

4-30-2008

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Muhammad Mustofa

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Recommended Citation

Mustofa, Muhammad (2008) "Bilateral Cooperation between Indonesia and Malaysia in Combating Transnational Crime," *Indonesian Journal of International Law*. Vol. 5: No. 3, Article 7.

DOI: 10.17304/ijil.vol5.3.180

Available at: <https://scholarhub.ui.ac.id/ijil/vol5/iss3/7>

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Bilateral Cooperation between Indonesia and Malaysia in Combating Transnational Crime*

Prof. Muhammad Mustofa**

Makalah ini membahas bahwa kerjasama bilateral antara Indonesia dengan Malaysia untuk mengatasi kejahatan transnasional atau kejahatan lintas wilayah (trans-border crime) pertama-tama harus didasarkan pada pemahaman akar masalah kejahatan-kejahatan lintas wilayah tersebut. Selain itu efektivitas kerjasama bilateral tersebut dapat terjadi bila memperhatikan aspek-aspek persamaan definisi kejahatan yang dipermasalahkan, adanya hukum yang melarang tindakan tersebut, pengakuan bukti kejahatan, perjanjian ekstradisi, dan jaringan informasi antar kedua negara.

Background

The development of technology and social change are consequences of human nature for its survival to cope with their environment. As a result, the activities of modern human beings are not limited only in their national territories, but also transgress the national boundary of their state. In an era now known as globalization, people activities globalize physically as well as perceptually. However, the globalization will be followed by the development of the dark-side nature of human being, i.e. crime, in

* Makalah ini merupakan modifikasi dari makalah yang telah disampaikan pada Seminar Internasional Sebumi kerja sama antara Universiti Kebangsaan Malaysia (UKM) dengan Universitas Indonesia di Kampus UKM, 15-16 Desember 2005. Terima kasih kepada Herlina Permatasari yang telah membantu mengedit bahasa Inggrisnya.

** Guru Besar pada Fakultas FISIP Universitas Indonesia, Depok. Memperoleh gelar Sarjana Muda Ilmu Sosial dan Doktorandus (Drs.) Kriminologi dari Universitas Indonesia. Pada tahun 1990, penulis mendapatkan gelar MA in Criminology dari University of Melbourne, Australia. Gelar Doktor Sosiologi dari Universitas Indonesia Beliau dapatkan pada tahun 1998.

which its incidents also transgress the national boundary of the state. Particular forms of crimes previously considered as conventional crimes and a matter of internal security affair of a state, have become international issues for they involve more than one country jurisdiction. According to Nelken (1997) "... globalization processes are creating new opportunities for transnational corporate and organized crime - opportunities that territorially-bound state criminal justice agencies are poorly placed to stem"¹.

The state jurisdiction borders between Indonesia and Malaysia have been affected by such evolution of crime. The incident of crimes such as piracy, illegal logging, human trafficking and human smuggling, drug trafficking are now the concern of both countries in many aspects. This paper will deal with such an issue, especially to discuss how to deal with transnational crimes occurred in the state jurisdiction between Indonesia and Malaysia.

It is assumed that in order to combat crime effectively, we should understand the determinant factors of the crime comprehensively. Based on such understanding, the strategy to deal with the transnational crime problem could be drawn systematically as well as rationally. Thus in line with such assumptions, the discussion will be divided into two parts: understanding transnational crime, and requirements for an effective bilateral cooperation in dealing with transnational crime.

Understanding the nature of transnational crime

The incidents of transnational crime involving Indonesian and Malaysian offenders are better defined as transborder crime. The category of transnational crime, according to Castells², generally

¹ D. Nelken (1997), *"The Globalization of Crime and Criminal Justice: Prospects and Problems"*, *Current Legal Problems*, 50.

² M. Castells (1988), *The Information Age: Economy, Society and Culture: Vol. III-End of Millennium*, Oxford: Basil Blackwell, pp. 168-180.

includes the cross-border smuggling of drugs, weapons, radioactive materials, information, art, cars, and other stolen goods; trafficking in illegal immigrants, women and children (often to work in the sex industry), and body parts; counterfeiting, international fraud, and other financial crime; and espionage, terrorism, extortion, and kidnapping. In the border regions between Indonesia and Malaysia, there are many forms of trans-border crimes i.e. piracy, illegal logging, people trafficking, people smuggling, arms weapon smuggling, money laundering, cyber crimes etc.

Basically, most of the transborder crimes are conventional crime that is that such behaviors are considered as crimes in the criminal code of each country and exist in each country's own jurisdiction. When crimes committed involve legal jurisdiction of both countries, such crimes fall under the category of transborder crime. As Sacco³ stated, in terms of their existence, the types of transborder crimes could be categorized into two different characteristics. Firstly, the trans-border crimes that are more likely visible and relatively easy to be detected, such as piracy, illegal logging, people smuggling or trafficking, and other forms of smuggling. Secondly, the less visible crimes which are more difficult to be detected, such as money laundering, and cyber crimes.

The trans-border crimes tend to be committed organizationally, thus one may define such crime as transnational organized crimes. Organized crimes have a distinctive feature that is criminals establish enterprise group whose ultimate purpose is personal economic gain through illegitimate means. Siegel (2000) defined organized crime as:

"the ongoing criminal enterprise groups whose ultimate purpose is personal economic gain through illegitimate means.

³ J Sacco, V.F. (2002) *"Organized Crime"*, J. Dressler (Editor in Chief), *Encyclopedia of Crime and Justice*, Second Edition, Volume 3, New York: Macmillan Reference USA.

Here a structured enterprise system is set up to continually supply consumers with merchandise and services banned by criminal law but for which a ready market exists: prostitution, pornography, gambling, and narcotics. The system may resemble a legitimate business run by an ambitious chief executive officer, his or her assistants, staff attorneys, and accountants, with thorough, efficient accounts receivable and complaint department".⁴

Transborder organized crime activities then are taken to be the work of local and regional criminal networks. According to Karstedt (2000), the criminal network of transborder crime, "effectively couple (pre-modern) local identities and kinship affiliations with (post-modern) entrepreneurial organization and know-how"⁵.

The incident of transborder crime

In this part some of the transborder crime incidents will be described as an exemplar of the problem that needs to be solved effectively. The description is based on secondary information, primarily the publication of Indonesian news media. Of course such information could be regarded as valid. However, based on information published by news media, we might identify that there are some problems concerning transborder crime that affect the interest of Indonesia as well as of Malaysia.

People smuggling

People smuggling, especially children and women smuggling has become an international problem.⁶ Such a problem is in

⁴ L. Siegel.(2000) *Criminology*. 7th ed. Stamford; Wadsworth, p. 409.

⁵ Karstedt, S., (2000), "*Knights of Crime: The Success of 'Pre-Modern' Structures in the Illegal Economy*", in S. Karstedt and KD. Bussmann (eds), *Social Dynamics of Crime and Control: New Theories for a World in Transition*, Oxford: Hart.

⁶ Farooq Azam (2004), "*The Global Challenge of Human Trafficking & Smuggling*". Resource Material. Tokyo: Unafei Series No. 62, Februari.

contradiction with humanity values and fall under the issue of human rights offence. According to Supplementary Protocol of the Palermo Convention to the Article 3⁷, people smuggling is defined as follows:

- a) "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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 as 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.
- b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) has been used.
- c) The recruitment, transportation, transfers, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in person" even if this does not involve any of the means set forth in subparagraph (a) of this article".

Base on children and woman smuggling cases involving Indonesian victims, Rosenberg⁸ stated that the purposes of the offenders were to exploit the victims to become illegal workers, prostitutes, slaves, and child-force labour. People smuggling problem, which becomes the concern of Indonesia and Malaysia governments is the issue of Indonesian illegal workers in Malaysia. Labor force smuggling as a transborder crime involves Indonesia and Malaysian offenders. They are illegally sent laborers (usually unskilled labors) from Indonesia to Malaysia who will be employed

⁷ Unicri. (2004) *Trafficking of Nigerian Girls to Italy*. Unicri.

⁸ R. Rosenberg, (ed.) (2003). *Perdagangan Perempuan dan Anak di Indonesia*. Jakarta: ICMC.

in plantation fields or at construction sites. The mode of operations of this type of crime can be categorized into three ways. First, Indonesia offenders smuggle laborers via small boats and enter the Malaysian territory illegally. The smuggled laborers are then picked up by the Malaysian counterpart and handed over to the black labor market. The laborers have no appropriate documents for international transportation, such as passports, visas and/or working permit visa. The second way involves the offenders smuggling the laborers into Malaysian territory with fake passports and fake visas. In the third way, the offenders send the laborers legally into Malaysian territory, with legal travel documents but on tourist not working visas. The laborers then are employed illegally.⁹ The number of the Indonesia illegal workers in Malaysia is about 700,000 people.¹⁰

Piracy

Piracy in Malacca strait is another type of transborder crime regarded by the shipping industry as the most serious. Southeast Asia is regarded as a "piracy risk area", especially the Strait of Malacca and the Singapore Strait. The offenders are suspected to be mostly Indonesians, because after they execute a crime, they take flight into Indonesian territory.¹¹ However, Kompas Daily News reported that fishing boats used to pirate a barge *Kuroshio* in March 2005 in Malacca Strait were suspected as Malaysian boats and registered in Malaysia.¹²

The International Maritime Bureau reported that there is a trend in the increasing number of piracy in the Strait of Malacca. In 2002

⁹ M. Mustofa (2000), "Transnational Organized Crime: An Indonesia Perspective", Asia Crime Prevention Foundation, Annual Report.

¹⁰ Kompas.Com. Updated: October 29, 2004.

¹¹ J. Vagg, (1995) "Rough Seas? Contemporary Piracy in Southeast Asia", British Journal of Criminology, Vol. 33, No. 1.

¹² Kompas, Daily, March 18, 2005.

there were 370 incidents reported, and in 2003 it increased into 445 incidents. Indonesian authority criticizes that these piracy incident number is exaggerated. Based on Indonesia figure, during the first semester of 2004 Department of Transportation Affairs of Indonesia recorded only 10 incidents of piracy in Indonesia sea territory, while the IMB recorded 50 incidents.¹³ The discrepancy of the piracy figure might be due to the differences in defining the piracy. Legally, there is a distinction between piracy and sea robbery in Indonesia.

Early 2008, ICC Commercial Crime Service of International Maritime Bureau¹⁴ revealed that even though reported piracy incidents in 2007 internationally rose 10 % compared to the previous year, the reported incidents of piracy in Malacca Straits have continued to drop since 2004. The decline of reported incidents of piracy in this area was due to the Indonesian authorities being extremely vigilant. However, there is a question concerning future development. Since the declining incidents of piracy in this area were simply to be supported mainly by the Indonesian authorities, such a success does not reflect the result of bilateral cooperation between Indonesia and Malaysia yet. In the future, for an effective and sustainable result in dealing with piracy problem in that area, joint operations between Indonesia and Malaysia should be enhanced, because piracy incidents in this area are the concern of at least both countries.

In order to deal with piracy problems in South East Asia, one should understand its history. Young¹⁵ has asserted that "maritime

¹³ D. Rosadi, (2004) "*Meneropong Gangguan Keamanan di Selat Malaka*", *Jurnal Intelijen dan Kontra Intelijen*, Vol. 1, No. 3, Oktober.

¹⁴ <http://www.icc-ccs.org/main/publication.php/> *Reported piracy incidents rise sharply in 2007/ London: 9 January 2008*. Access date: 18 January 2008.

¹⁵ A.J. Young (2005), "*Roots of Contemporary Maritime Piracy in South East Asia*", in D. Johnson and M. Valencia (eds.), *Piracy in South East Asia*. The Netherlands; International Institute for Asian Studies; Singapore: Institute of South East Asian Studies, p. 2.

piracy has been a reality in South East Asia since at least the fifth century C.E. when Chinese pilgrims returning home from India via South East Asia mentioned piracy in the Strait of Malacca." In regard to contemporary maritime piracy in this area, Young states that it "has been heavily influenced by modern economic, political, and social forces".¹⁶

Johnson and Valencia (2005) have pointed that, "defining piracy becomes even more problematic when considered in the context of Southeast Asia".¹⁷ In this sense the United Nations Convention on the High Seas (1958) and Convention on the Law of the Sea (UNCLOS 1982), has defined piracy as "an attack mounted for private and on a ship, involving violence, illegal detention of persons or property, or the theft or destruction of goods."¹⁸ This definition could not be applied inside a territorial limit of a nation. The International Maritime Bureau defines piracy simply as "any act of boarding any vessel with the intent to commit theft or other crime and with the capability to use force for furtherance of the act".

The description above reveals that there are some problems posse in the incident of trans-border piracy. Besides the problem in defining piracy, there is a problem regarding state jurisdiction. The location of the incidents might be involving different jurisdiction. According to the UNCLOS (1982 UN Convention), crime committed in a territorial sea, contiguous zone, and the ZEE of a state is the jurisdiction of the relevant state to respond, While crime committed in high seas is an international problem. The state, which has a right to respond, will depend on the issue. As a result, to count the incident of piracy accurately there is a need to consider many aspects, as indicated by the aforementioned problems.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 7.

¹⁸ Vagg, J., *Loc. Cit.*

Illegal logging

Illegal logging in Indonesia territory is not simply an issue of illegally logged timbers and smuggling the logs into Malaysia, but also the issue of environmental problem and most importantly border territory. Based on Kompas Daily News documentation, since September 1999 to April 2005 there are 18 illegal logging cases in Indonesia. From the 18 cases, 5 of them involve Malaysia as a place of destination of illegally logged timbers.¹⁹ Another media has revealed that one of the legal enterprises involved with illegal logging was a Malaysian, name Wong Tse Thung. He was accused for having earned Rp. 344,23 billion each year from his illegal logging activities in Papua²⁰ Illegal logging activities by Malaysian in border territory between Indonesia and Malaysia in Borneo were also alleged that in order to cover up the offence, has removed the boundary pole from the original position to the jurisdiction side of Indonesia. Thus, in the issue of illegal logging, Indonesia most likely becomes the victim of the transborder crime.

General analysis

Each of the trans-border crimes described above posses different dimensions in terms of its causes and its legal consequences. Thus, each requires a different approach in its prevention strategy. However, there is one condition for successful prevention that could not be avoided, the cooperation between the relevant countries. Such cooperation could be conducted regionally, through ASEAN or bilaterally between Indonesia and Malaysia themselves.

To cope with the problem effectively, there is an urgent need to have comprehensive understanding of the crime causation in question. People smuggling, i.e. labor smuggling seems to be

¹⁹ Kompas Daily, 23 April 2005, page 9.

²⁰ Media Indonesia, Daily, March 30, 2005.

affected by the fact that there is a gap of prosperity between Indonesia and Malaysia. There are many job opportunities for plantation and construction workers in Malaysia. These types of job are no longer attracting local people in these areas, because it is considered as a lower job. In Indonesia, there is a large number of labor forces that are looking for jobs. Unfortunately there is a lack of job opportunities. As globalization resulted in seemingly borderless communication and movement of the people, thus Malaysia becomes an attractive country for Indonesia labor forces that need jobs. Findlay (2000) argued, "globalization has enhanced material crime relationships such that they must be understood on the same terms as any other significant market force"²¹. As the piracy problem involves, *inter alia*, the shipping industry, export and import trade, insurance, and banking, the understanding of market force in dealing with the piracy could not be avoided. The illegal logging in Indonesian territory has caused Indonesia as the most victimized party. Besides the effect of the globalization market force, the root of the problem in the illegal logging is posed by Indonesia for its lack of machinery in enforcing the law.

Requirements for effective cooperation in dealing with trans-border crime

For effective-operational action in dealing with the transborder crime, there are some problems that should be overcome.

1. There should be a common definition of the crime in question, because distinct legal definitions of transborder crime might limit the cooperation
2. Each country should have legal regulation, which criminalizes accessory offences that support the transborder crime.
3. There should be an extradition agreement between the two countries.

²¹ Findlay, M. *Op. Cit.* p. 1.

4. There should be information networks and information exchange in terms of the trans-border crime, as well as the accessory offences.
5. There should be an acknowledgment of the legal evidence provided by any party, because distinct legal systems might limit the cooperation.

Conclusion

Based on the general analysis above, it seems that the causes of trans-border crime affected Indonesia and Malaysia are multidimensional. Such an analysis should be considered as a tentative one, because it is simply based on secondary data. To understand the problem comprehensively, which is important for the prevention strategy, a joint research between Indonesia and Malaysian academia is suggested. Such research should be conducted by academia that hopefully will be able to collect more valid data through a rigorous methodology. The research results might relatively be objective, since academics are tightly bound by their scientific integrity.

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