

BAB 4

KESIMPULAN

Penelitian dan pembahasan sebelumnya telah mengungkapkan gambaran mengenai praktik *turn back the boat* yang menjadi pelaksanaan dari kebijakan OSBoleh Australia, dengan demikian penulis dapat menarik beberapa poin kesimpulan sebagai berikut:

- 1) Serangkaian kebijakan *Operation Sovereign Borders*, yang salah satu kebijakannya adalah *turn back the boats*, diklaim sebagai *deterrence policy* untuk mencegah pencari suaka melakukan perjalanan laut dengan menggunakan jasa penyelundup (*smugglers*). Pelaksanaannya merupakan upaya penyelamatan di laut yang dilakukan Angkatan Laut Australia bekerja sama dengan lembaga pemerintahan lainnya. Pelaksanaan kebijakan ini telah sesuai dengan kerangka hukum domestik Australia, yaitu ketentuan dalam *Migration Act 1958 (Cth)* dan *Maritime Powers Act 2013 (Cth)*, serta amandemennya *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)*.
- 2) Mengingat permasalahan pencari suaka yang kompleks dan bisa merambat ke berbagai rezim hukum internasional, maka perlu diingat bahwa salah satu prinsip utama dari penanganan pencari suaka adalah prinsip non refoulement. Non refoulement adalah prinsip hukum internasional yang telah menjadi *customary international law*, prinsip ini melarang transfer individu ke negara atau yurisdiksi lain di mana mereka akan menghadapi risiko penganiayaan atau pelanggaran hak asasi manusia serius lainnya. Prinsip ini merupakan sebuah landasan sistem perlindungan pengungsi internasional dan juga merupakan konsep kunci dalam hukum hak asasi manusia internasional. Dengan adanya keberlakuan extraterritorial pada non-refoulement, kewajiban non-refoulement berlaku di mana pun suatu negara melakukan *effective control*. Ini termasuk situasi di mana negara

melakukan kontrol *de facto* atau *de jure* atas pencari suaka yang berada laut lepas.

- 3) Pada dasarnya, Australia dapat mencegat kapal saat berada di perairan pedalaman, perairan teritorial atau zona tambahannya untuk mencegah atau menegakkan hukum apabila ada pelanggaran undang-undang keimigrasiannya. Pencegatan kapal juga dapat terjadi sebagai akibat dari pemenuhan kewajiban-kewajiban yang dibebankan kepada negara dari sumber-sumber hukum internasional lainnya, yaitu terkait Protokol Penyelundupan Migran serta kewajiban terkait penyelamatan dan memberikan bantuan di laut. Namun perlu diperhatikan bahwa kewenangan negara di laut tidak mutlak dan dibatasi oleh kewajiban-kewajiban internasional lainnya. Oleh karena itu, kerangka hukum yang mengatur pencegahan maritim terhadap kapal suaka juga berkaitan dengan hukum hak asasi manusia dan hukum pengungsi, serta ketentuan untuk melakukan penyelamatan di laut terhadap kapal suaka yang berada dalam bahaya.
- 4) *Turn back the boats* yang dilakukan pada kapal pencari suaka sebagai pelaksanaan kebijakan OSB tidak sesuai dengan kewajiban internasional Australia berdasarkan:
 - a) Hukum Pengungsi Internasional dan Hak Asasi Manusia: Australia jelas melakukan diskriminasi terhadap pencari suaka yang datang melalui laut, Australia tidak mempertimbangkan adanya “*good cause*” terhadap mereka yang mencoba memasuki wilayahnya secara tidak sah, tidak memberikan akses untuk melakukan klaim suaka dan RSD yang adil dan efektif, menahan pencari suaka di laut lepas dapat secara tidak sah menghalangi akses mereka ke prosedur tersebut dan merupakan penahanan sewenang-wenang, pencegahan justru berakhir pada perlakuan tidak manusiawi atau merendahkan martabat, seluruh perlakuan ini berakhir pada pengembalian kapal ke laut lepas atau ke luar batas wilayah laut Indonesia, yang mana merupakan negara yang tidak meratifikasi Konvensi dan Protokol Pengungsi.

- b) Hukum Laut dan Protokol Penyelundupan Migran: pelaksanaan pengecatan telah melampaui batas yang diizinkan oleh hukum laut, Australia telah mencegat kapal suaka tanpa adanya pemberitahuan atau izin kepada otoritas Indonesia dan memutar balik kapal tersebut di laut lepas, tidak adanya *appropriate measures* yang dilakukan Australia untuk membawa para migran berlabuh di daratan Australia untuk kemudian di proses sesuai hukum domestik Australia.
 - c) Hukum terkait Penyelundupan Migran: kebijakan Australia tidak sesuai dengan tujuan Protokol, kebijakan tersebut sifatnya anti migrasi dan menghilangkan hak-hak yang seharusnya diterima pengungsi termasuk mereka yang terlibat dalam penyelundupan migran, Australia tidak mempertimbangkan adanya kondisi *protracted refugee* terhadap pencari suaka yang hendak datang ke Australia, adanya dugaan petugas Australia yang membayar penyelundup untuk kembali membawa pencari suaka ke Indonesia yang mana sama dengan pemberian fasilitas untuk melakukan tindak pidana, serta tidak adanya konsultasi dari Australia dengan pemerintah Indonesia dalam memfasilitasi pemulangan para pencari suaka ke Indonesia.
 - d) Hukum yang berkaitan dengan Penyelamatan di Laut: Australia tidak memenuhi kewajibannya untuk berkoordinasi dan bekerja sama dengan Indonesia dalam upaya pencarian dan penyelamatan pencari suaka yang terdampar di laut, terlebih dalam kondisi kapal yang tidak layak laut serta kondisi fisik dari para pencari suaka itu sendiri, Australia juga tidak melakukan upaya untuk memastikan bahwa orang-orang yang diselamatkan telah dikirim dan berlabuh ke tempat yang aman, tindakan Australia mengembalikan kapal ke laut Indonesia bukan upaya pemindahan ke *safe third country*.
- 5) Sebagai sebuah negara yang berdaulat, Australia harus menghormati kewajiban dan hak-hak dibawah hukum internasional tertentu jika ingin mempertahankan posisinya di antara komunitas bangsa-bangsa. Namun, kebijakan Australia terhadap pengungsi dan pencari suaka masih belum

memenuhi ketentuan dalam perjanjian internasional yang telah diratifikasi oleh Australia sendiri, secara sukarela dan tanpa paksaan. Australia tidak memperlakukan pencari suaka sebagai manusia yang berhak atas penghormatan atas kemanusiaan dan martabat mereka. Dengan demikian, hukum dan kebijakan Australia dalam melakukan penanganan pencari suaka yang datang melalui laut masih belum sesuai dengan ketentuan hukum internasional.

Konsep kedaulatan, perlindungan perbatasan, penanganan pencari suaka dan, hak asasi manusia harusnya dapat beroperasi sebagai konsep yang saling melengkapi, bukan bertentangan. Menurut hemat penulis, kebijakan pencegahan dan pengembalian kapal lebih fokus dilakukan oleh Australia alih-alih memastikan keselamatan dan hak-hak pengungsi dan pencari suaka di laut. Perbuatan semacam itu mengabaikan hak asasi manusia dan penegakkan prinsip non-refoulement, yang melarang Negara mengirim orang ke negara mana pun di mana mereka mungkin menghadapi penganiayaan, perlakuan buruk atau pelanggaran serius lainnya.

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- Convention on Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994)*
- Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)*
- Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)*
- International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 23489 (entered into force 22 June 1985)*
- International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976)*

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004)

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