

# Illegal Asylum Seekers through Sea and Exploitation of Indonesian Children Working on Ship to Australia

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**Abstract**—Indonesia is a strategic archipelagic country. It makes Indonesia as a transit point for asylum seekers and refugees to pursue their destination to Australia. Some of these asylum seekers do not apply for refugees' status determination procedure through UNHCR (United Nations High Commissioner for Refugees) for some reasons. They entry in Australia through sea illegally. On the other hand, the trafficking syndicates employ Indonesian children who work on a ship which bring asylum seeker to Australia. They arrive in Australia and do not realize that they break Australian Law for committing people smuggling crime. In the process of law, some of them identify as adults because lack of evidence regarding their age. Then, they are imprisoned in an adult Australian prison. However, in the appeal stage, they are found not guilty as children. Furthermore, Indonesian children have replacement in Indonesia and have submitted a lawsuit in Central Jakarta District Court to get the composition of their sentence in prison without committing a crime. The increasing number of asylum seekers/refugees immigrates to Indonesia raises its own problems and also the impact of their use illegal way to Australia. Therefore, the Australian and Indonesian Government should have responsibility toward build bilateral cooperation in order to resolve this problem by providing legal protection for children who are victims of trafficking syndicates and enforce the law for trafficking syndicates.

**Keywords**—*Illegal Asylum Seekers, Trafficking in Persons through Sea, Exploitation of Children, Responsibility of States*

## I. INTRODUCTION

Indonesia started to face real problem of refugees in 1975. As a result of the change of regimes in countries in the Indochinese peninsula (Cambodia, Laos and Vietnam), hundreds of thousands of people left this area to seek refuge in other countries, either by land including up-river, by air or by sea. Many of them mostly from Vietnam, who traveled by sea, reached Indonesia [1]. The recent situation refugees are from the Middle East using Indonesia's geographical position that is closer to Australia than other countries as a transit / transit place. The United Nations High Commissioner for Refugees (UNHCR) has registered 13,840 refugees cumulatively came from Afghanistan (55%), Somalia (11%) and Iraq (6%) at the end of December 2017 [2]. Refugees come from countries that are experiencing disputes due to politics, war or economic difficulties that force their citizens to leave their countries to find a better life and can provide security guarantees by exiting. Australia is seen as a country with a good and stable

economic condition, safe and has a high level of welfare so that it becomes an option for refugees. The immigrant asylum seekers prefer to go to a country that can provide better life expectancy by using sea facilities, either by boat as a means of transportation to Australia.

Australia received 17,202 asylum seekers with the highest boats in 2012. This number is only 1.47% of world asylum seekers. Nevertheless, Australia admitted 190,000 of refugee through the family migration scheme [3]. The refugees entering Australia are mostly illegal refugees through sea by using Indonesian ships where Indonesian children work in the ships.

Indonesia has a strategic position and is geographically close to Australia. In the face of the large number of refugees coming to Indonesia as transit points to third countries including Australia, Indonesia will face problems in providing protection and assisting refugees as obligations of fellow civilized nations in the world. One of the problems that became the focus of this paper is the additional impact of the refugees in Indonesia that is exploiting Indonesian children who work on ships to bring them illegally to Australia.

Data from Australian Human Rights Commission identified there were 180 young Indonesians, who claimed were still underage, arrived in Australia on boats along with asylum seekers to Australia from 1 September 2008 and 22 November 2011. These young Indonesians worked as crew on the boats, and were often fishermen from poor communities in Eastern and Southern Indonesia. Without being charged or before being charged, many of them had to spend long time in immigration detention, while some others spent in adult correctional facilities in Australia after being charged, and some others convicted as an adult of people smuggling offence. [4].

This paper will describe the condition of refugees and exploitation of Indonesia children who bring refugees in the boat to Australia by analyzing the provisions of international and national law on refugees and child trafficking. It will examine legal protection efforts to provide protection for refugees and Indonesia children who exploit as the victim of trafficking.

## II. THE LEGAL CONTEXT ON REFUGEE AND CHILDREN TRAFFICKING

In the case of involving Indonesian children who bring refugees to Australia, it will be related to the provision regarding refugees, people smuggling and human trafficking in both transit countries (Indonesia) and destination countries (Australia). In the International context, is undebatable that every person has the right to obtain and have asylum from persecution, serious human rights violation and other serious harm. This right is protected under article 14 Universal Declaration of Human Rights that states *"1. Everyone has the rights to seek and enjoy in other countries asylum from prosecution. 2. This rights may not be involved in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principle of the United Nations."*

The two main instruments on refugee are the 1951 Refugee Convention and its 1967 Protocol. The Refugee Convention defines who is refugee and outlines the rights of refugees and the legal obligation of state towards refugees and asylum seekers. Under article 33 of the Refugee Convention, refugees cannot be sent to place where they may be persecuted. This fundamental principle is known as non-refoulement. Under Article 31 of the Convention, countries that have signed the Convention cannot punish refugees for entering or living without permission or unnecessarily restrict their freedom of movement. Refugees have a number of rights such as entitled to equal treatment than other foreign nationals for most of these rights. Australia was one of the first countries to become state party to the Refugee Convention on 22 January 1954 [6].

Other international treaties relevant to the maritime asylum seekers are Convention on the Law of the Sea 1982, Safety Life at Sea Convention 1974, and the Migrant Smuggling Protocol to the UN Transnational Organized Crime Convention. All of these treaties acknowledge the requirement to respect the safety and rights of the asylum seekers arriving by sea. In addition, the 2004 International Maritime Organization's Guidelines on the Treatment of Persons Rescued at Sea state that "rescued asylum seekers should not be come ashore 'in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea" [5]. Australia is a party to Refugee Convention and its Protocol. However, Indonesia is not a party to this Convention and do not have national procedures to determine refugees status.

### A. *Definition of Asylum, Asylum Seekers and Refugees*

Asylum is a protection award in the territory of a country with people from other countries who come to the country concerned because it avoids the pursuit or major danger. Whereas someone who is in the process of asylum application and has not been decided in the country where he / she applies for protection is an asylum seeker. While the refugee term (refugee) is a person who is outside his home country or his original place of residence has a basis of legitimate fear that his safety will be disturbed as a result of

ethnicity (race), religion, nationality, membership in certain social groups or political opinions he adheres to and unable or do not want to get protection for themselves from the country of origin or return there because they are worried about their safety. A person who has been recognized as a refugee status as a refugee will receive the rights and protection of his/her rights and the obligations set out [7].

Article 1A of the Refugee Convention defines a refugee as a person with a well-grounded fear of persecution because of 'convention reasons' (race, religion, nationality, membership of a particular social group or political opinion). The Refugee Convention should be protected a person must be stateless or outside the country of his or her nationality and unable to receive the protection of that country.

### B. *Legal Provision on Refugees.*

The right to seek asylum in Indonesia has been declared and guaranteed in Article 28 G (paragraph (2) of the 1945 Constitution states: "every person has the right to be free from torture or treatment which degrades the degree of human dignity and has the right to obtain political asylum from other countries". In Law No. 39 of 1999 concerning Human Rights, Law No. 37 of 1999 concerning Foreign Relations and Law No. 1 of 1979 concerning Extradition.

Article 5 paragraphs (1) of Law Number 1 of 1979 regarding Extradition states that extradition is not committed against political crime. Furthermore, in Article 14 it is said that the request for extradition is rejected if there is a strong enough suspicion that the extradition requested will be prosecuted, convicted or subject to other actions for reasons related to his religion, political beliefs or citizenship or because he belongs to a particular ethnic group or population.

The provision of Law Number 37 of 1999 concerning Foreign Relations Article 25 paragraphs (1) states that the President has the authority to grant asylum to foreigners in paragraph 2, which stipulates that this authority is carried out through a Presidential Decree. Article 26 stipulates that granting asylum to foreigners is made in accordance with national legislation and by observing international law, customs and practices. Article 27 states that the President determines the policy on the issue of foreign operators (paragraph 1) whose main provision will be regulated by a Presidential Decree paragraph (2).

Operational provisions regarding refugees and asylum seekers are regulated in Government Regulation No. 125 of 2016 concerning Refugee Handling of Overseas as follow:

**TABLE 1 THE SUBSTANCE REGULATED IN THE GOVERNMENT REGULATION NO. 125 OF 2016 CONCERNING REFUGEE HANDLING OF OVERSEAS**

The substance regulated in the Articles	Explanation
Definition of refugee	Refugees are foreigners residing in the territory of the Republic of Indonesia because of their fear of persecution on the grounds of race, ethnicity, religion, nationality, membership of certain social groups and different political opinions and not wanting protection from their country of origin and / or having obtained asylum seeker status or status of refugee from the United Nations through the High Commissioner for Refugee Affairs in Indonesia.
Cooperation in handling refugees	Refugee Handling is carried out based on the collaboration between the central government and the United Nations through the High Commissioner of Information in Indonesia and / or international organizations in the field of migration affairs or in the humanitarian sector that have agreements with the central government
Discovery of refugees	The discovery of refugees in emergencies in the territorial waters of Indonesia is coordinated and carried out by institutions that carry out matters in the field of Search and Relief. The transfer of refugees was carried out to the Immigration Office in the local area.
Shelter	The immigration detention center coordinated with the local district / city government to bring and place refugees and where to locate shelters. Shelter for refugees is governed by the Regional / City Government and must comply the criteria: close to health and worship service facilities, placed in one district/city area with the Immigration Detention House, supporting security conditions. Facilities at the shelter must at least have: a. clean water and sanitation, b. fulfillment of basic needs c. access to health and hygiene services and d. praying facilities.
Security	Safeguarding refugees in shelters in coordination with the local police: a. keep refugees in a shelter, b. creating a sense of security for surroundings, c. create and disseminate the rules for refugees.
Supervision	Immigration detention house officers, who were carried out when found in shelters and external shelters, departing to the destination country, voluntary repatriation and deportation, carried out migration oversight.
Immigration supervision of asylum seekers who were denied their refugee status by UNHCR	Asylum seekers who are denied applications for their refugee status by UNHCR will be removed from shelters and placed at the Immigration Detention Center. The administration will then be processed and escort deportation outside Indonesian territory (voluntary repatriation).

This Government Regulation contains definition of refugees, discovery of refugees, shelter, supervision, cooperation etc. With the operational arrangements regarding refugees, there is a precision about who has the right to get protection and who does not have the right to get protection under international and national law. With the enactment of this Government Regulation, Indonesia recognizes the status of asylum seekers and refugees and the country will no longer label them as illegal immigrants.

This decree also stipulates a policy to permit the establishment of more local refugee shelters. Coordination within Indonesia Institution such as Police, Immigration Office to discover and to safe refugee in territorial water and to make security for refugees not to push into detained center in the Immigration. It also builds coordination with UNHCR office in Indonesia. In the process to get refugees status in UNHCR, Indonesia protect and respect the rights of refugees under International Convention. However, if the refugees' status rejected by UNHCR, the refugees should escort deportation outside Indonesia territory. Indonesia does not give opportunity for asylum seeker to stay in Indonesia.

Although there are normative formulations in the constitution and are spread in other laws and regulations regarding the right to obtain political asylum in Indonesia, Indonesia does not yet have a special law on the Ratification of the Geneva Convention 1951 and the 1967 New York Protocol on Refugee Status.

As Indonesia has not ratified the Refugee Convention, Indonesia does not have the authority to determine the procedure for determining refugee status of asylum seekers in its territory. The procedure for determining refugee status is under the authority of the UNHCR office in Indonesia. By ratifying the Refugee Convention into domestic law through special laws, it will be a proof of Indonesia's commitment to give protection and enforcement of human rights, especially for refugees or asylum seekers to get basic rights.

While on the other hand in Australia, the Migration Act 1958 (Cth) make it an offence for a person organizing or facilitating the arrival of individuals who does not have lawful right to come to Australia (The Office of People Smuggling). It is an aggravated offence of people smuggling if there are more than five persons (who has no lawful right to come to Australia) in a group facilitated to entry Australia. The migration Act provides for mandatory minimum sentences of imprisonment on conviction for some people smuggling offences. These mandatory minimum sentences do not apply to minors. Under the Migration Act, unlawful non-citizens residing in Australian offshore places will be detained on Christmas Island [8].

However, in this Indonesian children case, they were imprisoned in an adult jail because of errors in estimating age method by the Australian Federal Police. The method used writs x-rays that was considered not valid by the surgeons of the Royal Colleges of Surgeons in Australia and New Zealand and the courts in Europe, as stated by Mr. Plunket, the offenders' lawyer.[9].

### *C. Legal Provisions on Trafficking*

AHRC reports stated that the young Indonesians working as boats crew carrying asylum seekers to Australia were engaged from remote fishing communities on the Indonesian coast. Most of them were poor without educational background, from single parent families. This condition forced them to work hard and became bread winner of the family to provide for younger siblings and other dependent relatives. Many of them were only eight years.



Referring to the exploitation of children who work on ships carrying refugees to Australia it is included in the crime of smuggling people or trafficking in persons. In Indonesia, the definition of trafficking based on Article 1 of Law Number 21 of 2007 concerning Eradication of Criminal Trafficking in Persons (Trafficking Law) states *"the act of recruitment, transportation, storage, transmission, transfer or acceptance of a person with the threat of violence, use of violence, kidnapping, confiscation, forgery, fraud, misuse or position vulnerable, entrapment or pay or benefit so as to obtain approval from the person who holds control and the other person, whether done within the country or between countries for the purpose of exploitation"*.

Indonesian children detained in Australia are victims of trafficking. This can be viewed by analyzing the fulfillment of the elements in the article above. First element, namely in the act or process in which the recruitment of these children is to be employed in the ship, their delivery and transfer from their homeland. The second element, regarding the means / means to make them want to work was done in a fraudulent manner. They were not told that the ship would bring refugees to Australia. Then the third element, regarding the purpose of the employment of these children is exploitation of forced labor where the child is used in a work environment that is harmful to his safety.

The obligation of the Indonesian government in the case of trafficking in persons where victims are abroad, based on article 54 of Trafficking Law states that in the event that a victim is abroad requires legal protection due to criminal acts of trafficking in persons. The Indonesian Government, through its representatives abroad, is obliged to protect the person and interests of victims and to try to repatriate victims to Indonesia at the expense of the state.

This provision can be invoked as a basis for the Indonesian Government to provide protection to Indonesian children who are facing legal problems in Australia by cooperating with the Australian Government to provide the best interest of the children. Indonesian children carrying refugees can be subjected to people smuggling in Australia.

Unlike Australia inquiries into the treatment of the people smuggling offenders who say that they are children and makes 17 recommendations that Australia break International Convention. Indonesia does not have inquiry to help Indonesian children to prove in their poor village that they are children. Some effort from Non-Government Organizations and lawyers to help them to advocate their rights to get justice.

AHRC report stated that it appears to the inquiry that these young Indonesians might be victims of trafficking. As such, they should be protected and treated as victims appropriately. The major finding of this inquiry is that Australia's treatment on these young individuals suspected of people smuggling offences has headed to numerous breaches of both the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR).

The first recommendations of AHRC said "the Migration Act 1958 (Cth) and if appropriate the Crimes Act 1941 (Cth), should be amended to make clear that the purposes of Part 2,

Division 12, Subdivision A of the Migration Act, an individual who claims to be under the age of 18 years must be deemed to be a minor unless the relevant decision maker is positively satisfied or in the case of judicial decision-maker, satisfied on the balance of probabilities after taking into account the matters identified s 140(2) of the Evidence Act 1995 (Cth), that the individual is over the age of 18 years".

Therefore, the Governments of Indonesia and Australia already have ratified the civil and political rights conventions, the Convention on the Rights of the Child, the Transnational Convention on Organized Crime and Supplementary to Prevent, the Suppress and Communist Trafficking in Persons especially Women and Children. So the protection of Indonesian children who are victims of trafficking is not only the obligation of the Indonesian government but also Australia's international obligations.

### III. LEGAL PROTECTION EFFORTS TO INDONESIA HOLDER REFUGEES AND CHILDREN IN INDONESIA

Indonesia holder refugees and children is provided with provide temporary protection by the Indonesian Government and will receive legal processing provided by the Government. The United Nations High Commission currently undertakes refugee processing in Indonesia for Refugees (UNHCR). Based on the documentations prepared by UNHCR Office in Indonesia will use it as the basis for not deporting the individuals, as it is the UNHCR's responsibility to assume the refugees processing[10].

For most of refugees cases in the world, the solution is to return to their home country. However, this voluntary repatriation must occur in a safe and dignified condition and on the basis of decisions carried out by refugees themselves. Some refugees have the opportunity to live permanently in a country where they first seek asylum. This is called as local integration. The last solution is resettled to the second asylum country, which is not that many. Although resettlement is the solution to the smallest number of refugees. This is an important protection tool apart from sustainable solutions [11]. Given Indonesia does not give the option of local integration, the rejected applications will be processed further to deport the asylum seekers out of Indonesia (Government Regulation Number 125 of 2016, Table 1).

Asylum seekers and refugees are not allowed to work and their children cannot go to school by the majority of Indonesian local governments. Some asylum seekers and refugees who had been residing in Indonesia for up to nine years, cannot stand this condition (they refer it as living like a limbo or like animals or as death or dying by stages), and pay people smugglers and travel to Australia by boat, seeking an opportunity to live a more meaningful life [12]. In order to stop or to reduce asylum seekers reach to Australia by boat, it is important that Australia should support a sufficient funding for Indonesia to develop and establish facilities on shelter and detention center, to support the fulfill of basic needs for asylum seekers such food, drink,

health, school for children and workplace for adult.

The similar condition of poverty makes young people in Indonesia to employ as crew on boats. From the AHRC inquiry, it shows that the boat crew who brought the asylum seekers to Australia were recruited from remote and poor fishing communities. They are poor and uneducated. These children are responsible for providing their families to meet their daily needs.

Indonesia must create programs to improve the economic conditions of the poor in rural areas. So, in the future there will be no more Indonesian children who are deceived to work in places that are dangerous for children. Enforcing the law in finding the main perpetrators of trafficking that exploit Indonesian children. The Indonesian Child Protection Commission (KPAI) accompanies psychological assistance for Indonesian children detained upon their return from Indonesia.

Australian lawyers and Indonesian lawyers have provided legal assistance for Indonesian children working on ship to Australia. Firstly, Australian lawyers travel to Indonesia to obtain a certificate or proof that they are underage in order to cancel criminal charges in Australia. At the end of 2011 in Western Australia, Indonesian children working on ships had been charged as adults who smuggled people into Australia who later stated that they were still children. In two cases of these children, the court criticized the use of X-ray evidence to determine the age of children or adults carried out by the Commonwealth. Attorney General refuses to look back on relevant cases so that the AHRC on 21 November 2011 investigates individuals suspected of committing criminal acts of people smuggling.[13].

Furthermore, around 200 Indonesian children are still shackled in Australian Federal prisons since 2012. Some of these children come from the island of Rote, NTT, Indonesia on charges of involvement in people smuggling operations. Last year a lawyer in Australia canceled the sentence of Ali Jasmin, who subsequently was 13 years old and sentenced as an adult. He has submitted a lawsuit with the Australian Human Rights Commission and demands compensation [14].

Secondly, The Central Jakarta District Court has begun hearing a civil class action against the Australian Government involving 115 Indonesian who crewed asylum boats between 2008 and 2012. The Indonesia's Child Protection Commission has demanded compensation payment from the Australian Government to a group of Indonesians allegedly jailed in adult prisons while they were minors [15]. Under International Convention, the victim of trafficking has the right to get rehabilitation and compensation.

In the context of protecting Indonesian children who are dealing with the law in Australia on charges of smuggling people who threaten high penalties in Australia, the legal process in Australia must be guaranteed to be in line with the concept of human rights protection. Legal efforts have been made both by Australian lawyers in advocating for Indonesian children in trials in Australia and by Indonesian lawyers who demand compensation for child trafficking victims in the Central Jakarta Court. This is a good step that has been done but not enough to restore the rights of

Indonesian children who were detained in Australia because of a wrong implementation of the law.

Therefore, it is necessary in order to increase cooperation between Indonesian and Australian lawyers, non-governmental organizations or legal aid institutions in both countries to help each other in the struggle for the rights of the child victims of trafficking. In addition, the importance of countries of origin, transit and destination to increase efforts of people smuggling and trafficking in persons by cooperating between the two countries is not only limited in refugee cooperation but of trafficking in person and people smuggling. In addition to legal remedies, the Indonesian government must resolve poverty problems in the Rote islands and other islands so that they are not trapped in persuasion to work in the harmful place for children. The socialization of trafficking and the dangers of safety, especially for women and children, need to be encouraged so that people can avoid themselves as victims of trafficking in persons and embezzlement of people into Australia.

#### IV. CONCLUSION

The 1951 Refugee Convention has not been ratified by Indonesia. Nevertheless, Indonesia has made operational rules in the form of Government Regulation Number 125 of 2016 concerning Refugee Handling of Foreign Affairs. With the enacted of this Government Regulation, Indonesia recognizes refugee status based on the definition of the 1951 Refugee Convention, regulates the cooperation of the Central Government and UNHCR in the handling of refugees, the protection of refugees in their shelters and supervision. Nevertheless, there is no provision in this regulation if the refugee cannot be placed in a third country and cannot be returned to his home country.

The Indonesian government is expected to be able to ratify the Geneva Convention of 1951 on the Status of Refugees, by ratifying the Government to be directly involved and contribute in dealing with the problem of refugees and its impact on Indonesia in accordance with national interests.

It is important to increase cooperation between the Indonesian government and the Australian government in resolving the problems of refugees and Indonesian children detained in Australia. Furthermore, the basic problem for refugees and the victims of trafficking children are poverty so it is needed to fulfill their the basic need as human being supported by both countries. It will prevent refugees and children do not endanger themselves to go to Australia through sea.

Cooperation between the two countries is not just limited to the government and the government but also includes cooperation with professionals (lawyers), non-governmental organizations and academics to find solutions in solving cases of refugees and Indonesian children detained in Australia for bringing refugees through ships.

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