offender, even if the alleged offender is one of its nationals.¹⁰

It is important to note that under the Convention, States Parties must carry out their obligations in a manner consistent with the principle of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.¹¹ It means that States Parties are under the obligation to respect international law, including the UN Charter and the 1982 Convention on the Law of the Sea.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

⁴ Ibid, article 3, paragraph 2.

⁵ Ibid, article 5.

⁶ Ibid, article 6.

⁷ Ibid, article 8.

⁸ Ibid, article 24.

⁹ Ibid, article 15, paragraph 1.

¹⁰ Ibid, article 15, paragraph 3 and paragraph 4.

¹¹ Ibid, article 4, paragraph 1.

The Protocol against Trafficking in Persons (TIP) defines "Trafficking in Persons" as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹² Thus, the definition consists of two components, namely the act of trafficking, and the means used for trafficking.

It is worth noting in this regard that the Protocol stipulates that the consent of a victim of trafficking in persons shall be irrelevant where any of the means of trafficking as set forth earlier have been used.¹³ It provides further that if the victim is a child, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation, shall be considered "trafficking in persons", even if this does not involve any of the means of trafficking.¹⁴

One of the main features of the Protocol is the obligation of each State Party to criminalize trafficking in persons as defined in the Protocol, including attempting to conduct trafficking in persons, participating as an accomplice in the conduct of trafficking in persons and organizing or directing the conduct of trafficking in persons.¹⁵

The TIP Protocol contains comprehensive provisions aimed at preventing and combating trafficking in persons, protecting victims of trafficking in persons and promoting international cooperation. The Protocol also contains a saving clause, stipulating that the Protocol must not affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law. The Protocol also prohibits discriminatory treatment against the victims of trafficking in persons.¹⁶

¹² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Crime, article 3(a).

¹³ *Ibid*, article 3(b).

¹⁴ *Ibid*, article 3(c).

¹⁵ *Ibid*, Article 5, paragraphs 1 and 2.

¹⁶ *Ibid*, article 14, paragraphs 1 and 2.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime

Smuggling of migrants, or people smuggling, is defined in the Protocol against Smuggling of Migrants as 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.¹⁷ This Protocol is aimed at the prevention, investigation and prosecution of the smuggling of migrants and other related offences listed in the Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.¹⁸ The Protocol also contains provisions aimed at promoting cooperation among State Parties to prevent and combat smuggling of migrants while protecting the rights of smuggled migrants.¹⁹ Another important provision is the one stipulating that migrants must not become liable to criminal prosecution under the Protocol for the fact of having been the object of smuggling of migrants.²⁰

The Protocol provides an obligation for each State Party to adopt legislative measures to criminalize the intentional commission of smuggling of migrants, and of producing fraudulent travel or identity documents, procuring, providing or possessing such documents to enable the smuggling of migrants.²¹ The same obligation applies to the intentional commission of conducts that enable a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State.²²

The Protocol contains special provisions on smuggling of migrants by sea. It also contains provisions on prevention, protection and assistance measure and returns of smuggled migrants.

As in the case of the Protocol on Trafficking of Persons, the Protocol against

¹⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Crime, article 3(a).

¹⁸ *Ibid*, article 4.

¹⁹ *Ibid*, article 2.

²⁰ *Ibid*, article 5.

²¹ *Ibid*, article 6, paragraphs 1 (a) and (b).

²² *Ibid*, article 6, paragraph 1(c).

the Smuggling of Migrants contains a saving clause stipulating that nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.²³ The Protocol also prohibits discriminatory treatment against the victims of trafficking in persons.²⁴

Differences between “trafficking in persons” and “smuggling of migrants”

It is to be noted that the term “human trafficking” and “people smuggling” are often used to address the same issue. However, from the definition of the two as contained in their respective Protocols, there are certain differences. The main features of trafficking in persons are the means being used which includes the threat or use of force, fraud, deception and the purpose of the offence, i.e. the exploitation of the victim. Such an exploitation will continue even after the persons have arrived in the country of destination. In people smuggling, the smuggler acts on the voluntary request of the person who wants to be smuggled. and on arrival in the country of destination, the smuggled person is free.

In practice, however, it is not easy to clearly establish the differences between trafficking in persons and smuggling of migrants. The understanding of the meaning of trafficking in persons and smuggling of people or migrants sometimes merge. As has often happened, a migrant worker who voluntarily requests to be smuggled to another country may become a victim of abuse and exploitation by the group or syndicate that smuggled the migrant and by elements in the country of destination. In order to distinguish between the two categories, it is necessary to establish the identification of the victim and the facts surrounding transportation and transfer of the victim, so as to be able to establish which country is responsible for the victim and for taking the follow-up actions.

Protocol against the Illicit manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime

²³ Ibid, article 19, paragraph 1.

²⁴ Ibid, article 19, paragraph 2.

A third protocol adopted by the UN General Assembly deals with the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.²⁵ This Protocol was adopted in light of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition due to the harmful effects of such activities on the security of each State, the region and the world as a whole, endangering the well-being of the peoples, their social and economic development and their right to live in peace. The Protocol defines "illicit trafficking" as the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the State Parties concerned does not authorize it in accordance with the terms of the Protocol or if the firearms are not marked in accordance with the provisions of the Protocol.²⁶

The Protocol contains provisions on the obligation of each State Party to adopt legislative measures to criminalize the intentional commission of illicit manufacturing of firearms, their parts and components and ammunition; illicit trafficking in firearms, their parts and components and ammunition, and falsifying or illicitly obliterating, removing or altering the marking(s) on firearms.²⁷ The obligation also includes the criminalization of an attempt to commit or participate as an accomplice in the said offences²⁸ and the criminalization of organizing, directing, aiding, abetting or counseling the commission of the said offences.²⁹

Geographical area of international organized crime

Discussing maritime security and transnational organized crime in Southeast Asia means discussing trafficking in persons, smuggling of migrants, illicit trafficking in firearms, sea piracy and sea robberies, money laundering, illegal fishing and illegal logging involving a vast area of sea or waters, i.e. territorial seas, archipelagic waters, economic zones, high seas and straits used for international navigation. The geographical fact that Indonesia is an archipelagic State situated between two oceans and two continents, straddling across important

²⁵ UNGA resolution 55/255.

²⁶ *Ibid*, article 3(e).

²⁷ *Ibid*, article 5, paragraphs 1(a), 1(b) and 1(c).

²⁸ *Ibid*, article 5, paragraph 2(a).

²⁹ *Ibid*, article 5, paragraph 2(b).

sea lines of communication, has made Indonesia and this sub-region highly vulnerable to transnational organized crime. In this regard, the Straits of Malacca and Singapore have added a security dimension to the problem, including the possibility of trafficking in nuclear materials and nuclear terrorism.

Indonesia and maritime security issues

Being an archipelagic State with an extensive maritime area of 5,9 million square kilometers, Indonesia's top priority in maritime security is to defend and maintain its national unity and integrity, its national sovereignty and sovereign rights and to maintain peace and stability in the region on the basis of international law, and in particular the UN Charter and the 1982 Convention on the Law of the Sea. In this context, Indonesia attaches great importance to transnational organized crime such as trafficking in persons, smuggling of migrants, sea piracy and robberies, terrorism, illicit trafficking of arms, illicit trafficking in drugs and illegal logging and illegal fishing. Security threats in connection with disputed maritime area are also of great importance to Indonesia.

While transnational organized crime encompasses a wide range of crime, for the purpose of the discussion, this paper focuses primarily on the issue of trafficking and smuggling in person in the context of maritime security. and as maritime security in the Malacca and Singapore Straits has a particular characteristics, this deserves special attention.

Trafficking in persons and maritime security

Admittedly it is difficult to establish accurate data on the victims of trafficking in persons. Approximately 2,5 million persons are trafficked globally every year.³⁰ The victims are 80% women and girls. Most of the victims are trapped by coercive means into sexual exploitation, forced labour, slavery and trade in human organs. The United Nations estimates that 200,000 women are trafficked annually in Southeast Asia. Human trafficking and people smuggling have become a very lucrative business for the traffickers and smugglers. The big profit gained from their operation is partly used to finance their future operation. Human trafficking and people smuggling is a low risk operation as it is not easy to detect and apprehend the perpetrators. Trafficking in persons and smuggling of migrants are violations of basic human rights, and a threat to security.

Some of the causes of trafficking in persons are poverty, lack of job opportunities, regional imbalances, economic disparities, rising demand for labour and construction workers elsewhere, high demand for prostitutes in destination countries, profitability in trafficking, abuses by employment agencies, presence of organized criminal gangs, lack of adequate legal protection under national laws, and ineffective law enforcement.

Indonesia is a source, transit and destination country in the trafficking in persons. According to the UN Office on Drugs and Crime (UNODC), as a country of origin, Indonesia falls under the category "medium", and as a transit and destination country it falls under the category "low".³¹ Women, children and men are being trafficked from Indonesia to Malaysia, Saudi Arabia, Kuwait, United Arab Emirates, Hongkong, Taiwan, Japan and South Korea for labour and sexual exploitation, slavery and other types of forced labour as in plantations and construction work. Indonesia, as well as some other Southeast Asian countries are transit countries, especially for trafficking and smuggling of persons to Australia from the Middle East, the Sub-continent and Southeast Asia. As a country of destination, persons are being trafficked to Indonesia from China, Thailand, Taiwan, Usbekistan, the Netherlands, Poland, Russia, Venezuela, Spain and Ukraine, mostly for sexual exploitation.

The new modality used by the traffickers for trafficking Indonesian women includes disguised cultural missions (Japan and Europe), abuse of status of religious missions (United States) and the use of non-traditional routes such as entries to the United States via China (United States).³²

In the 2007 Report of the US State Department on Trafficking in Person, Indonesia is placed in the so-called "Tier 2", under which category the Indonesian Government is considered as not fully complying with the minimum standards for the elimination of trafficking, but "it is making significant efforts to do so". This observation indicates progress compared to the previous year which placed Indonesia in the category of "Tier 2 Watch List".³³

According to the report, a significant number of Indonesian women who go overseas each year to work as domestic servants are subjected to exploita-

³⁰ 2007 Report of UN Office on Drugs and Crimes (UNODC)

³¹ UNDOC "Trafficking in Persons : Global Pattern 2006", April 2006, Appendix 6.

³² Information gathered from Indonesian diplomatic missions abroad.

³³ 2007 Report of the US Department of States on Trafficking in Persons.

tion and conditions of involuntary servitude in Malaysia, Singapore, Saudi Arabia, Japan, Syria, Kuwait and Hongkong. Indeed, an alarming number of Indonesians trafficked to Malaysia and Saudi Arabia are subjected to severe physical and sexual abuse. Even worse, some of them ended in death, with no satisfactory judicial proceeding to punish the perpetrators. These unfortunate incidents have often triggered popular protests in the streets of the source country and raise tension in bilateral relations that have security implications.

One of the challenges faced by the Indonesian Government is how to deal effectively with migrant workers recruiting agencies – whether licensed or unlicensed – that in practice engage in trafficking leading to all forms of exploitation such as abusive labour employments, debt bondage and sexual exploitation.

National efforts to combat trafficking in persons

Indonesia has made serious efforts to combat trafficking in persons in the areas of law (legislation, ratification of relevant international legal instruments, law enforcement), prevention and protection. One of the most important steps is the adoption of a comprehensive law on anti-trafficking in persons in April 2007 which imposes stiff prison sentences and fines for traffickers.³⁴ The law criminalizes the transportation of persons to the territory of Indonesia for exploitation in Indonesia or in another country,³⁵ and the transportation of Indonesian citizens to another country for the purpose of exploitation.³⁶ The law also criminalizes the adoption of a child with the purpose of exploitation³⁷ and the transportation of a child into Indonesia or from Indonesia to another country for the purpose of exploitation.³⁸ Likewise, the law criminalizes the abuse of authority by government officials that have led to trafficking in persons³⁹ and criminalizes trafficking by corporate entities like recruitment and placement agencies.⁴⁰

³⁴ Law No. 21 of the year 2007 on Trafficking in Persons.

³⁵ *Ibid*, article 3.

³⁶ *Ibid*, article 4.

³⁷ *Ibid*, article 5.

³⁸ *Ibid*, article 6.

³⁹ *Ibid*, article 8.

⁴⁰ *Ibid*, article 13.

There are other related legislations, *inter alia* the law on child protection with a maximum jail sentence of 15 years for trafficking children⁴¹, the law on the eradication of domestic violence,⁴² and the law on the protection of witnesses and victims of trafficking in persons.⁴³

Indonesia is at present reviewing the National Plan of Action on the Elimination of Child Commercial Sexual Exploitation⁴⁴ and the Plan of Action on the Elimination of Trafficking in Women and Children⁴⁵ which will expire at the end of 2007. Indonesia has also taken effective law enforcement measures against traffickers. Indonesia is finalizing the legal process towards the ratification of the UN Convention against Transnational Organized Crime and its three Protocols. The year 2006 shows a significant increase in the number of arrests (29%), prosecution (87%) and sentencing (112%). Indonesia has also improved efforts in the protection of victims and in taking preventive measures.

Regional cooperation in combating transnational crime

Transnational organized crime, including trafficking in persons and smuggling of migrants, is considered to be a serious problem that has a social-economic impact on States in the region. It has also maritime security implications at the regional and international level. No single country can deal with the challenges of transnational organized crime. Regional and international cooperation are therefore imperative.

The fight against transnational organized crime is reflected in various regional agreements and arrangements and cooperation, including the so-called Bali Process and the ASEAN Regional Forum (ARF) as well as national legislations. International organizations, in addition to the United Nations, are also deeply involved in combating international organized crime. They include the International Organization for Migration (IOM) and the International Maritime Organization (IMO).

For these reasons, Indonesia has actively pursued regional cooperation, including in the context of Regional Consultative Processes (RCP's). As early

⁴¹ Law No. 23 of the Year 2002.

⁴² Law No. 23 of the Year 2004.

⁴³ Law No. 13 of the Year 2006.

⁴⁴ Presidential Decree No. 87 of the year 2000.

⁴⁵ Presidential Decree No. 88 of the Year 2002.

as 20 December 1997 ASEAN issued the ASEAN Declaration on Transnational Crime that expressed concern about the pernicious effects of transnational crime, such as terrorism, illicit drug trafficking, arms smuggling, money laundering, trafficking in persons and piracy, on regional stability and development, the maintenance of the rule of law and the welfare of the region's people. ASEAN decided to strengthen the commitments to cooperate at the regional level in combating the transnational crime and to convene at least once every two years, the ASEAN Ministerial Meeting on Transnational Crime.

In 2002 ASEAN adopted the ASEAN Plan of Action to Combat Transnational Crimes which recognizes human trafficking as one of the eight transnational crimes to be dealt with by ASEAN Member States. In a Joint Communique of the Fifth ASEAN Ministerial Meeting on Transnational Crime (AMM-TC) held in Ha Noi on 29 November 2005, the Ministers expressed their concern over the growing challenges of terrorism and other international crimes, including illicit drug trafficking, trafficking in persons, money laundering, arms smuggling, sea piracy, international economic crime and cyber crime. They endorsed the revised Work Program to implement the 2002 ASEAN Plan of Action to Combat Transnational Crime.

Trafficking in persons is also the subject of continued consideration in the ASEAN Senior Official Meeting on Transnational Crimes (SOM-TC) and ASEAN Ministerial Meeting on Transnational Crime (MM-TC). ASEAN Regional Forum (ARF), comprising ASEAN Member States and its Dialogue Partners has also been very active in addressing maritime security and transnational crime. For over a decade, ARF has regularly discussed and taken cooperative efforts to address maritime security issues, including through the holding workshops, roundtable discussion and seminars. The latest of such activities is the convening of ARF Roundtable Discussion on Stocktaking Maritime Security Issues in Bali on 23-25 August 2007.

To promote concerted regional cooperation and actions to disrupt people smuggling and trafficking in the region, Indonesia and Australia took a joint initiative to convene the Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (BRMC) known as the Bali Process, Co-Chaired by Indonesia and Australia and held in 2002 and 2003.

The Bali Process has 42 participants from Asia and the Pacific representing governments including those from outside the region, international organiza-

tions (such as IOM, UNHCR, ICRC, UNDP, UNODC, ILO, ADB, World Bank) and non-governmental organizations.

The objectives of the Bali Process, as agreed at the two conferences are:

- the development of more effective information and intelligence sharing;
- Improved cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks;
- enhanced cooperation on border and visa system to detect and prevent illegal movements;
- increased public awareness in order to discourage these activities and warn those susceptible;
- enhanced effectiveness of returns as a strategy to deter people smuggling and trafficking victims;
- cooperation in verifying the identity and nationality of illegal migrants and trafficking victims;
- the enactment of national legislation to criminalize people smuggling and trafficking in persons;
- provision of appropriate protection and assistance to the victims of trafficking, particularly women and children;
- enhanced focus on tackling the root causes of illegal migration, including by increasing opportunities for legal migration between States; and
- Assisting countries to adopt best practices in asylum management, in accordance with the principles of the Refugees Convention.

The mechanism to achieve the objectives of the Bali Process include Senior Officials Meetings, Ad Hoc Expert Group under the coordination of Thailand and New Zealand, Steering Group Meetings and workshops. One of the recent important workshops is the Workshop on Human Trafficking: Victims Support, held in Bali on 7-9 November 2006. The Workshop provided a forum to exchange information on government policy and best practices in managing victims of human trafficking with emphasis on how the destination States can support victims; how destination and source States ensure victim support during repatriation arrangements; and what constitutes best practices in the re-integration of victims in the home countries.

Efforts to deal with people smuggling and human trafficking in person as

well as other transnational crimes have gained further momentum recently with the convening of the Third Bali Process on 14-15 April 2009 in Bali. The Ministerial Conference was attended by 31 Asia-Pacific countries as well as nine countries from outside the region and several international organizations as observers. Some of the important results of the Ministerial Conference, as expressed in the Co-Chairs' Statement are as follows :

- The Ministers acknowledged that people smuggling and trafficking, as well all forms of transnational crime, continued to present a threat to the integrity of regional border security processes and procedures, and undermines the ability of regional States to manage migration.
- There is a need for strong national legislation criminalizing these activities, coupled with strong law enforcement mechanism; it was also agreed that victim-centered approach to law enforcement is important.
- It was affirmed that the root causes of movements within the region, particularly those involving people smuggling and trafficking in person, were numerous and multi-dimensional;
- The Ministers agreed that the Ad Hoc Group (AHG) mechanisms used during the establishment phase of the Bali Process be retasked to develop regional responses to the current situation concerning the irregular movement of people in the Asia-Pacific region on a case-by-case basis upon the request of affected countries.

Maritime security issues in the Malacca and Singapore Straits

Threats to security

Security threats in the Malacca and Singapore Straits have always been a source of concern on the part of the littoral and the user's States in general. Those threats include piracy/robbery at sea, hijacking, kidnapping for ransom, arms smuggling, drugs and human trafficking, maritime terrorism or "political piracy" and other transnational crimes. The prospect of terrorist attacks such as those against Achile Lauro, USS Cole and the French supertanker Limburg and attacks involving weapons of mass destruction (WMD) in the waterway, are real. These developments have raised serious concern not only among the coastal States bordering the Straits (Indonesia, Malaysia and Singapore), but also the user States (e.g. Japan, China, South Korea, India, the United States).

The Malacca and Singapore Straits are a narrow 600 km stretch of water

with its widest point extends 350 km and its narrowest point extends less than 3 km. According to the International Maritime Organisation (IMO), at least 50,000 ships sail through the Malacca strait every year, transporting oil needs of China and Japan (80% Japan's and China's oil needs respectively) and about 30% of the world's trade goods. In fact, the Straits are the passageway to a third of the world's crude oil. Thus the Straits which constitute the second busiest shipping lane in the world have quite a significant strategic value. Apart from its economic dimension, the political and security importance of the Straits has notably increased since the 9/11 attacks against the United States and the ensuing war on terrorism.

Indeed, pirates or sea robbers stalking ships in the Straits have escalated their tactics and capabilities, armed with machine guns, rocket-propelled grenades and other weapons ready to board, kill crews, steal cargo and even hijack and resell ships.⁴⁶ This development has raised the fear that terrorists may infiltrate their ranks and use hijacked ships as a platform for attacks. So far there is no evidence that terrorists have joined pirates/sea robbers in the pursuit of their political goals by targeting ships in transit through the Malacca and Singapore Straits. It is however critical not to preclude the possibility that terrorism and piracy/sea robbery might someday merge, which certainly will not only cause more innocent human casualties but will also pose serious threats to the security and the economic wellbeing of the littoral States and in turn, threaten regional stability.

Combating piracy/sea robbery and maritime terrorism

One would recall that in 2004, Admiral Thomas Fargo, Commander of the US Pacific fleet in his testimony to the U.S. House of Representatives Armed Services Committee had suggested that US troops might assist in patrolling the Malacca Strait to deter terrorists who might target shipping in the Strait, under the so-called Regional Maritime Security Initiative (RMSI). Indonesia and Malaysia immediately expressed their objection to the idea proposed by Admiral Fargo.

This proposal also provoked public rejection especially in Indonesia and Malaysia. Deploying foreign forces to maneuver in the waters in the Strait, which are parts of the territorial sea and economic zone of the Littoral States,

⁴⁶ WorldNetDaily, 31 July 2005, <http://wnd.com/news>.

infringe upon the sovereignty and sovereign rights of those States and, in effect internationalize the Straits. Another reason for opposing the deployment of foreign forces including the U.S. naval forces in the Strait is the fear that it will provoke a backlash from radical elements in the littoral States and attacks from Al Qaeda and Jemaah Islamiyah terrorists already operating in Southeast Asia.

Under the terms of the 1982 UN Convention on the Law of the Sea (UNCLOS 1982), Malacca and Singapore Straits fall under the category of "Straits used for international navigation" (Part III). Article 34 (1) of UNCLOS 1982 provides :

"The regime of passage through straits used for international navigation established in this Part shall not in other respect affect the legal status of the waters forming such strait or the exercise by the States bordering the strait of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil."

This provision means that foreign ships and aircraft may pass through or overfly the Malacca Strait only in the exercise of the right of transit passage and overflight which under Article 38 (1) and Article 44 of UNCLOS 1982 shall not be impeded, hampered or suspended. However, the exercise of the right of transit passage of foreign ships and aircraft is subject to specific duties as stipulated in Article 39 of UNCLOS 1982 and the laws and regulations of the littoral States as specified in Article 42. Foreign ships may also pass through the Malacca Strait in the exercise of the right of innocent passage which shall not be suspended as provided in Article 45 of UNCLOS 1982.

While one has to recognize that among the States bordering Malacca and Singapore Straits there have always been some differences in *nuance*, it is also a fact that the three littoral States – Indonesia, Malaysia and Singapore – at early stage established their responsibility in the safety of navigation and the protection and preservation of the marine environment in the Straits. On 16 November 1971, Indonesia, Malaysia and Singapore issued a Joint Statement which states :

1. The three governments agreed that the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal States concerned;
2. The three governments agreed on the need for tripartite cooperation on the safety of navigation in the two straits;
3. The three governments agree that a body for cooperation to coordinate

efforts for the safety of navigation in the Straits of Malacca and Singapore be established as soon as possible and that such body should be composed of only the three coastal States concerned;

4. The three governments also agreed that the problem of the safety of navigation and the question of internationalization of the straits are two separate issues;
5. The Governments of the Republic of Indonesia and of Malaysia agreed that the Straits of Malacca and Singapore are not international straits, while fully recognizing their use for international shipping in accordance with the principle of innocent passage. The Government of Singapore takes note of the position of the Governments of the Republic of Indonesia and of Malaysia on this point.
6. On the basis of this understanding the three governments approved the continuation of the hydrographic survey.

On 24 February 1977, Foreign Minister Adam Malik of Indonesia together with Foreign Ministers Tengku Ahmad Rithauddeen of Malaysia and Rajaratnam of Singapore, signed an agreement reaffirming the 1971 Joint Statement and their determination "to further promote the existing tripartite cooperation on enhancing safety of navigation and promoting close cooperation and coordination on anti-pollution policy and measures in the Straits of Malacca and Singapore".

In order to help the littoral States to promote safety of navigation and protection and preservation of the marine environment in the Malacca and Singapore Straits, Japan, as a user State, established the Malacca Strait Council which provide a revolving fund for combating marine pollution from ships in the Straits.

While the interest of the littoral States initially was driven by the desire to ensure the safety of navigation and protect the marine environment in the Straits, it is undeniable that the Straits constitute a part of an area where the coastal States have a major security concern, as evident in various ASEAN security instruments such as the 1971 Treaty on the Zone of Peace, Freedom and Neutrality in Southeast Asia (ZOPFAN), 1995 Southeast Asia Nuclear-Weapon-Free Zone (SEANWFZ), 1976 Treaty of Amity and Cooperation, and the recently adopted ASEAN Security Community as a part of the Bali Concord II.

The foregoing clearly indicates the determination of the three States bordering the Straits of Malacca and Singapore to forge coordinated efforts in dealing with safety of navigation and the protection and preservation of the

marine environment as well as the security in the Straits. In facing the escalating security threats in the Malacca and Singapore Straits, the littoral States already taken specific measures, e.g establishing a coordinated patrol codenamed "Operation Malsindo" established by their navies on 29 June 2004. Each navy has to operate within their respective territorial sea and Exclusive Economic Zone (EEZ). This operation has yielded some results. It is necessary to point out, however, that the arrangement whereby each navy operates within its national jurisdiction has in fact limited the effectiveness of "Operation Malsindo". The fact that no agreement has been reached on the delimitation of the territorial sea between Indonesia and Malaysia has further complicated the issue. Another limiting factor is the weaknesses in the coordination among relevant national agencies in the littoral States.⁴⁷

The seriousness of the littoral States in addressing the security issues in the Straits was evident in a tripartite meeting of the Foreign Ministers of Indonesia, Malaysia and Singapore held in Batam, Indonesia on 1-2 August 2005 to discuss maritime safety and security in the Straits of Malacca and Singapore. In the Joint Ministerial Meeting issued at the end of the meeting, the Ministers "reaffirmed the sovereignty and sovereign rights of the littoral States over the Straits of Malacca and Singapore. As such, the primary responsibility over the safety of navigation, environmental protection and maritime security in the Straits of Malacca and Singapore lies with the littoral States." They also expressed the need to address the issues of maritime security comprehensively, which includes trans-boundary crimes such as piracy, armed robbery and terrorism. The Ministers also recognized the need to address the issues of trafficking in persons, smuggling of people, smuggling of weapons and other trans-boundary crimes. To enhance the security aspect of the tripartite cooperation, the Ministers agreed to establish the Tripartite Technical Experts Group (TTEG) on Maritime Security, complementing the existing TTEG on Safety of Navigation.

The Ministers also acknowledged the role that user States and relevant international agencies could play in respect of the Straits and called upon them and the shipping community to assist the littoral States in the areas of capacity building, training and technology transfer, and other forms of assistance in ac-

⁴⁷ In the case of Indonesia, Djoko Sumaryono, former Commander of the Western Fleet of the Indonesian Navy wrote in *Kompas Daily* of 27 Mei 2005 that the role of BAKORKAMLA, the inter-agency body, has declined, especially following the separation of the Police from TNI armed forces.

cordance with UNCLOS 1982. While Japan has been for many years assisting the littoral States, the U.S., China and India have now provided assistance to the littoral States to deal with security issues in the Straits short of deploying their naval forces in the waterway, such as surveillance and other equipment, exchange of information and sharing of intelligence.

It is to be noted as well that the navy officers from Indonesia, Malaysia and Singapore as well as Thailand had a meeting in mid August 2005 in Batam to discuss ways to boost security in the Malacca and Singapore Straits. Admiral Tedjo Edhi, the Western Fleet Commander of the Indonesian Navy said that the main issue discussed during the meeting was the mechanism to allow the navy of one littoral States to engage in a "hot pursuit" from its territorial sea into the territorial sea of another littoral State.⁴⁸ This will make naval operation against piracy/sea robbery more effective. Other international and regional meetings and discussions addressing the problem of piracy/sea robbery and terrorism in the Straits of Malacca and Singapore have also taken place.

The triple issues of safety, security and environmental protection in the Straits have been the focus of efforts by the littoral States. The Jakarta Meeting on the Straits of Malacca and Singapore : Enhancing safety, security and environmental protection" was held in Jakarta on 7-8 September 2005. The meeting, organized by Indonesia, Malaysia, Singapore and International Maritime Organization (IMO) was attended by 33 government representatives from different regions and observers. The Meeting agreed *inter alia* that a mechanism be established by the littoral States to meet on a regular basis with user States and other stake holders to discuss issues relating to safety, security and environmental protection of the Straits. As a follow-up of the Jakarta Meeting, Malaysia, in cooperation with Indonesia, Singapore, and the IMO convened a meeting on "Enhancing Safety, Security and Environmental Protection" in Kuala Lumpur on 20 September 2006. At the Kuala Lumpur Meeting, security in the Malacca and Singapore Straits was given more serious attention, in addition to the issues of safety of navigation and the protection of the marine environment. The meeting appreciate the entry into force of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia.

It is heartening to note that all the efforts by the three littoral States have

⁴⁸ Jakarta Post Daily, 19 August 2005.

borne fruit. The number of seaborne attacks has gone down. In August 2006, the Loyd's Market Association's (LMS) Joint War Committee (JWC) revoked the Straits of Malacca and Singapore from its list of areas worldwide in jeopardy of "war, strike, terrorism and related perils". The revocation of the JWC listing is a testimony to the effectiveness of the measures implemented and the diligent efforts by the littoral States to create a better security environment all around in the maritime sector.⁴⁹

Further progress in combating piracy and sea robberies in the Malacca Straits have been made by the three littoral States. Attacks were dramatically down as a result of better cooperation among the littoral States. It is reported that according to the Malaysia-based International Maritime Bureau (IMB), in the year 2008 until September, there have been only two pirate attacks in the Straits.⁵⁰ But experts warned that unless vigilance is being maintained, a resurgence of piracy and sea robberies attacks will happen. They also believe that pirate attacks like on the sea near Somalia is unlikely. "It will not be easy for them because the governments in the region won't hesitate to take action".⁵¹ This positive development prevails in the first quarter of 2009.⁵²

Concluding observation

Transnational organized crime is a real challenge to maritime security in Southeast Asia, including in the Straits of Malacca and Singapore. It is a complex, multi-faceted problem driven by greed, regional economic imbalances, poverty, corruption, weakness of national institutions as well as political adventurism. No single country has the capability to address transnational crime alone. Regional and international cooperation is imperative. Efforts by the Southeast Asian countries and other stake holders have so far yielded a modest result. More comprehensive efforts to enhance the capacity to combat transnational organized crime are indeed necessary.

⁴⁹ Nazery Khalid, Research Fellow at Maritime Institute of Malaysia (MIMA), Revocation of the Straits of Malacca as a War Risk Zone Long Overdue, 10 August 2006.

⁵⁰ Agence France Press, 20 November 2008.

⁵¹ Noel Choong, Head of the IMBPiracyReportingCenter, as quoted by Agence France Press, *ibid*.

⁵² Kang Siew Li, "Straits of Malacca seeing drop in piracy attacks", *Business Times*, 19 January 2009.