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THE ROLE AND LIMITATIONS OF NON-PARTY STATE OF THE 1951
CONVENTION AND THE 1967 PROTOCOL IN REFUGEE MANAGEMENT:
THE CASE OF INDONESIA AS A TRANSIT COUNTRY FOR REFUGEE TO
AUSTRALIA

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The Role and Limitations of Non-Party State of The 1951 Convention and The 1967
Protocol in Refugee Management:

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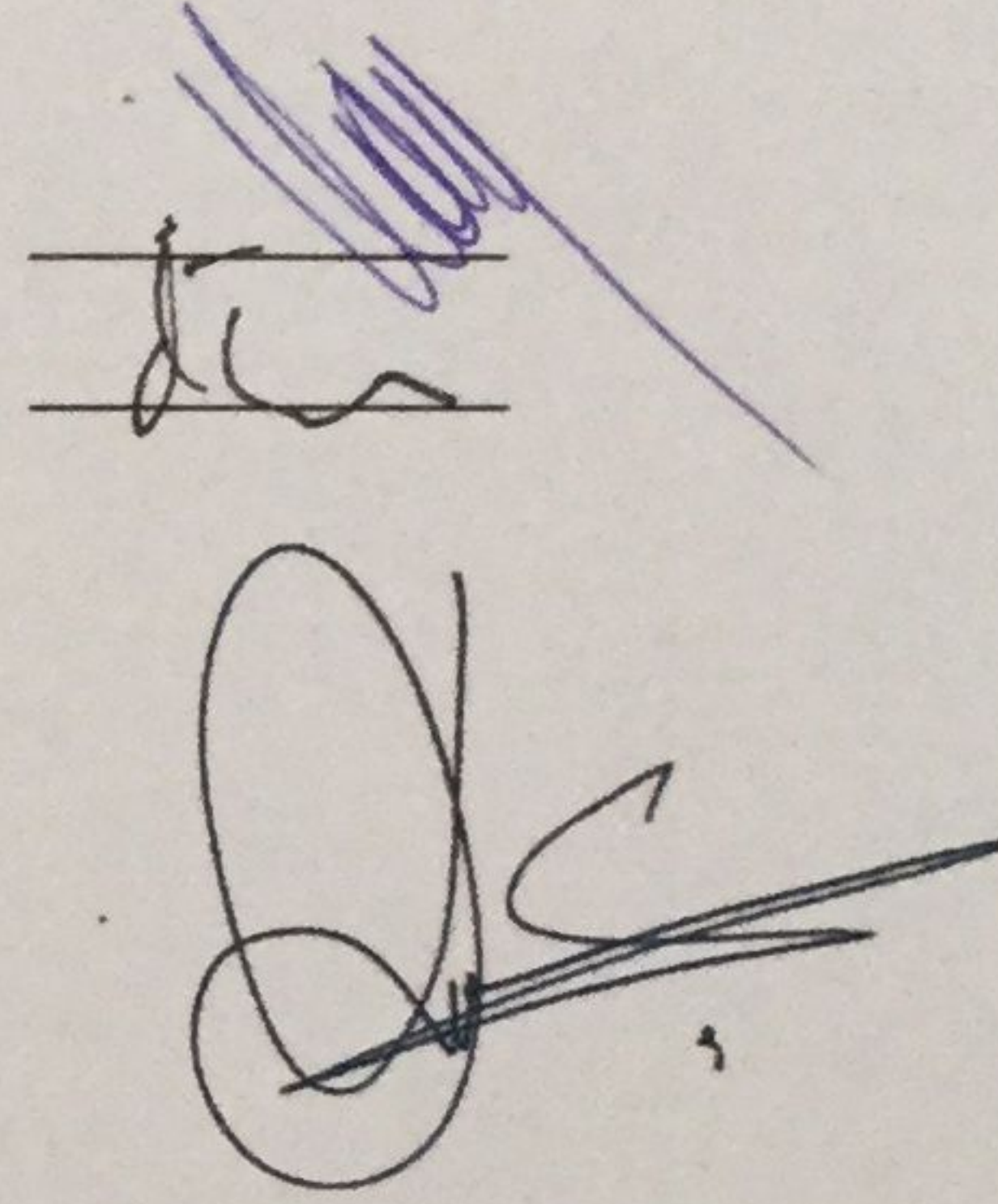
Mülteci yönetimindeki 1951 Sözleşmesinin ve 1967 protokolünün parti dışı devletin rolü ve
sınırlamaları:

Mülteci için Avustralya'ya transit ülke olarak Endonezya örnek olayı

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ABBREVIATIONS

ASEAN	: Association of South East Asian Nations
CAT	: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment
CRC	: Convention on the Right of the Child
DIAC	: Department of Immigration and Citizenship of Australia
EU	: European Union
HRW	: Human Right Watch
ICCPR	: International Covenant on Civil and Political Rights
IOM	: International Organization for Migration
JATF	: Joint Agency Task Force
MoU	: Memorandum of Understanding
OSB	: Operation Sovereign Borders
RCA	: Regional Cooperation Agreement
RI	: Republic of Indonesia
RMIM	: Reinforcing Management of Irregular Migration
SAR	: Search and Rescue
SOP	: Standard Operating Procedures
TOC	: Transnational Organized Crime
UN	: United Nations
UNGA	: United Nations General Assembly
UNHCR	: United Nations High Commissioner for Refugees
US	: United Nations

ABSTRACT

Transit migration as an emerged phenomenon in international migration has been affiliated with irregular migration and people smuggling. Along with the principle of non-refoulment and the obligation to protect the refugees and asylum seekers, every state has a dilemma to prevent the transnational crime

Every country respects the principle of non-refoulment and is obliged to protect refugees and asylum seekers who come to their territory, even though they come in an irregular way utilizing smugglers. However, the transnational crime phenomenon becomes parallel with the issue of irregular migration. Thus, every country should increase its border security to prevent the growth of this crime. Meanwhile, it can be a barrier to the state to apply the principle of non-refoulment and carry out its obligations to provide protection for refugees and asylum seekers.

To address the problem of refugees, the UN 1951 Convention has substantially regulated and established minimum standards for refugee protection. The Indonesian Government did not ratify the UN 1951 Convention and its protocol. Indonesia, as a transit country for asylum seekers and refugees going to Australia, competes with countless problems coming from the flows of refugees and asylum seekers. This thesis attempts to provide a better outlook on how law limitation can affect a transit country to manage the refugees and asylum seekers by examining the laws and regulations that Indonesia undertook in managing this issue in its territory with its limitations with the UNHCR in collaboration with the IOM to execute its mandate, helping the refugees and asylum seekers. This thesis also examines the complicated relationship between Indonesia and Australia in cooperation to prevent the irregular migration and manage the refugees in the same time –who takes the position that it does not owe the protection obligations to those asylum seekers who came from Indonesia–.

ÖZET

Transit göç; uluslararası göçte, düzensiz göç ve insan kaçakçılığı ile bir olgu olarak ortaya çıkmıştır. Sınır dışı etmeme prenebi, mülteci ve sığınmacıları koruma yükümlülüğüyle birlikte, her devedetin sınırışan suçları önlemek için ikilemi vardır.

Her ülke sınır dışı etmeme prenebesi saygılıdır ve düzensiz bir şekilde topraklarında gelen mültecileri ve sığınmacıları korumakla yükümlüdür. Bununla birlikte sınırışan suçları olayı, düzensiz göç konusu ile paralellik arz etmektedir. Böylece her ülke bu suçun büyümesini önlemek için sınır güvenliğini artırmalıdır. Bu arada, devlete sığınma önlemi ilkesini uygulamak mülteci ve sığınmacılara koruma yükümlülüklerini yerine getirmede bir engel oluşturabilir.

Mülteci problemlerine değinmek için, 1951 BM (Birleşmiş Milletler) sözleşmesi'nde mültecileri korumak için ciddi anlamda, minimum standartlar düzenlendi ve kuruldu. 1951 BM sözleşmesi ve protokolünü Endonezya Cumhuriyetinde onaylamadı. Endonezya, mülteciler ve sığınmacıların Avustralya'ya gitmek için kullandığı bir geçiş ülkesidir ve mülteci ve sığınmacı akışının beraberinde getirdiği sayısız problem ile mücadele eder. Bu tez, hukuki kısıtlamaların bir geçiş ülkesinde mültecileri ve sığınmacıları control etmekte ki etkisi üzerine daha iyi bir bakış açısı getirmek için, Endonezyanın kendi toprakları içinde bu sorunu yönetmek mülteci ve sığınmacılara yardım eden BMMYK (Birleşmiş Milletler Mülteciler Yüksek Komiserliği) ve işbirliğindeki UGÖ (Uluslararası Göç Örgütü) ile olan kısıtlamalara rağmen yetkisi uygulamak için uyguladığı hukuk yönetmelikleri inceler. Bu tez aynı zamanda yasadışı göç ile mücadele ve mültecilerin kontrol edilmesinde Endonezya ve Endonezya'dan gelen mültecilerin korumasında yükümlülük kabul etmeyen Avustralya arasındaki komplike ilişkiyi açıklar.

CHAPTER I

INTRODUCTION

1.1. BACKGROUND

The migration problem, as a large spread issue nowadays, is actually an old phenomenon, yet the international law to manage it is relatively new. The history of the World War II has shown the human rights violations that perpetrated the movement of those migrants. This event also emerged as a major driven factor of international migration throughout the world. Many believe that human right violation by the government in regards with the war is the main condition that forces a mass people displacement.

In regard to contemporary movement, the transit migration becomes more significant because the route is no longer a direct one but can involve a few of transits before the destination. It is interesting to examine the shift of international migration complexity from its traditional point of view to the most contemporary one: transit migration. The direct movement of migration from the country of origin to destination is no longer seen in the recent refugees and asylum seekers issue. In order to understand the new path of this kind of migration, it is important to understand the prior process of transit migration.

Fortunately, the 1951 United Nations Convention Relating to the Status of Refugees (the 1951 Convention) and the 1967 United Nations Protocol Relating to the Status of Refugees (the 1967 Protocol) have been the international instrument to protect those refugees and asylum seekers. All the member states are obliged to protect the refugees and asylum seekers on its territory after they determined the status of them, whether they are asylum seeker or refugee or not. Unfortunately, in practice, some of these member states started to look for a loophole to avoid the obligation. It can be said that states have started to establish a legal procedure to control the incoming flux of refugees and asylum seekers. The result is every states are trying to withdraw the obligations but they keep holding the non-refoulment principle. As the consequence, transit countries –

which are not a member state of the convention– will hold the big role in keeping the refugees and asylum seekers on their territory under the pressure of the non refoulment principle.

Indonesia, as one of the transit migration destination to Australia has been out of sight. The problem that it had as a sovereign state and a dutiful state for its international obligation should be considered in the international world. The aim of this thesis is to examine the government of transit country's problematic concern for refugees that have been stranded for years with no permanent settlement policy or certainty of the final destination country. The role of Indonesian Government in tackling the issue of refugee starting from the first flow of incoming refugees and asylum seekers until now is complicated. In response to this issue, the Indonesian Government has its own strategy to manage the refugees and asylum seekers in its territory and push the states party of the 1951 Convention and the 1967 Protocol to move forward helping these refugees and asylum seekers, particularly Australia. Yet unfortunately, the policy is limited in terms of Indonesia's capacity as non-party state of the 1951 Convention and the 1967 Protocol.

In regard to this situation, I formulate two research questions to be answered in this thesis: *what is the effect of international law in the ability of individual states to tackle migration crises?* I attempt to address this question with a focus on Indonesia as a country that has not ratified the UN 1951 Convention, yet is struggling with the issue of transit migrants (refugees and/or asylum seekers) en route to Australia.

Based on Indonesia's immigration law and regulations, everyone who enters the border of Indonesia without proper documents will be determined as illegal migrant. Those who are considered as illegal migrants will be put on the detention centers; even they are refugees and asylum seekers. Having a new local mechanism or legal framework of treating refugees and asylum seekers, Indonesia becomes very vulnerable in the sense of managing the refugees and asylum seekers. Indonesia then authorized the United Nations High Commissioner for

Refugees (UNHCR) in collaboration with the International Organization of Migration (IOM) to execute its mandate, helping the refugees and asylum seekers in Indonesia's territory. According to the UNHCR page, it registered 7,560 asylum seekers in Indonesia and 6,269 refugees by the end of February 2016.

Most studies done until today focus on the conflicts that cause migration, on migrants themselves, and on destination countries of migrations. The amount of academic research that aims to discuss the transit countries, that in several cases become a limbo for migrants, is considered limited. Thus, this study is expected to complete the few existing literature on transit migration and aims to come with a new perspective from non-party state of the 1951 Convention and the 1967 Protocol, also as transit country with its limited competence in tackling the emerging issue of refugees and asylum seekers. By examining Indonesia's role and actions, it can affirm how transit countries behave towards the refugees and asylum seekers and destination countries' government. In the end, this study is expected to at least point out the attention to transit country as one of the keys overcoming the issue of refugee.

In this thesis, the relationship between Indonesia and Australia in terms of border protection that affects Indonesian policy regarding the refugees and asylum seekers in practice is seen as a very dilemmatic bilateral relationship. This Indonesia-Australia bilateral relation has shaped Indonesia's role and actions in tackling this migration issue more or less.

1.2. GEOPOLITICAL SIGNIFICANCE OF INDONESIA

The Republic of Indonesia, abbreviated with the RI or Indonesia, is a country in Southeast Asia that crosses the equator, located between the continent of Asia and Australia, and between the Pacific and the Indian Ocean. Indonesia is the largest archipelago in the world, comprising 17.507 islands commonly referred as Nusantara in Indonesian. With a population of over 256 million by 2016 and GDP worth USD 861.9 billion in 2017, Indonesia is the fourth most populous country in the world and has more than 207 Muslims, making it the biggest Muslim country globally (World Bank, 2017). The Muslims comprise

87.2% of the country's entire population, followed by Christians (9.9%), Hindus (1.7%) and others—Buddhists and Confucians— (0.9%) (CIA 2016).

Indonesia has a republican government whose House of Representatives, Regional Representatives Council, and President are directly elected by the people every five years. Jakarta is the capital city and the country has land borders with Malaysia in Borneo island, Papua New Guinea in the island of Papua, and East Timor in the island of Timor. Other neighboring countries include Singapore, the Philippines, Australia, and the union territory of Andaman and Nicobar Islands in India with a total of 1,904,569 km square.

Despite being the only G20 member from Southeast Asia and the largest country in the region, many Indonesians still live under the poverty line with an unequal opportunity for employment. Also, a good healthcare and higher education system are out of many people's reach. While the country's economy has been growing rapidly as measured by the GDP, some types of infrastructure are still inaccessible, including schools, hospitals, roads, and other public facilities (OECD 2016).

Having an archipelagic state form, Indonesia has to deal with the state sovereignty crisis due to human migration issues. The handling of refugee issues and geographic articulation has resulted in the failure to protect human rights in some certain occasions. This is what Indonesia is avoiding where refugee management lies in the geopolitics of migration. Migrants who come to Indonesia indirectly enter the geopolitical limbo Indonesia is struggling to manifest and maintain its state sovereignty over the human right protection.

Indonesia has a strategic location with its own strengths and weaknesses. The strength lies in its position and geography of a strategic and rich with natural resources. Meanwhile, the weakness lies in the form of archipelago and the diversity of society that must be united in one nation and one homeland. It is not easy for Indonesia to secure its entire maritime territory. The traditional view tends to link security with territorial integrity of a country. This understanding puts the state as an entity that needs to be secured.

The geopolitical view in interpreting Indonesia's territory –as a unity that covers the whole region and all the power of the state– would be inadequate if the border of the state are guaranteed but the people are disrupted due to various security disturbances that attack the humanity. Simply securing national boundaries from internal and external threats does not guarantee the security of a country in the event of economic turmoil and political instability.

The geography of the Indonesian archipelago on the intersection of the world procreates Indonesia as a state party to transnational crimes. People smuggling, as a part of irregular migration with undocumented migrants, is one of the non-traditional security threat for Indonesia. Plus with the prolonged conflict in Middle East and some part of South East Asia that led to the flow of asylum seekers abroad to Australia as the destination country to seek a protection, Indonesia is burdened with a dilemma: sending those asylum seekers to Australia or keeping them in the territory.

Despite being a party state of the UN 1951 Convention, Australia has arranged a rigorous process to select asylum seekers who illegally entering the country. With its geographical position, Indonesia serves as a transit country to Australia. Yet the abundance of illegal migrants in Indonesia is not only because Indonesia is geographically Australia's closest country but also because the Indonesian Government is considered weak in its border control. It is easy because the entrance spot in Indonesia is quite a lot due to its long sea line with limited immigration officers and checkpoints. Thus it is easier for migrants to enter and pass illegally.

Without a strict border law enforcement, the Indonesian archipelago is a fenceless yard that anyone could access easily, especially the people smugglers. Unfortunately, the weakness of a state to maintain its border security could have the impact on increasing transnational crime. It could be said that weak border surveillance would only invite incoming threats from outside to endanger the national security inside. This condition is taken advantage by those who wants to

go to Australia because Indonesia is considered easy to enter and easy to leave as well.

Indonesia has enormous geopolitical potential in terms of demography and geography. However, this is still regarded as a burden rather than capital that can be developed with the maximum. With a 260 million population, Indonesia is the fourth-largest country in terms of population size after China, India and the United States. Around half of the total population is a young population (age of below 30 years). Along with the decrease in fertility number, that could be caused by birth control and higher number of educated women, this young (working age) population is predicted to be able to accelerate the economic growth.

According to Indonesian Investment (2017), Indonesia is currently in the middle of the first and second demographic wave. Child mortality and fertility declining and working age population inclining has created a productive population that could be function as the motor of national economy. Unfortunately, there are millions of unemployed workforces who cannot be entering the labor market. The education level plays an important role to determine the workplace. For those who are well-educated or well-skilled (graduate students and trained workers), finding a proper job in Indonesia is hard due to the proper salary and facilities. Most of workforce labors (informal sectors) are primary school graduates. This vulnerable employment opens for everyone, making all young population competes for an improper paid job only to survive. According to World Bank (2017), the unemployment in Indonesia shows a downward but still remains high compared to other developed countries.

Gross Domestic Product growth of Indonesia contributes more than 55 percent of total economic growth (Indonesia Investment, 2017). Yet in 2013, the depreciating Rupiah (Indonesian currency) against USD (United States Dollar) contributes the domestic consumption force where Indonesia relies on domestic consumption. This indirect demand for a higher employment implies a higher incomes that correspondently serves more consumption in one household. This is

why in 2008 monetary crisis, Indonesia could survive unlike back in 1997 financial crisis.

This economic condition would not be an attractive point for those refugees and asylum seekers coming to Indonesia. Indonesia is not a part of resettlement options that could be offered to them, even if it is possible. As in the chapter IV, I would elaborate why Indonesia did not offer any resettlement option regarding its demographic and economic condition with regards its geopolitical aspect.

1.3. RECENT CONDITION OF REFUGEES IN INDONESIA

A total of 13,829 refugees and asylum seekers have been registered under the UNHCR Indonesia per 29 February 2016, where the number consists of 6,269 refugees and 7,560 asylum seekers. The increased number occurred in May 2015 due to the rescue at sea of nearly 1,000 Rohingyas from Myanmar. Until the end of 2015, there were 2,044 interviews and 2,824 final decisions. There are 4,007 cases of 6,090 individuals that remain postponed with the waiting period from the registration to first interview ranging from 8 to 20 months, depending on the priority and complexity of the cases (UNHCR, 2016).

There are 4,273 refugees and asylum seekers forced to be detained at the immigration detaining center for some reasons. The use of detention centers is aimed at preventing groups of refugees and asylum seekers from entering or leaving the Indonesian territory illegally. However, there are some cases where they are sent to the detention centers for self-reporting to the UNHCR for their incapability to support themselves financially to stay in Indonesia or for their attempt to leave. Currently, there are 13 detention centers in Indonesia but this number is considered inadequate to accommodate the many people. Most of them (1,239 persons) have been released and sent to an alternative accommodation under the monitoring and intervention of the UNHCR and the IOM (Global Detention Project, 2016).

Refugees arrive in Indonesia either by plane with their travel documents and visa or by boat (mostly from Malaysia) without proper travel documents. Most refugees will fly to Kuala Lumpur then travel by boat to North Sumatra in Indonesia by crossing the Strait of Malacca. According to Ali et. al (2016), smugglers pay a certain amount of money to Malaysian and Indonesian immigration authorities to pass the refugees through the airports and checkpoints. They take away the refugees' belonging in several cases and play a mean role. Some refugees admitted that there were some local smugglers who stopped their journey and ask for more money.

It is important to note that Indonesia is not a party state to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, thus disallowing refugees to stay within its territory and only becoming a transit state. Also, the absence of the domestic law and regulation that protect refugees and asylum seekers simply makes the UNHCR the one to provide the protection needed. Therefore, it can be said that Indonesia is dependent on the UNHCR in resolving the refugee problems.

Once refugees and asylum seekers arrive in Indonesia, they straightly report themselves to the UNHCR Jakarta office in order to get a document explaining their status as asylum seekers. This document is issued to protect them from deportation and the UNHCR will later run a long process to determine their status. While undergoing the process, refugees and asylum seekers are not allowed to roam freely in the territory of Indonesia and are considered border violators to be sent to the immigration detention. Some of those who already obtained the asylum seeker status will be placed in a community-based accommodation arranged by the UNHCR and the IOM under a cooperation with immigration authorities.

That their presence is not permanent in Indonesia has caused many problems for refugees and asylum seekers because they could not access the education and health services they deserve. To stay permanently is not one of the available solutions. Their stagnancy in the transit state like Indonesia should be on

top of countries' list of concerns. While it is important to prevent the unwanted migrants from entering another country's territory, the impact of the existence and residence of these refugees and asylum seekers has to be taken into consideration. The premise that transit migrants will not permanently live in the host country rule out an assumption that they could be stuck in Indonesia for quite a long time to get used to the rhythm of the surrounding community. Thus, local aspects of integration should be considered as an option to address the issues faced by refugees and asylum seekers.

I personally view that Indonesia leaving unwanted migrants in limbo is an overstatement. I believe, Indonesia, like other nations, has national interests and domestic policies to fit with the international laws. However, I consider that scientific examination of refugees in Indonesia, studies on this matter is still limited. Researchers like Missbach (2015), Taylor and Rafferty-Brown (2011), and Mountz (2011) wrote about refugees in the country but, unfortunately, their work only explained the complexity of living there from the perspective of transit migrants and their personal decisions. The complexities that Indonesia faces in response to this issue are not captured well by the researchers. As an impact, from the human rights perspective, Indonesia's domestic policy towards undocumented migrants with their status will be seen as quite awful.

Those undocumented migrants, who have been registered in UNHCR, will receive a monthly allowance to be spent on a daily basis while some have to rent an accommodation from local landlords and only receive assistance from their relatives from their home countries. This results to them struggling to meet basic needs like food and health. Some refugees from Sri Lanka even admitted that they survive so far because of the extensive sharing of food, money, and accommodation. They also received food from a nearby Hindu temple. The long process of determination of asylum seeker status, as well as the process of resettlement, have become a challenge for them. This makes it more difficult and costly for refugees to fulfill their basic needs during the waiting time. Newly-arrived refugees hoped that the process would not take more than five years

because the New Australian Resettlement Policy was just announced in late 2014 (ABC, 2014)

In 1979, Indonesia dealt with a relatively massive influx of refugees for the first time ever. The war between China and Vietnam forced some 170,000 people to flee and seek asylum in Indonesia. Most of them arrived by boat and this was where the term '*boat people*' rose. Twenty years later, refugees from East Timor entered Indonesia as an impact of the violence by pro-integration militias with approximately 250,000 people coming in through Nusa Tenggara Timur. Not only have neighboring countries' people been recorded to enter and seek for refugee status in the territory of Indonesia, people from countries like Afghanistan, Sri Lanka, Iraq, Iran, and Pakistan have also been recorded (Missbach, 2015).

The arrival of asylum seekers and refugees is driven by multiple factors. In addition to the geographical factors, Indonesia becomes a destination because:

- a. as an archipelago, Indonesia has made extensive ocean areas and a long coastline. However, this is not supported by the border law enforcement. The seas and the borders in many areas are unguarded and do not have immigration checkpoints, so they could easily be used for refugees and asylum seekers to enter the territory. Due to the size of its territory, it is difficult to properly monitor the immigration agency. Also, there are times when both citizens of Indonesia and unscrupulous agencies take advantage of the refugee situation for profit.
- b. in addressing the problem of refugees and asylum seekers, Indonesia has a weaker position compared to other countries because the national regulations specifically addressing the issue has just recently been launched. This recent change of national laws regarding the handling of refugees has made the tasks of refugee- and asylum seeker-related institutions harder and more complicated.

- c. the country lacks in supporting facilities and infrastructures for addressing the issues faced by refugees, and this particularly applies in the sea areas.
- d. the existence of the UNHCR in Jakarta appeals to refugees. They feel safe to enter Indonesia because any illegal immigrants who claim to be refugees and asylum seekers will be directly referred to the UNHCR. The Indonesian Government, in other words, allows immigrants to settle in the country to obtain a solution.
- e. the culture of Indonesian people (known for its warm hospitality) creates an impression that they easily and friendly accept the arrival and presence of refugees who are mainly Muslims.
- f. last but not least, Indonesia has proven to establish a harmony in spite of the diverse tribes, religions, and cultures. Again, combined with growing economy and stable political conditions, this successfully attracts immigrants.

CHAPTER II

LITERATURE REVIEW

Migration crisis is also connected with the global political problem. This issue has a huge correlative with how the geography and politics give its nuance to the migration, especially to the forced migration. The migratory movement already obscured the terminology of country of origin, transit, and destination. This obscurity automatically influences the term of citizen, migrant, and refugee as well.

Irregular migration and people smuggling generally is affiliated with transit migration. Transit migration, as a phase in the migration process, somehow is difficult to be defined. At some point, migrants do not always set the destination before they depart from their country of origin. They develop it while they are in transit country and often change their destination or route based on their present condition in their transit. The factors do not only lie in destination country policy, but also in the calculation of their cost and risk to enroll the journey. Therefore, transit countries play a crucial role in here. Unfortunately, transit countries can be the last ground for the migrants' journey due to their loss of chance to get into their destination and finally be a limbo for them.

Transit migration is currently under studied, especially in Asia Pacific. The existing literatures concentrates mostly on transit migration in the European Union and the 1951 Convention implementation. Indonesia, as a transit country in Asia Pacific, has not been a research target in terms of its role and efforts in tackling the emerging issue of migration. By examining Indonesia with its demographic and economic conditions, the other kind of transit migration could be also examined. The case of Indonesia will serve a different perspective on how a transit country managed the influx of undocumented migrants coming towards Australia.

This chapter discusses the migration, asylum seekers, and refugees in terminologies that will ease in distinguishing and understanding each concept. In order to easily absorb the research questions, it is important to understand the concepts used in this research. The concepts will be different in some other cases i.e. Turkey and Eastern Europe countries, but the author tries to fit these concepts into Indonesian case in order to fully understand at least the general description about refugees issue in Indonesia.

2.1. MIGRATION AND TRANSIT MIGRATION

Migration has been a part of the history of human life. On how the earliest primitive tribes were nomads, they began to crawl all the inhabited parts of the earth (Frilich, et al, 2002). Currently, the UNHCR estimates that as many as 244 million migrants in 2015, 65.3 million were forced displaced people around the world, and 21.3 million of whom were refugees (UNHCR, 2015).

Their designation as undocumented, irregular, unauthorized, and illegal migrants is constituted by the way they crossed the border of a country without an official sanction. The use of the word 'illegal' is now avoided because *illegal* means an unlawful act against an established regulation, and it should not be attached to a human being. The term is applied to action, not the person who committed the actions. If this term is used to describe a person, it will be considered as a dehumanizing. Moreover, these migrants mean to be 'illegal' because they committed the crime crossing national borders without proper documents but not necessarily makes them an illegal migrant.

There are several reasons people perform voluntary and involuntary migration but, economically, they are mostly based on voluntary reasons. This thesis focuses on migrations caused by war, government structure, minority struggle, and oppression (Edmonston, 1992). War has become a push factor, forcing people to escape their country thus making it a case of violations across national borders. War could be the main factor that causes migration yet the fear it causes is not relevant to the kind of fear applicable for claiming asylum and becoming refugees.

Massey (1994) believed that economic and social foundations hold a big role in examining the international migration widely. The economic foundation lies in the spread of capital-intensive economic development in developed countries and lack of economic development in developing countries. As for the social foundation, migration is induced by the migrants through the kinship and friendship. The cost of migration; such as trip cost, information searching cost, new job obtaining cost, and moving up setting cost, is reduced if a prospective migrant already has a personal tie with the existing migrant with the same destination area.

Zelinsky (1971) argues economic and social changes generates a migration. Migration patterns can be linked to the demographic factor and industrialization. Industrialization that is inherent with modernization has an effect on the increasing demand for migrant labors. This globalization lead to less border control as Zolberg (1981) emphasizes that migration is not just about economic factors, but some political reasons and motives also influence the migration flow i.e. of refugees. He argues that the political setting holds an important factor in migration decision.

Unfortunately, the chain of migration does not only involve the migrants themselves. Smugglers and traffickers also play an important role in it. Smugglers are individuals who help migrants in passing this illegal process while traffickers are those who exploit the migrants. This chain of events is also strongly influenced by the role of law enforcement in the host and transit countries (Grant A., et. al., 2002). In some cases, a complete journey to destination country is not organized by the smugglers that makes transit migration becomes more crucial in reaching the final destination (Hugo et. al., 2014)

The migration can increase the number of people smuggling because it is one of the ways people can migrate to seek a protection. Migrant smuggling and human trafficking are two different transnational crime that sometime overlap each other. The states consider that intensifying border control can prevent the crimes, but for migrants it can lead them to seek for a help to organized smugglers

group to cross the border. With their unawareness with this crime, the smuggled migrants can potentially be abused financially, psychologically, and physically.

Migrants can become an object of people smuggling and trafficking crime, and at the same time, could be criminals in the host country. Thus, cultural differences make this group a target of ultra-nationalists and racists parties (Castles, et. al., 2013). Push and pull factors bring these migrants in the process of smuggling and trafficking. Every day many refugees and asylum seekers are forced to flee their countries to find another host countries willing to accept them. However, more often than not, they voluntary leave their country with free will.

The long process of migration involves many parties in which one of them is the transit country. To be able to migrate to the destination country, those with limited cash in hand and poor plan may have to pass through one transit country or more. The migration discussed here is concentrated on ones done by breaking another country's law of borders by putting the principle of non-refoulement into action. Meanwhile, border policies become stricter and even though migrants have entered another territory, the destination country may not want to send them back considering the existing procedures they must follow.

Kimball (2007) suggested that a transit country should have at least four criteria. First, it has a common border with a developed country. Second, the number of the emigration cases in that country is low while the number of immigration cases is high. Third, it serves as a primary staging ground for migrants planning a clandestine entrance to a destination country whose borders are guarded, often heavily. Fourth, it has restrictive immigration policies and activities without financial assistance from neighboring countries, which are considered the country of destination.

Based on the criteria mentioned above, the author has found that Indonesia has met some, but not all, of them. The first criteria of nature made the sea as a border between Indonesia and Australia. Missbach (2014a) explained that Indonesia has demonstrated a considerable effort in monitoring its very long sea borders, where it reviewed and redesigned its border policy to reduce the number

of transit migration. Due to its long borders, Indonesia did the hard work in securing and controlling the border (Indonesian Ministry of Maritime Affairs and Fisheries, 2008).

When assessing the second criteria, emigration-to-immigration ratio, Index Mundi (2013) showed a surplus of emigration. In 2012, data showed that the rate of emigration is -1.08 migrant(s)/1,000 population, showing that there are more people going out than people coming in. Most emigration cases are driven by economic factors, where Indonesians leave their country to find better employment opportunities overseas, especially in neighboring countries like Malaysia, Singapore, Thailand, and Hong Kong. Although Australia has a better economy than Indonesia does, the number of Indonesians migrating to the country for the same economic reason is still low. Besides, the strict inspection of work visas in Australia results to the small number of Indonesians permitted to work there regardless of skills they possess (Australian Department of Immigration and Border Protection, 2013).

As a transit country, Indonesia is considered the last transit to Australia for migrants traveling by boat. With this argument, Indonesia has met Kimball's third criterion. The year 2012 became the beginning of the increasing number of asylum seekers who arrived by boat heading to Australia (Australian Department of Immigration and Citizenship 2012b, p. 7; Masanauskas 2011). Kimball's last criterion is related to how Indonesia implements its policy shortly on the border. Indonesia just recently produced a legal framework on asylum seekers and refugees, to help tighten its border regardless from and to where people are coming.

To get to the host country, there can be more than one transit country involved. However, the dilemma faced by countries to become a place of transit is a unique challenge. On the one hand, the transit countries do not want to keep the asylum seekers much longer but on the other hand, it has no high leverage to push the destination countries to simply accept the migrants. It also needs to be taken into account that the journey an asylum seeker takes in searching for a protection

could be a multi-transit movement, where he may go through more than one transit destination.

According to Hugo et. al. (2014) the transit country can serve as a place where the irregular migrants can arrange their entry to the next destination. As in the Indonesia context, the geography and corrupted government system open the possibility for an onward migration and if not, for a staying in Indonesia. He also emphasizes that Indonesia is less repressive compared to Malaysia in accepting the migrants UNHCR documents that can lead to a massive incoming asylum seekers who intended to be detected by the immigration officers in purpose. In state of transit, these migrants rely on their financial resources and social contacts to facilitate their next journey crossing the border.

2.2. UNDOCUMENTED MIGRANTS

Undocumented migrants generally refers to those who enter without legal permission. There are some cases where they entered the country legally but remained illegally. Based on Indonesia case, the undocumented migrants is distinguished by the status of the migrants when first entering the territory. Indonesian law will consider every migrant without a proper document or with a false document is an undocumented one. Due to the fact that Indonesia did not ratify the UN 1951 Convention, the concept of undocumented migrants, refugees, and asylum seekers would be conflated. As a particular case, Indonesia has simplified the term of these. As in the chapter III, I will elaborate how Indonesia articulates the concepts through its legal framework in managing the refugees and asylum seekers as undocumented migrants.

Immigrants (economic migrants, illegal migrants, refugees, and asylum seekers) have a similarity in political and social rights (Cohen, 2006). Undocumented migration involves persons entering a country that is not theirs without proper documents like visa or passport. This could also be referred to those who enter the borders of another country with false documents. If during the process, the people are assisted by a third party, then it is called smuggling and trafficking (Graycar, 2002). According to the United Nations Office on Drugs and

Crime (2011), smuggling is the procurement of an illegal entry of a person into a country where that person is not a citizen with the objective of making a profit. Trafficking is the recruitment, transportation, or receipt of persons through deception or coercion for the purposes of prostitution, of sexual exploitation, or forced labor.

International migration can be distinguished with the two conceptual terms: economic and political migrants. Refugees issue has formed a new problem since 1970's and became a political form. This is applied to those migrants by states in a political motives when the dichotomy charged that immigrants constituted an economic forms in the other part. After the UN 1951 Convention defined refugee, at least it is easier to conceptualize the term of refugee. If they cross the national border, they will be stated as refugees but if they remain in their country they will be called displaced people. Hein (1993) suggests that political condition can cause a deteriorating economic condition that can lead a person an economic migrant. However, the recent political factor i.e. of political violence in ethnic minorities or civil war, gives a consequence of the rising of refugee crisis.

2.2.1. Economic Migrants

Marxist's capital logic argues that migrants are hopeless groups buffeted by fierce economic storms. Normally, such storms are what initially cause the migration to happen. There are several types of economic migrants, including individually contracted workers commonly called *expatriates*. This type, where skilled, managerial or professional individuals are involved, provides amenities of life such as good salary, family allowances, pension funds, and other facilities.

Nowadays, poverty and economic backwardness also become a factor that causes people to migrate. Governments are faced with the issue of economic crisis and underdevelopment, so the society becomes dissatisfied with their government's performance. In response to such a dissatisfaction, some governments, instead, disallow their people to raise their voice and protest. When the situation in a country becomes

unbearable, some people may decide to leave. However, this should not be a major factor in the case of refugees (Zolberg et. al, 1989).

The weak economy does not necessarily make people refugees. According to the UNHCR (1995), although there is a general relationship between development and displacement, refugees' movement is not related to economic factors. Indeed, poverty in some cases is forcing people to migrate, but those leaving their countries for economic purposes are not classified as refugees, but economic migrants (Hathaway, 199).

2.2.2. Refugees and Asylum Seekers

The 1951 Convention Relating to the Status of Refugees (and its 1967 Protocol), to which Indonesia is not a signatory, defines a refugee as:

Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country.

The important parts of this definition are: that the person has to be outside their country of origin, the reason for their flight has to be a fear of persecution, this fear of persecution has to be well-founded (i.e., they have to have experienced it or be likely to experience it if they return), the persecution has to result from one or more of the five grounds listed in the definition, and they have to be unwilling or unable to seek the protection of the authorities in their country (Refugee Council of Australia, 2012).

Legal definitions withdrawn from the 1951 UN Convention defines refugees as '*persons who are outside their country because of a well-founded of persecution for reasons of race, religion, nationality, membership of a particular social group of political opinion*'. A refugee is a person who is forced to flee his country of origin due to a force he

could not control and it is against his will. According to Cohen (2006), the 1951 Convention was drafted with the needs of the influx of displaced people of Europe after The Second World War.

Based on the definition of the 1951 Convention, refugees are not economic migrants in a way that they move from their country to another country they are not a citizen in order to improve their economic life. Also, refugees could mean undocumented migrants who enter a country's border without proper documents. The difference is that refugees are forced to migrate while economic migrants move voluntarily for an economic purpose. In addition, basic needs also make a distinction between them, where refugees' basic need, on top of all needs, is protection and the sense of safety and security.

Thus, the standard definition derived from the 1951 Convention applies to any person who:

As a result of event occurring before January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion or nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable, or owing to such fear, is unwilling to return to it.

Bohmer and Schuman (2007) describe the difference between refugees and asylum seekers, where 'refugee' is commonly used to describe anyone who flees his country unwillingly while asylum seekers are people who travel under their own steam and apply for asylum. Refugees receive a legal status that allows them to be brought into a host country's expense, and benefit certain public rights. Meanwhile, the 1951 Convention regulates asylum seekers to apply for protection under it on the premise that if these people return to their country of origin, they will be persecuted due to their race, religion, nationality, political belief, or their membership of a particular social group. After their application is accepted, their

status will be changed to a refugee. For genuine asylum seekers, they are vulnerable in the sense of inability to return home due to fear of persecution or punishment, where the authority is unable to protect them. Yet, those whose application is rejected would not be returned to their country of origin due to some humanitarian reasons.

As stated in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), people who flee their country of origin as a result of international or national armed conflict with no well-founded fear of persecution as defined by the 1951 Convention are not considered as refugees. However, they do have a right to claim an international protection under the other provisions, such as the *Geneva Convention of 1949 on Protection of War Victims* and the *1977 Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts* (International Committee of Red Cross, 2005).

The internal conflicts that take place nowadays have caused a great death toll and destructive effects to the civilians. A result is an increasing number of people fleeing outside. However, poverty and economic underdevelopment also become the cause of migration flow yet it does not fit with the 1951 Convention's protection. The conflict in one country could force some groups to flee to another country for security reasons, with or without the well-founded fear of persecution. Conflicts are not only between the government and civil society; they also occur due to ethnicity tension. Oppressions towards minority produce separatist movements and eventually threaten the lives of the opposite group. Ethnic tension can refer to the political exploitation in which power is held by a certain ethnic and used for factional interests. This situation could also end up in an ethnic cleansing because it is considered an obstacle for the national development agenda that would occur if the level of identity is heterogeneous.

Policies on refugee can be a substantial part of international politics and a country's domestic relations. Refugee could be the part of policy making at the

national and international level. This issue, given the growing polemics, could be one of the issues in the human rights enforcement.

To put it shortly, an asylum seeker may not be granted a refugee status, while a refugee can be granted protection. The problem relies on them demanding an international protection to the rights of their lives that they do not receive in their home country. Missbach (2015) argues that asylum seekers and refugees are more likely to be treated not as people with rights, but as '*people receiving services*'. Thus, they can expect to be treated with mercy and will find protection and resettlement themselves not as the fulfillment of rights but as a manifestation of compassion. As a result, it is possible that they receive semi-protection instead of full protection, as long the protection, in general, is taken into account.

As most refugees and asylum seekers enter another country unlawfully, the local authorities cannot return them because of the principle of non-refoulement. For some governments, refugees are threats. According to Brown (1996), refugees who pose a threat to their country of origin is a refugee who flees from fear. This kind of refugee is the opposition of the government that could create an antagonistic relationship, as they may send information and funds to their countries of origin to support the opposition. In the worst scenario, they could even receive support from the host country, especially when it has certain interests towards the home country.

Refugees can be a threat to the host country when they are considered dangerous for politics and security. Refugees protected by the state might be armed and launch an armed conflict within the country or to their home countries. They may be actors of arms smuggling, drug trafficking, the opposition alliance for the host country, and crimes in the society with different languages and cultures. If the host government is not able to manage the demographic trends, cultural differences could result in a threat like a culture clash. It would also threaten the value and the local life if people and refugees clash with each other culturally.

Meanwhile, in the economic perspective, refugees would be a threat to people who are still struggling in the lower economic level, where they are competing with local citizens in the employment. This can be a potential conflict if the government does not thoroughly regulate the lives of refugees in their country. Recipient countries or transit country will be burdened economically in the provision of housing, education, transportation, and jobs.

Apart from the potential seen as a threat, refugees are people who are vulnerable in terms of human rights. They risk their lives to escape the process and do not have economic stability in the host or transit country. Applying the human rights perspective, they should be protected by all governments. However, provided that one government may have different regulations with another, to determine whether or not a person is an asylum seeker is still unclear.

CHAPTER III

INTERNATIONAL LAW REGULATING REFUGEES AND ASYLUM SEEKERS IN INDONESIA

The UN 1951 Convention and its protocol already set the minimum operation standard to manage the refugees in national level. Its scope is wider and well-accepted to establish the juridical status of refugees and their rights. Therefore, the need to adopt this convention is required for the states to execute its obligations regarding the issue. It is just not every states in the world has the capability to ratify the convention with regards its domestic economy, political, and social conditions.

Being a non-party to the 1951 Convention and the 1967 Protocol, Indonesia officially became a transit country for refugees and asylum seekers. Inevitably, Indonesia must respect the principle of non-refoulement (Justinar 2011). This principle has been implemented through the use of legal immigration detention centers for irregular migrants who could have been a refugee and asylum seeker (Soeprapto 2004; Riyanto 2004; and Havid 2004). Many of these refugees and asylum seekers stuck in limbo in Indonesia, waiting for the time to settle in Australia.

This chapter will examine the principle of non-refoulment that Indonesia recognizes and puts in its laws and regulations in managing refugees. In this chapter, the author will examine that even though Indonesia is not the party state of UN 1951 Convention and the UN 1967 Protocol, Indonesia respects its international obligation to take part in solving the emerging refugees and asylum seekers issue.

3.1. LAW REGULATING REFUGEES AND ASYLUM SEEKERS

3.1.1. The UN 1951 Convention and the 1967 UN Protocol Relating to Refugee Status

The World War II was the main reason for the establishment of this convention. Displaced people from European countries as the result of the World War II were not able to return to their country due to security reasons (note that the Convention is limited only to events that happened before January 1st, 1951). The state's obligation is to provide refugee status to asylum seekers and avoid refoulement or returning refugees to a country where they had a risk of death or persecution. Broadly, this convention obliges state parties to provide some basic rights such as employment, education, and welfare to them.

Furthermore, the 1967 Protocol removed the constraint of time and geography existing within the 1951 Convention. This protocol describes in detail that refugees are people who migrate because they are driven by a fear of persecution due to their civil or political status. Thus, if there is a man who flees his country because of war, natural disaster, or economic motivation, he cannot be classified as a refugee and cannot claim the rights granted by the Convention.

Until today, the two have become an important legal foundation as the basis of defining refugee status. Based on the 1948 Universal Declaration of Human Rights, every person in this world has the right to life and personal liberty. The state should not be a threat to a person's freedom. He must not become a victim of physical and mental torture by individuals, groups, or even states on the basis of his individual activities and characteristics or his membership of a social group.

The Protocol Relating to the Status of Refugees is a key element in the international treaty regarding refugee law that came into force on 4 October 1967. As the 1951 Convention has restricted refugee status to those who fled as a result of events that occurred before 1 January 1951

and these events occurred as well in Europe, the 1967 Protocol came to remove those two restrictions: time and geographical aspect. However, countries who ratified the 1951 Convention still have an option to use the geographic restriction definition in retaining the restriction.

There is a difference in understanding refugees before and after 1951. This difference is based on the content of international agreements, mainly the definition of refugee itself. Refugee, in the 1951 Convention, has indeed been interpreted in general, not only limited in certain areas. Meanwhile, in the 1951 Convention, there are still restrictions on the time that were meant only for those who were displaced prior to 1 January 1951, although geography is not taken into account. This time restriction was intended to limit the protection to people who have been displaced, while those who will be displaced at a later date will not receive the protection under the 1951 Convention. However, years following 1951 showed that refugee movements were not merely temporary results of the WWII and its aftermath. Throughout the late 1950s and 1960s new refugee groups, particularly in Africa, emerged. These refugees were in need of protection they cannot be given due to the time limit set by the 1951 Convention.

Regarding time limit, the development of the 1951 Convention is considered no longer up to date or in accordance with the current development. Therefore, in 1967 the UN General Assembly held a meeting on refugee and issued resolution 2198 (XXI) 1966 which came into force on 4 October 1967 on the Status of Refugees, known as the Protocol on the Status of Refugees of 1967 or the 1967 Protocol. To broaden the notion of refugees and protection for them, this protocol was no longer limited to events before 1951. It can be seen in article 1, paragraph 2, where the phrase “*As a result of events occurring before January 1, 1951*” was removed and replaced with “*... As a result of such events*”.

The 1951 Convention and the 1967 Protocol are similar in principle. There are three main points in the content of the Convention and the Protocol, which are:

- a. Basic understanding of refugees. The basic understanding of refugees that was defined in the 1951 Convention and the 1967 Protocol is important to notice because it is necessary to establish a refugee status for a displaced person. This determination is set by the state the person is located in and by the UNHCR.
- b. The legal status, rights, and obligations of refugees in the country where the refugee is resettled.
- c. Implementation agreement, especially regarding the administrative and diplomatic relations; that matters concerning cooperation with UNHCR.

The 1951 Convention and the 1967 Protocol set the minimum standards for treatment of refugees, including their basic rights. They also establish the legal status of refugees and contain provisions on their rights, such as the permission to:

- a. Get a job and welfare,
- b. Gain the identity papers, travel documents, and applicability of fiscal charges,
- c. Transfer their assets from their country of origin to destination country where they have received the purposes of resettlement.

The Convention prohibits the expulsion or forcible return of those who have obtained refugee status. It was stated in Article 33 that none of the state parties shall expel or return (refoulement) refugee for any reason to the border area where his life or freedom would be threatened on account of race, religion, nationality, and membership of a social group or political opinion.

Article 34 concerns with naturalization and assimilation of refugees. This article also discusses the existence of other provisions with respect to rights issues of access to justice, education, social security, housing and freedom of movement. The main provisions 1951 Convention can be grouped into two parts:

- a. Provisions containing the basic definition of anyone who is a refugee, anyone who is no longer a refugee, and anyone who is dispelled from refugee status.
- b. Provisions defining the status of non-refugees, their rights, and duties.

There are four rules in the 1951 Convention and the 1967 Protocol, namely *defend refugees*, *termination of refugee status*, *exclusion from refugee status*, *rights of refugees*, and *obligations of refugees*:

- a. Defend refugees

The main objective of the convention is to provide legal rules that guarantee a protection to a group of people who are in a vulnerable state. Article 1 of the Convention defines refugee as a person –who is due to reasonable fear of the existence of persecution due to his race, religion, nationality, membership of a particular social group or political opinion–is outside the country where he became a citizen and cannot get or would not get a chance of protection from that country for reasons of fear earlier; or a person who –because he has no nationality and is outside the country he used to live before the event– does not want to return because of the fear.

Thus, a refugee is someone who is outside his country of origin or where he used to live in before, and due to reasonable fear of the existence of persecution caused by his race, religion, nationality, membership of a particular social group or political opinion, cannot or does not want to get protection from the country, which under normal circumstances, is his right. The decision on whether a

person is entitled to refugee status is taken by each country concerned. It is in accordance with the procedure set by the country itself, following the international standards, on the basis of the criteria contained in Article 1 of the Convention. Here, the UNHCR plays a role as requested by the countries concerned. As for the case of Indonesia, the UNHCR engages in a substantial role as the authorized institution to determine the refugee status for those who apply.

b. Termination of Refugee Status

Article 1C of the 1951 Convention provides requirements for a person to receive refugee status, as long as he:

- a. Regains the chance of protection voluntarily from the country where he became a citizen,
- b. Gets his old citizenship voluntarily after he lost it,
- c. Gets a new citizenship and enjoys the protection by the state where he became a new citizen,
- d. Resettles voluntarily in a country that he has previously fled or outside the country that he left for reasons of persecution,
- e. Has no more fear because the situation relating to his recognition as refugee gets better, so he can go and cannot refuse the protection, or
- f. Is a stateless person, but because the situation relating to his recognition as refugee gets better, he can go back to the country where he previously lived in.

c. Exclusion from the refugee status

The 1951 Convention also examines cases of people who, despite having the characteristics of refugees, are excluded from refugee status. They are categorized into three groups:

- i. The first group consists of people who have received protection or assistance from organs or agencies of the United Nations other than the UNHCR. For example, the

Palestinians in some parts of the Middle East receive assistance from the UN Relief and Works Agency for Palestinian Refugees in the Near East or UNRWA.

- ii. The second group consists of people who are not considered eligible for international protection. This provision refers to people who have been accepted by a country in which they have been given most of the rights that can only be enjoyed by that country's citizens. For instance, German descent from Central Europe and the former Soviet Union, regardless of their nationality, are all protected by the German constitution, and therefore not considered as refugees under the 1951 Convention.
- iii. The third group consists of people not eligible for international protection, because they have committed a crime against peace, war crimes or crimes against humanity, serious non-political crimes outside the destination country, or they have been guilty of acts contrary to the purposes and principles of the United Nation.

d. Rights of Refugee

To guarantee the legal status of refugees in countries of asylum, the 1951 Convention offers comprehensive provisions of the rights of refugees. Unless the rights of the more favorable are clearly stated in the Convention, refugees are given the same standard as the minimum rights granted to foreigners in general. They are also given special rights that would not normally be enjoyed by foreigners due to the absence of protection from the country where they are citizens. The rights of refugees are as follows:

- i. The right not to be deported to a country where they have reasons to fear persecution,

- ii. The right not to be expelled, except for certain reasons, such as national security and public order,
 - iii. The right to be excluded from penalties for illegal entry to the territory of the destination country that is a party to the 1951 Convention. Given that refugees leave their country for emergency and particular reasons, it is near impossible for them to enter a country with proper documents like passport and visa. Therefore, they can be exempted from immigration law.
 - iv. The right to move freely; the party states are obliged to provide the right to choose their residence and move freely in their territory in accordance with regulations applicable to foreigners in general under the same conditions.
 - v. The right to live the religion doctrine freely,
 - vi. The right to have free access to the courts,
 - vii. The right to have a formal identity and travel documents,
 - viii. The right to have access to a job and housing,
 - ix. The right to have access to formal education.
 - x. The right to have access to government aid, labor regulations, and social security aid.
- e. Obligations of Refugees

Although refugees are foreigners who are in a vulnerable state, it does not mean they are free from obligations, like people living in other countries. They have obligations to countries where they seek asylum and must comply with the existing laws and regulations and are also subjected to authorized actions taken by the authorities for the sake of maintenance of public order.

3.2.1. The Laws Governing Refugees In Indonesia

In Indonesia, the term *asylum seekers* and *refugees* are not commonly known until recently. Yet, Indonesia puts high concern on combating irregular migrants. Since the early 2000's, Indonesia has

intensified its efforts to control the movement of the transit migration into and out of its territory and to stop the operation of people-smuggling networks (Missbach, 2015). However, the country does not really consider asylum seekers and refugees as part of policy-making target group because the governments assume that these people only temporarily stay and could not be able to participate in the society like citizens do.

In Indonesian territory, they are put in 13 detaining houses and local houses provided by the Immigration Office with UNHCR and IOM monitoring. They are not allowed to have society agenda with the locals. With their incapability of communicating in the local language, it becomes more apparent that they find it difficult to participate in the society. Therefore, it could be seen that the country puts concern more in the sense of protecting the borders than on the refugees and asylum seekers. Düvell (2006) also argued that Indonesia admits not intensifying its law enforcement in minimizing the entry of refugees. It should be considered that in Indonesia, an enormous number of asylum seekers and refugees has already increased, and at the same time, they may not want to stay there for long.

Indonesia is a country that supports justice for all and believes that each human deserves protection anywhere he/she is. The followings are some laws constituted in regulating political asylum:

3.1.2.1. Circular Letter of the Prime Minister on Political Refugees (No. 11/ R.I./dated 7 September 1965)

The entry of persons with non-Indonesian nationality into the territory of the country who, after provisional investigation, could be considered as political refugees is deemed necessary to set the following guidelines:

- i. Article 1: Political refugees who entered or are in the Indonesian territory will be granted protection on the basis of human rights and fundamental freedom in accordance with international law.

- ii. Article 2: A political refugee is defined as a foreigner who entered or is in the Indonesian territory for having committed a political crime.

3.1.2.2. Presidential Decree (No. 38/1979) Relating to Vietnamese Asylum Seekers

Indonesia ruled that the Minister of Defense was in charge of coordinating the settlement of the Indochinese refugees in Indonesia; the Department of Defense and Security was responsible for the refugees, and the Minister of Foreign Affairs had the task of arranging contact with the UNHCR and with the third countries willing to accept refugees. The establishment of camps for the Indochinese refugees was mainly left to the Minister of Home Affairs. Despite having to handle more than ten thousands of applications for international protection, Indonesia refrained from establishing a domestic protection framework.

3.1.2.3. Law No. 1/1979 on Extradition Chapter 2 Article 14

“Requests for extradition will be rejected if the relevant authorities have well-founded suspicions that the person who is requested for extradition will be prosecuted, convicted or become subject to other punitive actions because of this person’s religion, political beliefs, nationality, ethnic or minority status.”

3.1.2.4. Law No. 5/1998 as the Ratification of CAT

This law was a ratification of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT) after Indonesia signed it in 1985.

3.1.2.5. Law No. 39/1999 on Human Rights Article 7

It was 1999 this law was implemented, that affirmed Indonesia obliged the principle of non-refoulment. Article 7 of this law affirmed that Indonesia recognized everyone to use all national

and international legal means from human right violations under Indonesia's law.

3.1.2.6. Law No. 37/ 1999 on Foreign Relations Chapter 6

Granting asylum and refugees issue is in hand of the president along with the advice from the minister of foreign affairs. This law also emphasized the granted asylum should be in accordance with Indonesian law and its obligation to international practice.

3.1.2.7. Department of Justice and Human Right Directive from the Directorate General of Immigration, the Procedures Regarding Aliens Expressing their desire to seek asylum or refugee status (F-IL.01.10.1297 dated 30 September 2002)

This provision prohibited foreigners in entering Indonesia's territory in an illegal way but guaranteed that repatriation to their country where they had the fear of persecution would not be taken. UNHCR would determine their status after they are being referred to.

3.1.2.8. Regulation of the Directorate General of Immigration No. IMI-1489.UM.08.05 on the Processing of Illegal Immigrants in September 2010

This law assisted to provide a placement for those who applied for asylum in facilities that are run by the international institution, i.e. UNHCR. UNHCR should report their presence and activities to the directorate general of immigration as long as they are still in Indonesia's territory. This regulation also stated that all the expenses and living cost of those reside in the facilities are not the responsibility of the Immigration Office, Regional Office Ministry of Law and Human Rights, or the Directorate General of

Immigration. All expenses related to residence and living costs of illegal immigrants while undergoing status determination process or being under the protection of the UNHCR are not the responsibility of the Immigration Office, Regional Office Ministry of Law and Human Rights, or the Directorate General of Immigration.

3.1.2.9. Law No. 6/2011 on Immigration

In this new law, there is no new regulation for the asylum seekers and refugees. This law stressed on how to consider the illegal migrants as human trafficking and smuggling victims. Thus, deportation of those considered migrants is a mean that should be taken by the authority.

3.1.2.10. Presidential Decree No. 125 the Year 2016 on Refugees from Abroad

With consideration to implementing the provisions of Article 27 paragraph (2) of Law Number 37 of 1999 on Foreign Relations, President Joko Widodo on December 31, 2016, signed the Presidential Decree No. 125 2016 on Regulating Refugees from Abroad. According to the regulation, the arrangement is based on cooperation between the central government and the UN through the UNHCR in Indonesia and other authorized international organizations that have already built agreement with the Indonesian government. In the Article 3, this decree mentions that “Refugee management should consider the international regulation and accord with the provisions of the legislation.” It is coordinated by the Minister who is in charge of coordinating government affairs in the political, legal, and security category. The coordination is intended to formulate policies encompassing invention, shelter, security, and immigration supervision.

Article 6 mentioned that the institution organizing the search and rescue carries out search and rescue operations towards suspected ships transporting refugees that make an emergency call. The Search and Rescue operation, as intended according to this regulation, can involve a few relevant agencies, including:

- i. Indonesian National Army (TNI);
- ii. Indonesian National Police (Polri);
- iii. Ministry doing government affairs in the field of transportation;
- iv. Institutions doing government affairs in the field of security and safety of the sea, called Maritime Security Agency; or
- v. Other ministries or non-ministry government agencies related to duties in the sea of Indonesia.

For the refugees who were found in a state of emergency, according to this regulation, urgent actions should be taken in the form of:

- i. Moving refugees into an auxiliary ship when their ship is considered sinking;
- ii. Transferring refugees to the nearest mainland port or if the safety aspects of the lives of refugees are imperiled;
- iii. Identifying refugees who require emergency medical assistance;
- iv. Submitting refugees to the immigration detention center in the port or the nearest land.

If the immigration detention center cannot be found in the nearest port or mainland, refugees are then submitted to the immigration office in the local area. If the immigration office cannot be found too, refugees are submitted to the local Indonesian National Police as what stated in Article 10 and 11.

Furthermore, the officers at the immigration detention center work to collect data of the refugees by examining their travel documents, immigration status, and identities. If from such an examination, it is found that they are, indeed, refugees or asylum seekers, the immigration detention center will coordinate with the UNHCR.

The immigration detention centers also work closely with local government to place the refugees at available shelters. If no shelter is available, the local government will arrange a temporary shelter. It, however, must meet the following criteria:

- i. Close to the healthcare and worship facilities,
- ii. Located in the city or district where the immigration detention center is,
- iii. Supportive in terms of security condition.

Meanwhile, refugees with special needs, according to this regulation, can be placed outside the shelter, facilitated by international organizations handling migration issues after obtaining permission from the minister in charge of government affairs. The international organization will collaborate with the working unit of law and human rights of related ministry in managing the immigration. According to Article 27 paragraph (3) of the regulation, refugees with special needs refer to those who are:

- i. Sick;
- ii. Pregnant;
- iii. Disabled;
- iv. Children;
- v. The elderly.

This law also emphasizes that refugees can be moved from one shelter to another with the intention of family reunification, hospital visit, and settlement of a third country. According to it, asylum seekers whose application for refugee status is rejected after the final interview by the UNHCR in Indonesia are assigned to the immigration detention center for Voluntary Repatriation or deportation process in accordance with the provisions of the legislation.

The Indonesian National Police will be responsible for protecting the refugees in the time they are found. The local communities or other government agencies that find the refugees shall undertake necessary security actions, coordinate with, and report to the nearest police station. The authorized police will hand over these refugees to the immigration officers. Henceforth, the refugees are transferred to immigration detention center to get a full-time supervision by authorized immigration officers. This is in line with Article 33 paragraph (2) emphasizing that the immigration supervision of refugees is implemented since the refugees are found, in their shelters, outside their shelters, when dispatched to the country of destination, when repatriated voluntarily, and when deported.

After the refugees are listed, they will be given an identity and refugees document that explains their status. These documents will be expired within a year and can be renewed. They have to report themselves every month to get stamps in their special identity card. There will be a sanction for those who abandon this rule.

This decree also regulates the funding issue coming from:

- i. A revenue and expenditure budget through relevant ministries and agencies;

- ii. Other sources that are legitimate and are not binding, in accordance with the provisions of the legislations.

This regulation comes into force on the date of enactment, as what Article 45 states and this also was promulgated by the Minister of Law and Human Right on December 31, 2016 (Secretary of Cabinet Affairs, 2016).

The lack of law sources for refugees and asylum seekers management has been eliminated by this regulation. Indonesia, with such a law, will coordinate the refugees and asylum seekers from the lower level of government to the central government. It will also establish clear coordination among government officers at all levels to execute a proper action as a response to the presence of refugees both at sea and land. However, officials at the lower level, who discover refugees for the first time, may not have a comprehensive understanding of the country's immigration law that they may be hesitant in identifying immigrants. Most refugees and asylum seekers enter Indonesia by water boat and there is no legal regulation to manage such an event. The lack of a clear regulation and the need to take an action in the meantime have forced the authorized officers to run a security approach as the border law violence mechanism by sending them to the immigration detention center. It makes them more vulnerable.

The adaptation of the definition of refugees based on the 1951 Convention is the main *good* thing in this regulation. Prior to this regulation, immigration officers treated refugees as illegal or undocumented migrants. The mechanism for both categories is different; thus, this regulation came up with the implementation of the better understanding and approach for officers in the field to run it. Furthermore, its implementation should be done comprehensively in every level of government to prevent

mistreatment of refugees and asylum seekers. It should also incorporate human right principles regardless of the lack of facilities in Indonesia.

This decree is the product of Indonesia's eagerness to carry out the 1951 Convention and 1967 Protocol principles even when it is not a party state. Indonesia shows its commitment to fulfilling and guaranteeing the right of refugees and asylum seekers there, as a transit country that participates in solving the refugee issues. This regulation is comprehensive to enforce the law and provide a complete guide for officers related to refugee management. Despite the adopted definition, this decree also accommodates special concerns of the refugees and asylum seekers from the first stage of refugee management to the last stage, where they are decided to either stay or be sent to the country of destination. To effectively implement this decree, accurate distribution of roles among institutions and the principle of shared responsibility must be taken into account.

3.2. THE INTERNATIONAL INSTITUTIONS AND THEIR ROLES

The UNHCR and the IOM are two international organizations operating in Indonesia to address the issue of asylum seekers and refugees. Although both have different mandates and concerns, they have a great influence in the handling of asylum seekers and refugees in Indonesia. They provide protection based on the Geneva Convention and the 1951 UN Convention. Protection, in this context, means the fulfillment of fundamental rights of migrants in the form of securing admission, asylum, and respect for human rights, including the principle of non-refoulement with no exception, considering their safety and security (UNHCR, 1997).

Indonesia still applies the principle of non-refoulement as part of international law. Thus, such a practice of sending the people back to their country may not be found there. But, considering its internal condition, Indonesia

can only accommodate asylum seekers and refugees with a restricted new legal framework. Thus, the role of these two organizations is important in ensuring the achievement of the intended protection for asylum seekers and refugees.

3.2.1. The United Nations of Higher Commissioners for Refugees (UNHCR)

The Office of the UNHCR was established in December 1950 by the UN General Assembly (UNGA) as a subsidiary organ of the UNGA. The mandate is to protect and find durable solutions for refugees. Its work is guided by the 1950 Office Statute as well as the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol.

The UNHCR has been present in Indonesia since 1979 and currently has more than 60 staff working in Jakarta (main office), Kupang, Makassar, Medan, Pontianak, Tanjung Pinang and Surabaya. By the end of July 2014, the total population of concern to UNHCR in Indonesia stood at 9,547 persons, including 5,564 asylum seekers and 3,983 refugees. Indonesia is not a party to the Refugee Instruments, but the government has pledged in its 2010-2014 National Human Rights Action Plan to accede to the 1951 Refugee Convention and its 1967 Protocol (UNHCR 2016).

To date, Indonesia has authorized the UNHCR to carry out its refugee protection mandate in the country, as per terms defined in the September 2010 Regulation of the Director General of Immigration. This Regulation ensures that refugees and asylum seekers are granted access to the UNHCR, registered and allowed to stay temporarily in the country while waiting for the determination of their refugee status and identification of durable solutions.

The UNHCR and its implementing partner, Church World Service (CWS), are assisting the government of Indonesia to manage the arrival of persons requesting international protection (increasing from 385 in 2008 to

3,230 in 2009, 3,905 in 2010, 4,052 in 2011, 7,218 in 2012, 8,332 in 2013, and 2,906 thus far in 2014). The population originates from Afghanistan, Iran, Iraq, Myanmar, Pakistan, Somalia, Sri Lanka and some 38 other countries (UNHCR, 2016). Recognized refugees are submitted for consideration of resettlement countries, and when feasible, the Office facilitates voluntary repatriation in close co-operation with the IOM. The work with IOM, the main operational partner, also involves access to protection, detention, community housing programs and capacity building activities.

Since 2002, the UNHCR has actively participated in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. It works closely with the Ministry of Foreign Affairs in the implementation of the decisions taken by the Bali Process Regional Ministerial Conferences of March 2011 and April 2013 to address the problem of mixed population movements in the region (The Bali Process, 2016). In addition, it is mandated to address statelessness and offer assistance to increase the state's capacity to undertake the registration of newly born children.

In 2014, it operated under a USD 3,337,791,218 budget for refugee and statelessness programs, the main objectives being the preservation of asylum space and increasing the levels of protection for refugees, asylum seekers, and stateless persons (UNHCR, 2015). One of the main tasks of the UNHCR in Indonesia is to determine the status of asylum seeker registering at UNHCR representatives in cities in Indonesia. Asylum seekers who entered in detention will be visited by the officials of UNHCR that monitor them. After having their data collected, they will be able to start the application process to receive international protection. Those holding documents from the UNHCR would not be deported to their countries or their last embarkation ports. Indonesia accepts this document although it is not a substitute for legal documents.

3.2.2. The International Organization for Migration (IOM)

The IOM has an unusual role in Indonesia because the country itself is not a member but merely an observer since 1991. As a legal form of operation and its continuity, IOM and Indonesia have a contract that must be renewed every six months. The organization has 20 sub-offices there, making Indonesia its major mission. Although the country is not a member, IOM has an obligation to assist the candidate country member to overcome the problem of irregular migration and, in this case, to prevent irregular migration movement from the transit country. As Indonesia is recognized as a transit country to Australia, IOM has its mandate to prevent more irregular migration movement out from Indonesia (IOM, 2017).

By signing the Cooperation Arrangement on Migration with the Indonesian government in 2000, the IOM considers that it operates in Indonesia under the approval of the Indonesian government. It is believed that the IOM helps Indonesia develop and implement policies and administrative mechanisms for irregular migration issues. Tasks of the IOM in Indonesia are not limited to the government sector only; the organization is also directly in contact with the migrants (Taylor and Brown, 2010). Significantly, the IOM has been involved and had a significant role and in Indonesia, it sheds its focus on addressing human trafficking and labor migrants from the country. It puts a lot of emphasis on capacity-building and technical cooperation with the government.

The IOM is not a body under the UN but it has become the lead agency in dealing with irregular migration even without a formal mandate under the international law. It provides assistance to asylum seekers and refugees in order to avoid human rights abuses and protect their rights. However, many perceive that its involvement across borders for handling refugee issues is rather superfluous. This is because the IOM is not a UN body, but has data and information that the UNHCR and local government do not. According to Missbach (2015), important information owned by

the IOM could be distributed to the government of Indonesia and Australia to prevent the increasing numbers of irregular migrants. It will also help the two countries develop a better security program. However, in return, the IOM will become an important stakeholder in the global migration industry. A prove that it plays an important role is the abundance of the budget it owns. Missbach (2015) also added that based on her interview with one of the IOM staff, she concluded that the organization would not run out of funds. In 2009, it received funds from twenty-two different donors in which the Department of Immigration and Citizenship of Australia (DIAC) donated as much as USD 21,407,194.

CHAPTER IV

REFUGEE AND ASYLUM SEEKERS MANAGEMENT IN INDONESIA

This chapter will examine that Indonesia has a very limited role to manage the refugees and asylum seekers, yet it supports the importance of protecting these refugees and asylum seekers as the obligation to honor the refugees' standard protection: the right to life and personal safety based on the UN Universal Declaration on Human Rights stated in Article 3 (Krustiyati 2012). The article is considered as *ius cogens*, where this norm has been accepted and recognized internationally. Nobody could exempt and be exempted. As a right, which has specific characteristic, then this right is binding on those states where there are no obligations required in special conventions, statement of consent, and a particular comment. Thus, without ratification, each state (especially member states of the United Nations) cannot evade that obligation even it is not a state-party of the 1951 Convention and the 1976 Protocol, including Indonesia.

Therefore, Indonesia has no authority to issue the Refugee Determination Status (RDS) and it has passed the authority to UNHCR based on its mandate according to 1950 UNHCR Statute. These refugees and asylum seekers, mostly, find themselves in a state of limbo in Indonesia. This state will last for years or even for a lifetime, at worst. It could be changed when their country of origin adjusts a new circumstance in a possibility of resettlement in the third country. Indonesian government insisted that local integration is not an available option (Taylor and Rafferty-Brown, 2010).

4.1. REFUGEE AND ASYLUM SEEKERS MANAGEMENT IN INDONESIA

The principle of non-refoulement is found not only in the 1951 Convention, but also implicitly and explicitly in Article 3 of the Convention Against Torture, Article 45 paragraph 4 of Fourth Geneva Convention of 1949, Article 13 of the International Covenant Civil rights and Politics 1966, and other

human rights instruments. This principle has been recognized as part of the international customary law. In a sense, countries that have not become state parties of the 1951 Convention must respect the principle of non-refoulement. The main principle of international protection of refugees is the 1951 Convention and 1967 Protocol provisions contained in it, including:

1. Prohibition to repatriate refugees and asylum seekers at a risk of persecution when they are repatriated (the principle of non-refoulement);
2. The requirement to treat all refugees in a way that is non-discriminatory;
3. Standard treatment of refugees;
4. The obligation of refugees to the countries where they seek for an asylum; and
5. That the state is obliged to cooperate with the UNHCR in carrying out its tasks.

More specifically, the principle of non-refoulement regulates that:

1. It prohibits the return of refugees in any manner to their countries or territories of origin or another country or territory where their life or freedom is threatened because of their race, religion, nationality, or membership in a particular social group or political opinion;
2. Exceptions can only be made if a refugee is considered a threat to national security or has been convicted of a serious crime dangerous to society. However, it does not apply if the individual is at risk of torture or cruel treatment, inhuman or humiliating punishment; and
3. As part of customary law and treaties, the basic principle is binding all countries.

Indonesia, in carrying out its responsibilities, is assisted by several agencies. The Ministry of Law and Human Rights controls some implementation units dealing with the immigration law, better known by the Directorate General of Immigration. Directorate General under the auspices of the Ministry of Law

and Human Rights is a unit representing the Indonesian government in dealing with issues related to immigration and the tasks are performed by the Directorate of Investigation and Immigration Enforcement. In every province in Indonesia, there is an extension of the Ministry of Law and Human Rights called the Immigration Division with its function to deal with the implementation of immigration laws. Overseeing smuggling problems, the Intelligence and Enforcement Division of Immigration is the responsible unit. Meanwhile, the Immigration Office is the authorized institution that oversees the undocumented migrants in the territory of Indonesia, cooperating with the Immigration Detention Center as a place to quarantine and serve as a temporary detention of undocumented migrants before they are sent to third countries or repatriated. In handling undocumented migrants, the Detention Centre is also assisted by international organizations such as the IOM as a facilitator of migrants and the UNHCR for the treatment of refugees and asylum seekers along with the process of granting refugee status.

People smuggling has been a serious problem for Indonesia, although the movement itself is considered a relatively new crime. Commonly, smuggling in Indonesia involves foreigners consisting of smuggler and smuggled persons. Smugglers have discovered and learned the right time to enter Indonesian territory, the geographical conditions, as well as the character of Indonesian society. They could easily determine the locations they deem to be convenient as the place in and out and prepare the transportation tools by utilizing the economic conditions of communities around the coast where they enter. The south coast of Java island is the most strategic spot that is geographically close to Christmas Island, Australia. Thus, smugglers use this spot as an embarkation to depart for Australia by boat.

In the sense of juridical, the Protocol against the Smuggling of Migrants by Land, Sea, and Air supplementing the United Nations Convention against the Transnational Organized Crime has regulated the smuggling issues. It is specially mentioned in Article 6 that points out and subjects a legal action for migrants who

commit people smuggling with the purpose of seeking profit by doing immigration violations of a sovereign state. Arrested foreigners who are proven to be smugglers will be directed to the police and immigration office then reported to their embassy. According to Indonesian law, they will be extradited and perhaps prosecuted, depending on their level of crime.

In the smuggling process, besides the smuggler, another person involved is the person being smuggled, commonly referred as the victim –although the provisions of immigration law do not define him/her as a *victim*. It is because no human casualties but the state were harmed in the violation of immigration law. Therefore, a smuggling victim will still be referred to the person being smuggled based on several reasons. They are aware of their desire to cross over another state illegally but still want to do so due to the existing situation of their original state. Thus, they will pay the smugglers to help them reach their will.

There is a paradigm shift found when managing those being smuggled, particularly in terms of the right to be kept away from torture, cruelty, inhumanity, degrading treatments or punishment (Article 16 Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime). These people are then detained by the immigration office at detention centers or houses. In detaining these people, the state should comply with its obligations described in the Vienna Convention on Consular Relations, including that the detention of the person must be notified to the consular officers. As for the repatriation of smuggled migrants, the country of origin should facilitate and accept the return of them, be they citizens or former citizens of another country who now have the right of permanent residence in that country at that time. If the migrants do not have legal documents, the party states shall issue a travel document or other authorized documents to facilitate these people to leave and enter the country.

In Indonesia, according to Law No. 6 of 2011, when foreign citizens illegally enter the territory, their status will be changed according to the process. First, they will be referred to as illegal migrants for entering the territory with

false or incomplete documents. Second, they will have surveys in which the immigration office, in coordination with the UNHCR, will process their return to the home country if they are not willing to leave. Third, upon the registration for asylum seeker status, they are voluntarily placed into the detention center and as the occupants of the detention center, they are called detainee. There, the UNHCR will give them guidance, interviews, and lessons of local language on a weekly basis. After completing the interview, they will obtain a Refugee Certificate that gives them a formal status as a refugee, and those who do not pass can make an appeal to the UNHCR for the certificate.

Those with a refugee status will now have a freedom to do things as they are transferred from the detention center to the accommodation arranged by the IOM and the UNHCR. Would they decide to leave to another country, their refugee status would be void and they would be required to register for the status again. Meanwhile, those who stay will have interviews with the embassy of the country of destination. If the embassy decides to reject them, the UNHCR will assist and recommend them to another country. This long process normally takes years to complete, especially in Indonesia (UNHCR, 2016).

In managing refugees and asylum seekers, Indonesia adheres to the principle of a durable solution with the advanced three approaches:

- a. Voluntary Repatriation; repatriation to their country of origin voluntarily;
- b. Resettlement in Third Country; or
- c. Local settlement; placement in Indonesia.

In this case, the government issues a temporary residence permit for refugees-that will be reviewed again when it is close to its expiry date. However, in most cases, the government chooses Voluntary Repatriation as the main solution. There are some different conditions of undocumented immigrants going through repatriation:

- a. The migrants are willing to go home, have immigration papers, have

fund to return to their home country, with the immigration authorizing the repatriation facilities;

- b. The migrants are willing to go home, have fund but no immigration documents, with the immigration authorities directly contacting and coordinating with the concerned embassy of the migrants; or
- c. The immigrants are willing to go home, do not have fund and immigration papers with the IOM financing, arranging documents to the immigrants' embassy, and monitoring whether these immigrants have returned to their country of origin.

Indonesia tries its best to avoid the last solution given the economic condition of the country and the limited capacity of detention centers. However, placement in the third country, which is processed by the UNHCR, involves a relatively long process. Therefore, many of these refugees and asylum seekers refuse to be repatriated and hope to be sent to Australia.

In carrying out its responsibilities, Indonesia, while becoming a responsible international relations actor, faces many challenges in handling refugees and asylum seekers. These challenges can be summarized as follows:

- a. The lack of allocated budget for illegal migrants.
- b. The inadequate number of shelters available for illegal migrants, both at the immigration office and detention centers.
- c. The absence of medical help or doctor in detention centers from the local health department.
- d. The absence of isolation rooms for detainees who have violated the law.
- e. The absence of special rooms for detainees who are married.
- f. The lack in security officers (procurement officer must go through the central government), with a smaller number of officers not proportional to balance the huge number of detainees
- g. The lack of facilities and infrastructure (electricity, water, CCTV, etc.) to support the implementation of immigration officers' tasks

- h. The slow flow of material support from the facilitators (UNHCR and IOM), for example, slow reimbursement of meal budget due to a long administrative process in the disbursement of funds, or in some cases, immigration officers use bailouts to cover the expenditure.
- i. Differences in the culture that lead to frequent misunderstandings of food and dietary pattern.
- j. Detainees want to be treated exclusively.

Indonesia, through the national legislation, continues to overcome the human trafficking in the country. There are two kinds of initiatives taken; preventive and repressive. Indonesia can perform a preventive measure by:

1. having an exchange of information with other countries and relevant agencies in the country, covering modus operandi, monitoring and securing the travel documents for their validity and legitimacy.
2. Implementing a technical cooperation and training with other countries, including treatments against the victim, security, and quality of travel documents, detection of counterfeit documents, exchange of information, monitoring and detection of human smuggling by all means of conventional and non-conventional.
3. Providing legal counseling in the form of public campaigns for raising public awareness that smuggling and human trafficking are criminal against the Indonesian law.
4. Ensuring that the travel documents or identity documents are issued only by the authorized government bodies so they could not be misused, falsified, altered, duplicated or published illegally.
5. Ensuring the integrity and security of travel documents issued or published on behalf of the state, to prevent the making of such documents unlawfully.

Repressive efforts can be manifested through the immigration investigations against perpetrators of the crime of trafficking in persons and human smuggling, administrative action against the perpetrators of the crime of

trafficking in persons and human smuggling; and cooperation in the field of investigation with other law enforcement agencies.

To handle refugees (boat people) who are still at sea (approximately 6000-8000 people), the SAR methods and rules involving them (Rule of Engagement) are still applicable (BASARNAS Indonesia, 2017). Yet, the determination of evacuation points needs to be established as soon as the officials find any boat people entering the territory. This is due to the social vulnerability that may arise in establishing the temporary evacuation points. The government has to take action before the communities –where boat people enter– do. Preparation for the repatriation process is also needed to support the transport, whether to bear the cost together or to fully hand over to the home country that is responsible for its citizens.

Given that this issue is related to the idea of transnational organized crime (TOC), it is necessary to clarify how the concepts, framework, mechanisms, forum, and efforts should be done to overcome this problem within Indonesia's domestic policy, and through bilateral cooperation with Malaysia, Thailand, Myanmar and Bangladesh, and other international organizations including ASEAN.

The Coordination Meeting led by the Coordinating Minister for Politics, Law, and Human Rights agreed to appoint Desk Management for Smuggled People, Refugees, and Asylum Seekers under the coordination of Coordinating Minister Politics, Law, and Human Rights to act as Focal Point. The meeting was expected to produce the concept of emergency response of refugees already in Indonesia. Another expected outcome was a draft work plan containing the duties and responsibilities of all stakeholders, time frame, logistic and financial support (Coordinating Minister for Politics, Law, and Human Rights, 2013). According to the data from the Aceh immigration office per 24 May 2015, the Rohingya refugees of Myanmar and Bangladesh who totaled 1,860 people are located in a few places in the province of Aceh and North Sumatra (VOA Indonesia, 2015).

The Director General of Immigration has issued a circular No. F-IL.01.10-

1297 of 2002 letter stating that:

- a. In principle, the immigration officer must conduct denial against foreigners who enter Indonesia not in accordance with the applicable provision.
- b. Foreigners who express a desire to seek asylum upon arrival in Indonesia are not subject to immigration measures such as deportation to a country that threatens life and liberty.
- c. If there are foreigners who are believed to have an indication of asylum seekers or refugees, the immigration officer should contact the UNHCR or other refugee-related international organizations to help determine their status.
- d. If the immigration checks are far away from the UNHCR office, officials must establish a coordination with the person in charge of conveyance while waiting for the UNHCR delegates to arrive.
- e. Foreigners who have obtained the Attestation Letter (protection of UNHCR as asylum seekers or refugees) in order to permit his residence are not in question.
- f. Matters related to residence and living expenses during the research process or the immigration office for foreigners are under the protection of the UNHCR and not a responsibility of immigration offices and Directorate General of Immigration.

The abovementioned letter was made to provide a guideline for immigration officials examining at the immigration checkpoints, as well as to give special treatment to foreigners who pose as asylum seekers or refugees. Indonesian government's actions against refugees are in line with the principles of International Law. Although it is not yet a state party to the 1951 Refugee Convention and its 1967 Protocol, Indonesia has been supporting the process by allowing asylum seekers and refugees into the territory of Indonesia, referring to the asylum seekers to the UNHCR, and by allowing them to stay in Indonesia while waiting for a sustainable solution.

In the other side, the waiting period for the refugee status determination and durable solution by UNHCR can be a new form of human right abuse. It is because the long period can produce a psychological pressure to the refugees and asylum seekers who are placed in the detention centers with insufficient facilities. Basically, those refugees and asylum seekers are people who experienced a human right abuse in their country of origin. When they arrived in Indonesia, they could potentially experience another form of human right abuse in the detention center.

Thus, the circular letter of the Director General of Immigration Number: F-IL.01.10-1297 September 30, 2002, which has been set on immigrants seeking status as asylum seekers or refugees, is no longer relevant to current conditions, where the increasing number of arrivals and presence of foreigners in Indonesia does have any impact on the ideology, politics, economy, society, national security, immigration, and insecurity.

4.2. REASONS INDONESIA DID NOT RATIFY THE UN 1951 CONVENTION AND THE 1967 PROTOCOL

There are some reasons. Signing the Protocol means Indonesia agrees with the international law while ratifying means it is ready to implement the contents of the international law and adopt them into the national legislation. At the time when the 1951 Convention and the 1967 Protocol were established, the Indonesian government did not participate in the drafting process, nor did it gain benefit from welcoming refugees. In international law, as for now, Indonesia has an interest in refugee and would like to adopt the 1951 Convention and 1967 Protocol into a domestic law. The government does not need to sign the Convention and Protocol; instead, it could directly ratify, considering that there will be a long pause from the signing to ratification.

In most countries, formal approval by the national legislature is needed to ratify a treaty. Ratification of a convention usually requires several steps taken by the executive and legislative bodies. Once the executive board has approved the ratification or accession to the Convention, it usually will prepare and submit a

ratification proposal to the national legislature.

The legislative body refers to the representative body of the people who have the authority to make policy for the people of a country. Indonesia has regulations governing the performance of the legislature (DPR-RI), in accordance with Law No. 37, Article 6, which states that, “Authority organizing the Republic of Indonesia’s foreign policy in the hands of the president, while in the case of declared war, make peace, and agreements with other countries required the approval of the legislature.”

In the article, it is explained that to ratify an international treaty with another country, the parliament has to agree to the ratification before it proceeds to the president. In other words, the president becomes the last in the process. Indonesian legislature, in this case, the House of Representatives, supports the ratification of the 1951 Convention and the 1967 Protocol. An international agreement—both bilateral and multilateral—puts the Parliament on the passive side, in the sense of waiting for the submission from the government, in this case, the president or the ministers. The House of Representative cannot construct a law unless requested. The problem exists when, in order to request for a law to be made, all relevant parties must agree, including the ministries related to refugee management.

Executive agency or in this context, the government, has not yet submitted a request to ratify the 1951 Convention and the 1967 Protocol. This is not because the government disapproves the ratification of the international refugee law, but because there are many aspects to consider. Through the National Action Plans of Human Rights 2004-2009 and 2010-2014, the government has shown a positive response to the efforts of the 1951 Convention and the Protocol of 1967 ratification. However, the current condition in the country (economy, politics, and society) are rather vulnerable that ratification does not seem to be a right move.

The 1951 Convention and the 1967 Protocol had set the rules and norms that must be met by the participating countries through the provisions contained therein. Among those chapters, there are some clauses in the 1951 Convention

that are rather difficult to be fulfilled by the Indonesian government. Such articles are:

- a. *Article 13, 14, and 30.* State Parties are required to assist the refugees in terms of property rights, both mobile and fixed, and save and transfer their assets wherever those assets are, to a country where they would settle. State Parties are required to assist or even facilitate the transfer of property rights and those assets.
- b. *Article 17, 18 and 19.* These articles are giving freedom to refugees for a gainful wage, doing their own business such as agriculture and companies. This means that the people of Indonesia must compete with refugees in the economy and business development. On the other hand, the government is still responsible for creating jobs for its citizens, and as an impact, the unemployment rate in the country continues to rise.
- c. *Article 22.* Refugees have the right to education, and the government is obliged to have them fulfilled. This then puts the governments in a dilemmatic situation. On the one hand, there are Indonesians with no access to education, while on the other hand, the government is yet expected to provide education to the refugees.
- d. *Article 21 and 24.* These two articles are to give the right to welfare to refugees, such as housing and allowances. This means that the ratifying countries must prepare more budget to accomplish the target of the Article.

Above are some articles that may be difficult to be met by the government given the condition of Indonesia, especially the economic condition that is remarked by poverty and employment.

4.2.1 Reduced UNHCR Involvement in the Handling of Refugees in Indonesia

As it primarily involves in the handling of refugees in Indonesia, the UNHCR plays a very important role. Even though Indonesia has not ratified the

1951 Convention and the 1967 Protocol, under its appropriate mandate, the UNHCR is still the agency that grants the right to determining a refugee status in Indonesia. In addition, in the process of determining the status, UNHCR provides assistance to refugees in hopes that their basic rights like food, water, shelter, education, and others can be met. With Indonesia having limited fund for helping refugees, the presence of UNHCR would be helpful enough in assisting the country in resolving some issues.

When, in the future, Indonesia decides to ratify the 1951 Convention and the 1967 Protocol, the UNHCR's involvement in the process of handling refugees will be greatly minimized. The mandate of the refugee status determination process that is owned by the UNHCR and the fulfillment of the refugees' and asylum seekers' needs while in Indonesia will be directly transferred to the Indonesian government. Thus, the government will have to be fully responsible for determining refugee status in accordance with the applicable rules. As for the needs of refugees and asylum seekers themselves, the government needs to prepare a specific budget allocation in accordance with the 1951 Convention and the 1967 Protocol.

4.2.2. Concerns Increase in the Number of Refugees and the Related Transnational Crime States

If both the Convention and Protocol are ratified, the government is obliged to protect refugees while they are in Indonesia. It can no longer treat refugees as illegal immigrants and accommodate them in detention centers. These people will have the right to live and enjoy human rights like local citizens. It may be a harmful decision for some reasons because by doing so, new refugees will feel safe to enter the territory and they may as well demand protection and certain rights. In other words, if the government chooses to ratify, chances are the refugee influx will rise.

Indonesia keeps an eye on its neighbor, Australia, a destination country that has tightened its domestic laws on refugees. Another consequence of ratification is that Indonesia may become the end destination (not a transit

country) for refugees. When it gets harder to enter Australia, refugees may choose to enter Indonesia instead.

That some individuals who claim to be refugees enter a country without proper documents can bring another issue, in which the government will find it hard to identify them in details. This is a potent threat because those claiming refugee may have undisclosed intent and purpose to enter the country. They could be involved in terrorist activities or other transnational crimes such as human trafficking, illegal fishing, illegal logging, and drugs, which can lead to potential danger to the country, particularly to its citizens.

Cross-border crime can also occur as a result of a large population. Indonesia's large population makes the people compete immensely for employment. People's lack of formal education, in addition, can further stimulate transnational crime. Refugees and citizens of Indonesia's vulnerability in terms of economic and psychological could increase the exploitation by human trafficking networks, trafficking of people, drugs, and other criminal activities including international terrorist networks. This could have an impact as well as a variety of problems in Indonesia.

The magnitude of the potential of the growing number of refugees and transnational crime in Indonesia accompanied by weak law enforcement are also taken into consideration by the government to ratify the 1951 Convention and the 1967 Protocol on the Status of Refugees.

4.2.3. National Domestic Factors

4.2.3.1. Law Enforcement

As mentioned previously, refugees and asylum seekers who enter Indonesia through the sea are rather difficult to detect. This means that if the government decides to ratify the 1951 Convention and the 1967 Protocol, it should strengthen the law enforcement in the country by, for instance, improving border surveillance and maritime security and defense.

Defense and maritime security would require the procurement of equipment and weaponry that are complete and in good condition for officers in patrolling the sea and the border regions. However, it is important to note that collecting equipment and weapon alone is not enough; empowering personnel's capacity is also critical. One of the strategies to improve such law enforcement on the border and maritime is to by providing insight or training to communities around the border related to the presence of refugees and asylum seekers around them.

4.2.3.2. Management Budgeting Plan

The ratification of the 1951 Convention and the 1967 Protocol will also bring an impact to the Indonesian economy. All the costs incurred for financing the handling of refugees and asylum seekers will be fully borne by the government. Thankfully, if Indonesia decides to ratify, it is allowed to request assistance from the UNHCR and other participating countries. Among the financial costs that the country needs to prepare are:

- a. The cost of training for agencies that will work in handling refugees. This includes the police, the navy, officers at the immigration checkpoints handling administration at the entry level, the director general of the immigration later determining refugee status, the Ministry of Law and Human Rights that ensures the fulfillment of refugees' rights, and the Ministry of Foreign Affairs as it works and corresponds closely with other countries in addressing issues with refugees.
- b. The costs for determining the refugee status. These costs include the financing of professional personnel in the registration and interviews with refugees or asylum seekers. As not all refugees can communicate in either English or Indonesian, the task may require professional interpreters based on the needs at the time of registration in accordance

with the language the particular refugees and asylum seekers speak. Having interpreters will help refugees provide more accurate personal details like name, country, and city of origin, ethnicity, religion, citizenship, language used, the date of departure from the country of origin, transit, family data, the reason of fleeing, and other information necessary for determination process. In addition, during the process of refugee status determination, Indonesia is also obliged to provide and meet the basic needs of refugees like shelter and food, which will certainly incur costs.

- c. The cost of sending refugees back to their countries. Once the refugee status has been determined, Indonesia should offer long-term solutions for them. If local integration is not an option, the refugees will be given the option of voluntary return to their country on condition that the situation there has been stable enough. Since the option of deployment to the third country will require larger cost, such an option is not highly favorable, thus repatriation is considered a more viable solution.

The extensive amount of financial costs required in handling refugees, of course, cannot be obtained by waiting for assistance from the UNHCR and other countries. Having a large number of people illegally entering a country's territory means a financial loss too. Countries are supposed to be benefitted from immigration in general, but illegal immigration, in which people are coming without paying for visa and other administration, has put them at a risk of losing income. Besides having to risk losing financially, Indonesia must also prepare specific budget for refugee management. This perhaps strengthens the government's reason for not ratifying the Convention and Protocol.

4.3.2.3. Social Culture Society Condition

There are some long-term solutions for handling refugees that Indonesia can take if it decides to go for ratification of the Convention and Protocol. Such solutions include local integration, voluntary repatriation, or placement in third countries. Becoming the state party will force Indonesia to set an integration there. The 1951 Convention Relating to the Status of Refugees has provided the instructions on the treatment to be given to refugees, such as:

- a. The national treatment. This is related to provisions of freedom to practice religion, access to justice, access to legal aid and others;
- b. The same treatment as given by the home country, including protection of individual property, inventions, trademarks, rights of literary works, scientific works, and others;
- c. Most favored treatment with respect to the right to join non-political organization, form an organization, non-profit, or a trade organization (trade union); and
- d. The same treatment to foreigners residing in the country. For example, right to have movable and immovable own goods, the right to gain profit, right to housing, and so on.

When local integration is an option, refugees are expected and required to live together with the local community. If refugees and the locals cannot coexist as expected by the government, conflict and other issues can arise. There is a possibility of social jealousy to exist if the government is not able to treat both groups fairly.

CHAPTER V

INDONESIA-AUSTRALIA IMMIGRATION COOPERATION

Human Right Watch (2002), Hofmann (2010), Baker (2013), United Nations on Drugs and Crime (2011), and Baker (2013) (as cited in Missbach 2015) found that most of the refugees and asylum seekers who choose Indonesia as the final stepping stone to Australia were driven by the lower cost of being smuggled to Australia compared to the EU countries and United States (US). By choosing Indonesia, they also consider relatively stable situation since the first flow of refugees and asylum seekers in 1979 when the UNHCR was established. In addition, Indonesia is considered geographically strategic because it connects two continents (Asia and Australia) and two oceans (Pacific and Indian). It serves a cross position, considered very strategic, for the migrants who come from Asia continent heading to Australia.

The dilemma between a commitment to respect human rights and a requirement to serve for states' security is faced by Indonesian and Australian governments in terms of influx acceptance of refugees and asylum seekers. Thus in 2002, Indonesia and Australia have agreed to establish a ministerial cooperation known as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) that still goes on until now (The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, 2002). This framework is also engaged with the UNHCR and the IOM along the progress. People who illegally enter the Indonesian and Australian borders are not classified as refugees and asylum seekers until the UNHCR determines their status. By that, Indonesia and Australia recognize that any illegal enters of the states' border undertaken by those people are against the national sovereignty of the states. Thus, it needs to be cut in respect to states' borders.

This chapter will focus on Indonesia and Australian immigration cooperation in managing those who seek the protection. It also examines the

restrictions that the both governments had in fulfilling their obligations and protecting their sovereignty as an independent state. Thus by far, Indonesia and Australia is still searching for the best way out to serve their interests.

5.1. AUSTRALIA IMMIGRATION POLICY AND ITS IMPACT ON INDONESIA

Unlike Indonesia, Australia ratified the 1951 UN Convention which gave it a responsibility for resolving the current problem of refugees. However, it appears that Australia puts efforts in blocking refugee resettlement efforts from Indonesia. It adopts a zero-tolerance stance when it comes to boat people issues.

The process of formulating and implementing Australia's policies in dealing with refugees has undergone a very lengthy and ups and downs process. When John Howard held the Prime Minister's office, it was the time Australia's policy in handling refugees took more attention. In order to prevent unauthorized entry of vessels into waters and prevent asylum seekers (as well as smugglers) attempting to enter the territory, in 2001, Howard established a policy called Relex Operation. The Relex operation itself was an Australian border protection strategy on the high seas by intercepting, detaining, and preventing ships carrying people who wanted to enter Australia without a visa (Parliament of Australia, 2001). Later on, there had been several other policies to block the arrival of refugees; the Pacific Solution, offshore processing, and regulation of temporary protection visas for refugees.

Based on Australian immigration law, there should be a detention to those who arrived illegally to its territory. The UNHRC also recommends that the detaining process should be applied for individual cases only. Children are also detained in Australia if they arrived by violating the immigration law with no exception. As of 5 September 2013, there were 1,428 children, with the average age of 10 years old. As a signatory of the Convention on the Rights of the Child (CRC), Australia clearly violates its obligations that detaining children is the last resort and not the first. In this refugee issue, Australia makes it first and without a given period (Save the Children Australia, 2015).

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR) that has a bond under the article 9 (1) of the ICCPR for not subjecting anyone to arbitrary detention. The UN Human Rights Committee has found that Australia repeatedly breached the article (Australian Human Rights Commission, 2010). According to Taylor (2006), the Australian government is in a position where it has no protecting obligations to persons who are adequately protected in a safe third country.

In terms of dealing with immigration issues, the government has a Department of Immigration and Citizenship (DIAC) responsible for guarding the borders against each arrival of foreign immigrants. The Department determines the formulation of immigration policy, including the authority to determine the legality of immigrants entering the territory. In facing the arrival of asylum seekers using boats, Prime Minister and the Minister of Immigration Australia established the Expert Panel on Asylum Seeker that serves as a provider of government policy-related reports.

The purpose of the Expert Panel's establishment is to provide advice and recommendations on policies that governments can take in stemming the migration of asylum-seekers using boats by establishing the principle of 'no advantage'. With this principle, the government seeks to give a message to asylum seekers, with the substance of the policy being made, not to try to obtain protection without the mechanisms that have been provided, because it is going to be useless. The recommendations provided by the Expert Panel are structured in a large framework containing technical advice on the implementation of the policy. The framework, according to Refugee Council of Australia (2012), is divided into 22 recommendations based on;

1. Policy principles
2. The addition of humanitarian programs at Australia
3. Regional capacity building
4. Bilateral cooperation with Indonesia
5. Cooperation with Malaysia on the issue of asylum seekers

6. Agreement with countries of origin of asylum seekers
7. Legislative permits in the transfer of asylum seekers to other countries
8. The plan to process claims of asylum-seekers in Nauru
9. Formation of claim processing plan for asylum seekers in Papua New Guinea
10. Australia Agreement with Malaysia
11. Short-term access tighter over Special Humanitarian Program
12. Long-term access tighter to Special Humanitarian Program
13. Coordination with other host countries
14. Extending the excision policy to all areas of Australia
15. Reviewing the refugee status determination (RSD) process
16. Elimination and return strategies
17. Disruption strategies
18. Anti-smuggling operations
19. Sending boat back to sea
20. Search and rescue activities
21. Linkages between onshore and offshore programs in Australia
22. Conducting further research

Of the 22 recommendations listed above, at least some have been adopted by the Australian government. Some policies that are in accordance with the recommendations include:

1. Introducing the Regional Processing Act amending the Migration Act that allows the Minister to declare a third country as a Regional Processing Country with legislative approval
2. The official signing of a Memorandum of Understanding (MoU) related to the transfer and processing of persons in Nauru and Papua New Guinea
3. Voluntary and forced withdrawal of 500 asylum seekers who have been screened as persons without protection claims from Australia, Christmas Island, and Nauru

4. Imposed restrictions on bridging visas for people coming by boat effective from August 13, 2012, and people who have been detained in Australia and are in the process of transfer to Nauru or Papua New Guinea.

In fact, Indonesia manifested its commitment to manage the influx of refugees and asylum seekers coming towards its territory with regards to Co-Chairs' statement of Bali Process in 2016. Indonesia actively addresses the humanitarian and protection needs for those who sailed in Indonesia maritime area with non-refoulement principle. By providing temporary protection, local stay arrangement, and recommended research, Indonesia presents its hospitality (The Bali Process on People Smuggling, Trafficking in Persons, and Related Transnational Crime, 2016).

Some of Australia's policies lead to how Indonesia restrains the rate of refugees and asylum seekers towards Australia's territory. This policy is also structured in the Bali Process in 2002. Questioning what Indonesia does in dealing with refugees and asylum seekers means to question the implementation of the 1951 Convention by Australia. The implemented policy by the Australian government to push back asylum seekers boat to Indonesia's territory simply makes Indonesia a shelter of uncertainty while Australia keeps its border closed. In 2014, Australia also announced its policy to make it ineligible for asylum seekers registered in UNHCR Jakarta after 1 July 2014 to resettle in Australia's territory (Australian Customs and Border Protection, 2014). This is aimed to reduce the movement to Australia via Indonesia. Thus, Indonesia finds it burdening because the intention of seeking asylum in Australia has not been replaced to another country. In this stage, the implementation of non-refoulment principle becomes the curtain for Australia's off responsibility, in which indirectly puts Indonesia a burden to host these asylum seekers who have been in Indonesia already.

The interesting part is Australia's efforts in tackling the influx of these refugees and asylum seekers, as a state party of the 1951 Convention. During the period of Kevin Rudd's administration, the number of asylum seekers went up.

Thus, the policy on handling asylum seekers turned to border security measures was designed to disrupt the human-smuggling chain. As a result of handling these asylum seekers, Australia spent a substantial amount of fund. To detain the flow of refugees and asylum seekers coming to Australia via Indonesia, Australian government provided a significant level of funding and resources for Indonesia to use its immigration detention facilities (Nethery et. al, 2012). As a state that respects the principle of non-refoulement, Indonesia becomes a buffer state in which the flow of refugees and asylum seekers is being detained before entering Australian waters, one of party state of the 1951 Convention. Sending asylum seekers who entered the country by boat to Papua New Guinea and the Pacific Island Nauru was also a policy aimed at dressing many asylum seekers coming to Australia. This controversial policy also set the asylum plan for Papua New Guinea and Nauru, such as a substantial financial support (VOA, 2013). It was until 2016, Australia and Papua New Guinea agreed to close the detention centre in Manus Island after a media leaked 2,000 documentations regarding sexual abuses, assaults, and self-harm attempts in Nauru detention centre over two years (Reuters, 2016).

Australia, under the administration of Julia Gillard, was able to implement several policies relating to refugees and asylum seekers. Some of them were related to Irregular Maritime Arrival issues, including The Pacific Solution, Mandatory Detention, Bridging Visa, Asylum seekers to the country of origin, and Malaysia Solution (Karlsen et. al., 2011). The overall policy issued by the Australian government during Julia Gillard's tenure tended to be punitive or punish asylum seekers who came by boat and did not bring official documents to Australia.

In addition, Australia has also changed the policy of asylum seekers so that their arrival in the country's mainland by boat can be sent to Nauru Island in the Pacific or Papua New Guinea, like the previous Pacific Solution policy for immigration processing where the government has the authority to send refugees to detention centers in Nauru and, when they land, in remote island areas such as

Christmas Island. This policy has been in effect since mid-2013 (BBC, 2016). Domestically, such a policy has come under widespread criticism, as Australia considers human rights violations. Human rights groups have criticized the dam and accuse Australia of failing to meet the requirements of the refugee convention. With this change, the asylum seekers landing in the main area no longer have the advantage of remaining in Australia as long as their immigration affairs are processed by the authorities.

Tony Abbott's administration also performed various operations, one of which is Operation Sovereign Borders (OSB) to dispel the asylum seekers who came from the sea to be returned to the nearest country or the country of origin of their last departure (Australian Government Department of Immigration and Border Policy, 2013). Policies issued by this administration in handling asylum seekers were also suspected of human rights violation because asylum-seekers who should have been protected were ignored and their future was unclear due to the existing policies.

The OSB was a military-led border security operation, supported by various federal government agencies. Launched on September 18, 2013, the government coalition set up the military in response to fighting people smuggling and protecting Australia's borders, preventing people from endangering their lives from marine, and maintaining the integrity of Australia's migration program. In the OSB, a Joint Agency Task Force (JATF) was established to ensure all governments' efforts to combat people smuggling and protect the Australian border (Ardianti, 2015). Under this policy, people traveling illegally by boat would be intercepted and removed from Australian waters or shipped to other countries for processing outside the territory. Such persons would never be able to choose to be processed and resettled in Australia. This policy applied to everyone (family, children and unaccompanied children, and educated or skilled persons) without exception. For people who come by boat illegally, regardless of the departure point, they would be returned to the country where they disembark or

transferred to a new processing center outside Australia in Papua New Guinea or in Nauru within 48 hours (Ardianti, 2015).

The Australian Immigration Act applies a rule where a person must first legally enter the country before he/she is able to seek for asylum. This is what then causes thousands of boat people attempt to enter the Australian territory to be able to undergo the asylum process. However, based on the latest policy by the Australian government after amending the immigration law, refugees are only allowed to stay in the country for a relatively short period; three to five years. The Australian government will not provide permanent protection, so in other words, this visa prevents those who come by boat from making Australia a permanent home.

In the amendments to the law, all unauthorized refugees and ship arrivals to Australia will be directly processed offshore, where they will remain in custody until a third country shelter for them has been determined. Surprisingly, the amendments contained in the law will exclude Australia as a possible third country for their shelter regarded as legal refugees. Revocation of Australia's land from its own migration zone and its potential deprivation as a third country to accommodate those who are proven to be legal refugees are unprecedented steps. It is a shame for this country because over the past decade it has implemented some of the most extreme and punitive refugee policies ever seen, including the obligation of child detention. Australia itself, for now, is arresting the caught refugees arriving by boat and placing them in the camps in Papua New Guinea and Nauru. In addition, with the enactment of this law, thousands of refugees including children will be able to leave the detention camps and live at least three years in Australia. They will have the right to work and eventually be able to apply for a skilled immigrant visa.

Under the regulation, Australia has agreed to increase the number of refugees by 7,500 people by 2018, from the current 13,750 refugees. They will be allowed to work in Australia while taking care of refugee status (Karlsen, 2016). In fact, the temporary visa policy was introduced by Prime Minister John Howard

but the policy was criticized by human rights groups and the UN for failing to meet Australia's obligations as a signatory to the 1951 Refugee Convention.

Indonesia as a transit country faces unique challenges. It is clear that, on the one hand, it does not want to keep these transit migrants longer in its territory, which is also the desire of the transit migrants. On the other hand, it must maintain good relations with Australia, as its powerful neighbor. This is similar to what happened in Europe, where the transit country in East-central and Southeastern Europe became "buffer zones" for transit migrants (Vachudova, 2000).

5.2. INDONESIA-AUSTRALIA COOPERATION AND AGREEMENTS ON REFUGEE MANAGEMENT

Indonesia does not consider itself capable of receiving refugees and allocating funds for asylum seekers who come. Indeed, the country lacks for proper regulation for non-citizens, so the role of UNHCR and IOM is crucial in handling the migration flow of people who come in an illegal way. Georgi and Schatral (2012) argue that the coverage of the IOM is already very wide in Indonesia. Through its programs, it has succeeded in becoming the foremost guard in the handling of irregular migration in Indonesia. In fact, IOM has proven to be more effective than the UNHCR as the official UN body.

The existence of transit countries like Indonesia serves as limbo for the asylum seekers who will continue their journey. The process of claiming permanent protection in the state party of the UN 1951 Convention will be suspended for an indefinite time with the assistance of the IOM and UNHCR. When the UNHCR denies the role of resolving issues of migrants, such a role will be played by the IOM. Missbach (2015) argues that the IOM reduces its protection to semi-protection primarily by persuading migrants to receive assisted voluntary repatriation and discourage seeking international protection.

Detention policy in Indonesia can be seen as extraterritorial protection that benefits Australia. Regional protection area policy in the transit country, in this

case, Indonesia, can be used as a tool to get away from responsibility as a destination country, like Australia. Australia will assume that the de facto permanent protection asylum seekers receive from Indonesia will be the best solution for them, instead of continuing their journey to the initial destination country, Australia. However, this is certainly a problematic and flawed solution for Indonesia that has insufficient capacity or capability in protecting and fulfilling the asylum seekers' basic rights. In the end, these asylum seekers will perceive Indonesia as a limbo in their quest for international protection.

Reasonably, Indonesia may assume that Australia's regional protection policy is giving a disadvantage to Indonesia's sovereignty. Meanwhile, it will be a burden for Indonesia to create domestic policies concerning the handling of asylum seekers and refugees, not to mention that it will also take a long time due to a major scale of the reshuffle in some parts of government and Indonesian law. At the very least, a high political commitment and a long series of legislative framework for a comprehensive protection are required. Creating a framework for the protection of asylum seekers and refugees in Indonesia as part of domestic law is not something Indonesia will do. Instead, it adopted a policy of tightening border protection and reducing the acceptance of asylum seekers and refugees registering.

5.2.1. Regional Cooperation Agreement

The Regional Cooperation Agreement is a partnership signed by Indonesia, Australia, and the IOM in 2000. Indonesia generally has no legal framework to deal with transit migrants. This Agreement authorizes Australia to return refugees to Indonesia, a country that is not a signatory to the 1951 Convention. This Agreement also somewhat requires Indonesia with IOM to prevent any departure from Indonesian territory to Australia and provide basic needs such as food, accommodation, and access to health.

The amendment of the Australian Migration Act 1958, passed on 26 September 2001, authorizes Australian authorities to detain or remove

vessels within or outside its territory if the ship is found to be suspicious. Regarding this provision, between October and December 2001, Australian navy intercepted SIEVs 5, 7, 11, and 12. These boats were escorted back to Indonesia (Taylor, 2006).

That being said, the UNHCR and the IOM become Indonesia's biggest pedestal today. Missbach (2015) explains that Indonesia's lack of political will and limited capacity coupled with the increasing number of transit migrants coming have made the country more vulnerable. Therefore, the RCA acts as a legal umbrella for the IOM to deal with stranded irregular migrants located in the territory of Indonesia. This project is fully funded by the Australian Government.

Stranded migrants who need international protection but cannot be repatriated or have been denied asylum applications have become the responsibility of this project, including those still held in detention houses. The IOM provides them most basic needs on a daily basis. According to the Human Rights Watch (2002), under this RCA, the IOM receives as much as USD 250,000 monthly. In 2011, a total of AUD23.8 million was allocated by the Australian government to fund this RCA project for a period of three years. Specifically, the project aims to provide accommodation, food and emergency medical assistance. The amount of monthly support provided by the IOM differs from the UNHCR and the differences sometimes cause tension between migrants.

5.2.2. Reinforcing Management of Irregular Migration (RMIM)

RMIM is an additional project to strengthen RCA. Established in 2007, it works to detect and monitor irregular migration patterns in Indonesia, raise awareness of irregular migration through campaigns with targeted relevant government officials and local communities, and provide training programs on law enforcement to officials at local and provincial level (Expert Panel, 2012). As for budget, it has been streamed as much as AUD 8.5 million from July 2007 to June 2013 for this project (IOM

Indonesia, 2013). The project itself is mostly carried out in the form of training, workshops, and capacity-building that makes Indonesian officials as the target. Thus, the prevention and treatment of irregular migration can be further improved. Through RMIM too, the IOM hopes to reach the deepest part of Indonesia, which are people living in villages.

Between 2007 and October 2012, IOM has implemented 112 three-day training workshops and 283 one-day workshops (IOM Indonesia, 2013). This activity is considered more impactful because, through projects like this, IOM Indonesia has produced many printed materials and guidebooks for Indonesian law enforcement and immigration officers (IOM Indonesia, 2009). The availability of printout of this activity that can be used as a basic guide for officers is considered helpful in the field, so when something happens, the field officers who both have and have not received the training will be able to act according to the guidelines. Misunderstanding and confusion in the field will, therefore, be anticipated with this printout in order to intensify the program purpose.

5.2.3. Management and Care of Irregular Immigrants Project

This project enhances the capacity of the Indonesian General Director of Immigration to manage irregular migration through the development of standard operating procedures (SOPs). Through this project, the IOM contributes to the improvement of detention centers in Indonesia. The intended SOPs are procedures concerning the rights and obligations of detainees such as nutrition, healthcare, communication, religious needs, and some other technical matters. However, the SOPs have not yet included any procedure in the event of a breach in its application (Missbach, 2015). The Human Right Watch (2013) shows that although a considerable number of training programs have been conducted among the officers of Indonesian Detention Centers, violations of the rights of detainees could not be denied. Thus, it is considered a violation of the rights to detainees in Indonesia by the IOM that claims to be the

protector of those migrants (HRW 2002, Taylor 2009, and Metacalfe 2010).

Even more, Missbach (2015) considers that the IOM has gone too far as it ignored the human rights dimension of detainees. Its focus has shifted to migration flow management, as shown in how its programs are designed for border security and control, expansion of detention systems, and a questionable repatriation scheme. These are regarded as designs for securing Indonesian borders to prevent the increasing number of irregular migration to Australia via Indonesia. To put it simply, the rights of migrants who are in need of international protection are ignored.

CHAPTER VI

CONCLUSION

The mechanisms of refugee treatment in countries are highly dependent on the country's perspective on refugee issues. The 1951 Convention has substantially protected the rights of refugees. Thus, the convention categorized the type and form of human rights that need to be protected. Therefore the position of refugees is greatly specified by the UN. Many considers that Indonesia needs to ratify the UN 1951 Convention in order to make an international instrument as a national law. Yet, ratifying that convention is not an urgent agenda for Indonesia right now.

Refugees and asylum seekers issue is an international problem. But because Indonesia, in reality is the transit country, thus the problem become a domestic problem that needs to be solved immediately. The recent law in Indonesia, President Decree No. 125 Year 2016, has not regulated the existence of specific refugees. This regulation does not examine the rights of education, health care, and job for the refugees and asylum seekers. They will not be guaranteed the opportunity to legally access those rights while in Indonesia but they also are not forbidden in the same time. It regulates how to manage the incoming undocumented migrants who considered as refugees and asylum seekers, but it does not regulate the final solution for them.

The immigration law that Indonesia already had cannot guarantee the protection for those refugee and asylum seekers. In Indonesia, refugee issues are still regarded as an immigration issue, thus it is only seen from the point of view of immigration only. It should be realized that equating refugees and asylum seekers law with the general immigration rule could lead to a confusion addressing the problem of refugee and asylum seekers in Indonesia. The separation of asylum and refugees from general immigration rules through separate legislation stresses the human nature of refugees and underscores the

specific protection that institutions must provide in comparison to other forms of migration.

The chance of refugee law being institutionalized in national legal system is hard to be implemented in Indonesia because Indonesian government has to ratify the UN 1951 Convention first to be able to adopt the regulations. The President Decree Number 125 Year 2016 has fulfilled the vacuum in refugees and asylum seekers law in Indonesia. The decree's impact will depend mostly in the local level of implementation. In the regulation, the technical assistance method is clear enough to direct the refugees and asylum seekers to the detention centers and it will be provided by local government.

The problem that Indonesia faced to solve the refugees and asylum seekers problem is escalated recently by Australia's policy. Australia focused on Indonesia to control the irregular migration coming towards its territory. Its new policy reduces the application number from Indonesia to reduce the possibility of demand for people smuggling from Indonesia. Furthermore, this will create an accumulation of refugees and asylum seekers stuck in Indonesia as the result. Yet, as a developing country with no legal binding to the UN 1951 Convention, Indonesia still has many more important priorities than taking care of refugee and asylum seekers within the country.

I believe that the refugees and asylum seekers issue is the shared responsibility for both Indonesia and Australia. It is just unfair if Australia keeps closing its border in order to keep those refugees and asylum seekers stuck in Indonesia for years with all capabilities that Australia had and every exception that may be occurred. The violation that Australia has been doing since 2012 gives a huge impact to Indonesia as the transit country.

As for now, Indonesia considers to place the refugees and asylum seekers in a special island to accommodate them. This solution can cause harm and benefit for Indonesians and the refugees and asylum seekers in the same time. None of the refugees and asylum seekers wants to be placed in Indonesia since they travel to reach a protection in Australia. They will ask for how long they will

stay and when they will be moved to the final destination country. Indonesia does not guarantee the refugees right as what the signatory states do. It is difficult for them to access education, health care provision, and job. When Australia tightens the immigration border policy, especially for those who come from Indonesia, the people smuggling will grow rapidly because the number of refugees and asylum seekers in Indonesia will do anything to be arrived in Australia border. With all these factors, it is not a surprise that hundreds of asylum seekers are encouraged to find a way in whatever end, to Australia.



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