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Indonesian Case on Illegal Migrant

Melda Kamil Ariadno, Ph.D¹

Indonesia has faced the problem of illegal immigrants for a long time, especially with the rise of war in other countries or other forms of oppression against a party who then makes them leave the country with the hope to live in another country better off than where they originated. The issue of "illegal migrants" itself has gained a lot of international attention as well as international talks that discussed the problem and how to overcome it. Policies and mitigation measures carried out so far can not address the problem of illegal immigration effectively, which force Government of Indonesia to accommodate those who are awaiting receipt of the status of refugees ("Refugee") and the opportunity to leave to Australia. It requires comprehensive and effective arrangements in tackling this includes identifying relevant agencies that should cooperate in the supervision and law enforcement action

Keywords: Illegal migrant, illegal immigrant, refugee, smuggling of migrants

I. Introduction

Immigration is the movement of people from one place to another. In the modern world today, immigration is always associated with the migration of people from one country to another and in the new country which he has a permanent residence. Tourists and people who visit other countries for a short term can not be referred to as immigrants. Parties that can be referred to as immigrants are people who move to another country for a long time and in the new country he has had a permanent residence².

Illegal immigration itself is a movement of one person who crossed the line of the territory of a state where the movement has violated the im-

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² According to Black's Law Dictionary, "immigration is the act of entering a country with the intention of settling there permanently."

migration laws of the country of destination. People who perform illegal migration is referred to as illegal immigrant. Illegal Immigrants made up of two types namely:

1. foreigners who enter the boundaries of a country illegally (without a valid visa or travel documents), whether by land, sea, or air; or
2. foreigners who legally entered a country but their immigration permits run out in force and yet still remained within the country and abusing or perform activities that are inconsistent with the purpose of their immigration permit.

The terminology of illegal immigrants in the English language itself has a variety of debates. The word "illegal" is considered less suitable, have a normative connotation and is associated with the word "crime". Then the International Conference on Population and Development in 1994 recommended using the word "undocumented". But that term does not include immigrants who entered the country legally with tourist visas and then misuse the visa while doing job. International Symposium on Migration in Bangkok, April 1999, recommended the use of the term "irregular" which began widely used to replace the term "illegal".

The United Nations Convention Against Transnational Organized Crime, adopted on November 5, 2000 (Palermo Convention) with its protocol about the "smuggling of migrants" (Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted on November 15, 2000), defines "smuggling of migrants" as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person, into a state party of the which the person is not a national or permanent resident", someone who moved illegally into a country for economic gain, thus the entry of an illegal immigrant solely for humanitarian reasons will tend to be categorized as "asylum seekers" or "refugee" who will then be subject to the provisions concerning refugees³.

³ According to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000), the "smuggling of migrants" is the procurement of the illegal entry of a person into a State of which the person is not a national or a permanent resident, in order to obtain, directly or indirectly, a financial or other material benefit. Smugglers provide services to willing customers – acting as extra-legal travel agents. Trafficking, on the other hand, involves the use of violence, coercion or deception to exploit workers – essentially treating people as commodities, and does not require crossing an international border,

Each country is free to cover the country from the influx of foreigners; it is inherent in the principle of State sovereignty which is the basis of relations between States in the international community. No one country can force other countries to allow entry of foreigners into his country, unless there is "force majeure", which is proven and not endanger the "internal security" of the country⁴. Large countries like the United States, although known as the "land of dreams" for migrants also recognizes that every country has the right to refuse entry of foreigners into the country without permission⁵.

The issue of "illegal migrants" itself has gained a lot of international attention as well as international talks that discussed the problem and how to overcome it⁶. Not only developed countries like the United States and

although the same people or gangs are often involved in both smuggling and trafficking. Trafficked migrants are the victims, and should not be liable to criminal prosecution.

4 There are two principles that define the rights of sovereign nations to regulate the flow of alien immigration into their territories:

1. the principle of state sovereignty, which emphasizes national borders and allows the exclusion of aliens, and
2. the principle of interdependence, which emphasizes the interrelationship among nations and forbids the exclusion of aliens.

Several prominent European and Latin American jurists subscribe to the principle of interdependence. Most Anglo-Saxon theorists, however, champion state sovereignty. While the right to exclude aliens has not always been deemed a *sine qua non* of the state sovereignty principle, subscribing states have seldom felt obliged to admit aliens, except when compelled by human rights concerns.

5 American jurisprudence has also adopted this view, as emphasized by an opinion of the Solicitor for the U.S. State Department in 1909. In that year, the Solicitor considered Ecuador's refusal to admit a Chinese-American laborer. In light of a sovereign nation's "undoubted right" to exclude aliens, he could find no basis to object to Ecuador's decision to exclude the American citizen.

6 At the 1994 International Conference on Population and Development (ICPD) in Cairo, the need for a new migration regime was discussed; the *Programme of Action* adopted at that Conference called on origin and destination States to cooperate to protect the rights of migrants, reduce clandestine or irregular migration, towards a fair deal for migrant workers in the global economy and combat racism and xenophobia. This raised hopes for giving specific form to the actions needed at national and multilateral levels to establish a more orderly migration regime in which migration would be mutually beneficial. However, subsequent developments appear to have weakened the ability and the resolve to establish cooperative agreements between origin and destination States to manage migration.

Other initiatives aimed at developing ideas for an international framework for migration governance include the "Berne Initiative", sponsored by the Federal Office for Refugees of Switzerland, and the 2003 "Declaration of The Hague on the Future of Refugee and Migration Policy" – the contribution of the Netherlands Chapter of the International Society for Development. Two international commissions, the Commission on Human Security and the World Commission on the Social Dimension of Globalization, have argued for better management of global migration. At the initiative of Sweden

European Union countries are facing this problem⁷ but also developing countries, like Argentina, for various reasons the entry of illegal immigrants is not only for economic reasons and seek a better livelihood⁸.

Indonesia has faced the problem of illegal immigrants for a long time, especially with the rise of war in other countries or other forms of oppression against a party who then makes them leave the country with the hope to live in another country better off than where they originated. In general, illegal immigrants who came to Indonesia did not intend to settle in Indonesia, but only through the territories of Indonesia to other countries, mostly Australia as their final destination. Basically they can easily enter illegally into Indonesia due to a weak system of law enforcement in Indonesia. The illegal immigrants who entered as a group to Indonesia usually due to have occurred in the chaos in their country such as war, bloody conflict, perhaps even genocide, ranging from Iraq, Iran, Afghanistan, Sri Lanka and Pakistan.

But it turns out illegal immigrants in Indonesia are not only those who experience the threat in the State of origin is generally made Indonesia only as a State of transit (transit state), where their destination countries is mainly Australia (destinating state), but many are indeed intended to make a living in Indonesia. At the beginning of the year 2000, it is admitted much flow of illegal immigrants from China, especially women of all ages to work in various sectors, including commercial sex workers, singer, dancer, herbalist, teachers, technicians, experts, etc. Later starting to wane and was replaced by the flow of illegal immigrants from Eastern Europe or countries of ex Soviet Union, such as Kazakhstan, Uzbekistan, Tajikistan, Turkmenistan, Ukraine, Russia, Poland, etc. who generally work as commercial sex workers.

and Switzerland, a Global Commission on Migration was launched in December 2003 with a mandate for placing international migration on the global agenda and analysing gaps in current approaches. On a more informal basis there are regular consultations between international agencies concerned with migration such as the ILO, IOM, UNCTAD, UNHCHR, UNHCR and UNODC and in what has been called the Geneva Migration Group.

⁷ Information obtained from regularization programmes and other sources suggests that 10 to 15 per cent of migrants are irregular.

⁸ Irregular migration is not confined to the developed countries. In Argentina, for example, it was estimated in 2004 that there were 800,000 irregular migrants, mainly from the bordering countries.

The extent of the territory of Indonesia and with the limited power of guarding both on land, sea and air, and the lack of sophisticated technology to monitor all of the archipelago, making Indonesia is very vulnerable to the entry of illegal immigrants. Entry points are popular and often used by illegal immigrants is: Tanjung Pinang, Tanjung Balai Karimun, Batam, Bali, Banten bay waters, Medan, Riau Islands, Mataram, Eastern Indonesia as well. Most of them go through the sea, but also by air. Soekarno Hatta International Airport are also prone to enter these illegal immigrants. They came in with the original document and after entering the territory of Indonesia, they easily changed the identity so it would be difficult to trace. The weakness of the administration system in Indonesia makes such things very easy to be done in Indonesia. Bali is a favorite entry point for illegal migrants to Indonesia, because Bali is one of the major tourist destination where anyone who went in there, will be easily blend.

Illegal immigrants who only make Indonesia as a transit country, have generated a lot of problems, mainly originating from the Middle East. Their case is handled by the Directorate General of Immigration (DGI) in cooperation with "United Nations High Commissioner for Refugees" (UNHCR) and the "International Organisation for Migration" (IOM), of which placed in immigration detention house (RUDENIM) of Serang, Kupang, Lampung and Pontianak. Policies and mitigation measures carried out so far can not address the problem of illegal immigration effectively, which force Government of Indonesia to accommodate those who are awaiting receipt of the status of refugees ("Refugee") and the opportunity to leave to Australia. It requires comprehensive and effective arrangements in tackling this includes identifying relevant agencies that should cooperate in the supervision and law enforcement action.

II. Illegal Migrant v Refugee

A. Illegal Migrant

Migration, according to Black's Law Dictionary, is a "movement (of people or animal) from one country region to another"⁹. Migration is said to be one of high issue 21st Century, where people tend to more travel than

⁹ "Migration," Black's Law Dictionary, 8th ed, United States: West – A Thompson Business, 2004, p.1013.

the rate of spread population throughout the history of mankind. Now there are about 192 million people living outside their homeland. This figure represents 3% of the total world population. Between 1965 and 1990, the number of international migrants increased 45 million people (with lift growth of about 2.1% per year). The current growth rate is about 2.9%¹⁰.

Dimension of migration is very diverse and complex, including: labor migration, family reunification, migration and security, the fight against irregular migration, migration and trafficking, migrant rights, health and migration, integration, and migration and development¹¹. There are several global trends that will affect the migration and its regulation, namely demographic trends, the economic gap between developing countries and developed countries, trade liberalization in need migrant labor, communications network that connects all parts of the world, and transnational migration

In the 21st Century, the movement of people will become more significant as the impact of the following trends¹²:

1. Economic liberalization,

The high demand for labor in developed countries and the availability of labor in developing country has created the current global migrant workers. The global market has opened up employment opportunities for employers to hire migrant workers as part of their strategy to minimize costs. In addition, globalization has also increased the movement of labor across national borders, especially the workers who have skills / higher education (highly skilled labor). Faced with the lack of manpower, industries in developed countries are evaluating the regulation of their migration and show their tendency to implement regulations more flexible. Service industry in America and Europe is promoting the "rule-free" for the labor movement as a provider of services, especially in hotels and restaurants, software, insurance, and financial industries.

2. The decline in the economy

The global economy has been experiencing decline since early 2001. International Monetary Fund (IMF) has projected global growth of 3.2% lower than the previous year. This can create pressure on the labor movement, especially in the field of Information Technology (IT), construction

10 "About Migration" < <http://www.iom.int/jahia/Jahia/about-migration/lang/en> >. (Diakses pada Jumat, 19 Februari 2010).

11 Ibid.

12 Ibid.

and manufacturing sectors. But the impact of the economic downturn in the receiving country does not make them return to their home country. The experience that occurred with the monetary crisis in 1999 showed that migrants tend to stay in the country where they migrate, although the situation is deteriorating. Recession while not always create major changes to migration flows.

3. Demographic changes

Population growth rates differ between the developed and developing countries. In developed countries, population growth rate is less than 0.3%, while in other parts of the world, growing population with a growth rate 6 times faster. These demographic changes are affecting international migration in two ways. Rapid population growth with economic difficulty encourages people to move from its original place, while countries with low population growth rate are forced to accept immigrants. Low fertility rates in developed countries create a fast aging population. According to UN population project, Japan and all European countries will face a population decline in 50 years.

4. The emergence of "Migrant Networks,"

Networks are formed as regions of migrants have created a major force in facilitating the movement of people. They influence the political decisions of the host country to provide economic aid to their countries of origin. They also affect economic and trade relations between the host country and their home countries and require the integration process more creative and productive.

5. The emergence of transnational migration

Development of transportation and communication technologies that connect the places and people globally leads to the emergence of "transnational migration space". Apart from physical movement, the flow of information, expertise, and delivery is another component of "transnational migration space." The results of this phenomenon are the acceptance of dual citizenship, multiple property ownership and voting rights. Countries now realizes that membership is no longer based on territory. A new form of relations between country and people is quick to take root in the world of international politics, are likely to influence the future of the movement of mankind.

Irregular migration has become a major issue at this time. Smuggling of migrants now rival drug trafficking as the main source of income of organized crime. Trafficking in persons has also become the world's attention. Migration became a major issue on the agenda of regulations developed countries, eg countries G-8. It is not difficult to understand why people from poorer regions in the world, wanted to migrate to richer areas. People always want to improve their living standards. This is the main rule in migrating from the first. Now, with modern transportation and telecommunications, more people are motivated to move.

B. Refugee

1. Definition of Refugee

The UNHCR Statute defines refugees as persons who are outside the country of their nationality and who have a well founded fear of being persecuted for reasons of race, religion, nationality or political opinion.¹³ Specifically, Article 1A(2) of the 1951 Convention defines as a refugee any person who:

“As a result of events occurring before 1 January 1951 and owing to 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 [or her] nationality and is unable, or owing to such fear, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

In addition to the 1 January 1951 date line, the 1951 Convention also provided in Article 1B for an optional geographical limitation to refugees “as a result of events occurring in Europe”. These restrictions to the scope of its refugee definition are no longer of major importance. The temporal limitation was formally removed by the 1967 Protocol, while the geographical restriction was withdrawn by the vast majority of States which are Party to the two instruments, thus giving a universal dimension to the Convention's provisions.¹⁴

¹³ G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20 at 46. ch. II, U.N. Doc. A/1775

¹⁴ UNHCR. *Refugee Status Determination: Identifying who is a refugee*. 2005.

Article 1A(2) of the 1951 Convention contains the so-called **inclusion** criteria of the refugee definition, that is, those elements which form the positive basis for making a determination of refugee status, and which must be met for an individual to be recognized as a refugee. These criteria are examined in chapter 2. In addition, the 1951 Convention refugee definition also contains **exclusion** provisions (Articles 1D, 1E and 1F) and **cessation** clauses (Article 1C). These are discussed in chapters 3 and 4, respectively.

In addition to incorporating the refugee definition contained in the 1951 Convention, the 1969 OAU Convention provides in Article I(2) that

“the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality.”

This definition developed out of the experience of the wars of liberation and decolonization which erupted in the African continent during the late 1950s and early 1960s. In Article I(4) and (5), the 1969 OAU Convention also contains cessation and exclusion provisions, which differ in some respects from those of the 1951 Convention.

In Central America, the definition of Refugee is also provided in Article III(3) of the 1984 Cartagena Declaration on Refugees.

“[...] the refugee definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

Although the Cartagena Declaration is not formally binding, many Latin American countries have incorporated its principles, including its refugee definition, into their national legislation and practice.

[http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43144dc52&query=definition of refugee](http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43144dc52&query=definition%20of%20refugee) (diunduh pada pukul 10:47 WIB, Tanggal 05 Maret 2010)

2. Exclusion from international refugee protection

Under certain conditions, persons who meet the criteria for recognition as refugees are nevertheless denied the protection of the 1951 Refugee Convention. This is the case for the following categories:

- **Persons who are not entitled to the benefits of the 1951 Refugee Convention:** The 1951 Refugee Convention denies international refugee protection to individuals who are receiving protection or assistance from a UN agency other than UNHCR. In today's context, this applies to certain groups of Palestinian refugees who are inside the area of operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). If such persons are outside the area of operations of UNRWA, they may be entitled to the protection of the 1951 Refugee Convention.
- **Persons who are not in need of international refugee protection:** The 1951 Refugee Convention provides for denial of refugee status to persons who have taken up regular or permanent residence in a country that has given them a status whereby they effectively enjoy the same rights and have the same obligations as nationals of that country.
- **Persons who are considered undeserving of international refugee protection:** The 1951 Refugee Convention envisages exclusion from international refugee protection of persons considered not to deserve such protection on account of their having committed certain serious crimes or heinous acts. This applies to persons who are responsible for war crimes, crimes against humanity or crimes against peace. Similarly, those who have committed serious non-political crimes or acted against the purposes and principles of the United Nations cannot benefit from refugee status.¹⁵
- **Migrants** who leave a country voluntarily, seeking a better life and who can return to their country without fear of persecution are not refugees. Similarly, people fleeing natural disasters are **not** refugees. There may be situations where individuals — including those who are smuggled or trafficked — who left their country voluntarily or who were coerced into leaving their country, are in need of international protection after they arrive in another country.
- Since refugee status is civilian and humanitarian in character, persons who continue to pursue armed activities cannot be considered to be

¹⁵ UNHCR. Chapter 2: Persons of Concern to UNHCR. <http://www.unhcr.org/publ/PUBL/44b5005c2.pdf>, p. 23

refugees. Persons who participated in armed conflict but have genuinely and permanently renounced military activities may be considered as refugees if they fulfill the criteria of the refugee definition and do not come within the scope of an exclusion clause.¹⁶

3. The Legal Framework of the International Refugee Protection System

a. International Law

i. The 1951 Convention relating to the Status of Refugees

The Convention Relating to the Status of Refugees is the foundation of international refugee law. The Refugee Convention defines the term “refugee” and sets minimum standards for the treatment of persons who are found to qualify for refugee status. Because the Convention was drafted in the wake of World War II, its definition of a refugee focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951. As new refugee crises emerged during the late 1950s and early 1960s, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, a Protocol to the Convention was drafted and adopted.

ii. The 1967 Refugee Protocol

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention’s refugee definition.

Together, the Refugee Convention and Protocol cover three main subjects:

- i. The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status
- ii. The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or *refoulement*, to a territory where their lives or freedom would be threatened
- iii. States’ obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention

16 Ibid., p.24-25

By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

b. Regional Laws

At least there are two regional laws that are worthwhile to be mentioned, those are:

i. 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.

The conflicts that accompanied the end of the colonial era in Africa led to a succession of large-scale refugee movements. These population displacements prompted the drafting and adoption of not only the 1967 Refugee Protocol but also the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Asserting that the 1951 Refugee Convention is "the basic and universal instrument relating to the status of refugees", the OAU Convention is, to date, the only legally binding regional refugee treaty. Perhaps the most important portion of the OAU Convention is its definition of a refugee.

The OAU Convention follows the refugee definition found in the 1951 Convention, but includes a more objectively based consideration: any person compelled to leave his/her country because of "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality". This means that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in States that are parties to this Convention, regardless of whether they have a well-founded fear of persecution.

The OAU Convention sets up a system which recognizes both the treaty refugee and a "displaced person" refugee. Only treaty refugees are afforded full asylum protection, whereas all refugees are afforded temporary protection. In addition, the OAU Convention allows for the UNHCR to concern itself with both types of refugees and considers that the provisions contained therein are a "regional

complement in Africa of the 1951 United Nations Convention on the Status of Refugees.”¹⁷

ii. The Cartagena Declaration

In 1984, a colloquium of government representatives and distinguished Latin American jurists was convened in Cartagena, Colombia to discuss the international protection of refugees in the region. This gathering adopted what became known as the Cartagena Declaration. The Declaration recommends that although the Declaration is not legally binding on States, most Latin American States apply the definition as a matter of practice; some have incorporated the definition into their own national legislation. The Declaration has been endorsed by the Organization of American States (OAS), the UN General Assembly, and UNHCR’s advisory Executive Committee.¹⁸

4. The Recent Development of Refugees

The office of UNHCR estimates that over 16 million people were refugees at the end of 2007. As of the end of this year, roughly one third of all refugees were residing in countries in the Asia and Pacific region. The Middle East and North Africa region hosted a quarter of all refugees, while Africa and Europe was host to respectively 20 and 14 percent of the world’s refugees. The Americas had the smallest share of refugees – 9 percent.¹⁹

UNHCR’S legal mandate applies to people who have fled from their countries owing to “well-founded fear of persecution”. However, UNHCR’s concerns have in practice successfully broadened to cover people fleeing warfare and turmoil as well, for example internal displaced persons, stateless person, etc. Prima facie group determination of refugee status on the basis of the circumstances prevailing in the country of origin has largely replaced determination by individual interview. These circumstances are frequently characterized by persecution and insecurity and by starvation and critical environmental conditions. Motives for flight are often mixed or vague, probably seldom clear even to the refugees themselves.²⁰

¹⁷ Carlos Ortiz Miranda, *Toward A Broader Definition Of Refugee: 20th Century Development Trends*, California Western International Law Journal 1989/1990.

¹⁸ Ibid.

¹⁹ Global Migration Group, *International Migration and Human Rights*, www.globalmigrationgroup.org, hal. 60.

²⁰ Harto Hakovirta, *The Global Refugee Problem: A Model and Its Application*, International Political Science Review / Revue internationale de science politique, Vol. 14, No. 1, International Political Economy and the Global Environment, L’*économie po-*

By the end of the 20th century, the definition of “refugee” had been extended bringing international protection to people “who are forced to move for a complex range of reasons including persecution, widespread humanitarian rights abuses, armed conflict and generalized violence”.²¹ However this extended definition does not cover environmental refugees and forced the refugees who fled Mozambique because of a drought to claim political refugee status in Zambia.²²

While refugees are persons displaced outside their home country, internally displaced people (IDP) are persons displaced within the borders of their country. In 1998, the United Nations Secretary-General’s special representative for displaced persons, Francis M. Deng, proposed a definition for internally displaced people (IDP) which clearly incorporates environmentally displaced persons:

“Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border”²³

However, this definition has no authoritative value, since there are no international conventions that mention displaced persons. Displaced persons do not form a category under international law.

Environmental refugees therefore do not exist in regard to current international law. Persons who are forced to leave their country for environmental reasons are not granted any legal status. The United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM) and the Refugee Policy Group all use the term “environmentally displaced persons” rather than “environmental refugees”. Environmentally displaced persons are defined as “persons who are displaced within their own country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration

litique internationale et l’environnement planétaires (Jan., 1993). p. 36.

²¹ UNHCR. 2003. <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?id=3e5ca910a&tbl=PUBL>

²² Julienne, M. Eco-refugees. The environment Times. <http://www.environment-times.net/article.cfm?pageID=54>

²³ Guiding Principles on Internal Displacement: <http://www.unhcr.ch/html/menu2/7/b/principles.htm>

or destruction is a major cause of their displacement, although not necessarily the sole one". There is no status provided for the persons, who have to cross the border and cannot return to their country.

In its 1985 report for the United Nations Environment Program entitled *Environmental Refugees*, El-Hinnawi has defined environmental refugees as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life". However, it is argued by some that a more narrow definition is more appropriate, in order to differentiate environmental migrants, who make a "voluntary, rational choice of leaving their country", from environmental refugees, who "are compelled to flee by sudden, drastic environmental change that cannot be reversed".

It is possible to expand the 1951 Convention along human rights lines. The Refugee Convention clearly recognizes that refugee status results from the denial of human rights but the Convention also recognizes the right to seek safety, as contained in Article 14(1) of the Universal Declaration. Both the International Covenant for Civil and Political Rights and the International Covenant for Economic and Social Rights acknowledge the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" and "in no case may a people be deprived of its own means of subsistence." When people are deprived of their means of subsistence and can no longer enjoy their resources are their human rights sufficiently hurt to seek asylum in a different state?

Critical voices often claim that an environmental refugee is often not solely seeking asylum because of an environmental issue. The environmental aspect is often closely related to economic and social reasons. There is a lack of evidence, that the environment can be the sole and substantive cause for migration although a linkage of the both terms is agreed on.²⁴

5. Countries' Practice

a. Thailand

Today, 150,000 Burmese (of various ethnic groups) reside in 9 Thai temporary displaced persons camps assisted by the Thai Burmese Border

²⁴ <http://www.gimun.org/en/2009/committees/6th/environmental-refugees>

Consortium and UNHCR. Hundreds of thousands of other Burmese, particularly the Shan live as illegal migrants without access to refugee status or assistance despite having experienced persecution and conflict in Burma. 6,000 Laotian Hmong asylum seekers are being held in an Army supervised camp at Petchabon, without any access to UNHCR or resettlement. The Thai government permits UNHCR to facilitate the international resettlement of Burmese registered in camps, and over 50,000 have been resettled, mainly to the United States, to date. However, the government has given no indication of when it will be able to screen the 70,000 unregistered camp dwellers or assess the claims of thousands of other asylum seekers outside these camps.

Non-governmental organizations have been providing sorely needed humanitarian assistance cross-border to many of the conflict ridden areas of Burma with displaced populations. RI supports the continuation of this life saving assistance.²⁵

b. Malaysia²⁶

Malaysia is not a signatory to the 1951 Refugee Convention or its 1967 Protocol and does not recognize the ethnic Burmese in the country as refugees. There are more than 40,000 persons of concerns registered with the UN refugee agency in Malaysia, the majority of whom are refugees from Burma. There are also a large number of unregistered refugees in Malaysia, estimated in the tens of thousands.

The number of unregistered refugees in the country is increasing as ethnic Burmese continue to flee persecution and violence in Burma. Particularly concerning is the growing number of Burmese Rohingya refugees. Rohingya crowd onto unseaworthy boats departing from the Burmese - Bangladesh border and can be at sea for weeks before landing in Thailand. Every year, countless people lose their lives during this dangerous crossing. Refugees who arrive safely make their way south to Malaysia, where livelihood opportunities are much better than in Bangladesh or Thailand.

Burmese refugees in Malaysia, including women and children, are targeted by the government as illegal migrants. Refugees are regularly arrested, held in detention centers in deplorable conditions, and deported to Thailand, where they fall prey to traffickers and are vulnerable to being sold into forced labor. Even those refugees who hold UN refugee cards are

25 <http://www.refintl.org/where-we-work/asia/thailand>

26 <http://www.refintl.org/where-we-work/asia/Malaysia>

subject to arrest and deportation, and the UN refugee agency continues to face difficulties in accessing refugees and asylum seekers held in detention centers.

In addition to the protection concerns facing Burmese refugees in Malaysia, access to basic services remains difficult. The cost of medical care is higher for refugees, and unregistered refugees risk arrest if they visit local hospitals. Burmese refugee children are not allowed to attend public schools. There are some community-based education and health programs focused on helping Burmese refugees, however more funding is needed to support this work.

c. Australia

The flow of boat people, periodically a problem in Australia, has surged since the onset of the global financial crisis. In 2009 at least, 34 boats carrying more than 1,700 refugees have sought asylum in Australia compared with just seven boats carrying a total of 161 people in 2008.

Some other countries also have seen an increase in political refugees this year, especially in Europe, as residents from Iraq and parts of Africa flee long-simmering conflicts. But for Asia, Australia is a destination of choice, in part because its relatively strong economy is still demanding workers at a time when several Asian nations -- including Afghanistan and Sri Lanka -- have been experiencing turmoil.

In addition, Australian government has relaxed some rules on asylum applications since taking office in 2007, creating a perception among refugees that it is easier to relocate to Australia than elsewhere. Critics of Mr. Rudd say he has brought the problem on himself by reversing some of the strict immigration policies of his predecessor, John Howard. Mr. Rudd's center-left Labor government last year abandoned Mr. Howard's practice of granting refugees so-called temporary-protection visas, which were launched in 1999 and designed to limit the entitlements of people who arrive illegally. The Rudd administration also ended the controversial Howard-era policy known as the "Pacific Solution" of housing refugees on remote Pacific island nations like Nauru, which some Australians considered inhumane.²⁷

Mr. Rudd endorsed the changes as a way of showing that his government was taking a more humanitarian stance on refugees. But the changes have left Australia's remaining offshore detention center, on the Australian

²⁷ <http://online.wsj.com/article/SB125676584673614229.html>

territory of Christmas Island near Indonesia, overflowing. All boat people seeking asylum in Australia are first brought here to Christmas Island, just 220 miles south of Indonesia but nearly 1,000 miles from the Australian mainland, and most are now held at enormous cost within the center's electrified, 13-foot-high razor-wire fences.²⁸

Mr. Rudd has responded by trying to persuade neighboring governments, chiefly Indonesia, to work harder to cut off boat people before they reach Australian waters -- a tactic critics have derided as the "Indonesian Solution." Mr. Rudd met with Indonesian President Susilo Bambang Yudhoyono to discuss a potential deal where Indonesia would intercept more people-smuggling boats within its territory, with Australia footing the bill for processing and detention until the refugees can be resettled elsewhere.

While Indonesia agreed to accept the 78 Sri Lankan asylum seekers rescued this month by the Australian navy, their fate remains unclear. They were taken to Indonesia's Riau islands, where their claims are supposed to be processed at an Australia-funded detention center, after which they might be resettled overseas. But, they remained in limbo, refusing -- like their counterparts in Merak -- to disembark. Indonesian officials say removing them forcibly would breach international law, and Australia is refusing to take them to an Australian port.

III. State Responsibility

State responsibility in international law refers to the obligations of one country against another country to carry out the obligations imposed by the international legal system. State responsibility is a complex problem. Key aspects of modern law regarding the responsibility of developing countries has historically been based on the violations of law regarding the treatment of foreigners and so-called international minimum standards. The state is not obliged to recognize a stranger in their territory, but if the foreigner has a permit to be in the country, the State must treat them in a civilized manner. A country is considered guilty in international law when it may cause injury to a stranger at a time when they are outside its territory. state should not be any government action in the territory of another country, without the consent of the other country.

²⁸ <http://www.nytimes.com/2009/11/05/world/asia/05island.html?pagewanted=2>

Failure to comply with minimum international standards 'generate international responsibility of a state, and country where its citizens were injured may exercise diplomatic protection rights', namely, to make a claim, through diplomatic channels, to which other countries, in order to obtain compensation or other forms other compensation. Such claims are usually settled by negotiation, on the contrary, if both parties agree, they can be handled by arbitration or judicial settlement.

A. The term of State Responsibility

Linguistic deficiency in non-English language to distinguish between "responsibility" and "liability" further create difficulty in distinguishing between State Responsibility and the State's International Liability. Vocabulary of Civil Law law differentiates "Liability" in terms of "Responsibility" or "civil responsibility." So, "State responsibility" refers to State responsibility under international law in general, while "International Liability" shows a "civil responsibility of the state," or the obligation to pay compensation or make reparation for damage to foreign citizens who suffered outside national boundaries as a result of activities within the territory or under its control. A State has international obligations not only under international law, but also in the national dimension of the national legal system in a state involving transnational relations.

B. TreatmentStandard

1. National treatment standard

According to national treatment standards, foreigners should be treated the same way as nationals of the countries concerned. However, international law does not regulate the same treatment to foreign citizens in all activities for instance a foreigner in the United Kingdom is not possible to select or admitted to public office.

The weakness of the national treatment standard is clear. A foreign country can treat people with inhumane and justify such treatment on the grounds that its own citizens can also be treated the same.

2. International minimum standards

International minimum standard is difficult to define. International law does not provide a definition, although effort to do so was made in 1957

when the International Law Commission to debate the second report of State Responsibility. Countries are required to provide equal treatment of foreigners such as the treatment enjoyed by its own citizens, but not a treatment that reduces the 'human rights' which are recognized and defined in contemporary international instruments.

C. Exhaustion of Local Remedies

An aggrieved individual or company must go through the whole level of national judicial process in the country resulting in a loss, before an international claim can be brought on his behalf by his home country. These are the basic rules of customary international law that diplomatic protection can be given before, or before other roads can be reached through international arbitration or judicial process, the process of local justice must be pursued first. Raison d'être of this rule are:

- 1) to provide an opportunity for concerned countries to pay compensation in the legal system itself;
- 2) to reduce the number of possible international claims;
- 3) respect for national sovereignty.

Local remedies are not only a reference to the court, but also the use of procedural facilities which are determined by national law, which is a whole system of legal protection provided by national law.

D. State responsibility in Refugees

Under the concept of sovereignty and citizenship in international law, states are obliged to allow its citizens to stay inside their own territory. The expulsion of the country made them without citizenship, forcing other countries to accept the foreigners even though these countries are not obliged to accept foreigners under international law. In 1974, the European Court stated that "A citizen can not be denied entry to their own country by the government of his country, despite the entry of people into the territory of his country can cause harm. A state obligation in international law is to accept back its own citizens."

Special Protocol Concerning the People Without A citizen of 1930 stated that when a citizen loses his citizenship when he was in a foreign country, the State where he has citizenship last obliged to recognize him at the request of the state where he is now:

(1) if he is unable to permanently, whether as a result of an incurable illness or other reasons; or

(2) if he had been convicted in a country where he is no less than one month in jail and had to undergo his sentence or to obtain a total or partial remission.

In the first case, the State where the person has a nationality latter can refuse to accept him, if the reception is meant to pay maintenance fees to the state where he is now. In the second case return shipping costs is borne by the state making the request.

As the conventional law, the American Convention on Human Rights of 1969 states: "no one shall be expelled from the territory of the State where he was a citizen or lose the right to enter it." Under the norms of international law, a country that expelled large numbers of citizens have violated both international human rights law and their obligations regarding the friendly relations between the countries. The norm is more come from law practice of conventional international human rights law rather than refugee law. The international community wants to stop the refugee flow and forms the basis for burden sharing among countries as reflected in the development of state responsibility. But there is no international system to enforce these principles, except ad hoc system set out in special situations such as treatment of Iraq against the Kurds after the Gulf War.

Basically, both international law and social contract theory to understand the state which is established by a set of obligations, which are accounted to its citizens who are an integral part of its authority to act '. When these obligations have been violated through the creation of refugees, the country must repair the broken bond between itself and its citizens is wasted, if it is to regain the moral and legal legitimacy. Indeed, Principle 1 of the Cairo Declaration on Principles of International Law on Compensation to Refugees asserts, "Responsibility for protecting refugees in the world in turn is based on the countries that directly or indirectly force their own citizens to flee". Creating the conditions for return is only one of the principal ways in which countries of origin are responsible to the refugees, who are beginning the process of reconciliation.

Standards and legal obligations are borne by the state resulting from violations of the protection of citizens contained in the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.

However, due to state's control upon basic elements of power-sovereignty, namely territory, population and decision-making structures and institutions, States have traditionally refused to monitoring human rights issues on the basis that it is a domestic issue. Countries often mentioned article 2 (7) of the Charter of the United Nations in asserting this claim. Often, as one expert has said, "not security of a nation that is really being threatened, but only his power to harass people." violations of human rights is widely acknowledged as one of the driving force to create a flow of refugees.

While the primary responsibility for protection of refugees lies with UNHCR, all countries must also share responsibility. However, few of the many countries that provide a friendly climate for resettlement. Construction of the barrier at the entrance of refugees, which unfortunately happens in many European countries, will not stop the mass migration and mass expulsion. Professor Gil Loescher recently described the current situation. During recent years, Western Europe has built a barrier, firstly, through the revision of immigration laws and regulations and procedures of asylum, secondly, by adopting practices that limit the steps to control the new arrivals of asylum seekers and other migrants, and thirdly, to 1992, to harmonize the practice of asylum in an effort to build a joint European system of external borders (the Schengen Agreement and the Dublin Convention on asylum seekers).

In 1981, the UN General Assembly established the Group of Experts to study the root causes of refugee flows and to recommend steps to prevent a new flow. The experts determined that the primary responsibility for solving the problem lies in the countries concerned, and increased international cooperation is needed at all levels to prevent massive refugee flows. Group of Experts also made the following recommendations, among others:

1. The State should promote civil rights, political, economic, social and cultural rights of their communities and trying to not violate these rights to its people and not to discriminate against groups of people based on nationality, ethnicity, race, religion or their language, thus directly or indirectly forcing them to leave their country;
2. Countries should work together to prevent refugee flows in the future. They should enhance international cooperation in all its aspects, particularly in regional and subregional levels, in line and as an important means to prevent flow;
3. The State must, wherever a new flow of refugees massive case, respecting the norms that exist and generally recognized principles of

international law governing the rights and obligations of countries and refugees directly, including those relating to the rights of refugees who will facilitated to return voluntarily and safely to their homes in their homeland and to receive adequate compensation thereof in the cases of people who do not want to return;

4. Countries, individually and collectively, should make provision and take action to prevent refugee flows that might be caused by natural disasters, in accordance with the support of international organizations relevant. In the event of disaster or similar situation occurs, the state must assist the State concerned the best of their ability to cope with the situation, as well as to prevent a massive flow of new refugees.

This recommendation implies that the failure of states to consider human rights to violate international principles of state responsibility. As has been observed by many experts, separate from the obligation which the country owes to an individual because of violations of human rights, this issue should also be examined from the standpoint that the obligations of that country to other countries whose interests are harmed by the arrival of refugees. The sovereignty of states, however, remains represents a significant obstacle to efforts to prevent refugee flows.

IV. Indonesian Case: Illegal Migrant or Refugee?

The issue of "illegal migrants" in Indonesia is unique for reasons of illegal entry of migrants in Indonesia is very diverse, from humanitarian reasons to increase life's quality or economic purpose, to which Indonesia is not only a country of destination but also as a transit country. Below is a picture of the "illegal migrants" in Indonesia.

A. Refugees in Indonesia

Refugee Problems in Indonesia began in the 70s, especially 1979, when Vietnamese refugees came to Indonesia and placed on an island called Pulau Galang. Galang Island is a small island located in the Riau Archipelago District, southeast of the island of Batam.

Development refugee processing center at Galang Island began in 1979. In August 1979, the first occupant had come as many as 46 people and occupied the island. At the end of 1979, there were approximately 121,000 refugees in Galang Island which were the origin of Vietnamese boat people. At that time the whole boat people from Vietnam were refugee status and were a surrogate of neighboring countries to be processed before being sent to a third country²⁹. Over time, in March 1989 the number of boat people on the island of 19,646 people living Galang, 1996 boat people from Vietnam in Indonesia was recorded 4254 people.

To overcome the problem of boat people on Galang Island, the government had launched several policies, among others: Humanitarian Operations Galang 1996. The purpose of this operation is to accelerate the return of boat people from Galang Island and Tanjung Pinang to Vietnam, and Cambodia. In carrying out these activities the Indonesian government was in cooperation with UNHCR³⁰.

In addition to the resettlement to third countries, there were some refugees who returned voluntarily repatriated to their home country. Repatriation of Vietnamese boat people to their home country under the UNHCR sponsorship amounted to 109,000 inhabitants³¹. Based on the special report Comprehensive Plan of Action, largely since 1975 approximately 122,000 Vietnamese people came to Indonesia, plus the 55,000 refugees who come through "the regional processing center." More than 111,000 had been resettled and 8,000 people returned to Vietnam³².

Another refugee problem found in Indonesia is the current East Timorese refugees. After the announcement of poll results on independence for East Timor, pro-integration militia violence against the population and attacking humanitarian workers throughout East Timor. In the event there were as many as 500,000 people were evacuated from their homes, and about half of the population of East Timor to leave the area by force. Most of them fled the territory and became refugees in West Timor and in other parts of Indonesia³³.

29 Achmad Romsan, et. al., *Pengantar Hukum Pengungsi: Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional*, Jakarta: UNHCR, 2003, Hal. 189.

30 *Ibid.*, Hal. 190.

31 United Nations., *Briefing Papers for Students "We the Peoples" the Role of the United Nations in the Twenty-First Century*, New York, 2001, Hal . 231

32 UNHCR., *Special Report Comprehensive Plan of Action, The Indo-Chinese Exodus and the CPA.*, Hal. 15.

33 Achmad Romsan., *Op.Cit.*, Hal. 192

Since October 1999, the process of repatriation of refugees in West Timor and other parts of Indonesia which was under the sponsor of the UNHCR and the International Organization for Migration (IOM). October 14, 1999 the government Indonesia and UNHCR signed an MOU regarding the repatriation process. In accordance with the UNHCR NGO Unit 5 October 1999 there were 136,000 displaced East Timorese living in over two dozen camps and shelters in the town of Atambua³⁴.

Then on June 12, 2001 Media Center had records of ex-East Timorese residents in various areas in NTT, to determine their choice to remain in Indonesia or return to East Timor. There were as many as 113,794 people register data that all refugees were entitled to choose from as many as 295,751 people. As a result 111,540 people chose to stay in Indonesia and 1,250 chose to go home to East Timor, and 713 abstained, and 296 letters registration damaged. UNHCR had set a December 31, 2002 as the deadline for repatriation³⁵.

The next case was displaced Acehnese refugees. Escalation of the refugee population on a large scale, triggered by the prolonged conflict in Aceh began in 1999 and reached the peak in 2000³⁶. International World categorizes Acehnese refugees and refugees from other conflict areas such as Ambon as Internal Displaced Persons (IDPs) because they move in the same territory.

The problem of refugees that occurred recently is the Rohingya refugees from Bangladesh and Myanmar. Rohingya refugees are quite a burden for the government of Indonesia in particular local government in Aceh where they were accommodated at this time. There are hundreds of the Rohingya who are in Sabang and Idi Rayeuk, Nanggroe Aceh Darussalam. The findings of the verification team mention that Rohingya in Sabang, consist of Bangladesh and Myanmar. So far known to their motive is to seek a better life or motif can be classified as economic migrants. Because Indonesia does not open up to migrants economic motives, they should be repatriated to their home countries. There are some people who claim to have Rohingya political and religious reasons. For those who claim political reasons could obtain refugee status, but must pass a rigorous screening process and takes a long time³⁷.

34 Ibid., Hal.193

35 Ibid., Hal 194

36 Dahlan, *Pengungsi Domestik di Aceh (Peta Permasalahan dan Alternatif Penyelesaian secara Simultan*, makalah disampaikan di Hotel Bumikarsa Jakarta, 6-7 Februari 2001).

37 <http://internasional.kompas.com/read/2009/02/07/04480820/Hentikan.Arus>.

Rohingya refugee problem is discussed in the Bali Process III on 14-15 April 2009. Bali Process III agreed on a comprehensive solution involving the home countries (Myanmar and Bangladesh), countries of transit, and destination country. Former Foreign Minister of Indonesia Hassan Wirajuda revealed the most important strategy to suppress smuggling and human trafficking is by focusing on the root of the problem in the country of origin that becomes the driving factor of a group or individual to leave the country, which including the security situation, economic, and social.

Related to the root of the issue, Australia will provide humanitarian aid worth 3.2 million Australian dollars for the Rohingya people who live in Northern Rakhine State, Myanmar. The intention is to improve living conditions and opportunities for reaching the improvement of economic situation of the Rohingya widespread so they no longer need to flee to another country³⁸.

It is clear that the illegal immigrants who claim to be refugees turned out to go to Indonesia not to settle in Indonesia but to go to third countries, namely Australia. Thus Indonesian has become a transit country for illegal immigrants, either intentionally or unintentionally. In many cases illegal immigrants were arrested when they were about to cross into Australia, as well as illegal immigrants from Sri Lanka who recently entered into Indonesian waters. Indonesia has given shelter to illegal immigrants from the Middle East in various detention house of Immigration (RUDENIM) including in Serang, Kupang, Lampung and Pontianak.

B. People Smuggling in Indonesia

Illegal migrants with other reasons can be classified into two: because of economic incentives so-called "people smuggling" or "human trafficking", which can be categorized as transnational organized crime, as stipulated in the Palermo Convention in 2000. In addition to child and women trafficking, smuggling foreigners into Indonesia is also growing. Some of them admitted into Indonesia only for a while, before moving to other countries, like Australia. Some had tried to marry Indonesian women to be able to become Indonesian citizens.

Orang Rohingya.

38 <http://ditpolkom.bappenas.go.id/?page=news&id=181>

For example, in early February 2004, the immigration office in Samarinda, East Kalimantan detained 11 people who turned out to be foreigners of Chinese origin. They were selling a variety of electronic goods in various markets sidewalk in Samarinda. Those Chinese citizens could be admitted into Indonesia by assistance of Andy or U Chio Leong which was the mastermind behind the smuggling of 210 Chinese's smugglers to Indonesia. After reviewed by the officer, apparently these people only had the temporary residence permit card which was valid for 3 months. They also obtained business visit visa from PT Bina Citra Perkasa mentioned engaged in the deployment of manpower which was unfortunately fictitious. Andy tried to escape through the Soekarno-Hatta Airport unsuccessfully. When asked for his identity, Andy could only show an international driving permit and temporary residency card issued by the Indonesian Immigration Office in Central Jakarta. In this residency card, Andy was recorded as a marketing officer of PT Sapta Asien Mid East engaged in the business of buying and selling slabs of iron. To the officer, Andy admitted that he came in into Indonesia since 2000. After two years in Indonesia and he set up a fictitious company PT Bina Citra Perkasa. The company provided services to Chinese citizens who want to work in Indonesia. Throughout 2003, Andy admitted that he had helped 87 people entered Indonesia from China, and in 2004 until early March 2005 had been 123 people³⁹.

Police of West Kalimantan admitted that in 2000 and 2006 there were illegal immigrants arrested in Sambas (from Afghanistan) and in Ketapang (originally Vietnam) with the purpose of entry to Australia. The Immigration Office Entikong had rejected incoming immigrants from Baghdad because they do not have documents which permitting them to enter Indonesia. With the ratification of the Palermo Convention and Protocol relating to "smuggling" in 2009, Indonesia now has the growing stronger legal basis for handling illegal immigration problem and now Indonesia have to participate actively to combat the people smuggling by land, sea and air.

C. Cases of Illegal Migrant Happened in Indonesia

According to data in April 2009, at least 951 illegal immigrants entered Indonesia from various countries. Figures are based on data obtained illegal immigrants who are arrested and detained by immigration officials

39 Ibid, *Penyelundupan: Anggota Sindikat Dilepaskan*.

and local police. The number of illegal immigrants came from countries namely Afghanistan numbered 484 people. The illegal immigrants are entering Indonesia does not pass through official channels, such as airports. In addition to citizens of Afghanistan, there are also citizens of Pakistan, Sri Lanka, Iraq, Iran, Bangladesh, Myanmar, and India. Indonesia is usually the location of illegal immigrants after their staying in Malaysia runs out, they had entered Indonesia through domestic channels such as land and sea in order to go to Australia. Indonesia is also classified as a country of origin of trafficking in persons (human trafficking).

1. Sri Lanka Illegal Immigrants

Sri Lanka's illegal immigrant problem occurs because the immigrants who fled their country were hit by the ongoing civil war since 1983. They were forced to flee to various countries in the world because of their own country is not safe to live. The conflict is between the Government of Sri Lanka with Tamil Tiger rebels movements. The conflict, which lasted for two Decades resulted many victims from both sides so that those who cannot stand with the situation in the country had chosen to flee to another country, without any official papers to seek asylum. One of the main destinations of the refugees is Australia, but sometimes they are not acceptable in Australia so they choose Indonesia as their alternative destination.

An example is the story of the 260 of Sri Lankan illegal immigrants who sailed to Christmas Island, Australia to seek asylum in October 2009. They are found in a cargo vessel named Vessel Motor (KM) Jaya Lestari 5 by the warship KRI Teuku Umar-385 owned by the Navy when it was in the Sunda Strait. The immigrants consisted of men, women and children. They were housed in the Port of Indah Kiat, Merak, Banten, until they got assurance from the Health and Port Health Office immigration officials. Based on communication with the representatives of the immigrants, the navy explained that the immigrants had fled from their home country for fear the pressure on Sri Lanka either coming from the government and Tamil Tiger rebels. Before arriving in the Sunda strait, they had lived in the forests of the state of Malaysia. It was tragic fate suffered by immigrants, but unfortunately, in their efforts to seek asylum, they were not equipped with refugee documents from UNHCR. Instead they involve international syndicates such as immigrant agents from Thailand, Malaysia, and Indonesia that in fact no authority to take care of it.

Sri Lankan illegal immigrants were also found in Riau. A total of 78 Sri Lankan illegal immigrants who were on board Australia's Oceanic Viking dwelled in waters of Cempedak Island, Bintan regency, Riau Islands Province. They also wanted to ask for asylum to Australia, but was rejected by Australia and even sent to Indonesia by boat the Oceanic Viking. Up to November 2009 the Indonesian government still allowed the boat dwelled in the waters of the Riau Islands. Most of the 78 people were reported to have some official status as refugees while others had not clear status.

Problem of illegal immigrants from Sri Lanka is a problem shared between Indonesia, Australia, and Sri Lanka. Sri Lanka as the country of origin of these immigrants should be responsible for the fate of its citizens. Although perhaps the country is still unstable due to Tamil Tiger insurgency, but it is the responsibility of the Government of Sri Lanka to think about the fate of those immigrants who are victims of circumstances. In addition, the government of Indonesia and Australia as a civilized country, should also help the immigrants for humanitarian reasons at least by giving them a shelter and food.

2. Rohingya Illegal Immigrants

Rohingya illegal immigrants come from some conflict countries, including Myanmar, Bangladesh and Afghanistan. A total of 193 people Rohingya Refugees (Boat Man) from Myanmar were stranded in the area and Kuala Sabang, Nanggroe Aceh Darussalam on February 3, 2009. According to the results of investigations conducted by MER-C, all refugees are accommodated in Navy base of Sabang, Aceh. They were given a maximum handling of the Aceh administration. On the same day found another 220 refugees from Myanmar in Kuala Idi, Langsa, Aceh. Results of investigation Medical Team MER-C said that as many as 22 people died and 198 were survived.

The refugees reported that they had suffered ill-treatment committed by the Myanmar government is because they are ethnic minorities who are not recognized by the military regime in Myanmar. Because of bad treatment from their government, so as much as 2000 people (according to their narrative) Myanmar residents of this ethnic chose to leave their country by using a wooden boat across the ocean. Myanmar refugees are said to Tim MER-C would wish to be accepted by the Government of Indonesia. They also refused to be repatriated to their country of origin (Myanmar) because of the military regime they experience. They also told the Team MER-C

that they would rather die than have to return to his country. Rohingya refugees from Bangladesh were also reportedly stranded in Aceh⁴⁰. They enter Indonesia without official papers, making them can be categorized as illegal immigrants. However, they became illegal immigrants because of safety reasons, that is their country was no longer safe for them so they have to go from their home country. At first they went to Thailand, but once landed there they were driven back. They were put in to the boat and pulled up to the middle of the sea with no boat engines until they finally stranded in Aceh, Indonesia⁴¹.

Rohingya refugees originating from Afghanistan, aiming to seek asylum in Australia but they were arrested by Indonesian immigration officials. Refugees from Afghanistan are a victim of the Taliban conflict in his country. During the year 2009, more than 300 immigrants from Afghanistan foiled enter Australia by boat from Lombok and depart from Dompu and Bima, West Nusa Tenggara (NTB). Their presence was also difficult to be handled by the Immigration and Police NTB because they refused to move from Mataram to be placed in immigration detention house in the Riau Islands. As many as 300 Afghans are holders of the status of political asylum seekers who have registered by UNHCR⁴².

The two examples above reflect more closely the case of refugees for humanitarian reasons so that they are seeking status as a refugee. This kind of cases dominates the case of illegal migrants in Indonesia, where Indonesia is presented as a transit country rather than the country of destination.

D. International Regulations Related to Migration

There is a lot of International regulations relating to migration. However, when associated with illegal migration in Indonesia, where most of

40 "Berikan Suaka Politik untuk Pengungsi Rohingya"

< <http://www.mer-c.org/misi-merc/6-misi-dalam-negeri/552-berikan-suaka-politik-untuk-pengungsi-rohingya.html>> (Diakses pada Jumat, 19 Februari 2010).

41 "Indonesia ambil langkah diplomatik soal pengungsi Rohingya" <<http://www.antara.co.id/view/?i=1233910301&c=NAS&s=>>> (diakses pada Jumat, 19 Februari 2010, 18.15 WIB)

42 "Lebih 300 Imigran Gelap Tujuan Australia Digagalkan Imigrasi Mataram" <<http://www.tempointeraktif.com/hg/nusa/2009/12/28/brk,20091228-215980,id.html>> (diakses pada Jumat, 19 Februari 2010, 18.30 WIB).

the cases is associated not only with people smuggling, but also asylum seekers and refugees, then some relevant international provisions are:

- Convention Relating to the Status of Refugee, adopted on July 28, 1951
- Protocol Relating to the Status of Refugee, adopted on January 31, 1967

Convention relating to the Status of Refugee 1951 replaces the Convention of 28 October, 1933 relating to the International Status of Refugees. This 1951 Convention is an international convention that stipulated the refugee definition and established individual rights that could be enjoyed if they get asylum (asylum) and the obligations of countries giving asylum. The Convention also explains about the people who can not be categorized as a refugee, for example, a war criminal. The Convention also regulates the visa-free travel for holders of travel documents at issue under this convention. This convention was limited to protect European refugees after World War II but with the 1967 Protocol there be no time limit with the coverage area is more than just in Europe alone. Because the convention was approved in Geneva, it is often known as the Geneva Convention.

Indonesia is not a member of this convention. However, although Indonesia is not a member, in Indonesia has been the UNHCR representative. Moreover, in practice it could be said that Indonesia has implemented effective protection against the asylum seekers by not doing refoul immediately against them⁴³.

While convention which relating to the smuggling of people are:

- United Nations Convention Against Transnational Organized Crime, adopted on November 5, 2000
- Protocol Against the smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted on November 15, 2000
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, entry into force on December 25, 2003

⁴³ "UNHCR's views on the concept of effective protection as it relates to Indonesia" <<http://www.unhcr.org.au/UNHCR-protlegal-EPIndonesia.shtml>> (diakses pada Jumat, 19 Februari 2010, 20.09 WIB).

The Convention regulates the fight against transnational organized crime (TOC)⁴⁴ such as corruption, money laundering, a crime of participating in organized crime (people smuggling and human trafficking), attempt to hinder criminal process and to obstruct justice (Article 3) and carried out by crossing state boundaries and are organized. Indonesia signed the agreement on December 12, 2000 but only ratified it on April 20, 2009 through Law No. 5 Year 2009.

E. National Regulations Related to Migration

National legislation related to migration and the fight against illegal migration, among others, as follows:

- Act No.62 of 1958 on Citizenship of the Republic of Indonesia
- Law No.9 of 2002 on Immigration
- Act No.12 of 2006 on Citizenship of the Republic of Indonesia, replacing the Law No.62 of 1958
- Law No. 5 of 2009 on Ratification of the United Nations Convention Against Transnational Organized Crime

Indonesia has ratified the Palermo Convention on 17 December 2008 and its protocols are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children on February 3, 2009 with Law no. 14 of 2009 on Ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Indonesia has also ratified the Protocol against the smuggling of Migrants by Land, Sea and Air, which directly regulate the illegal migrants by Act no. 15 of 2009.

Crime trafficking of women and children is also one of the modus operandi of these illegal migrants, where women and children may be coming to and from Indonesia for trading purposes. Indonesia itself has a national

⁴⁴ A crime that is cross-border can no longer be tolerated. United Nations Convention on Transnational Organized Crime (Transnational Organized Crime / TOC), The United Nations Convention on Transnational Organized Crime or better known as the Palermo Convention / Palermo Convention was launched in 2000 and is valid (entry into force) since 29 September 2003. The Convention is intended to combat the TOC includes the "illegal trafficking" and "people smuggling". This Convention has three protocols are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against the smuggling of Migrants by Land, Sea and Air, and the Protocol against the illicit manufacturing of and Trafficking in Firearms, Their Parts and Components and ammunition.

law on trafficking in persons, namely Act No. 21 of 2007 on Eradication of Criminal Acts against Trafficking in Persons.

F. Regional Cooperation

ASEAN as a regional organization also has sought to overcome this TOC with the agreed ASEAN Plan of Action to Combat Transnational Crime, and then establishing the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) which discusses the 8 types of transnational crime: illicit Drug Trafficking, Trafficking in Person, Sea Piracy, Arms smuggling, Money Laundering, Terrorism, International Economic Crime and Cyber Crime. For it has formed an Ad Hoc Experts Group on the Work Programme to implement the ASEAN Plan of Action to Combat Transnational Crime⁴⁵.

ASEAN action is even reaching the types TOC wider than the Palermo Convention. The ASEAN Security Community (ASC) was initiated by Indonesia in 2003 at the ASEAN forum has opened the way for more intensive cooperation between ASEAN countries, where Indonesia as the largest country in ASEAN to take more roles in regional cooperation to secure the ASEAN region.

V. Conclusion

A. Some Strategic Thoughts

1. Basically, illegal migrants have a different character with the victims of human trafficking as well as refugees namely:
 - a. Illegal migrants are usually smuggled into the country of destination by way of stealth (smuggling of people) and by the will of the person concerned, while human trafficking is usually done by fraud or violence (fraudulent intention / act) and refugee is forced of the critical situation;
 - b. Illegal migrants are usually conducted with the aim of the economic benefits of illegal migrants themselves, while human trafficking for the benefit of the person engaging the trade and refugees for their life safety.

⁴⁵ Lihat <http://www.ascansec.org/16133.htm>

2. In Indonesian regulations which noteworthy is the Law No.9 of 2002 on immigration. The law regulates all the requirements needed by immigrants to get into the territory of Indonesia. Any immigrant who does not comply with the requirements contained in the Act No.9 of 2002 is an illegal immigrant. In addition the Law No. 5 of 2009 which ratified the UN Convention against Transnational Organized Crime has become the basis for combating transnational organized crime. This law shows willingness of Indonesia in combating the smuggling of persons. Nevertheless, Indonesia is still categorized as country that often targeted for the smuggling of persons. Vast territory has made the supervision of the entry of illegal immigrants to Indonesia rather difficult to do.

B. Some Strategic Inputs

1. Local governments must be sensitive to the problems that arise in the region which borders with other countries, both in terms of preventing the entry of offenders to the Indonesian border and the influx of Indonesian nationals illegally to other countries. They should also handle carefully the "cross-border crime" ("transboundary organized crime"), involving Indonesia and neighboring countries. Thus the border guard needs to be done carefully, the placement of border posts and custody must be supported by adequate policies and budget.
2. Trafficking and human smuggling activities are often carried by sea, so there shall be improvements over security in the sea area bordering the territory of another country. Regional cooperation needs to be done to make it more effective and efficient, especially with neighboring countries such as Malaysia, Singapore and Australia.
3. Indonesia needs a strong navy. The thing to do is equip the Navy with modern facilities. A partnership of mutual respect and benefit between the countries in Southeast Asia need to be built with the same perception, doctrine, force and extradition treaties to bring a "workable".
4. The second Protocol to the Palermo Convention can serve as the legal basis for the efforts and actions to be undertaken by the Government in combating illegal Immigrant through people smuggling. Cooperation among participating countries of the Convention and Protocol is a must. The Convention itself can serve as the legal basis of extradition

if necessary although there is no extradition treaty between the countries.

5. Considering the case in Indonesia vary widely depending on the motive of smuggling people, then there must be a clear restriction on the category and the handling of irregular migrants who go to Indonesia, based on their motives, whether because there are elements of "human trafficking", refugees or asylum seekers, or who was motivated by economics to seek a better livelihood. All three of these categories have different arrangements in international law and would require different treatment. Appropriate legal instruments and supporting resources have to be prepared by the Government of Indonesia for various kinds of illegal immigrants thus this problem can be handled properly.
6. Indonesia needs to cooperate with country or origin and destination country of illegal immigrants thus the effective and efficient measures could be taken to tackle the problem of illegal immigrants.

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