

proceeding



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DISASTER MANAGEMENT

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THE ANALITICAL COMPARATIVE OF STRATEGY ON DISASTER MANAGEMENT INDONESIA-JAPAN IN THE POST- EARTQUAKE AND TSUNAMI

Galuh Dian Prama Dewi, MA

Universitas Respati Yogyakarta

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Abstract

This paper will explain about the experiences of Indonesia and Japan in the disaster management of the Earthquake and Tsunami of 2004 and 2011. The analysis will be focused on disaster management and emergency response in the pre-disaster and post-disaster. In our opinion, the countries has an interest in the effort to create a strategy on disaster management. For those countries that prioritize cooperation as a strategic way in disaster management, humanitarian aids become a tool of diplomacy to save life the victims, providing the necessary assistance to human, implementing the rehabilitation and reconstruction work, preparing for risks of natural disasters, and reducing disaster losses. In order to achieve these goals, humanitarian aids require professional activities from the governments and individuals. In the case of a natural disaster, both government and individuals are responsible to support and rebuild the society after the disasters have occurred include preparing for a disaster before it happens and performing the disaster response.

“The Analitical Comparative of Strategy on Disaster Management Indonesia-Japan in the Post-Eartquake and Tsunami” aims to find similarities and differences between Indonesia and Japan in the strategy on disaster management, success and failure of implementation of the strategy.

This paper will be divided into three parts: First, elaborate the meaning of disaster management and strategy on disaster management. Secondly, the similars and differences strategy on disaster management between Indonesia and Japan. The author will use the disaster management cycle to analyze the strategies used by Indonesia and Japan in disaster management. Thirdly, in closing the author will present the recommendation for the governments and individuals / groups.

Key Words : Disaster Management, Disaster Management Cycle, Humanitarian Aids

Introduction

The challenge for the countries in the face of disaster in the modern era is disaster management. Geological and meteorological disasters / hidrometerologi with various types such as earthquakes,

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tsunamis, floods, volcanic eruptions, hurricanes, landslides, droughts have occurred in many countries in the world - Asia, North America, Africa, Europe. In fact, 90% of natural disasters in 2011 took place in Asia¹ - such as India, China, Japan, Bangladesh, Vietnam, Philippines, Cambodia, Thailand and Indonesia.

Indonesia and Japan is located in the earth vulnerable to natural disasters. Geographically, Indonesia is located between three tectonic plates (World Ring of Fire): Indo-Australian Plate, Eurasian Plate and the Pacific. Japan is also located in the World Ring of Fire. This geographical condition cause Indonesia and Japan to be an “cartilage” area to earthquakes. Aceh’s earthquake in 2004 and Japan in 2011, which was followed by a tsunami wave. This disaster illustrates the position of the particular vulnerability of the area located on the World Ring of Fire.

The government, humanitarian actors-local and international communities have the important role to undertake efforts in the post disaster. Japanase Many researchs and legal reports show detail the application of disaster management by the Japanese, especially in formulating and applying the concept of disaster management. How about Indonesia? This paper explores the disaster management and analysis the disaster management in Indonesia and Japan’s disaster in 2004 and 2011. The analysis will be focused on the government of Indonesia and Japan in taking the strategy on disaster management.

“Disaster Management Cycle”

Disaster (referred to here as natural disaster), has the potential damage to human life. They often result from complex dynamics involving interaction of innumerable system parts within three major systems: the physical environment; the social and demographic characteristics of the communities that experience them; and the buildings, roads, bridges, and other components of the constructed environment. In nonscientifi terms, such events are commonly referred to as *disasters* (Simonovi’ c:2011).² A disaster is a sudden,

¹ [IRIN News](http://www.asianscientist.com/features/natural-disasters-2011-asia/), “90% Of Natural Disasters In 2011 Took Place In Asia, UN Says,” January 6, 2012, <http://www.asianscientist.com/features/natural-disasters-2011-asia/>, accessed August, 24, 2012.

² Simonovi’ c, Slobodan P, *Systems approach to management of disasters: methods and applications*, John Wiley & Sons, Inc., Hoboken, New Jersey, 2011, p.3.

calamitous event that causes serious disruption of the functioning of a community or a society causing widespread human, material, economic and/or environmental losses which exceed the ability of the affected community or society to cope using its own level of resources (UN/ISDR, 2004).³

The risk term of loss and damage of the human, material, economic, environment, and infrastructure such as defined by UN / ISDR and Simonović is a risk of the presence of any form of disaster. In the concept of disaster management, the risk is in the basic framework of disaster management. In relation to the disaster risk, the use of the concept of disaster management is aimed to reduce, or avoid the potential losses from hazards, assure prompt and appropriate assistance to victims of disaster, and Achieve rapid and effective recovery. (Warfield: 2008).⁴

The linkage of the each programs and actions taken during the pre-disaster and post-disaster eventually led to a system. Some kind of system is inherent in all but the most trivial mitigation, preparedness, and response and recovery problems. The problems that we currently face in disaster management have been stubbornly resistant to solution. Human beings are quick problem solvers. (Simonović:2011).⁵ The system involves the use of several methods to assist in planning and design of a system.

The concept of disaster management shows the passage of a process that is formed from the analysis of problem solving. Furthermore, the process will be the policy and guidance in solving problems related to the preparedness, prevention, response, and the recovery from a disaster. Simonović termed as "Integrated Disaster Management," is the elements of mitigation, preparedness response and the recovery.

³ http://ec.europa.eu/agriculture/analysis/external/insurance/definitions_en.pdf, p.23

⁴ Warfield, C., *The Disaster Management Cycle*, 2008, http://www.gdrc.org/uem/disasters/1-dm_cycle.html.

⁵ Simonović, Slobodan P, *Op.Cit.*, p.55-56.



Figure 1. The Venn diagram of integrated disaster management
(Simonovi'c:2011)

Furthermore, Simonovi'c provides a definition to each elements. (1) Mitigation involves identifying the types of hazards, vulnerability, and identification of steps to eliminate or reduce the impacts and risks of hazards through proactive measures taken before an emergency or disaster occurs. (2) Preparedness is measures to anticipate problems includes such activities as formulating, testing, and exercising disaster plans; providing training for disaster responders and the general public; communicating with the public and others about disaster vulnerability and ways to reduce it. (3) The disaster response activities such as the emergency sheltering, search and rescue, care of injured, fir fighting damage assessment, and other emergency measures. The first performed in this action is responders must also cope with such demands response as the need for coordination, communications, ongoing situation assessment, and resource mobilization during emergency period. (4) Recovery such as reconstruction, restoration, rehabilitation, and postdisaster redevelopment.

"Management" in term of the verb is "managing", generally means to handle with skills. The "handle" require capabilities and coordination. Management is the act of managing. In the relation to the disaster management, requires the coordination and commitment

that involves the government and humanitarian agencies from the local and international communities to support the successful the implementation of concept of disaster management. So, disaster management is a system. It is an iterative process that creates a cycle".

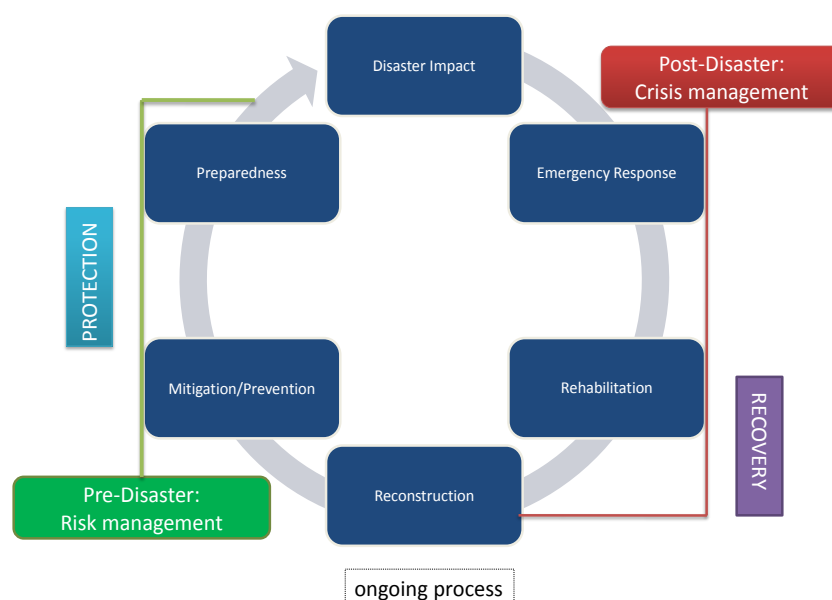


Figure 2. Disaster Management Cycle

The first step is the emergency response measures to ensure the fulfillment of needs and security / protection of the victims of disasters such as early warning, evacuation, and other support needs. The second is rehabilitation and reconstruction are categorized into the recovery stage. The third, mitigation and preparedness activities to reduce human and property losses caused by a potential hazard. This stage is a form of anticipation and prevention of a disaster events.

When a disaster occurs and raise impact to the surrounding environment, emergency staffs of local Governments act first with support from local volunteers including the local agency, neighboring government, and humanitarian organization are mobilized in case of a large scale disaster. To understand how it works easily, we divide the disaster management cycle into two periods, namely pre-disaster and post-disaster. Pre-disaster is an risk management act consist of prevention, mitigation, and preparedness, such as building codes and zoning, vulnerability analyzes, public education (prevention and mitigation), planning, emergency exercises/training, warning

systems (preparedness). Whereas, the post-disaster crisis management is a section in the action consists of emergency response, rehabilitation and reconstruction.

In the post-disaster period, disaster management cycle begins with the stage after the disaster occurred, then the response-reconstruction-mitigation/prevention-preparedness rehabilitation activity. As for the pre-disaster period, although the area was not affected but they can do a risk assessment to determine the potential hazard function that has the possibility to threat the region at a time. Thus, the strategic plan to reduce the effects of disasters through prevention and mitigation measures can be formulated.

Disaster Management Cycle illustrates the ongoing process by the government, civil society, local agencies, and humanitarian organizations to reduce the impact of disasters, react during and immediately following a disaster, and take steps to recover after a disaster has occurred. Disaster management cycle is organized by the basic framework of disaster management.

Strategic on Disaster Management : Indonesia and Japan's Experiences

Disaster management cycle will be collaborated with an approach of the strategy to ensure the use of resources is done effectively.

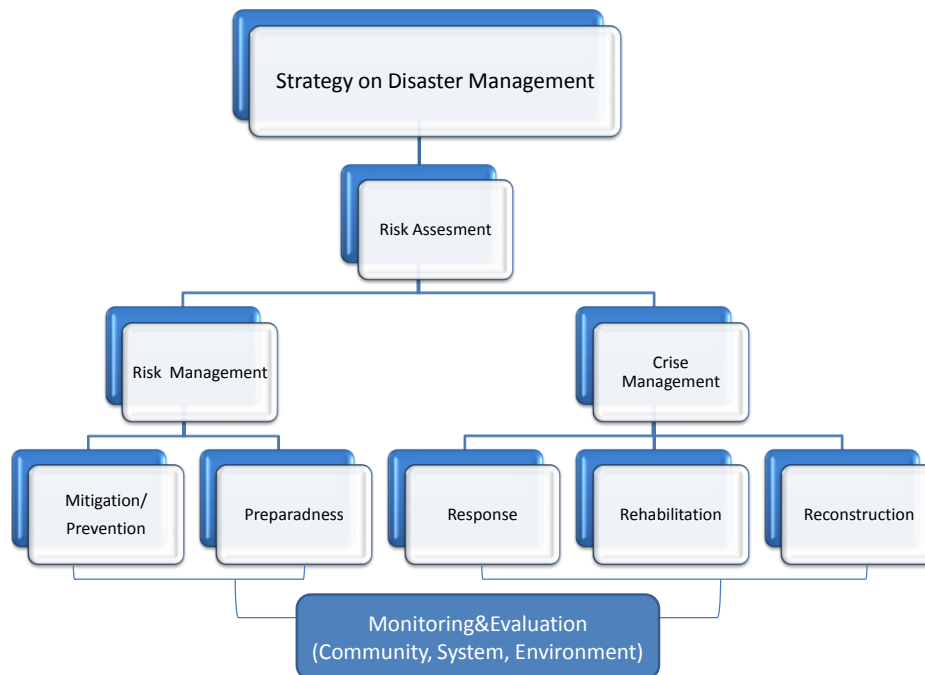


Chart 1. Strategy on Disaster Management

The chart above, risk management is a fundamental strategy for the tsunami disaster measures. In the phase that consists of prevention, mitigation, and preparedness, measures are beneficial for reducing human and economic damages by disaster. As in the description of the basic framework, Disaster Management is aimed to: *first*, ensure protection of human lives, assets and national land line on the basis of constructing coastal protection facilities. *Second*, conducting technical development and improvement of structure so that the structure is not broken easily when the tsunami comes. *Third*, prevent as much human damages by integrated prevention or the integrated of structural and non-structural measures. It needs monitoring and evaluation from community, system, environment to control the implementation of disaster management cycle to help human determine the next strategy.

By using the chart above, the author will apply the Strategy on Disaster Management based on the experiences of Indonesia and Japan in the post-earthquake and tsunami. The grouping into each elements will be explained through the table.

1. Japan's Disaster 11/3

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On March 11, 2011 a massive earthquake of magnitude 9.0 on the Richter Scale occurred off the north-eastern coast of Japan-triggered a tsunami of up to 30 meters in height that washed up to 5 kilometers inland, resulting in massive loss of life, environmental devastation and infrastructural damage, with a preliminary estimated cost of USD 309 billion (UNEP, 2011).⁶ The earthquake caused massive tsunami from Hokkaido to Kanto Region, with the total number of death and missing was 24,163 as of 19 May (JANIC, 2011).⁷ More than 4,648 houses were totally destroyed and another 68,231 houses were damaged (IFRC&RCS, 2011).⁸

Japan is the one best disaster prepared countries in the world. By seeing the number of fatalities and damages produced by the earthquake and tsunami 11/3, the rehabilitation and reconstruction logically takes a long time. How Japan can emerge from earthquake and tsunami 2011? This paper exclusively analyzes the Japan's Strategy on Disaster Management to earthquake and tsunami 11/3.

Emergency Response	Activities and Information Generally
Intensive search operations	Search operations within 10 km of the Fukushima Daiichi Nuclear Power Plant has taken place since 14 April ⁹

⁶ "Great East Japan Earthquake and tsunami," <http://www.unep.org/tsunami/>

⁷ Japan NGO Center for International Cooperation (JANIC), "JAPAN: Earthquake & Tsunami, Situation Report 20 May 2011, data covered from 7 to 20 May 2011, http://www.janic.org/en/earthquake/report/Situation_Report_110520.pdf. There are no new numbers for injured. Mikio Ishiwatari, "Recent Lessons from The Great East Japan Earthquake, Japan International Cooperation Agency, 2012 wrote the number people who died of 15,852, 3,287 missing (part of data 21 February 2012) in http://rach.conaf.cl/shop_image/Curso%202011/Lessons%20from%20Tsunami.pdf, 15835 died dan 3.664 missing (National Police Agency, 2011), approx. 470.000 evacuees remain (Cabinet Office White Paper on Disaster Management 2011), the United Nations Environment Programme, 5 March 2012 dalam "Expert Mission Studies Japan Eartquake Waste: UNEP Testing Method for Estimating Disaster Debris, more than 15.000 died, 3.305 missing, and more than 340.000 evacuees remain. http://www.unep.org/roap/Portals/96/Sendai_mission_050312.pdf, akses 27 September 2012.

⁸ International Federation of Red Cross and Red Crescent Societies, "Japan: Earthquake and Tsunami", Information bulletin, 15 March 2011.

⁹ Japan NGO Center for International Cooperation (JANIC), data covered from 9 – 15 April 2011.

Early warning system	By JMA (Japan Meteorological Agency) who informed the tsunami potential for earthquakes, issues warnings and estimates of tsunami wave heights.
Initial Response by the National Government ¹⁰	(1) Established the Emergency Response Team (extreme disaster management headquarters) headed by Prime Minister by the acts such as convening to arrange basic policy on response to the disaster and Disaster Relief Act, dispatched government inspection team to Miyagi Prefecture, meeting on relief measures, designation of event as a Specified Major Disaster, decision to liquidate reserve fund to purchase relief supplies (since 11 March 2011). (2) Established a “Wide-Area Support System” to mobilize a range of response resources available to the national government: National Police Agency Inter-Prefectural Emergency Rescue Units; Fire and Disaster Management Agency Disaster Medical Assistance Teams (DMAT); and resources of the Japan Coast Guard
Search and Rescue Operation ¹¹	(1) Operation by National Policy Agency Staff (307,500 staffs), Japan Coast Guard (4.413 boats), 1,564 aircraft and 1,510 special rescue teams, 193 disaster medical assistance teams. (2) Search and Rescue/recovery by Fire and Disaster Management Agency initially dispatched 1,558 Emergency Fire Teams and 6,099 staff (27,373 teams and 103,600 staff by 31 May), 28 countries also provided. (3) Search and rescue/recovery,

¹⁰ EERI, Learning from Earthquakes: **The March 11, 2011, “Great East Japan (Tohoku) Earthquake and Tsunami: Societal Dimensions,”** Special Earthquake Report, August 2011, p. 5, <http://www.eqclearinghouse.org/2011-03-11-sendai/files/2011/03/Japan-SocSci-Rpt-hirez-rev.pdf>.

¹¹ *Ibid*, p. 6

	logistics, medical transport, care and shelter operations by 107.000 personnel from Ministry of Defense (Self Defense Force). (4) Operation Tomodachi to support response by U.S with 16.000 personnel, 15 ships and 140 aircraft.
Disaster registration or tracking system ¹²	The government provides registration and tracking casualties and property.
Suggestion for research ¹³	(1) Understanding the effectiveness of tsunami education and response approaches. (2) Identifying and assess gaps between the Japanese emergency management system and its actual operations in the disaster.
Evakuasi	Tsunami evacuation building by the local government instruction for evacuation and inform the people were safe who evacuated above 4th floor.
Establishing the social welfare council	Volunteers coordination for the affected area.
The number of casualties and damage assessment	(1) The discovery of the number of missing and dead. i.e. damage 5% of agricultural land in Iwate, Miyagi and Fukushima, damages agriculture and livestock industries U.S. \$ 9 billion, the destruction of 88% of registered fishing vessels. (JANIC Situation Report, 15 April 2011). (2) The living conditions in the evacuation centres include health dan sanitation along the coastal lines are worse than the other centres.
Water and food/nutrition	NGOs are providing materials to local communities
Emergency	(1) Utilizing some of the 'safe' buildings

¹² *Ibid*, p.6

¹³ *Ibid*, p. 7

shelter/evacuation centre and temporary housing	' in the post-earth quake as an evacuation center for evacuees rooms, child care and education, clinic. (2) Constructing the temporary housing for public buildings, hospitals, lifelines, and small and large businesses.
Medical assistance	(1) NGOs provide the psychosocial care, treatment for chronic diseases, and recovery of medical facilities in the affected areas. (2) Ministry of Health, Labour and Welfare mobilised care managers, child psychologists, sign language interpreters, and volunteer coordinators.
Education assistance	NGOs provide the psychosocial support for children and teachers, child friendly space in evacuation centres, and play and art therapies to the children.
Livelihood support	Government of Japan is planning to increase the employment adjustment subsidy and unemployment insurance, supplement the social insurance and employee pension.
Protection	(1) Providing free telephone legal counseling services to both Japanese nationals and foreign residents (by Japan Federation of Bar Associations). (2) Providing legal counselling and protection of women projects for foreign residents and their families in the affected areas (by Japan Association for Refugees).
Telecommunication and Information	(1) Setting up internet accesses and provide the radio receivers, transceivers and megaphone in Rikuzentakata, Ofunato, Kamaishi, Otsuchi, Yamada and Miyako cities

	in Iwate prefecture and planning to organise a community radio programs in the affected areas (by BHN Telecom Association). (2) Establishing the Community FM Station (3) Making coordination between organisations, government agencies, NGOs and civil society organisations (CSO) to provide the information post disaster and humanitarian assistance.
Request for international assistance ¹⁴	Japan asked for international help to deal with the disaster and has received offers of assistance from 130 countries and 33 international organizations.

Sources: EERI, UKaid, SEED, coe-dmha, etc.

Recovery	Activities and Information Generally
Transition	(1) Clearing roads, removing large amount of debris, accommodating displaced person in shelter.
Earlier recovery	(1) House owner select one of color flag from three flags and give it to their own house. Red means houses and rubbles round house can be demolished, yellow means only rubbles around houses can be demolished, and green shows any demolishment is not necessary. (2) The government provides the information on damages and recovery works. (3) Social welfare council teams identifying the humanitarian actors that will come in order to the recovery. (4) Build the emergency government office to continue recovery works and others.

¹⁴ Center for Excellent, In Disaster Management and Humanitarian Assistance, "Japan Earthquake and Tsunami Update," March 23, 2011, p. 2., <http://www.coe-dmha.org/Research/ResearchInfoMgmt/Japan/Japan03232011.pdf>

Coordination on Recovery Preparation	(1) First meeting of the Great East Japan Earthquake Reconstruction Design Council for a basic outline of reconstruction for June-August) (2) Roadmap for the next three month recovery phase (by Emergency Disaster Response Headquarters)
Debris Management Plan	(1) Iwate plans to complete the cleaning, sorting, and disposal of its disaster debris in the next three years (2) Estimating the volume of disaster debris, transporting of disaster debris, reduce the total volume of debris, handling tsunami sediments, management of hazardous materials, environmental monitoring, support to municipalities, local employment generation to complete the post-disaster clean-up, avoiding bottlenecks in the interim steps in the process.¹⁵
Recovery Planning(April-december end) ¹⁶	(1) The recovery vision also emphasizes mitigating future disaster impacts. (2) Rebuilding fisheries, port damage, relocating damaged residential neighborhoods to higher ground (Miyagi, Iwate) (3) Government select a recovery pattern, collect people's ideas, and draft the recovery plans (Iwate) (4) Enhanced economy and industry; and better social capita included elevated roadway systems that serve as tsunami barriers, a more resilient energy supply, and promote mutual aid/networks for disaster preparedness, rebuild their homes in the same location and neighborhoods, and to improve evacuation routes, shelter locations and supplies, and the town's disaster

¹⁵ "Managing post-disaster debris: the Japan experience, United Nations Environment Programme (UNEP), 1st publishing on June 2012, p.45-47, http://www.unep.org/pdf/UNEP_Japan_post-tsunami_debris.pdf

¹⁶ *Ibid*, 18-21

	administration system (Miyagi)
Reconstruction plan ¹⁷	(1) Completion of a disaster-resisting trunk road network (2) Financial support for housing re-construction (3) Rebuild medical systems with helicopters (4) Policies to move urban functions to higher ground and to keep people together (5) Economic and industrial revitalization
Health recovery	(1) Build back health infrastructure (2) Introduction the electronic health records (3) Coordination with the US defining the infrastructure development strategies dan pscycology rehabilitation to survivors.
Working on full restoration ¹⁸	Trunk lines (1) Building bypass route by erecting telephone poles along railway (2) Rerouting a trunk line upstream to string a cable across a river where it was narrower Exchange buildings (1) Installation of new power incoming unit on third floor (2) Building repair and communications equipment replacement (3) Installing container-like temporary exchanges to restore services (3) Restoring services by using feeders from other buildings
Working with and for	(1) Telephone charge reduction and

¹⁷ *Ibid*, 19-20

¹⁸ "Recovering from the Great East Japan Earthquake," NTT East's Endeavors, Nippon Telegraph and Telephone East Corporation, p.35. http://www.ntt-east.co.jp/info/detail/pdf/shinsai_fukkyu_e.pdf

the local community as a trusted partner to provide assistance to disaster victims ¹⁹	exemption (2) Initiatives for temporary housing (3) Supporting local authorities, and medical and educational facilities by providing communications to local authorities, damaged public medical facilities, supporting remote health consultations, sending medical professionals to the disaster area, providing communications to educational facilities, providing jobs in the disaster area, preferential purchase of disaster area agricultural produce for company cafeterias, helping with live broadcasts of charity concerts, donations, game competition in the disaster area.
Economic Recovery	Stable energy supply, tax reform, regulatory reform, trade liberalization

Sources: UNEP, coe-dmha, ntt-east

Prevention and Mitigation	Activities and Information Generally
Optimization the use of GIS systems	To acquisition of objective data, knowing the tsunami magnitude, buildings and their damage, tsunami map and damaged building, zoning evacuation and shelter. ²⁰
Tsunami Warning System ²¹	Communication & Transmission of Tsunami Warning to Localities & Civil Defense Authorities to determine the design of tsunami level and the basis for coastal levee height
Promoting Basic Knowledge about	Appropriate risk awareness of local communities (tsunami evacuation route, understanding of hazardous areas),

¹⁹ *Ibid*, p.33-34

²⁰ Kato, Gakumin, et.al, ESRI International User Conference, July 23-27 san Diego Convention Centre, Effective Application of GIS in post disaster management in Japan, 24 Juli 2012,
http://proceedings.esri.com/library/userconf/proc12/papers/223_208.pdf

²¹ "Japan's Disaster Management System," <http://nctr.pmel.noaa.gov>

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“Tsunami” Disaster	memberikan pictogram on tsunami
Sign of Previous Tsunami Height	Inundated level of previous Tsunami
Tsunami countermeasures taken by local municipalities and communities	Evacuation drill on tsunami, group session on evacuation plan, check of the dangerous points, training for supplying food, meeting on the disaster map, drill for disaster management with maps.

Sources: prepared from several sources

Preparedness	Activities and Information Generally
Government, municipalities roles	(1) Minister for Land, Infrastructure, Transport, and Tourism set the basic Guidelines. (2) Promotion Plan (comprehensively promote tsunami resilient city) by municipalities.
Development of tsunami adaptation structures	Such as embankment structures, inland lock gates, protective walls or breast-walls built and managed by governors or mayors.
Governors set “Tsunami Disaster Security Zones” to escape from tsunami. (Yellow zone: development of preparedness and evacuation procedures, orange and red zone for land use regulation) ²²	(1) Constructing evacuation route, conducting evacuation drill. (2) Preparation of evacuation plans or implementation of tsunami evacuation drills in underground facilities or facilities used by people who need assistance for evacuation preparation of tsunami hazard maps by municipalities. (3) Designation of evacuation facilities and execution of management agreements (succession effective) by municipalities. (4) Designating tsunami evacuation building such as hospitals, social welfare facilities, dan houses with a secure structure and floor level to be

²² “Flood Management in Japan,”

http://www.mlit.go.jp/river/basic_info/english/pdf/conf_01-6.pdf

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	above of 4rd floor. (5) Retrofitting of older structures by innovative engineering technology
Early warning system	JMA earthquake warning then tsunami warning based on data National Eceanic Atmospheric Administration Data Buoy Centre
Disaster training	Study evacuation procedures to individual, family, business preparedness plans that are both highly tailored and routinely practiced. ²³
Build a hill near the building ²⁴	A hill was designated as a evacuation area which is nearly 16 meters high.
Guiding pre-disaster education ²⁵	Providing an pre-disaster education to primary and junior high schools
Preparing for future contingencies ²⁶	(1) Ensuring even greater safety and security. (2) Building disaster-resistant communications equipment. (3) Ensuring rapid restoration of services. (4) Assisting communication when disasters strike.
US-Japan Partnership ²⁷	(1) “localize” decision making of the reconstruction headquarters in Tohoku (2) Create and transparent and state-of-the-art reconstruction financial tracking system (3) Formalize emergent city twinning network within Japan and create a platform for them to share best practices (4) Take a methodical approach to public participation

²³ Report of a CSIS Task Force in Partnership with Keidanren, “Partnership for Recovery and A Stronger Future : Standing With Japan After 3-11,” November 2011, P. 1-4,
http://csis.org/files/publication/111026_Green_PartnershipforRecovery_Web.pdf

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ NTT East’s Endeavors, *Op. Cit.*, p.36

²⁷ Report of a CSIS, *Op.Cit*, p. 6-9

	(5) Make a historical documentation of public decision making and inter-governmental relation throughout recovery (6) Examine the establishment of a US-Japan Facility for Disaster Risk Reduction and Recovery (7) Use the disaster to initiate bilateral learning about the rule of bussinesses in disaster relief and recovery
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Sources: CSIS Report, NTT-East, and other

2. Indonesia's Disaster

Eight years after the earthquake and tsunami on December 26, 2004, the Government of Indonesia still have to face the challenges in recovery and protection from disaster. An earthquake with a 9.0 on the Richter scale and result a wave as high as 30 meters and killed 126.602 people interned, and 93.638 people missing, the number of refugees is 514.150 people scattered in 21 districts / cities the Province of Aceh. ²⁸ Total damage and losses is estimated U.S. \$ 4.5 Billion and over 21,000 houses were destroyed. Considering those impacts, how is strategy on Disaster Management in Aceh after the tsunami attack?

Based on the master plan formulated by the Government of Indonesia on 15 April 2011, the implementation of disaster management is generally carried out in three stages, *first*, the emergency response stage (January-March 2005), to rescue the surviving community members and to immediately fulfil their minimum basic needs. *Second*, rehabilitation stage (April 2005-December 2006), to enhance public services in the legal aspect through settlement of rights of land and the psychological

²⁸Republic of Indonesia, Master Plan for The Rehabilitation and Reconstruction of The Regions and Communities of The Province of Nanggroe Aceh Darussalam and The Islands of Nias, Province of North Sumatra, April 2005, ch.1, p. 1, dalam

<http://reliefweb.int/sites/reliefweb.int/files/resources/FAE4EFA9C9E8EFC149256FE30027BF78-govtidn-idn-12apr-main.pdf>.

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aspects through the handling of disaster victims' trauma. *Third*, reconstruction stage (July 2006-December 2009) to protect areas and communities affected by disaster. (Bappenas, 2005).

Emergency Response/Relief	Activities and Information Generally
Coordinate by the National Coordinating Agency for Disaster Mitigation and Refugee Management (Bakornas PBP). ²⁹	(1) Immediately helping the disaster survivors. (2) Immediately burying the victims' dead bodies. (3) Immediately enhancing basic facilities and infrastructure to be able to provide adequate services for the victims.
The Indonesian central government announced to support relief activities and operations of disaster management.	They release approximately US\$5 million to support relief activities and operations in three phases : (1) emergency rescue and relief operations, (2) rehabilitation and reconstruction of basic socioeconomic infrastructure and restoration of law and order, (3) reconstruction of the economy and government system.
Government of Indonesia asked the UN (Humanitarian Coordinator, Coordination for Humanitarian Affairs (OCHA), UN Disaster Management Assistance and Coordination (UNDAC) to coordinate the activities of the international community-formed team and conducted a	Focus on humanitarian relief: emergency rescue, emergency food and medical assistance, emergency infrastructure and temporary shelter, burying the bodies, rubble clearing, livelihood, recovery planning.

²⁹ Republic of Indonesia, *Ibid.*, ch.1, p. 12.

quick assessment on 31 December 2004 ³⁰	
The role of UN and NGO volunteers in the first 6 months	Trauma counseling and medical clinic in severely affected tsunami areas.
In the environmental response: Ministry of Environment (MOE) staff arrived within three days and asked UNEP to provide technical assistance in identifying the environmental impacts and risks of the disaster. ³¹	The arrival of MOE is addressed to determine the situation and needs on the ground, and to establish an emergency group of staff and volunteers working to make assessments, data collection, sampling and analysis as the basis for preparing the recovery planning, i.e. : a. 1 January 2005 was established the team (Joint UNEP and OCHA Environment Unit, UNDAC, UN Flash Appeal) b. Joint MOE and GTZ on the assessment plans on the identifying the environmental impacts and risks of the disaster through three level: Stage 1-Organizational to identify critical environmental issues from the perspective of organizations who provide relief and recovery assistance; Stage 2-Community to identify issues from the affected community's perspective; Stage 3-Consolidation and analysis to identify and prioritize environment that may threaten lives, well-being and the environment.

Sources : Republic of Indonesia's Master Plan, 2005 & UNEP, 2005

Early Recovery³²	Activities and Information Generally
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³⁰ Overall emergency relief focuses on humanitarian relief in 6 months, including food and medical assistance and temporary shelters.

³¹ UNEP, "After The Tsunami : Rapid Environmental Assessment," 2005, p.18-19, http://www.unep.org/tsunami/reports/tsunami_indonesia_layout.pdf akses 2 Oktober 2012.

³² In this section, early recovery plan consists of the steps taken by the government of Indonesia (details at Bappenas, 2005) through the master plan and sector plan. See: Abdulharis, Rizqi, et.al, (2005), "Geo-information as Disaster Management Tools in Aceh and Nias, Indonesia: a Post-disaster Area," p. 3-10, http://atdr.tdmrc.org:8084/jspui/bitstream/123456789/9495/1/20050907_G
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National Development Planning Agency (Badan Perencanaan Pembangunan Nasional/ BAPPENAS) created the five years master plan for rehabilitation and reconstruction for Aceh.³³	(1) Create understanding and commitment to national and international community for the future reconstruction of Aceh. (2) Prepare a post-earthquake-and-tsunami action plan by related parties. (3) Coordinate, synchronize and integrate plans of various sectors. (4) Early warning system in anticipation of any exposure to disaster. (5) Promote solidarity, participation, and involvement of civil society in the plans and efforts for the rehabilitation and reconstruction of Aceh through dialogue and public consultations. (6) Design a system and mechanism for the mobilization of funds.
Master plan is lowered into the activity sectors.	(1) Spatial layout and land affairs sector plan as a guideline to rebuild. (2) Management of natural resource and environment sector plan. (3) Infrastructure and housing sector plan, (4) Economic and man power sector plan to restore the victim's economic life. (5) Strengthening regional government's roles sector plan. (6) Education and health sector plan through science and technology. (7) The religious, social cultural and human resources sector plan to redevelop the life and welfare. (8) The legal sector plan as a guideline for law enforcement. (9) The public order, security, and resilience sector plan to provide security assurance on rehabilitation and reconstruction processes.

[eo-information Disaster Management Tools Aceh Nias.pdf](#) dan Republic of Indonesia, *Op.,Cit.*

³³ Republic of Indonesia, *Ibid*, ch.1, p. 2

	(10) Implementation of good governance and supervision to ensure the target achievement of the master plan and to prevent corruption and other deviations. (11) Funding to map the needs and the sources of funds and monitor the implementation of master plan.
Partner supporting	11 multilateral institutions, 20 countries, more than 40 NGOs and several UN agencies.
Establishing the Rehabilitation and Reconstruction Agency (Badan Rehabilitasi dan Rekonstruksi/BRR) on April 16, 2005	BRR as a coordinating agency to ensure transparency, accountability and speed in the rehabilitation and reconstruction.
Land mapping	(1) BRR urges local community to conduct their own village mapping (2) BRR has developed Participative Land Mapping Guidelines to conduct the whole processes of parcel mapping which was supported by photogrametric and large-scale satellite imagery of areas affected by tsunami before the catastrophe.

Sources: Abdulharis, Rizqi, et.al, 2005 and Republic of Indonesia's Master Plan, 2005

Recovery³⁴	Activities and Information Generally
Land title	Reconstruction of the Aceh Land Administration System (RALAS) through National Land Administration Agency (<i>Badan Pertanahan Nasional</i> or BPN) identified land ownership and to issue land titles through establishing a community

³⁴ Jayasuriya, Sisira & Peter McCawley, *The Asian Tsunami: Aid and Reconstruction after a Disaster*, A joint publication of the Asian Development Bank and Edward Elgar Publishing, Asian Development Bank Institute 2010, p. 94-107.

	land inventory, recovering land records, and establishing a land database.
Housing	Reconstructiong the new temporary or temporary house for survivors.
Livelihoods were developed (BRR and International Partners 2005).	(1) Restored the agriculture and fishery sectors through revitalizing agricultural and plantation land, rebuilding ports, and replacing lost fishing boats. (2) Microfinance by cheap credit facilitation. (3) Employment programs such as cash-for- work and training programs i.e entrepreneurship training.
School and Health Services	Rebuilding the education system, hospitals and health centres
Infrastructure	Rebuilding the household sources of drinking water and household sanitation facilities

Sources : Jayasuriya, Sisira&Peter McCawley,2010

Mitigation	Activities and Information Generally
Base on Government of Indonesian Master Plan mitigation efforts has three stages : Emergency response stage on humanitarian rescue and aid, Rehabilitation stage, Reconstruction Stage ³⁵	(1) Stage 1-endeavored to complete decent temporary places for refuge, and quick logistic arrangement and distribution. (2) Stage 2-recovering and restoring the functions of structures and infrastructures. (3) Stage 3- reconstructing the areas.
The Government declared the disaster in Aceh and North Sumatra as a national disaster on 27 December 2004	<i>(based on the master plan from Indonesia's those statement put into mitigation).</i>
Mobilizing national and regional resources for emergency handling	Focused on : (1) Evacuation and burial of the victims'

³⁵ *Ibid*, p. 10-11.

efforts on 30 December 2004	dead bodies. (2) Handling of refugees. (3) Provision of emergency aid. (4) Healthcare, sanitation and water supply. (5) City cleaning up. (6) Preparation of temporary dwelling. <i>(based on the master plan from Indonesia's those statement put into mitigation)</i>
Disaster mitigation through spatial land use of safe zone (through master plan defined as five components) ³⁶	(1) Housing (2) Government facilities, education facilities, hospitals, local and central government office buildings, culture and science museums. (3) Local and regional trade and services, industrial and warehousing facilities etc. (4) Intercity and provincial land transport terminal. (5) Environment supporting utilities, such as electricity generators, water supply, fuel distribution, telecommunications centres. i.e: a. Zoning plan in Kota Barat, Sabang, Aceh : Beach/ maritime tourism site, settlement areas, highland (hills)/ evacuation area, evacuation route, port area; plantation estates/ protection forests, fish farming/ floating cage culture, coastline, beach morphology. b. Conceptual zoning plan di Meulaboh, Aceh : Settlements areas, port area, coastal areas for beach/maritime tourism, highland areas for evacuation, south part of the bay as a fish farming zone.

Source: Abdulharis, Rizqi, et.al, 2005

³⁶ Abdulharis, Rizqi, et.al, *Op., Cit.* p. 3-10.

Preparedness	Activities and Information Generally
Spatial planning and land policy guideline, especially on spatial use directive	(1) Training the rescue unities, preparing emergency and escape Plans, and preparing appropriate instructions to citizens by government. (2) Utilizing the Geo-Information (GIS) technology to define the evacuation routes, risk maps and safe areas and support the decision makers in the phases mitigation, preparedness and recovery.

Similarities and Differences

The comparison strategy on disaster management between Indonesia and Japan shows the differences in the implementation strategy on disaster management. Indonesia only designs the phase of mitigation which emergency response, rehabilitation, and reconstruction became part of mitigation phase. Whereas, Japan implements the phase of emergency response, recovery, mitigation, and preparedness completely.

Furthermore, below some differences in the implementation of the following elements of disaster management based on Japan's and Indonesia's comparisons that have been previously analyzed in this paper.

Strategy on DM	Indonesia	Japan
Emergency Response	Tsunami slow warning. The GIS's systems has weak ability to detect an earthquake and tsunami earlier.	Tsunami early warning. JMA (Japan Meteorological Agency) provides early warning and tsunami wave height estimates, provide more time for evacuation.
	Slow response.	Quick response.
	Involving the local and international agents	Involve much more.
	Land tracking.	Registration or tracking

		system for human and properties.
	No specific building design	Buildings design made to facilitate the evacuation and protection from disaster.
	Providing the water, food / nutrition supplies, medical, health, education, livelihood, counseling and protection by the Government / NGOs	Providing the water, food / nutrition supplies, medical, health, education, livelihood, counseling and protection, post-disaster information and humanitarian assistance through radio and other sources by the government / NGOs.
	Environment reform program through master plan.	Environment reform programs.
	Land ownership certification will be a problem in the future.	No found.
Recovery	The basic implementation of disaster management is a master with the five-year plan drawn up by the government.	A basic outline of reconstruction and roadmap every three months drawn up by the Emergency Disaster Response Headquarters.
	Not found.	Restoring the telecommunication access each home and building public service
	The reconstruction includes the reconstruction of the community by restoring the aspects of religious and socio-cultural lives	Not found.
Prevention and Mitigation	<i>(Included in emergency response, recovery activities)</i>	Increasing the capacity of the tsunami warning system
		The widely publishing evacuation maps and disaster risks information

Preparedness	X	Guideline for development, determination and granting the signs to the tsunami disaster zones obvious security
	X	Planning the evacuation routes and development or implementation of tsunami evacuation drills
	X	Guiding pre-disaster education to elementary school students, the general public.

X: No phase

Japanese has learned a lot from the experience of the Japanese disasters. The formulation of the methods in the implementation of the strategy on disaster management conducted by their disaster experiences. Basically, Indonesia also has several natural disasters, but it does not do a serious evaluation and planning for disaster protection.

Monitoring and Evaluation

Having seen comparison of strategy on disaster management between Japan and Indonesia, there are some things that need to be evaluated. The people need to be trained in emergency response such as early warning systems, evacuation, basic medical knowledge, and post-disaster rehabilitation, so when the disaster strikes the community will be better prepared.

In early warning system for the maintenance of geo-information (GIS), government or national partners are currently discussing with the help of international organizations to be able to serve better disaster management in Indonesia. By enhancing the ability of GIS, the early warning system could function effectively and helpful the disaster makers in the disaster management phases.

Japan has a strategy in strengthening the local capacity in facing disasters. The strategy is useful in uniting the whole of

Japanese society in the development of post-disaster and disaster protection in the pre-disaster. The policy of decentralization and autonomy become an obstacle the success of disaster management. Good governance and commitment between communities have to be strong. It required a national policy on disaster management in Indonesia.

Indonesia, the post-disaster development includes the structural and non-structural measures should be improved. Zoning hazardous areas, earthquake-resistant building design and protection from the tsunami region that has been designated as a hazardous zone. For the coastal areas need to green belt mangrove planting, coastal forest, and land use arrangements and other measures to create the ecological sustainability of the coastal zone. Moreover, there should be intensive practice of public awareness through education, training and awareness building, media dissemination, and various public campaign activities.

Research is also fundamental to build tsunami disaster mitigation strategies. It should be organized multidisciplinary research agendas, comprehensive knowledge about disaster. On the one hand, the research useful to determine the mitigation strategies, on the other hand, the research impacts to the societies and communities interact. This interaction will foster a sense of caring and cooperation.

Although the Indonesian disaster management is not in accordance with the strategy on disaster management, when the returning to the concept of disaster management as the range of activities designed to maintain control over disaster and emergency situations and to provide a framework for helping at-risk persons to avoid or recover from the impact of the disaster in order to reduce or avoid the human, physical, and economic losses suffered by individuals, by the society, and by the country at large, (2) to reduce personal suffering; and (3) to speed recovery, if the two elements (mitigation and preparedness) has been able to help Indonesia's disaster recovery process, then it is not a problem. but then it would be a problem when the disaster management solutions which not have been conceived to help disaster recovery. Through the comparison strategy on disaster management between Indonesia and Japan are expected to contribute to Indonesia and Japan to further enhance the capacity of the strategy on disaster management.

Conclusion

There is a linkage between the conceptual framework model of disaster management with development. This approach emphasizes the problems that occurred in the process before and after the disaster. At the pre-disaster, the activities focused on the effort to avoid or minimize the effects of disasters. At the post-disaster the activities aimed at helping the the victims both material and immaterial.

With the such those mindset, finally the disaster management moving on the two processes, humanitarian aid and development. Humanitarian aid is identified with saving lives and alleviating human suffering, while the development to increase economic and social life of the community.

Implementation of each phases in the strategy on disaster management between Indonesia and Japan have similarities and differences. The implementation of the overall phase begins after the disaster emerged. If we look at Japan's experience in the implementation of the strategy on disaster management and the intensity of the disaster in Japan, shows the disaster continuity triggered cycles. The grouping processes of disaster management that work on the two things and view the disaster management system runs when the disaster came, eventually led to the issue whether the disaster is a cycle / continuum.

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ASSESSING NATIONAL PROTECTION OF THE INTERNAL DISPLACED PERSONS (IDPS) IN POST -DISASTER PERIOD IN INDONESIA

Erna Dyah Kusumawati

Faculty of Law, Sebelas Maret University, Solo

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Abstract

This article assesses what regulations has Indonesia provided as the legal framework concerning the protection of the IDPs. Also, it will analyze the effectiveness of the legal framework for the protection of the IDPs especially in the post disaster period. Instead of the human rights laws which affirm the rights of every people to live in a good condition, Indonesia does have a set of rules concerning the protection for the IDPs. These rules are applicable to those who become the victim of natural disaster and man-made disaster. These rules are set out for the protection in three periods: pre-disaster, disaster and post-disaster period. Indonesia has also established the Indonesian National Disaster Management Agency (BNPB) to take care the victim and the disaster's effect. However, the Indonesian government c.q BNPB did not provide the maximum protection as it is stipulated in the rules. Many IDPs still live in a very bad condition in the post disaster period. Therefore, the author argues that there is a need to strengthen the independent monitoring function. This mechanism will play role in giving recommendation to the government for a better protection of IDPs. It might be done by establishing the new independent monitoring body especially for IDPs or employing the established body of human rights, such as the Indonesian Commission of Human Rights (KOMNAS HAM).

Keywords: Protection, IDPs, Post Disaster Period

Introduction

Internally Displaced persons (hereinafter referred to as IDPs) are persons who have been forced to leave their home; but they are differed from refugee. Refugees leave the countries border, while IDPs do not. They are still in their home country; therefore, their government becomes the most responsible party in protecting their rights.³⁷ The number of IDPs all over the world is around 23.7 million, including women and children who became the victim of violence and conflict, as well as the victims of natural disasters or the government development projects.³⁸ Because of all the causes, the

³⁷ Kirsten Zaat, *The Protection of Internally Displaced Persons in the Sudan: Applying International Law at the Field Level*,
(http://www.brook.edu/fp/projects/idp/2006_zaat_laws_policies.htm., 2006),
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³⁸ Ibid.

IDPs are forced to leave their home. Leaving their habitual residence has made IDPs vulnerable from the human rights violations.

Unlike the refugee, the plight of IDPs is being ignored by the international or national authorities for many years.³⁹ Refugees have received greater protection from international society since 1921 when the High Commissioner for Refugee of the League of Nations has been appointed. The IDPs started to get large and serious attention since 1980 when the number of IDPs has increased dramatically.⁴⁰ Prior to 1980, the international attention has limited only on humanitarian assistance not on the protection of IDPs rights. In addition, refugees are protected by an International Convention of 1951, while IDPs are not protected by a specific binding convention.

The plight of IDPs happened in most countries in the world especially in countries where civil strikes, natural or man-made disaster, or human rights violations existed. Indonesia; as a country with so many natural disasters occurring, has a large number of IDPs. Based on the data from Internal Displacement Monitoring, the number of IDPs in Indonesia in December 2011 could be as high as 150,000.⁴¹ Indonesian government is under its obligation to protect and fulfill the IDPs rights since they are Indonesian. The protection of IDPs' rights is indeed needed. However, based on some NGO reports⁴², IDPs in Indonesia have experienced violations of their rights, discrimination, segregation, etc. Moreover, they could not access their basic rights, such as health, place to live, access to water, food, etc. Even in the post disaster period, IDPs rights' are not fully fulfilled.⁴³

This present study is aimed to analyze what kind of rules are existed which can be used as a legal basis for IDPs' rights protection at the national level, and to assess as to whether the existing regulations were well implemented at the national levels. To address the purposes above, I will first discuss briefly about the protection of

³⁹ Jessica Wyndham, *A Developing Trend: Laws And Policies on Internal Displacement*. (http://www.brook.edu/fp/projects/idp/2006_wyndham_laws_policies.htm., 2006), 7

⁴⁰ Suplemen Yayasan Aksara, *Pengungsi Kita*, (Majalah Tempo Edisi 17 Juni 2002), 69 – 89.

⁴¹ Internal Displacement Monitoring, *INDONESIA: Durable solutions remain elusive for many IDPs while thousands are newly displaced by military operations in Papua*, (Norwegian Refugee Council, 22 December 2011)

⁴² Ibid.

⁴³ The condition of IDPs in the post disaster period will be discussed in the fourth section.

IDPs at the international level. The purpose is to gain an understanding of international norms or value in respecting and protecting IDPs' rights. Second, I will discuss the regulations which have been provided by the Indonesian government at the national level, as legal basis in protecting IDPs' rights. Third, I will assess the protection of IDPs at the national level especially in the post disaster period. Finally, I will give the conclusion of the study and the recommendation which should be taken by the government for a better protection of the IDPs.

The protection of IDPs' Rights at International Level

Albeit not being the beneficiaries of a certain convention, IDPs are protected by various bodies of law; national law, human rights law and international humanitarian law in countries when armed conflicts occur. Instead of lack international instruments, there is no institutional arrangement which deal specially with the fulfillment of the IDPs' need. However, the complexity of many crises of internal displacement and the increasing number of IDPs has improved the international attention on the protection of IDPs.⁴⁴ The condition of IDPs might be even worse especially if the responsible government does not willing to protect them. What happened to IDPs in Rwanda, Southern Iraq, Sudan and Kosovo have shown the extremely danger situation for IDPs who were neglected by their own governments.⁴⁵ Internal displacement will lead to the instability, not only in the state but also will threaten the peace and security to the neighboring countries and the whole regions.⁴⁶ Therefore, IDPs needs international protection instead of national protection.

The opinion regarding the IDPs protection is divided into two opinions. First, some scholars argue that the protection for IDPs lies between international human rights and international humanitarian law. These laws offer a firm legal basis to invoke state responsibilities to protect IDPs. Second, the other scholars emphasize the need to establish the specific norms which deal with IDPs protection. The

⁴⁴ Cathrine Brun, "Local Citizens or Internally Displaced Persons? Dilemmas of Long Term Displacement in Srilanka," *Journal of Refugees Studies*, Vol 16 No. 4, (2003): 376-397, see also Thomas G. Weiss, "Whither International Efforts for Internally Displaced Persons?," *Journal of Peace Research*, Vol. 36 No. 3, (1999): 363-373

⁴⁵ Nill Geissler, "The International Protection of Internally Displaced Persons," *International Journal of Refugee Law*, Volume 11 No. 3, (1999): 451-478.

⁴⁶ Ibid.

conditions resulting displacement are varied, from war, civil strikes, to natural disaster; therefore, different norms will apply to different situations. The weaknesses of the existing laws are:⁴⁷

- a. The international humanitarian law only applies in certain situations, i.e. international and internal armed conflict.
- b. Many provisions of international human rights law can in any case be suspended when a national emergency has been declared – precisely the circumstances which generate the largest movements of internally displaced people.

Based on the consideration above, there is a strong need to develop specific norms with deal with IDPS protection.⁴⁸

Until present time, there are no binding internationally binding instruments concerning IDPs. The only instrument which regulates the minimum standard treatment to the IDPs is Guiding Principles of Internal Displacement, firstly introduced by the Secretary Representative of the Secretary-general on Internally Displaced Persons) to the United Nations Commission on Human Rights) on April 1998. This document reflects an effort to address the needs of the human rights protection of the IDPs. It codifies a set of human right guarantees, combining the international humanitarian law and international human rights law.

The purpose of this document is primarily intended “to provide guidance to the Representative in implementing his mandate, in particular in his dialogue with states; to states facing situations of internal displacement; to all other authorities, groups and persons in their relations with internally displaced persons; and to inter-governmental and non- governmental organisations when addressing internal displacement” (Principle 3)

These principles address all phases of displacement and are organized into 5 main sections: general principles, principles relating to protection from arbitrary displacement, principles relating to protection during displacement, principles relating to humanitarian assistance, and principles relating to return or resettlement and

⁴⁷ Promod Nair, *Towards a Regime for the Protection of the Internally Displaced Persons*, *ISIL Year Book of International Humanitarian and Refugee Law*, (<http://www.worldlii.org/in/journals/ISILYBIHRL/2001/10.html>, 2001 (10)),

⁴⁸ See for further discussion in Catherine Phuong, *The International protection of Internally Displaced Persons*, (United Kingdom: Cambridge University Press, 2004), on Introduction (pp. 1-6), Chapter 2 on the legal Protection of Internally Displaced Persons (pp. 39-74) and in Promod Nair, *ibid*.

integration. The General Principles give basic rights to IDPs and affirm the responsibility of their government. IDPs have to enjoy equal rights and liberty under the national and international protection as other persons, with the exception if they are accused as a war or genocide criminal.

According to the Guidelines, the government where IDPs reside bears the primary responsibility to ensure the protection and to give humanitarian assistance (principle 3 para. 11) to IDPs. All the IDPs have the same rights and might not be discriminated under any reason (Principle 4 para 1.). Specific protections are given to certain groups; such as pregnant women, children, persons with disabilities, and elderly people. The protections are given based on their specific needs. The principles stipulated in the Guidance are also included protection during the displacement period (Principles 10-23). The rights granted in the guidance include right to live; right to dignity, physical, mental and moral integrity, etc.

Although this instrument is a soft law instrument which does not have binding and enforcement power, it “reflects and consolidates international norms in international human rights law and international humanitarian law”⁴⁹. These principles also constitute an important mean for addressing the protection and assistance needs of IDPs as well as contributing to the prevention of internal displacement in the future. Therefore, the need to give an authority to these principles is indeed needed. If these principles are given enforcement power one day; like the hard laws they reflected, they will help to eliminate the tragedy that often happened to IDPs all over the world.

Protection for IDPs should also be the responsibility of international bodies, either intergovernmental bodies or international non-government organizations. This protection has been done by UNHCR, OCHA, and the UN Commissioner for Human Rights and Non-Governmental Organizations such as Internal Displacement Monitoring Centre (IDMC), International Organization for Migration (IOM), etc. Furthermore, in order to build institutional framework in protecting IDPs collaborative response from all stakeholders related to IDPs is needed. Governments, intergovernmental organizations, NGO-s have to work hand in hand to protect IDPs all over the world.

⁴⁹ As stated in the Introduction paragraph 3 of the Guiding Principles.

National Legal Basis to Protect IDPs

Based on international law, states bear the primary responsibility to ensure the security and welfare of their citizens, including displaced people. In some cases; however, displacements are caused by government actions. While in other cases, governments may be willing to help, but may lack resources or access. Therefore, IDPs are internal matter of the states.⁵⁰ In this section, the regulations which have been provided by Indonesian Government will be discussed.

Indonesia neither has regulations specially designed to cover IDPs. Indonesia has also not ratified the Convention 1951 on the Status of Refugee and its protocol. However, some national norms can be used as a legal basis to tackle IDPs problem. Indonesia affirms the equal rights of its citizen without discrimination. This norm emerges in the Constitution 1945, as well as the Human Rights Law No. 39 year 1999. These two regulations stipulate the rights of all citizens in a comprehensive way. Although, these regulations do not explicitly stipulate the world IDPs, it can be interpreted that they can be applied for IDPs since IDPs are also Indonesian.

Furthermore there are some regulations which also serve as mean of protection, such as the Law No. 24 year 2007 on Disaster Management, Law No. 23 year 2002 on Children Protection, as well as the ICPPR and IESCR which have been ratified by Indonesia. Also, Indonesian government issues some government regulations related to protection and to tackle IDPs. These regulations are President Decree (Peraturan Presiden Republik Indonesia) No. 8 year 2008 on National Disaster Management Agency (Badan Nasional Penanggulangan Bencana-BNBP) and Government Decree (Peraturan Pemerintah Republik Indonesia) No. 21 Year 2008 on the implementation of Disaster Handling (Penyelenggaraan Penanggulangan Bencana).

The disasters which often happen in Indonesia have made the government issues a specific regulation to deal with disaster management and the victim protection, i.e. the Law No. 24 /2007 on

⁵⁰ Minutes of the Seminar , *International Field Protection of Internally Displaced Persons: Needs and Challenges, Actors and Strategies*, (Brussel, June 5th & 6th 2002), 4, available online at http://www.protectionline.org/IMG/pdf/pbibeo_idpseminar02.pdf
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Disaster Management. The purposes of this regulation are stipulated in article 4, such as: to protection to the society from the threat of disaster, to guarantee the implementation of the disaster management in a planned and coordinated manner.

Since 2008,⁵¹ the National Disaster Management Agency (Badan Nasional Penanggulangan Bencana-BNBP) has been the national agency responsible for disaster management and policy formulation. It was established by the President Decree No. 8 year 2008. It has responsibility for IDPs displaced by natural disasters, by non-natural disaster, and by “social conflicts” (man- made disaster). The Ministry of Social Affairs is responsible for logistical and relief assistance to IDPs during an emergency. Article 6 of Law Number 24 year 2007 stipulates that IDPs and communities affected by disaster are entitled to protection and the fulfilment of their rights “in a fair manner and complying with the minimum service standards”.⁵² Assistance and protection for IDPs is not only provided during the emergency period but also before (through “mainstreaming of disaster risk reduction into development programs”), and after (by ensuring the “recovery from disaster impacts”).⁵³

⁵¹ It does not mean that before 2008, Indonesia does not have an agency dealing with disaster management, as well as the regulation. The Government started its effort in handling IDPs in 1970 by forming the National Board for the Coordination of Natural Disasters through Presidential Resolution 28/1979. However, the mandate of this Board is limited only for IDPs as a result of natural disasters. In 1990 the government established a new National Board for the Coordination of Natural Disasters through Presidential Resolution No. 43/1990. The mandate of this board extended to include those IDPs who became displaced due to natural disaster, and also those persons who became displaced due to the conflict in East Timor, particularly those IDPs who settled in Nusa Tenggara Timur. In addition, in 1999 the government revised the National Coordination Agency with regard to disaster handling. Presidential Decree No. 43/1990 and Presidential Decree No. 106 / 1999 were passed. The next development was the issuing of the Presidential Decree No. 3/ 2001 allowing the establishment of the new National Agency for the Coordination of Disaster and Refugee Handling. This agency was then succeeded by the National Disaster Management Agency (BNBP). The name of the agency has a difference, the former was included the Refugee handling while the latter was not. However, again it does not mean that the newest agency (BNBP) does not deal with IDPs. It still has a mandate to protect IDPs resulted by both natural disaster and social conflicts.

⁵² BNBP, National Disaster Plan for Indonesia 2010-2014, Jakarta (2010), p. 80

⁵³ Internal Displacement Monitoring Centre (IDMC), *Situation in Indonesia, 21 November 2011*, Submission from the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC) to the Universal Periodic Review mechanism established by the Human Rights Council in Resolution 5/1 of 18 June 2007 , Thirteenth session of the Working Group on the UPR , 21 May-1 June 2012.

Article 26 of Law on disaster management affirms the basic rights of the disaster victim (IDPs) that have to be fulfilled in the emergency situations. These rights include:

- a. rights to get the social protection and safeness;
- b. rights to get education, training and skill on the implementation of disaster tackling;
- c. rights to get information on the policies of disaster tackling;
- d. rights to have a role in planning, operation, and taking care health service programs including psychosocial support;
- e. rights to participate in the decision making on the disaster handling activity, especially activity which related to him/her or his/her community; and
- f. rights to watch based on the mechanism under the disaster handling
- g. the basic rights of anyone who is affected by disaster have to be fulfilled,
- h. Anyone has the rights to receive compensation because of construction failure.

The fulfillment of the basic rights of IDPs includes the provision of water and sanitation; food, clothes, health services, psychosocial services; and shelter. This law also acknowledges the vulnerable groups which have to be treated differently in the rescue proses, evacuation, protection, health services and psychosocial support. These groups include baby, kids and children; pregnant and breast-feeding women; people with disabilities; and elderly people.

The Government regulation No. 21 Year 2008 on the Implementation of the Disaster Handling, implements the Law on Disaster Management. This regulation guides the BNPB to fulfill its mandate. The disaster handling management includes all the effort during and after the disaster, including rehabilitation and reconstruction. The preventive efforts prior to the disaster also become BNPB consideration. Therefore, this Government regulation puts the preventive efforts prior to disaster as one of its strategies to tackling the disaster. It also affirms that monitoring function in the disaster handling period is needed in order to give a better protection to IDPs and to respect IDPs rights as human beings.

Needless to say, Indonesia has a set of rules which can be used as a legal basis to protect IDPs rights. These regulations affirm that IDPs rights have to be protected and fulfilled without discrimination. All of these regulations might be used in handling the disaster and protecting IDPs in Indonesia. The following section will discuss how the government implements these regulations in protecting the IDPs in Disaster Period. The discussion will merely focus on the efforts of protection in the post disaster period.

Assessing the National Protection for The IDPs in the Post Disaster Period

Since its independence in 1945, Indonesia has experienced many “disaster” resulting IDPs.⁵⁴ A series of conflicts haunted Indonesia as a new country and afterward so many people were forced to leave their habitual residence. Between 1999 and 2002, more than 1.4 million people were displaced throughout the country because of violence between ethnic and religious groups.⁵⁵ They competed for political and economic resources, in the context of an economic recession and a political reconfiguration that followed the ending of Suharto’s “New Order”.⁵⁶

A further estimated 500,000 to 700,000 people were displaced by the conflict in Aceh between 1999 and 2004, while 10,000 people have been forced from their homes by military operations in Papua since 2001.⁵⁷ The tsunami that hit Sumatra in 2004 resulted in the increasing number of IDPs. Another disaster happened on May 29, 2006 when mud and gases began erupting from the gas exploration field of Lapindo Brantas Incorporated (LBI), a subsidiary of the Bakrie group, one of the Indonesian biggest oil drilling companies.⁵⁸ The disaster has caused damage to the lives of the affected victims. The mud flood has presently engulfed 1,810 houses as well as 18

⁵⁴ Asia Pacific Forum, IDPs Indonesia; Problem and Policy, (Asia Pacific Forum, <http://www.asiapacificforum.net/support/training/regional-workshops/idp/downloads/session-3/noor.pdf>),

⁵⁵ IDMC, *supra* note 14

⁵⁶ *Ibid*

⁵⁷ *Ibid*.

⁵⁸ World Health Organization (WHO), *Hot Mud Flow, Sidoarjo*, East Java, Emergency Situation Report, 24 November 2006, p. 1, available at http://www.searo.who.int/LinkFiles/Indonesia_Emergency_Situation_Report_ESR_07_HotMudFloodSidoarjo24Nov06.pdf

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schools, 2 government offices, 20 factories and 15 mosques.⁵⁹ An estimated 3,000 families, or about 10,000 people, have been displaced from their homes.⁶⁰ The latest case happened were segregations of ethnic and religious communities in many provinces, such as East Kalimantan, Papua, Ambon⁶¹ and Madura. They have continued to cause displacement around. As of early 2011, IDMC estimated that between 170,000 and 180,000 people remained displaced in Indonesia.

Based on thousands of IDPs all over Indonesia, the government needs to react positively in order to help and to protect IDPs. The national and provincial governments have made progresses in helping IDPs in the post disaster, especially in the reconstruction and recovery of the affected provinces. The Governments have enabled nearly all IDPs to return or the settle elsewhere in the country. However; due to lack of funding and wide spread corruption have made not all IDPs communities have received the assistance they needed. Furthermore, post-conflict programs tended to neglect needs such as peace-building and reconciliation, and economic empowerment of affected communities.⁶²

In giving assistance, the government worked together with international organizations serving as funding institution. This method was possible since Indonesia has a Government Regulation No. 23/2008 on the role of International Institutions and International NGOs in Participating Disaster Handling.

The attention should be given to the effort of the government in fulfillment the IDPs rights as a result of Tsunami in Aceh 2004. Two years after the disaster, the government still did not able to fulfill the need of IDPs.⁶³ The fact that the shelter for IDPs did not fulfill the standard requirement had revealed the inability of the government in protecting IDPs. Other problems were dealt with the adequacy of the sanitation and drinking water. The problem arisen not only in emergency period but also in rehabilitation period, in which not all

⁵⁹ Ibid, at 2.

⁶⁰ Ibid.

⁶¹ IDMC, supra note 14.

⁶² Ibid

⁶³ Erna Dyah Kusumawati, Laporan Penelitian, Perlindungan atas Hak-Hak Pengungsi Internal (IDPs) Akibat Bencana Alam di Aceh sebagai Bentuk Perlindungan Hak Asasi Manusia, LPPM UNS, 2008, p. 59-60

IDPs have received a new place to live⁶⁴ or received compensation promising under a post conflict program in 2006.⁶⁵

Another case faced by the government is the handling of the victim of the mud flow disaster in Sidoarjo, East Java. Thousands of people were forced to leave, later they have to live in the evacuation sites which lack basic needs, sanitary, and health care.⁶⁶ There was a debate as to the disaster was triggered by natural activity or human activity. Geological expert said that it was happened because of human error in drilling activity, while Lapindo Brantas said that it was triggered by natural disaster. The later was strengthened by the Court (District, High Court and Supreme Court) decisions.⁶⁷

Despite the debate, the government is the main party who bears the responsibility in taking care the victims and giving them compensation to live in new places. The government established the specific agency to deal with mud flow disaster, namely the Sidoarjo Mudflow Mitigation Agency (BPLS) through the Presidential Decree No. 14 of 2007.⁶⁸ Pursuant to the Regulation, the Agency has duties to stem the flow, to prevent the mud spreading, and to manage the social impacts to deal with the damage of infrastructures.⁶⁹

⁶⁴ Ibid., p. 61

⁶⁵ Multi-stakeholder Review (MSR), December 2009, Multi-Stakeholder Review of Post-Conflict Programming in Aceh - Identifying the Foundations for Sustainable Peace and Development in Aceh, p. 59

⁶⁶ James Morgan, *Mud eruption 'caused by drilling'*, BBC News, 1 November 2008, can be found at <http://news.bbc.co.uk/2/hi/science/nature/7699672.stm>; see also Integrated Regional Information Networks (IRIN), Indonesia: Plight of mudflow IDPs continues, 10 February 2010, available at: <http://www.unhcr.org/refworld/docid/4b7ba8d6c.html>

⁶⁷ Two Indonesian NGOs; the Indonesian Legal Aid Foundation (YLBHI) and the Friends of the Earth (Wahana Lingkungan Indonesia-WALHI) brought this case before the District Courts, the Central Jakarta District Court and the South Jakarta District Court respectively. The result of these cases was discussed in Erna Dyah Kusumawati, Thesis, *The Role of the Indonesian Human Rights Commission and National Courts in Facilitating the Justiciability of Economic, Social and Cultural Rights (A Case Study on the Hot Mud Flow Disaster in East Java Province, Indonesia)*, University of Groningen, the Netherlands, 2011, pp. 66-69.

⁶⁸ Prior to the establishment of this agency, the government has enacted Presidential Decree No. 13 of 2006 on 8 September 2006 establishing the National Mudflow Mitigation Team (*Tim Nasional Penanggulangan Lumpur Sidoarjo*). The Team has 3 main duties: to stem the flow, to prevent the mud spreading, and to manage the social impacts. By the establishment of the new agency, the previous agency was liquidated.

⁶⁹ President of Republic Indonesia, Presidential Decree No. 14 of 2007 concerning *the Sidoarjo Mudflow Mitigation Agency (BPLS)*, Jakarta, 8 April 2007, Article 2 para. 2, available at <http://www.presidentri.go.id/DokumenUU.php/381.pdf> . The regulation was Proceeding – Indonesian Humanitarian Action Forum 2012

The regulation stipulating the transfer of the responsibilities from LBI to the Government has made the Government becomes the main responsible party for the abuses carried out by the private company which affected the population. Therefore, it should take a direct action to mitigate the disaster, to compensate the victim, and to maintain the infrastructures. Later, the payment stipulated in the regulations did not run well. According to the investigation carried out by *KOMNAS HAM*, the payment for both money for renting the house and buying the land were not paid in time⁷⁰, as ruled in the Presidential Regulations.⁷¹ Another difficulty arose when many victims did not receive the money since they could not prove the ownership of the land.⁷²

The fact that the majority of victims have not received the compensation promised by the regulations shows the failure of the current scheme to provide the victims with prompt compensation. Another reason is that the current scheme only compensates for the damages to property but it does not address physical pain and mental suffering. These facts appear to indicate that the burden sharing is not an effective way to solve the problem and give remedy to the victims.

The two cases above show that the government did some efforts in protecting the IDPs. However, it carried out the protection not in a “a fair manner and complying with the minimum service standards”, since not all the IDPs got the same help or compensation scheme as well as the fact that IDPs still live under poverty with lack of basic needs, such as access to food, drinking water, health services and education. Therefore, harder work needs to be done by the government to give better protection to IDPs. Coordination with all the stakeholders; national, provincial government and including the international institutions need to be strengthened. Involving the

later amended by the Presidential Decree No. 48 of 2008 and Presidential Decree No. 40 of 2009.

⁷⁰ Komisi Nasional Hak Asasi Manusia (Komnas Ham), *Laporan Tim Investigasi Kasus Lumpur Panas Lapindo*, (Jakarta. 2009) , at 12

⁷¹ Pursuant to article 15 (2) Presidential Decree No.14 of 2007, the 20 % payment should be given at first and the 80 % should be paid in the next two years (translation by the author). There is no further explanation related to the time frame, whether it is 2 years after the enactment of the decree or two years after the disaster. In this regard, *Komnas Ham* interprets it as two years after the disaster.

⁷² BPLS also recognized this difficulties within the other difficulties and was written in their report, see note 8, at 10.

IDPs in establishing the policy will fit best, since IDPs know their need very well.

This present study argues that monitoring function is an essential element in a Disaster handling or mitigation. As an essential element, it needs to be formed. A Disaster management involves a lot of money both from the government or from the funding institutions; therefore it needs to be monitored as to whether the money is devoted to the right expending. Next question that should be answered is what or which body will be charged to carry out the monitoring function?

Monitoring function might be carry out by a new independent body. There is no independent body deals with the monitoring of disaster management right now; therefore, the government should establish a new independent body specially in monitoring the disaster management. This choice will take so many consequences, one of them is much money needed to finance the body, starting the recruitment process until the monitoring process of each disaster. This choice seems less favorable. Or rather, empowerment of the Indonesian Commission on Human Rights (KOMNAS HAM) in the monitoring program of Disaster Mitigation seems to be a perfect choice. In its establishment KOMNAS HAM has two purposes,⁷³ i.e.

- a. to develop conducive conditions to the realization of human rights in accordance with Pancasila, the 1945 Constitution, the United Nations Charter, and the Universal Declaration of Human Rights; and,
- b. to improve the protection and enforcement of human rights in the interests of the personal development of Indonesian as a whole and their ability development to participate in several aspects of life.

To achieve these aims, the KOMNAS HAM carries out its function in study, research, dissemination, monitor and mediation human rights issues. Based on its functions, monitoring of the disaster management might be included in the monitoring function on KOMNAS HAM. In the past, between 2001 and 2006, KOMNAS HAM was actively involved in the monitoring and protection of IDP rights in the country, mainly through its Sub-Commission on the Protection of Special Groups. It also conducted training courses on

⁷³ Law No. 39 Year 1999 on Human Rights, article 76, unofficial translation
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IDP rights in various provinces and disseminated the Guiding Principles on Internal Displacement. After, the replacement of all members of the Commission in 2007 and disbanding of the Sub-Commission on Special Group Protection, KOMNAS HAM ceased to carry out IDP-specific monitoring and advocacy, although it remained involved in some IDP matters.⁷⁴

With its very important function in the past, it is an urgent to empower again its function in monitoring function in the issues of IDPs. As a watchdog, KOMNAS HAM might give recommendation to the government or give reminder if the government does not act the way it should do. KOMNAS HAM might give human rights education to IDPs in order to give knowledge to them to realize their rights. For that reason, IDPs will realize their rights and know what to do if their rights were violated.

Conclusion: Human Rights for IDPs in Indonesia: A Challenge

The IDPs' condition as stated above brings the writer in to a conclusion that a challenge in disaster management in Indonesia should be faced. Coordination inter agencies both national and international is necessary to have a comprehensive management of IDPs protection in the future. Lack of money problem might be overcome by employing international assistance provided by international community. In addition, empowerment monitoring function dealing with disaster management to improve the IDPs protection in Indonesia.

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MONITORING HUMAN RIGHTS COMPLIANCE IN DISASTER RISK REDUCTION

Ronan McDermott

International University College of Dublin

Introduction

The threat posed by natural disasters to human dignity is great and is arguably increasing due to trends such as accelerating population growth, increased urbanisation, and greater climatic unpredictability due to the greenhouse phenomenon. The rising awareness of the threats posed by natural disasters is reflected in international governance mechanisms such as the Hyogo Framework of Action, which place a legally non-binding obligation on government to take positive measures to mitigate against disaster risk. Despite this recognition of government's responsibilities in disaster risk reduction (DRR) and the calls by disaster management professionals for increased promotion of community-based disaster risk reduction, the role of human rights in bridging the responsibilities of government and the agency of community in this policy domain is surprisingly lacking. Few studies have focused on the role of human rights in providing the necessary legal accountability in this phase of the disaster cycle, despite also an increased awareness by many of those in the humanitarian and development fields of the role of human rights in providing a moral basis as well as a set of guidelines as to how to conduct humanitarian operations. This paper proposes to address this neglect through first exploring the nexus between disaster risk reduction and human rights in the academic literature and in grey literature issued by international governmental organisations. This is followed by a more focused analysis of the human rights standards and jurisprudence of most relevance to disaster risk reduction. Finally, the practical means by which progress towards the realisation of human rights in disaster-prone areas may be measured will be outlined through critical analysis of literature on the measurement of human rights.

1. The Conceptual Link between Human Rights and DRR

There is a burgeoning academic literature concerning the politics of natural disasters. This literature is couched in the paradigm shift within disaster management generally from concern solely with the natural hazard to consider more critically the underlying vulnerabilities and capacities of human and social systems. The meaning of vulnerability within disaster management has been broadened from an undue emphasis on exposure to natural hazards to capture the multidimensional way in which social systems,

independently of the hazards that may threaten them, are rendered vulnerable due to their physical, social, economic, infrastructural and institutional characteristics (Birkmann 2005). This approach views societal structures as integral to human vulnerability to natural hazards (Fisher 2010: 552). From this perspective, natural hazards have the potential to harm those who are exposed to them yet that exposure is distributed differentially within society as a result of underlying socio-economic and political factors. Such factors also influence the capacity of communities or countries to respond, cope with or recover from the damaging effects of disaster events (Ahrens & Rudolph 2006; Blaikie *et al.* 1994: 9; Heijmans 2004).

Within this paradigm of disaster risk reduction, the political participation and empowerment of local communities to acquire a share of DRR interventions becomes important (Wilkinson 2012; Boyce 2000). This is reflected in the shift towards community-based initiatives as the most appropriate method with which to mitigate disaster risk (Ahrens & Rudolph 2006: 208; Allen 2006; Alexander 1997; Shaw 2006). However, as Kaufman and Alfonso (1997: 10) put it, 'the community is one of several critical loci of organisation and change'. Self-protection efforts made by households and communities themselves ought to be complemented by 'top down' disaster management (Cannon, 2000; Wisner *et al.*, 2004; UN/SDR, 2004; O'Brien *et al.* 2006; Wisner and Walker, 2005). In this vein, states also have been encouraged to promote such participation in DRR efforts through enfranchisement and the decentralisation of authority (Disaster Risk Reduction for Sustainable Development in Africa 2004). States have also been called upon to provide funding and disaster management knowledge (Allen 2006).

Although government institutions are integral to disaster risk management, the relationship between local people and government institutions is an unequal one. CBDRM and state DRR policies often have differing aims as well as differing methods to achieve these aims. This raises the question of how best civil society and the state should interact in the provision of disaster risk management. In a study focusing on megacities Wisner noted that local authorities and civil society seem to have complementary strengths and weaknesses. Whereas local authorities have considerable technical expertise and finances relative to civil society, civil society actors possess detailed knowledge of vulnerable groups and have their trust (Wisner 2003: 181).

On the basis of this review, it is submitted that the adoption of human rights monitoring of government interventions in disaster-prone areas would serve as a conduit to regulate government-community relationships within this policy domain. Human rights provide suitable standards by which disaster risk reduction policies could be assessed in terms of their accountability and the degree to which the state-civil society partnership is promoted. There is considerable potential for the elaboration of the role of human rights in disaster risk reduction policy generally and this is reflected in the grey literature emanating from international governmental organisations. The UNISDR has issued a policy document entitled 'Towards a post-2015 Framework' that highlights the need for greater accountability mechanisms within disaster risk reduction policies (UNISDR 2012: 4). It also stated that Priority Action 1 relating to governance, local level implementation and multi-stakeholder participation ought to be reinforced post-2015. In order to achieve this there was a need for a 'set of underlying values and principles' to guide policy-making in this domain (UNISDR *ibid.*). Researchers were called upon to conduct 'studies that help identify solutions and that support a strategic shift in disaster risk reduction from the 'what' to the 'how' (UNISDR *ibid.*). This indicates that the UNISDR has identified a need to critically analyse the manner in which government DRR policies are designed and implemented. The International Federation of the Red Cross and Red Crescent (IFRC) (2011) has recommended, on the basis of considerable research involving national Red Cross Societies, that states consider analysing their existing legislative frameworks to assess their effectiveness in promoting community-level DRR activities and in empowering community involvement. In addition, the IFRC deems that progress towards greater community participation within disaster risk reduction policies is uneven within countries and between regions and the full implementation of normative frameworks remains an ongoing challenge. In the wake of studies by UNICEF (2008) and the Global Network of Civil Society Organisations for Disaster Reduction (2009), it was recommended that DRR implementation strategies at the national level ought to deepen participation of the most vulnerable groups.

In a public statement by Waterlex (2011), an applied research institute working on the legal aspects of water-related issues, to the Global Platform for Disaster Risk Reduction in May 2011, it was claimed that little has been done to apply human rights law and

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principles to DRR policies. At a conference concerning hazards, globalisation and sustainability one participant 'felt that there has been little interchange of ideas to date between people working on human rights and those dealing with disasters, despite the considerable overlap between these areas' (Handmer & Wisner 1999: 344). Although Heijmans (2004) notes that there is considerable overlap between disaster risk reduction efforts and human rights work, Twigg (2003: 5) asserts that despite this 'little research has been done on regionally- or state-defined rights relating to disasters'. Sarewitz *et al.* (2003: 810) reinforce this by pointing out that although the relationship between human rights protection and the promotion of measures to counteract vulnerability seems obvious and straightforward, this issue has received little attention in the literature.

Analysing existing disaster risk reduction policies on the basis of human rights standards would provide a response to the demands of Gopalakrishnan (2007) and Twigg (2003) who, *pace* IFRC (2011), stress the importance of a post-audit of disaster management legislation currently in place in order to form the basis for future legislation. Such a project would provide a response to the call of a number of authors who claim that disaster risk reduction policies ought to be subject to rigorous theoretical analysis (Alast 2006; Kandlikar & Sagar 1999; Wilkinson 2012).

2. Substantive Human Rights Law and Disaster Risk Reduction Policy

Having noted the need to regulate an increasingly politicised policy environment and having proposed a rationale for incorporating human rights into disaster risk reduction, the question arises as to how international human rights law intersects practically with disaster risk reduction policy and how they might better be integrated. A non-exhaustive set of the potentially most relevant rights to disaster risk reduction will be identified and the relevance of their content to disaster risk reduction will be outlined. Although there is no explicit provision in existing international human rights law that identifies a right to protection from disasters or a right to safety, it has been asserted that a right to protection from disasters may be implied from existing international human rights law provisions (Kent 2001).

Article 25 of the Universal Declaration of Human Rights provides *inter alia* for a ‘right to security in the event of unemployment, sickness, disability, widowhood, or old age or other lack of livelihood in circumstances beyond his control’ (UDHR 1948). Natural disasters must surely fall into the category of ‘circumstances beyond his control’. An interpretation of security that is comprehensive may involve a positive obligation to promote such security through disaster risk reduction policies.

It must be admitted that absolute protection from natural disasters is not attainable due to the unpredictability of natural hazard. Rather, such a right could involve an obligation to provide a certain standard of safety in the absence of certainty. Drawing on the rights to food and health respectively, Twigg (2003) has suggested ‘adequate safety’ or ‘highest attainable standard of safety’ as standards against which the progress of governments towards the realisation of a right to safety may be assessed. Fisher (2010: 556-7) suggests there may be an emerging consensus around the latter standard, citing the declaration adopted by the delegates to the World Conference on Disaster Reduction in 2005:

“We affirm that States have the primary responsibility to protect the people and property on their territory from hazards, and thus, it is vital to give high priority to disaster risk reduction in national policy, consistent with their capacities and the resources available to them.” (Hyogo Declaration, World Conference on Disaster Reduction, cited in Fisher 2010: 556-7)

The right to life

DRR policies are ultimately concerned with saving lives, alleviating suffering and sustaining livelihoods. The right to life, in its various guises in both universal and regional human rights instruments, must therefore be considered a relevant human right (Kent 2001; Fisher 2010)⁷⁵.

⁷⁵ Article 3, Universal Declaration of Human Rights (1948), GA Res. 217A (III), 10 December 1948; Article 6, International Covenant on Civil and Political Rights (1966), 999 UNTS 171 (entered into force 23 March 1976).

The 2008 *Budayeva*⁷⁶ case before the European Court of Human Rights related to the death of eight people in a mudslide that struck a town in the Russian Caucasus Mountains. The Court found that the competent state authorities had violated the right to life through their failure to adequately implement land-planning and emergency relief policies in the vulnerable areas of the town. The Court further noted that by failing to take the necessary preventive measures to avert what was deemed a foreseeable hazard, there had been a 'causal link between the serious administrative flaws' and the death of the victims.

The Human Rights Committee's General Comment 6 concerning the right to life contained in Article 6 of the International Covenant on Civil and Political Rights highlights on two occasions that the provision ought not to be interpreted narrowly.⁷⁷ Furthermore, it construes Article 6 to include a duty 'to adopt positive measures' including, for example, 'all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics' (Fisher 2010: 555; Human Rights Committee 1994: para. 5).

Interestingly, Article 11 of the Convention on the Rights of the Disabled obliges states parties to enact positive measures of protection and safety for people with disabilities in situations of risk. Risk is left undefined in the convention, which allows for the interpretation that risk of natural disasters represents a set of circumstances in which such positive measures must be enacted.

The right to equality and non-discrimination

Those who are most vulnerable to shocks to their economic and social systems are often those most exposed to natural hazards. Furthermore, as in the case of New Orleans pre-Katrina for example, this marginalisation is bound up with caste, class, ethnic, gender, racial, religious or other entrenched divisions within a society. All stages of disaster risk reduction management ought to ensure that

⁷⁶ European Court of Human Rights, Case of *Budayeva et al. v Russian Federation*, applications 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008

⁷⁷ UN Human Rights Committee, General Comment No. 6 : Article 6, Compilations of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para. 5, UN Doc. No. HRI/GEN/1/Rev. 6 (1994)
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the principle of non-discrimination is adhered to. All relevant stakeholders ought to be included in both the identification and assessment of risk regardless of their status. Likewise, the distribution of resources earmarked for disaster risk reduction ought to be done solely on the basis of vulnerability to natural hazards. In the implementation of policy, such measures ought not to discriminate on gender, racial or ethnic grounds. In its General Comment 18, the Human Rights Committee made it clear that the non-discrimination provision in Article 26 ICCPR ‘prohibits discrimination in law or in fact in any field regulated and protected by public authorities’, including in regard to their legislation and the application thereof.⁷⁸ In addition, an approach to equality based on equity may also necessitate positive discrimination to address the resilience of social groups whose historical marginalisation makes them especially vulnerable to natural hazards. Positive discrimination on the grounds of gender, race and ethnicity is permitted by international human rights law until such time as the historical injustice has been adequately addressed.

The right to adequate housing

In 2010 two earthquakes of comparable magnitude shook Chile and Haiti. The death toll in Haiti was in the hundreds of thousand whereas that in Chile was in the hundreds. The differential impact of the two earthquakes can be attributed in part to the greater resilience of Chile’s infrastructure as a result of strictly enforced building codes. The right to adequate housing is contained in article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantees this right as part of the right to an adequate standard of living. The UN Committee on Economic, Social and Cultural Rights (CESCR) has required states comply with this right by ensuring that housing is of ‘habitable’ standard and that provides adequate protection from health and safety hazards.⁷⁹ This standard may be of relevance to disaster risk reduction policies in ensuring that building codes are enforced (Fisher 2010: 555).

⁷⁸ UN Human Rights Committee, General Comment No. 18: Non-discrimination : . 10/11/1989.

⁷⁹ United Nations Committee on Economic, Social and Cultural Rights General Comment No. 4 (1991) on right to adequate housing and No. 7 (1997) on forced evictions;

Regardless of how limited government resources may be, states parties that have ratified this instrument are under a continuous duty to progressively realise this right.

Various elements of the right to adequate housing is also relevant where government plans and/or implements the mass relocation of communities away from disaster-prone areas.⁸⁰ These provisions relate to protection against forced evictions and the arbitrary destruction and demolition of one's home, freedom from arbitrary interference with one's home, privacy and family, the ability to choose one's residence, to determine where to live and to move freely. For housing in relocation areas to be considered adequate, there must be adequate security of tenure, accessibility, and the location must not be cut off from employment opportunities, health-care services, schools, childcare centres and other social facilities, or if located in polluted or dangerous areas.

The right to the highest attainable standard of health

The right to health under the ICESCR entails obligations to ensure a preventive rather than merely a reactive approach to health crises (Fisher 2010: 555-6)⁸¹. This may be fulfilled for example through a commitment to environmental hygiene and preventative medical treatment (Fisher 2010: 555-6). Article 12 ICESCR is the most comprehensive provision on the right to health in international human rights law. The CESCR's General Comment 14 construes the right to health to entail the obligation to ensure 'the prevention and reduction of the population's exposure to ... detrimental environmental conditions that directly or indirectly impact upon human health'.⁸² Human and social vulnerability as well as the importance of a healthy environment are key aspects of the CESCR's interpretation of the right to the highest attainable standard of health:

⁸⁰ See *supra* note 3

Art. 25 UDHR; Article 16, ICESCR; Basic principles and guidelines on development-based evictions and displacement

⁸¹ Article 12, International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3 (entered into force 3 January 1976).

⁸² UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The Right to Highest Attainable Standard of Health*, ¶ 15, U.N. Doc. E/C.12/2000/4 (2000)

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‘...the drafting history and express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as ... a healthy environment’⁸³

Principle 1 of the non-binding 1972 Stockholm Declaration⁸⁴ refers to a right to a healthy environment (Fisher 2010: 566). At the national level, a number of countries have developed constitutional or statutory provisions that approximate to such a right. For instance, Ethiopia’s constitution provides that the ‘government shall take measures to avert any natural and man-made disasters’ (*ibid.*: 568). Countries with similar constitutional provisions include Uganda and Macedonia (*ibid.*). The importance of creating a healthy environment through addressing the ‘underlying determinants of health’ with due regard for resource constraints are clearly outlined in the above instruments. This approach to the right to health may be reasonably inferred to relate to the public policies required to build resilience to natural hazards.

The right to freedom of expression/right to information

Aspects of the right to freedom of expression contained in Article 19 of the Universal Declaration of Human Rights is of relevance to an adequate monitoring by citizens of government DRR policies. In addition, , the Aarhus Convention on Access to Information, Public Participation in Decision-making and access to Justice in Environmental Matters, while not strictly a human rights law convention, regulates government-citizen relationships relating to the environment. Insofar as these policies pertain to natural disasters, provisions of this convention may be applicable. Issues of access to information on environmental matters, public participation in decision making and access to justice on environmental affairs are the most prominent issues addressed by this convention. Varied national laws governing freedom of information are also of relevance here.

⁸³ *Ibid.*

⁸⁴ Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1972)

The right to liberty of movement and freedom to choose his or her residence

Art. 13 of the Universal Declaration of Human Rights provides that:

‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence...’

This provision is reinforced by Art. 12 ICCPR. According to the latter provision, any curtailment of this right, such as a forced relocation due to threat of natural disaster, must be provided for by law, be necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and be consistent with the other rights recognised in the ICCPR.

3. Monitoring DRR Policy Compliance with Human Rights Law

Having identified a rationale for holding governments to account for their disaster risk reduction interventions through human rights and detailing the most pertinent provisions within international human rights law, the question arises as to how compliance by governments with their human rights commitments within the DRR policy domain may be promoted. Possible options include the drafting of an international treaty codifying in one document the above-mentioned human rights standards for the purposes of government disaster risk reduction policy or the passing of a UN General Assembly Resolution recognising the role of human rights principles in disaster risk reduction along the lines of the Guiding Principles on Internal Displacement. Given the explosion of legal documentation at the international level, perhaps the most practical means of promoting human rights in disaster risk reduction would be to promote the monitoring of the above-mentioned human rights standards in disaster-prone areas.

Such an approach would involve drawing on various methods developed for the purposes of conducting human rights impact assessments (HRIA). HRIA is a relatively new concept, which has as its purpose the assessment of particular policies on the basis of their compliance with human rights standards (Bakker *et al.* 2009: 454).

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It involves the elaboration of human rights indicators for determining compliance with human rights. The elaboration of a systematic set of human rights indicators allows for the documentation of changes in human rights compliance over time and allows for greater transparency and accountability within the measurement of human rights compliance (Andreassen & Sano 2007: 276). Despite this, the development of a set of indicators for monitoring human rights compliance is neglected in human rights research (Andreassen & Sano, *ibid.*).

While there is a duty on states to demonstratively monitor their compliance with human rights⁸⁵, a number of initiatives have been taken by civil society and academia to monitor human rights. The development of indicators for measuring human rights compliance has its roots in a larger intellectual shift, beginning in the 1960s, which shifted focus from pure economic standards of well-being in favour of alternative indicators of quality of life (Rosga & Satterthwaite 2008). United States President Carter's Administration provided an impetus to the generation of various methods of measuring human rights compliance to guide that administration's foreign policy. The treaty bodies themselves also encourage states to develop indicators themselves in order to facilitate monitoring by the state itself as well as the treaty bodies. This approach is most notably taken by the CESCR. In 2006 OHCHR produced a report detailing steps to develop human rights indicators. Commissioned by the treaty bodies and prepared following several meetings of experts from the academy, international agencies and NGOs plus members of the treaty bodies themselves, the goal was to design and adopt a conceptual framework for the creation and implementation of human rights indicators that could be used for monitoring human rights compliance by the treaty bodies.

Although the treaty bodies expected that the OHCHR would produce a report detailing universal indicators, the body of experts proposed a framework that 'seeks neither to prepare a common list of indicators to be applied across all countries irrespective of their social, political and economic development, nor to make a case for

⁸⁵ ECOSOC, CESCR, *General Comment No. 1, Reporting by States Parties* (1989), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, *supra* note 31, ¶ 6, at 14; ECOSOC, CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, ¶ 52, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

building a global measure for cross-country comparisons on the realisation of human rights' (OHCHR 2008: para. 43). The report therefore sought a balance between capturing universal elements of human rights and the need to be sensitive to the requirements of a particular situation. Such a framework, which is outlined below, is most appropriate for the application of human rights to situations of disaster risk due to the specific nature and complexity of the issues that natural disasters raise.

The report divides human rights indicators into structural, process and outcome indicators. In this respect it draws on earlier work by Paul Hunt, Special Rapporteur for the right to health (Hunt & MacNaughton 2006). Structural indicators attempt to measure the commitment by government to human rights within their policies. Examples include ratification of relevant human rights treaties and inclusion of rights-based notions in relevant policies. Process indicators on the other hand are deployed to assess the efforts, financial, institutional or otherwise, made by governments on foot of those commitments. Finally, outcome indicators relate to the actual realisation of human rights. This framework involves the identification of the elements that compose a human right. These in turn serve as the basis for indicators at the structural, process and outcome levels. Thus, in the case of the right to adequate housing, a structural indicator may include, a process indicator may be and an outcome indicator may be .

By taking the structural, process, and outcome indicator approach, the monitoring of human rights within disaster risk settings can capture both compliance with human rights by government and the enjoyment of human rights by those in disaster-prone communities. The approach also has the benefit of being readily applicable across all the human rights standards outlined above regardless of whether they are civil and political rights or economic, social and cultural rights.

The limitations of undertaking a human rights based approach to disaster risk reduction ought to be acknowledged. They include the risk of focusing on short-term, easily visible effects as opposed to longer-term structural issues (Bakker *et al.* 2009: 439). There is also a lack of clarity at the UN level as to who, in addition to the treaty bodies, may legitimately use the structural, process, outcome approach outlined above and in which contexts (Rosga & Satterthwaite 2008: 46). It is also unclear how to adopt a systematic

approach to translating human rights standards into indicators of relevance in disaster risk reduction contexts. Also, by reducing human rights compliance and realisation to a set of indicators, the capturing of the entire content of the relevant standards is inevitably lost. In addition, there is a certain trade-off or tension between information-gathering on disaster risk reduction interventions by governments at micro levels with the ability to make a systematic comparison between disaster-prone areas and between policy responses. Systematic comparison of human rights outcomes through subjective indicators can also be hampered by differing cultural understandings of human rights (Landman 2003). In relation to this, it has been recognised that more work needs to be done to investigate appropriate participatory mechanisms for human rights monitoring tools (Harrison and Goller, 2008: 611–612). Any methodology developed for monitoring human rights in disaster-prone settings ought to address these potential limitations by ensuring as participatory a process as possible and using a mix of quantitative and qualitative data at as local a level as possible. As Hunt and MacNaughton (2006: 4) assert, the choice of human rights and the scale of analysis using the structural, process, outcome approach is flexible ‘depending on the policy, programme or project assessed and on the size of the relevant issue’ (Hunt and MacNaughton, 2006: 4).

Conclusion

Two major strands within current thinking on disaster risk reduction include a growing realisation of the political nature of vulnerability to natural disasters and the importance of community-based initiatives to building resilience. Despite this recognition within the academic and grey literature and although the literature on the relevance of human rights law within the disaster response stage of the is growing, there has been little attention to the human rights dimensions of the disaster risk reduction stage of the disaster management cycle. It is argued that existing human rights law provides the basis for increased monitoring of government’s role in addressing vulnerability to disaster. However, such a monitoring approach must walk the tightrope between upholding the universality of human rights and sensitivity towards the complex issues that each disaster-prone area raise. If disaster risk reduction is to be conceived of as sustainable development and if the realisation of human rights

is one of the major objectives of sustainable development, then greater sensitivity to the human rights of those living in disaster-prone communities is called for. Human dignity and safety ought not be merely the end goal of policies to reduce disaster risk; they ought to be incorporated into how this end is achieved by government through due recognition for human rights in policy design and implementation.

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THE PATTERN OF DECENTRALIZED POLITICS AND ADMINISTRATIVE POWER OF DISASTER MANAGEMENT IN POST MENTAWAI TSUNAMI 2010

RR Emilia Yustiningrum

LIPi

Abstract

The striking of Mentawai tsunami in October 25th, 2010 has raised a broader policy of post disaster management in Indonesia, from national level into provincial and district level that has been running into two phases like emergency and rehabilitation/reconstruction. As an archipelagic district, apart from its mainland of West Sumatera, and prone to natural disaster, Mentawai has to be treated specifically apart from other disaster-prone areas. The Indonesian post disaster management has been adopted into national law that legally binding into provincial and district level. However, when the disaster stroke into a remote district like Mentawai, the national law could not be applied yet until the provincial and the district level approved the local law as well as applied for decentralized politics.

Thus, decentralized politics applied when tsunami hit only one district, then the disaster management should be the responsibility of the district however when tsunami hit more than one districts, then it goes to the provincial government. Unfortunately, the tsunami hit Mentawai as a single district therefore the disaster management was its responsibility, however Mentawai has no capabilities to cope disaster, then it asked provincial government for help. As a consequence, most policies during emergency phase had been done based on governor's law. Up to the rehabilitation and reconstruction phase, the West Sumatera provincial government did not have more power to implement the phase, because the Mentawai district government has to negotiate to the Ministry of Forestry at the national level regarding the relocation of the victims.

Keyword: decentralized politics, administrative power, disaster management, Mentawai tsunami

1. Introduction

During the period of 2009-2010, there were various great natural disasters stroke on Indonesia such as West Sumatera earthquake, volcano eruption of Merapi, tsunami Mentawai, Wasior flood, and Bandung district landslide. These natural disasters needed a quick response of local government as well as central government in Jakarta to save the lives and bring recovery programmes toward them. It applied the same on the case of Mentawai tsunami that hit the island on October 25th, 2010 that needed further responses from the government.

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The history of Mentawai tsunami can be traced back from the source of earthquake in two separated islands, Siberut and Sipora-Pagai, while all of them are part of Mentawai archipelago. The earthquake that happened in the sea could have longer period of repetition than in the mainland however the magnitude could reach up to 8 RS. The earthquake in the sea could have brought tsunami into the mainland. Danny Hilman et al (2012) resumed that the series of huge earthquake hit up to 9 RS had happened on Siberut in 1600, Sipora in 1797, and Pagai 1833, by measuring on the spread of coral reef in the coastal region of Mentawai that shown up the repetition period of earthquake in each 200-300 year.¹

The latest earthquake triggered to tsunami Mentawai on October 25th, 2010 had caused 461 people dead, 70 people missing, 270 people seriously injured, 142 lightly injured and 14.983 people lost home. The most affected areas were South Sipora, North Pagai, and South Pagai islands. Tsunami hit up to one km across the mainland and destroyed houses, physical infrastructure, economic facilities, and social facilities including primary schools and primary health cares. Based on the damage and loss assessment (DaLA), tsunami Mentawai had damaged highly on economical infrastructure up to Rp. 117,821.51 million (33.9%) of total DaLA with 80% on fishery and plantation damages. As a consequence, most victims who were farmers lost the main jobs because tsunami has the following damages on the plantation land, failure of harvest, the fisheries' equipments. The following damages and losses were housing up to Rp. 115,826.63 million (33.2%) and it was followed by infrastructure, social facilities, and inter sectors.² The detail of damage and loss assessment on tsunami Mentawai can be seen in the Table 1 below:

¹ Philibosian, Belle and Sieh, Kerry and Natawidjaja, Danny H. and Chiang, Hong-Wei and Shen, Chuan-Chou and Suwargadi, Bambang W. and Hill, Emma M. and Edwards, R. Lawrence (2012). "An ancient shallow slip event on the Mentawai segment of the Sunda megathrust, Sumatra". *Journal of Geophysical Research B*, 117 (B5).

² Bappenas & BNPB, December 2010. *Rencana Aksi Rehabilitasi dan Rekonstruksi Pasca Bencana, serta Percepatan Pembangunan Wilayah Kepulauan Mentawai Propinsi Sumatera Barat Tahun 2011-2013*. Jakarta, Bappenas & BNPB, hlm. 25.

Table 1 Damage and Loss Assessment (DaLA) of the Mentawai Tsunami 2010

No	Sector / Subsector	Damage (Rp million)	Loss (Rp million)	Total (Rp million)
1	Housing	105.414,13	10.412,50	115.826,63
2	Infrastructure	17.365,00	1.801,44	19.166,44
3	Economic	53.423,85	64.397,77	117.821,61
4	Social	16.048,41	619,10	16.667,51
5	Inter sector	79.613,40	188,00	79.441,40
	Total	271.864,79	77.418,81	348.923,59

Source: Bappenas & BNPB, December 2010. *Rencana Aksi Rehabilitasi dan Rekonstruksi Pasca Bencana, serta Percepatan Pembangunan Wilayah Kepulauan Mentawai Propinsi Sumatera Barat Tahun 2011-2013*. Jakarta, Bappenas & BNPB, hlm. 25.

Based on the Law 24/2007 on disaster management in Indonesia, it had legally binding that if a natural disaster hit only a district than it would be the responsibility of the affected district to cope with its disaster management however when a natural disaster hit more than two districts than it would be the responsibility of the provincial government to cope with it. Regarding the case of Mentawai tsunami, the main idea of the paper leads to answer the question of *how the impact of natural disaster could lead to a centralized or decentralized politics of disaster management that sometimes does not count on the geographical constraints and incapability of the affected district to cope with its disaster management*.

2. The Nature of Disaster Management on Mentawai Tsunami 2010

At first, Mentawai tsunami was responded by having emergency phase to save lives, burry the dead, deliver food aids, temporary tents, and medical aids, for almost a month. It was established by the Act of West Sumatera Governor 188.45-268/2010 on emergency and recovery of post Mentawai tsunami to deliver those aids for a month.

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However, the Act of Head of the Mentawai district 188.45-269/2010 had responded the previous act to establish the chain of command on emergency phase by putting financial responsibility during the emergency phase on the Mentawai district, West Sumatera province, central government of Jakarta, and nonbinding of any kind of financial assistances. It happened based on the evidence that tsunami Mentawai only hit a district, however the Mentawai district did not have enough supporting capabilities to cope with the emergency and recovery phases as part of its disaster management. It went worse since the Local Disaster Management Council of Mentawai district (BPBD Mentawai) has just been established in 2008, had its human resources in 2009, and faced tsunami in 2010, then it did not have strong enough capabilities to do the emergency phase. According the Law 24/2007, it could ask help from the West Sumatera provincial government to have any assistance regarding the disaster management.

At the time of tsunami hit Mentawai, it spread into three main islands that apart from each other. The most affected areas were the coastal sub-districts that have facade to the Indian Ocean. Almost a week in the aftermath of tsunami, Mentawai faced extreme weather that lead to the bottlenecking of aids in Sikakap sub-district, and could not be sent into the affected sub-districts along with many humanitarian workers. Mentawai, a remote archipelagic district apart from mainland of West Sumatra province, did not have supporting mainland infrastructure to deliver the aids with the humanitarian workers because the only way to deliver the aids was by the sea. Thus, the affected islands were apart from each other so that delivering the aids could not be done in a single island but it had to be split into many islands.

The Act of West Sumatera Governor 071/2010 has been re-established to prolong the emergency phase for another month because the delivering aids had only reached 50% of total aids because of extreme weather, the difficulties of delivering aids in the different islands, and the plan to develop temporary shelters for the victims could not be done yet because there was no agreement among the victims on where would be the areas for relocation.

After four week of emergency phase, the Act of West Sumatera Governor 360-99-2010/2010 has been established to end the phase and the following policies regarding the post disaster management would be the responsibility of Mentawai District. The urgent problem

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in the aftermath of emergency phase was relocation of the victims that mostly resided in the west coast of South Sipora, North Pagai, and South Pagai islands. The Act of Head of Mentawai District 188.45-208/2010 has stated that the relocation area in those islands will be done based on supporting budget from the Mentawai District.

The following phase was rehabilitation and reconstruction phase. Unfortunately the rehabilitation and reconstruction phase could not be implemented yet because the unfinished political process toward this phase. It started by the proposal of the acting Head of Mentawai District to deliver the rehabilitation and reconstruction phase as the following (a) infrastructure development such as roads, bridges, and ports, (b) permanent residence completed with social and public services, (c) economic development, and (d) social development. The infrastructure and permanent residence were needed to relocate the victims that used to live in the coastal regions of the tsunami affected areas into the higher location, and the roads, bridges, and ports are the supporting facilities toward the permanent residence. Those locations mostly situated in the production forest that its utilities rights were on the Ministry of Forestry in Jakarta. Therefore the acting Head of Mentawai District had to negotiate to Ministry of Forestry to exchange the function of production forest into another function that has been declined by the Ministry of Forestry. The first negotiation was failed due to the main reason of the Ministry of Forestry that exchanging the function of production forest will reduce the overall coverage of forest in Indonesia.

As the first negotiation failed then the rehabilitation and reconstruction phase could not be done yet. However there were early recovery programmes done by the Mentawai District to deliver clean water, sanitation facilities, and plants to give activities to the victims as the permanent relocation could not be done yet. As the early recovery programmes have finished, the Mentawai District needed further negotiation regarding the rehabilitation and reconstruction phase.

The newly elected government of Mentawai District for period of 2012-2016 started further negotiation by exchanging location of production forest into other locations that were set up to the production forest, with the aims of rehabilitation and reconstruction phase as the following (a) infrastructure development such as roads, bridges, and ports, (b) permanent residence completed with social

and public services, (c) economic development focuses on empowering the victims, and (d) social development focuses on health and education.

The relocation areas for the Mentawai tsunami victims had to be negotiated vertically started from Head of Mentawai District to West Sumatera Governor by asking for releasing production forest into permanent residence for the tsunami victims. The releasing areas covered $\pm 30,443$ ha outside Siberut island with the following details: (a) South Sipora island for $\pm 11,623$ ha, (b) North Pagai island for $\pm 12,241$ ha, and (c) South Pagai island for $\pm 6,505$ ha. Those releasing areas would be developed into permanent residence as the following: (a) South Sipora island 3,563 ha, (b) North Pagai island 3,007 ha, and (c) South Pagai island 4,600.34 ha.³ As the Mentawai District needed further study to re-established the relocation areas then the Head of Mentawai District established an integrated team to analyst the needed relocation areas that could not be done except by negotiation with the Ministry of Forestry.

The integrated team found some obstacles in the relocation areas as the following. First, the design of permanent residences on the Spatial Planning of Mentawai District, as it was matched with the current situation, it did not have any coordinates and no permanent sign either. Second, the people who live in Bosua and Berioulou villages, at the South Sipora sub district, were unwilling to live in the planned permanent residence because the planned permanent residence was not match with the Spatial Planning of the Mentawai District. Third, in North Pagai sub district, the people who live in Tumalei, Gogoa, and Mangguiruk villages were unwilling to live in the planned permanent residence that far away from their planting areas, lying on the cultural land that had potential to be a problem in the future. Fourth, some people who live in Tumalei, Gogoa, and Mangguiruk villages had permanent residence built by the non governmental organizations that already existed in their neighbourhood. Fifth, there were some locations in Tumalei, Gogoa, and Mangguiruk villages that were not on the plan drawn to the negotiation to the Ministry of Forestry.

Sixth, in the South Pagai sub-district, the planned of permanent residences were not connected to each other such as lied on Km 37/Kamp Jaya, Km 39-42, and Km 46 that raised disconnected

³ Pemda. Kab. Mentawai, 2007. *Rencana Tata Ruang Wilayah (RTRW) Kabupaten Kepulauan Mentawai 2011-2031*, Mentawai, hlm 178-79.

enclave within the production forest that should be integrated into a single enclave. Seventh, the location of primary school in Km 37 of South Pagai sub-district was not on the planned areas that have been negotiated to the Ministry of Forestry. Eighth, the road in Km 46 at Limu and Mappinang villages of the South Pagai sub-district was not on the negotiating areas to the Ministry of Forestry therefore it needed to renegotiate otherwise the villagers would not have access toward the permanent residence.⁴

The problems of relocation became more complex since there was a mistake to note the planned road that supposed to be 300 km along South Sipora, North Pagai, and South Pagai, and not 42 km in the previous document that should be integrated into the Development Programme of the Mentawai District.⁵ The road problems, not only lied on the utilities right of the planned road, but also the more viable way to use the planned road by exchanging the function of the production forest into the road, or just borrowing the usage of road on the production forest, that again the authority of it was not on the Mentawai District but it lied on the forestry rights of private corporation known as PT Minas Pagai Lumber that still have the forestry rights from the Ministry of Forestry.

Beside, based on Act of Ministry of Forestry P.32/Menhut-II/2010 on exchanging the function of forest, the exchanging location of production forest into permanent residence of Mentawai tsunami victims could not be applied since phrase 6e blocked the negotiation by stating that the planned areas were not in the middle of dispute and free from any other obligations during the negotiation and also there were still people and their homes in the planned areas.⁶

⁴ Pemda. Kab. Mentawai, 2007. *Rencana Tata Ruang Wilayah (RTRW) Kabupaten Kepulauan Mentawai 2011-2031*, Mentawai, hlm 178-79.

⁵ Pemda. Kab. Mentawai, 2007. *Rencana Tata Ruang Wilayah (RTRW) Kabupaten Kepulauan Mentawai 2011-2031*, Mentawai, hlm 178-79.

⁶ Tim Terpadu Pengkajian Lapangan Tukar Menukar Kawasan Hutan, 5 April 2012. *Hasil Pengkajian Lapangan Tim Terpadu dalam Rangka Tukar Menukar Kawasan Hutan atas nama Bupati Kepulauan Mentawai untuk Relokasi Korban Bencana Gempa dan Tsunami Mentawai di Kabupaten Kepulauan Mentawai Provinsi Sumatera Barat*, Padang, hlm. 15.

3. The Political Matter of Post Mentawai Tsunami Management

It has been widely known that the problems of post disaster management in Mentawai were mostly politics. It's about the long ongoing political process that covered the first stage into the next one that sometimes took more time than the original time needed to implement the rehabilitation and reconstruction phases. As the emergency phase has been finished with the highlight that the Mentawai District could not do it alone because many obstacles inside, then the West Sumatera Provincial government has replied by helping one of the districts within its authority.

Then it came to the next phase, rehabilitation and reconstruction, mainly on the relocation of the victims, that needed further negotiation because the authority of the relocation areas belong to the Ministry of Forestry, and not to West Sumatera Province or Mentawai District. First negotiation failed, then the second negotiation had result a positive sign from the Ministry of Forestry in June 2012, however the rehabilitation and reconstruction phases should be done in 2011-2012. The time will be over as the Mentawai District does not have enough time to prepare and implement the phases and beside it has just been a memorandum of understanding between Ministry of Forestry and Mentawai District that needed the following regulations done internally by the Mentawai District. The internal regulations have been started by grouping of victims based on their villages to develop the preparation of building the permanent residence in the planned areas.

However, as the West Sumatera Provincial government took highlight that the Mentawai District had historical record of inability to handle the emergency phase, then the West Sumatera Provincial government asking for a separation management on the rehabilitation and reconstruction phases. The first thing to develop was infrastructure such as roads, bridges, and ports, that followed by the permanent residence, then the management of them should be separated. The West Sumatera Provincial government shared Rp 200 billion as well as the Mentawai District shared the same amount to implement the development of infrastructures.⁷ The problems have been started since both of them have different financial management. The West Sumatera Provincial government asked for a tender for

⁷ Interview with Vice Head of Mentawai District, Jakarta, October 2012.

each work at the infrastructures with the procedure, involved parties, and implementation in the Mentawai District would be done by their own officers. However the Mentawai District asked for grouping the victims based on their villages so that the District could develop infrastructure based on the planned areas that not too far away from the original places of the victims.

The differences on the financial management of developing infrastructure between West Sumatera Provincial government and the Mentawai District has caused tension among each other because the Mentawai District has seen the problems as a way of the provincial government to interfere the local disaster management. However the West Sumatera Provincial government has excused its involvement in Mentawai District based on the historical record of the inability of Mentawai District to handle the disaster management in the past. Thus it contributes to the fact that the disaster management somewhat it would be a decentralized or centralized politics based on the overall damages covered the affected areas as well as the abilities of the affected areas to handle the post disaster management. The Mentawai District faces it nowadays.

4. Conclusion

Disaster management is part of the state's responsibility to protect the citizen. It applied the same on the case of Mentawai tsunami 2010 when it needed state's response in a quick way. The first phase was emergency aimed to save lives, bury the dead, deliver aids long with the humanitarian workers, and provide medical helps. As Local Disaster Management Council of Mentawai District (BPBD Kabupaten) has been established in 2008, filled out the human resources in 2009, and tsunami stroke in 2010, it has not enough power yet to handle the emergency phase although the tsunami only hit a district that means it should be the responsibility of Mentawai District. Then it asked help for West Sumatera Provincial Government, the upper level of government, to help the implementation of emergency phase.

As the emergency phase finished, it came to rehabilitation and reconstruction phases, mainly on the relocation of the victims that needed further negotiation because the relocations areas were not the authority of Mentawai District but Ministry of Forestry in Jakarta. The Mentawai District started series of negotiations with the Ministry

of Forestry resulted in a memorandum of understanding among both of them. As the internal regulations established in the Mentawai District, the rehabilitation and reconstruction phases have to be separated between the West Sumatera Provincial Government and the Mentawai District although both of them shares different on financial management. The separation causes tension and distrust among both of them because the Mentawai District has seen it as a form in interference of provincial government in the district level however the West Sumatera Provincial government has seen it as the relations to the historical record that the Mentawai District was not able to handle the emergency phase in the past.

The long ongoing political process toward the rehabilitation and reconstruction phases, the damages covered on the affected areas, the abilities of the affected areas to handle the emergency phase would contribute to be the centralized or decentralized politics of disaster management in Mentawai District. Despite the programme toward the victims, the disaster management mostly involved political matters.

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Provinsi Sumatera Barat, Padang.*

DEVELOPING FRAMEWORK OF CLIMATE CHANGE INDUCED MIGRATION

Meredian Alam

Sociology Research Centre (SOREC), Universitas Gadjah Mada

Abstract

Many mistakenly understand that climate change is always the direct force for migration and such thought is mostly taken for granted by publics. This paper puts up, there are specific extents that may co-shape migratory pattern while the climatic events emerge. And vulnerabilities themselves are not necessarily associated with the forthcoming action and decision to leave the zones that are susceptible to climate changes. For instance, some studies as briefly described in this paper even unveils, the depletion of natural resource hampered by drought does not propel communities in African state like Burkinafaso and Mali to leave their villages or homelands away because they have no sufficient socio-economic sources to finance their moving-out. From this, it may be concluded migration that is induced by climate change may occur dependent on the degree of interplays among socio-economic features of the communities, the availability of natural resources management, and sensibility of the physical zones or regions in which the community dwells. The weaker resilience of factors the higher possibility of community to do migration. Along with this paper, whether environmentally forced migration is considered as adaptation or risk aversion is also questioned. It is hereby argued that migration may be adaptation to climate change if the groups or individuals return to their pre-occupied settlements to innovate their natural resource managements in order to cope with further weather events. Those who migrate from the pre-occupied settlements for good due to pressing climate change is regarded to be a risk aversion to refrain from more damage of weather events.

(Keywords: Migration, climate change, vulnerability)

This paper deals with the questions of whether environmental migration is purely and directly forced by climate changes occurring in the specific local settings. To allow readers discern the empirical arguments in climate change and the situation that may cause it, the first segment of the paper provide the natural science perspectives of the climate change. While the second part, adaptation as responds of human being to the co-existing weather events are pointed out from rather cultural and social adaptation. In the third part, the arguments that there are specific circumstance characterized by the socio-

economic features, natural resources, and the severity of climate vulnerability. In the end of this part, conclusion on the specific extents or local conditions in forcing migratory action is also presented.

The Natural Science Perspectives of the Climate Change Causes

Climate change has ostensibly become the global pressure not solely for the North but also the South. The persistent treat of climate change has in the last decades ignited inconvenient concerns amongst natural and social scientists who debates concerning the perturbing impacts and uncertainty, which may steadfastly ruin the entitlements of general livelihoods. The evident of climate change, following Locke (2009), has rapidly exaggerated many problems, in terms of increase in pollution, and land degradations. The chief problems are now at the expense of environment that obviously ruins the fresh water sources, crops, near shore fishing, and health problems. In all fragments of the worlds the impacts of climate change emerges in the complicacy of social-ecological system (Barnet and Adger 2007), and more exaggerated by the diminishing human's consciousness towards natural resource conservation.

Before moving on, it is imperative to understand the facts of climate change from natural science perspective. The empirical basis of climate change is necessary to prove that this natural phenomenon is a reality. Asbjørn Torvanger as researcher of CICERO ('Senter for Klimaforskning'/Centre for Climate Change) headquartered in University of Oslo puts up his approval. By comparing the heating temperature driven by anthropogenic behavior and natural events like volcanic eruptions, the temperature caused by human activities rapidly increases and getting higher for 20 years but the one driven by natural event as such remains steady and constant, and does not show any significant increase. The concentration of CH₄ and CO₂ was considered to be the main driver of climate change itself, followed by other green house gases like NO_x and So_x, which are attributed to the chemical formulation of those two gases. As Schneider and Lane (2002) assert, the discovery of agriculture and green revolution in 1960 are two extents that have diminished natural cooling that also indicates the severity of climate change.

Moreover, the burning fuels in large scale has been clear

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evidence to be publicly presented that this mining activities have lead to the increase of carbon dioxide more than 30%, while the land use and other agricultural activities such as cement industry and animal farming have been proven to be “the one of the greatest contributor of climate change by 1880” (Schneider & Lane: 2006:202). According to a scientific calculation, CO₂ in atmosphere has been increasing since pre-industrial revolution, from level 280 ppm and in 2005 it reach 379 ppm, for methane it reached 714 ppm to 1.774 ppm in 2005 (Falkner 2008). This circumstance prompted average global temperature increase from 0.74° C and is recently predicted to be 4° C, so there is a possibility to reach 6.4° C over 21st century. An observed annual temperature from 1980 to 2000 also shows dangerous pattern in Nuuk Greenland, where the highest temperature occurred in 2005 that reached 2.6° C, as it was not constantly going up because in 1980 it went down to -4.4° C.

An analysis of methane gas concentration indicates similar pattern, counting from industrial period it had been increasing from 700 ppm to 1780 ppm at the end of 2005. In terms of increase in CFC, which is one of the most dangerous affecting gas that can leave out holes in the atmospheric layers. Since then CO₂ accounts for 60%, methane gas is 25%. While the CO₂, in 2005 it reached 379 ppm exceeding natural variability that occurred in the last 600.000 years which was 180-300 ppm and this severe situation is worsened by growth of population, the increase of total GDP, foreign direct investment, water use, chemical fertilizer consumption, mushrooming urban population.

Several reports on the consistent model of increasing temperature in the globe are scientifically no doubt, especially in the 20th century. The main indications of it occur to the global glaciers, ice melting, and the sea level rose. A striking explanation from scientific calculation unveils, since 1950 the global temperature increased 0.1 C per decade, winter snow covers declined by 10%, Northern ice thickness fell over by 40%, the frequencies and intensities of droughts, storms, and warm periods leveraged, glaciers melted and even the sea level becomes 20 cm higher (Rauveny 2007). The many of long term and short term effects of such event can perturb much more degrading situation. As projected it turns to be unquantifiable risks of high impacts events. Meanwhile other sources also assert that the deconstruct of thermohaline circulation is proven to be one of the severest cause of regional climate changes in the

northern hemisphere and major scales weather changes such Asian monsoon and the El-Nino in the South (Barnet & Adger 2007). From this evident, it can be seen that the situation gets alarming throughout many years and becomes real threats to the being in the world. Climate scholars observe the severity of climate change can impose the sustainability of the entire life of the human themselves and other associated creatures (Rauveny 2007). Further studies developed by IPCC (2007) corroborates this argument by presenting the fact that business of usual (BoA) led by some environmentally degrading industries will much more terrify the current environment. Moreover, the developing countries are those of being terribly impacted by the climatic events, as they are lacking of robust infrastructures and stretched in equatorial zones which prone to the extreme monsoon. The impacts on the developing country vary, inclusive of food security and health, degradation of land and freshwater resources. Private sectors, following Rauveny (2007), which are less paid attention are hampered by climatic events due to coastal erosion and landslides that downgrade their profitability in a way.

As of the concern of this articles emphasizing the migration, the impact of climate change has indirectly put more stress on the global community living with inadequate sources, which made them living in suffer. From this thought, it is regarded that population has been a global concern. Associated to population, according to Tacoli (2009), the forcing of climate change to population distribution and mobility ignites growing interests and close attention from scholars that their recent discussion is emphasized on the yielding systematic framework of the relations between climate change and migration in diverse parts of the globe. In further discussion, this paper will scrutinize it featured with various cases concentrating on ongoing migration.

Adaptation to Climate Change

As emphasized above, adaptation to climate change is of importance in discerning how the climatic event has posed the community to take action in order to survive their live. The conception of adaptation is initially developed from the natural science considering that it may provide empirical prediction and forecast. Despites of many terminological disputes in the natural

sciences themselves, it is rather worth to get a glimpse from the interdisciplinary definitions. Referring to Futuyama (1979), Winterhalder (1980), and Kitano (2002) adaptation may broadly be conceptualized as the development of behavioral characteristics which enable organisms, humans, and living systems to tackle the emergence of environmental changes in order to survive and keep continuing their sustenance. In its association to climate change and its natural forcing, such concept of adaptation shall be contextualized to grab the matched meaning.

The adaptation, when it comes to human-being, shall integrate the pre-existing culture, tradition, and customs in the community. Henceforth, sociologist and anthropologist in collaboration with natural scientists trace climate change from cultural manner (Wandel & Smith 2006). An ecologist who is also profound in human's culture, Julian Stewards underpins that adaptation to climate change is co-shaped by culture, namely "cultural adaptation". He thus defines, adaptation is one by which groups of people add new and improved methods of coping with the environment to their cultural repertoire" (Wandel & Smith 2006:283). In broader perspective to challenge the definitions to be more touching down onto population, Denevan (1983, in Wandel & Smith 2006) encapsulates, cultural adaptation as ongoing process of change in responding change in the physical environment or a change in internal pressure, such as demography, economics, and organizations. On the other words, his thought of human's adaptation to climatic events is more embracing to cultural thing than the physical one. In more culturally precise, survival of a culture after the coping from climatic events is interpreted distinctively. O'Brien and Holland (1992) speak out about the successful breakthrough of culture amidst climate change adaptation is that, adaptation is "consequence of selection acting on variation through cultural practices (adaptations) which have historically allowed a culture to survive". Further, they emphasize the distinction between adaptation from adaptive variables, that adaption enables societies to function within their environments regardless of whether they evolved as a result of selection. From this perspectives, we are strongly inspired that people remain in their community or pre-impacted settlements when the climatic event occur and hence modify the way their behaviors, infrastructures and innovate their systems to tackle more severe impacts of the weather. The current coping of groups from climate change events is through migration, which becomes raising debates whether it is adoption,

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risk-averting action, or perhaps both.

Through different presentation of cases in this paper, the further reflection about the above matter will be discussed. As Tacoli (2009) asserts, the debates that migration forced by climatic event is part of adaptation becomes recent discourse in the climate change. The forecasts unveils, in 2050 the number of people will migrate out to the more resourceful spots partly because their currently existing natural resources are seen depleting and keeps them no hopes. According to this prediction, there is a view that migration reflects a failure of certain groups of people to adapt to changes in the physical environment, and the migrants tend to make distinctive ways of emergency responses (Tacoli 2009).

Learning from the Climate Change Induced Migration Cases

The migration induced by climate change or weather events raise debates among the scholars. Migration cases in many countries perpetrated by climate changes and weather events is provided to corroborate the discussion about how the climate induced migration could be conceived as adaptation to climate change or just a risk aversion. Developing countries are those, which become the most susceptible to climate change. In Bangladesh for instance, frequent storms, floods, and prolonged droughts made the living community desperate to seek alternative natural resource for the survival of family members. The continuous poverty in this country has since 1950 preferred to moving out of the villages to embark in secure places (Rauveny 2007). Previously in 1930 in the US Great Plains, large dust, strong winds, and aggressive soil tilling produced large dust storms and severely forced 2.5 people to flee (Rauveny 2007).

In the Pacific islands, many local communities are almost under threat of climate change due to the increasing sea level. Tuvalu for specific, are largely perceived as the place that is vulnerable to climate change. 2001 was the year in which people flocked out the island to the neighboring states. Evident describes that Tuvalu becomes the near shrinking, drowning, and disappearing island in the Pacific zones (Montreaux and Barnett 2009). Following the study of Red Cross and Red Crescent's World Disaster Report 2005, Pacific zones are deemed as one of Least Developed Countries in the globe with severe adverse effect of a climate change and in the

regions, thousands of people's settlements were eroded by climate change-associated disaster, which the number has risen over 21% in the last 20 years (Locke 2009). The surprising evident indicates, the number of people living in zone has rapidly increased from 270.000 during 1980s to 1.2 million in the 1990s (Locke 2009). Kiribati, as the nearby island, overcomes the almost similar condition. In 1970 the majority of the population of Banaba under Kiribati authority was shipped to Rabi Island in Fiji. At that time Kiribati people's lives were more devastated after the coming of hurricane. The hurricane arrived in the country debilitating most of the agricultural system in Tokelau (New Zealand's neighboring state), and with assistance of New Zealand authority relocation program was then mobilized to New Zealand (Locke 2009).

As for the climatic event in Kiribati, World Bank (2006) notices, the sea level rise that leads to coastal erosion and rapid salinisation of fresh water really hampers the agricultural land and decline the local earning from tourism. Kiribati island is examined as one of the 10 most vulnerable countries in the world to climate change by International Institute for Environment and Development, which few islands are measured with only 2 meter high from sea level and the average island width isles than 1000 m. This environmental landscape shows us that the island is prone to any effect of climate change and extinction. The Gilbert Islands, part of the Kiribati, desperately overcomes prolong drought and storms. Gilbert Islands, composing eight atolls, are situated on average less rainfall than the other islands of Kiribati. Located on the western lines of equatorial zone, the documented annual rainfall in this island can be as low as 360 mm or may be much lower than that. Nowadays, these island experience very prolonged unusual drought and followed by much shorter period of rainfall.

From above evident of natural forcing, it is believed that small island states will be no longer inhabited because of the sea level rise and inundation is on alert (Parks & Timmons 2006: Locke 2009). Eventually in the year 2007 Tuvalu there had many animal life and plant thrived and disappeared beneath the sea. 7 years back Tuvalu experienced a strange long flood lasted for 5 consecutive months. The flood itself eroded the porous soil and hence devastated many of Tuvalu's islands from the every angle. This alarming situation posed global concern, which reinforces UNFCCC to take further action. In 2003, UNFCCC (United Nation Framework Convention on Climate

change) reinvigorate Tuvaluan Government for awareness raising on the precedent risks of climate change by talking about the feasibility of island abandonment during Conference of Party (CoP) (Connell 2003; Mortreux & Bannet 2003). Such political forcing may work, but the real fact does not, because the local authority of Tuvalu has no sufficient resources to ship out their residents to neighboring states.

The migration model as seen in Tuvalu case is clear to evidence that climate change indirectly put the locals in unpredictable risk and dangers of life. Relied on this case, such environmental migrants who are adversely affected by severe weather events are forced to leave their habitual homes temporarily or permanently to safeguard their life (Locke 2009). Given this situation, it can be perceived, even without government's intervention, migration induced by severity of climate change is something rationally intuitive. People will choose to migration in order to seek safer place for dwelling. In the same vein, people's capacity to adopt climate change, by looking closely at Tuvalu and Kiribati' cases, are low in as much as there few reserves and natural resources of land available, household's access to technology and sufficient sources of live. Briefly speaking, people's live are constrained by many diminishing entitlements so that the situation does not allow them to stay in (Barnet & Adger 2007).

The similar pattern occurs to Bangladesh who is conceived as one of the most climate-devastated developing countries in the globe. The economic growth of the country is constrained by the growing weather events in the country. The weather events in this country has characterized there are many prone zones and according to Black (2006), prolonged drought and widespread drought and water scarcity in the northeast, intensified and more frequent storm activity, exacerbated in coastal regions by the rising sea levels, riverbank erosion and more frequent flooding on account of intensified rainfall and short term upstream glacier melting, drainage congestion and deeper penetration of salinity in surface water and soils are the myriads disaster, which forcibly brings the more severity. This situation impedes the locals to do seasonal migration to both rural and urban area with more well-off condition, so that they can get income sources for the family, more than half of rural households in Faridpur and Rajbari send out their children to nearby towns and the 25% of the households across all wealth groups migrate in the agricultural zones for long time. More than one million

people lose out their settlements or land due to river erosion each year and this displaced group of people have migratory pattern. One of the case study finds out, people initially attempted to secure themselves into neighboring villages after the fact that annual cyclone or flooding both erodes land and can slowly generate new areas for potential settlements as result of risk aversion. In the same situation, while the riverbank erosion occurs over night, local sedimentation is considerably longer process and may not importantly happen in the location. Local population pressures hence rise and some of local displaced growingly move out to urban zones while no other alternative incomes can be made available.

As for the Bangladesh migratory model, several key impeding factors also interplay in this case. The research findings by Black et al (2008) may bring the light the constraining physical condition of the country that exaggerate the vulnerability and forces migration. First of all, it deals with unemployment in the country. More than 70% of the rural Bangladeshi becomes landless and the country itself is worsened by the incredibly high population density, leading the landless laborer to poverty, high likelihood exposures to contagious diseases, and other risks that undermine their lives. Second of all, the ecological vulnerability is deemed to be the shaping factors that trigger people to leave their homes. The north-west of Bangladesh are assessed to be highly prone to prolonged drought and the massive flooding in elsewhere is a driver of migration. While the climate vulnerability is high, the flood washes out the infrastructures and agricultural system run by the local community. Another climate variability that puts the country in risk is cyclone. Even though it is temporary and has temporal characteristics in specific zones, cyclone comes to happen in significant frequency and destructive.

The cases above have inspired about the partial linear understanding of climate variability that triggers migratory pattern in naturally different places in the globe. However, the later question is then, does all climate vulnerability always impose people to leave their homes? To provide the sufficient explanation about this matter, the research findings of Kniveton et al 2008 is thought to be able to convince us. Following to their studies, climate variability, to some extents, does not force people to leave out their origins. The heavy downpours data for Mexican states of Zacatecas and Durango informs opposite relationship. In 1970s and 1980s the decreases in international long distanced migration occurred to Mali and

Burkinafaso. In these two countries, while the drought worsened the food scarcity and in the same time the prices of food were on rise, people tended to stay in and concentrated on spending their money on their basic needs rather than migrating out. Learning from this case, I regard that sensibility of the areas and the capability of people concerned in tackling the environmental crisis due to climate change plays is sufficient to discern the reverse relation.

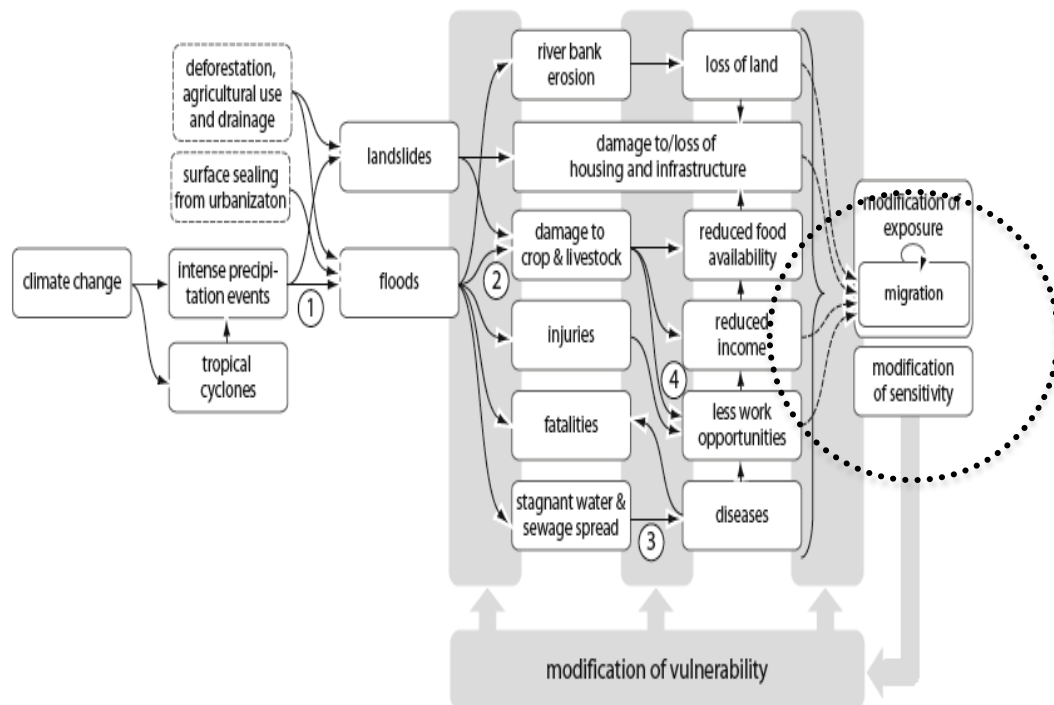
Is Migration Necessary to Cope With Climate Variability?

Given above elaboration, we can reflect that the climate change variability such as flood, droughts, and heavy rainfalls does not, in some circumstance, force community to do migration. If we follow the cases above, even the weather events are highly extreme, each of the community, area, and zone has distinct sensibility. The sensibility hereby implies, the capacity of community in mobilizing resources to cope with and response severe climate variability are diverse. Socioeconomic features of the community may inform the decision-making processes. The proximity to the neighboring secured places are detrimental to the community weather migratory action necessary. The outland transportation also plays in shaping the collective decision of the community. For further understanding each of it will be discussed.

The sensibilities in the context of climate change shed light that zones that are hit by the climate change has different resilience and resistance. If the zones are located in multiple potentials of natural hazards, and hence the climate change emerges, the probability of being severely damaged is high. The physical characteristic and robustness of the areas also determines its strength in underpinning the weather events. For instance, in the zones where the soil structures are fragile and situated in hilly locations, the more critical it will get devastated because it will be easily washed out by the harsh flowing water. In the case of typhoon and cyclone where the power of wind is relatively hurling, infrastructures like the model of building structures are of the concern. If they are not well constructed following the possibly pre-existing natural catastrophe, the may be ruined at all times. Concerning the capacity, the discussion can be oriented to the preparedness of local populations in handling the forthcoming disaster but it depends on the availability of information that renders specific predictions on the event and previous disasters.

Stable economic condition may contribute to access of endowment before decision of migrating is made. Some of the zones are closed to the site for securing themselves, but the others are not. People exposed to the site with close distant will tend to prefer to migrate. Transportation to the more secure location is also critical consideration, which may bring them away from the susceptible sites.

To illuminate our thought of how migration is decided to survive for the climate events, the following is a framework developed by Perch-Nielsen et al (2008) in order to systematically explain in what circumstances of vulnerability of climate change increase possibility of migratory pattern.



Source: Pierce et al (2008)

According to above framework, deforestation, intense precipitation, massive storms like hurricane, typhoon, and cyclones can put more risk to the society through the existing modification of vulnerabilities. There are at least 6 environmental changes that drive up the communities, groups, and even individuals to undertake migratory actions. If their settlements are going to loose, the food storage is declining, the diseases makes the live more severe, local

incomes is going to diminish, and employment opportunities are getting bad, migratory action as survival alternatives will be taken. Nevertheless, since the contextual variability according to the places, geographical locations, demographic instability, and other physical complication that is dynamic, migratory pattern—be it seasonal, long term, and short term, is calling for more attention to be sought and defined.

From the discussion, we may partly conclude, migration is a risk-aversion behavior to cope with individually or collectively perceived vulnerability of climate change event. Migration can be defined as adaptation to climate change as long as the individuals or groups return to their pre-occupied homeland after the weather events end up and hence they set up renewed settlements that can endure from further vulnerability. Aside of it, migration can entirely be conceptualized as risk aversion, in the condition that community or groups leave their homeland permanently and thus generate new livelihood in their new lands.

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HUMAN RIGHTS PROTECTION

Proceeding – Indonesian Humanitarian Action Forum 2012

THE ROLE OF ASEAN IN PROMOTING HUMAN RIGHTS: A CASE STUDY OF ROHINGYA REFUGEES

Irmawati

Institut Ilmu Sosial & Ilmu Politik, Jakarta

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Abstract

This paper aims to analyze the role of ASEAN in the context of regional human rights architecture in promoting human rights issue in the region towards Rohingya refugees. The assumption on this paper is built upon the concept of human rights and human security. Based on this concept, the state must protect its citizens from threats to human security if the State fails to realize human security, either intentionally or because of incapacity, the international community shall intervene. The majority of third world countries have a complexity in terms of implementation of human rights. It has an impact on “half-hearted” behavior of the ASEAN Member States in enforcing human rights in the region. ASEAN has committed to enforce human rights in the region by establishing human rights body namely ASEAN Intergovernmental Commission on Human Rights (AICHR). The effectiveness of this body depends on the political will among its member. In the case of Rohingya refugees, the effectiveness of AICHR has been questionable. ASEAN remains silent due to the lack of human rights respects. In Author’s point of view, political will among ASEAN member to promote the implementation of human rights and obligate the protection capacities is appeasement policy in the framework of human rights enforcement in the region.

Keyword: role, human rights, human security, policy appeasement.

Introduction

The Rohingyas are Burmese Muslims who have lived as a distinct cultural group in Myanmar's western province of Arakan since the 8th century. This is a rugged region of three million people and once was an independent Muslim homeland. It was founded by Arab and Moorish merchants in the 7th century when they stay there during the trading into China. Rohingyas form distinct cultural group that trace their roots to the 8th century. In the late 18th century Burma conquered Arakan ending their independence.⁸⁶ Arakan region has been officially designated as the Rakhine since 1989.

⁸⁶ Peter Tran, “Rohingya refugees: an ambivalent future,” *Migration World Magazine*, January-February (1996): 29,
<<http://go.galegroup.com/ps/i.do?id=GALE%7CA18340136&v=2.1&u=kpto3051&it=r&p=GPS&sw=w>>

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United Nations view Rohingyas as one of the worlds most prosecuted minorities.⁸⁷ They are confronted other forms of persecution, discrimination and exploitation, including (but are not limited to) forced labour, extortion, restriction on freedom of movement, the absence of residence rights, inequitable marriage regulations and land confiscation. They also have limited access to secondary and tertiary education as well as other public services. Rohingyas were not formally recognized as one of the country's official national groups when the country gained independence in 1947 and they were excluded from both full and associate citizenship when the Burmese government introduced Citizenship Act in 1982.

In 1977, Burmese Army pushed out about 300.000 Rohingyas into Chittagong.⁸⁸ Their flight was caused by an atrocity of Burmese Army under Naga Min Operation or Dragon King Operation. The suppression of Rohingya continued in 1991-1992 that caused Rohingya fled to Bangladesh as refugees. Following the bloody violence erupted in June 2012 and killed at least 78 people from Rohingyas and Budhist in Rakhine, the wave of Rohingya continued to rage.⁸⁹ The ongoing violence has driven Rohingyas from their homes. They have turned up in waves as asylum seekers and refugees in neighboring country.

Over decades, Rohingyas face widespread murder, rape, torture, forced labor, ethnic and religious persecution. Many of them have strived to escape because the lack of human security. They have left Myanmar and taken up residence elsewhere. It is affecting neighboring country in Southeast Asia such as Thailand, Malaysia and Indonesia.

The case of Rohingya refugees become regional ones. It was urged ASEAN play its role to be more proactive, substantive and effective in resolving the Rohingya problem. ASEAN can't blind an

⁸⁷ "Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees," May (2007), UNHCR, <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=46fa1af32&query=rohingya>>

⁸⁸ Peter Tran, "Rohingya refugees: an ambivalent future," *Migration World Magazine*, January-February (1996): 29, <<http://go.galegroup.com/ps/i.do?id=GALE%7CA18340136&v=2.1&u=kpt03051&it=r&p=GPS&sw=w>>

⁸⁹ Indonesia Should Brace for More Rohingya Refugees: HRW, 10 August (2012), The Jakarta Globe, 5 October 2012, <<http://www.thejakartaglobe.com/home/indonesia-should-brace-for-more-rohingya-refugees-hrw/537327>>

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eye regarding human rights violations. As human security issues become intensive discussion among academician, many question raised about the role of regional mechanism regarding human security issues (including human rights issues). In this context, human security reframes rights as security issues.⁹⁰

ASEAN as regional institution that had launched its human rights body namely ASEAN Intergovernmental Human Rights Commission (AICHR) in 2009 can take its role regarded Rohingya refugees. Regional human rights protection mechanisms constitute the main pillars of the international system for the promotion and protection of human rights.⁹¹ Furthermore, this article will analyse To what extent ASEAN take its role in promoting human rights in the region in the case of Rohingya refugees.

Human Rights and Human Security

Human rights are commonly understood as the fundamental rights inherent in every person. This rights is inherently entitled simply to which a person because he or she is a human being.⁹² Human rights may exist as natural rights or as legal rights, in both national and international law. At the international level, human rights depend upon a wide acceptance that there is a higher moral authority to the state. In contemporary international economic and politic, human rights issues can affect investment or supply management decisions. Human rights issues are frequently at the center of contemporary human security crises, from struggles for self-determination to conflicts over natural resources or access to medical care. As stated in the Universal Declaration of Human Rights, human rights are a pillar of international peace and hence can

⁹⁰ Michelle D. Bonner, "Applying The Concept of Human Security in Latin America: An Argentine Case Study," *Canadian Journal of Latin American and Caribbean Studies*, Vol.33, No 65 (2008): 9-33.

⁹¹ The Role of Regional Human Rights Mechanism, European Parliament , Directorate General for External Policies, November 2010, <
<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>>

⁹² J. Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca and London: Cornell University Press, 2003), 7-21.

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be conceived as fundamental human security “goods.”⁹³ Most authors argue that human rights is in essence to protect human security.⁹⁴

In essence of human security concept, the safety of individuals becomes a centre of analysis. As defined by UNDP, human security moves away from the militaristic idea of security. Human security defines as safety from chronic threat such as hunger, disease, repression, and protection from sudden and hurtful disruption to daily lives in terms of seven broad categories of security such as food, economic, health, political, personal, community and environment (UNDP, 1994). A secure state whose did not have trouble in dispute boundaries or external threat could still have insecure citizens. States by perpetuating selfish and outdated sovereignty can directly threaten the safety and welfare of its citizen rather than external enemy.⁹⁵

Human security does not limit security to issues related with physical violence but includes issues that within human rights discourse would be considered social and economic rights. In this way, the concept of security is not a simply military prerogative but requires the integrations and interconnection of many different types of organization working on issues as diverse as health, education, and the environment.⁹⁶ Here, security is not just state protect itself by using its military from foreign threats, but also involves the state and international actors working to provide security for individuals within states.⁹⁷

States must protect its citizens from threats to human security. Since the state failed to protect their people, the international community can take its role. The international community when necessary and appropriate could help the state to build their protection capacities. The safety of individuals is at the centre of international priorities and a motivating force for international actions. Global, regional and bilateral are built and equipped to

⁹³ Paul Battersby and Joseph M. Siracusa, *Globalization and human security*, (UK: Rowman & Littlefield Publishers Inc, 2009), 159

⁹⁴ Ramcharan 2003, in Michelle D. Bonner, “Applying The Concept of Human Security in Latin America: An Argentine Case Study,” *Canadian Journal of Latin American and Caribbean Studies*, Vol.33, No 65 (2008): 9-33

⁹⁵ Herman Joseph S Kraft, *Building an East Asian Community : The Human Security Imperatives*, in Soesastro, Hadi dan Clara Juwono (ed). *The Inclusive Regionalist: A Festschrift Dedicated to Jusuf Wanandi*. (Jakarta: CSIS, 2007), 425-436

⁹⁶ Michelle D. Bonner, “Applying The Concept of Human Security in Latin America: An Argentine Case Study,” *Canadian Journal of Latin American and Caribbean Studies*, Vol.33, No 65 (2008): 9-33.

⁹⁷ Ibid.

enhance and enforce to protect individuals. The Myanmar government had failed to protect its citizen during violence in June 2012 in Rakhine. In addition, Government restrictions on humanitarian access to the Rohingya community have left over 100,000 people displaced and in dire need of food, shelter and medical care.⁹⁸

The Rohingya have had stateless since 1982. The Article 15 of the 1948 Universal Declaration of Human Rights confers upon every individual, everywhere in the world, the right to have a legal connection with a State. Citizenship or nationality not only provides people with a sense of identity, it entitles individuals to the protection of a State and to many civil and political rights. Citizenship has been described as “the right to have rights.”⁹⁹ Considering these condition, Rohingya is a specific condition. Considering its condition, urge ASEAN as regional institutions to promote and protect human rights in Myanmar regarding Rohingya crisis.

Myanmar and the wave of Rohingya Refugees

Myanmar is ASEAN member state that had high attention from international community related human rights violations. Myanmar has experienced decades in the field of first generation human rights (as codified in the 1948 Universal Declaration of Human Rights) and “second generation” economic, social and political rights (as contained in the 1966 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights).¹⁰⁰ Based on Amnesty international reports, the government of Myanmar violates the human rights of ethnic minority, political opponents and activist in myriad of ways, including torture and other ill treatment; discrimination on the basis of religion and ethnicity; unlawful killings; and arbitrary detention.¹⁰¹ These abuses have resulted in the lack of human security which has been felt most acutely in the

⁹⁸ Hafid Abbas , “The Rohingya crisis: ASEAN vs Red Cross,” 06 September 2012, The Jakarta Post, <<http://www.thejakartapost.com/news/2012/09/06/the-rohingya-crisis-asean-vs-red-cross.html>>

⁹⁹ Nationality and Statelessness: A Handbook for Parliamentarians, UNHCR, <<http://www.unhcr.org/refworld/pdfid/436608b24.pdf>>

¹⁰⁰ Asley South, Ethnic Politics in Burma: states of conflict, (New York: Routledge, 2008), 78

¹⁰¹ Amnesty international, 2010, in Annisa Gita Srikandini, Responsibility to Protect in Myanmar: The Political Willingness of the Myanmar Government After Cyclone Nargis, (Yogyakarta: Institute of International Studies, 2011), 19. Proceeding – Indonesian Humanitarian Action Forum 2012

country's remote, armed conflict-affected regions, where the Tatmadaw and other armed groups often act as a law unto themselves.¹⁰²

Human insecurity has been forced Burmese to leave their homes. The causes of population movement within Burma and beyond its borders often relate to serious and systematic abuses of a range of basic rights. Patterns of forced migration reflect the changing nature of conflict in the country. Some of the most acute difficulties are faced by people living in the few areas of Burma that still affected by significant levels of armed conflict. However, the phenomenon of forced migration is more complex and widespread, and reflects deep-seated patterns of structural violence (non-armed conflict). The patterns of cyclic migration for many Burmese often include periods spent abroad as laborer (legal or otherwise), and/or refugees (official or otherwise) in neighboring countries.¹⁰³

Most research on forced migration in and from Burma has a strong human rights orientation.¹⁰⁴ This article will focus on Rohingya as one of ethnic minority and perhaps the most exploit muslim minority groups. The ancestors of the Muslim Rohingya have lived in the north Arakan State (or Northern Rakhine State) for at least 200 years. During the period of British rule, the Rohingya population increased significantly. Since 1982, The Burmese Government implemented citizenship law that has been refused Rohingya citizenship. Under Burma's Socialist Program Party (BSPP), the 850,000 Rohingya in Burma are ineligible for full citizenship, as they are considered as resident aliens.¹⁰⁵ They faced severe restrictions on access to land, in receiving permission to travel between villages in northern or even to marry.¹⁰⁶ The Rohingya were citizens of Myanmar until Ne Win promulgated the restrictive Citizenship Law of 1982 declared that the Rohingya non-nationals or foreign residents and excluded them from one of the 135 national races recognized by the Burmese government.¹⁰⁷ The 2008

¹⁰² Asley South, *Ethnic Politics in Burma: states of conflict*, (New York: Routledge, 2008), 79

¹⁰³ Op.Cit, 78-81

¹⁰⁴ Op.Cit, 81

¹⁰⁵ Op.Cit, 43

¹⁰⁶ refugees international, 2006 in Asley South, *Ethnic Politics in Burma: states of conflict*, (New York: Routledge, 2008)

¹⁰⁷ Lucas Bento and Guled Yusuf, *The Rohingya: Unwanted at Home Unwelcome Abroad*, The Diplomat Blog, 9 October 2012, <<http://thediplomat.com/asean-beat/2012/10/09/the-rohingyas-place-in-a-democratic-burma/>>

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Constitution does not alter the fact that Rohingyas' legal status relies entirely on the political will of the government: Article 345 (a) sets a double *jus sanguinis* requirement – both parents have to be citizens, whereas (b) refers to the existing 1982 Citizenship Law.¹⁰⁸

In 1991-1992, At least 250.000 Rohingya fled to Bangladesh as refugees following a wave of suppression by Tatmadaw, including the massive use of forced labor and other systematic human rights abuses. About 28,000 Rohingya stay in refugee camps around Cox's Bazaar in Bangladesh by mid 2007. In the mid 1990 until the late 1990s, Most of these people were repatriated by the UN High Commission for Refugees (UNHCR). The 95 per cent of Rohingya refugees who were returned to Northern Rakhine State faced a protracted humanitarian crisis, including annual food deficits, exacerbated by widespread forced labour and other abuses, often related to their statelessness. A further 100,000–200,000 Rohingya were living illegally in Bangladesh, including 5,000–10,000 people settled in a makeshift camp near Teknaf.¹⁰⁹ In the mid February 2011, the wave of Rohingya refugees arrived at Aceh, about 129 Rohingya fled from Arakan following the suppression by The Junta.¹¹⁰

ASEAN and Human Right Mechanism in Region

International politics environment has changed due to the end of cold war. When country in the world entered global transition that marked by contradictory trends, the states decides to yield some sovereign prerogatives to the wider common political associations. Regional associations of states are evolving ways to deepen cooperation. In a response of the international environment, Association of South East Asia Nation (ASEAN) engaged in human rights needs. After World Conference on Human Rights that held in Vienna, June 1993, ASEAN found optimism culminated in convening. The following month (July 1993), of the 26th ASEAN Ministerial Meeting (AMM) in Singapore declared that “...*in support*

¹⁰⁸ The Arakan Project: Issued To Be Raised Concerning The Situation of Stateless Rohingya Children in Myanmar (Burma).
<<http://www.unhcr.org/refworld/pdfid/436608b24.pdf>>

¹⁰⁹ Asley South, *Ethnic Politics in Burma: states of conflict*, (New York: Routledge, 2008), 79-81

¹¹⁰ Manusia Perahu Asal Myanmar Terdampar di Aceh, 16 February 2011, Okezone, 5 Oktober 2012, <http://gresnews.com/ch/National/cl/IOM/id/1885539/read/1/129-Manusia-Perahu-Asal-Myanmar-Terdampar-di-Aceh>

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of the Vienna Declaration and Program of Action...ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.”¹¹¹

The term human rights mechanism means the promotion and protection of human rights. A human rights commission is one type human rights mechanism, although it does not tell us what the mechanism can do. The commission does suggest that the mechanism not be able to issue legally binding decision that needed a court to play this role. This type of mechanism has weakness that its decisions are not legally binding. The role of civil society organization is crucial to made up the efficacy of a commission.

Following the commitment in promoting and protection of human rights, ASEAN shall establish an ASEAN human rights body that they stated in Article 14 of ASEAN Charter. ASEAN’s Foreign Ministers endorse the final draft of the Term of Reference on 20 July 2009, which named the “body” the “ASEAN Intergovernmental Commission on Human Rights” (AICHR). Finally, AICHR was launched on 23 October 2009 during the 15th ASEAN Summit in Hua Hin, Thailand. The political declaration that launched stated that *“the AICHR will be the overarching institution responsible for the promotion and protection of human rights in ASEAN.”¹¹²*

Term of Reference of AICHR define its mandate, purposes, principle and functions. The independence and effectiveness of AICHR was questionable. AICHR is not independent by design.¹¹³ AICHR is an intergovernmental and consultative body (article 3).¹¹⁴ AICHR consist of member states rather than independent and competent human rights experts. Each of ASEAN Member State appoints a Representative to AICHR and these Representatives are accountable to the appointing Government. AICHR reports to the ASEAN foreign ministers. It means AICHR’s constituents are the States, not the peoples of ASEAN. The Spaces for civil society to

¹¹¹ Joint Communiqué of the 26th ASEAN Ministerial Meeting, Singapore, on 23-24 July 1993, ASEAN Secretariat, <http://www.aseanhrmech.org/downloads/1993_Joint_Communique.pdf>

¹¹² Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights, ASEAN Secretariat, <<http://www.aseansec.org/documents/Declaration-AICHR.pdf>>

¹¹³ FIDH submission to the European Parliament Sub-committee on Human Rights (DROI) on AICHR, <<http://www.fidh.org/FIDH-submission-to-the-European-12186>>

¹¹⁴ Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, ASEAN Secretariat, <www.aseansec.org/DOC-TOR-AHRB.pdf>
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participate in the work of the body is not mentioned in the TOR. It will leave the participation of civil society at the discretion of the member states and the members appointed to the body. This certainly is not in line with the aspiration of making ASEAN a people oriented ASEAN.¹¹⁵

AICHR is less effective. AICHR's TOR subjects the body to principle of non interference (article 2.1 (b)). States can use this principle to deflect international scrutiny of human rights abuses. Abusive ASEAN governments in countries like Burma, Cambodia, Laos and Vietnam have consistently used this convenient principle to deflect international scrutiny of human rights abuses.¹¹⁶

AICHR regard with **consensus decision-making**. Based on Article 6.1 of TOR, AICHR shall make a decision on the basis of consultation and consensus. Thus modalities give de facto veto power to every member and that every decision made is thus very likely the lowest common denominator. This flaw has reportedly been exploited by Representatives of governments with poor human rights record to introduce regressive languages and to block the inclusion of certain rights, such as the right to self-determination.¹¹⁷

The Role of ASEAN in Promoting human rights and The Case of Rohingya Refugees

ASEAN commitment to promote human rights through the establishment of an appropriate regional mechanism on human rights namely ASEAN Intergovernmental Commission on Human Rights (AICHR) was one step ahead of the ASEAN evolution. ASEAN have come around to the idea of human rights issues including the third generation issues of the right to security, survival and safe environments and sustainable development, will constitute the most salient new dimensions of human rights in the region.

The human rights violations against the Rohingya Muslims will hinder the commitment regarding human rights issues. On august 1, Human Rights Watch (HRW) stated that Myanmar security forces

¹¹⁵ ASEAN Must Ensure Independence and Effectiveness of the body if it is to be Credible and Realistic,
<<http://www.thinkcentre.org/article.cfm?ArticleID=2972>>

¹¹⁶ FIDH submission to the European Parliament Sub-committee on Human Rights (DROI) on AICHR,
<<http://www.fidh.org/FIDH-submission-to-the-European-12186>>

¹¹⁷ Ibid.

had committed killings, rape and mass arrests against Rohingya Muslims after failing to protect both the Muslims and Arakan Buddhists during deadly sectarian violence in June 2012. Government restrictions on humanitarian access to the Rohingya community have left over 100,000 people displaced and in dire need of food, shelter and medical care.¹¹⁸ Myanmar's government considers at least 800,000 Rohingya in the country to be foreigners while many citizens see them as illegal immigrants from Bangladesh and view them with hostility.¹¹⁹

ASEAN by its body namely AICHR has to restore its credibility as a regional institution that has mandate to promote and protect human rights. Under AICHR, ASEAN could facilitate the Myanmar government through various capacity-building supports. Referring to the implementation of Responsibility to protect which stipulates that the state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement. The international community responsible to encourage and assist states in fulfilling these responsibilities and to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If state failed to protect its population, the international community could take collective action to protect people in accordance with the Charter of the United Nations. Ironically, ASEAN has not yet offered any solution due to the plight of Rohingya.

ASEAN common norm of non interference hinder such act. During the ASEAN Day, initial discussions held among Indonesian Foreign Minister Marty Natalegawa, Cambodian Foreign Minister Hor Namhong and Surin during the Asean Day celebrations at the Asean Secretariat in Phnom Penh indicated that the time had come for Asean ministers to call a special meeting to address the problem. They address ministerial meeting in Pnompenh at August 14, 2012. Hor Namhong depicted that the situation in Rakhine as a humanitarian crisis as well as a cultural and religious issue.¹²⁰

¹¹⁸ Hafid Abbas , "The Rohingya crisis: ASEAN vs Red Cross," 06 September 2012, The Jakarta Post, <<http://www.thejakartapost.com/news/2012/09/06/the-rohingya-crisis-asean-vs-red-cross.html>>

¹¹⁹ Indonesia Should Brace for More Rohingya Refugees: HRW, <<http://www.thejakartaglobe.com/home/indonesia-should-brace-for-more-rohingya-refugees-hrw/537327>>

¹²⁰ Rohingya Plight Further Divides Asean, 5 September 2012, The Jakarta Globe <<http://www.thejakartaglobe.com/opinion/rohingya-plight-further-divides-asean/542446>>

Otherwise, The Myanmar Minister, Wunna Maung Lwin rebut the invitation and point out that the chair did not engage in prior consultations. Furthermore, the Rohingya plight was an internal issue in which ASEAN should not intervene. Myanmar strong reaction had called off the plan.

ASEAN failed in collective action. Eventough, ASEAN members used their own approach. Indonesian President Susilo Bambang Yudhoyono appointed Indonesian Red Cross chief Jusuf Kalla as his special envoy on the issue.¹²¹ Then, Malaysia has hosted international conferences regarding the plight of Rohingya.

Conclusion

Rohingyas become stateless since 1982 when the Myanmar government implemented citizenship law. Being stateless persons, Rohingyas are vulnerable to abuse and exploitations. Furthermore, Rohingyas turned up in waves as refugee to its neighboring country because of the lack human rights respect. ASEAN as regional institution can play role as regional mechanism to promote and protects human rights by AICHR. Even though AICHR is an important step towards the better promotion and protection of human rights in the region but it is remain silence in addressing human rights violations against rohingya. Asean principle of non interference and consensus handicapped collective act. Each ASEAN member country prefer act on their own than collectively.

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¹²¹ Indonesian Red Cross Sends Team to Myanmar, 25 August 2012, The Jakarta Globe, <<http://www.thejakartaglobe.com/asia/indonesian-red-cross-sends-team-to-myanmar/540266>>

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ASSESSMENT ON THE MYANMAR GOVERNMENT'S RESPONSE TO THE VIOLENCE AND HUMANITARIAN CRISES IN RAKHINE

Ririn Tri Nurhayati

Universitas Gadjah Mada

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Abstract

Humanitarian crisis broke out in Myanmar and invited deep concern from the international community. This humanitarian crisis is happening as the impact of communal violence between ethnic Rakhine Buddhist and ethnic Rohingya Muslim that occurred in the region of Rakhine, Myanmar's west side. A lot of states, international organization, humanitarian and human rights organization have expressed deep concern over the incident and hope that the Myanmar government immediately to control the violence and undertake the recovery, rehabilitation and reconciliation between the parties concerned. This paper aimed at assessing the Myanmar government's response to the violence and humanitarian crises in Rakhine. It is also analyze the reason for the government to restrict access of humanitarian aid while the pressure is so strong from the international community. It is interesting to analyze the problem using the concept of the roles and responsibilities of the state in dealing with humanitarian crises.

Keywords: conflict and violence, humanitarian response, humanitarian access, human rights, roles and responsibility of the state

1. Introduction

Humanitarian crisis broke out in Myanmar and invited deep concern from the international community. This humanitarian crisis is happening as the impact of communal violence that occurred in the region of Rakhine, Myanmar's west side. The conflict that took place since the beginning of June 2012 occurred between ethnic Rakhine Buddhist and ethnic Rohingya Muslim. Based on data submitted by the Myanmar government, the conflict has caused 78 people were killed, 87 people injured and destroyed 3000 homes. Furthermore, it has led to tens of thousands of people on both sides have become refugees. But many doubt the government's version of the data and assumed that the number of victims could be much more than the official figures from the government. Amnesty International said that even government officials in Myanmar's soldiers come to be actors in the violence committed to the ethnic Rohingya Rakhine. The World Food Program said that 90,000 people had been displaced as a result of violence.

Humanitarian issues experienced by ethnic Rohingya is not new, in fact has happened since the time of Burma's independence. Rohingya people, amounting to some 800,000 people are one of the minority ethnic groups in Myanmar and most lives in the Rakhine State. But the Myanmar government does not recognize the Rohingya as citizens of their country. The government calls them illegal refugees from Bangladesh, while Bangladesh government did not recognize the Rohingya as citizens of their country because people have hereditary Rohingya living in Myanmar territory. As the impact of government policies that do not recognize the existence of the Rohingya, the Rohingya often experience alienation, discrimination and violence over the past few decades. Due to a variety of difficult conditions in Myanmar there are many Rohingyas who fled to neighboring countries. The largest number of them fled to Bangladesh which is around about 30,000 Rohingyas living in UNHCR barracks.

Various responses immediately emerged from the international community to the humanitarian situation in Rakhine. Humanitarian agencies such as Amnesty International and Human Rights Watch deplore human rights violations against the Rohingya minority. Countries such as Egypt, Iran, Turkey, Indonesia, the U.S. and others have also expressed concern over the incident and hope that the Myanmar government immediately to control the violence and undertake the recovery, rehabilitation and reconciliation between the parties concerned. The UN had then intervened to resolve the situation by sending a special envoy to Myanmar Rakhine. The UN asked the government to take action to stop the violence. The UN also warned Myanmar that the conflict could hamper political transformation towards democratization of Myanmar.

This issue is important and interesting to study using the perspective of humanitarianism. The important and interesting questions to study are: **What the Myanmar government's response to the violence and humanitarian crises in Rakhine? Is the response effective to solve humanitarian problems experienced by Rohingya? What is the reason for the government to restrict access of humanitarian aid while the pressure is so strong from the international community?** It is interesting to analyze the problem using the concept of the roles and responsibilities of the state in dealing with humanitarian crises.

2. Conceptual framework

There is a growing focus on the role of national governments in responding to disasters, both in the context of natural disaster and man-made disaster such in a conflict and other emergencies situations. The state's primary responsibility in responding to disasters is clearly recognized both in law and in statements of principle. For example UN Resolution 46/182 states:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected

country and in principle on the basis of an appeal by the affected country. Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.

The Sphere guidelines 'acknowledge the primary role and responsibility of the state to provide assistance when people's capacity to cope has been exceeded. It is the responsibility of states to ensure the safety and security of their citizens. The protection of civilians, whether understood primarily in physical or legal terms, remains first and foremost the duty of governments, a reflection of their sovereign authority over, and responsibility for, all those living within their territory.¹²²

In conflict contexts, where the state is unable or unwilling to meet the population's basic needs, international humanitarian relief remains the aid instrument of last resort. In these contexts it may neither be possible nor desirable to work with the government, either because it does not control the areas where services are needed or because donors are unwilling to engage for political reasons. Whatever the case, there is still likely to be a need for longer-term

¹²² "The role of national governments in international humanitarian response to disasters" 26th ALNAP Meeting in Kuala Lumpur, 16-17 November 2010, Meeting Background Paper.

approaches that seek to align with the national government, to the extent possible.

Full and unimpeded humanitarian access is a fundamental prerequisite to effective humanitarian action, especially in situations of armed conflict, such as Somalia, the DRC or Sudan (Darfur), but also in the context of natural disasters (e.g. Haiti, Pakistan) or civil unrest. Humanitarian access, mandated by the United Nations GA Resolution 46/182, refers to a two-pronged concept, comprising:

- Humanitarian actors' ability to reach populations in need
- Affected populations' access to assistance and services.

Yet, multiple constraints impinge on access. The 2010 Report of the Secretary-General on the Protection of Civilians identifies the following:

- *Bureaucratic restrictions* imposed by State and non-State actors on personnel and humanitarian supplies.
- *Intensity of hostility* in civilian areas
- *Attacks on humanitarian personnel and theft of assets*¹²³

In Resolution 1894 (S/RES/1894), the Security Council underscored that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law. At the same time, the Security Council also noting with grave concern on the severity and prevalence of constraints on humanitarian access, as well as the frequency and gravity of attacks against humanitarian personnel and objects and the significant implications of such attacks for humanitarian operations. Therefore, states have important role in promoting an environment that is conducive to the facilitation of humanitarian access to those in need.¹²⁴

Full and unimpeded access is a basic prerequisite to humanitarian action. However in many cases, humanitarian access has become major challenge to response the crises. Humanitarian aid and personnel are prevented from reaching the millions of people in need of vital assistance. Issues of sovereignty and territorial integrity

¹²³ <http://www.unocha.org/what-we-do/policy/thematic-areas/humanitarian-access>

¹²⁴ [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1894\(2009\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1894(2009))
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are repeatedly used to hinder humanitarian access, yet claims that humanitarian aid and humanitarian workers can threaten national sovereignty and challenge territorial integrity seem ludicrous. With some exception, the neutrality of ICRC has allowed that organization access to remote area more importantly allowed it to raise concern about protection of civilians in affected areas. In many emergencies, local authorities and government are caught up in internal conflicts, meaning that humanitarian assistance is denied to people in dire need. Within this situation, international society has a strong role to play in advocating and securing humanitarian access in appropriate ways. And the ability of international society to respond crises is being compromised and those most affected are the world's most vulnerable people.¹²⁵

The role and responsibility of the states to respect and ensure human rights of its citizens as well as all individuals within their territory can be referred to Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, and so on. For the purpose of this paper, it is important to be emphasize that human rights are applicable at all times whether in time of peace, of state of emergency (i.e. natural disaster) and/or armed conflict. The rights established in human rights treaties are to be enjoyed by all persons on the territory or subject to the jurisdiction of a State party, including non-citizens such as refugees, stateless persons, and migrants. This right is attached to each individual with no distinction as to race, sex, religion, citizenship status, and so on. So these rights are universal and must be respected wherever the individual is located. Although certain human rights can be derogated from in times of public emergency, many human rights guarantees can never be suspended, e.g. the prohibition of the use of torture. Moreover, in accordance with the International Covenant on Civil and Political Rights, derogation from human rights obligations declared in a situation of public emergency that threatens the life of the nation must be officially proclaimed, must not be inconsistent with the State's obligations under international law, must not involve discrimination

¹²⁵ DARA, *The Humanitarian Response Index 2009: Whose Crises? Clarifying Donor's Priorities*, New York: Palgrave Macmillan, 2010, p. v.
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and must include only measures strictly required by the exigencies of the situation.¹²⁶

3. Analysis

a. Facts about the violence in Rakhine

Violence in Rakhine began in June 3, 2012 when a bus was attacked in Taungup, due to incorrect information regarding a number of passengers believed responsible for the rape and murder of a female Buddha in the late of May. Ten Muslims were killed in the attack, which led to violence in the city of Maung Daw and Buthidaung, Friday June 8th and the destruction of property belonging to Buddhists. According to state media, the riots killed seven people and wounded 17 others. Violence continued to flare up at least 17 people were killed and hundreds of houses were damaged in the violence involving between Buddhists and Muslims in western Myanmar.¹²⁷ But other sources said there was a greater number of the death, estimated 25 people were killed and 41 others injured in riots that occurred during five days. The death does not include the 10 Muslims who were killed on June 3 by the mass of the Buddha as an act of revenge for the rape and murder of a woman that triggered the violence in Rakhine. Violence continued to erupt in the capital city of Rakhine, Sittwe on June 9, where both Rohingya and Arakan mobs burning homes and house of worships and launching attacks on each other. The violence left over 100,000 displaced.¹²⁸

The government mobilized the military to resolve the unrest that has killed tens of people and damaged hundreds of houses. Myanmar's President Thein Sein on Sunday June 10 announced the emergency conditions in Rakhine State. "I urge the citizens, political parties, religious leaders and the media to cooperate with the government, to come to feel

¹²⁶ Inter-Agency Standing Committee, *International Humanitarian Norms and Principles: Guidance Material*, Workshop on Humanitarian Coordinators, January 2010, p. 22.

¹²⁷

http://www.bbc.co.uk/indonesia/dunia/2012/06/120611_burmaemergency.shtml

¹²⁸ AFP/ANTARA – *Thursday, 14 Jun 2012*

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responsible, restore peace and stability, and to prevent the escalation of violence", said Thein Sein. Myanmar's president declared an emergency situation in Rakhine State through national television. The government had earlier imposed a curfew in four cities in Rakhine, in order to avoid further conflict.¹²⁹

However, sectarian unrest continued and spread to the capital Sittwe and other villages has forced thousands of people from both sides to leave their homes since Friday. An official report stated by Htein Lin, border affairs minister in Rakhine State, Thursday June 14 stated that at least 29 people were killed, hundreds injured and more than 30,000 people fled from Rakhine State were rocked by sectarian violence.¹³⁰ Some of the refugees tried to flee to neighboring countries, Bangladesh. But Bangladesh itself increased security at the border for fear exodus group. The government then announced the closure of the border with Myanmar and rejected the arrival of new refugees. Bangladesh border guards said they had rejected a number of boats carrying Rohingya group on Monday June 11. Some reports said Bangladesh has repatriated more than 2,000 Muslims were trying to enter the country.¹³¹ The decision to refuse refugee have deteriorated the situation.

b. Response toward the Rakhine situation

The continued unrest immediately invited the attention and concern of the international community. UN Secretary General Ban Ki-moon immediately sent Vijay Nambiar, UN special adviser on Myanmar, came to Rakhine on Thursday, June 13, to observe the situation there. However, due to security reasons, the United Nations has evacuated most of its foreign staff out of the headquarters in Rakhine. UN envoy has warned that violent communities in the west of Myanmar poses a threat to the country's shift to democracy and said that discrimination against the Rohingya Muslim minority were behind the riots. Tomas Ojea Quintana, the UN Special Envoy in charge of human rights in Myanmar, urged the government reforms to address the "root cause" of

¹²⁹ <http://www.dw.de/myanmar-umumkan-keadaan-darurat/a-16013493-1>

¹³⁰ <http://www.dw.de/ribuan-warga-myanmar-mengungsi/a-16028771-1>

¹³¹ http://www.bbc.co.uk/indonesia/dunia/2012/06/120612_burmaviolence.shtml
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discrimination against the Rohingya Muslims living in the strife-torn region. On those bases, the UN Envoy urged all parties to exercise restraint, respect the law, and not provoked the violence.¹³² Deep concern also declared by numbers of governments from Indonesia, Malaysia, Iran, Saudi Arabia, Egypt, USA, etc and from several international organization such as European Union, Organization of Islamic Conference. They urge the Myanmar's government to take steps necessary to stop the violence and address the root cause of the conflict.

Activists criticized the Burmese government for imposing a state of emergency and could pave the way state takeover. In emergency conditions, the military is allowed to take control of the government in the region. Human Rights Watch accused the government of Myanmar to delegate powers in Rakhine State to the military, which they say has a history of brutality against the Buddhist and Muslim.¹³³ Activists criticized the Burmese government for allowing the army took control of the western provinces. Violence is rising without control under government control, as stated by Human Rights Watch. Government newspaper Ahlin, said security forces had to take up arms to resist the rioters. The troops were deployed to assist the police in the cities of Maungdaw and Buthidaung, as mobs rampage. A curfew was implemented and public gatherings of more than five persons are also prohibited. However, activist criticized that security forces who were deployed to stop the violence have been reported to conduct attacks targeting Rohingya Moslem. Therefore UNHCR called for an investigation on the conflict between Budhis Rakhine and Rohingya. ¹³⁴

The activist also called for journalists, aid workers and diplomats allowed to enter so that they can monitor the actual condition, and then provide much needed assistance to the victims. Human rights organization, Amnesty International, has called for the Burmese government to allow aid agencies to enter the evacuation areas without a

¹³² AFP/ANTARA, Thursday June 14 2012.

¹³³ http://www.bbc.co.uk/indonesia/dunia/2012/06/120612_burmaviolence.shtml

¹³⁴ <http://www.republika.co.id/berita/internasional/global/12/06/10/m5ehv9-myanmar-perketat-keamanan-pascakonflik-muslimbuddha>

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hitch at all. The agency also urged an independent investigation and warned that although violence has stopped, it is still a violation of human rights.¹³⁵ Amnesty International says communal violence is continuing in western Myanmar six weeks after the government declared a state of emergency, and that much of it is directed at minority Muslim Rohingyas. The rights group accuses both security forces and local Rakhine Buddhists of carrying out attacks against Rohingyas in the region and says an unknown number have been beaten, killed and raped. The group's Asia researcher, Benjamin Zawacki, says while both Buddhists and Muslims have been targeted, recent violence has been directed primarily against Rohingyas.¹³⁶

Human Rights Watch (HRW) denounces Myanmar government for the killing of the Rohingya Muslim minority during the wave of sectarian violence in the country. Murder, rape, and arrests were conducted by security forces of Myanmar toward the Muslim Rohingya. The government has failed to protect minority Muslims in sectarian conflict with Buddhist Arakan in western Burma in June 2012. Violence against Rohingya indicates that the state-sponsored persecution and discrimination still persists despite the government's promise to end the ethnic discrimination. HRW said the Burmese government has restricted access to humanitarian organizations to the Muslim Rohingya. More than 100,000 people were displaced and in need of shelter, care, food, and medicine. Therefore, HRW called on the government of Myanmar to take urgent steps to end human rights violations, and ensure humanitarian access, as well as allow international independent monitors to visit the affected area in investigating human rights violations. The sectarian violence and abuses that have followed have created urgent humanitarian needs for both Arakan and Rohingya communities. The humanitarian response to the crisis has been severely hampered by restricted access to the affected areas, particularly to northern Arakan State. UN and independent humanitarian agencies and their local staff have

¹³⁵

http://www.bbc.co.uk/indonesia/dunia/2012/06/120620_burma_pengungsi.shtml

¹³⁶ The Jakarta Post, July 20 2012

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been subjected to arrests, threats, and intimidation. At the time of greatest need, their work has been brought almost to a standstill.¹³⁷

Coalition of 58 civil society groups from a number of countries in Asia, Europe, and Africa condemned the acts of violence and discrimination against ethnic Rohingya in Myanmar and Bangladesh. Coalition, in a statement released Wednesday, July 18, 2012, asking for an international inquiry to investigate the unrest and violence against the Rohingya community. Violence against Rohingya community in Burma began on June 3 in the town of Sittwe and Maungdaw.¹³⁸

Government of Myanmar, who received harsh criticism from a number of issues related to the Rohingya, denied any massacre of ethnic minorities. Myanmar dismissed claims about the massacre committed by the security forces and indigenous people, the minority Rohingya in Arakan. The Myanmar government also believes that there were lies from the media regarding incidents of communal conflict in Arakan. In addition, the Government of Myanmar stated that Rohingya are not considered as citizens and denied all the comments stating that they treat Rohingya arbitrarily. Vice President Sai Mauk Kham Myanmar reiterated that Myanmar currently needs long-term solutions to the problem.

Responding to international criticism, the government affirmed stance even refusal to pressure from the international community. President Thein Sein told the delegates from the United Nations High Commissioner for Refugees (UNHCR) that the government was not going to recognize the Rohingya. Thein Sein also said that he was considering submission Rohingya ethnic group to the UNHCR. UN delegation led by Antonio Guterres met with the president on July 11 when Thein Sein clarify his position against Muslim minorities, as reported by the presidential office website.

¹³⁷ Human Rights Watch Report, August 2012, "The Government Could Have Stopped This" Sectarian Violence and Ensuing Abuses in Burma's Arakan State

¹³⁸ <http://www.tempo.co/read/news/2012/07/19/118417905/Koalisi-Sipil-Minta-Penyelidikan-Internasional-Kasus-Rohingya>

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Here, we see the response and policy of Myanmar's government as inappropriate with the principle of state's primary responsibility in responding to disasters which is clearly recognized both in law and in statements of principle of the United Nations. That response also is in contrary to the obligations of the country as mandated by the various provisions and principles of the international law of human rights. It is the responsibility of states to ensure the safety and security of their citizens. The protection of civilians, whether understood primarily in physical or legal terms, remains first and foremost the duty of governments, a reflection of their sovereign authority over, and responsibility for, all those living within their territory. In conflict contexts, where the state is unable or unwilling to meet the population's basic needs, international humanitarian relief remains the aid instrument of last resort. Therefore, it is mandated that states have important role in promoting an environment that is conducive to the facilitation of humanitarian access to those in need.

Then, it is important to analyze two points: the response of Myanmar government inappropriate in terms of: **(1) human rights protection**, and **(2) humanitarian access**.

First, assessment on the Myanmar government's response toward widespread violence in Rakhine in terms of human rights protection. The government gave response by imposing state of emergency and then followed with the assertion that the government will not recognize the Rohingya as citizens. The government argued that the state of emergency was imposed as an effort to restore security. But what happened instead is the security forces deployed in the field engages in violence against one of the parties, the Rohingya minority group. So here the government is not neutral and is not able to provide protection to both sides of the conflict fairly. This means that the government has violated human rights. Because human rights are the rights inherent in human beings with no distinction as to race, ethnicity, religion, language, race or citizenship status. States have a duty to protect, fulfill and promote human rights for all people living in their territory. In the next response, the Myanmar government firmly stated that they will not recognize the Rohingya as citizens. Myanmar President Thein Sein said in June the government

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was only responsible for third-generation Rohingyas whose families had arrived before independence in 1948 and that it was impossible to accept those who had "illegally entered" Myanmar. Myanmar policy not to recognize or give status to the Rohingya citizenship itself has been a violation of human rights as stated in the Universal declaration of Human Rights 1948 article 15 (1) declare that "Every person has the right to citizenship." In addition, Myanmar has ratified Conventions on the Rights of the Child. It means that Myanmar cannot deny the rights of Rohingya children to acquire the nationality and citizenship. The children also have the rights to have access to public services, education, health services, etc so that they can enjoy a decent life.

Second, in terms of humanitarian access. With the policy of applying state of emergency, the government is very restrictive and impedes humanitarian access. This policy is in appropriate with the guidance of the United Nations that states have important role in promoting an environment that is conducive to the facilitation of humanitarian access to those in need. That access is crucial to the success of a humanitarian mission to improve the condition of the victim.

This is what happened in Myanmar, the government cannot coordinate well with humanitarian organizations. The government also imposed the policy that restrict and limit the access for humanitarian assistant from external actors. This situation has drawn criticism from several humanitarian and human rights organizations. They called for the government to allow local and international aid agencies full and unhindered access to all displaced persons and all victims. According to aid workers, nearly [75,000](#) people are currently in temporary camps and shelters in Rakhine where they face deteriorating living conditions. The basic humanitarian needs of these people must be met immediately, as many still lack adequate food, water, shelter, and medical attention. However, the authorities have impeded access for humanitarian workers. Furthermore, there are a few humanitarian workers were arrested. As reported by an independent newspaper in Myanmar, Weekly Eleven, that there were two members of the Refugee Agency (UNHCR) and the UN food agency (WFP) was accused of spreading hatred between two warring factions, the ethnic Rakhine Buddhist and Muslim ethnic Rohingya. Both are also accused of taking part in a number of arson attacks on houses. Myanmar humanitarian group

said at least 12 staff volunteers was detained by Myanmar's government on charges of engaging in acts of violence. But, six of them have been released.¹³⁹

Why the government took such response? Myanmar is known as a closed country. Government stated that it was for security reasons, so they limit access to outsiders whether journalists, humanitarian workers and even international agencies. They also make bureaucratic provision so long and convoluted so that the process for gaining permission to enter the territory of Myanmar is long and time consuming. If permission is obtained, outsiders are restricted only come to certain places. As a result of such restrictions is a deteriorating situation. In refugee camps, there were lacks of food, clean water, health services and so on. In such a situation, if the government cannot provide services and protection to the maximum, the government should open access for humanitarian aid coming from external parties. It is understood that the government is entitled to make provision on entry permits and so on, but it cannot be interpreted to prohibit and restrict access to humanitarian aid.

So, here the authors consider that the government is very concerned about the sovereignty and integrity. Although recently Myanmar began taking steps to be more open and launched a reform of political system, but in practice it is still in the initial stage. So the fears and suspicious of foreign influence are still strongly concerned among the government officials. Because of this, the government severely restricts the entry of external parties; eventhough the situation is quite alarming, as we can see in this humanitarian crisis caused by the unrest in Rakhine.

Here the authors also consider that the government is very concerned about the sovereignty and integrity. We can refer to a government statement called Rohingyas as a security threat to the nation of Myanmar. With this reason became the pretext for the government to take action that would not recognize the Rohingya as citizens of their country. They said that they only admit the third generation who came before the Second World War, but did not recognize those who come to Myanmar after, and regard these people as illegal immigrant.

The riots, which have occurred since last June, are not really a new issue. This is a manifestation of the conflict between the

¹³⁹ Republika, Tuesday, 28 Agustus 2012

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Government of Myanmar to the Rohingya minority. Myanmar also has problems with some other minority groups such as Kachin, Karen, Shan, etc, but the situation is more pathetic for Rohingyas because they are not recognized as citizens. Because not recognized as citizens then they never get access to the public services that are the responsibility of the state towards its citizens. Even the stateless status also affects other community attitudes that see Rohingya people with suspicion and stereotyping as illegal immigrants. This non-recognition policy is a violation of human rights. This should not be done by the state Myanmar (and Bangladesh). Look at that stateless status that resulted in the situation that Rohingya people cannot access public facilities and services that enable them to live with dignity. They do not have access to residence / decent and safe housing, health cares; children are not educated, and so on. Government policies also affect other citizen's attitudes so there is prejudice and stereotyping that makes the relationship between the citizens of the different ethnic and religious it becomes not harmonious, disputes are easily to arise and potentially explode into open conflict, as happened in last June.

This is actually as a manifestation of the conflict the majority of the minority in Myanmar. Rohingya, in the government of Myanmar point of view is illegal immigrants. Their status as stateless easily leads to tensions and conflicts between communities. Even Rohingya often receive inhuman treatment from the government as well as surrounding residents. Faced with that situation, there are many Rohingyas who had to flee to other countries such as Thailand, Malaysia, Bangladesh, and even to Indonesia. But unfortunately, the government of Bangladesh did not recognize the Rohingya as citizens as well. There are about 30,000 of Rohingya living in refugee camps in Bangladesh. And in this recent conflict Bangladesh was instead tightened its policy by denying entry of Rohingya refugees.

So the United Nations calls Rohingya the most persecuted minority in the world. Stripped of their nationality and subject to widespread persecution in their native Myanmar, they have travelled far and wide over the past forty years, desperately seeking refuge and a better life. They are stateless, without a legal nationality, and many are also refugees. The 1982 Citizenship Law of Myanmar stripped the Rohingya of their nationality, making them legally stateless.² Furthermore; Myanmar does not recognize the existence of an ethnic community by the name of Rohingya. This law was the basis for

arbitrary and discriminatory treatment against the Rohingya community. As a result, their human rights and freedoms have been systematically eroded through a series of draconian policies, arbitrary taxes and controls. The Rohingya do not have the freedom to move within Myanmar. In fact, they must pay for a travel permit even to visit a neighboring village and they are not permitted to travel beyond the three townships of northern Rakhine state. This restriction severely impedes their already limited access to employment, education, health and trade. Rohingya who leave Myanmar are denied the right to return; their names are struck off family lists and they face long-term imprisonment if captured upon re-entry. The NaSaka – Myanmar's border security force – also places severe controls on Rohingya marriages. A marriage permit must be obtained through a lengthy and expensive process which is rife with bribery and corruption. Marriages without a permit can result in up to ten years of imprisonment. In addition to acute discrimination and severe restrictions on their human rights, the extreme poverty and complete lack of development initiatives in northern Rakhine have ensured that this extremely vulnerable, downtrodden and impoverished community will continue to remain so.¹⁴⁰

Conclusion

Myanmar's response to the humanitarian crisis in Rakhine invites criticism and concern from the international community. The government's response is inappropriate and contrary to the obligations of the state as the primary actor to give protection and assistance for the people living in its territory. Furthermore, Myanmar did not fulfill responsibility of the state to respect and fulfill the human rights of the Rohingya people as mandated by principles of international law (UDHR etc). This is closely related to the type of the political system of a country. In a closed political system characterized by a closed regime will respond to differences and demands of minorities by taking measures of denial and repressive or suppressive, unwilling to accommodate the aspirations and interests of minorities. This is in contrary to the situation in an open political system characterized by a democratic regime that is usually easier to give accommodation for cultural diversity and embrace these differences to be managed in a way that is democratic,

¹⁴⁰ The Equal Rights Trust, "Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia", January 2010, p 4-5
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thus minimizing the occurrence of tension and conflict between the different groups. The solution for the Rohingya longtime conflicts and suffering can only be resolved through the recognition of Rohingya as citizens by the Myanmar government.

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PROTECTING REFUGEES IN PROTRACTED SITUATION; THE CASE OF ROHINGYA REFUGEES IN SOUTH-EAST ASIA

Yurike F. Wahyudi

Universitas Airlangga

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Abstract

Two-third of today's world refugee is in the state of protracted refugee situations. According to UNHCR, refugees experiencing protracted situations are living in a long-lasting and intractable state of limbo. While durable solutions do not seems to be anywhere in sight, refugee in protracted situations are among the worlds most vulnerable people. Their existence continue to represent potential political and security concerns for receiving countries, country of origins as well as regional actors. Such situations are continually experienced by the Rohingya refugees in South-East Asia. Prolong persecution towards minorities in Burma by the Junta-led government has forcibly displaced significant number of refugees to neighboring countries including Bangladesh, Thailand, Malaysia and Indonesia. These humanitarian crises has placed Rohingya refugees crisis as one of the major protracted refugee situations in the world to date. Fleeing gross human right violation at home for sanctuaries abroad across South-East Asia countries, Rohingya refugees found themselves trapped in a sub-regions where comprehensive regional framework on refugee protections are still lacking. This paper seek to lays the understanding of protracted refugee situations to further draws attention to the urgency to provide protections during transit and encampment beside mitigating the cause of displacement at refugees home countries.

Keywords: protracted refugee situations, Rohingya refugees, protection

I. Introduction

Refugees are defined as individuals leaving their country of origins to avoid human rights violations and conflicts by seeking protection abroad.¹⁴¹ For many years, their plights are the consequences of gross human right violations they experienced at home. Human right violations towards refugees according to the 1951 Convention on the Status of Refugees are including persecution based on race, religion, nationality, and membership of a particular social group or political opinions.¹⁴² The flow of refugees on a certain area of the world has also indicated the failure of government to fulfill its fundamental task of providing protection for their citizens. In some cases, it is the government who in turn persecuted their own citizens. The failure has forced refugees to seek for protection elsewhere beyond

¹⁴¹ Alexander Betts & Gil Loescher, "Refugees in International Relations" in *Refugees in International Relations*, ed. Alexander Betts and Gil Loescher, 1 – 52 (New York: Oxford University Press, 2011).

¹⁴² full text of the 1951 Convention on the Status of Refugees and the 1967 Protocols are available in <http://www.unhcr.org/3b66c2aa10.html>

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their country borders, to the international community. Having experienced human rights violation as well as the conflict that entails, refugees serve as the ramification of ongoing state of instability and reminder of the suffering they have to bear at home.

However, the sufferings refugees have experienced are not instantly end upon their arrival on receiving countries. The attempts to find sanctuaries abroad have been harden by the fact that refugee' causes and consequences of displacement might as well entail political and security concerns. This is especially important since opening doors to refugees might affect the relationship between receiving countries and country of origins. While at the same time, refugees convey the possibilities to create conflicts in receiving countries and the region they are within.¹⁴³ They are not only trying to escape conflict in country of origins but also a possible cause of new ones. Their existence is seen as an important variable to explain the spread of conflict in neighboring countries and the region.¹⁴⁴ Palestinian refugees in Lebanon and Jordan serve as the example of how refugee populations can trigger civil wars and a series of cross-border conflicts in attempt to fight their cause of displacement.¹⁴⁵ Their reprisal has cost casualties and damages for the citizen and a round of instability in the receiving countries.

Therefore, analyses on the existence of refugees will help to identify the challenges our international system is facing.¹⁴⁶ This is especially important since, following the UNHCR director Antonio Guterres statement, humanitarian crisis globally reached a point unequal with the recent history.¹⁴⁷ Our international system not only still bearing the instability of unresolved conflicts, but also continue to experienced new ones, including the continuous course of Arab Springs, where more and more refugees displaced. In 2011, UNHCR figure shows that at the moment,

¹⁴³ Sarah Lischer, *Dangerous Sanctuaries, Refugee Camps, Civil War and the Dilemmas of Humanitarian Aid*, (Ithaca: Cornell University Press, 2005), 2; James Milner, "Refugees, Peacebuilding, and the Regional Dynamics of Conflict" in *Refugees in International Relations*. Edward Newman, "Refugees, International Security, and Human Vulnerability" in *Refugee and Forced Displacement: International Security, Human Vulnerability, and the States*, ed. Edward Newman and Joanne Selm, 3 - 30 (New York: United Nations University, 2003).

¹⁴⁴ Idean Salehyan & Kristian Glenditsch, "Refugees and the Spread of Civil War". *International Organization* 60 (Spring 2006): 335 – 366.

¹⁴⁵ "International Crisis Group, *Nurturing Instability Lebanon's Palestinian Refugee Camps*," Middle East Report Number 84, 2009

¹⁴⁶ Andrew Hurrell, "Refugees, International Society, and Global Order" in *Refugees in International Relations*, 85 – 104

¹⁴⁷ "UNHCR's Guterres says global humanitarian crises at level unmatched in recent history," <http://www.unhcr.org/506c2a2d6.html> (accessed October 2nd, 2012).

there are at least 10.5 million refugees worldwide.¹⁴⁸ The number didn't include approximately 4.8 million Palestine refugees under the care of United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA). While 4/5th receiving countries of refugees are developing countries,¹⁴⁹ the portion represent a total of 8.4 million refugees. Developing countries as receiving countries has been related to their ill-equipped capabilities to serves the refugees need of protection.¹⁵⁰

However, the high number of refugees across the globe has not followed by significant number of durable solutions. Conceptually, refugee crises might end when one of the three durable solutions met. Durable solutions include voluntary repatriation, a process where refugee return voluntarily to their country of origins without any further persecution, local integration, a solutions which include the naturalization of refugee to country where they try to obtain asylum, and the last is resettlement, which include the relocation of refugee to third country which willing to take them as their permanent citizen.¹⁵¹ Out of the total number of refugees in 2011, only 532.000 people are voluntarily repatriated to their country of origins, 62.000 resettled to third countries, and local integration proved to be easier said than done.¹⁵² Today's two-third of the global refugee population has spent longer time in exile.¹⁵³ Constant unresolved conflicts and persecutions in country of origins that cause their displacement have hindered their prospect for durable solutions. This condition has lead to the creations of protracted refugee situations.

Southeast Asia inevitably becomes the home of both country of origins and receiving countries for the plight of refugees. One of it is the Rohingya refugee from Myanmar to neighboring state in the sub-region. Muslim Rohingya are an ethnic group inhabiting Rakhine state in northern Myanmar. However, under the 1982 Citizenship Law, the Burmese Government denied their Burmese citizenship and constantly persecuted their lives. Until recently, another riot broke in Rakhine between the Muslim Rohingya and Buddhist Rakhine, sending more and more refugees across borders. Not to forget the population of Rohingya refugees in

¹⁴⁸ "Refugee Figures" <http://unhcr.org/pages/49c3646c1d.html> (accessed in October 2nd, 2012)

¹⁴⁹ "UNHCR Global Trend 2011," (UNHCR: New York, 2011)

¹⁵⁰ Malik Shiv, "UNHCR report says refugee number at 15-year high," *The Guardian*, June 20, 2011, <http://www.guardian.co.uk/world/2011/jun/20/unhcr-report-refugee-numbers-15-year-high> (accessed October 3rd, 2012)

¹⁵¹ "Refugee Status Determination: a Self-Learn Manual," (UNHCR: New York, 2006)

¹⁵² "UNHCR Global Trend 2011,"

¹⁵³ Gil Loescher, James Milner, Edward Newman, and Gary Troeller, "Introduction," in *Protracted Refugee Situations Political, Human Rights and Security Implications*, ed. Gil Loescher, James Milner, Edward Newman, and Gary Troeller (New York: United Nations University Press, 2008).

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Bangladesh, Thailand, Malaysia and Indonesia that have endured destitute living conditions since their initial displacement with no prospect for durable solutions in the near future. Rohingya refugee crisis today is one of the most protracted refugee situations in Asia.¹⁵⁴ The fate of the Rohingya is in the hand of the Burmese Government constant denial of Rohingya citizenship and the sub-region weak framework for refugee protections.

II. Protracted Refugee Situations

According to the UNHCR, protracted refugee situations are experienced by refugees who have been in exile for more than five years, with no prospect of durable solutions and uncompleted basic rights and essential economic, social and psychological need.¹⁵⁵ These groups of refugee are no longer in the recent displaced phase, but rather has spend extended period of exile in refugee camps or gathering in receiving countries. Their long-lasting situations reflected conflicts and persecutions that last for years in their country of origins.¹⁵⁶ Beside the prolong period of exile, the majority of protracted refugee situations continue to live in destitute living conditions. Receiving countries frequently apply significant limitation on their rights,¹⁵⁷ ranging from restrictions on the right to work, education, freedom of movement and speech to the right to own property. These limitations, which also called as the practice of refugee warehousing, further worsen refugees' socio-economic conditions. Refugee camps and gathering in receiving countries regularly associated with chronic living conditions, including high poverty and unemployment rate among the refugee populations. Their survival during years of exile is heavily relied on external support to provide them with their basic social services and everyday needs.

The responses are rooted to the security and political consequences protracted refugee situations entails to receiving countries. Prolong period of exile in destitute and uncertainty of durable solutions' prospect possibly drive refugees activism to seek solutions for their cause of displacement. Milner concluded that protracted refugee situations bear the possibilities of direct and indirect threat to receiving countries and regional actors.¹⁵⁸

¹⁵⁴ "Burmese (in Thailand and Bangladesh)," *PRS Project*, <http://www.prsproject.org/case-studies/contemporary/burmese/> (accessed October, 3rd, 2012)

¹⁵⁵ "Conclusion on Protracted Refugee Situations no. 109 (LXI)," UNHCR, 2009 <http://www.unhcr.org/4b332bca9.html> (accessed October 1st, 2012)

¹⁵⁶ James Milner and Gil Loescher, "Protracted Refugee Situations" <http://www.prsproject.org/protracted-refugee-situations/> (accessed August 20th, 2012)

¹⁵⁷ Loescher, Milner, Newman, and Troeller, *Protracted Refugee Situations Political, Human Rights and Security Implications*, 2

¹⁵⁸ James Milner, "Refugees, Peacebuilding and the Regional Dynamic of Conflicts" in *Refugees in International Relations*, 261 – 284
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Directly, protracted refugee situations might lead to the militarization and radicalization of refugee populations and the spill-over of conflicts. While further, protracted refugee situations might present indirect threat by inflaming the existing inter-communal tensions, alter the community balance of power and trigger injustice in term of economic competitions with the locals.

As the number of both unresolved violence conflicts and continued persecutions remain high, more and more refugees in developing countries are experiencing protracted refugee situations today.¹⁵⁹ In 2011 there are 7.1 million refugees in 26 countries living in protracted situation out of the 10.5 million refugee globally.¹⁶⁰ In the 1990s, the average period of exile stay at 9 years, but today the number rose to 20 years. Afghanis, Palestinians, Burmese are among a long list of protracted refugees situations around the world, indicating it's prolong instability at home that put their life in danger. Beside the urgency to find solutions to end their cause of displacement, providing protection for refugees in protracted situation shares equal priorities. Ignoring refugee in protracted situations might entails greater security risk of the spread of conflicts and instability in both receiving countries and the region where refugees hosted. In Southeast Asia, the Rohingya from Burma has experienced protracted refugee situations for decades and therefore continue to strive with uncertainty in receiving states across the sub-region.

III. Case Study: Rohingya Protracted Refugee Situation in Southeast Asia

Rohingya protracted refugee situations are originated from the unending persecution and instability in Myanmar. Muslim Rohingya is one of the ethnic groups inhabiting Rakhine state, Myanmar. Historically, The Rohingya is believed to be the descendant of Muslim merchants, later racially mixed with the Bengalis, Persians, Moghuls, Turks and Pathans. The Muslim merchants came in to contact with the Rakhine settlements through their shipping routes during the 9th century. The Rohingya Muslims share common language, customs and religion with the Bengalis who live in Chittagonian, Bangladesh.

Across history, Rakhine state plays an important role for Myanmar geopolitics. Their geographic location serves as a strategic hub between South Asia and Southeast Asia. Due to their strategic location, the area was

¹⁵⁹ Loescher, Milner, Newman, and Troeller, *Protracted Refugee Situations Political, Human Rights and Security Implications*, 4

¹⁶⁰ "UNHCR Global Trend 2011"

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once an important economic zone.¹⁶¹ They are on the shipping routes of Persian Gulf and Asia transporting goods for trades and people. Until today, Rakhine relentlessly plays a strategic geopolitical role for Myanmar, especially under the joint oil and gas partnership with China, South Korea and Indian multinational cooperation with Myanmar Oil and Gas Enterprise. Under the joint partnership the pipelines transporting oil and gas will be constructed through Rakhine and Shan.¹⁶²

However, ethnic and religion-base clashes were not a new issue in Myanmar. Secession attempts of Rohingya part of Rakine from Myanmar was once showed in 1947. Leaders of the Rohingya proposed to the new President of Pakistan, the idea of joining northern Arakan into then East Pakistan, today's Bangladesh. The initiative is seen as the threat to Myanmar's sovereignty and integrity.¹⁶³ The military-lead government has continued its course of hostility against different ethnic groups and nationalist movements who is fighting for autonomy from the Burmese Government to date.¹⁶⁴

Under the 1982 Citizenship Law Burmese Government continuously denied Burmese citizenship to the Rohingya and several other ethnic groups, leaving the ethnic members stateless. Far before the 1982 Citizenship Law, the government has even pushed out Muslim communities from Burma under the "Burmese Way of Socialism" a nationalization program they set out in 1960s.¹⁶⁵ While in 1978, the military government introduced the Nagamin operation with its goal to prevent illegal entering to Myanmar territory by different ethnic groups. The operation resulted to the displacement of around 200,000 Rohingya to Bangladesh. Another course of refugee flowed to Bangladesh in 1991-1992 and years after, following brutal repression and restriction on Rohingya's freedom of movements, imposition of compulsory forced labor, and collection of taxes. There's approximately a total of two million Rohingyas, 80,000 remind in Burma, while the rest continue to try to survive in Southeast Asia and other receiving countries.

According to a report by Refugee International, persecutions against Rohingya by the Burmese Government remain unchanged.¹⁶⁶ Rohingyas are

¹⁶¹ Chris Lewa, "The Rohingya: Forced Migration and Statelessness," in *Forced Migration in Southeast Asia Region* ed. Omprakash Mishra (Calcutta: Jadavpur University, 2001).

¹⁶² "The Burma-China Pipelines: Human Rights Violations, Applicable Law and Revenue Secrecy" (Washington DC: Earthrights International, 2011)

¹⁶³ Chris Lewa, "The Rohingya: Forced Migration and Statelessness"

¹⁶⁴ Burmese (in Thailand and Bangladesh)

¹⁶⁵ "Burma Perilous Plight Burma's Rohingya Take to the Seas" (New York: Human Right Watch, 2009)

¹⁶⁶ "The Rohingya: Discrimination in Burma and Denial of Rights in Bangladesh" <http://www.refugeesinternational.org/policy/field-report/rohingya->
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constantly being subject to persecution and hostility by the government and the Buddhist Rakhine community. Last July, Buddhist Rakhine and Muslim Rohingya once again involved in violent conflict after the murder of a Buddhist women, accused to be done by Muslim. The upheaval has forced approximately 100,000 Rohingya to seek refuge outside Myanmar border.¹⁶⁷ Human Right Watch also reported that the Burmese army killed, rape, and arrested a large number of Rohingya during the 2012 riot.¹⁶⁸

However, receiving countries in Southeast Asia seems to turn a blind eye to the fact that repatriation is not yet a durable solution for the refugees and continue their course of ignoring Rohingya. In southern Bangladesh, Rohingya refugees live in two official camps, Kutupalong and Nayapara refugee camps and outside of camps in Cox's Bazar, only two kilometer from Myanmar-Bangladesh borders. There are at least 27.000 Rohingya in refugee camps in Bangladesh, while approximately 200.000 believe to stay outside the camps. However, the Government of Bangladesh currently denying Rohingya refugee status, closed its border to another flight of refugees to their territory and pushed many Rohingya back to water. Bangladesh has also ban international organization to delivered aid to the refugees in their territory.

While in Thailand, the government officials constantly claimed that Rohingya are economic migrants and therefore they have no capabilities to welcome them.¹⁶⁹ The claimed followed by the limitation they put on UNHCR attempts to access the Rohingya in Thailand territory as well as sending the Rohingya back to open sea after their arrivals in Thailand. The responses are built up for their claim that Rohingya are a threat to their national security. The Rohingya arrival to Thailand has been long seen as possible allies to the southern Thai Muslim militant.¹⁷⁰ Their existence within Thailand border might trigger further social dissatisfaction that can be use as scapegoat against the government.

No different from the other Southeast Asia receiving countries, Malaysia continually refused to legally recognized refugees, granted them protection or right to work.¹⁷¹ Beside, Rohingyas in Malaysia has been under the fear of the Malaysian police authorities and the RELA (Ikatan Relawan

[discrimination-burma-and-denial-rights-bangladesh](#) (accessed in October 1st, 2012).

¹⁶⁷ "Crisis Watch N 107," (Brussels: International Crisis Group, 2012)

¹⁶⁸ "Burma: Government Forces Targeting Rohingya Muslim"
<http://www.hrw.org/news/2012/07/31/burma-government-forces-targeting-rohingya-muslims-0> (accessed in October 2nd, 2012)

¹⁶⁹ "Burma Perilous Plight Burma's Rohingya Take to the Seas"

¹⁷⁰ "Burma Perilous Plight Burma's Rohingya Take to the Seas"

¹⁷¹ "Refugees in Malaysia arrested, abused and denied right to work"
<http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16> (accessed in October 1st, 2012)

Rakyat Malaysia) threat of arrests and violence.¹⁷² In Indonesia the Rohingya refugees, upon arrivals in its archipelago, are being held by the immigration officials who treat them as illegal migrants.¹⁷³ Despite the protest by Indonesia demanding the government to provide protection and encourage the possibilities of ending persecutions and conflicts, little has been done to further provide protections. In Myanmar, the country's president, in one of his official address to the United Nations last July, stated that Rohingyas are not welcome in Myanmar and they should be resettled to countries who wish to take them as their citizen.¹⁷⁴ On the other hand, Aung San Suu Kyi, the country's democracy figure, remain silence about the Rohingya issue. The Rohingya are not welcome anywhere in Southeast Asia. They are constantly being the subject of persecutions in Myanmar and refugee receiving countries. Despite its chronic situations and the urgency to provide protections for the refugees, both the international and regional framework in providing protections for refugees in Southeast Asia deemed insufficient.

IV. Providing Protections to the Rohingya Protracted Refugee Situations

There's room for improvement in the practice of providing protection to refugees in protracted situations especially in Southeast Asia. Legally there are a pile of human rights law that closely regulate the protection of displaced person and ensuring their basic human rights, including the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. As well as the refugee law that specifically deal with refugees. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol are the two governing framework that regulate the standard for refugee protections. While both has significantly regulate the handling of refugees protections, not all United Nations member countries ratified this documents.

In Southeast Asia, only Cambodia, the Philippines and Timor-Leste are parties to the Convention and its Protocol. As a result, the other countries in the sub-region continually failed to recognized refugees legal status as well as their mechanism for protections in their territories. The failure include, recognizing Rohingya refugee status and let alone providing protection to the protracted refugee situations Rohingya experiencing. Receiving countries consider Rohingya arrival to their territory as illegal

¹⁷² "Burma Perilous Plight Burma's Rohingya Take to the Seas"

¹⁷³ "Pengungsi Rohingya di Indonesia Kurang Diperhatikan," *Republika Online*, August 13th, 2012, <http://www.republika.co.id/berita/internasional/tragedi-rohingya/12/08/13/m8pozr-pengungsi-rohingya-di-indonesia-kurang-diperhatikan> (accessed in September 23rd, 2012)

¹⁷⁴ "Only Solutions' Unacceptable," *Bangkok Post*, July 20th, 2012, <http://www.bangkokpost.com/print/303354/> (accessed October 3rd, 2012)
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migrants and failed to offer international protections when mostly needed. The situations are followed by the lack of regional framework in practice to deal with humanitarian crises especially refugee flows.

Despite the fact that the sub-region hosts a large group of refugees from Middle East and Asia,¹⁷⁵ Association of the South East Asia Nations (ASEAN) has done little to ensure the protection for refugees in their region of operations. On Rohingya refugees issue, their existences are constantly forgotten. In February 2009, ASEAN agreed to not adapt the issues of Rohingyas refugees in to their agenda of the Leaders' Summit.¹⁷⁶ The same thing happened in the last ASEAN Inter-Parliamentary Assembly last September. In Senggigi, Indonesia, the meeting did not officially adapt the issue of Rohingya displacement as part of the meeting agenda. Lately the pressure for ASEAN to take bolder step and discuss Rohingya refugees in their meetings has become larger.

The Southeast Asia receiving countries treatment towards the Rohingyas in addition to ASEAN indifference is a contrary to what have been the organization's purposes to promote and protect human rights and fundamental freedom as stated in the ASEAN Charter. In fact, through ASEAN Charter, ASEAN Intergovernmental Commission on Human Rights (AICHR) is established. In accordance to the purposes and principles of the ASEAN, AICHR work to promote and protect human rights in the sub-regions.¹⁷⁷ The consultative body meet twice a year to discuss the human rights issue in the region and currently working on the ASEAN Human Rights Declaration. However, AICHR has not yet discuss or take significant step regarding the Rohingya refugees issue.

V. Conclusion

The plight of refugees not only implies a humanitarian issue but also embodied complex political and security concerns in both their causes and consequences of displacement. Their existence marked the growing instability for the current international system. Beside the urgency to end the cause of displacement, providing protection shared equal priorities. This is especially important since more refugees are displaced and lesser repatriated, creating a large number of protracted refugee situations including the Rohingya in Southeast Asia. The Rohingya continuously living in destitute living conditions in receiving countries across Southeast Asia

¹⁷⁵ "Regional Operations Profile – South-East Asia," (UNHCR, 2012)

¹⁷⁶ Eva-Lotta Hedman, "Refugees, IDPs and Regional Security in the Asia-Pacific" in *CSCAP Regional Security Outlook 2009-2010: Security through Co-operation*, eds. B. L. Job and E. E. Williams, (Canada: Council for Security Cooperation in the Asia Pacific, 2009)

¹⁷⁷ "ASEAN Intergovernmental Commission on Human Rights (Term of Reference)," (Jakarta: ASEAN, 2009)

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with uncertainty of durable solutions. Their protracted refugee situations require a comprehensive collective actions in order to not only strategically end their cause of displacement but also securing their life while in exile. This include first, the recognition of all involving parties that Rohingya refugees deserve protection in their sanctuaries abroad. Repatriation of Rohingya is not an option at all until Burmese Government lift it's Citizenship Law. Second, ASEAN have to be actively leading the regional cooperation to deal with Rohingya refugee. ASEAN should start discussing Rohingya refugee seriously if they are looking for an integrated ASEAN community in the near future. However the challenges of protecting protracted refugee situations are not without any opportunities in arm length, ASEAN has already established the AICHR which specifically dealing with the promotion and protection of human rights. ASEAN, together with it's member states should strengthen the consultative bodies roles to deal with the Rohingya refugees in the region.

HUMANITARIAN DIPLOMACY - 1

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IMPROVING HUMANITARIAN DIPLOMACY THROUGH HUMANITARIAN SECURITIZATION

Yunizar Adiputera

Universitas Gadjah Mada

Introduction

Whether in national or international level, politics and power have traditionally come above everything else. Together, they defined the meaning of security. In the era of Great Powers rivalry decades ago, security was defined as state's security from foreign "attack", be it physical or ideological. Such conception of security justified what is called by Copenhagen School of security studies as "emergency measures" that took many forms, including budget provision for aid diplomacy, weaponry, black operations, etc. These emergency measures were conveniently taken with the backdrop of existential threat posed by the enemy, thus giving little room for opposition. The fear of nuclear attacks and complete annihilation had brought about acceptance to policies that are otherwise unacceptable.

Humanitarian supporters could take a precious lesson from the Cold War, that when it comes to security, people would take whatever means necessary to fulfill it. In fact, the current humanitarian diplomacy has been successful in securitizing the issue of humanity on several occasions, particularly in the field of humanitarian intervention, like what happened in Libya recently and Somalia, Haiti, Bosnia, Kosovo, East Timor, Sierra Leone in the last two decades (Roth 2004, 13; Wheeler 2004, 29). Despite many disagreements on whether those interventions were indeed for the better of humanitarian goals, the fact that humanitarian rhetoric is used in those instances, and a success, proves that humanitarianism is a powerful discourse in international politics. By framing the issue of humanitarian crises as existential threats, in whatever way, humanitarian supporters could benefit from legitimacy they gained in 'marshaling the vast amount of resources in the implementation of emergency measures' (Watson 2011, 4).

Few would reject that one of the most important pinnacle of humanitarian ideals in international stage is the historic commitment finally made at the World Summit in September 2005 to the Responsibility to Protect (R2P) principle (see General Assembly 2005, para. 138–139). It originated from a report by International Commission on Intervention and State Sovereignty (ICISS). It reconciled the tension between intervention and sovereignty by reformulating the concept of sovereignty not as 'control', but as responsibility. This means that the state authorities are responsible to protect the safety and lives of its citizens and promote their welfare (ICISS 2001). The failure to serve these functions implies that the

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state relinquishes its sovereignty to the international community, who would then assume the responsibility for those functions. RtoP signals a major breakthrough for humanitarianism as it challenged the concept of state security that had been dominating all along.

But furthering humanitarian principles in international politics through ‘securitization’ is not without constraints. Traditional security concerns in field of politics and economy are still in the center stage of attention, especially in light of recent economic crisis. Syria is case in point. Even with R2P gaining traction, sovereignty is still a formidable argument in resisting international intervention, especially when supported by powerful ally. But the current crisis in Europe, and U.S. on-going economic recovery have also played role in the failure of intervening up to this point. Economic limitation is a problem obviously in need of addressing, but humanitarian concern must not be left as secondary to these concerns. It is the function of humanitarian diplomacy to elevate humanitarian concern to the same level as those of political and economic sectors, or in the term of Copenhagen School, the “sectors of security” (see Buzan, Waever, and Wilde 1998).

This paper would examine humanitarian diplomacy with securitization approach. It asks whether humanitarian securitization is a viable means of improving humanitarian diplomacy and how does it take form in real cases. Using the existing concept of securitization by Copenhagen School, this paper attempts to make sense of putting humanity as referent object that could systematically be securitized by humanitarian organizations in order to bypass political barriers standing in the way of humanitarian actions. This paper draws the case of Aceh Tsunami and Cyclone Nargis as references of humanitarian securitization. The content of the paper would be split into two parts. The first part talks about conceptual analysis of humanitarian diplomacy, securitization, and their logical compatibility with each other. The second part discusses the cases in Aceh and Myanmar to get grasp of how securitization works in real life.

The Concept of Humanitarian Securitization and Diplomacy

The concept of securitization developed by Copenhagen School (CS) refer to the process of bringing an issue(s) to the realm of security by presenting it ‘as an existential threat, requiring

emergency measures and justifying actions outside the normal bounds of political procedure' (Buzan, Waever, and Wilde 1998, 23–24). Securitization could be considered as an extreme version of politicization, where decisions are made with no or minimum debate and public discussion. When people understood an issue as security issues that threaten their survival, especially when time is of the essence, there would not be much discussion as to the necessity of emergency action.

Securitization studies aims to understand "who securitizes (Securitizing actor), on what issues (threats), for whom (referent object), why, with what results, and not least, under what conditions (Buzan, Waever, and Wilde 1998, 32). Securitizing actor is traditionally believed as political leaders with authority and influence to the public audience, but current development of securitization theory opens the possibility of wide array of actors that could be securitizing actors, ranging from NGO officials, media and even important figures. Securitizing actor would do 'speech act', an act to show his/her view on certain issue as an existential threat. This could come in the form of statements, gestures, or even visual images that are accessible to the public (see Hansen 2011). The speech act is called a 'securitizing move'. Securitizing move alone does not determine whether an issue has been securitized or not (McDonald 2008, 69). An issue is securitized only if and when the audience accepts it as such. This acceptance is itself conditioned by the existence of a series of 'facilitating conditions', including the form of the speech act; the position of the securitizing actor; and the 'conditions historically associated with that threat' (Buzan, Waever, and Wilde 1998, 31–33).

This paper draws heavily from the work of Scott Watson, who managed to build and clarify the relations between humanitarianism and security studies of Copenhagen School (Watson 2011). Watson claims that humanitarianism is a sector of security with its very own logics, other than that of state security, societal security, cyber-security and social security. Each of these logics of security revolves around its own referent object and existential character. For example, state security is organized around the concept of sovereignty, while societal security is organized around the concept of identity. Humanitarian security, in this context, is organized around the concept of humanity/dignity, which implies that humanitarian security discourse must attempt to prioritize the concern on human

life and dignity over state interests or societal interests (Watson 2011, 5–6).

Buzan identifies three components of securitization, namely ‘(1) existential threats to a referent object; (2) emergency action; and (3) effects on inter-unit relations by breaking free of rules’ (Buzan, Waever, and Wilde 1998, 26). Watson substantiates humanitarian security into these three components. Referent object of humanitarian security, as has been mentioned, is human life/dignity. But the threats to this referent object may vary, depending on the actors securitizing it. For example, ICRC mostly concerned about alleviating existential threat associated with armed conflict, while Oxfam identifies poverty and injustices as primary existential threat. In the realm of Human Security, the proponents are also divided in defining priority threats, such as freedom from fear and freedom from want. Emergency action in humanitarian security also takes various forms and is often contested. It depends on ‘what types of emergency measures are appropriate (relief, development, intervention, nation- and state-building), how these measures should be implemented (independently and neutrally, pragmatically), and by whom (NGOs, states, local communities)’ (Watson 2011, 7). Nevertheless, the debate over emergency measures is common to happen, even when there is consensus upon referent object and existential threat.

The last component is a bit more complicated. The concept of ‘breaking free of rules’ indicates exceptionality of the measures taken. Originally, breaking free of rules means that the measure is in the ‘outside of normal bounds of political procedures’, which in this case meant to be democratic processes. But further examination indicates that securitization framework could also be applied in non-states and non-democratic states. This means that the ‘exceptionality’ must be pushed beyond mere democratic practices, and thus, further conceptualization of ‘normal rules’ is needed. The problem in defining ‘normal rules’ comes when the measures taken in response to securitization move are institutionalized, as a result of recurrent and persistent threats. The example of this is the existence of standing military or fire departments, which answer to the threat of war and fire respectively. These institutions are no longer exceptional in the sense that their existence is common to everyday practices. There is nothing dramatic about them. The issue is resolved, then, by still pointing these institutions as successful securitization, because

these institutions are built on the ‘modality of threat-urgency’, despite not ‘violating existing rules’ (Watson 2011, 8).

Watson contends that humanitarian security is understood along the spectrum of exceptionality-institutionalization. On one occasion, humanitarian response might be in the form of institution such as the existence of many relief organizations, such as ICRC, Oxfam, MSF, USAID, WFP, etc. On another occasion, it might take an ad hoc securitization, such as deployment of military to do humanitarian assistance and a dramatic temporary increase of emergency fund. Defined this way, humanitarian imperative fits the framework of security provided by CS. The problem now is to find a way to incorporate humanitarian securitization into humanitarian diplomacy.

Humanitarian diplomacy is not uncontroversial in definition. There are as many as eighty-nine different definition found by ICRC spread across different agencies and literatures (Régnier 2011, 1213). Among several well-used definitions are:

- (The concept of humanitarian diplomacy) ‘...encompasses the activities carried out by humanitarian organizations to obtain the space from political and military authorities within which to function with integrity. These activities comprise such efforts as arranging for the presence of humanitarian organizations in a given country, negotiating access to civilian populations in need of assistance and protection, monitoring assistance programmes, promoting respect for international law and norms, supporting indigenous individuals and institutions, and engaging in advocacy at a variety of levels in support of humanitarian objectives’ (Minear and Smith 2007, 1).
- ‘Humanitarian diplomacy is persuading decision makers and opinion leaders to act, at all times, in the interests of vulnerable people, and with full respect for fundamental humanitarian principles’ (IFRC 2009).
- ‘Humanitarian diplomacy is the use of international law and the humanitarian imperative as complimentary levers to facilitate the delivery of assistance or to promote the protection of civilians in a complex political emergency’ (Whittall 2009, 38).

As can be observed from three definitions above, the meaning of humanitarian diplomacy could be defined from broad or narrow

perspective, as well as from alternative angles. It is therefore pointless to confront one definition to another. This paper believes that it is more useful to deduce from those definitions the characteristics of humanitarian diplomacy, as has been done by Régnier:

Table 1. Characteristics of humanitarian diplomacy (Régnier 2011, 1236):

Goals	To persuade others to take measures to protect and/or assist the victims of conflict or disasters, and/or to obtain access to these groups to carry out these activities directly.
Instruments	Negotiations, communications, awareness-rising.
Levels	○ Centralized or decentralized. ○ Internationally or at various sub- national levels (national capital, provinces, large municipalities, districts, small towns, etc.).
Beneficiaries	Victims and any other vulnerable population groups affected by man-made or natural crises.
Actors	A wide range of governmental, inter-state and private civil society actors.
Methods	○ Discreet or makes use of the media ○ Informal or official ○ Operates from the center to the periphery (from representatives in national or regional capitals or at the United Nations), but increasingly also in the field, where communities affected by crises are developing their capacities for information and organization.
Legal Basis	International Humanitarian Law, human rights and emerging disaster law.

With the above understanding of humanitarian diplomacy, it is now time to incorporate humanitarian securitization as an approach to humanitarian diplomacy. In the first instance, it may seem that

securitization and diplomacy is contradictory. Diplomacy is traditionally regarded as a peaceful instrument of foreign policy, as opposed to war, while securitization is traditionally understood as militarization. But this perception is false on two levels. First, understanding of security by CS above has clearly clarified that anything could be regarded as security threats depending on the referent object, and therefore the response to the threats could also take various forms, not exclusive to military action. According to this understanding, then, securitization may take a 'peaceful' form, such as allocation of emergency funding or 'focusing society's energy and resources on a specific task' (Buzan, Waever, and Wilde 1998, 24).

On the second level, humanitarian diplomacy may indeed result in military actions, like what happened in Libya or many countries in Africa. Again, this may seem like a failure of diplomacy to persuade governments like Khadaffi regime to stop killing civilians, which resulted in humanitarian crisis. This premise is only true if one would imagine humanitarian diplomacy only happened in one level, which is the middle level, between humanitarian organizations and the state (Libya). But humanitarian diplomacy also happens in the system or global level, in which humanitarian diplomacy is conducted in international organization like United Nations. In this level, military intervention could be seen as a successful humanitarian diplomacy in raising awareness of UN members about the importance of saving lives in Libya. The Responsibility to Protect as an international norm is also a product of humanitarian diplomacy at the system/global level

Figure 1. Two-level game humanitarian diplomacy

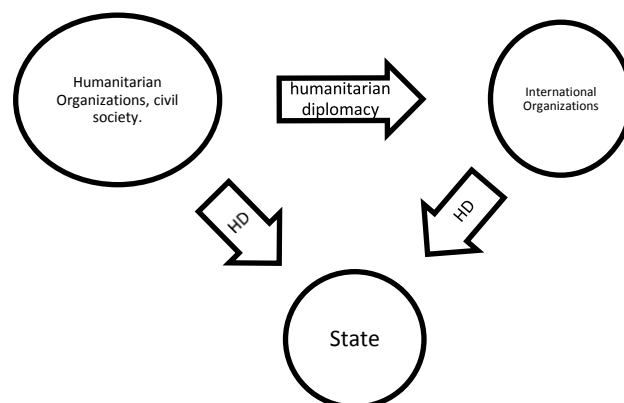


Figure 2. Humanitarian securitization



Securitization approach fits in the picture by equipping humanitarian diplomacy with a more robust framework of action. Securitization move made by humanitarian organization must be able to create strong political discourse that politicians cannot ignore. In order to do that, humanitarian supporters must work together to conceptualize securitizing move for humanitarian purposes. It is important to identify referent object, which in this case is humanity/dignity, and build connection from this referent object to other referent object that is valuable to the audience. For example, if humanity/dignity is constructed as having connection with political legitimacy, then it might be useful for modifying behavior of government in power to be more attentive toward humanitarian concerns. It is important to note that the practice of humanitarian securitization might be different among different cases depending on the audience and constraints. To get a better grasp of this, it is necessary to examine the cases where humanitarian securitization did happen.

The Case of Indian Ocean Tsunami 2004 and Cyclone Nargis

Indian Ocean Tsunami

A 9.0-Richter-scale earthquake struck nine states bordering with Indian Ocean on December 26th 2004. It said to have claimed more than 227,000 lives and brought about massive destruction. Soon after that, response from international community was massive, marked by mobilization of relief organizations and humanitarian workers to the affected areas, excessive media coverage of the destructions and victims, as well as huge amount of funding dedicated to support relief efforts (see Telford and Cosgrave 2007).

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Even president Bush of The United States was committed to give \$350 million in emergency aid (Sanger and Hoge 2005). This, even at a glance, shows that emergency measures that take the process away from normal bounds of political procedure are in place.

In this tragedy, it is safe to say that the referent object is well identified and legitimized, that is the survivor. According to Watson, during the Tsunami in 2004, media coverage has been extensive in covering the victims and destructions, making it effectively a securitizing actor.

In the two weeks following the tsunami (between 26 December 2004 and 7 January 2005), the New York Times devoted 24 front- page articles to the tsunami and its aftermath, and the three main US television news networks devoted over 80 stories to the events in their nightly news segments over this same time-frame (Watson 2011, 13).

Attempt to legitimize the referent object to the U.S. and global community was also reflected in an editorial of The New York Times that specifically highlights the referent object that was existentially threatened by various developments:

At first, the concern of the living was naturally for the dead. But to avert a far worse disaster, the living must now look after themselves with all the aid the rest of the world can provide. The World Health Organization has stated that the greatest risk of disease doesn't come from the decaying of the numerous corpses. It comes from the way the survivors are now forced to live - without fresh water, without adequate sanitation and, in many places, without shelter or enough food (NYT 2004).

The article rightly pointed out the absence of food, fresh water, sanitation and shelter as developments that would threaten the survival of the victims. Other media also published stories about survivors of the tsunamis, along with images (Rohde 2005). During emergency phase of the disaster, national and international media also securitized the issue in very graphic way. Live feeds from the affected areas are constantly broadcasted, not to mention amateur videos that are spread across mainstream media as well as the Internet showing the moment of impact of the tsunami.

The securitizing actors were, in fact, various. Media broadcasted many 'speech acts' during the disaster ranging from NGO representatives, UN agencies, local populations, government officials, and even affected westerners. Among those actors, NGO representatives and UN agencies are of prominence, due to their role in relief efforts that give them access to a fuller story. Jan Egeland, UN emergency aid coordinator, once suggested that 'the world leading economies had been stingy in providing foreign aid generally' (Sanger and Hoge 2005). This suggestion triggered annoyance from U.S. officials, but eventually was successful in bringing in more aid.

Securitizing moves that were massively done by various securitizing actors at the time resulted in extensive emergency measures that defy the logic of normal politics. Aside from being able to focus international attention, energy and fund to humanitarian cause, there are two examples worth noting as a standout in terms of extraordinary-ness. The first one is the decision from Indonesian government to implement open-sky policy during emergency phase of the disaster. This policy is aimed to accelerate the distribution of aids to the affected areas, which at that stage was still having logistical problems (Xinhua 2005; Bennett, Harkin, and Samarasinghe, 21). This policy is particularly extraordinary, because the 'normal' political procedure would be to have the government of the affected territory to be responsible in delivering aids. If sovereignty is understood as responsibility, it means that the Government of Indonesia admitted that it could not fulfill its obligation toward its citizen, hence violating the norm of state sovereignty. The condition around that period of time enforced the exceptionality. At the time, the government was in the middle of military crackdown of separatist movement, which makes foreign entrance to the area very sensitive. The only foreign presence in Aceh province prior to the tsunamis were ICRC and small OCHA office (Bennett, Harkin, and Samarasinghe, 5). The second example is regarding the insurgency itself. Humanitarian securitization at the time had even subordinated military and identity securitization that had been going on in the form of armed insurgency in the province. The insurgents and military agreed to have ceasefire during the period, and eventually reached a memorandum of understanding (MoU) as a framework for peace in the region.

Nargis Cyclone

On 2 and 3 May 2008, Cyclone Nargis hit Myanmar with winds up to 200 kph, sweeping through Ayeyarwady delta region and the country's main city and former capital, Yangon. In the delta region, the storm 'destroyed an estimated 95% of the housing', while Yangon suffered 'downed power and communications lines, and inflicted major damage to buildings, such that six days after the storm people remain largely without electricity, piped water and communications' (OCHA 2008). As of May 16th, the official death toll for Burma's cyclone disaster has jumped to almost 78,000 people, with nearly 56,000 missing, according to state TV (BBC 2008).

Myanmar, until slight reformation recently, had been one of the most isolated countries in the world, along with countries like North Korea and Iran. This is reflected in the attitude of the Junta government in light of Nargis Cyclone destructions. The military leader Than Shwe and his generals rejected the entry of international aid workers, refusing to let medicine, food and other relief supplies into the country, which triggered one of the worst humanitarian crises in the country (Schlag 2012, 2). The reason for this rejection cannot be separated with junta's own securitization of its power grip, or what other author called paranoia. Through the history, military junta in Myanmar had been criticized by the world, even suffered various sanctions, for its appalling human rights record.

Fears of armed intervention by the United States and its allies, and of indirect interference in Myanmar's internal affairs, have been strong influences on the regime's defense and foreign policies ever since the 1988 pro-democracy uprising (Selth 2008, 380)

It could be inferred that junta government kept a constant effort to securitize its sovereignty and portray foreign presence as existential threats. If the regime was successful in doing this, the issue of sovereignty would precede the issue of humanitarian crisis, and the junta would have a firm standing of not inviting foreign assistance to enter. But this is not the case in Cyclone Nargis. In fact, the result was mixed. International securitization of humanitarian crisis in Myanmar had been successful in amassing aids in various forms and in making the government of Myanmar open its door to foreign aid workers. But even after a while, the junta government still restricted assistance from any military vessels, which 'remains a very

sensitive issue' (Kazmin 2008). This is somehow frustrating since foreign militaries are equipped with ships and helicopters that could help expedite the process of delivering aids.

Similar to the case in Tsunami 2004, the referent object whose survival was legitimized was the victim, and the securitizing actor came from various backgrounds, including top government officials, NGO representatives and humanitarian organizations as well as local populations. All of these securitizing actors transmitted their speech act through media, mainstream and non-mainstream. One notable speech act from top government official came from French Foreign Minister Bernard Kouchner, who publicly announced his intention to bring this issue to the Security Council and invoke the Responsibility to Protect, as reported by Reuters:

... "We are seeing at the United Nations if we can't implement the 'responsibility to protect,' given that food, boats and relief teams are there, and obtain a U.N. resolution which authorizes the delivery (of aid) and imposes this on the Burmese government," French Foreign Minister Bernard Kouchner told reporter.

... French U.N. Ambassador Jean-Maurice Ripert asked the Security Council on Wednesday to call for a humanitarian briefing and issue a statement urging greater cooperation. He told reporters he was very disappointed that two or three countries had blocked that step on procedural grounds, saying that it was not a security matter. "We think it is time for the Security Council to express its concern ... to exhort, to ask, to call on the government of Myanmar to open its border and accept the access of humanitarian workers," Ripert said (Parsons 2008).

As has been known, securitizing move by French Ambassador to invoke R2P was not successful. The reason for this failure was the refusal from Russia and China representatives, not to mention that most experts thought that Nargis Cyclone 'did not meet to the narrow terms set out by R2P for intervention' (Schlag 2012, 6). But further examination shows that the failure of R2P invocation partly rests on the inability of media journalists to access the most severely affected areas. Gabi Schlag concluded the nature of BBC reporting during the disaster as follow:

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One could conclude that the images published on BBC.com make the human suffering of the people in Myanmar invisible. This is certainly the result of the regime's policy of restricting foreign journalists and aid workers travel, preventing them from going to the most destroyed regions in the Delta. While BBC.com published many photos and videos of eyewitnesses, which supported the overall narrative of reconstruction and control, the majority of these images depicted the destruction of infrastructure and cleanup efforts by the people, military units and the monks. This absence of heart-breaking and iconic images, I argue, undermined the invocation of R2P as a response to the difficult situation in Burma. The references to a humanitarian crisis and the call for immediate action were not supported by these pictures and the visual narrative they told. They did not fit into the depiction of a humanitarian crisis, but already envisioned that "help is on the way" (Schlag 2012, 10).

Nevertheless, it could not be said that humanitarian securitization did not work completely. To certain level, efforts by various securitizing actors managed to bring about changes in the attitude of Myanmar's government. Junta government was willing to give wider, albeit limited, access for foreign workers into the country (Kazmin 2008). This was a result of a series of securitizing move by many actors. The urgency of the situations were reflected by many remarks, such as one uttered by USAID administrator, "It's a race for time, a race to save lives" (Newman 2008, emphasis added). Spain State Secretary of European Affairs even said, "If the military junta seriously blocks the arrival of aid, this would be similar to a crime against humanity" (MSNBC 2008, emphasis added). Media also highlighted several statement from ICRC and other NGOs about the severity of the situation, such as water scarcity, and emphasize that "time is life" (BBC 2008).

Conclusion

The use of securitization approach in humanitarian diplomacy is possible through careful analysis on every aspect. Moving humanitarian issues into the realm of security allow humanitarian

supporters to use the very basic impulse of human being to their advantage. Security is about survival, and survival is the most fundamental instinct of human being. Once survival is threatened, any other things become irrelevant. Integrating humanitarian securitization to humanitarian diplomacy, therefore, could be the way to go.

Conceptually, securitization as an approach and diplomacy as an instrument have compatibility, especially in terms of level of analysis. They could be applied to middle level collectivities (state, groups, etc), or to global/system level. Humanitarian diplomacy has been aimed at both of these levels. In the global level, it has successfully challenge traditional 'normal' political concept of sovereignty, and makes it subordinate to the higher order humanitarian protections. In middle level, as has been seen in the case of Tsunami and Cyclone, humanitarian diplomacy has accomplished successful, albeit limited, securitization.

The inquiry toward humanitarian diplomacy as a concept and its relations with securitization should further be developed. One option for further research is finding the conceptual basis for humanitarian macro-securitization, an expansion of the securitization's level of analysis that fill the gap between middle level and system level.

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HUMANITARIAN DIPLOMACY: AN (NEW) AGENDA IN INDONESIA'S FOREIGN POLICY?

Ludiro Madu

Universitas Pembangunan Nasional “Veteran” Yogyakarta

Abstract

This paper assumes that the post-1998 democracy raised humanitarian diplomacy as a new agenda in Indonesia's foreign policy. The case of Indonesia's foreign policy shows that the fundamental political change significantly laid important bases for practicing humanitarian principles in its foreign policy. Following cosmopolitanism of International Relations theory, this paper seeks to understand the adoption of humanitarianism in foreign policy with the case of Indonesia in the post-1998. Domestically, Indonesia has paid more attention to the security of its citizens who work abroad. Public's and NGOs' sensitivity has also increased in demanding the government commitment for the safety of its migrant workers abroad. In international level, Indonesia's government and society has been involved in various humanitarian actions. This international participation has raised Indonesia's global profile in the form of its support to various attempts in dealing with humanitarian problems abroad. In doing so, the government has not been the only actor, but it has attracted individual and NGOs' involvement in strengthening its national commitment and global profile. Therefore, these post-1998 domestic factors have strongly intensified the practice and promotion of humanitarian diplomacy in the agenda of Indonesia's foreign policy.

Keywords: humanitarian diplomacy, Indonesia's foreign policy, democracy.

Introduction

Foreign policy is generally defined as arrangements or regulations which governments practise to interact with other governments. It particularly focuses on the actions and purposes of national government in its relations to others beyond states territorial limits. Furthermore, non-state actors also play important role in the overall dynamics of the international system. Within this context, governments' interaction with other external actors would also include non-state actors.¹⁷⁸ Both states and non-state actors have had increased their impact in determining the behaviour of states within international system.

¹⁷⁸ Vincensio Dugis, "Domestic Political Structure and Public Influence on Foreign Policy: a Basic Model," *Journal of Global & Strategis* Vol. 3, No. 2, 2009, pp. 173-90.

In the formation of foreign policy, domestic politics does matter¹⁷⁹. Recent democratization has played significant influence in the practice of Indonesia's foreign policy. Similar to domestic political structure, democracy has diversified the number of actors in foreign policy, particularly with the emergence of non-state actors. The post-1998 democratization has presented the different reality of the traditional insight on foreign policy, that is, the state --- in the form of government--- has not been the only single actor in Indonesia's foreign policy. The increasing role of Indonesia's non-state actors in its foreign policy has been a new phenomenon since foreign policy is strongly deemed as the domain of government, particularly its executive branch, i.e. the Ministry of Foreign Policy.

The case of Indonesia's foreign policy shows that the fundamental political change significantly laid important bases for practicing humanitarian principles in its foreign policy. Domestically, Indonesia has paid more attention to the security of its citizens who work abroad. Public's and NGOs' sensitivities have also increased in demanding the government commitment for the safety of its migrant workers abroad. In international level, Indonesia's government and society has been involved in various humanitarian actions. This international participation has raised Indonesia's global profile in the form of its support to various attempts in dealing with humanitarian problems abroad. In doing so, the government has not been the only actor, but it has attracted individual and NGOs' involvement in strengthening its national commitment and global profile. Therefore, these post-1998 domestic factors have strongly intensified the practice and promotion of humanitarian diplomacy in the agenda of Indonesia's foreign policy.

Following cosmopolitanism of International Relations theory, this paper seeks to understand the adoption of humanitarianism in foreign policy with the case of Indonesia in the post-1998. Tracing back to some event during the administration of Susilo Bambang Yudhoyono ---popularly called SBY---, the agenda of humanitarianism in Indonesia's foreign policy found new bases from domestic political changes, namely democratization. In turn, this development increased Indonesia's commitment in taking part at various overseas cases of humanitarian problems.

¹⁷⁹James D. Fearon, "Domestic Politics, Foreign Policy, and Theories of International Relations", *Annual Review of Political Science*, No. 1, 1998, pp. 298-313.

Democracy and Cosmopolitanism

It is commonly understood that the main characteristic of foreign policy is state-centric. It comprises the set of measures and guidelines pursued by a given state towards external actors on specific international issues. Realist model of foreign policy analysis places internal conditions of a state as an intervening variable between systemic constraints and incentives, and the state's decision-making process which, in turn, inquires the *raison d'etre*. In this case, foreign policy considers the interplay of domestic and international realm with an executive-formed and elite-driven process in its nature.¹⁸⁰

Having adopted a democratic political system, foreign policy-making in Indonesia has become more complicated due to the diverse political group, which competes to influence government's decisions. The increasing power of parliamentary and Indonesia's political culture favors coalition-building between president and political parties, have intensified the burden of the executive's responsibility in foreign policy formation. Within this political structure, dynamics of domestic electoral politics would determine political considerations in foreign policy decision-making. In case of a 'radical' foreign policy which does not take the domestic politics into account, it is prone to create political risks for a government which is strongly supported by multi-party coalition.¹⁸¹

The nexus between democratization and foreign policy shows that the influence of democratic process does not only stopped in domestic politics, but it goes on influencing the practice of Indonesia's foreign policy. Indonesia's democratization has not only resulted in a brand-new national political order, but it also has had an impact on foreign policy making. Furthermore, Dosch explores that

The influence of non-governmental actors in the foreign policy arena is prominently related to the way in which regime accountability constraints the government's latitude of decision-making in foreign affairs. In an authoritarian state regime, accountability tends to be low because the procedures for power transfer are not

¹⁸⁰ Iisgandarsih, "Indonesia's Democratic Politics and Foreign Policy-Making: A Case Study of Iranian Nuclear Issue, 2007-2008", *the S. Rajaratnam School of International Studies (RSIS) Working Paper*, No. 236, NTU, Singapore, p. 3.

¹⁸¹ *Ibid.*, p. 4.

*institutionalized. The continuity of a regime is not linked to the legislative process, elections, judicial decision, or even the regime's performance. Hence, accountability does not impose a significant limitation on foreign policy making in authoritarian polities. In contrast, democratization increases regime accountability and, as a result, restricts the regime's leeway in determining and implementing foreign policy goals.*¹⁸²

Within this context, Indonesia's foreign policy has not been a mere domain of the state or the ruling government. However, foreign policy arenas have opened up its room for a certain groups of community in Indonesia. These non-state actors have forced Indonesian government "...to pay more attention to issues such as human rights and environmental matters in foreign affairs and blocked or significantly re-shaped governmental initiatives toward other countries."¹⁸³ This phenomenon has been going very well in the era of President Susilo Bambang Yudhoyono, who is popularly called 'SBY'. Different from his predecessors, the SBY government has enjoyed more stable political condition. This domestic political structure has given him political guarantee of running his two-term administrations without any threat of being ousted by his domestic political opposition.¹⁸⁴

This actually relates to the dynamics of global structure in the 21st Century. The era has been remarked by the increasing importance of domestic context in Indonesia's foreign policy as the result of the outside world changes. This tendency was brought by rapid changes and fluid preconditions in international arena which caused domestic economic crisis and political reform in Indonesia, particularly in the post-1997. Different from the authoritarian political system, the post-1997 democratization has resulted in the change of Indonesia's foreign policy agenda, with special reference to humanitarian issues.

¹⁸² Jörn Dosch, "The Impact of Democratization on the Making of Foreign Policy in Indonesia, Thailand and the Philippines," *Südostasien Aktuell* No. 5, 2006, p. 42.

¹⁸³ *Ibid.*, p. 46

¹⁸⁴ Ludiro Madu, "Democratization: Changes of Foreign Policy in Indonesia," paper presented at a collaborative International Seminar between UPN "Veteran" Yogyakarta and Institute of International Affairs at Prague on *Democracy, Gender, and Islam in Indonesia*, May 2011.

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The humanitarian issues have reflected a new agenda in Indonesia's foreign policy. The change in foreign policy is prone to portray changes which take place in structures, beliefs, politics of society, and the state within a dynamics systemic of international context. A period of political instability and transition may generate such changes which, in turn, depend on the nature and timing of events and crises in triggering the change.¹⁸⁵ The increasing importance of humanitarianism in Indonesia's foreign policy has been determined by domestic development in the country. Democratization strongly correlates to the principles of liberalism. Immanuel Kant asserts the role of democracy as the primary values for promoting global peace. In this case, global peace is the sine qua non for interactions among states. In the history of international relations, this perspective states that conflict or war occurs among non-democratic states. If one democratic state involves in war, it happens between this democratic state and non-democratic state. This perspective is then called cosmopolitanism.¹⁸⁶

Other important principles of cosmopolitanism are universalism and impartialism.

Both correlate to global promotion for principles of open mindedness, tolerance, and empathy. Different from other theories of International Relations, cosmopolitanism gives more dimensions on moral, normative, and politics beyond national borders. In political realm, global orientation of citizenship and institutional building put cosmopolitanism beyond realist's principles. All these principles have emphasized cosmopolitanism to give priority to the value that although human being belongs to a single category or community, equal treatment is of importance regardless social and political identities or, even, national citizenship.¹⁸⁷

The idea of cosmopolitanism can be traced to several multilateral agreements. First, the UN Charter promotes the importance of human through the implementation of the right to

¹⁸⁵ John H. Broesamle, *Reform and Reaction in Twentieth Century American Politics*, Greenwood Press, Westport, 1990, p. 406.

¹⁸⁶ Aryanta Nugraha dan Ludi Madu, "Human Security: Contending Perspectives of Liberalism, Critical Theory and Postcolonial Theory," *Journal of Global and Strategis*, forthcoming.

¹⁸⁷ Muhadi Sugiono, "Cosmopolitanism and World Politics: Bringing the Global World to International Relations," *Journal of Global and Strategis*, Vol. 6, No. 2, pp. 217-30.

self-determination. Second, the Universal Declaration of human rights in 1948 is also another form of manifestation of the cosmopolitan commitment. Additionally, cosmopolitanism significantly changes the definition of sovereignty. While political theory defines sovereignty as the absolute right, cosmopolitanism brings new understanding of the idea of sovereignty as both right and responsibility. Consequently, this new definition of sovereignty raised the concept of ‘responsibility to protect’ within interaction among states and non-state actors, which was based on the 2005 World Summit.¹⁸⁸ In this context, the value base of the humanitarian regime is encapsulated in the principle of ‘humanity’ which means a desire ‘to prevent and alleviate human suffering.’¹⁸⁹

With the importance of humanity, the post-1998 Indonesia’s democratization brought easier path for the country to practise in its foreign policy. Of course, this application would not neglect the fact that domestic dynamics has also put the commitment of Indonesia’s government on the humanitarian issues into question. Several domestic ethnic and religious conflicts resulted in the incapability of Indonesia’s government in preventing and protecting its citizen from horizontal conflicts. Importantly, the domestic incapability of government seems to be paradox to its achievement in promoting the humanitarian issues in international level. Apart from that, democratization has brought the humanitarian issue into the agenda of Indonesia’s foreign policy.

Humanitarianism and Indonesia’s Foreign Policy: A New Agenda?

Orientation of Indonesia’s foreign policy in 2012 seems to manage and promote global changes in order to establish common stability, security, and prosperity at regional and global levels. President SBY has actively strengthened the *bebas aktif* foreign policy through his directives through Indonesia’s participation in multilateral diplomacy. Furthermore, President SBY also introduced the idea of an “all-directions foreign policy” and “a million friends, zero enemies” in order to make Indonesia’s foreign policy more

¹⁸⁸ *Ibid.*

¹⁸⁹ Oliver Ramsbotham and Woodhouse T., *Humanitarian Intervention in Contemporary Conflict*, Oxford University Press, Oxford, 1996, p. 14.

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relevant to the national interests and the challenges that Indonesia has to deal with.¹⁹⁰

In a press release of the Ministry of Foreign Affairs, Indonesia's contemporary foreign policy slogan is "a thousand friends, zero enemy" for the best of national interest. It clearly articulated that it would improve relations with every nation through bilateral ties and multilateral institutions. One of its international aspirations is to promote justice and order in the international arena by giving priority on protecting Indonesian nationals ---particularly migrant workers--- and promoting Indonesia's commitment on human security in general.¹⁹¹ In this context, Indonesia's foreign policy does not only emphasized the importance of national security, but it also give priority of promoting its commitment on human security.

The United Nations Development Programme's *Human Development Report 1994* defines human security as 'safety from the constant threats of hunger, disease, crime and repression and 'protection from the sudden and hurtful disruption to the pattern of our daily lives'.¹⁹² The Commission on Human Security defines human security as protecting the vital core of all human lives in ways that enhance human freedom and human fulfilment.¹⁹³ Various international organisations as well as academics have different views and perspectives regarding human security, so that human security is often seen from two different approaches. The first approach focuses on the issue that undermine the life chances of majority of people such as extreme poverty, disease and underdevelopment (freedom from want and freedom from fear). The second approach gives more attention to the consequences of armed conflict to individual and group, including the danger from repressive government and state failure phenomena (freedom from fear).¹⁹⁴

Adopting new agenda of humanitarian issues in foreign policy, Indonesia's government considers rapid changes of domestic structure and identifying diverse actors involved in its formation

¹⁹⁰ Yayan GH. Mulyana, "Does Indonesia Need a Foreign Policy White Paper?" *the Jakarta Post*, 07 February 2012.

¹⁹¹ Irfa Puspitasari, "Indonesia's New Foreign Policy- 'Thousand Friends-Zero Enemy', *IDSA Issue Brief*, New Delhi, India, 2010, p. 2

¹⁹² UNDP, *Human Development Report 1994: New Dimension of Human Security*, Oxford University Press, New York, 1994, p. 23.

¹⁹³ Commission on Human Security, *Human Security Now: Protecting and Empowering People*, Commission on Human Security, New York, 2003, p. 4.

¹⁹⁴ Nugraha & Madu, *op.cit.*

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process. In the case of foreign policy restructuring, the pattern of states' external relations could also experience radical alteration. In a broader sense, foreign policy change can be divided into several factors, as follows:

1) change which is resulted from regime change of state transformation, and 2) change that happens when the existing government decides to push in different foreign policy directions. By definition, therefore, foreign policy change that relates to the changing political system falls in the former, which is also called as foreign policy redirection. Meanwhile, the latter occurs when the existing actors change their course in foreign policy.¹⁹⁵

As for the democratic governments in the post-1998, humanitarianism agenda in Indonesia's foreign policy seems to get its grip during the era of Susilo Bambang Yudhoyono ---popularly known SBY--- both in his first and second term. Humanitarian issues in Bosnia, Cambodia, Myanmar, Lebanon, and others are several hotspots in which Indonesia took part in the United Nations Peace Keeping Operation (UNPKO) and other multilateral initiatives. Looking beyond realist tradition of International Relations, liberalism and liberal democratic tradition strongly suggest the constructive influence of the public or society in foreign policy. Foreign policy in democratic country gives more spheres for individuals and non-government organization to take important role in influencing foreign policy-making. Furthermore, liberalism promotes the primacy of human being's existence and protection in the interaction among states. Many argued that foreign policies of democratic states are more peaceful partly due to public opinion constraint upon their leaders. Within this context, public concern towards the tragedy of human being in other states could direct government's orientation in the practise of its foreign policy.¹⁹⁶

The practise of this agenda can be categorised into two patterns, i.e.: humanitarian problems in foreign countries and the security of Indonesia's citizen abroad. The first pattern reflects to Indonesia's concern in international level. The case of Myanmar's cyclone Nargis shows Indonesia's concern on the humanitarian tragedy. Another example is Indonesia's assistance to Fukushima's nuclear tragedy in Japan. The second pattern reflects the increasing commitment of

¹⁹⁵ Dugis, *op.cit.*

¹⁹⁶ *Ibid.*

Indonesia's foreign policy in Indonesia's domestic workers abroad, especially in Malaysia and several countries in Middle East. Recent crisis in Syria and Arab Spring placed Indonesian citizens into risk which made the government to evacuate them out of the hotspot, either to surrounding countries or take them back to Indonesia.

As democratization raised the new agenda of humanitarian diplomacy in Indonesia's foreign policy, it inevitably relates to concentric circle. As foreign policy starts at home, the redefinition of Indonesia's foreign policy concentric circle begins with the bold efforts in identifying challenges ---in both regional and global levels-- - and in which area the government would like to signify and conform to the national strategic interests of Indonesia's government. As Dewi Fortuna Anwar stated Indonesia's primary concentric circle emphasized on ASEAN countries, meanwhile the South Pacific, East Asia, and multilateral diplomacy made up the second, third, and fourth circles.¹⁹⁷ Similar to the projection of foreign policy where it starts from the national sphere Indonesia's effort to rebuild its international image starts from rebuilding itself in ASEAN, as a home for the country. Pragmatism is reflected in the focus circle of our foreign policy.¹⁹⁸

From this experience, it seems that concentric circle only applies to foreign policy areas in which Indonesia is projecting on a regular basis. Although it is said that Indonesia's foreign relations are projected in accordance to the concentric circle, knowing the complexities of issues and varieties of challenges and the governments work plan that faced Indonesia's formal foreign policy actors, the circles should not be a rigid one. Otherwise stated, we might need to rethink the relevance of our concentric circle in the daily conduct of diplomacy, including humanitarian diplomacy.¹⁹⁹

Indonesia has non-state actors, such as NGOs and the business community, which have linked internationally with their partners and networks outside the country. While the role of the Foreign Ministry is important, the Indonesian foreign policy is not solely dominated by the Ministry since the Ministry takes the role of coordinating Indonesian diplomacy. Activists and experts have

¹⁹⁷ Dewi Fortuna Anwar, "Key Aspects of Indonesia's Foreign Policy," *Trends in Southeast Asia Series*, Nanyang Technological University, No. 9, 2003, p.3.

¹⁹⁸ Hadiano Wirajuga, "Rethinking RI's Foreign Policy Concentric Circle," *the Jakarta Post*, 04 November 2010.

¹⁹⁹ *ibid.*

underscored a number of targets Indonesia should meet during its chairmanship of ASEAN 2012, especially in the issues of human rights, migrant workers, and security issues. Human rights NGO Imparsial's program manager, Al Araf, said that the need to empower the ASEAN Intergovernmental Commission on Human Rights (AICHR) authorities. Indonesia should push for the establishment of a national commission on human rights in countries which do not have yet. Indonesia, Malaysia, the Philippines, and Thailand are the only countries in the 10-member group that already established the commission.²⁰⁰

Indonesia's humanitarian diplomacy also shows its increasing role in its effort of helping Rohingya ethnic in Myanmar. The incapability of international organizations and states in their negotiation with Myanmar's government, Indonesia through the former Vice Presiden and recent Head of Indonesia's Red Cross, Jusuf Kalla, succeeded in taking initiatives of promoting peace between conflicted parties in Myanmar. Indonesia's migrant worker NGO, Migrant Care executive director, Anis Hidayah said Indonesia must give priority in finishing the negotiations on the draft of the ASEAN Framework Instrument on the Protection and Promotion of the Rights of Migrant Workers. Since December 2009, Singapore and Malaysia has opposed the legally binding concept of the framework and standard of protection of migrant workers on a human rights basis, which was proposed by Indonesia and the Philippines ---the two largest migrant workers providers in the region.²⁰¹

Most humanitarian agencies today acknowledge that humanitarian aid is rarely non-political and neutral; there have been calls for a 'new ethic' and to 'humanitarianise' foreign policy. In this case, humanitarianism is a 'value', rather than an 'interest'. State interests may incorporate and in some ways are necessarily based on values, even under non-democratic systems. Values have become reasons for states 'rationally' to support humanitarian action. The convergence of values within the international system may further peace. Therefore, humanitarian action is important for states,

²⁰⁰ Mustaqim Adamrah, "Can Indonesia deliver on High Expectations?," *the Jakarta Post*, 01 May 2011.

²⁰¹ *ibid.*

including the US image abroad, and thus an investment in a national 'corporate asset'.²⁰²

Indonesia received many supports for its foreign policy participation in numerous high level meetings. In the last 60 days of 2011, there was the G20 in Cannes, APEC in Hawaii, ASEAN and East Asia Summit (EAS) in Bali and COP17 in Durban. SBY's first foreign policy objective during his first tenure was for recovering Indonesia's national image in international politics. In SBY's second tenure, foreign policy has tried hard in promoting domestic democratization and its commitment to human security.

Indonesia is known as mediating power among developing countries. This means that Indonesia has the power to mediate between developed and developing countries and to negotiate for a collective position among developing countries, such as on the developmental and environmental issues. Indonesia's position is central among countries in regional and global forums. For example, Indonesia holds a crucial role in providing a balance in Southeast Asia and the Asia Pacific regions. Indonesia is also recognized for its role as a coordinating actor within Southeast Asia. It can use its influence to pursue and coordinate all ASEAN countries in supporting the realization of the ASEAN Community and in actively shaping the coherence of ASEAN in international fora.²⁰³

With this growing power and position of Indonesia in global arena, it is important to think of redefining foreign policy's concentric circle. Considering the changing nature of threat in international politics which is transnational, non-military, and beyond state borders, the effort of redefining concentric circle for Indonesia's foreign policy could response to the emergence of non-traditional (in)security issues. These issues are strongly related to those of humanitarian issues which give priority to the importance of protecting human being. These diversifying non-military threats should be responded with appropriate foreign policy which is not merely focus on territorially-based in nature. In turn, the humanitarian issues must be covered in the issue-based concentric circle rather than a mere territorially-based one.

²⁰² Sean Greenaway, "Post-Modern Conflict and Humanitarian Action: Questioning the Paradigm," *the Journal of Humanitarian Assistance*, 9 January 2000.

²⁰³ Beginsa Pakpahan, "Assessing RI's Foreign Policy in 2012," *the Jakarta Post*, 18 January 2012.

Conclusion

In line with the application and influence of cosmopolitanism in foreign policy, the case of Indonesia show that domestic political process of democratization are likely to play its important role in elevating humanitarian issues in its foreign policy. Although the state, in particular the executive, remains in the driving seat to set the pace and direction of Indonesia's foreign policy, non-state actors has found their political foundation in promoting the protection and equal treatment of human being without considering political identities and borders. Partisan organization, interest groups, non-government organizations (NGOs), mass organization, and political parties are ready for giving their influence to the executive-formed international policy in order to pursue their idea of promoting human security, rather than just national security. Under democratic political system, these actors have more freedom in giving their initiative in Indonesia's foreign policy with particular reference to the concept of responsibility to others. Several case studies show the interplay between state and non-state actors in developing humanitarian diplomacy as the new agenda of Indonesia's foreign policy.

HUMANITARIAN DIPLOMACY - 2

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THE HUMAN RIGHTS PROTECTION ON REFUGEES AND ASYLUM SEEKERS IN INTERNATIONAL HUMANITARIAN LAW PERSPECTIVE

Ayub Torry Satriyo Kusumo

International Law Department, Faculty of Law

Universitas Negeri Sebelas Maret

Abstract

Asylum is the protection to the people or a group of people who leave their country because of very threatening fear. Refugees are a group of people who were forced to leave the country because of very threatening fear. Fear in this article is often due to conflict. Residing countries receiving refugees, they often experience inhumane treatment such as rape, assault, discrimination, repatriated by force, which lead to the violation of human rights. The protection toward refugee and asylum seekers is obligation of every states. There has been regulation for human rights in refugee issues both internationally and regionally, for instance Convention related to Status of Refugee 1951 and The Protocol related to the Status of Refugee 1967. There are at least five basic rights of refugees, i.e the right to be protected from returning to the country of origin forcibly (non refoulement), the right to seek asylum, the right to obtain equality and non-discrimination, the right to live and to be secured, as well as the right to return home. Article 14 paragraph (1) Universal Declaration of Human Rights also regulates that everyone has the right to seek and enjoy in other countries asylum from persecution.

Keywords: International Convention on Refugees, Status of Refugee, Human Rights Protection, International Refugees and asylum seekers

Introduction

The protection of refugees is the responsibility of every country²⁰⁴. Refugees is an issue that always arises in every human development. Refugees can be started from a very threatening fear for their safety²⁰⁵. Fear can be caused by a natural disaster or man-made disasters (in this case can be called conflict). The problem of refugees is a domestic issue, but now with the development of the Human Rights concept, refugee has become an international issue²⁰⁶.

²⁰⁴SigitRiyanto, "The Urgency of Refugee Legislation in Indonesia and The Present Obstacles", *Indonesian Journal of International Law*, Vol. 2 Nomor 1, Oktober (2004): 67.

²⁰⁵AchmadRomsandkk, *PengantarHukumPengungsiInternasional.HukumInternasionaldanPrinsip-PrinsipPerlindunganInternasional*, (Jakarta : UNHCR, 2003), 3.

²⁰⁶Erika Feller, "The Evolution of the International Refugee Protection Regime", *Journal Law and Policy*, (2001) : 130.

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The displacement conducted because of the suppression of refugees human rights in their country. The refugees are also looking for land or other countries as a new residence which is certainly far from the suppression of human rights. Looking for a new country by refugees should be considered as a human right²⁰⁷. There are legal frameworks protecting international refugees according to the international law²⁰⁸, they are:

1. Treaties

These are the legally binding agreements among states that can either be open to all countries (universal or specifically confined to a few states with shared interest (usually regional)).

2. Customary International Law

This body of law consists of practices by states that have become so firmly established that they have become legally binding rules

3. General principle of Law

Where neither a treaty nor custom cover a particular issue, principle considered common to major legal system throughout the world can also be applied

4. Judicial Decisions

Made by States superior courts and the opinions of respected academics. These decisions and opinions assist in the interpretation of international law.

The Convention related to the Status of Refugees 1951 (The Convention 1951) or The Geneva Convention related to the Status of Refugees are the legal basis of international refugee law. James C. Hathaway explains that the International refugee law is designed only to provide a back-up source of protection to seriously at-risk persons. Its purpose is not to displace the primary rule that individuals should look to their state of nationality for protection, but simply to provide a safety net in the event a state fails to meet its basic protective responsibilities²⁰⁹. The definition of refugee based

²⁰⁷Soffa Salsabila Alfafa, "Peranan UNHCR dalam Menangani Masalah Perlindungan Pengungsi", Makalah, (2011), 1.

²⁰⁸ UNHCR, *An Introduction to International Protection*, (Jakarta : UNHCR, 2005) : 25.

²⁰⁹James Hathaway, "Crisis in International Law". *Indian Journal of International Law*, vol. 39. (1999) : 1.

on Article 1 of The Convention relating to the Status of Refugees 1951 is *"Refugee relates a person who owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country, and is unable or unwilling to avail himself of the protection of that country"*. The Convention provides an international boundary about refugee status who registered prior to January 1, 1951. Due to the increasing problem of refugees between 1950 and 1960, it would require a wider range of definition concerning international refugee. It was agreed that there is an additional Protocols for refugees, Protocol Related to the Status of Refugees or the Protocol New York 1967. Unfortunately, the Protocol did not give particular limitation of refugee-related events²¹⁰.

The principles of international law at the international convention on the protection of refugees is an affirmation of and essentially derived from International Customary Law, which have legally binding on all states regardless it has ratified the convention or not²¹¹. Indonesia is one country that has yet to ratify the international legal instruments on the protection of refugees, either the Convention 1951 or its Protocol 1967.

In the understanding of legal positivism, Indonesia does not have an obligation to accept a refugee who came to this country since Indonesia does not have any national legislation regarding the protection of international refugee. While it is in fact not only a few refugees or asylum seekers who entered the territory of Indonesia to seek protection. International problems can occur due to the crossing border process, which can lead to the violation of human rights. This issue often happens because of the lack of legal documents of the refugees²¹². There are differences on treatment and protection of refugees, between international and national one. This review will emphasize on international refugees.

International Refugee Regulation

²¹⁰Sri Setyaningsih Suwardi, "Aspek Hukum Masalah Pengungsi Internasional", *Jurnal Hukum Internasional*, Vol 2 No. 1 Oktober (2004) : 25

²¹¹ Sigit Riyanto, "The Urgency of Refugee Legislation in Indonesia and The Present Obstacles", *Indonesian Journal of International Law*. Vol. 2 Nomor 1 Oktober (2004) : 68.

²¹² Anonim, "Guidelines of International Refugee Protection, Teaching Materials", (Geneve : UNHCR), 124.

There are the similar principal between The Convention related to the Status of Refugees 1951 and Protocol Related to the Status of Refugees 1967. There are three main points that contained in the convention, they are:

1. The basic understanding of refugees

The basic understanding of refugees defined in the Convention 1951 and Protocol 1967 is important to know because it is necessary to determine a person's refugee status (including refugees or not). Determination is set by the state where the person is and in cooperation with the *United Nation f or Refugee High Commissioner* (UNHCR).

2. The legal status, the rights, and the obligations of refugees in the displacement (the rights and obligations that apply in the camp of refugee camps).
3. Implementation of the agreement, especially in regard to administrative and diplomatic relationship between the displacement and the UNHCR, particularly for the UNHCR to do its work alone and perform supervisory duties, especially to countries where refugees are located.

Beside being regulated in the Convention 1951 as well as in the Protocol 1967, the international refugee is also regulated in the Organization of Africa Unity Convention and the Cartagena Declaration. Organization of African Unity (OAU) Convention 1969 manage refugee issues in the region of Africa and have the legally binding to the countries of African region. OAU Convention set out more about the definition of refugee as someone who left his country because of external aggression, occupation, foreign domination or events seriously disturbing public order in certain parts or the whole of his country of origin or nationality²¹³. Regulation has legal implications that the one fled the country due to civil unrest, widespread violence, and war, to be entitled to claim refugee status in the countries that are the party to the Convention, regardless whether they have a fear of the oppression or fundamental persecution²¹⁴. It was set that certain groups of

²¹³Achmad Romsan dkk, *Pengantar Hukum Pengungsi Internasional. Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional*, (Jakarta : UNHCR, 2003), 97.

²¹⁴Sigit Riyanto, "The Urgency of Refugee Legislation in Indonesia and The Present Obstacles", *Indonesian Journal of International Law*. Vol. 2 Nomor 1 Oktober (2004) : 73.

individuals who have fear of persecution because of political and civil status and who have fled their country should be considered a refugee and given a specific set of rights that distinguishes them from other foreigners²¹⁵.

Similar to the OAU Convention, The Cartagena Declaration 1994 also supports the definition on refugees in the Convention 1951 "... Because *their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*". It can be concluded that fear is distinguishing refugees from other types of migrants, not only the situation but also the need of humanitarian assistance. Because regulation regarding the refugees has set both regionally and internationally, the protection of refugees already had a legal force in international law.

Various kinds of refugees

The refugees can be classified into two types²¹⁶, they are:

1. Refugees due to natural disasters. This refugees is still covered by the country of their origin to save their lives, and these people can still ask to the country from which it originated.
2. Refugees due to man-made disaster. The refugees left the country due to the persecution from their country of origin, usually because of a political situation, and these refugees did not receive a protection from the country. This refugee also can be qualified as international refugees.

For the international refugees, there are three types which are:

1. Statutory Refugees are the refugees who are derived from a particular country that does not get diplomatic protection from his country of origin. The refugees categorized as *Statutory*

²¹⁵ Michael Barutciski, "Tensions between the Refugee Concept and the IDP Debate", *Forced Migration Review* : Norwegian Refugee Council (1998) : 11.

²¹⁶ Prasetyo Hadi Purwandoko, "Perlindungan Pengungsi (Refugee) menurut Hukum Internasional", *Jurnal Yustisia Fakultas Hukum Universitas Sebelas Maret*, September-Oktober (1998) : 5.

Refugees are the refugees qualified as stated in the International agreement before the 1951.

2. *Refugee of Convention* is the refugees based on the Convention 1951 and Protocol 1967. The refugees being in a country as a convention party. Meanwhile, the authorities who determine the status of refugee is the country where the refugees are located in collaboration with UNHCR. The collaboration can be in form of jointly setting the status of refugee or by giving the full authority of status setting to the UNHCR.
3. *Mandate refugees* are determined based on the mandate of the UNHCR. The refugees are located in the countries that not party to the Convention 1951. UNHCR have a full authority to set the status of refugee and the country where refugees are located cannot take any legal action.

Haryomartaram divides refugees into two kinds i.e. the Human Rights refugees and Humanitarian Refugees²¹⁷.

1. Human Rights Refugees are the refugees who leave the country because of fear of being persecuted caused by ethnic race, religion, nationality or political beliefs.
2. Humanitarian Refugees are those who leave the country because of a conflict (international armed conflict or non-international armed conflict). They are in general regarded as an alien in countries where people are displaced. In accordance to the Geneva Conventions 1949, alien is treated as protected persons. Thus they are protected both by Geneva Convention 1949 (especially Chapter. IV) and by Additional Protocol I-1977.

Threat of International Refugees Rights Violations

Data showed that million of children, men and women has suffered from religious exploitation of ethnic conflict or civil war. This amount increases sharply every year²¹⁸.

²¹⁷Andre Sujatmoko, “*Hubungan antara Hukum Humaniter Internasional, Hukum Hak Asasi Manusia Internasional, dan Hukum Pengungsi Internasional*”, Makalah disampaikan dalam Short Course on International Humanitarian Law. Yogyakarta, (2011) : 9-10.

²¹⁸Anonim, “*United Nation Report about Refugee*, New York : United Nation (1995) : 217-218.

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To date, refugees protection is the reason for the existence of The United Nations High Commissioner for Refugees (UNHCR). Approximately 26 million people in the world become the attention of UNHCR. They cover more than 13.2 million refugees, at least 4.7 million people are internally displaced, 8.1 million are victims of war and returnees. The number most likely to come from Afghanistan (2.3 million), Rwanda (1.7 million), Bosnia and Herzegovina (1.3 million), Liberia (750,000), Iraq (630,000), Somalia (466,000), Sudan (424 000) , Eritrea (362,000), Angola (324,000) and Sierra Leone (320 000)²¹⁹.

United States invasion of Iraq in 2003 has resulted in 2.4 million Iraqis abandon Iraq, approximately 1.4 million people went to Syria and approximately 750,000 refugees in Jordan²²⁰. UNHCR in Greece also deal with immigrants from Afghanistan in 2007 as many as 130,000 people, but camps can only accommodate 400 people²²¹. Summit of the African Union in 2009 discussed that a number of 17 million African refugees experiencing problems. Those problems include Angola refugees who exodus to Congo had returned because of their very large number. Some 25,000 Somali refugees were also in Ethiopia, which cost about US\$ 13 million dollars. It can be concluded that the problem of refugees are not only about the camps alone but also in the quite large cost of living²²². UNHCR data in 2010 in relation with the refugees in Syria said that "Refugees in Syria and in all the neighboring countries with confirmed outflow now approaching 150,000; 36,841 refugees in Lebanon, in Turkey 50,000 refugees, 45,869 refugees in Jordan, and Iraq 13,730 refugees, primarily reflects those among the refugee community who have registered or are in the process of being registered, shows a total population of 146.667 people as of August 9th, "²²³

The conflict of Sudan between the Sudan Armed Forces and Sudan People's Liberation Movement-North in January 2011 has resulted in 10,000 people have leave Sudan to Ethiopia and UNHCR put at least 20,000 refugees in Ethiopia in an new location. The

²¹⁹Anonim, "*Information Paper*", Jakarta : Regional office of UNHCR, (1998) : 6

²²⁰Anonim, "UNHCR Report", October 9, (2007)

²²¹Anonim, "UNHCR report", (2007).

²²²Daniel C. Martin, "*Refugees and Asylees. Annual Flow Report 2010*", Immigration Statistic of United States Homeland Security, (2010) : 2.

²²³ <http://www.unhcr.org/502522469.html>.

amount is cumulative with the number of refugees at an earlier time²²⁴.

Discussion about refugees will not be separated from human rights. This is reasonable because the refugees are particularly vulnerable to inhumane treatment, both in native and recipient countries. The departure of refugees to other countries was due to forced circumstances and possibly they did not have any legal documents. Treatment that often received by the refugees are torture, rape, discrimination, as well as to be forcibly repatriated (refoulement). Erika Feller said that refugee protection also embraces the safeguarding of basic human rights placed in particular jeopardy in refugee situations i.e. the right to life, liberty and security of person, the right to be free from torture and other cruel or degrading treatment, the right not be discriminated against, and the right of access to the basics necessary for survival i.e. food, shelter, medical assistance, as well as, at a later point, for self-sufficiency i.e. a livelihood, education, health care²²⁵.

It is clear that the threat to human rights is forcing people to cross the border into another country to seek refuge. Therefore, the protection of human rights in the country of origin is very important to prevent refugee flows. When the conditions of the country of origin have changed, the refugees can return to their home country or build their own communities to have their rights fulfilled.

The protection of human rights is very essential in a country. The issue of human rights violations is frequently separated from the term 'refugee' because of assumption that refugees is the guilty one so that they fled their country. The current trend is the integration of the human rights, humanitarian law and refugee law, given the growing refugee problem related to the complex number, size and complexity of the problem of refugees. All this time, the approach used in refugee treatment is limited to the safety and welfare of the refugees without further consideration to the issue of the protection provided by the asylum-receiving countries. The essence of international human rights law is setting the universal humanity without being limited to a specific time and space

²²⁴<http://www.unhcr.org/pages/4f689d6c6.html>.

²²⁵Erika Feller, "International Refugee Protection 50 years on: The Protection Challenges of The Past, Present and Future", *IRRC Journal*, Vol. 83 No 843, September (2001) : 3.

attributes²²⁶. Human Rights in the context of refugee law related to three things, i.e.: the protection of civilians in armed conflict, the protection provided to the civilian population in normal circumstances, and the protection of the refugees, both of Internal Displaced Persons (IDP's) and international refugees²²⁷.

The global problem today on the issue of refugees and asylum is not only an individual problem but also a problem of international relations between native country and the receiving country. Therefore we need a law which provide the solution for the entire problems as well as the collective responsibility of all countries. It is believed to be able to protect the rights of refugees and to restructure of the draft Law on Refugees, as well as can provide legal basis for developing countries in protecting refugees' rights.

There are three important points that should be noticed by every country in protecting the international refugee²²⁸.

1. Increased demands on the state bureaucracy to manage the population while there are still weaknesses of state institution to provide assistance for the refugees,
2. Increased demands on the state apparatus to control and manage the resources
3. Increased demands on state security forces to guard the borders which can be threatened by incoming refugees

Human Rights of Refugees

Refugee Rights includes the following:

1. Rights of protection on *Non-refoulement*

When someone or people run away from their country of origin, a country must provide protection for him upon return to their home country. It is necessary to avoid further violation of their human rights. The international community has

²²⁶AgusFadillah,
Pengantar Hukum Internasional dan Hukum Humaniter Internasional, (Jakarta : ELSAM, 2007), 6.

²²⁷KoesparmonoIrsan, *Pengungsi Internal dan Hukum Hak Asasi Manusia*, (Jakarta : Komnas HAM, 2007), 6-7.

²²⁸Karen Jacobsen, "Can Refugees Benefit The State? Refugee resources and African Statebuilding", *Journal of Modern African Studies*, Cambridge (2002) : 588.

recognized the principle of non-refoulement on Article 33 paragraph 1 The 1951 Refugee Convention); UNHCR Basic Legal Documents on Refugees 1999 page 8-37; Article 3 United Nations Declaration on Territorial Asylum; Article VIII of the Asian-African Legal Consultative Committee, Bangkok Principles; Article II paragraph 3 OAU Convention 1969; and Article 22 paragraph 8 American Convention on Human Rights Convention 1969²²⁹.

The legal basis of non-refoulement is stated on article 9 of the Universal Declaration of Human Rights (UDHR), Article 5 UNHCR; Articles 2 and 6 Convention Against Torture; and Article 7 of the ICCPR. Malthus in response to the non-refoulement principle of international law, combining the conventional and local laws which give authority to the government (unilaterally) to control the entry of refugees into the country by way of arresting or detaining the airlines or ship carrying refugees, in addition to bringing a new concept of temporary protection and safe third country²³⁰.

2. Asylum-seeking rights

*The State will bear joint responsibility for the fate of the asylum-seeker as a matter of international law*²³¹. Asylum is the protection provided by the jurisdiction of a state in the country for anyone who came to look for. Asylum is needed not only to ensure the right to life but also to prevent the violations of human rights. Thus granting asylum to human rights violation victims refugees is an important aspect of the protection of human rights, so it should be considered as a principle of international law under the United Nations charter. Granting asylum to asylum seekers in accordance to Article 14 Universal Declaration of Human Rights can not be

²²⁹ Theofransus Litaay. 2003. *Penanganan Pengungsi menurut Hak Asasi Manusia*.

http://amalatu2005.multiply.com/journal/item/2/PENANGANAN_PENGUNGSI_DALAM_PERSPEKTIF_HAK_ASASI_MANUSIA?&show_interstitial=1&u=%2Fjournal%2Fitem.

²³⁰ Malthus in James Hathaway, "International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative", *First Colloquium on Challenges in International Refugee Law, Michigan* : Michigan Law School.(1999) : 9-11.

²³¹ Mary Crook, "In the Wake of The Tampa : Conflicting Visions of International Refugee Law in the Management of Refugee Flows", *Pacific Rim Law & Policy Journal Association*, (2003) : 12.

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regarded as an act of hostility by other countries, especially the countries of origin of asylum seekers²³².

Asylum has been regulated in Article 14 paragraph (1) of the Universal Declaration of Human Rights (UDHR) which stated that *everyone has the right to seek and enjoy in other countries asylum from persecution*. One of the UNHCR Principle is when there is asylum seeker comes in large scale, states should be giving protection for a while²³³.

3. Rights of equality and non-discrimination

Refugees have the right to be treated humanely by the asylum-granting-state. As the general rule, the rights and freedoms recognized in international human rights law is shared by all people including refugees, and the right to receive respect on basic human rights as citizens of the state that give an asylum do²³⁴. It is important to protect the rights and freedoms of refugees globally and regionally, (Article 2 paragraph 1 ICCPR; ICESCR article 2 paragraph 2; Article 1 paragraph 3, article 13 paragraph 1 (b), 55 (c) and 76 (c) UN Charter; Article 2 Universal Declaration of Human Rights; Article 14 European Convention; Articles 1 and 24 American Convention; and Articles 2, 13, 18 paragraph 3 African Charter) because refugees in a foreign country are most vulnerable to discrimination. It can not be denied that refugee usually do not carry identity and any legal documents that may be a problem with the authorities of the state which grant asylum. Refugees may be received in the receiving country with suspicion and lack of legal certainty of their existence in the recipient country.

4. Rights for Life and Security

Refugees are the most threatened group of people in the world. Some of their basic rights is threatened during the process of evacuation even in the same country. At first they felt

²³²BS Chimni, "Refugees in International Law, The Geopolitics of Refugee Studies: A View from the South", *Journal of Refugee Studies*, Vol.11, No.4, (1998) : 18-22.

²³³Michell Moussalli, *Who is a Refugee*, Refugee Magazine, (1982) : 42

²³⁴BS Chimni, "Refugees in International Law The Changing World Order, the Structural Role of Humanitarian NGOs, and the Protection of Displaced Persons and Migrants", Human Right Watch (HRW), Paper for the ICVA Conference on NGOs in a Changing World Order : Dilemmas and Challenges Geneva, 14-15 February, (2003) : 15.

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frustrated because of the loss of property, security, family and even their own lives. Gil Loescher explains the condition of refugee in recipient country is worse than in native countries²³⁵. Refugees are often separated from their family, being threaten, being the object of exploitation and being haunted by the fear of forcibly returned to their native country. Most of the children who live in displacement can not live a normal life like most children in general. Many refugees are also at risk of violence, including murder, rape, genocide, and forced disappearances.

Women are the most vulnerable victims of violence²³⁶. Right to life has been regulated in many kind of regulation on protecting human rights such as Article 3 Universal Declaration of Human Rights; Article 6 paragraph 1 ICCPR; Art. 1 American Declaration; Art. 4 paragraph 1 American Convention; Art. 2 paragraph 1 European Convention; Article 4 African Charter; and protection against genocide on article II Genocide Convention 1948. All countries have to do investigation if there is evidence of violation of the refugees' rights according to The Vienna Declaration (1993). Related to the recognition of human rights violations on a large scale in the form of genocide and systematic rape perpetrators, the subject of such crimes is affirmed to be punished (Vienna Declaration, 1993, paragraph 28). In connection with the rape and sexual violence encourages to all states to adopt regulation that protect women, including refugee women.

5. Right to Return to The Native Country

Refugees need to be secured if they want to return to their native country voluntarily. In addition, refugees also need the protection from forcibly return to their native country. Human rights regulate individual rights to return to their native country in Article 13 paragraph 2 Universal Declaration of Human Rights; Article 12 paragraph 2 African Charter; Article 12 paragraph 4 ICCPR, Article 22 paragraph 5 of the American Convention; Article 3 paragraph of the Fourth Protocol to the

²³⁵Gil Loescher and Laila Monahan, (eds.) . 1989, "Refugee Issues in International Relations", Refugees and International Relations Journal, (1989) : 1-2.

²³⁶Anonim, "Human Rights and Refugee Protection", UNHCR Report in Refugees, (1998) : 9.

European Convention prohibits the deprivation of the right to enter the territory of the state of which a person is a national; Article 12 paragraph 2 The African Charter limits restrictions to those provided for by law for the protection of national security, law and order, public health or morality. United Nation Security Council had affirmed that refugees and displaced persons entitled to return to their native country according to the U.N.S.C. Resolution 876 (1993) of 19 Oct, 1993 on the situation in Abkhazia on the right of Palestinians to return²³⁷.

The Commission on the prevention of discrimination and protection of minorities affirmed that "It is the right of refugees and displaced persons to return to their native country safely with their own choice voluntarily" (Sub-Commission resolution 1994/24, para 2 and 1995/13 paragraph 2). Refugees have the right to return to their native country and the recipient country may return the refugees when it is known in its native country situation was conducive²³⁸. Therefore, in facilitating the return of refugees should involve recipient country, native country and UNHCR, as far as voluntary requirements need not worry anymore according to Article V of the OAU Convention 1969²³⁹.

Conclusion

1. Understanding the definition and qualification of international refugees and Internal Displaced Persons in a comprehensive way is sorely needed, because the enforcement of human rights among the refugees is distinguished from among the civilian in normal condition.
2. The human rights of refugees should be seriously considered because of their vulnerability of human rights violation.
3. Every state should provide protection to the international refugees although not yet ratified International Convention Relating on International Refugees 1951, because there is

²³⁷Kathleen Lawland, "The Right to Return of Palestinians in International Law", *International Journal of Refugee Law*, Vol. 8, (1996) : 532.

²³⁸GhasanArnaout, *Refugee Law Today*, (New York : United Nation, 1996), 11.

²³⁹AsriTriajidkk, "*HubunganantaraPengungsiInternasionaldenganHakAsasiManusiaInternasional*", MakalahdisampaikandalamperkuliahanHukumPengungsiInternasional.Surakarta : UNS, (2011) : 10.

international customary law that have legally bond to every country to fullfil the human rights.

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HUMANITARIAN CAPITALISM REGIME IN POST-DISASTER RECONSTRUCTION

Deni Meutia

International Law Department

Universitas Respati Yogyakarta

Abstract

This paper will discuss about humanitarian issues, conflict, security and development in South East Asian countries with the case study the 2004 Asian tsunami disaster would be taken. This paper would analyze the implication of the disaster toward international humanitarian action both theoretically and empirically. The argument of this research clarified that humanitarianism have both of positive and negative side. From both of that sides this paper explaining development phenomena after a disaster happened (post-disaster reconstruction) as outcome of humanitarian aid given to the victims. This paper argue that theoretically humanitarian action in the post-disaster reconstruction has eroded the values of local community. After the disaster struck and the aid came, the relief work will different on reconstructing the community than already existed. Not to “rebuild” but to “build a new” which set asides the local wisdom and tend to refer capitalistic development. Humanitarian action has gone from its principles and shifted to capitalist ambition looking for profit and fulfilling its interests.

Key words : humanitarianism, development, disaster, post-disaster reconstruction, profit and interest.

Introduction

The December 24, 2004 tsunami had destroyed and brought a lot of harm to those who live around the Indian Ocean. The amount of damages and casualties raised profound sympathy in the international community. International aid came to affected countries in very large in number which is the amount of the aid about \$ 13.5 billion²⁴⁰. The areas worst affected were South East Asia and South Asia and countries most severely suffered from damages and victims were Indonesia, Sri Lanka and Thailand.

The unpreparedness of the people and weaknesses of local government capacity to deal with the disaster are blamed as causes of the huge number of victims and worst damages. Soon after the tsunami hit, the international aid had arrived and brought first aid and assistance to the tsunami survivors. They brought food, medicines, tents and other primary basic needs equipments. The

²⁴⁰ Darini Rajasingham, “International Aid, Peace-building and Conflict: Lesson from Aceh and Sri Lanka”, *ISAS Working Paper*, No. 8, August (2009), p. 2.
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pulse of life in affected areas suddenly became a misery. Fisherman village located near the beach swept away by the wave, the entire settlements destroyed and no one left. The agriculture field no longer could be functioned because it had been flooded by sea water, people's livelihood suddenly stopped. Many families have lost their family members and have to live in temporary tents.

Government, NGO, international institution such as PBB, World Bank and IMF and other humanitarian agencies came together and work to normalize the situation. The donor countries also give their attention. immediately after the tsunami hit, US as one of largest donor country had initiated to send assistance by created a consortium consisted of India, Australia, Canada, Jepang and other donor countries²⁴¹. On disaster lies a chance to recover and reconstruct a state to be better than before. Recovery to normalize people's life affected by disaster not a simple thing by delivering aid, but there is a political competition between the donor, the beneficiaries and NGO also other humanitarian agencies. This competition makes the effectiveness of aid low. International aid just not an aid, there is a political values lied as the tools to pursue the state's national interests.

The principles of disaster reconstruction have goals gain the victim's physical recovery, returning back the refugee to their village, rebuild public facilities, and functionalized social community organization. In recovery and reconstruction phase, international actors have primary role who led by United Nations and ICRC. But in recent years, anything related to international assistance control by donor countries and international fund institution, IMF and World Bank, who created international aid regime. Therefore, it made the problem more complex. By bringing neoliberal market approach, the regime make disaster relief more capitalist than humanist.

Humanitarian regime has affected how international aid is channeled and used. The regime not only controlled the beneficiaries conduct for their aid but also regulated how donors behave in global humanitarian order. The existence of this regime is expected to make the flow of international aid and humanitarian activities could be run more effectively and help countries hit by disasters, war and poverty get out of their problems. whether the presence of humanitarian

²⁴¹ Walden Bello, "The Rise of The Relief-And-Reconstruction Complex", *Journal of International Affairs*, Vol. 59, No. 2, Spring/Summer (2006), p. 282.

regime will bring a better effectiveness for the distribution of international aid or not? Or this regime exists to support the existence and interest of donor countries in countries affected by disaster?

Discussion

Stephen D. Krasner (1983) states regime as, "sets of implicit or explicit principles, norms, rules and decision-making procedures around roomates actors expectations converge in a given area of international relations"²⁴². We may conclude that regime is an order in writing or implied form of principles, norms, rules and decision-making process to enable the actors involved in the international political arena gain their interests. In this case, the actor is a country who battles for power and dominance. So when we reconcile the notion of this regime toward humanitarian regime there will be a little skewed because humanitarian regime filled to not only state actors but also there are non-state actors who have influece in how humanitarian action is executed. For that reason authors try to combine model regime offered by Bueno de Mesquita which stated about non state actors. Bueno de Mesquita says about the concept of self-interest that "leaders make aid and policy decisions that reflect their self-interest, with an eye to how they influence political survival"²⁴³.

There are many interest competitions among humanitarian donors, beneficiaries' countries, international financial institutions and humanitarian agencies in aid regime. The competition has weakened the importance of harmonization in aid delivery and makes it ineffective dealing the disaster. Local state will always be outside the circle of humanitarian action and all the activities will reflect the interests and policies of the donor countries and international financial institutions. The aid regime set rules on how international assistance should be run by the actors in the regime. For example, aid from the United States provided by USAID required that all NGOs and other humanitarian agencies who received funding from it have

²⁴² Stephen D. Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables", *International Organizations*, Vol. 36, No. 2, Spring (1982), p.186.

²⁴³ Bruce Buena de Mesquita cited from Oliver Cunningham, "The Humanitarian Aid Regime in The Republic of NGOs: The Fallacy of Building Back Better", *The Josef Kourbel Journal of Advanced International Studies*, Vol. 4, Summer (2011), p. 103.

to include brand "From the American People" in their assistance project. USAID stated that the labelling of this brand on aid project as form of transparency to the American people and to the people themselves about from where the aid derived. Furthermore for the beneficiaries will be burdened by rules to always adjust the recovery and reconstruction programs consisted with the policies issued by the donor countries. Although the forms of these rules can lead to resentment, jealousy and tension between donors, humanitarian agencies and the beneficiaries but these rules viewed as altruism of how the regime is trying to show its superiority in handling disasters.

One of the reference introduced by aid regime rebuilding countries experienced of war or natural disaster is development. Neoliberal development projects are said as one of the powerful effort to pull out state experiencing disaster to reconstruction. Neoliberal prescriptions can be seen in the policies of international financial institutions that deal with disasters such as the World Bank, OECD and USAID. Forms such as the Disaster Risk Reduction policies contained poverty reduction policies, mitigation of strategic sectors, and improvement of the economic system and the application of good governance²⁴⁴. Such policies will be very similar to the policy of Structural Adjustment Program (SAP) which is popular to fix in failed states. In the case of natural disasters, disasters serve as a key entry point for humanitarian regime to be able interferring domestic policies of host countries. Afterwards in the current global debate, humanitarian action is said to be foreign intervention in the form of non-military action. Referring to the concept used by Naomi Klein on "disaster capitalism" on how international aid work in an disaster area refered to neoliberal policies which reconstruction efforts involving private corporation whose aim to gain more profit than humanitarian motives²⁴⁵.

After the tsunami hit the region around the Indian Ocean, especially Southeast Asia and South Asia where worst affected, the international community immediately send aid to the disaster area. Indonesia (Aceh and North Sumatra), Thailand and Sri Lanka are just some of the affected countries that received great attention from the international community. Due to great number of life loss and

²⁴⁴ IDA at Work, see http://siteresources.worldbank.org/IDA/Resources/IDA-Risk_Management.pdf accessed October 2, 2012 at 11.00 a.m

²⁴⁵ Naomi Klein, *The Shock Doctrine*, (New York: Metropolitan Books, 2007)

destruction they received big attention from international community. In Indonesia alone, the central government immediately issued a policy to open Aceh directly for international community to deliver aid without having to go through the various bureaucratic hassle. In other way, disasters and international aid are expected to be one form of conflict resolution to stop the fighting between the state and the separatists (Indonesia-GAM, Sri Lanka-Tamil Tigers). There is a hope that disaster moments and reconstruction will unity the warring groups in achieving hurting stalemate to reach a peace agreement. Humanitarian regime was trying to use the moment this disaster to persuade the warring parties to the negotiating table.

But there are things more important than helping the victims and to make peace between the warring parties. The disaster left a precious opportunity to transform what was once a "not favorable" to areas that are "profitable". Disaster capitalism makes this opportunity exists. If in the past the regime held by the United Nations and humanitarian NGO sort of ICRC, MSF and other humanitarian agencies that actually underlie their action on humanitarian motive then in current years humanitarian regime is being under control of the donor countries and international financial institution such as World Bank, IMF and OECD. Donor countries and international financial institutions hold the power for whom assistance will be provided and how the aid is applied. Humanitarian principles which used to be lie in international aid has been eroded by the interests for profit refer to neo-liberal ideology imposed by donor countries and international financial institutions. Since reconstruction effort has envolved private corporation in the implementation as soon as humanitarian action is no longer aims to help victims of the disaster but business field which produces abundant profits.

Before international aid arrived in disaster area, a very amazing thing happened there. Regions such as Aceh, Indonesia and Sri Lanka's East Coast are conflict zone between the central government and separatist movements, GAM in Aceh and the Tamil Tigers in Sri Lanka. When the tsunami hit this area, the hostility between the groups has been erased, only a sense of humanity to help each other who are suffering. There is no hatred and hostility, all parties helping each other and work together to deal with the tsunami. From this came the idea to make tsunami as conflict resolution momentum to deliver the warring parties to the negotiating table. The mass media

play a major role to bring a large donation to help the tsunami victims. International community's sympathy and collected funds to the total around \$ 13 billion, which is enough to rebuild public housing damaged by the tsunami²⁴⁶. But it turns out that much aid never gets to those victims in need.

The reconstruction effort that used the money by selling the suffering of disaster victims was never really reached the victims needs. Reconstruction policy makes these victims lost their livelihoods, homes and land and became IDPs who have to live in refugee camps for two until three years, such as the reconstruction process in the Arugam Bay, Sri Lanka. Arugam Bay local resident whose livelihood as fishermen who depended their livelihood on sea. Before the tsunami hit, the residents and tourists mingle into one, as Arugam Bay is one of the interesting places in Sri Lanka. Local residents living near the sea where they are freely and can produce their catch there. Arugam Bay with beautiful beaches, big waves suitable for surfing sports, marine wealth and abundant fish, the area around the rolling hills and lush forests looks very well suited as a center of tourism in the eastern region of Sri Lanka. However, this area is the center of the conflict between the Sri Lankan government and Tamil Tiger separatist movement that the government can not freely explore the potential of tourism asset in Arugam Bay.

Tsunami provides an opportunity to realize the dream of making the Arugam Bay as Phuket, Thailand or Bali, Indonesia as tourism center complete with various forms of luxury and entertainment. Post-disaster reconstruction and poured of grant from USAID, the IMF and the World Bank realized an idea for making the Arugam Bay as a center for tourism and resorts in Sri Lanka became a reality. Arguing that tourism will be big revenue for the government of Sri Lanka and help the development process as well as a way to alleviate poverty, Arugam Bay reconstructed to be the center of tourism, resort and entertainment. The tsunami that devastated local settlements and forced them flee to a place further away from the beach is used by the central government to make a 200-meter safety distance "buffer zone" and should not be used as residential. However, the buffer zone is no more just as a matter of policy that supports capitalism developed in Arugam Bay. Local residents who used to inhabit in this area are not allowed to return to where they lived before, while hotels, resorts and those investors who

²⁴⁶ Ibid, p. 390

want to build the entertainment business are allowed building with some condition about building construction. This policy alienated the locals for the right to life and the reconstruction program only was a cover to build a business solely neo-liberal in Arugam Bay. Humanitarian principle to help victims of the tsunami in Arugam Bay have been eliminated and replaced by a larger interest.

Humanitarian aid regime also implemented a similar thing in Aceh, Indonesia. The reconstruction process in Aceh tend to marginalize the role of the local community. Donors consisting of donor countries and international financial institutions like the World Bank, IDB and other international NGOs to put a sense distrust on local community accountability in Aceh. Anxiety for spreading corruption and weak enforcement of law and human rights in Indonesia makes the donor doubtfull on capacity building of local communities in Aceh. Therefore, reconstruction efforts become private project because it is considered more credible and accountable. There are four things that make the reconstruction effort that makes it ineffective and caused problems²⁴⁷. First, there is the slowness of the reconstruction effort, hampered by the enormity of the task of reconstruction, the complexity of bureaucratic procedures, and the constraints between the actors of reconstruction in Aceh. Second are about the 400.000 displaced person who have not house yet and should to life in temporal tents which far from satisfaction and health settlement where they have to be there for two until three years along the reconstruction. Due to the bad condition in tents allowed for new form of surveillance also take out their privacy and independence. Thirdly, there is anger on international aid regime model of construction and the failure to appreciate local community capacity. Finally, the gap living condition between the victims and aid workers which become a source of anger.

The context of aid is still operated by international agencies over the past four decades. The Eurocentric mode in development theory has been consructed notion that development is about the binary framework of reach pole as North and poor pole as South. The north as developed world will construct south as underdeveloped world to be well establish. Indonesia identified as part of south lacked the capacity to operate south performance. As a framework to rebuild the underdevelop country there are needed foreign aid with surely

²⁴⁷ Sue Kenny, "Reconstruction in Aceh: Building Whose Capacity?", *Community Development Journal*, Vol. 42, No. 2, August (2005), p. 214-215
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will always involve western capitalist system based on enterprise, governance and democracy notions. The aid regime doesn't seem easily to believe on local people in Aceh could organize themselves independently, conducted their resources, and take their planning and reconstruction initiatives even that their development program lied in "people-centred" notion. What are exactly happened is the marketization of aid about opportunity to fulfill the western corporation to secure their development. In that battlefield disaster arena, non-profit and for profit sector are cashing for fund competition to manage their program and deliver for expert reconstruction in Aceh.

As Naomi Klein points out, we are witnessing the rise of disaster capitalism. Klein argues that

"now that the traditional territories for capitalist adventure have largely disappeared, new territory has to be found, and this new territory exists in countries that have been 'smashed to rubble, whether by so-called Acts of God or by Acts of Bush'"²⁴⁸.

From this perspective, disaster is just about marketization of suffering and misery for developing global mechanism toward private corporations. Competition among aid agencies is hard. About eighty percent aid fund come to well-branded aid agencies who received their fund from western government²⁴⁹. But even they are mostly non-profit aid agencies because the western government need to increase and securing their image and interest in global politics so they pursued and obeyed to act their project along the censorship and become public relations agent for donor countries. It well noticed that "politics of aid" being played in Aceh because the huge amount of money that has been promised to fund reconstruction program.

Conclusion

The effects of the marketization are far more insidious. As Klein points out,

"Employment of highly paid foreign consultants ensures that locals are shut out of jobs, and foreign contractors reject the need for their own transparency, while

²⁴⁸ Naomi Klein cited from *ibid*, p. 217-218

²⁴⁹ Sue Kenny, p. 218

lecturing governments and local NGOs on good governance and transparency. Indeed, the inequities arising out of 'disaster capitalism' are many. While local Acehnese are herded into tent cities, many Western development experts are located in much plusher accommodation, sometimes where locals have been displaced. From this perspective, aid and reconstruction provide the twenty-first century's key launching pad for Western cultural and capitalist imperialism.²⁵⁰"

From these two case studies of post-tsunami reconstruction in Sri Lanka and Aceh, we can analyze how the effectiveness of the regime on humanitarian work. Development efforts are touted as the key to restoring the country back damaged by the disaster far from the principles of humanity. The entry of donor countries and international financial institutions into this regime has made it a tool to serve the interests of big powers. Tsunami provides a great opportunity for capitalism to grow and develop in the region that was not easily accessible. The presence of the humanitarian regime composed of great powers and the blurring of humanitarian principles in practice just like creating a disaster after disaster victims. The first disaster came from the tsunami disaster itself while the second one comes from the work of humanitarian regime with capitalism that robs victims' rights in the name of their kindness that is not easy anymore disaster but it was a cover behind the interests of the donor countries alone.

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ASSESSING INTERNATIONAL POLITICAL AGENDA OF ISLAMIC HUMAN RIGHTS

Hangga Fathana and Irawan Jati

Universitas Islam Indonesia

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Abstract

This paper is an attempt to synthesize and extract the political agenda of the Islamic human rights. It argues that the rise of Islamic human rights is not only perceived as common religious movement, but also carries out political agenda for the world at large. The paper identifies three central issues—the debate on universality of Western human rights; the Islamic human rights; and Islamic political agenda—in the sphere of Islamic perspective and explores the arguments developed under those categories. In essence the paper claims that Islamic human rights are means to sign the revival of Islamic movement; to gain greater influence on the world stage; and to use as protective umbrella for the human rights abuses in a number of Islamic countries.

Introduction

As the second-largest and one of the fastest-growing religions in the world, Islam has recognized human rights as universal fundamental rights for humanity as a whole, which are to be observed and respected under all circumstances whether such a person is resident within the territory of the Islamic state or outside it, whether he is at peace or at war²⁵¹. The Islamic interpretation as response to the growing discourse of human rights in the recent centuries has indicated the intention of Islam to play a more important role in the world of international affairs at large. Grasping the Islamic conception of human rights should include a historical analysis of the universality of human rights, which Islam has provided vivid arguments of how the universality claimed of human rights by Western conception should be debated. Most importantly, Islamic interpretation of human rights not only perceived as a common religious movement, it also carries out several international political agendas on the world stage.

This paper aims to assess international political agenda of Islamic human rights. The first section of this paper will debate the current universality-claimed of human rights by Western conception. Despite the rise of Universal Declaration of Human Rights (UDHR) during the post war period, the progress made it clear that such declaration only can be acknowledged in very limited groups and

²⁵¹ A.A. Mawdudi, *Human Rights in Islam*, Islamic Publication, Pakistan, 1995, pp. 8-9.

societies. Debating the universality of human rights will include philosophical context, which will compare the historical aspects within Western and Socialist countries in grasping the concept of freedom. It will also allude to the cultural context, comprising analysis on cultural relativism in several countries in Southeast Asia. More importantly, the first section will also sketch a brief analysis on the religious context, highlighting the diverse interpretation of human rights from various religions, with particular emphasis on Islamic interpretation.

An empirical analysis on the Islamic interpretation of human rights will form the second section of this paper. It will include elaboration on the three Islamic human rights declarations, such as the Universal Islamic Declaration of Human Rights (UIDHR) in 1981, the Cairo Declaration on Human Rights in Islam (CDHRI) in 1990 and the Arab Charter of Human Rights (ACHR) in 2004. The second section will also examine the nature position of Islam in human rights, despite of some contentions from Western perspective. The thirds section of this paper will provide an analysis on the political agenda of Islamic human rights. It is our intent in this section then to examine the rise of Islamic declarations of human rights as the sign of Islamic movement resurgence. Besides, it will also argue that such declarations were precipitated by a number of changes and events in international relations. It will also elaborate the tendencies of Islamic human rights as media to gain influence on the world stage and contributes as protective umbrella for human rights abuses in several Islamic countries.

Are Human Rights Universal?

Philosophical Context

The main problems with the universality of human rights claimed by the Western perspective through the UDHR can be perceived from the context of philosophical difference among international society, particularly between western countries and socialist countries. First, the western conception interpreted human rights from the point of view of natural law, from which human rights are naturally given in every single individual and being an inherent factor in the 'quality of human person'²⁵². This also means that any

²⁵² A. Cassese, 'Are Human Rights Truly Universal?' in Cassese, *Human Rights in Changing World*, Oxford, Polity Press, 1990, p. 51.

government of any states must respect the human rights, including its structures, laws and governmental actions. The states may legitimately be given sanctions when the laws, actions or its structures violate human rights. Furthermore, for western countries, declaring human rights means totally protecting the area of individual freedom against the power of an invasive state. However, the western conception of human rights sparks contentious debate, particularly from the socialist countries. By contrast, the socialist countries assume that human rights merely exist in society and in the state, and only to the extent that specifically recognized. This interpretation can be found on how the citizens are treated differently between western and socialist countries. Citizens in the western countries would be able to receive human rights as an individual right, while citizens in socialist countries face several limitations in their individual rights.

Second, the conception of freedom is also grasped differently between western and socialist countries. In the socialist countries perspective, the freedom of individual can be only found in particular classes of society. The socialist thinkers and politicians propose that freedom does not automatically mean prioritizing the rights of individual. Freedom means rather the creation of mechanisms that promote and enhance integration between individual and community. From the socialist point of view, freedom emphasizes not on the discourse between liberty and authority, but on the discourse between individual and community. This perspective is at odds with the western countries that placing the freedom as basic individual rights.

Cultural Context

Assessing the universality of human rights should also include an elaboration on the cultural context. The role of culture in interpreting human rights is regarded as somewhat important as well as the role of an ideology in shaping the expression of freedom of human beings. Cultural diversity has been placed as one of main problems on the universality of human rights. The local values, which are shaped by each culture, create diverse conceptions of human rights. These values create cultural relativity, a term describes the

cultures differ, often dramatically, across time and spaces²⁵³. This cultural relativism comes up as conception challenging the existing conception of human rights. Cultural relativism, conceived as a set of doctrines that imbue cultural relativity with prescriptive force. From the cultural context, the evidence of diverse interpretation of interpretation of human rights can be found in Asian values discourse. These values came up with emphasis on collective well-being of the community over individual right. This idea can be seen from arguments proposed by some Asian values proponents, such as Lee Kuan Yew conceived the role of culture as the main component to distinguish conception of freedom between Western and Asian²⁵⁴. The term of 'cultural ballast' was coined to build a new social consensus based upon the retention of traditional cultures in Singapore. He constructed the Asian values as an instrument to shape the Singaporean society through the illiberal and paternalistic governance. He further believed that Asian values enabled Singapore to have a clean government. However, some argue that the Asian values are mainly used by political elites as an instrument to retain their power²⁵⁵.

Furthermore, in Malaysia, democracy and human rights values are also placed after the order and authority. The former Prime Minister, Mahathir Muhammad, stated that Malaysia should not being slaved by the democracy, as the democracy can ruin the country and generate an unexpected chaos²⁵⁶. He further argued that overriding the democracy would enable the country to shape a strong government and run the administration properly. In creating this conception, Mahathir combined values of universalist Islam, a developmental nationalism, and a more laissez-faire approach and an attempt at mass appeal²⁵⁷. Similar interpretation of freedom also came up from Indonesia, particularly during the era of Suharto.

²⁵³ J. Donnelly, 'The Relative Universality of Human Rights', *Human Rights Quarterly* 29, 2007, p. 294.

²⁵⁴ M.D. Barr, 'Lee Kuan Yew and the "Asian Values" Debate', *Asian Studies Review*, vol. 24, no. 3, 2000, pp. 310-2. See also A. Sen, 'Human rights and Asian values: what Lee Kuan Yew and Le Peng don't understand about Asia', *The New Republic*, New York, 1997, pp. 3-4.

²⁵⁵ D.K. Mauzy, 'The human rights and 'Asian Values' debate in Southeast Asia: trying to clarify the key issues', *The Pacific Review*, vol. 10, no. 2, 1997, p. 211.

²⁵⁶ A.J. Langlois, 'The Asian Values Discourse' in Langlois, *The Politics of Justice and Human Rights*, Cambridge, Cambridge University Press, 2000, p. 13.

²⁵⁷ S. Hasan & C. Lopez, 'Human Rights in Malaysia: Globalization, National Governance and Local Responses', in Francis L.K. Wah & J. Ojendal (eds.), *Southeast Asian Responses to Globalization, Restructuring Governance and Deepening Democracy*, Copenhagen, Nias Press, 2005, pp. 120-1.

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Suharto shaped his administration through affirming the international law and the treaties of human rights from the interpretation based on Indonesian culture. Throughout his administration, Indonesia has been shaped to perceive human rights based on Indonesian values, which is also known as *musyawarah-mufakat*, or deliberations to obtain consensus. It should be noted that these illustrations have underlined the growing debate on the universality of human rights claimed by Western perspective. From Malaysia, Indonesia to Singapore, each country has its own interpretation to conceive the human rights conceptions. It is important to emphasize that cultural diversity indicates a range of interpretation that is shaped by 'language', environment and influenced by the history.

Religious Context

Following the first two contexts in assessing the universality of human rights, it should be noted that the religious context also plays an important role in perceiving human rights. More importantly, it also reaches to the secularism in human rights. This perspective places human rights emphasis on the universal equality and the protection of human beings, while the religion conceptions merely concern on the *human dignity*²⁵⁸. Besides, it is also interesting to see the contentious debate between western and religions conceptions of the source of human rights. According to Jack Donnelly, human rights are derived from the human actions, and are not given to man by God or Nature. This finding indicates that on the western conceptions, human rights do not make any relations with God or Nature. Evidence of this also could be obtained from the UDHR 1948 that does not make any reference to God²⁵⁹. On the other hand, the religious conception perceives human rights with the reference to God. Human beings as the creature of God inherently owned the human rights as a tool to defend their rights given by God.

Moreover, religious diversity also has created a various conceptions of human rights. For example, in Hindu tradition, division into castes that is still implemented in India, even though this practice has been legally abolished. Despite the fact that the

²⁵⁸ J. Donnelly, *Universal Human Rights*, supra note 2, p. 2. Quoted by Freeman, Michael, 'The Problem of Secularism in Human Rights Theory', *Human Rights Quarterly*, Vol. 26, No. 2, 2004, p. 382.

²⁵⁹ United Nations, *Universal Declaration of Human Rights*, New York, 1948
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castes tradition shows inequality among society in India –and therefore overriding the individual freedom, this Hindu tradition should also be taken into account in the debate on human rights. Besides, the Catholic position on contraception also leads the human rights on more complex discourse. Even though the use of contraception is generally allowed and in line with the human rights conception, Catholic refuses the use of contraception. The Catholic conceptions claim this refusal as a moral value of normative universality²⁶⁰. Another interpretation of human rights also raised by the Confucianism. Confucianism emphasizes family as the fundamental focus of society, with the main role goes to the head of the household²⁶¹. The head of household deserves and owes an unlimited respect by other members of family. This circumstances also flows to the form of the state, where the Emperor is conceived as the head of the state and deserves to get unlimited deference.

A normative framework of universality in perceiving human rights is also initiated by the Islamic conception. Islam has different point of view in understanding human rights. In the conceptions of freedom to choose religion, Islamic human rights describe that religion conversion to Islam means a submission, not a conversion or choice. Besides, the role of women also specifically governed by Islam, from which women possess an equal position to the rights of men, but in relation to the house hold relationship, women should perform a total obedience to their husband. In relation to this conception, it is interesting to see the objection of Saudi Arabia delegation to ratify declaration throughout UDHR arrangement in 1948. As an implementation of Islamic values, Saudi Arabia raised some objections, particularly to the Article 16, concerning about free marriage choice, and Article 18 relating to the freedom of religion²⁶².

More importantly, in contrast to the secular perspective, Chandra Muzaffar as a human rights proponent from Asia proposes a

²⁶⁰ A.J. Langlois, *Human Rights: The Globalization and Fragmentation of Moral Discourse*, Review of International Studies, Vol. 28, No. 3, 2002, pp. 485.

²⁶¹ A. Sen, *Human Rights and Asian Values*, Carnegie Council of Ethics and International Affairs, New York, 1997, pp. 10-2. See also M.S.I. Diokno, 'Once Again, the Asian Values Debate' in M. Jacobsen & O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, Richmond Surrey, Curzon Press, 2000, pp. 78-9.

²⁶² M. Ignatieff, 'Human Rights as Idolatry', in Ignatieff, *Human Rights as Politics and Idolatry*, Princeton, Princeton University Press, 2001, pp. 58-59.

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concept to remember God in the human rights principles²⁶³. He argues for the remembrance of God in the human rights conceptions based on the religious point of view, particularly Islamic point of view.

According to Muzaffar, it is compulsory to have commitment to the transcendent in the international affairs. In addition, as Muzaffar claims, through remembering God, the international affairs could find the proper way to create peace, justice, equality, compassion and freedom to human beings. His proposition should be noted as a religious philosophy to place religion at the central of political and ethical approaches. He also argues that the commitment to metaphysics is also required to make sense of human rights.

Furthermore, in response to the extensive debates on UDHR 1948, Islamic version has resulted at least three human rights declarations in Islamic perspective. These declarations and charters comprise international and regional human rights instruments. In 1981, one of London based Islamic NGO, Islamic Council, had proclaimed the Universal Islamic Declaration of Human Rights (UIDHR). On 5 August 1990 the Organization of Islamic Conference (OIC) adopted a legal document of the Cairo Declaration on Human Rights in Islam (CDHRI). In 1994 the Arab League introduced the Arab Charter of Human Rights (ACHR). The first document of this Arab Charter then was revisited and adopted in 2004. As we discuss further, the rest of this section will explore the contents or the legal language of those human rights instruments and concluded with counter arguments from the Western perspective.

Islamic Human Rights

The Universal Islamic Declaration of Human Rights (UIDHR)

The UIDHR consists of 23 aspects of human rights from the rights to life to the rights to freedom and residence. The notions of these 23 rights are alike to the UDHR. The wordings are referred to divine sources of law the *Al Qur'an* and *Hadits*. The first right, the right to life is derived from *Surah Al Maidah* verse 32 which is said:

“Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for

²⁶³ A.J. Langlois, *Religion and the Defense of Human Rights*, Overland, Vol. 181, 2005, pp. 64-65.

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corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors.”

By designating to the divine law, the UIDHR and other Islamic human rights declaration are considered as universal, therefore pertinent to be applied in the world wide. Islam protects the rights of all human being from any kind of illicit actions to dishonor those rights. However, the protection itself should meet the criteria enacted by the *Syari'ah*. For instance, the right to freedom of a man, and right to freedom of belief, thought and speech are active in the borders of *Syari'ah*.

Cairo Declaration on Human Rights in Islam (CDHRI)

CDHRI undoubtedly is an astonishing achievement of Muslim states under the banner of OIC. The declaration is the result of prolonged political and academic dialogues between the West and Islamic World. Among the OIC member, Iran and Saudi Arabia are the most vocal OIC members in criticizing the UDHR while promoting the need to create alike declaration in Islamic version. As for that many people would see this declaration as to contest the UDHR primacy. But in the submission of the CDHRI document to the UN World Conference on Human Rights in 1993, it is considered as the contribution of OIC to the conference and as the complement to the UDHR.

The essence of the human rights in CDHRI is almost the same with UDHR. The first and second articles speak on the equal nature of human dignity, basic obligations and responsibilities, and the right to life. The rest of the declaration captures the rights to marry, to fair trial, to have education, to belief, to free movement, to work, to fair trade, to own property, to live in clean environment, to medical and social care, to live in security, equality before the law, to express opinion, and to participate in the administrative of public affairs. Conversely, unlike the UDHR, article 24 of CDHRI states that “all the rights and freedoms stipulated in this declaration are subject to the Islamic *syari'ah*.” The final article underlines the role of *syari'ah* as

the main reference in the explanation or clarification of the content of CDHRI.

During the 21st Islamic Conference of Foreign Ministers in Karachi, OIC released the resolution No. 41/21-P on Coordinating among Member States in the Field of Human Rights. The resolution reaffirmed the objective of the Charter of OIC and CDHRI as to promote and encourage respect of human rights and fundamental freedoms for all in accordance with Islamic values and teachings as well as the Charter of UN and the UDHR. Interestingly, the resolution considers the poverty as the main obstacle in realizing the human rights. Arguably, the poverty may fertilize the violation of human rights. However, as we see later in the analysis part, it is not the main sources of the violations.

Arab Charter on Human Rights (ACHR)

In 1960 the Arab oldest NGO, Union of Arab Lawyer purposed the League of Arab to approve the Arab Convention on Human Rights. After 34 years, the Charter finally agreed but with central critics on the enforcement of the Charter in its member states. In 2004 the Charter was modified to 53 articles comprising four categories of rights; the individual rights, rule of justice, civil and political rights, and economic, social and cultural rights²⁶⁴. While, articles 45-47 of the Charter endorses the establishment of an Arab Human Rights Committee, altogether with the election procedure of its members. In its preamble the Charter declared to reject the racism and Zionism which may threat the human rights and the world harmony. The same wordings are used in CDHRI and UIDHR as to emphasize the struggle of Muslims around the world in the case of *Islamophobia* and the question of Palestine. Nevertheless, the Charter left the enforcement mechanism unresolved. No article in the Charter authorizes the Committee to compel the application of the Charter to the member states. It makes the Charter lost its legal effect to bind the members of the League to conform the Charter.

²⁶⁴ M.A.A. Midani, 'Arab Charter on Human Rights 2004', *Boston University International Law Journal*. Vol. 24, No. 147, 2006.

The Guardian or The Villain?

Since the legalization of modern human rights in 1948 the debate had raised on the cultural and ideological spheres with the focus on the universality concept²⁶⁵. Universality in human rights terminology is the magnet of debate between Islamic and secular human rights. Both stick the label of universality in their promotion to gain the support from international society. One common question in the universality matter is that if the declaration is universally admitted, should it be similarly applied worldwide²⁶⁶? The answer short answer is no. Because not all states can apply all the rights under international and regional human rights declaration. It will be depend on their respective national law. Ideally, human rights issues are free of power politics for the sake of humanity. However, human rights are never be able to relinquish from political juncture. Islam itself utters that the human rights in Islam is not based on political construction but it is based on the source of Islamic law which is derived from divine origin. Moreover, the Islamic jurisprudence or the *fiqh* encompasses five fundamental necessities of life (*maqasidush syari'ah*) as the jurisdictional basis of human rights protection. The *maqasidush syari'ah* preserves the divine religion, of self, of mind, of honour, family and lineage, and of wealth²⁶⁷. However, the arguments brought forward by the proponent of Islamic human rights seem to be re-evaluated.

The human rights index report by Maplecroft and School of Culture and Peace (SCP) illustrate the grim face of human rights violations. The Maplecroft identifies top 20 countries which considered as the poorest human rights risk. The SCP report indexing countries that indicate to commit violation on human rights. It includes 17 countries with highest level of vulnerability and non-compliance to human rights obligation, 24 countries with systemic

²⁶⁵ See the discussions of the debate for instance in A. Dacey, C. Koproske, *Islam and Human Rights:Defending Universality at United Nations*, Center for Inquiry International, 2004. See also, R. Peters, 'Islamic Law and Human Rights: A Contribution to an Ongoing Debate', *Islam and Christian-Muslim Relations*, Vol. 10, No. 1, 1999, also F. Halliday. 'Relativism and Universalism in Human Rights: The Case of Islamic Middle East', *Political Studies*, XLIII, 1995.

²⁶⁶ Advisory Council on International Affairs, *Universality of Human Rights and Cultural Identity*, <http://www.aiv-advies./ContentSuite/upload/aiv/doc/AIV_04_Eng_titel.pdf>, consulted 10 October 2012.

²⁶⁷ A.R.A. Sheha, *Human Rights in Islam and its Misconception*, <<http://www.islamland.com/Media/Books/HumanRightsinIslam.pdf>>, consulted 10 October 2012.

violations on International Law on Human Rights, and 27 countries with systemic violations of the International Humanitarian Law. Interestingly, around 12 countries listed in the report are the active members of OIC. Two OIC countries, Afghanistan and Sudan ranked the first by the two reports. In those 12 countries the suppression on women and children's rights and death sentence are the central critics to the government. The women and children are limited to get involve in social activities such as schooling and health facilities. The lesbian, gay, bisexual and transgender are considered as serious crimes and may sentenced to death on the ground of Islamic law.

Assessing Political Agenda

Resurgence of Islamic Movement

Regardless of some points of contention between Islamic and Western conception of human rights, it is important to recognize that many of Islamic human rights conceptions not only come up as responses to the UDHR, it also carrying out the political agenda for the world at large. It should be noted that a number of Islamic declarations on human rights indicate the resurgence of Islamic movement in the international affairs. The steps to formulate declarations from UIDHR, CDHRI to ACHR can be seen as gradual endeavor to depict the Islamic movement revival, with particular emphasis on the institutionalization of human rights by OIC. It is plausible to argue that a range of profound changes and events in international context sparked the rises of such formal declarations from Islamic perspective. The Iranian revolution in 1979 to some points can be perceived as the deprival of the US from a staunch ally who guaranteed and subsidized the long-lasting US hegemony over the Middle East and its oil resources²⁶⁸. However, the loss of Iran to Ayatollah Khomeini's Islamic Revolution also led to the rising Islamic power in the world at large and sparked Islamic responses to many issues, including human rights. This revolution should be taken into account for the rise of UIDHR as the first Islamic interpretation of human rights, underlining the emergence of the values complement to the existing UDHR.

Besides, following the rise of UIDHR, it is also important to recognize the end of Cold War in the late of 1980s, with particular

²⁶⁸ M.A.M. Khan, 'The Political Philosophy of Islamic Resurgence', *Cultural Dynamics*, Vol. 13, No. 211, 2001, pp. 2-3.

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emphasis on the fall of the Berlin wall which precipitated the rise of CDHRI²⁶⁹. The end of bipolarity in international relations throughout this period had emerged Islamic institutions including OIC to highlight Islamic positions on many discourses. Furthermore, ACHR adopted by the Council of the League of Arab States as another interpretation of human rights was prompted by the dramatic event of September 11 attacks. This event not only attracted widespread attentions on the relationship between Islam, violence and just war principles²⁷⁰. More importantly, the September 11 attacks also reinforced the need to clarify the Islamic interpretation of human rights. On the one hand, perceiving the Islamic interpretation of human rights as the resurgence of Islamic movement mark the slow demise of Western supremacy. On the other hand, this Islamic resurgence also can be recognized as the only lenses that able to counter the domination of Eurocentric perspective.

From Gaining Influence to Protective Umbrella

It should be noted that the rise of Islamic lenses in reinterpreting human rights is also in part attributable to the endeavor to gain influence and support from the international society. This stems from the fact that the CDHRI comes up as the only declaration that is accepted by the UN General Assembly and recognized as the important contribution and complement to the existing UDHR. Despite the fact that CDHRI prompted a showdown between Western and Islamic lenses, the UN member states politically acknowledged the contribution of CDHRI to the Western conception of human rights. It is also noteworthy to mention that the OIC has been calling for the outlawing of religious defamation, pushing through resolutions at the UN General Assembly and human rights bodies each year²⁷¹. Regardless of the polarizing debate on such issue, religious defamation has emerged as strong response towards the growing *Islamophobia*.

²⁶⁹ See the discussion on the contemporary challenges faced by Islam by S.A. Arjomand, 'Islam, Political Change and Globalization', *Thesis Eleven*, Vol. 76, No. 9, 2004, pp. 16-7.

²⁷⁰ K. Dalacoura, 'Violence, September 11 and the Interpretations of Islam', *International Relations*, Vol. 16, No. 269, 2001, pp. 270-2.

²⁷¹ P. Goodenough, 'Islamic Bloc Revives Drive to Outlaw 'Religious Defamation' Worldwide', *TheCNS News*, 20 September 2012, <<http://cnsnews.com/news/article/islamic-bloc-revives-drive-outlawreligious-defamation-worldwide>>, consulted 10 October 2012.

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However, the rise of Islamic perspective of human rights also needs to be interpreted with caution. As mentioned earlier, the human rights index provided by the Maplecroft indicated that the top 12 countries with highest level of vulnerability and non-compliance to human rights obligation are listed as the OIC member states. It is plausible to argue that the institutionalization of human rights in Islam is not only regarded as a response to the UDHR, but also perceived as a protective umbrella for human rights violations in the Islamic states. Despite the fact that the 12 OIC member states implement Sharia law, human rights abuses in such countries have become more complex over time. These include some obscurities on detention, court process and even on death penalty. Nevertheless, the human rights abuses in the 12 OIC member states not only violates the Western human rights values, but also contravenes the Islamic human rights, in compliance with the article 8, 9 and 20 of the CDHRI.

Conclusion

The Islamic interpretation of human rights has come up as response to the universality-claimed of Western conception of human rights. In conjunction with the philosophical and cultural context, Islamic human rights through the religious context have provided vivid position debating the universality of Western human rights. The three declarations of Islamic human rights have been proposed to clarify the position of Islam both in human rights and in international relations. It has been argued that human rights are never being able to relinquish from political juncture. Nevertheless, Islamic lenses in interpreting human rights are conducted on the basis of Sharia and away from political context.

Most importantly, the Islamic human rights have been regarded not only as a religious interpretation, but also as a mean to promote political agenda. Many Islamic interpretations of contemporary issues, including human rights have signed the revival of Islamic movement. A number of changes and events in international context have prompted the Islamic movement to secure the position of Islam through the three declarations. Besides, Islamic human rights also tended to be implemented as a mean to gain greater influence in the world at large, with particular emphasis from the OIC that perpetually calls for the prohibition of religious defamation.

Moreover, there has been tendency to assess Islamic version of human rights as a protective umbrella for human rights abuses in Islamic countries, which have been ranked in the top 12 in the world for human rights violations index.

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RESPONSIBILITY TO PROTECT (R2P): COMPARING CONSTRUCTIVIST, CRITICAL THEORY AND POST COLONIAL THEORY

Aryanta Nugraha

Department of International Relations UPN “Veteran” Yogyakarta

Abstract

The normative idea of R2P is that international community has a moral obligation to give protection to people from the threats of genocide, ethnic cleansing or crimes against humanity. The R2P is aimed to bring about international legitimacy for international community to conduct intervention if state is no longer willing or able to protect its citizen from severe humanitarian crisis. It however is also seen as liberal idea domination in international norms and practices. The adoption of Responsibility to Protect (R2P) norm in the 2005 World Summit has spurred debates in International Relations theory whether it represented norms in the making or it represented the domination of liberal view in international politics. Employing several non-mainstreams International Relations Theory, namely constructivism, critical theory and post-colonial theory, this paper tries to map-out the debate of R2P between these theories. This paper finds out that there are different picture and understanding regarding R2P if it is seen from different theoretical lens. Nevertheless, the three theories employed, highlighted the importance of non-military action while at the same time open a wider room for local-indigenous involvement and empowerment in resolving their own problems.

Keywords: R2P, constructivism, critical theory, post-colonial theory

Introduction: the emergence of the R2P

The Responsibility to Protect (R2P) has been growing prominence as an important framework for collective international security in the post-Cold War era. The basic idea of R2P is when a state is no longer willing or able to protect its citizen from the threats of genocide, ethnic cleansing or crimes against humanity, this responsibility will be assumed by the international community. The emergence of the R2P could be seen as an attempt to codify and win broader international legitimacy, since the liberalist peace idea of “the right to intervene” which was by the Western states has been criticised by realist proponents and non-western states as violated the sovereignty norm in world politics.²⁷²

²⁷² See for example, David Chandler, ‘*The Responsibility to Protect? Imposing the ‘Liberal Peace’*’, *International Peacekeeping*, vol. 11, no. 1 2005, pp. 59-81.
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As a concept or international doctrine, the R2P is derived from the experience of NATO intervention in Kosovo war in 1999. The stimulus for the development of the R2P was a statement from Kofi Annan reflected the dilemma of humanitarian intervention in the wake of Kosovo crisis. He questioned, on the one hand, the legitimacy of regional organisation to use force without a UN mandate, and on the other hand, he also asked what the UN would do to prevent another case like Rwanda and Srebrenica (Kosovo).²⁷³ The Rwanda and Srebrenica (Kosovo) cases showed the fail of international community to take a decisive action to protect genocide and mass murder from worsening. In his speech before the UN Assembly, Annan called for “responsibility to act in circumstances in which universally accepted human rights are being violated on a massive scale”.²⁷⁴

The Annan contention was taken by Lloyd Axworthy (then, the Canadian Minister of Foreign Affairs) who established an international commission to find the solution of Annan question. Funded by Canadian government, the commission called as the International Commission on Intervention and State Sovereignty (ICISS) which acted as independent panel to examine and develop a concept regarding the dilemma of human intervention and state sovereignty. As a result, the ICISS published a report entitled “The Responsibility to Protect”. In its report, the ICISS stated, “state sovereignty implies responsibility and the primary responsibility for the protection of its people lays with the state its self. Where a population is suffering serious harm and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to international responsibility to protect”.²⁷⁵ There are at least three stages of the “responsibility to protect”. First, responsibility to prevent; the international community has an obligation to prevent in the case state’s unwillingness or unable to protect its citizen. Second, responsibility to react; international community conducts a response in the case of heightened emergency such as mass killing and if necessary using force. Third, responsibility

²⁷³ Kofi Annan, ‘Two Concept of Sovereignty’, *the Economist*, September 18, 1999.

²⁷⁴ Kofi Annan cited from Alex J Bellamy, ‘Wither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’, *International Affairs*, vol. 20, no. 2, 2006, p. 141

²⁷⁵ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa, 2001, p. Xi.

to rebuild; international community runs a follow-up program that considered essential for people protection.

The ICISS result was endorsed in the World Summit of the UN General Assembly and the Security Council in 2005. The Summit outcome document was considered milder than the original concept, since the Summit document did not exclude vetoes of the UNSC member in the case of humanitarian crisis, while the role of regional organisations were subsume under the consent of the UNSC. It however, adopted the normative idea of R2P that international community has a moral obligation to give protection to people under severe humanitarian crisis.²⁷⁶

The acceptance of R2P concept to the UN system replaced the debate on 'the right to intervene' in the case of human rights violation to the degree of obligation/ responsibility of the states and the international community to protect the individual. It however, did not automatically win international acceptance. It was proven by the issued of the UN Secretary General Ban Ki-Moon that published a report 'Implementing Responsibility to Protect'. This report called for a more effective implementation of the R2P. Parallel to the UN process, there has been a growing support from international NGOs such as the International Crisis Group (ICG), Oxfam, Human Right Watch, and other groups which founded the Global Centre for the Responsibility to protect in 2007 that wanted to further implementation of the R2P.

The recognition of the R2P in the UN system represents the attempt to institutionalise and to gain legitimacy of a new international security framework, namely the collective security action which stressed that democratic and peaceful states have a leading role to ensure the protection of individual rights for the sake of common humanity. From international relations theory, the prevalent of R2P signifies the dominance of liberal peace theory that intersects with solidarist view of the English School theory. However, it never escapes from criticisms. From realist point of view, for example, the emergence of R2P concept is not only a matter of the violation of sovereignty norm, but the R2P also embodies a realist politics of the major power. No international organisation could make a certain judgement whether a humanitarian intervention

²⁷⁶ Alex J Bellamy, 'Wither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *International Affairs*, vol. 20, no. 2, 2006, p. 142-143.

based on R2P concept is truly motivated by humanitarian, moral or even an altruistic spirits.²⁷⁷

It is therefore very interesting to discuss how other international relations theory explain and interpret the emergence of the R2P as global principle of humanitarian intervention. This paper will use constructivism, critical theory, and post colonial theory as lenses of explanation.

Constructivism on the R2P: a Norm in the Making?

From constructivist point view the ultimate question regarding the emergence of the R2P is will it become a new legitimate norm in international security system. Constructivist theory would focus on the developing of norm rather than the behaviour of state in rationally responding the R2P. Constructivist will also take a deeper look on how the notion of responsibility and legitimacy, are attributed to the norm by the states in the discourse of the R2P.

Constructivism theory in international relation is regarded as a criticism to neoliberal and neorealist theory that are considered as too rational-materialistic in explaining the international relations phenomena.²⁷⁸ Constructivism proposes several ontological bases about international relations.²⁷⁹ First, constructivism argues that normative and ideational structures have significant role as important as power and interest to the behavior of social and political actors. The normative and ideational structures are also fundamental in shaping identity of the actors. Second, based on the first ontological base, the understanding of how normative and ideational factors shape identity is significantly needed to identify the interest and action of the actors. Different with neorealism and neoliberalism which argue that states' preferences (interests) are already settled when they relate with other states; constructivism asserts that states' preferences are shaped by their identity.²⁸⁰ Norms are inter-

²⁷⁷ David Chandler, 'The Responsibility to Protect? Imposing the 'Liberal Peace'', *International Peacekeeping*, vol. 11, no. 1 2005, pp. 61-62.

²⁷⁸ See Christian Reus-Smith, 'Constructivism', in Scott Burchill, Andrew Linklater, Richard Davetak, Jack Donnelly, Mathew Paterson, Christian Reus-Smit & Jacqui True (eds), *Theories of International Relations*, 3rd edition, Palgrave Macmillan, New York, 2005, pp. 195-196.

²⁷⁹ The ontology of constructivism is summarised from Christian Reus-Smith. See footnote above.

²⁸⁰ Identity is strongly related with a context of normative meaning which shapes who they (the actors) are and the possibilities that available to them.

subjective understanding that constitute actors interest and identities and create expectation as well as prescribe what appropriate behavior ought to be.²⁸¹ Put succinctly, the core argument of constructivism is that world politics has been influenced by ideas, norms, knowledge, culture, and arguments. Constructivism, therefore stress its analysis on the particular role of 'inter-subjective' idea in creating norms and identities of the actors.

World politics, as constructivist argues, is not only composed by states that interact based on their perceived interests and strategy. In every interaction, not only material objects and subjective knowledge that are shaping the structure of interaction, but inter-subjective interaction should be also taken seriously. The famous statement of Alexander Wendt, 'anarchy is what states make of it' revealed that the reality of social world is not happened out there, but reality is basically constructed by concept, argument, and ideas that bring in communication process.²⁸² Constructivism also posits that agents and structures are mutually constituted.²⁸³ Actors cannot be perceived as being outside societal structures. Both are involved in a complex interaction in a mutual process of constitution in which neither of the two is ontologically above the other. Based on this situation, actors are in a network of roles and expectation which will be protected through norms and identity. From this point of view, the logic for actors' motivation is not the logic of material-rationalism. The relationship of actors and structures are guided by the logic of appropriateness that the behavior of actors is a function of 'what we should do' related to the shared norms and values within institutions. Norms and values therefore not only constrain actors' behavior but also constitute the identity of actors.²⁸⁴ This appropriateness is developed firstly in the perception of the actors, through their interpretation of the ongoing situation. Actors are guided by their

²⁸¹ Annika Bjorkdahl, 'Norms in International Relations, some conceptual and methodological Reflection', *Cambridge Review of International Affairs*, vol. 15 no. 1, 2002, pp. 9-23.

²⁸² Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', *International Organization*, vol. 46 no.2, p. 394

²⁸³ It based on the concept of structuration built by Anthony Giddens that the relationship between structure and actors involves inter-subjective understanding and meaning. See Robert Jackson & Georg Sorensen, *Introduction to International Relations; Theories and Approaches*, 3rd edition, Oxford University Press, New York, 2007, p. 163.

²⁸⁴ K.M. Fierke, 'Constructivism', in Tim Dunne, Milja Kurki & Steve Smith (eds), *International Relations Theories, Discipline and Diversity*, Oxford University Press, New York, 2007, p. 181.

material interest, but more to their role of identity as well as norms as representation of societal convention and practices. It is because constructivism believes that the idea behind developing a norm is that norm can bring an effect to actors due to its content.

The recognition of binding norm is originated through the recognition of perceived legitimacy. As Ann Florini argued, every norm has an aura of legitimacy that different with other ideational factors or rules. This potency of legitimacy brings about effectual power. Norms therefore are complied because of their legitimacy not because they are enforced.²⁸⁵ If the norms are legitimate it is likely to be obeyed. The legitimate norms will influence of the behavior of actors as normative guidance in which a network of roles and expectation will shape the identity of actors. One question that may rise is how norm can be perceived as legitimate. Constructivism argues that it cannot be only concluded based on actors' observation but also from the analysis of discourse and communication.²⁸⁶

Regarding the emergence of R2P, constructivism would argue that the R2P has normative potential to become a legitimate norm in international security. It could be answered from the process of norming of the R2P. Norm evolution can be divided into three phases: norm emergence (a concept that promoted by norms entrepreneurs), norm cascade (spread of the norm among other actors), internalisation (norm is taken for granted).²⁸⁷ From this approach the map development of R2P and what level it has been adopted at international scene can be identified.

The first development of R2P has been started since the end of the Cold War triggered by a series of humanitarian crises whether caused by the silence of international community (the case of Rwanda), or there was unapproved action (the case of Kosovo). This situation then brought by the norm entrepreneur, the ICISS in 2001-2005 in form of the report Responsibility to Protect (2001). The spread of the norm among actors happened in the World Summit 2005. In the summit, arguments and ideas were brought in the discourse and the inter-subjective understanding between actors constituted the norm building. Agents and structure were mutually

²⁸⁵ Ann Florini, 'The Evolution of International Norms', *International Studies Quarterly*, vol. 40, 1996, pp. 363-389.

²⁸⁶ Robert Jackson & Georg Sorensen, *Introduction to International Relations; Theories and Approaches*, p. 165.

²⁸⁷ Veronika Bilkova, *Responsibility to Protect: New Hope or Old Hypocrisy?*, Charles University, Prague, 2010.

constituted. The summit then adopted the report along with various changes and shift of the report but the significant ideas of ICISS report were maintained. The Outcome Document of 2005 World Summit therefore represents the only consensually negotiated material related to R2P.

The world summit 2005 acceptance of the R2P and the Security Council's endorsement of it with Resolution 1674 (Protection of Civilians and Armed Conflict), the UN appears not only to have accepted that a normative shift has occurred with regard to the protection of human rights. It has also affirmed that the UN as institutional mechanism holds the task to assure that these norms are enforced. The resolution 1674 particularly paragraph 4 stated ‘.. reaffirms the provision of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the Responsibility to Protect population from genocide, war crimes, ethnic cleansing, and crimes against humanity’.²⁸⁸

Critics may argue that there still some ambiguousness on the implementation of the R2P. The R2P has implemented in Kenya and Libya, but it failed to be implemented in several situation that were classified for R2P activation such as in Sudan, Myanmar, North Korea, DRC, Somalia, and Sri Lanka. Ironically, it misused to legitimise the use of force in Iraq and Georgia. Constructivism however would contend that norms may guide, inspire, rationalise and show mutual expectation of behaviour among actors, but norms are always contested in principal and are always in competition with other system of order. in the case of misused implementation, from constructivism point of view, should be analysed from the structure and working method of the Security Council, in which power and interests of the P-5. Although the UK and France morally support the R2P, the US remains silent While Russia and China keep reject it. This situation, from constructivism perspective, could be concluded that the R2P does not lose it validity but it seems that R2P is still a norm in the making.

Critical Theory on the R2P: does R2P have Emancipatory potential?

²⁸⁸ Patrick F White, ‘Normative Considerations Bearing on The Responsibility to Protect: Prospect and Implication in a Fracturing International System’, *Canadian Military Journal*, vol. 9, no. 2, 2010, pp. 20.

From critical theory point of view, the questions that may rise from the emergence of the R2P are; could intervention from a group of states become a real emancipatory act for the purpose of human protection? Can emancipation be imposed by external agents?

Critical theory in general is a distinct tradition of thought which questions modern social and political life through a method of immanent critique. The ultimate objective of critical theory is to disclose the underlying social structure and various forms of domination in order to overcome them and engage in social transformation.²⁸⁹ Critical theory challenges the ontology and epistemology of dominant theory in international relations and sparked the 'third debate' in the discipline of International Relations around the methodological approach. Using post-positivist methodology, critical theory rejects the postulate of positivism; objectivity of external reality, the separation of subject and object, and the qualify theory as a value-free.²⁹⁰ By realising that theories are always set in social and political life, critical theory scrutinises the purpose and function performed by certain theory. As has been stated by Robert Cox that theory is always for someone and for some purpose, critical theory inquires the politic of production and reproduction of knowledge in international relations.²⁹¹

According to critical theory, because of the influence of positivist methodology, the dominant theories of international relations have turned to become problem solving theory. The problem is that problem solving theories are prone to be politicised and have tendency to legitimise the established social and political structure of world order including the ideology and the inequalities in power and wealth.²⁹² As problem solving theories is always predisposed by certain interest, critical theory must bring awareness of the interest, ideology/ values and orientation of any other theories. Based on that, critical theory argues that theory is not only a tool to analyse day to day realities but also force to transform those realities. Critical theory thus featured by emancipatory principle.

²⁸⁹ See Richard Davetak, 'Critical Theory', in Scott Burchill, Andrew Linklater, Richard Davetak, Jack Donnelly, Mathew Paterson, Cristian Reus-Smit & Jacqui True (eds), *Theories of International Relations*, pp. 137-138.

²⁹⁰ Robert Jackson & Georg Sorensen, *Introduction to International Relations; Theories and Approaches*, 3rd edition, Oxford University Press, New York, 2007, pp. 292.

²⁹¹ Cited from Richard Davetak, 'Critical Theory', p. 140.

²⁹² Richard Davetak, 'Critical Theory', p. 141-142.

Emancipation broadly defined as freeing people from any socially constructed constraint to achieve autonomy.²⁹³

The issue of emancipation is very important according to critical theory, since the document of R2P stated that normatively, R2P focus on 'human needs and rights who seeking protection or assistance'.²⁹⁴ At the surface, the ongoing discourse on R2P looks like that it could be easily subsumed into the rubric emancipation of critical theory. Such focus implies that R2P is important part of globalising human security by turning the focus to the universal needs and rights of individuals. The R2P also often seen as global effort to de-territorialising and stimulate a more holistic approaches to human security. The R2P however maintains state actors as the most important agents of insecurity. By R2P, a group of states (claimed as international community) seeks to enforce the 'freedom from fear' and emancipate the 'victims' from illegitimate and threatening state's action. This new paradigm of R2P differentiate it from traditional mode of intervention which prioritising order. Put order as first priority is not sufficient since states could commit violent and atrocities towards their citizen on behalf of order. R2P prioritising human needs, human rights, and justice of the individuals that need to be protected. Based on that, R2P claimed that emancipatory is implied on the effect of freeing individuals from political conflict and violence. Therefore, the use of military force by a state or a group of states on behalf of international community is well-suited with the emancipatory objectives since the purpose of the military force is to protect the individual from political violence by other groups or from the state.

From critical theory point of view, the emancipation language in the R2P concept is only partial and ontologically weak.²⁹⁵ Embedded within the concept of liberal peace, the practice of R2P is very different with the emancipation concept of critical theory. Ken Booth conceptualises emancipation as security itself. According to Booth, emancipation should take precedence over the concern of states and militaries with power and order. Regarding emancipation

²⁹³ Steve Smith, 'The Contested Concept of Security', in Ken Booth (ed), *Critical Security Studies and World Politics*, Lynne Rienner, Boulder Colorado, 2005, p.26.

²⁹⁴ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa, 2001, p. 15.

²⁹⁵ See for example, Nicholas Glover, 'A Critique of the theory and Practice of R2P', <<http://www.e-ir.info/2011/09/27/a-critique-of-theory-and-practice-of-r2p/>> accessed, 25 June 2012.

(empowerment of the marginalised) and transformation of state and military power, Booth argues that emancipation produces more sustainable justice of the security than power and order.²⁹⁶ Hence, the genuine emancipatory security must be driven and controlled by the activism of local non-state actors, civil society, and or social movements that become the ‘victims’ of the ongoing political violence. The R2P practice gives privilege to international community as the predominant agent to emancipate the ‘victims’. Moreover, the R2P unavoidably accompanied by repressive action, militarisation and securitisation, in the process of re-state building in the recipient countries. By privileging external actors through state-based intervention, the R2P potentially marginalised indigenous process of consciousness of the individuals and civil society insurrection.

From the knowledge production view, the R2P also represents the tendency of the domination of neoliberal theory on peace.²⁹⁷ After the debate on ‘the rights to intervene’ lack international support, the rise of R2P re-legitimised state-based international intervention. It is built by the reconstruction of new concept such as new humanitarian order, failed states, and good governance. All these liberal banners give power to the so-called (liberal) international community to inscribe peace upon the ‘illiberal’ states through hegemonic modes of global politics, by the construction of administrative and governance of the recipient states under the control of western-liberal states, International NGO’s and International Financial Institutions. Without engaging ‘the local’ in the necessary emancipation process, the R2P will only become the emancipation of the Western from disorderly states. If it so, it will be very different with the truly emancipation of ‘the victims’ of global politics.

Postcolonial Theory on R2P: still Eurocentric?

From post colonial point of view, the questions that emerge from the debate on R2P are: does the R2P represent a new mode of colonialism? Is there any room to bring about rights protection by liberal alterity?

Postcolonial is a contested term with variety of cultural, economic and political practises. Postcolonial can be understood as

²⁹⁶ Ken Booth, ‘Security and Emancipation’, *Review of International Studies*, vol. 18, no. 1, 1991.

²⁹⁷ Nicholas Glover, ‘A Critique of the theory and Practice of R2P’,
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two important meaning; as a condition (time after colonialism) and as a ethical and literary theory that dealing with issues such as identity, race, ethnicity, gender, power and knowledge that influenced by condition of colonialism.²⁹⁸

Postcolonial theory of international relations contends the deficiency of the existing global norms, values and institutions in distributing international justice, particularly towards post-colonial non-European countries. Postcolonial theory aspires to a new kind of international relation knowledge and practises that elude from colonial legacies such as hegemony and exploitation towards more inclusive, empathetic and deliberative by considering the significance of global South countries.²⁹⁹ Postcolonial theory asserts that there is a separation or binary (between Europe/ non-Europe, strong/ weak, powerful/ powerless, the North/the South) in the knowledge of international relations. Today, Euro-centrism dominates the system of truth, values and institutions of international order. Samir Amin defines Euro-centrism as a complex idea with the core assumption of European centrality in the human past and present.³⁰⁰ Although the concept of Europe is changed overtime both as geographical location or imagined system, Europe is envisaged as separate and distinct from the rest of the world with superiority in social, economic, political and cultural aspects.³⁰¹ The centrality of Europe generates difficulties to find the 'truth' in international relations since the conceptual, normative and narrative from the eye of Europe are taken for granted as universal.

Postcolonial theory also rejects the notion of universalism, cosmopolitanism, humanism and rationalism derived from Euro-centrism. Those modern ideas always pose the North as civilised, ethical, humanist and progressive by ignoring the history of imperial violence and genocide in the colonies. Conversely the South states are attributed with certain category as not modern yet, disorder, fragile

²⁹⁸ Cheryl McEwan, *Postcolonialism and Development*, Routledge, Oxon, 2009, pp. 17-22.

²⁹⁹ Siba N. Grovogui, 'Postcolonialism', in Tim Dunne, Milja Kurki & Steve Smith, *International Relations Theories, Discipline and Diversity*, p. 253-254.

³⁰⁰ See Jean Francois Fourny, 'Anatomy of Eurocentrism: On Samir Amin's Eurocentrism and Vasilis Lambropoulos's the Rise of Eurocentrism', *Research in African Literature*, vol. 25, no. 4, 1994.

³⁰¹ In this essay the concept of Europe often overlaps with the 'West' and the 'North' states.

states or even failed states.³⁰² It is clear that those categories that derived from modern North countries' history and sociological context will keep relations between the North and the South always in separation, discrete binary and unequal. The reproduction of those categories shows that there is a hierarchical relation between the North and the South without paying attention to the histories, values and point of view from the South. Postcolonial theory suspiciously contends this mode of reproduction of hegemonic knowledge becomes the continuity of preoccupation of Europe towards others. Postcolonial theory therefore seeks to involve in creation of truth by recovering the lost historical and significant voices of the South through reconstruction of knowledge production. It is because the European knowledge-based perspectives takes the South which is weak and powerless as the marginal element of global politics, the potential source of instability of global system, and the locus of human security policy, ultimately humanitarian intervention and the R2P .

Regarding R2P, postcolonial theory argues that rather than become the solution to South countries security problem, R2P reinforces the binary self/other, between North-develop and South-underdevelop countries. The target of the R2P is the populations from underdevelop-South countries, by bringing together the existing institutions, network and practises under the new global norms-R2P. Duffield and Waddell argue that R2P, rather than a policy tools to secure people through the protection of 'freedom from fear', it best understood as policy formation, as relational governance on how international institutions and other actors categorise and separate and act towards South people.³⁰³ Similarly, David Chandler argues that R2P reflects the exaggeration of the new post-Cold War security threats and locates the threats in the South countries.³⁰⁴

Postcolonial theory would also argues that the R2P instead of natural in motives, is produced by standard Eurocentric through category such as fragile states, failed states, and 'new war' concept as the new security terrains. By those categories, Eurocentric literature

³⁰² Mark Duffield, 'Liberal Interventionism and Fragile States', in Mark Duffield & Vernon Hewitt, *Empire, Development & Colonialism; the Past in the Present*, James Curry, New York, 2009.

³⁰³ Mark Duffield & Nicholas Waddell, 'Securing Humans in dangerous World', *International Politics*, vol. 23, 2006.

³⁰⁴ David Chandler, 'The Responsibility to Protect? Imposing the 'Liberal Peace', p. 61.

warns that in the post Cold War era there is a changing the nature of conflict that is more internal logic driven, particularly in the third world countries. This in turn will become the most lethal source of global security de-stabiliser when they decouple with other problems such as poverty, health, transnational crimes. These new sources of threat clearly show European heavy without further understanding to the nature of security predicament in the third world countries. More badly, when international human intervention under the R2P flag is used as a policy tools to meet the human security problems in the third countries, once again it reinforces the image of the North as the saviour from genocide and punisher the human rights perpetrator, while the native is the violator.³⁰⁵

The R2P debate, thus according to post colonial theory needs to be located in the sociological and historical context of the South countries. Oliver P. Richmond contends that in 'the post-liberal peace' there is a strong need to reunite both the liberal proponents and the local. The Liberal-local nexus can be a positive method of achieving international security since it potentially 'connects the complementary practices related to self determination and agency, democracy, human rights, and needs, and a rule of law with customary social support networks, and customary form of governance and political order'.³⁰⁶

Conclusion

Seeing R2P from constructivism, critical theory and postcolonial theory result in different pictures and understanding. From constructivism explanation, R2P is a norm in the making; evidently in the process and the development of R2P involving inter-subjective debate between agents and structure which are based on the logic of appropriateness and legitimacy. Critical theory and postcolonial theory on the other hand, criticise the R2P as '(neo)-liberal heavy' and the practice of R2P prone to be dominated by the Western states paradigm.

As the R2P is getting world-wide accepted, it is important to pay a deeper attention to the criticism. The practice of R2P should reduce

³⁰⁵ Tarak Barkawi & Mark Laffey, 'The Postcolonial Moment in Security Studies', *Review of International Studies*, vol. 32, 2006.p. 341.

³⁰⁶ Oliver P. Richmond, 'Resistance and the Post-Liberal Peace', *Millenium Journal of International Studies*, vol. 38. No. 3. P. 689.

the use of military force and as instead empowering the local-indigenous forces as much as possible to meet the truly emancipation. Moreover, R2P should give more room for compromise with the indigenous people the South to develop their own alternative to protect the rights of their citizen.

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HUMANITARIAN PROTECTION AND HUMANITARIAN INTERVENTION

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QUESTIONING THE USE OF FORCE IN HUMANITARIAN INTERVENTION: COMPARING THE CASE OF KOSOVO AND LIBYA

Aswin Ariyanto Azis, SIP. MDevSt.

Department of International Relations Universitas Brawijaya

Abstract

There has been considerable attention within academic communities, by both theorists and practitioners in international relations, concerning the issue of so-called humanitarian intervention over the past decades. It has been argued that intervention related to problems of human security should come to the fore especially when the country has failed to maintain its governance of its people. Furthermore, the use of force in humanitarian intervention is generating a considerable amount of discussion in justifying this kind of action because the use of force in humanitarian intervention inevitably brings coercion and devastation to invaded states and often threatens the principle of state sovereignty. There have been many controversial examples of the notion of humanitarian intervention in places such as in Kosovo, Afghanistan, Iraq and Libya as opposed to other places such as Rwanda, where in 1994 humanitarian intervention was absent when genocide took place. It follows that before any moral person resort to the use of force he should be questioned by a series of defining moral questions of Just War tradition as the first moral theory which distinguishes between two basic questions of *jus ad bellum* and *jus in bello*. In attempt to respond, the objective of this essay is to examine arguments for and against just war theory using Kosovo and Libya as a case study.

Keywords: *Humanitarian Intervention, use of force, Kosovo and Libya*

Introduction

There has been considerable attention within academic communities, by both theorists and practitioners in international relations, concerning the issue of so-called humanitarian intervention over the past decades. At the same time, an interconnecting academic and policy discourse on the legal and moral grounds of military intervention for humanitarian reasons is also taking shape. It has been argued that intervention related to problems of human security should come to the fore especially when the country has failed to maintain its governance of its people. For example, intervention in Somalia, Haiti, Bosnia, Kosovo, East Timor, Iraq and Libya have been justified in humanitarian terms. However, some realist scholars argue that intervention and the use of force will

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inevitably lead to abuse and could become a weapon of the strong against the weak (Frank and Rodley 1973 cited in Wheeler and Bellamy 2005). Furthermore, the use of force in humanitarian intervention is generating a considerable amount of discussion in justifying this kind of action because the use of force in humanitarian intervention inevitably brings coercion and devastation to invaded states and often threatens the principle of state sovereignty (Walzer 2000). There have been many controversial examples of the notion of humanitarian intervention in places such as in Kosovo, Afghanistan, Iraq and recently in Libya as opposed to other places such as Rwanda, where in 1994 humanitarian intervention was absent when genocide took place. It follows that before any moral person resort to the use of force he should be questioned by a series of defining moral questions of Just War tradition as the first moral theory which distinguishes between two basic questions of *jus ad bellum* and *jus in bello* (Phillips 1996). In attempt to respond, the objective of this essay is to examine arguments for and against just war theory by comparing Kosovo and Libya as a case study.

The Case of Kosovo

Kosovo, a southern province of Serbia and part of the former Federal Republic of Yugoslavia has been experiencing many conflicts between Serbs and Albanians since 1389. Throughout the 20th century when Slobodan Milosevic as the acting government in Kosovo, the tension between the two communities occasionally erupted into major violence where some 12,000 Albanians were killed and 500,000 to 800,000 were expelled. About 3000 Albanians are still missing whereas the number of Serbian soldier, policemen, and civilian deaths is considered to be around 3,000. This figure is disputed, however and said to be much more, as 2,800 people of Serb origin are still missing and are believed to be dead. Right after the President Milosevic agreed to withdraw military forces from Kosovo in 1995, the OSCE (Organization for Security and Co-operation in Europe) established KVM (Kosovo Verification Mission) while NATO (North Atlantic Treaty Organization) under the Security Council Resolution number 1203, established an aerial surveillance mission. The Rambouillet negotiation on February and March was signed by the Albanian delegation, but the Serb delegation did not sign on it. Furthermore Serbia broke their previous agreement by intensifying their military forces against Kosovo Albanians. On March 23, the

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NATO campaign in Kosovo named “Allied Force” authorized the use of air strike against Serbia, and eventually an agreement to cease fire between NATO and Serbian army was reached after the operation. On June 10, under UN auspices (UNSCR 1244) NATO arrived in Kosovo as an international security force to return all refugees safely, provide political processes, demilitarization of KLA (Kosovo Liberation Army) and a comprehensive approach to the development of the war torn region (Woodhouse and Ramsbotham 2000).

A large number of Serbs had fled the region, UNHCR estimated it to be 100,000 and an additional approximately 120,000 remained in Kosovo and opposed any rule by Albanians. The Serbian government claimed that some 250,000 Serbs fled Kosovo (Scott 2000). According to the European Stability Initiative, there were some 65,000 Kosovo Serbs living in Serbia. Some 20,000 may still go back, whom are mainly rural Serbs, while urban Serbs have largely integrated into Serbia and will not go back to Kosovo despite the consequences of what their status will be. Many Serbs are reluctant to return to their homes since it is proven not to be safe for them, even with UNMIK (The UN Interim Administration in Kosovo) protection, which was present during the instability in 2004, when 900 Serbian houses were burned and other property was destroyed while the Serbians were closed into enclaves and had to concentrate to the north of Kosovo until today. In February 2006, the status talks started, and they are set to end in the course of the year. The security of the minorities must be provided by the Kosovo Albanian government, but it is disputed if the Kosovo Albanian Institutions can grant these guarantees. The EU (European Union) has said that they will not raise any demands for an independent Kosovo.

The case of Libya

In December 2010, a series of uprisings, known as the ‘Arab Spring’ began in northern Africa, which have led to regime change in Tunisia, Egypt, and Yemen. On February 15, 2011, protests also broke out in the Libyan city of Benghazi, which escalated into fighting across the country, and some areas changing hands numerous times during fierce battles between forces loyal to Muammar Gaddafi and rebels opposed to his regime. There have been consistent media reports of widespread and systematic violations of international

humanitarian and human rights law, primarily by pro-Gaddafi forces, paramilitaries and mercenaries.

From the beginning of the conflict, the violent reaction of the Gaddafi regime against protesters and insurgents was harshly criticized by the international community. In February 2011, UN Secretary-General Ban Ki-moon expressed his outrage in light of media accounts which reported that Libyan authorities had been firing at demonstrators from warplanes and helicopters. He referred to “allegations of indiscriminate killings, arbitrary arrests, shooting of peaceful demonstrators, the detention and torture of the opposition and the use of foreign mercenaries,” based on reports that he found to be “credible and consistent.”(UN Press Release, 25 Feb, 2011)

The growing international support culminated in United Nations Security Council Resolution 1973, on March 17, 2011. Resolution 1973 demanded an immediate “cease-fire and a complete end to violence and all attacks against, and abuses of, civilians”, it imposed a no-fly zone over Libya and increased the strength of the arms-embargo over Libya.

The day after resolution 1973 was adopted; the Libyan government immediately announced a ceasefire and expressed its intention to fully comply with the demands set by the resolution. Libyan forces however, continued to shell liberated cities and forces continued to approach the rebel stronghold of Benghazi. The next day, the French army started to uphold the no-fly zone over Libya and was quickly joined by American, British, Italian and Canadian forces. After the initial instalment of the no-fly zone over Libya, NATO took over all military operations by March 29th, under the umbrella of ‘Operation Unified Protector’.

Because the Security Council resolution allowed the intervening forces to go beyond a ‘mere’ no-fly zone, the intervening forces were successful in stopping the Libyan siege of Benghazi. In the months that followed the imposition of the no-fly zone, rebel forces gained more and more ground on Gaddafi and were able to seize the Libyan capital Tripoli on August 24, 2011. With the capture of Tripoli, Libya was now mostly under control of the NTC. Less than two months later, Gaddafi was captured by NTC forces and died the same day under dubious circumstances.

After the reported death of Gaddafi, NATO decided to end Operation Unified Protector by the end of October 2011 which after

222 days since the operation began; a NATO AWACS concluded the final flight of the operation.

Just War Tradition

In the early 12th century Thomas Aquinas identified that there are three requirements for just war. Firstly, there should be a just cause for example those who are attacked should be attacked. Secondly, the decision of war should be made by competent authority and lastly, intention to wage war should be right.

(<http://ethics.acusd.edu/Books/Texts/Aquinas/JustWar.html>, accessed in June 2, 2006).

Furthermore, in the 17th century, Hugo Grotius (1949) in his book *The Law of War and Peace* explains three basic rules of just war:

- a. There is an immediate threat or danger to a state
- b. The use of force in order to defend national interests and
- c. Use of force must be in proportion to the danger posed

In Amstutz's (1999) book of International Ethics there are eight elements of Just war which added three more elements of *Jus ad Bellum* which are limited objectives, last resort and reasonable hope of success. This tradition according to Norman (1995) is not merely a definitive set of principle but it is an evolving tradition. Therefore, there remains further a question as to whether the conduct of war or intervention is just. Both Grotius and Aquinas stated in their arguments that just war can take place if only there is a strong just cause such as self defence from threat or danger. After World War II, UN charter Article 2(4) prohibits the use of force stating "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." However, article 2(4) does not differentiate between the use of force during war time and peace time.

Many scholars argue that forcible humanitarian intervention is justified merely because of the threat to others human beings in other parts of sovereign countries who are abused and tortured by their own government purporting to protect their own citizens (Walzer,

2000). However, interventions sometimes involve the use of force and this is, in the end, what makes it problematical. As in the case of NATO intervention in Kosovo in 1999 and Libya 2011, the question raise whether they can be regarded as just war. As Tony Blair said in a speech he gave to NATO officers “You’re fighting a just war in a just cause...We are fighting for the value of civilization... There is no hesitation and every resolve this thing through the end” (Clark 2001). However, the result of this intervention has also created intense human catastrophe and has become a base of questioning as to whether a state can be trusted to act as an armed guardian of human rights in world politics. Solidarism argues that states are the trustees’ actors in promoting humanitarian values in global politics. However, the evidence of state practice in humanitarian intervention in the 1990’s shows that global civil society is the principal agent of humanitarian values (Bellamy and Wheeler 2005).

In the case of the 1999 NATO intervention to protect civilians in Kosovo, Wheeler (2005) writes:

The humanitarian motives behind NATO’s action have to be located in the context of the overriding constraint that the operation be “casualty free.” Without this assurance, there would have been no intervention in Kosovo. It was this requirement that dictated the selection of bombing as the means of humanitarian intervention, which, in turn, produced results that contradicted the humanitarian justifications of the operation. . . .The intervention precipitated the very disaster it was aimed at averting.

The pacifist approach simply prohibits the threat and the use of force under any grounds because in accordance with a rule-based ethic, it assumes that violence can never be a morally legitimate means to provide national security or to secure moral goods such as human rights, international justice, and peace. According to Erasmus, a Dutch Renaissance scholar, even when the war is won there are more disadvantages than advantages achieved. Consequently, this tradition of non violence developed by philosophers such as Rousseau and Kant who proposed a radical shift of sovereign countries to a common global authority, which has been known later as Cosmopolitanism, argued that *jus ad bellum* and *jus in bello* are morally unjust ,and that global institutions need to be transformed so that the risk of war is reduced (Amstutz 1999). Furthermore, the pacifist arguments against Just war theory hold

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that in *jus in bello* the protection and sanctity of the innocent is taken seriously, yet during the war for example in Kosovo, the lives of non combatant could not be guaranteed. As in the case of Kosovo as the Times on 22 May 1999 reported that day after day populations were increasingly bewildered that the vital foundations of daily life were blown away such as there is no electricity, fuel shortages, and broken bridges and regular interruptions to water, gas and sewage systems. Moreover, The Guardian, 15 on October 1999, an independent group of Serb economists estimated that 44% of industrial production had been destroyed making Serbia the poorest country in Europe.

Contrary to the case of Kosovo, where the civilians are not trying to topple a ruling government, many has criticized that military action in Libya has taken priority over efforts to secure a political resolution and that, beyond an evident desire to see the removal of Gaddafi's regime, therefore doubting the strategic direction of the mission. Hence, question should be asked whether NATO, in a situation that is so unclear, in which the worst violations of human rights are perpetrated, may take one side could be considered a "right intervention". One also might be suspicious that the Western world would hope the civilian rebels are a democratic mass similar to that in Egypt that it deliberately use military force to overthrow the ruling regime. Moreover, the NATO bombardment, which in order to – the grounds given by NATO– protect uninvolved civilians against violent attack by Gaddafi's troops has caused many lives of the other uninvolved civilians.

Analysis

The use of force in the intervention in Kosovo and Libya will be questioned by this moral tradition of just war criteria of proportionality. As Robert Tucker said that the war is just if their goals are limited and should be proportionate to the means and values sacrificed. However, what happened in the air strike by NATO there were many innocent people affected by this action. On the other hand, principled realism argues that power and force are fundamental realities of the international community. It assumes that force can be an instrument of justice by lessening the evil as in Michael Ignatieff's idea of "*Lesser evil*". (Amstutz 1995).

According to principled realism, the use of force is sometimes legitimately and ethically permissible, especially for self defence and under authorization of the representative council of international

society. This is stated in the UN Charter, which bars the threat or use of force unless authorized by the Security Council or, under Article 51, in self-defence against armed attack until the Security Council acts (Clarke 2003). It is clear that the authorization of Kosovo air strike by NATO in 1995 and in Libya in 2011 was given by Security Council under chapter VII of the UN charter. However, in the case of Kosovo in March 1999 there is no authorization given for NATO's operation *Allied Force*. In this case this action is illegitimate. Based on Augustine Just war criteria as quoted by Aquinas he says "The natural order conducive to human peace demands that the power to counsel and declare war belongs to those who hold the supreme authority" (Beach 2000).

Based on the above arguments, forcible humanitarian intervention should be the last resort because each country should determine its own choice. Therefore, according to the *Just ad bellum* condition stated, a peaceful solution should be the first solution for the intervening countries. In other words if the first alternative of enquiry, mediation, conciliation and so forth, *via* diplomatic and economic measures up to demonstrations, blockade and 'other operations' by land, sea and air forces would suffice, then armed force should not be used. This is stated in Articles 33 to 42 of the UN Charter. In Kosovo intervention many argue that land operation should have done earlier in order to stop some destruction at the early stages. In Kosovo perhaps NATO's action would have been better if it taken in the autumn of 1998, when it was first authorised in principle. (Beach 2000)

While in the case of Libya, Pattison argues that although the situation in Libya was so dire that a humanitarian intervention on the grounds of Responsibility to Protect was justified, "forcible regime change by an external party in support of a rebel movement", was not (Pattison 2011, p. 272). Pattison argues that the track record of forced regime change has shown that it often does more harm than good. This leads him to the question of whether the "intention of the intervention is predominantly the protection of civilians – a humanitarian objective – or the removal of Qaddafi" (Pattison 2011, p. 273).

Sovereignty and Intervention

Another important issue to consider in regards to humanitarian interventions is sovereignty. It is claimed that sovereignty is a

supreme power over citizens and subjugated people and a state is bound by no other law. Michael Walzer in *Just and Unjust Wars* accepted that modern order of sovereignty is a moral good but it is argued that individual should be understood to have rights and space to exercise their rights (Phillips and Cady 1996).

The principle of national or state sovereignty according to the rule engraved by the Treaty of Westphalia in 1648 is that each country has its own territorial influence to govern their citizen or foreigners under their jurisdiction to protect their country from the humanitarian interference. This means humanitarian intervention has become a threat to sovereignty because each country has its own domestic jurisdiction which is reserved by Article 2(7) of UN Charter. Moreover, according to Ambrose (cited in Vincent 1990) “peoples should not wage on war by taking over the care for those who do not belong to them.” However, over the past decade, there has been a shift from the term “sovereignty as authority” to “sovereignty as responsibility.” This term was firstly articulated by Francis M. Deng³⁰⁷ in 1993 and was quickly adopted by the UN Secretary General, and it means that sovereignty not only protects a state from outside interference but also obligates the state to respect and protect the basic rights and interests of its citizens. This argument is also supported by solidarist international societies, since the UN Charter has given permission to states to protect fundamental human rights, as well as in customary international law where humanitarian intervention has a right (Arend and Beck 1993 cited in Bellamy and Wheeler 2005).

These arguments have shown that sovereignty and non-intervention traditions have developed over time, especially as their stipulations have been translated into international law. Lauterpacht defines the principle of sovereignty and domestic jurisdiction as coming to a halt when gross violations of human rights take places (Vincent 1990). According to Grotius, individuals as a human being have independent status in international society and have right to intervene (Vincent 1990).

Conclusion

Humanitarian intervention still remains a debated issue. In Wheeler and Bellamy article (2005), the debate on the legality of the

³⁰⁷ Director of the Center for Displacement Studies; Research Professor of International Law, Politics and Society.

use of force in humanitarian intervention is between restrictionist and counter-restrictionist, whereas in Fixdal and Smith it is between realist and idealist. There are two sides of arguments which still remains contested where this action can be accepted by some states as Just war and the other still believe that non-intervention is the best solution. Therefore, the author have addressed on some issues such as the question which is a procedural one. Who has the right to decide to intervene? Is it only the UN Security Council? Is there a right of individual and/or collective intervention even if the Security Council is unwilling or unable to reach a decision to intervene like in the case of Kosovo? The third issue is the threshold at which to intervene: what kind of crises, what kind of violations justifies the disregarding of national sovereignty. Another important question has to do with the right vs. the obligation to intervene and to use force to deal with "humanitarian crises. Therefore, these actions remain troublesome and the most important thing is that just war tradition is not a weapon to be used to justify political conclusion or in the matter of pursuing national interests but to promote humanitarian values.

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**PROTECTION TOWARD THE
HUMANITARIAN WORKERS IN DISASTER
FIELD : FAST, TOTAL AND COMPLETED,
BASED FROM ACT EXPERIENCE IN THE
DISASTER FIELD IN INDONESIA AND
OTHER COUNTRIES**

Eddy Kuncoro

Disaster Management Institute of Indonesia – ACT (Aksi Cepat
Tanggap)

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Abstract

Humanitarian workers who used to work in the disaster realm, oftenly neglected the attention for their self safety. They faced with the fact that they have to help or even save the lives of others who are victims of disasters. The principle of total, complete, and fast is the guiding principle in handling disaster victims, should also be the principle of protecting humanitarian workers, because between the disaster victims and the humanitarian workers are two elements that difficult to separate. Based on the experience of ACT in the disaster areas in Indonesia and other countries

Background

In the span of years 2000-2010 attacks against humanitarian workers are always exist in a variety of forms, ranging from causing injury or even death, and kidnapping. It can be seen from the data issued by the Aid Worker Security Database (AWSDB) Report 2011. Aid worker in this case is defined as an UN humanitarian office agencies, the Red Cross / Red Crescent movement and NGOs in the context of the humanitarian program (AWSDB Report, 2011)

Tabel 1. Major attacks on aid workers : Summary statistics, 2000-2010

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of incidents	42	29	46	63	63	75	106	119	165	149	129
Total aid worker victims	91	90	85	143	125	172	239	208	278	290	242
Total killed	57	27	38	87	56	54	86	78	127	102	69
Total injured	23	20	23	49	46	95	87	84	91	94	86
Total kidnapped	11	43	24	7	23	23	66	46	60	94	87
International victims	21	28	17	27	24	16	26	35	51	74	38
National victims	70	62	68	116	101	156	213	173	227	216	204
UN Staff	31	28	18	31	11	28	61	39	65	101	44
International NGO staff	45	48	54	69	69	111	109	121	157	125	143
LNGO and RCS staff	5	2	5	35	43	28	55	34	46	54	45
ICRC staff	9	11	7	8	1	3	10	4	5	9	10

Source: AWSDB Report 2011

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Seeing the high rate of violence against humanitarian workers, and in the last 10 years has always occurred in every year, indicating that protection against humanitarian workers in conflict zones has not given serious attention by countries in conflict. Although the duty performed by humanitarian workers is very noble, because they work not only for himself and his own family but also gives meaning to the lives of others, and at the same time carrying fragrant for their country. Difficulties faced by humanitarian workers more complex than other professional workers. Some aid workers are not only risking his job professionalism at the same time but also risked their lives. Although each year the violence against humanitarian workers always, but it does not stop the spirit of humanitarian workers to help others that needed.

Seeing how noble the activity of humanitarian workers, logically activity by humanitarian workers must be supported by both regulation and operations. But in reality this issue has not been become attention by the policy makers in several countries. In the Indonesian context, regulation concerning of humanitarian workers seems to havent brought good tidings for humanitarian workers in the country. Indonesian Law Labor concering Humanitarian Workers has not been set and the specific mentioning about the humanitarian workers. Is it because humanitarian workers – being considered - do not bring a direct impact on countries economical income, in contrast to other workers.

Departing from this noble intentions, helping others with various forms of activities, sometimes humanitarian workers activity intersect with local government policy and this is not a positive thing. Sincere and noble intentions are sometimes interpreted otherwise by the local government, rather than intrpreted as a government partner, the government has interpreted the humanitarian worker activity as an outside forces that endanger and should be marginalized. Beside from having to help and rescue the victims of conflict, humanitarian workers are also demanded to align their humanitarian program with local government policy, while still holding the principles of humanitarian workers so they will not co-opted by the momentary interests of that sometimes tempting workers to turn around their work align.

Humanitarian workers between risk and Soul Call

Humanitarian workers working in conflict areas make them must to mentally prepared because they faces the risk for more severe and dangerous. Murder, kidnapping, intimidation, a cases of risks that threaten humanity worker. In such circumstances for what humanitarian workers meet the risk of danger. The table below - based on experience - try to give an explanation of the relationship between the activities of humanitarian workers to the risks their faces.

Table 2. Humanitarian Workers Activity in conflict zones Most Frequently Experienced Attacks

Activity	Statements and Experience from ACT Volunteer	Violence frequently occur	Anticipation steps
Distribution of Aid	Activity distribution of aid to the victims in conflict zones is a crucial. Required cooperation with various parties. Society participation should be involved. Small careless could endanger humanitarian workers. Unequal sharing, minimal securing, and did not involve the society, will make the society in conflict become emotions and tensions will increase. Riots during the distribution is very possible, the serious impact is the emergence casualties from both public and humanitarian workers on duty.	Persecution and shooting	1. Coordination with the security service, 2. Involvement of society in securing the distribution of aid; 3. Involvement the local area stakeholders 4. Preliminary information and data regarding the location of the activity
Regional Assessment	Assessment area of is an vital instrument in humanitarian programs. This activity demand humanitarian workers searching new areas they do not know and sometimes just by theirselves. The validity of preliminary data and information about the area asesment could reduce the risk for humanitarian workers. Not often the kidnapping and killing of humanitarian workers experience during asesment activity in conflict areas.	Kidnappings, killings and shootings	1. Data and preliminary information about the area that would be done asesment 2. A visit to the local key person who understands the local area and was well respected; 3. Brings identity and legality as humanitarian workers

Sources: ACT qualitative data

Humanitarian workers activity described in table 2 are the two activity most frequent under attack. There are many other activities - in conflict areas - that are not included in the table, such as

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kidnapping or forcible pick up of the humanitarian workers at the time, the attack while at home eating, bombing or shooting during a visit to the program area, with persecution and intimidation during interrogation.

Difficult to explain with common logic, the risk would be faced and experienced by humanitarian workers are already known and understood by those who working in conflict areas. One causing humanitarian workers unabated spirit in conducting humanitarian activities is to help and rescue victims of the conflict, which can be defined as the "call of the soul". Call of the soul in a broader meaning are capable of crossing border of state, ideology, and class for a humanitarian purpose.

The Principle Quick, Total and Completed for the Protection of Humanitarian Workers

Legal foundation for the protection of humanitarian workers listed in the 1949 Geneva Conventions and related protocols in 1977. In the agreement describing the category of non-combatant civilians and their rights and obligations during the conflict. These rights include the right to be treated humanely, the right to have access to food, water, temporary shelter, medical treatment, and communication, the right to live free from violence, hostage taking, torture, and prohibitions against collective punishment.

Armed with experience managing disaster issues inside and outside the country since 1994, ACT (Aksi Cepat Tanggap) Foundation formulating it into three major issues as the reference activity, Humanity, Philanthropi, and Volunterism.

Humanity, not only understood in the context of a disaster, but in a wider scale. Humanity closely related to values, feelings, and human responsibility over other people, both in the individual and community scales in terms of micro and macro. The function of humanity is universal and generally applicable, and can be implemented anywhere, anytime, and by anyone. Overcoming interference and oppression against it, a task for all of us (Ahyudin, 2012).

Philanthropi, defined as a person or an organization's willingness to be an social capital for positive change for the

environment, both micro and macro scale. Philanthropi contains four elements: space, time, subject and object (Ahyudin, 2012).

Volunterism, means mobilizing public participation, where people are subject in each program is the work principle of the ACT. In a broader meaning, public participation translated in the sense of volunteerism, not only society beneficiaries the program but also other stakeholders, both government and the business world. Evocating volunteerism souls that became spirit of the ACT vision. In the context of a disaster or other humanitarian events, volunteers who joined the activities of ACT is ready to help workers struggle helping others in the field of disaster.

Humanitarian workers and the victims of disaster are the two elements that are difficult to be separated, then the protection against humanitarian workers - particularly in conflict areas - become an important thing also. Fast, total, and complete, a principle of ACT in providing protection to humanitarian workers who join it.

Fast in providing protection against humanitarian workers who worked in conflict areas become inhern with Disaster Management activities. It should not be more than an hour in responding to disasters that occur. Protecting the humanitarian workers are equally important to help the victims. There is no dichotomies between disaster victims and humanitarian workers. Because they all are a national asset. What distinguishes both of them is the responsibility that scope around them. Fast is not interpreted as meaning prioritize anything but ignore the others, because they all are important. How to provide humanitarian workers with the knowledge, insight, and skills that are adequate, in effective ways. Fast in accessing information in conflicts areas as a basis for humanitarian workers in action. Fast in accessing to the formal legal in the conflict area so that humanitarian workers activity will not inhibited by bureaucratic conditions in the prevailing area. Fast in accessing to political power in areas where humanitarian workers ought to work, usually conflict that occur in a region or country cant be separated from a very pragmatic political interests. Delays in fulfilling these things, will inhibit the activity of humanitarian workers, the consequences will be inhibiting rescue of victims.

Humanitarian workers activity is an activity that is very integral and comprehensive. All terms and conditions that guarantee the protection of humanitarian workers as much as possible must be

fulfilled. Totality in providing protection against humanitarian workers are divided into two terms, internal and external. Internally, is all that are directly related to humanitarian workers, for example in this case is knowledge and skills that must be possessed by humanitarian workers. Assigning humanitarian workers in conflict areas without adequate knowledge and skills, not only harming institution that send them, but also harms all parties, including the nation. Another example is the family of the internal side of the humanitarian workers who will be assigned. Support from the family of the activities undertaken by humanitarian workers is needed. Needed a shared understanding on activities undertaken, it takes temperature and understanding between humanitarian workers with families are at the same level. Because family support participate for smoothing humanitarian workers activities, it provides life guarantee to humanitarian workers families that left-during the duty-is part of the total principle- from the internal side. While total from the external side is, things related to outside parties. A good example in this case is the protection of humanitarian workers from the formal conditions prevailing in the country. Since this is directly related to the nation stakeholders, it would require cooperation between humanitarian agencies and the government. Humanitarian workers serving in other countries that are in conflict not only carry the name of the institution, but also the nation. If cooperation between humanitarian agencies and the government in the realm of humanity could well maintained it will bring a fragrance name of the countries for peoples international world. In the technical level can be seen from the administrative requirements, such as the completeness of the letters, the ease in obtaining a visa, easy to get information on the country of destination, and other administrative requirements.

The third principle in providing protection against humanitarian workers is completed. In providing protection for humanitarian workers must be completed, should not be done half-half, because it will be fatal. Whatever the hurdles and obstacles remain to be done and completed, because all of these to provide the best protection for humanitarian workers, that will have an impact on rescue civilians in conflict areas.

Conclusion

Victims of disaster / conflict and humanitarian workers are the two elements that are difficult to separate. Provide protection for humanitarian workers in plenary as well as to provide the best for the survival of victims of disaster / conflicts. Fast, total, and complete a principle in the protection of humanitarian workers. Keep in cooperation with various parties in working in the realm of humanity. Sectoral ego not only harming the victims of disaster / conflicts, but also the nation.

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QUESTIONING THE PROTECTION FOR HUMANITARIAN ASSISTANCE: CONSTRAINTS AND CHALLENGES

Annisa Gita Srikandini, MA.

Program on Humanitarian Action – Institute of International Studies
Universitas Gadjah Mada

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Abstract

Political violence has caused serious civilian casualties. As international humanitarian law highlighting the principle of 'distinction' between military and civilian, series of attack to civilian including the civilian objective emerged as a humanitarian issue. In 2011, the International Committee of the Red Cross (ICRC) published a report called 'Health-Care in Danger' advocating the need for all parties to respect and protect the health-care facilities at all time (ICRC). This report was a reaction toward violence that affects the delivery of health care in 16 countries (ICRC). The issue of 'protection' toward humanitarian assistance is not only covering any essential means to defending civilian objective but also attempt to guarantying the safety to humanitarian worker. According to the Overseas Development Institutes, during 2003 – 2008, there were major attacks occurred in several countries which caused the death of humanitarian worker: Sudan (93 persons), Afghanistan (77 persons), Somalia (68 persons), Sri Lanka (20 persons), Chad (13 persons), Iraq (12 persons), Pakistan (12 persons). Any threat and violence against humanitarian worker should be a prominent issue within humanitarian crises. The increasing number of humanitarian worker who deployed to the field should followed by intensification of safety protection. In the case of legal instrument, the Geneva Conventions does not mention specifically on the protection of humanitarian worker. These conventions classify the subject of humanitarian worker as the 'civilian'. Later, in 2003 through the Resolution number 1502, the Security Council provides greater protection to the humanitarian worker in which any violence against this subject would be committed as war crimes. Considering the legal framework which already exist to guarantee the safety of humanitarian worker, this paper will elaborates two things: first, the legal instrument for the protection of humanitarian assistance and second, any constraints and challenges in assuring this protection.

Keywords: protection, humanitarian assistance, Geneva Conventions, UN Resolution 1502

A. Violence against humanitarian assistance

1. Background

Manuel Bessler, the Deputy Chief of the Policy Development and Studies Branch in the Office for the Coordination of Humanitarian Affairs (OCHA) stated that “without security there cannot be humanitarian action” (United Nations: New Protocol). Within this context, the safety toward humanitarian action becomes a prominent issue. A report from United Nations Office for Coordination of Humanitarian Affairs (UN OCHA) stated that the last 10 years has been ‘the deadliest on record for humanitarian workers’(CNN: Humanitarian Work). According to Overseas Development Institute (ODI) most of the victims of the attacks were staff members of UN agencies or NGOs (Radtke: Aid at Risk on Many Fronts). More than 60 % of all incidents recorded from 2006 to 2008 occurred in Sudan, Somalia or Afghanistan (OID: Providing Aid). Furthermore, another survey by ‘The Geneva-based Small Arms Survey and Centre for Humanitarian Dialogue’ elaborates the most dangerous area for humanitarian worker around 2001 – 2003 which consist of the Occupied Palestinian Territories (OPT), Uganda and Iraq (Center for Humanitarian Dialogue: No Relief). This trend shows that violence against humanitarian assistance could outbreak in any places in the world following the conflict escalation. Second, serious attacks toward humanitarian assistance express the lack of awareness and willingness within conflicted party to secure humanitarian assistance. This attack has indicated that humanitarian space has ‘shrinking’ (Radtke: Aid at Risk on Many Fronts). Humanitarian space attempts to explains about a situation where humanitarian organizations able to conduct their operation within conducive environment (NOHA Course Reader p 4). In terms of definition, humanitarian space attempts to covers several aspects such as:

(1) Humanitarian space as an agency space

Ability to operate freely and meet humanitarian needs in accordance with the principle of humanitarian action

(2) Humanitarian space as affected community space

Ability of beneficiaries to uphold their rights to relief and protection

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- (3) Humanitarian space as an international humanitarian law

Its focuses on the actions of warring parties

- (4) Humanitarian space as a complex political, military and legal arena

It highlights the highly political nature of the task humanitarian agencies seek to achieve and that humanitarian needs (and their relief) are a product of the dynamic and complex interplay of political, military and legal actors, interests, institutions and processes

(Humanitarian Policy Group: Humanitarian Space)

Series of incident has raised the discussion on the issue of protection. Humanitarian space is definitely a precondition to ensure the effectiveness of aid distribution. By challenging humanitarian space through systematic attack, it points out the fact that any threat toward beneficiaries and international humanitarian law has existed. In the other word, serious attack has cause further suffering and casualties. Violence against humanitarian action covers any attack toward (a) humanitarian worker (b) humanitarian facilities including refugee shelter, health-care facilities and (c) humanitarian vehicles. International Committee of the Red Cross (ICRC) on its report called 'Health Care in Danger' explains four main categories of the attacks:

1. Military Advantage

This attack targeting the opponents by destroying their medical support, meanwhile the attacker aimed to liberating their wounded comrades detained. For example: the attack on Jinnah Hospital, Lahore, Pakistan (2010) has a goal to free a wounded militant who captured after the mosque bombing that killed 80 worshippers.

2. Political, Religious and Ethnic Reasons

This attack targeting a specific political opposition, religious group and ethnic group that turns to be the threat. For example: the burning down of an Uzbek – run clinic in Kyrgyzstan during ethnic violence in June 2010.

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3. Unintentional damage

This occurs most frequently when military operations are carried out in densely populated, urban areas that sometimes no longer could distinguish between legitimate and illegitimate targets. For example: conflicts in Libya, Srilangka, Suriah, Somalia.

4. Looting of drugs and medical equipment

The motive behind this attack often is obtaining medical supplies for injured combatants. For example: violence in Baghdad 2003.

(Sources: ICRC: Health Care in Danger)

In 2009, ODI launched a report about number of attacks toward humanitarian aid workers. The figure below elaborated a significant growing number of accidents as well as accumulation of murdering, injuring and kidnapping.

Figure I: Statistics on number of violence affecting aid workers

							Annual averages	
	2003	2004	2005	2006	2007	2008	2003– 2005	2006– 2008
Number of incidents	63	63	75	106	119	155	67	127
Total aid worker victims	143	125	172	239	206	260	147	235
Total killed	87	56	54	86	79	122	66	95
Total injured	49	46	95	87	84	76	63	82
Total kidnapped	7	23	23	66	43	62	18	57

In addition, further research elaborates chronologically about several attacks on humanitarian worker which occurred in some countries. From this figure, it concludes that systematic violence often appear with various modus operandi: car bombing, kidnapping, shoot gunfire and lethal weapons.

Time	Violence against Humanitarian Action
2007	- Colombo, Sri Lanka – Two Red Cross workers were murdered. - Lebanon - Two Lebanese Red Cross workers were killed. - Sudan – A driver of the World Food Programme was killed. - Darfur – 12 humanitarian workers were killed. - Central African Republic – An MSF volunteer was killed by gunfire. - Somalia – Two nurses, one Argentine and the other one Spanish, were kidnapped. After one week, they were released. - Burundi – an Action Against Hunger vehicle was targeted by shooters. One died. - Algeria – 10 United Nations staff died in a double car bombing in the Algerian capital.
2008	- Kabul, Afghanistan – Six people were killed in an attack. - Kandahar, Afghanistan – An aid worker and her Afghan driver were kidnapped in Kandahar and are presumed dead. - Somalia – Three Médecins Sans Frontières (MSF) staff were killed as they were on their way back from the hospital to the compound. - Colombo, Sri Lanka – An Batticaloa-based employee of the Norwegian Refugee Council is killed while visiting the capital and disappears, presumed dead. - Tanzania – An Australian working was killed during a robbery. - Logar Province, Afghanistan – Three female International Rescue Committee (IRC) workers and their local driver were killed. - Merka, Somalia – A senior programme assistant for the World Food Programme (WFP) was shot and killed. - Kabul, Afghanistan – An aid worker with SERVE Afghanistan was killed. - Gurilel, Somalia – A local worker with the aid agency Iida was killed.
2009	Yemen - Several aid workers were

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	kidnapped. • Chechnya - Two Chechen aid workers were kidnapped and murdered. • An Irish charity worker was killed. • Pakistan – 3 United Nations staff killed in a suicide bombing attack. • Afghanistan - 5 United Nations staff, were killed by Taliban.
2010	• Palestine: Israeli forces killed 9 people who were traveling to the Gaza Strip by boat to deliver aid. • Afghanistan: 10 men and women working for a Christian aid agency were murdered by Taliban.
2011	• Somalia: 2 United Nations aid workers shot to death in Mataban

2. Humanitarianism

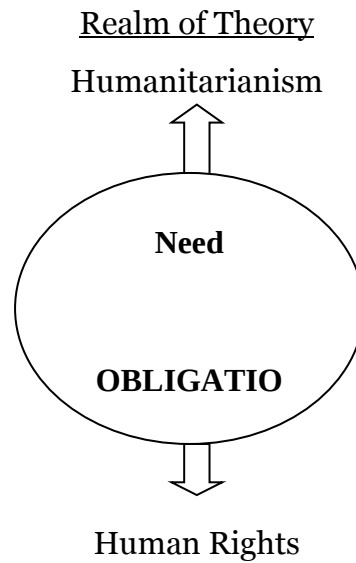
In order to examine the obligation to protect humanitarian assistance, an elaboration toward the essence of humanitarian action and international humanitarian law would be the primary basis. Violence against humanitarian action definitely hampered the principle of humanity. The principle of 'humanity' emphasize on the effort to address human suffering wherever it's found with attention to the most vulnerable in population, such as children, women and the elderly (NOHA Course Reader p 31). Humanitarian agencies have placed security and protection in the principles of humanitarian action, such as neutrality, impartiality and independence (Eckroth: Security in Practice). Through these principles, humanitarian action has their privilege to operate and to intervene in a conducive environment during humanitarian crises. Protection even treats as a basic requirement prior to the granting of humanitarian space.

Humanitarian Action was build based on the principle of humanity, neutrality, impartiality. This principle stated from Geneva Convention (Jocelyn). Regina Nockerts and Peter van Arsdale on Journal of Humanitarian Assistance defined 'humanitarianism' as any action to help human beings in need without considering any state boundaries (Nockerts & Arsdale). This concept is drive by the obligations to help someone who

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suffered from various disruptions. As one of prominent humanitarian principle, humanity highlighted the obligations to addressed human suffering wherever it is found with attention to the most vulnerable people such as children women and the elderly (NOHA Course Reader p 31). Humanity never reckons boundaries on nationality, religion, ethnic origin, gender, race and political associations on their work. In the traditional point of view, human solidarity builds on ‘something within each of us – our essential humanity – which resonates to the presence of this same thing in other human beings (Wheeler p 10). The principle of ‘humanity’ emphasize the effort to address human suffering wherever it’s found with attention to the most vulnerable in population, such as children, women and the elderly (NOHA Course Reader p 31). The objective of humanitarian action are to save lives, alleviate suffering and maintain human dignity during and in the aftermath of man-made crises and natural disasters, as well as to prevent and strengthen preparedness for the occurrence of such actions (Good Humanitarian Donorship). The principle of neutrality required any humanitarian assistance for not engaging in hostilities or taking sides in controversies of political, religious, or ideological nature, while the principle of impartiality stress out on the need to provide humanitarian assistance without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion (NOHA Course Reader p 31). This principle has formulates as a part of ‘Code of Conduct’ for humanitarian organizations. In addition, Bannet on his publication has emphasized the principle of ‘humanity’ as the foundation for humanitarian action (Barnett p 1).

Figure I: Humanitarianism and Moral Obligations



There are two moral reasons, which turn to be a basis for humanitarian action: **first**, the tendency to respond to people with certain kinds of respect as a bound to the idea of dignity, **second**, sympathy as part of caring behavior to address the miseries and the happiness (Glover p 22). The importance of 'obligations' has been perceived as a moral foundation for humanitarian action (Jocelyn Kelly). It indicates any relief of the suffering that guides solely by needs and priority (NOHA Course Reader p 31). Humanitarianism has driven by moral values embedded within human beings. Accordingly, humanitarian principle is narrated as nonnegotiable universal values in which human beings agree to respect and to comply. Walzer further argues that moral reality has to be seen in terms of a 'complex duality' between universalism and particularism; it is 'universal because it is human and particular because it is a society' (Wheeler p 12). Any violation to principle of humanity would be considered as uncivilized and barbaric action. International Migration Review elaborates four logics behind the engagement of countries into humanitarian values:

1. Humanitarian issues reflect the standards of civilization
2. Humanitarian issues can threaten domestic and international order
3. Multilateral forums are the legitimate means to handle

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these issues

4. Multilateral organization provide burden-sharing mechanisms

(Barnett p 250)

Violence toward humanitarian workers should be acknowledged as a barbaric action that could threaten beneficiaries and humanitarian space. International community should make a significant action since the growing trend of incident has created international terror especially within humanitarian enterprise. There are two kind of response in dealing with this issue: (1) Advocacy through the implementation of legal framework (2) Enhance security strategy for humanitarian organizations.

3. Legal Framework on Protection toward Humanitarian Assistance

There are two legal frameworks which regulates the obligation to respect and protect humanitarian assistance: (1) Geneva Conventions and (2) Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel. International Humanitarian Law (IHL) through Geneva Conventions address the needs to distinguish armed forces and civilian. The basic principle is 'respect for the life, security and dignity of those not taking, or no longer taking part in hostilities' (ICRC: Protected Person). Furthermore, all parties committed to a conflict whether State or non-State actors are bound by international humanitarian law (IHL) and required to respect and ensure respect for its rules (ICRC: Protected Person). This humanitarian law regulates humanitarian workers as part of the civilian. It indicates that IHL protect media professionals and facilitate the exercise of their professional activity. Four Geneva Conventions of 1949 and their Additional Protocols of 1977 contain the following risks:

1. The wounded and the sick, as well as the infirm and expectant mothers shall be the object of particular protection and respect.
2. The wounded and the sick must be protected against ill-treatment and pillage.

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3. No one may be left willfully without medical assistance and care.
4. Whenever circumstances permit and particularly after fighting, each party to a conflict must, without delay take all possible measures to search for, to collect and evacuate the wounded and the sick without adverse distinction between them.
5. The special role is recognized in facilitating the establishment of neutralized zones to protect the wounded, the sick and civilians from the effects of war
6. Parties to a conflict have the first obligation to care for the wounded and the sick. Any care provided by the local population, humanitarian organizations or third parties does not relieve the parties of their obligations.

(ICRC: Health Care in Danger)

As humanitarian worker and facilities is recognized as civilian, accordingly, any obligations and rights of civilian are engaged to humanitarian worker. Meanwhile, in terms of violence toward humanitarian facilities, all parties are obliged to protect humanitarian means as follows:

- a. Health-care facilities shall be respected and protected at all times and shall not be object of attack
- b. Protective emblems such as the red cross, red crescent, and red crystal
- c. Small arms are permitted in health-care facilities for the purpose of self-defence or defence of the wounded and the sick (against bandits, for example). The presence of all other weapons compromises the neutral status of a facility.
- d. Health-care facilities lose their protection if they are used to commit 'acts harmful to the enemy'
- e. 'Acts harmful to the enemy' include the use of health-care facilities to shelter able-bodied combatants, to store arms or ammunition, as military observation posts or as a shield for military action

(ICRC: Health Care in Danger)

Kofi Anan stated that this protocol has ‘expands the legal protection to all other United Nations operations, from emergency humanitarian assistance to peace building and the delivery of humanitarian, political and development assistance’ (United Nations: Optional Protocol). This Protocol will apply to humanitarian organizations working with the United Nations as implementing partners, such as the International Rescue Committee, Oxfam and some national chapters of Doctors without Borders, local partners, like small non-governmental organizations working with the United Nations (United Nations: Optional Protocol).

As the rights of protection toward humanitarian worker has clearly stated, humanitarian personnel should also maintain their neutrality. Humanitarian worker must in every situation should committed to: (1) not take part in the hostilities and they should always refrain from committing any act that could be construed as hostile towards one party to the conflict and (2) maintaining their operations remain in the neutral zones meaning that humanitarian assistance should not engaging in lawful military objective according to IHL.

B. Constraints and Challenges

Frank Schmidt on ‘International Review of the Red Cross’ elaborates four external factors which might threaten the security of humanitarian action:

- the emergence of new protagonists and armed groups and the difficulty of grasping the complexity of the situation in conflicts marked by general anarchy;
 - humanitarian action is sometimes identified with Western values or even a specific ideology and is being increasingly manipulated (displacement of civilian populations), resisted (ethnic conflicts), or simply disregarded by the belligerents;
 - the increase in crime and banditry, sometimes fostered by the material wealth which the humanitarian organizations display;
 - the perception of humanitarian aid is blurred by competition among its providers, the intervention of peace-keeping forces, the dual political and humanitarian agendas of States
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funding assistance, and excessive media exposure, which leads to indifference, confusion about specific roles, and challenging of the independence and neutrality of humanitarian action;

- the red cross emblem, perceived as a Western, Christian symbol, which means that the ICRC may become a target both because of its presence and activities, and because of the emblem's symbolic dimension;
- the confusion about specific mandates and the diversity of operational approaches among the different components of the International Red Cross and Red Crescent Movement also represent a risk factor.

(ICRC: Recommendations for Improving Security on Humanitarian Action)

Deadly attack toward humanitarian worker turns to be one of the dynamic of war. Conflicted parties 'hijacked' humanitarian assistance as part of the pressure to international community which often comes during humanitarian crises. The opportunity to protect humanitarian assistance has appeared through the framework of international humanitarian law. This legal mechanisms are reflections of political commitments made by countries, international organizations and non-government organizations. All parties have agreed that humanitarian action always comes with protection. In addition, stakeholders should maintain their commitment that civilian and public means are not classified as military target. Accordingly, serious effort to maintain a secure environment should be placing as a priority. Any attempt to breach and violate IHL should be responded firmly in the context that systematic measure should be taken to stop this violation. For humanitarian organizations, the challenges to maintain their humanitarian space are related to two factors:

a. Neutrality

One of the motivations of attack toward humanitarian organizations is stereotype that some organizations are no longer neutral. Humanitarian organizations should maintain their distance to government and conflicted parties thus it would not justified an attack on humanitarian assistance. There was also a surge in the number of politically motivated

attacks compared with economically motivated assaults (Radtke: Aid at Risk).

b. Humanitarian Legitimacy

Humanitarian legitimacy refers to an acceptance from beneficiaries to any assistance given by humanitarian personnel. Acceptance from beneficiaries would assist them to analyze potential attack that could endanger their work.

c. Security System

Humanitarian organizations should establish internal security system by adding more safeguards, barring windows of project offices, provision of night lighting, the employment of security guards and the use of armoured vehicles (Eckroth). Furthermore, capacity building on walkytalkies, barbed wire and helmets; operational policies and procedures (curfews, training), clear policies on vehicle operations, finances; and coordinated operations, such as coordination and cooperation with the UN (Center for Humanitarian Dialogue: No Relief). Considering the insecure environment, ICRC suggests several steps in order to secure the humanitarian action:

1. NGOs urgently need to deal with a number of fundamental questions relating to their engagement in crisis and conflict countries. These include medical, religious and humanitarian personnel, civil defence staff and even journalists. All these groups can face danger, and threats to their safety and freedom to carry out their work
2. The ICRC believes that developing trust and acceptance by local communities affected by armed conflict is key to the safety of relief workers.
3. Maintaining a clear distinction between humanitarian and military operations is also crucial to security.
4. The ICRC also puts great stress on the skill and professionalism of its staff in the field.

(ICRC: Protected Person)

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HUMANITARIAN ENTERPRISE

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LEGALIZING FOREIGN WORKERS AS HUMANITARIAN MEANS IN ACCORD TO 6P PROGRAM IN MALAYSIA

**Dr. Rohani Abdul Rahim, Dr Junaidi Abu Bakar, Dr. Salawati Mat
Basir, Siti Awanis Othman & Ehsan Rostamzadeh**

Universiti Kebangsaan Malaysia

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Abstract

From October 2011 until June 2012, the government enforced the 6 P Program (Registering, Legalizing, Monitoring, Amnesty, enforcement, and deportation) and 577,427 from the 1,015,852 illegal immigrants had been legalized during the exercise with 76,195 of them managed to secure employment in the manufacturing, services, construction, plantation and agriculture sectors. The Program ensures legal rights and protection for the temporary workers who come to Malaysia and at the same time promoting a secure and orderly border from illegal migrants. It is also designed to help the government keep track and increase the legal labor pool of foreign workers in the country, which can improve national security, reduce human trafficking and increase tax revenues. This paper presentation intends to draw on the purpose and the efforts made by Malaysian enforcement agencies in legalizing foreign workers as a humanitarian means of dealing with illegal migrants. This is based on the notion laid by the United Nations Convention which recognizes that legal migrants have the legitimacy to claim more rights than undocumented migrants, but it stresses that undocumented migrants must see their fundamental human rights respected, like all human beings. This is referring to Article 13, The Universal Declaration of Human Rights that provides for the right to freedom of movement and the right to leave and enter other country. However this should not be interpreted arbitrarily. 6P Program provide leniency to choose either be legalize and secure work or to leave for homeland upon being pardon. In this way, illegal migrants are not victimized while the country remains sovereign and respected.

Keywords: Legalizing, Foreign workers, humanitarian and 6P Program

Introduction

In situations where there are migration crises such as expulsion, asylum and refuge, humanitarian systems approaches are used to complement migration management. Their varied mobility problems are better addressed in these approaches and frameworks. The latter encompasses policies in the areas such as facilitating migration (e.g. labor, family migration); regulating migration (e.g. return, border management); migration and development (e.g. remittances,

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diaspora); and cross-cutting protection provisions (e.g. human rights, access to asylum). This paper will focus on how 6P program established by Malaysia government to facilitate the registration (*pendaftaran*), legalizing (*pemutihan*), amnesty (*pengampunan*), monitoring (*pemantauan*), enforcement (*penguatkuasaan*) and expulsion (*pengusiran*).

In the context of migrant labor, Universal Declaration of Human Rights (UDHR) provide various rights to migrants as identified below;

Everyone has the right to life, liberty and security of person (article 3)

Everyone has the right to freedom of movement and residence within the borders of each state.(article 13(1))

Everyone has the right to leave any country, including his own, and to return to his country.(article 13(2))

Everyone has the right to seek and to enjoy in other countries asylum from persecution. (article 14(1))

This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.(article 14(2))

Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. (article 23 (1))

Everyone, without any discrimination, has the right to equal pay for equal work. (article 23(2))

Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.(article 23(3))

Everyone has the right to form and to join trade unions for the protection of his interests (article 23(4))³⁰⁸

In this context, migrant is seen as having human right to ensure his freedom to move and have a place of shelter in his country. And if he leaves his country he should be able to return home to his own country. If a person finds that his life is threatened because of some political problem and if he seeks protection for that purpose, he will be considers as a person who is seeking for asylum. Thus it is his right not to be prosecuted and to enjoy asylum in other country. And everyone has the right to work, free choice of employment, to just

³⁰⁸ The Universal Declaration of Human Rights - United Nations
www.un.org/en/documents/udhr/

and favorable conditions of work, just and favorable remuneration, to protection against unemployment and, to join trade unions.

Mobility can also be seen as a crucial strategy for accessing these rights and livelihoods, and is deliberately employed as such by individuals and communities. Therefore, humanitarian approaches can be strengthened through a deeper understanding of the migration context and more systematic application of migration policy tools. A better awareness and tracking of population movements before and during a crisis can usefully underpin preparedness, protection and assistance efforts.³⁰⁹

Malaysian Policy on Foreign Labor

Foreign workers are essential when a country is on the approach to become a developed country status. In Malaysia, only foreign workers from the specified countries can be employed in specific work sectors as determined by the Malaysia Government and illustrated in Table 1. There is no doubt that the country still needs foreign workers to get particular work done. Some business owners even claim that without foreign laborers, their businesses would take a hit, which in turn, would affect the economy.³¹⁰ It is recorded by governments that there are 3.1 million foreign workers in Malaysia, estimated of which two-thirds are illegals. A total of 577,427 illegal immigrants (PATI) have been legalized under the Comprehensive Legalization Program for Illegal Immigrants or the 6P program, which ended on June 30th (original deadline is April 10th and October 10th). They were from the 1,015,852 PATI registered under 107,136 employers from sectors such as manufacturing, construction, plantation and agriculture. About 43.2 percent or 438,425 PATI are yet to be legalized. The following table illustrates the sending countries and the work sectors allowed as at June 2012.

Table 1: Numbers of Legalized Foreign workers (Pati) as at June 2012.

³⁰⁹ IOM International Dialogue On Migration 2012, Moving To Safety: Migration Consequences Of Complex Crises Managing Migration In Crisis Situations Intersessional Workshop, 24 And 25 April 2012

³¹⁰ Sean Augustin and Koi Kye Lee, New Straits Times, Thursday, Apr 12, 2012; <http://news.asiaone.com/News/AsiaOne%2BNews/Malaysia/Story/A1Story20120412-339195.html>
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Work Sectors	Sending Countries
<i>Manufacturing</i> - all export oriented manufacturing, that is where more than 50% of its production is for export. - Non-export orientated manufacturing (i.e total sales of RM2 million and above company's minimum paid-up capital of RM100,000), which are:- • wood based industry • furniture industry • rubber based industry • plastic based industry • food processing and manufacturing industry • building materials industry • iron, steel and mining industries • ceramic industry • textile industry • footwear industry • engineering and fabrication industry • manufacturing related industries • quarry and bitumen industry	Indonesia Cambodia Nepal Myanmar Laos Vietnam Philippines(male only) Pakistan Sri Lanka Thailand Turkmenistan Uzbekistan Kazakhstan
<i>Plantation- Crops</i>	
Food-Floriculture -Animal husbandry - Aquaculture	
<i>Agriculture</i>	
<i>Construction</i>	
<i>Services sector-</i> Eleven sub sectors: (restaurant, cleaning services, cargo handling, launderette, caddy in golf club, barber, wholesale/retail, textile, metal/scraps/recycle activities, welfare homes and hotel/resort island.	India
Services (cooks, wholesale/retail, barber, metal/scraps/ recycle, textile)	
Construction (fixing of high voltage cable only)	
Agriculture Plantation	
Total Numbers of PATI legalized as at 30 th June 2012	577,427

Sources: News Ministry of Home Affairs, 14 June 2012.

Besides legalizing temporary workers, there are other cases managed *via* Amnesty and expulsion. However there are larger numbers of amnesty as compared to expulsion cases as seen in the following Table 2. This can be regarded minimizing the effects on these illegal foreign workers as a means of managing the unregistered temporary workers. In the process of implementing the 6 P Program

operations, the following data was obtained through arrest done on illegal immigrants. This can be seen in Table 2.

Table 2: Amnesty and Expulsion of Foreign Illegal Workers (between 20/10/2011-13/6/2012)

Action	Arrest			
	2010	JAN-MAC 2011	20/10/2011-13/6/2012	
	Illegal Immigrants		PATI (Thousands)	Employe r (Hundre d)
Total No.Arrested INDONESIA	34,905 14,275	17,914 7,676	15,384	364
Cases in investigation			4205	36
Action pending in court INDONESIA	6,928	1,876	2,412	
Compound from citizen MALAYSIA	Collections RM 11,540,850	Collections RM 1,814,725		
INDONESIA	RM 5,227,971	RM 1,674,009	1,020	64
Total collection of citizen	RM27,026,940	RM 6,561,430		
Freed- no case			5,234	128
Traffick victims			154	136
Expulsion	42,622	9,294 (till 23 april 2011)	2,359	
Total No. Investigated			100,109	
<i>Amnesty & Expulsion</i> Indonesia			82,253	
India			10,091	
Nepal			9,271	
Myanmar			7,850	
Kemboja			5,121	
Bangladesh			4,816	
Vietnam			3,242	
Pakistan			2,707	
Filipina			2,249	
Sri Lanka			1,705	
China			1,492	
Other countries			1,627	
Total pardon/amnesty			132,424	
Expulsion Route :				
Air			100,133	
Sea			31,685	
Main Land			424	

Sources: *Portal Berita Kementerian Dalam Negeri, Malaysia, Kenyataan Media-Penguatkuasaan 6P sehingga 16 April 2012*

<http://portal.ikdn.gov.my/2012/04/kenyataan-media-penguatkuasaan-6p-sehingga-16-april-2012>, *Portal Berita Kementerian Dalam Negeri*, 14 June 2012.

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To manage this Registration 6P Ministry of Home Affairs (MOHA) decided a special committee with 17 representatives, among others are;

- a. Department of Immigration
- b. Ministry of Human Resources (MHR)
- c. Labour Department of Peninsular Malaysia
- d. Royal Malaysian Police
- e. Malaysian Anti-Corruption Commission

The categories of foreigners whom are required to register are;

- i. All foreign nationals who have entered Malaysia without permission and now living and working in this country illegally;
- ii. All foreign nationals who are still living in Malaysia after the pass or work permit expires or is canceled;
- iii. All foreign nationals who have been abusing the entry permit, pass or travel documents as amended or falsified;
- iv. All foreigners who violated the terms pass or permit as set by the laws of Malaysia, and
- v. Refugees that hold UNHCR card.

(For foreign workers that still having a valid work permit, there is no need to register).

Why foreign workers are still relevant?

1. It is because foreign workers were more prepared to work in sectors where locals shunned, such as the service sector. Such as the work environment that is not attractive enough for our locals, low social status associated with the jobs. Investing in machines may not be a good idea because the workers may not be able to operate the machinery because the number of skilled employees is only 28 per cent (projected by 2020 it could possibly increase to 40 per cent).
2. The country was dependent on foreign workers, especially in critical sectors, such as agriculture and plantation. These

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sectors are critical and if we discard foreign labour altogether, it would be difficult for the employer to survive. Thus it is crucial to determine the sectors that require them.

The 6P-Programme and Foreign Worker Policy

In accordance with these problems, the Government of Malaysia focuses primarily on efforts to streamline existing policies concerning migrant workers and reducing the dependency on migrant workers. Among the latest policies that are identified include;

- a. streamline all the procedures and process of hiring foreign workers.
- b. Companies supplying foreign workers are only allowed workers for the manufacturing, farming and agriculture. No new authorization to supply and manage the migrant workers.
- c. To study and improve incentives on offer to locals as the structure of salaries, allowances and training.
- d. Encourages more self service in the services sector such as gas stations, restaurants and mini markets.
- e. Bangladesh migrant workers admission remain freezed.
- f. Allows intake of migrant workers for the manufacturing of electrical and electronics, and textiles.
- g. Migrants workers are not allowed to work in the front office.

The 6P program stands for *Comprehensive Settlement Programme Foreign Workers and Illegal Immigrants*. It is a program package that incorporates some suggestions made by Foreigner Management Laboratory (MPWA) as the latest approach by the Government to strengthen the management of foreign nationals in Malaysia.

The 6 P stands for the *six stages* of Government implementation Program determined as follows;

REGISTRATION (*Pendaftaran*)- Registration of illegal foreign migrants that allows recording of personal information and data collected that will be use for biometric security purpose inline with the Government's initiative to establish a comprehensive database of

all foreigners in Malaysia. This allows effective monitoring process and efforts in handling fraudulent identity documents.

NEUTRALISE (*Pemutihan*) - All the illegals who have registered through this program will be identified if there is a need to keep them in a particular sector that involved the supply of foreign workers job vacancy. If the worker found suitable immigrants to fill the vacancy, then the next step is they will be neutralize and attached to foreign workers with a list of registered employers. However, the neutralize process will only be considered for the sector as well as national resources listed in the employment of foreign policy and that the government had given special permission to include sub-sectors that are frozen. At the same time, the neutralizing process will also take into account the qualification based on the current needs of employers by sector and sub-sector, which will be determined by the ministry/ regulatory agency.

AMNESTY (*Pengampunan*)- At this stage the illegals are not listed for neutralising, or immigrants who voluntarily choose to return to their home countries they will be pardon and allowed to return on their own cost without any form of action. However, this is only limited amnesty to illegal immigrants who commit immigration offenses.

MONITORING (*Pemantauan*), At this stage, the inspection to the employer's premises throughout the country will provide advice to the employer, as well as at the same time explain the implications of legal action if they are protecting the status of illegal workers who are not registered with 6P. Among other things, employers and the illegals who can be prosecuted under the provisions of the Anti-Trafficking in Persons Act 2007 (Amendment 2010) and the Immigration Act 1959/63 which can lead to a fine of up to RM1 million.

ENFORCEMENT (*Penguatkuasaan*), At this stage, integrated enforcement operations will be implemented on a large scale and be moved in order to detect and arrest illegal immigrants and employers whom have been identified committing immigration offense, and

EXPULSION (*Pengusiran*). In this last stage, the illegals have been arrested through integrated enforcement operations will incur legal action before expelled from the country. Since the cost of this is borne out eviction process uses government allocation, then all the

illegals were deported will be blacklisted from permission to re-enter the country.

Rationale for 6P Program

The rationale for having this 6P programs are:

I. Security and Safety

- a. To obtain biometric data and illegal immigrants in this country, thereby also get statistics on the illegal foreigners in Malaysia; The information given are name, Picture, 10 fingers right and left hands thumb prints, Numbers of passport / travel document, citizenship, gender, date of birth and employer information (name, no. Identity card, phone number, address, e-mail, and sector of employment), Confirmation of the information by the employer, and Purpose of registration - whether to work (waived), to return to their homeland (amnesty and no action/punishment), or any other purpose.
- b. To strengthen the management of foreign nationals in the country, including in and out of the country, thus also enabling their placement locations identified;
- c. To remove the negative perception of the citizen against the Government which tend to be mistaken as not acting strictly on illegal immigrants;
- d. To enable the implementation of law enforcement on a large scale for the purpose of reducing the number of illegal immigrants. This action also aimed to reduce and prevent crimes committed by the illegal immigrants.

II. For Industry Purpose

- a. To address the shortage of labor in certain sectors by changing the status of illegal foreign workers in the country so as to be distributed and placed to work with the list of registered employers;
- b. to end the rampant abuse of the levy imposed on foreign workers. Employers may took advantage of the differing levy charges set in each sector and sought foreign workers with better deals. This was particularly so with foreigners who were initially secured in for the agriculture sector, with the lowest levy and later, ended up in the service sector that imposed the highest levy. According to the Malaysian Employers Federation (MEF), the annual levy charges for foreign workers in the

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agriculture sector stood at RM410 (S\$168.70) each. Those who operated restaurants and island resorts were charged RM1,250 and RM1,850 respectively.

The biometric system which recorded data that included the workplaces and names of their employers might just discourage employers from abusing levy charges. Authorities now have the data of those hired under the agriculture sector but working in the service sector. If the new employer, a restaurant owner for example, wants to legalize them, he has to pay the additional levy to put them in the service sector. This will influence the decision to hire foreign workers.

In conclusion, the 6P features will play its vital role to prevent the influx of immigrants via the biometric system when having to surrender thumbprints of legal workers and stored in a database. This will prevent legal workers leaving one sector to join another, or deserting an employer in search of a better paying job. Malaysia also has prepared policies that can balance up the foreign workers with local workers because the government feels that too much dependence on foreign workers will results in long terms effects not only in terms of legal implications but also, political, cultural and economic dependence. Exposing the county to all sorts of illegal migrants will lead to many problems, such as spread of contagious diseases, trafficked of women, children, organs, weapons, drugs and many other international crime syndicates. Thus the 6P Program intends to weed some of the long standing and hard core problems identified to originate from illegal immigrants.

MIGRANT WORKERS IN MALAYSIA: ISSUES, IMPLICATIONS AND POLICY CONSIDERATIONS

Datin Paduka Dr Rohani Abdul Rahim & Siti Awanis Othman
Universiti Kebangsaan Malaysia

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Abstract

The flow of migrant workers from one country to another has become a global issue. The world today is awash with alien workers who legally and illegally enter the countries to seek better employment opportunities. Among the Asian countries, the importation of migrant workers in Malaysia is a necessity when the country is facing an acute shortage of labour force in its multi-sectoral development programmes. To keep up with sustainable economic development and rapid economic progress of the country, Malaysia desperately needs the migrant workers. Looking at the trend of the current inflow of legal and illegal migrant labour, it is pertinent to point out that the negative implications of their overwhelming presence on the locals will not only continue to exist but also double in the years to come, unless consistent and comprehensive strategies and policies, rules, regulations and effective measures are initiated and implemented to stop their arrival, to detect overstay, to deport or to legalise them accordingly. It is also clear that in doing so, all parties including the government, employers, workers and employers' union, employment agencies as well as the general public should make a concerted effort in line with wider current national strategies on human resource development that give priority to expanding the labour supply. This is to keep pace with the technological developments arising from the transformation on the economy towards an industrial-based production structure.

Keywords: migrant workers; policy; employers; development

In the last few decades, Malaysia experienced a very high level of industrial development; and its industrial sector is now becoming increasingly important day by day. This sort of industrial development obviously generates a huge demand of the work force for immediate employment in the industrial and manufacturing sectors. The rapid expansion of manufacturing and industrial sectors created a large number of employments in the country. But as there is a great scarcity of domestic labour force in the country, they have to depend largely on the foreign workers for their burgeoning industrial plans.³¹¹ The importation of migrant workers into Malaysia is a necessity when the country has been facing an acute shortage of labour force. But with this, there has been a simultaneous entry of a huge number of illegal immigrants as well. The records in the Malaysian Police Headquarters and Immigration Department estimated that there are over 1.8 million illegal immigrants with the ratio of 1:1 with the legal and documented migrants. However, in 1996 and 2011, the government urged all the employers in the country to legalize the illegally employed migrant workers to enjoy the privilege of general amnesties granted by the government.³¹²

Similar to the legal workers, the illegal workers were also employed but at a very low wage rate. It is a known fact that employers prefer these illegal migrants due to several reasons. First of all, because of their unlawful status, they are less demanding in terms of their salary. Secondly, to boost their production, the employers can get them to work extra time with a minimum wage payment. But there is another important reason which compels the employers to hire the illegal workers. Owing to bureaucracy, the employers often find the legal procedure of importing migrant workers a lengthy, tedious process. Therefore, they recruit illegal migrant workers who are readily available for employment. The course of registration process was to be borne by the Malaysian employers, not the authorities of the origin country or employees. Furthermore, for every illegal employee, the employers has to go through several procedures such as preparing them for the medical check-up, paying standard fee for works permit and visa documents. These amounts become burdensome if the employers have hundred of illegal workers and this leads them to continue

³¹¹ Shamsulbariah, K.A. 1998. "The Constant flux, the mobile reserve and the limits of control : Malaysia and the legal dimensions of International Migration," in R.Iredale, C.Hawksley and S. Castles (eds), *Migration in the Asia Pasific : Population, Settlement and Citizenship Issues*, Edward Elgar, London, p.46

³¹² Malaysian Immigration Department, as at December 2011.

hiring illegal migrants as workers.³¹³ Legalization also means that the employer are bound by a two year contract to the workers and this does not suit many employers in the plantation and construction sectors who normally used migrant workers in a much shorter terms and dump them once the works is completed.³¹⁴ In this regards many employers refuse to comply with the new ruling and legalization exercises as they bring about extra financial burden.

The resurgence of migration has brought new challenges to the Malaysian state. Malaysia thus, had to established policies in area such as labour migration, refugee and human trafficking; and is at another cross road of re-articulating its migration frameworks to better manage migration. The state's current regulatory structures and other control system are also evolving and its -periodic amnesties, detention and deportation programmes and responses to the refugee crisis are being played out against the background of the human rights of all migrants. However the policies that attempts to regularize and register illegal immigrants as well as measures taken to prevent them from entering the country had limited success despite the facts that several changes and measures were taken.

Consider also that, to employ a migrant worker through an approved agent, employers have to spend an average of RM2500 to RM8000 per migrant according to employment sector. It is also pertinent to note that despite the fact that the number of approved and legal agents has increased, the number of illegal agents has also risen.³¹⁵ As a result, there was a considerable number of illegal in-flow of migrant workers through illegal agents, particularly for small and medium sized industries since the cost of hiring workers through illegal agents is far lower than the approved agents.³¹⁶

³¹³ It should be borne in mind at this stage that illegal (undocumented or irregular – anyone who does not hold a proper travel document or valid visa to work in the country, including refugees, asylum seekers and trafficked persons) migrants constitute an important part of the migration stream, comprising approximately 50% of the total number of migrant workers in Malaysia.

³¹⁴ Lee, M.2010. “The factor market consequences of migrant workers in Malaysia : A Production Approach”. Paper presented at the Trade and Development seminar, Australian National University, Canberra, July 30.

³¹⁵ Sreenevasan, Ambiga, 2006, “Obligations of Labour Contractors and Agents”, paper presented at the Lawasia Labour Law Conference – Labour Migration: international and National Progress, Kuala Lumpur, August.

³¹⁶ Azizah Kassim. 1995. “From neglect to legalization: The Changing State Response to Illegal Inflow of Foreign Labour In Malaysia”. Paper presented at International Conference on Globalisation: Local Challenges and Responses, 19-21 January, Universiti Sains Malaysia, Penang.

Constraints in the legalization of immigrants are also related to a number of other factors. One of them is the heavy responsibilities of the implementing body, in this case the Immigration Department, which has to cope with the problems of a huge number of applicants, changing rules and regulations in a short period and the different economic sectors. The task is monumental. The problems become even more complicated when the process of registration and legalization involves only those who are full-time employees and does not include immigrants who are petty traders, hawkers as well as their wives, children and close relatives whom they brought in together. In addition, the cost and expenses of registration and legalization of immigrants are very high. The cost of transportation to immigration depots throughout the country, expenses during the detention period and deportation to their respective countries have to be borne by the government.

The nature of the immigrants' movements in and out of the country in a short period caused difficulties in legalizing them. Some immigrants might have come in according to legal procedures but they did not return to their countries nor extend their expired visas. This group of immigrants is very difficult to apprehend since they know of effective hiding areas and are also very close to some locals who would inform them of any exercise undertaken by the authorities.³¹⁷ Moreover, preventive measures undertaken by the police and the Immigration Department are not easy to implement with the existence of huge and long coastal areas.

The Immigration Department under the Ministry of Home Affairs bears full responsibility for the policy implementation. The government reviews the employment situation regularly and industries that require migrant labour will be scrutinized before importation is allowed. Prior to this, the employers are required to forward their recruitment advertisements and reminded that local workers should be given priority. When such vacancies are not filled by the locals, the employers can apply to the Immigration Department. Only then are the employers issued with a certificate to recruit immigrant workers who must have a passport and visa, and pass the medical check-up.

Strategies and policies towards immigrant labour in Malaysia have been formulated through a number of processes. To date, there has never been a comprehensive policy on the issue of illegals and immigrant

³¹⁷ International Trade Union Confederation (ITUC) 2010, "Internationally recognized core labour standards in Malaysia," report for the WTO General Council review of the Trade Policies of Malaysia, Geneva, January 18-20.

labour.³¹⁸ The immigrant arrivals cannot be successfully controlled without adequate mechanisms to overcome and to tackle the problem which creates adverse social, economic and political implications on the society and the local work-force. Such growing dilemma and issues are among the phenomena that the Malaysian Government cannot and should not neglect. Nonetheless, if the policies and measures introduced purposely and to terminate the inflow of immigrant labour are too stringent, the economic growth of the country may be jeopardized. Local and foreign investors may divert their investments and activities to other less developed countries of Asia or elsewhere. In this regard, contributions of immigrant labourers to sustainable economic growth and physical development of the country are significant.³¹⁹ More consistent and comprehensive strategies and policies, rules and regulations and effective measures should be imposed not just to stop their illegal arrival, but also to detect their overstaying and to deport them.³²⁰ Conversely, the same approach should be taken to legalize accordingly. Furthermore, all parties and relevant authorities should make concerted effort in line with strategies to produce a larger local work force under the country's human resource development.

It has been suggested that the country should immediately go for installing high-powered technology for its development programmes which will reduce dependence on foreign workers. The locals often complain about migrant workers violating the norms and values of the society and not respecting the local culture. In this regard, Malaysia as the receiving country may request that the exporter countries introduce some orientation programmes before sending them to work in this country. Government of Malaysia should formulate a most transparent and comprehensive policy to deal with the migrant workers so that they can be utilized suitably in a better working environment and also at the same time, so that they do not hurt the sentiment of the local people.³²¹

³¹⁸ Abdul Karim Zehadul, Mohd Asri Abdullah and Mohd Isa Bakar. 1999. *Foreign Workers in Malaysia : Issues and Implications*. Kuala Lumpur: Utusan Publications and Distributors Sdn Bhd. p.161

³¹⁹ Kanapathy, V. 2006. "Migrant workers in Malaysia : An overview", paper presented at the Workshop on an East Asian Cooperation framework for Migrant Labour, Malaysia, December 6-7

³²⁰ Azizah, K. 2005. "Cross-border movement of foreign workers in Malaysia : A Comparative Analysis," 3rd Quarter, pp.78-91

³²¹ Wickramasekara, Piyasiri. (2007). "Protection of migrant workers in an era of globalization: The role of international instruments", in R. Blanpain (ed.): *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 9th edition. Austin, Wolters Kluwer;

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Not to forget that employers are confronting numerous policy and practical challenges in employment of migrant workers, including : identifying, recruiting and ensuring entry of migrant workers through regular channels; complying with complex and lengthy administrative procedures, addressing document control; facing risks of sanctions for employing migrant workers without authorization; managing relations in multi-ethnic workplaces; and assuring proper workplace protection. Corporate social responsibility also requires that employers follow good practices in protecting migrant workers for example equal treatment and non-discrimination at workplace. Employers are also playing a major role in promoting and creating tools to encourage cultural understanding. Employers often lack the necessary expertise and resources to implement integration strategies in-house. Tools that may be useful to develop a comprehensive and effective strategy for migrant workers include coordination at all level of governance; guidance and guidelines to raise awareness of employers of their rights and liabilities, standard setting by public sector and clear policies and goals. It must also be remembered that employers are also contributing to promoting development benefits of migration, not just to home-country but also to the countries of their migrant workers.

Very recently, the inflow of illegal immigrant workers reached a level that cannot be tolerated anymore. The government is now in the process of repatriating these illegal immigrants back to their own countries through mutual arrangement with the governments of the sending countries. The persistent economic problem and unstable status of many Asian currencies have somehow forced Malaysia to formulate and implement stricter and more stringent immigrant labour policies in order to return the country to its initial economic development tracts.

It is clear that foreign workers migration phenomenon is difficult to avoid especially when most of the country in the world today are more focus to maximize their economic development. Even the world is getting hi-tech, roles of human resources are still important especially in particular sectors and traditional. Shortage of human resources in a country will cause development of foreign resources in order to cater domestic employment demands.

Taran, P. (2007). "Clashing Worlds: Imperative for a rights-based approach to labour migration in the age of globalization", in *Globalization, migration and human rights: International law under review*, Vol. 2. Bruylant, Brussels;.

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ENVIRONMENTAL LAW'S PROTECTION FOR THE VICTIM IN COAL MINING ACTIVITY, SAMARINDA

Siti Kotijah, SH.,MH, Ida Wahyuni

Universitas Mulawarman

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Abstraction

Legal protection within overcome the disaster of mining area of Samarinda city referring Law 32/2009 concerning Protection and Environment Manageable, Law 24/2007 concerning Overcoming Disaster and Law 4/2009 concerning Mineral and Coal. The regulations above have had role the effort of protection and manage mining area. The principality of environment law's protection in Samarinda is not well enforced due to the difference execution of *ultimum remedium* principal as mentioned in Law 32/2009. Furthermore, there is a distraction of interpretation regarding the clause explanations which emphasize on administration and civil sanction, for the criminal sanction will be sentence as the final effort, counted as the material article for victim's protection in mining operation area. It is required three evaluations; substance law, human resource and infrastructures. It is also existed several resistances; human resources of law enforcer, executing regulation of Law 32/2009, lack sense of law and politicization inside mining.

Keywords : Legal protection, Law, Mining, Samarinda

INTRODUCTION

Coal Mining Activity in Samarinda City

Samarinda in the only capital city have transformed into the mining area, almost seventy five percent of its region has defined as Wilayah Izin Usaha Tambang / Licensed Mining Area (LMA). The data from Department of Mining, Samarinda point out from sixty eight mining company existed; the permit issued by city government is sixty three, four licenses coming from central government while the rest from Province of Kalimantan Timur. The sum of mining area allowed from the city government is more than a half compare with permissible area of each company despite of covered area not up to one tenth licensed area from the central government. Landmass of rice field and plantation area according statistic counted 34,782 hectare, whereas the housing landmass estimated 6,000 ha. There about 19,000 ha overlapping area between site mining, farming and housing.

Table 1, LMA Area based on Permit Source (hectare)

Source	Total company	Total area (ha)	Average sum per company (ha)
Central*	4	20,843	5,211
Province*	1	2,343	2,343
City **	63	26,863	426
Total	68	50,049	7,980

Notes: * per 31 Dec 2008; ** per late Nov 2011

Data : Department of Mining of Samarinda, 2011

The total area given is over exceed as is properly regulated by Regional Regulations 12/2002 concerning Program of City Landscape 1999-2004. The site of coal mining is only allowed in the District of Sungai Siring (chapter 22).

Children Security in the Area of Coal Mining , Samarinda

The children safety oftentimes abandoned, mostly by the small level of companies and ignoring securities platform. The debris holes of digging area are neglected, and careless children are easy to play around it. In Ghana, reports said one child fall dead after plunge to the abandoned pit, (Agyapong,2009)

Security issue also occurred when parents (mother) must work as day labor in mining sites together with her child and even the infants. They usually placed under sheltered field or let them play under less surveillance. Report from Tanzania had revealing if among the children helping their parents lift up hazard mining materials. This practice suffer children to TBC also miss the chance to have education (Kitula, 2006).

Contribution to Local Economy

Coal mining contribution towards economic sector in Samarinda considered low enough. Last five years data (2006-2011) projecting mining sector share 6,3% out of Domestic Regional Product of the city. Mining contribution in 2010 only 1% higher than

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2006, insignificant also happened to another market sector. This mean, the economic structure of Samarinda is growing slowly. On the contrary, Mining Licensee growing rapidly resulting the coal production in 2009 third times in numbers than 2006. Most contribution shared from trading/hotel and restaurant (28%), manufacture (20%), services (12%), finance and rents (13%) and transportation (11%). Mining contribution is stand on sixth rank among those.

Table 2. Business sectors contribution to Samarinda Budgeting 2006-2010 (%)

Business Field	2006	2007	2008	2009	2010	Ave	Progress*
Coal and Excavation	5.7	6.0	6.5	6.6	6.8	6.3	1.0
Farming	2.2	2.3	2.2	2.2	2.1	2.2	-0.1
Manufactures	21.9	21.5	21.2	20.8	20.3	21.1	-1.5
Electricity, Gas and Water	1.3	1.2	1.3	1.3	1.3	1.3	0.0
Construction	5.7	5.6	5.5	5.5	5.3	5.5	-0.4
Trading, hotel and Restaurant	27.4	28.1	28.3	28.4	28.4	28.1	1.0
Transportation & Communication	11.5	11.0	10.3	10.5	10.5	10.8	-0.9
Finance and Rents	12.3	12.4	13.0	12.8	13.0	12.7	0.7
Services	12.1	11.8	11.7	12.0	12.3	12.0	0.2
Total Budgeting	100.0	100.0	100.0	100.0	100.0		

Source : Samarinda Government, 2011

Mark*: fluctuation 2010 – 2006

Table 3. Coal Productions in Samarinda Region

Year	Production (ton)	Progress (%)
2005	407,134	
2006	1,580,554	288
2007	2,200,098	39
2008	4,401,783	100
2009	5,132,915	17

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Average	111
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Table 4. Economy Growth minor Oil (%)

	2006	2007	2008	2009	Ave.
Samarinda	5.94	2.95	4.86	4.51	4.57
Tarakan	7.17	7.26	6.53	6.13	6.77
Balikpapan	7.93	8.02	10.14	9.98	9.02
Pontianak	4.96	5.45	5.42	4.93	5.19

Source: Dept.of Statistic Province of Kalimantan Timur year 2010

From the data above may conclude the average economy growth (minor oil) in Samarinda for 2006-2009 period stands under average from other cities without coal resource such as, Tarakan, Balikpapan and Pontianak. High demand on coal production isn't worth contribute local economy but the high cost paid through social and environment risks.

Healthy and good environment qualified as human right of Indonesia civilian as well as regulate in article 28H UUD 1945/Indonesia Constitution. Mineral and coal within the region of Indonesia land shall wisely manageable lead to bring the economy and social welfare throughout basic needs of people. This also mean to bring secure life, law ought to protect every citizen in mining activity foremost post mining activities. In Samarinda, five children lose their live in abandoned pit area, show clearly how the protection of law isn't run very well.

Purposes of Research

- a. To understanding the policies of Samarinda Government regarding environment law and its protection.
- b. Comprehend the legal action above the victim suspected died in post mining activity.

Methods

The selected method is empirical juridical, with the approach of statutory, concept and cases, have based on primary and secondary legal material and qualitative analyze.

ELUCIDATION

Legal action on the death of five children in the pond of abandoned mining site considered as civil offence from unsustainable resource exploitation which define as coal mining. Based on the fact, that the pond haven't been reclamation clearly break Law 32/2009 article 22(1) that activities of mining production with critical impacted are obligated to hold Environmental Impact Assessment/AMDAL. Refer to article 34 Law 32/2009, every production less than 100 ha wide is exclude form AMDAL but must have Environmental Management and Monitoring Plans (UKL-UPL) approval. AMDAL or UKL-UPL explains the reclamation as mandatory process after mining activity. These prove strong evidence during investigating the death of five children. Are the companies obediently make the reclamation or not?

Samarinda government publish Regional Regulation number 20/2000 concerning General Mining but has been cancelled by the Decision of Ministry of Domestic Affair 32/2002, following Law number 22/1999 concerning Regional Autonomy, Samarinda must withdrawn 20/2000. Instead to revoke it, the city government revises 20/2000 and so Regional Regulation 20/2003 issued without any article considering the disability of 20/2000. Furthermore, Law 4/2009 ought to become the legal base of mining policy in Samarinda.

System Control of Environment Damage

Regional regulation of General Mining 20/2003 doesn't specifically arrange the prevention instruments of ecology damage, spatial prerequisite, Environmental Impact Assessment/AMDAL, mining waste standard quality and obligation of risk analysis. All of those instruments are compulsory considering the high risk operation coal mining. It depend on the assessment system which also running under expectation.

Board of Nature Environment Samarinda has a pollution control instrument but going improperly due to the less budget allocation,

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not more than 2% of Samarinda expenses every year. This circumstance makes the Board unable to monitoring water and air pollutants regularly. Department of Energy and Mining Samarinda has supervising mining function, but again with only two mining ranger facing around fifty company make it unsuccessful to enforce crucial violations.

Tabel 5. Sharing Allocation for each Function (%)

Function	Expenses of Samarinda		Average Expenses in Province		Average Expenses of Indonesia	
	2010	2009	2010	2009	2010	2009
Public Services	39.2	31.1	49.8	33.4	35.3	33.7
Order and Correction	0.9	1.0	1.0	1.1	1.0	1.0
Economy	9.4	16.3	4.2	11.2	9.4	9.3
Environment	2.4	2.1	2.0	2.1	2.1	2.1
Housing and Public Facility	25.0	26.3	17.9	28.4	14.5	17.1
Healthy	6.6	3.1	2.7	6.8	9.2	8.8
Culture and Tourism	0.6	0.3	0.3	0.5	0.6	0.6
Education	14.9	19.1	21.1	15.5	26.5	26.0
Social Warranty	1.0	0.8	0.8	1.0	1.4	1.4

Source: Samarinda Government year 2011.

Criminal Law

In the field of criminal law the cases above related to act of negligence. Indonesia Penal Code article 359 “Any person by whose negligence the death of another person is caused shall be punished by a maximum imprisonment of five years or a maximum light imprisonment of one year”. To deliver prove of negligence refer to obligation imposed and any harm of it.

The legitimate of Mining Permit/Izin Usaha Pertambangan (IUP) basically indicate contractual relation and obligation to fulfill Environmental Impact Assessment /AMDAL or Environmental Management-Monitoring/UKL-UPL for conduct reclamation in post mining stage. On this fact, the contractual relation has implements reclamation of company's obligation. In the frame of environmental law, proving reclamation existence isn't hard to bring, by the implementation Law 32/2009 to utilize protection and environment management.

The Effort of Environment Law Protection

Case of the five children death already had drawn the public attention. In the middle of the criminal procedure, public prosecutor had returned the case's dossier three times to the investigators due to the lack of negligence evidences. The case also demand legal responsibility from Samarinda government because neglectful supervision of post mining activities. Therefore, verification of the children's death addresses to Mining Permit holder and/or Government of Samarinda. The assessments of Law 32/2009 jurisdiction impose through the deviance of every obligation among two sides above.

Thus the aspect that the protection of environmental law is the substantive law human resources, facilities and infrastructure, this is due to the constraint of the implementation of this law, the state human resources in law enforcement, there is no rule of law No. 32, 2009 year is still a lack of legal awareness and politicians in mining.

Conclusion

- a. Environment law is not adequate to protect disaster at the surrounding mining are in Samarinda City, due to strength to the medium ultimatum azas.
- b. Law protection is involved by material – law , that is Law No. 32, 2009 year regarding protection and environment management, human resources, facilities and infrastructure.
- c. Criminal procedding towards five childrens are still looking evident of negligence and criminal law.

Suggestion

Environment law in maning disaster region city government of Samarinda, better ensure legal certainly and point of realization on that the management of the natural resources of coal in Samarinda City should be more emphasis on the environmental aspects.

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