Promotion of Refugee Law in Indonesia

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Usaha untuk memperkenalkan hukum mengenai pengungsi telah mulai dilakukan di Indonesia sejak tahun 1981 dan mulai dilakukan secara intensif sejak tahun 1998 yang menghasilkan beberapa perkembangan. Hal tersebut nampak dari adanya ketentuan yang secara implisit terdapat pengaturan mengenai pengungsi yaitu Undang-Undang No. 37 Tahun 1999 tentang Hubungan Internasional. Selain itu, telah dikeluarkan beberapa peraturan nasional yang terkait dengan pengungsi, antara lain Surat Edaran Perdana Menteri RI No. 11/RI/1956 tentang Perlindungan Pelarian Politik, Keputusan Presiden No. 38 Tahun 1979 tentang Koordinasi Penyelesaian Masalah Pengungsi Vietnam di Indonesia, dan Keputusan Presiden No. 3 Tahun 2001 tentang Badan Koordinasi Nasional Penanggulangan Bencana dan Penanganan Pengungsi. Tulisan ini menjelaskan mengenai perkembangan dari hukum pengungsi di Indonesia dan posisi Indonesia terhadap *Convention relating to the Status of Refugee 1951* dan *Protocol relating to the Status of Refugee 1967*.

I. Introduction

1. In Indonesia, the term "refugees" *(pengungsi)* is still generally understood in its lexical meaning and used to refer to persons who are compelled to leave their place of habitual residence for another place they consider safe. The term does make a distinction between such movement of persons caused by a natural disaster (such as flood, drought, earthquake or volcano eruption) or human-made disaster (such as armed conflict, social disturbance or systematic or persistent violations of

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human right and fundamental freedoms) or a grey area between natural and human made disaster (such as forest fire caused by human negligence or landslide result from deforestation). Nor does the term make any difference between movements within state border or beyond.

2. Additionally, it is also generally perceived that the nature of refugee problems is humanitarian and social while their needs consist essentially of health care and material assistance. As to protection, it is generally understood and is applied in practice that it covers only physical protection, not the protection of their basic rights and fundamental freedoms.

3. At least three regulations of administrative and technical nature have been issued by the Government without, however, using or defining the term "refugees" as understood under international law. The first national instrument of such nature was Circular of the Prime Minister No. 11/R.I/1956 of 7 September 1956 on Protection of Political Fugitives (*Perlindungan Pelarian Politik*), the second was Presidential Decision No. 38 of 1979 on Coordination of the Solution of the Problems of Vietnamese Refugees and, the third was Presidential Decisions No. 3 of 2001 on National Coordinating Agency for the Prevention of Disasters and Handling of Refugees.

II. Circular of the Prime Minister No. 11/R.I./1956

4. On 7 September 1956 the Prime Minister issued as Circular of the Prime Minister No. 11/R.I./1956 on Protection of Political Fugitives containing guidelines on political fugitives (*pelarian politik or buronan politik*) who, according to the preambular paragraph of the circular has entered the Indonesian territory. It was not clear to what nationals the circular was referring to. Although the provisions set forth in the circular were meant as guidelines only and were issued under a circular, which is an instrument of administrative nature only, they were of significant importance for the promotion and observance of the most basic principles of the international refugee law at the

national plane. Such principle was evident in the following parts of the circular:

(a) Article I states that "To political fugitives, who enter or find themselves in the Indonesian territory, will be granted protection on the basic of human right and fundamental freedoms in accordance with international customary law". It was further stated in the general elucidation that such stance was in conformity with the relevant provisions on human rights and fundamental freedoms stipulated in the constitution applicable at that time, *i.e.* the Provisional Constitution of the Republic of Indonesia and also in line with Article 14 of the Universal Declaration of Human Rights 1948;

(b) Article 2 defines the term "political fugitives" as "foreigners who enter or found themselves in the Indonesian territory for having committed a political crime". The elucidation of this article emphasizes the concept reflected in this article that the term "political fugitives" refer to foreigners, not Indonesian citizens, "because it has been our basic concept that Indonesian citizens who find themselves in Indonesian territory shall not be extradited to another country for prosecution in spite of the fact that they have committed a crime in another country". The elucidation of this article further states that "Foreigners who are considered as political fugitives are foreigners who, according to the legal system of a given country, has committed a crime for political reasons or purpose for opposing the state system of that country. Such act may be committed either outside or in the territory of the Republic of Indonesian and it is for these reasons that Article 2 uses the expression 'foreigners who enter or find themselves in the Indonesian territory';

(c) Article 3 defines the term "political crimes" as "crimes committed for political reasons or objectives, including attempt to commit or assistance to commission of such crimes". The elucidation of this article further states that the important element, which determines whether a crime

may be called a political crime or not is the reasons, or objectives, which motivate the persons, concerned to commit such crime. This article and its elucidation imply that perpetrators of ordinary crimes, *i.e.* crimes other than "political crimes", shall not be accorded protection. The article constitutes, in fact, what is known as "exclusion clause" under that Statute of the Office of the United National High Commissioner for Refugee (UNHCR), 1950 (Para 7(d), one of the crimes mentioned) and the Convention relating to the Status of Refugees, 1951 (Article 1F(b));

(d) Article 4 stipulates that "political fugitives who enter and find themselves in the Indonesian territory shall only be protected if their acts are not against the foundation and/or interests of the Republic of Indonesia". The elucidation of this article stipulates that a political crime shall be considered as being against the foundation of the Republic of Indonesia if, *inter alia:*

(i) Such crime violates humanity, *i.e.* which contains elements of murder, kidnapping, torture or destruction of a group of human beings (genocide) or of a war crime nature, *etc.*;

(ii) The objectives of such crime are against state's order;

(iii) Such crime is directed against a religion, which exists and is legally recognized in Indonesia;

(e) The term "destruction of a group of human-beings (genocide)" is defined by the elucidation of Article 4 as "acts committed with the objectives of the destruction of an ethnical, a racial, national or religious group by various ways such as murder, serious ill-treatment, prevention of birth, forcible transfer of children of life to inflict physical destruction, *etc.*".

(f) As to "war crimes", the elucidation of Article 4 defines the term as "acts against international law of general obligations of members of armed forces of states which take part in the war. War crimes may be in the form of murder/ill-treatment of prisoners of war, murder/ill-

treatment of people in the occupied territory or other cruel acts which violate humanity and which are unnecessary in a war (not required to achieve the objectives of the war)".

5. As is the case with Article 3, Article 4 and its elucidation also constitute a recognition or adoption of a principle known as "exclusion clause" or "non-applicability" clause in international refugee law as translated in Para 7 (d) of the 1950 UNHCR Statute and Article 1F(b) of the 1951 Convention. For unknown consideration, paragraphs 3 and 4 of the 1956 Circular and their respective elucidation do not include crime against peace, crime against humanity, and acts against the purposes and principles of the United Nations as reasons for not applying the protection under the Circular to persons who committed such crimes or acts.

III. UNHCR Presence and the Promotion of Refugee Law

6. Indonesia started to face real problem of refugees in 1975. As a result of the change of regimes in countries in the Indochinese peninsula (Cambodia, Laos and Vietnam), hundreds of thousands of people left this area to seek refuge in other countries, either by land including up-river, by air or by sea. Many of them, mostly from Vietnam, who traveled by sea, reached Indonesia. There was no UNHCR office in Indonesia at that time. To secure their admission to and temporary stay in Indonesia pending solution, UNHCR acted through the Indonesian Permanent Mission in Geneva and its Branch Office in Bangkok and by sending its staff for short missions. A staff was assigned on a long term basic and the office in Indonesia was coordinated by UNHCR Branch Office in Kuala Lumpur. With the opening of Galang processing centre, since 1981 UNHCR office in Jakarta became a Branch Office of its own.

7. Since the principle peninsula in Indonesia in a large scale UNHCR's endeavors were of a more pragmatical nature, *i.e.* to secure the entry to and temporary stay in Indonesia of those Indochinese referred to with various names, such as "asylum-

seekers", "displaced persons", "boat people", "border-crossers" and, from time to time "refugees". Promotion of refugee law as such was not the emphasis of UNHCR activities in Indonesia as make time. UNHCR efforts in securing the admission of those Indochinese who left their respective country for fear of persecution and securing that they were not expelled from Indonesia for having illegally entered its territory constituted, in fact, forms of activities carried out by UNHCR to implement one of its protection mandate as set forth in Para 8(d) of the UNHCR Statute, 1950 and to promote a number of the basic principles of refugee law, namely the principle of non-punishment of refugees who enter illegally to a territory of a State as stipulated in Article 31 and the principle of non-refoulement as stipulated in Article 33 of the 1951 Convention.

8. UNHCR activities in Indonesia which may be considered as a real form of promotion of refuge law started in 1981 by entering into academic institutions to disseminate refugee law. General lectures were delivered to the schools of law of Gadjah Mada University in Yogyakarta, Airlangga University in Surabaya and University of Indonesia in Jakarta.

9. UNHCR restarted its promotion exercise in 1995 and initiated the promotion of refugee law. Seminars were organized by UNHCR office in Jakarta for the launching of the annual publication of UNHCR entitled The State of World's Refugees. During the seminars, principles of refugee law were referred to by speakers and discussed. It was evident that almost all of the participants were not cognizant of the law and its basic features.

10. Extremely serious, incessant and multi-pronged efforts to promote refugee law were made since 1998 after the fall of the authoritarian and repressive regime of "New Order". Conditions were more conducive for such efforts as the society at large is more open-minded and people felt free to express themselves. The purposes and objectives were multiple while the nature, formats and target groups of the exercise vary. The purposes include the creation of understanding and awareness on the overall refugee problems, which are not only of social

and humanitarian but also of legal nature, the existence of international legal instruments related thereto and the role of UNHCR in this matter. The objectives were two-fold, firstly, to disseminate understanding among academicians that refugee law has become part of international law and, more particularly, as is the case with humanitarian law, constitutes an application of human rights law in specific situations with a view to, eventually, incorporating the subject of refugee law in the curriculum. Secondly, of a practical nature, was to encourage the Government to accede to the 1951 Convention and/or 1967 Protocol. The nature of the exercise was both theoretical and practical, while the formats depended upon the nature of the exercise, which consisted of lectures, seminars, workshops, expert groups' meetings or trainings. Depending on the purposes, objectives and nature of the exercises the target groups consisted of students, lecturers of international law, government officials, parliamentarians and segments of the civil society.

11. For the holding of lectures, seminars and workshops on refugee law UNHCR was cooperating with a number of academic institutions such as Syiah Kuala University in Banda Aceh, Sumatera Utara University in Medan, Bung Hatta University in Padang, Trisakti University in Jakarta and Surabaya University in Surabaya. In cooperation with the Directorate-General of Immigration, UNHCR has organized trainings on refugee law in a number of places, among others Batam, Lembang and Makassar, for immigration officers. For the specific purpose of encouraging Indonesia to accede to the 1951 Convention and/or 1967 Protocol a seminar for the members of Commissions I and II, was held. For the same purpose, two other work for relevant government officials, academicians and NGOs were also held to follow-up on these to workshop to expert groups' meeting were organized which recommended the Government to accede to the 1951 Convention and 1967 Protocol with a small number of reservations on certain provisions permissible under the instruments.

12. Until the year 2000 the response of the Government with respect to the promotion of refugee law in general and accession to the 1951 Convention and/or 1967 Protocol was encouraging. In his letter of 20 April 1999 to Ms. Sadako Ogata, High Commissioner, Mr. Ali Alatas, Minister for Foreign Affairs expressed his hope that Indonesia would be able to accede to the 1951 Convention "at the right time in the near future". In the meantime, the Department of Justice and Human Rights established an inter-ministerial working group to study the various aspects and implications of possible accessions of Indonesia to the 1951 Convention and 1967 Protocol. The working Group Completed its work in November 2000 and concluded that the 1951 Convention and 1967 Protocol should be accepted by Indonesia with reservations on Articles 8, 14 and 26 of the 1951 Convention. The working group also concluded that Articles 15, 17 (1) and (2), 22 (1) and (2), 23 and 24 (1) of the 1951 Convention were of recommendatory nature while Articles 11, 17 (3), 24 (4) and 30 (2) were suggestions. As the working group was merely a technical team, it recommended that the conclusions and recommendations should be further discussed by another team the members of which should consist of officials with decision-making authority. Unfortunately, the results of the working group were not followed up.

13. Efforts to promote refugee law were also made during the process of the drafting of the bill on foreign relations, which commenced in 1996 as recommended, initially, in the relevant "Academy Text", an analytical and scientific document required to support the introduction of any draft bill before further process. Although not entirely of a normative nature, the bill, which became Law No. 37 of 1999 promulgated on 14 September 1999, incorporates three articles relating to asylum and refugees (Articles 25, 26 and 27). Article 25 is of the principles of refugee law. The Article states, "The granting of asylum to foreign nationals shall be exercised in accordance with national legislation taking into account international law, custom and practice". Reference to international, custom and practice indicates the acceptance by Indonesia of the rules of

international law, either conventional or customary, as well as international custom and practice on the granting of asylum, one of refugees, the Law is still of the view that it should be regulated by national legislation. This is reflected in Article 27 which stipulates that " The President shall determine policy with respect to (foreign) refugees taking into account the views of the Minister (for Foreign Affairs)" (Para (1) and that "The principles of policy referred to in paragraph (1) shall be set forth in presidential Decree (Para (2)). A commitment to cooperate with UNHCR is reflected in the elucidation of Article 27(1), which states, inter alia, that "Indonesia shall cooperate with bodies that have the competence to resolve refugee problems". To be noted that, under Article 25 (2) the exercise of the authority of granting asylum which is vested in the president according to Para (1), should be regulated by Presidential Decree. Most unfortunately, both the Presidential Decrees required by Article 25 (2) on asylum and by Article 27 (2) on refugees have not, until to date, been enacted, in spite of the fact that Law No. 37 of 1999 will be five years old on 14 September 2004.

14. The most recent development which is conducive to the further endeavors to promote refugee law is the incorporation of a governmental plan to ratify both the 1951 Convention and 1967 Protocol in the "National Plan of Action of Human Rights 2004-2009" as promulgated by Presidential Decree No. 40 of 2004 of 11 May 2004 (see Enclosure I, chapter III, B, no. 11 and 12). Regrettably, the ratification of the 1951 Conventions and 1967 Protocol (wrongly referred to in the National Plan of Action as "Optional Protocol of 1967 of the Convention on the Status of Refugees") has been planned for 2009 only, or five years from now. Nonetheless, this is an encouraging development as the plan signified the evolution of the thinking of the Government that refugee problems are not only of humanitarian and social nature but are of legal nature as well.

IV. Concluding Notes

15. Modest and limited in scope as they might have been, efforts to promote refugee law in Indonesia since 1981, more intensively since 1998, have produced some results. They are, to mention some of them, increasing and more widespread awareness on the part of government officials, parliamentarians, academicians and the public that the problems of refugees, while remaining basically humanitarian, they are human rights problems and problems of legal nature. In the academic world, it is significant to note that refugee law has been taught at, at least, in two universities, namely the school of law of Trisakti University in Jakarta and the School of Law at the Surabaya University in Surabaya. Not less important to note is the increasing interest among the lecturers and students on the subject of refugee law. At the normative level, the importance of the principles of refugee law is recognized, at least implicitly, in Law No. 37 of 1999 on Foreign Relations in the dealing of asylum-seekers and refugees. The inclusion of the 1951 Convention and 1967 Protocol in the list of twelve human rights-related international legal instruments for ratification during the period of 2004 through 2009 in the Indonesian Human Rights Plan of Action 2004-2009 indicates the recognition and awareness on the part of the Government on the necessity and importance of the above two instruments as the main sources of international refugee law.

16. It has been noted, regrettably, that efforts on the part of UNHCR in promoting refugee law in Indonesia through accession to the 51 Convention and/or 1967 Protocol seem relaxing. The efforts should now be revitalized and increased, as national conditions are now more conducive with the inclusion of the ratification of the two instruments in the Indonesian Human Rights Plan of Action. As the Plan of action is subject to review and assessment every year, efforts should be aimed at acceleration of the ratification of the two refugee instruments, *i.e.* not in 2009 but earlier.