

## PEOPLE SMUGGLING: JUSTICE, LEGAL CERTAINTY AND UTILITY CONCEPTS

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### ABSTRACT

Indonesia is not a state party to the 1951 Convention Relating to the Status of Refugees as well as its 1967 Protocol, but Indonesia is one of the countries with the greatest impact of refugees. There are many smuggler boats stranded in Indonesian water, bringing thousands of asylum seekers. These asylum seekers are often cheated by smugglers, they were boarded an improper vessels then stranded and being rejected. This article discusses the smuggling of people based on the perspective of legal theory of Gustav Radbruch.

Key words: People smuggling, Migrant, Asylum seeker

### INTRODUCTION

Migration undertakes different roles and creates different impact on countries. It is said the migration also affects the development of a state: the skilled and professional migrants provide a raised advantage a country's position in the global political economy.<sup>2</sup> However, such circumstances do not happen in every phenomenon of migration. Migrants are also crucial elements for the establishment and development of cultures in particular areas, in which, not every person can deal with the changes.

In Southeast Asia, Malaysia, Thailand, and Indonesia are host to numbers of refugees, asylum seekers, and stateless persons. In Malaysia, most of these populations spread in urban and surrounding areas. In Thailand, these populations are not only live in urban area, but they can be found also in the camps

along the border of Thailand – Myanmar. While in Indonesia, people often see numbers of refugee boats sank in Indonesian waters, leaving few survivors and most of them were drowned to the sea. The survivors then caught by the Immigration Police and placed in the detention.

Despite the volume of refugees and asylum seekers in their territories, none of those three countries ratify has signed the 1951 Convention Relating to the Status of Refugees as well as its 1967 Protocol. As a result, there is no legal framework which distinguishes a refugee or an asylum seeker from any other undocumented or illegal migrant. It comes to an effect they become the subject to arrest and detention. In fact, no one chooses to be a refugee. Since the condition at home is not suitable to live, they often force to flee from their homes and conducted forced migration.

The movements of migrants are closely related to the emergence of asylum seekers, which later known as the "boat people". Currently, the number of asylum seekers and refugee trying to reach Australia from Indonesia is increasing rapidly. Most cases, they use boat to reach

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<sup>2</sup> Arzura Idris, *Malaysia and Forced Migration*, Journal on Intellectual Discourse, 20:1 (2012), IIUM Press, p.31.

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Australia. They came by using improper boat and by having a short-term visa permit or deceptive document, even without documents at all. They bravely accross the sea in search of safety – something that cannot be found at home. It is a dilemmatic situation, when the asylum seekers and refugee keep their faith they will live safely when they reach other countries, but this is not simple as they thought. Australia, one of the most frequently targeted country, in fact restraint or spin their time out not to get into the country, even rejects them.

### **The Smuggled Migrants and Migrant Smugglers**

The flows of migrants movement is growing rapidly not only in term of their quantities but also in terms of their self-motivation. Formerly, persons decided to migrate because of seeking for a better life due to the poverty they face. Nowadays, they also found a fear of persecution threatening their life. According to the international law, a person that move to other country because of fear of being persecution and being the target of some inhumane treatment that threaten their life, and can be accepted by other countries on the ground of humanity, they deserve to get the refugee status.

The smuggling action generally requires involvement of other actors, but it does not always go with that way. Small-scale smugglers would generally not employ other actors in the process but arrange all aspects of the actual operation themselves. Within larger smuggling networks there will be a division of work among the actors involved. Often, those individuals at the top of migrant smuggling networks are the most difficult to identify and to intercept on the ground of justice.

The smuggled person is usually the vulnerable persons comprises of men, women and children. Some studies from different parts of the world have shown that the first migrants who are smuggled are young men. This is often due to the expectations placed on males to provide for their families; often such men will have to risk their own life in order for a chance to make remittances to send back home in support of those they leave behind. However, research has also revealed that there is a feminization of migration, with more women migrating than before.<sup>3</sup>

Many smuggled migrants are escaping poverty, lack of opportunity, natural disaster or conflict. Others may be seeking asylum. The tendency is that many smuggled migrants (though not necessarily all) are poor and uneducated. Others may be middle class people who are educated. Perhaps the only generalization that can be made about migrants who are smuggled is that they are all on a quest for a better life. There are some considerations to declare such smuggling of migrants is a deadly business, *inter alia*.<sup>4</sup>

- a. Criminals are increasingly providing smuggling services to irregular migrants to pass national border controls, migration regulations and visa requirements. Most irregular migrants resort to the assistance of profit-seeking smugglers. As border controls have improved, migrants are deterred from attempting to illegally cross them themselves and are diverted into the hands of smugglers.
- b. Migrant smuggling is a highly profitable business, in which criminals enjoy low risk of detection and punishment. As a

<sup>3</sup> *Ibid.*

<sup>4</sup> Marika McAdam, A Short Introduction to Migrant Smuggling, Issue Paper of UNODC, 2010

result, the crime is becoming increasingly attractive to criminals. Migrant smugglers are becoming more and more organized, establishing professional networks that transcend borders and regions.

- c. The modus operandi of migrant smugglers is diverse. Highly sophisticated and expensive services rely on document fraud or 'visa-smuggling'. Contrasted with these are low cost methods which often pose high risks for migrants, and have lead to a dramatic increase in loss of life in recent years.
- d. Migrant smugglers constantly change routes and modus operandi in response to changed circumstances often at the expense of the safety of the smuggled migrants.
- e. Thousands of people have lost their lives as a result of the indifferent or even deliberate actions of migrant smugglers.

These factors highlight the need for responses to combat the crime of migrant smuggling to be coordinated across and between regions, and adaptable to new methods.

### **Some Cases on Migrants Smuggling**

Sondos Ismail, Iraq nationality, hope to find security after her father was killed by Saddam Husssein's secret army. She fled to Iran with her three children and one sibling, Ahmed. Due to the poverty they faced in Iran, she lost a child because of inability to pay the medical care. Six years for poverty, one of their family in US sent them \$US\$ 3,000 for better life. The family then used some of the money for a journey to Australia by a smuggling. When the boat arrives in Indonesia, they placed in a detention centre. In brief, Ahmed himself got the refugee status from

UNHCR as well as temporary visa protection (TPV).

However, in 1999 Australian government enacted a new policy that visas did not allow family to join those granted asylum in Australia for at least three years. Consequently, Sondos ismail and three children took more time in Indonesian detention centre. As the last resort, she used people smugglers to try to be reunited with Ahmed.<sup>5</sup>

Abu Quassey, Egyptian organized smuggler approached this woman with remaining three children, to escape from detention centre and sail to Australia with his boat. Sondos was promised that boat was safe. Sondos felt satisfy since she had only to pay US\$500 (her husband ought to pay US\$1200 at the previous trip). She actually has promised to her husband not to join any dangerous trip which endangers her and three children, but after living two years in limbo she determined to start the trip.<sup>6</sup> The vessel of Abu Quasey was small and unnamed. Later, it was known as SIEV X. Sondos survived from the sinking but she and Ahmed lost three daughters, Aiman (9 yo), Fatima (7 yo), and Zahra (6 yo). Sondos survived in the sea off the coast of Java, 19 hours before the Indonesian fishermen found the boat's wreckage.<sup>7</sup>

The illegal conducts of people smugglers are increasing the risk of such journey. They even have no sufficient boat to sail. Even they forced the quantities of the smuggled migrants and only wanting to get enormous profit money from the highly risked journey of the smuggled people. As a result, they probably can die before their boat off to Australian territory.

<sup>5</sup> Mike Head, Drowned Refugees were Victims of Australian Policy, accessed on 28 November 2013.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

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Other cases, many asylum seekers and refugee attempt to come to Christmas Island (Australian's remote territory in Indian Ocean) by boat. Unfortunately, the improper condition of the vessel get them sink in Indonesian coast before they arrived to Australian's territory. On November 2011, an overloaded vessel carrying more than 60 asylum seekers from Middle East sank near Pangandaran Beach, West Java. Same tragedy occurred again last September in which the boat carrying migrants from Sri Lanka and Iran sank, remain more than 20 people were passed away and leaving only few of survivors.

Same case happen last September 2013, at least 21 of them drowned when a boat carrying the asylum seekers sank off the coast of Java.<sup>8</sup> After being interviewed, it is known 50 survivors came from Lebanon, Jordan, and Yemen.<sup>9</sup> Hundreds of migrant have died trying to reach Australian shores. The migrant smuggler determines the strategies and system to carry some migrants to go to place of destination. It is often to be found they force the migrant to live in the unclean condition. One who was safe from the wrecked boat testified they forced to sit in urine, seawater, faeces, or vomit.<sup>10</sup>

### **Differences between migrants smuggling and human trafficking**

Sometimes it is difficult to distinguish between the elements of crime of smuggling migrants and trafficking in persons. But, they always put altogether like two-sides of a coin because of both crimes are acted by the organized criminal group. Based on the Convention against

Transnational Organized Crime, organized criminal group means "... *A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.*"<sup>11</sup>

"Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.<sup>12</sup>

Since the Convention is supplementing by Protocols, according to the definition of both crimes in the Protocol, there are several reasons to distinguish both crimes, first, the constituent elements of the respective offences are different. Second, the response required and assistance will vary, depends on the offence. Third, the recognition as a smuggled migrant or a victim of trafficking will give serious implications for the person concerned. The Protocol defines the meaning of trafficking in persons as follows:

*"The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having*

<sup>8</sup> Many Drown as Indonesia Asylum Boat Sinks Near Cianjur, <http://www.bbc.co.uk/news/world-asia-24304276>, accessed on 28 November 2013.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Opcit.*, Marika McAdam.

<sup>11</sup> Article 2 (a) of United Nations Conventions against Transnational Organized Crime.

<sup>12</sup> *Ibid.*, art. 2 (c)

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*control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>13</sup>*

The provision stipulated above describes some parts of elements of crime in trafficking persons:

- Act: Recruiting, transporting, transferring, receiving a person;
- Means: use of force; threat to force; coercion; abduction; fraud; deception; abuse of power; of a position of vulnerability; giving or receiving of benefits;
- Purpose: exploitation.

After, there are three basic different distinguish between smuggling of migrants and trafficking in person:

	Smuggling of Migrants	Trafficking in Persons
How to generate income	<b>No intention to exploit.</b> The smuggled migrants have to pay in advance or upon the arrival.	<b>With intention to exploit.</b> The profit generate from the exploitation like prostitution, slavery. Exploitation might last for several

		years.
‘Illegal entry’ or residence	The objective: to enabled the smuggled migrants <b>irregularly</b> enter or stay in a country (always involve at least two countries).	Involvement of two countries is not necessary. The movement can be done either <b>legally</b> or <b>illegally</b> .
Sources of profit	Derived from the facilitation of transportation of the illegal entry	Derived from exploitation

### Types of migrants smuggling

1. Ad hoc smuggling services: they force themselves to entry other countries, by having self-motivation to set free from the economical crisis of heir family, they organize the journey themselves with the occasional use of local smugglers. The migrants commonly does not have sufficient budget and logistic for the journey.
2. Migrant smuggling through misuse or abuse of documents: the smugglers use fake visa given to the smuggled migrants. During the journey, after the migrants obtained the fraudulent visas they often conduct the journey without the presence of the smugglers.
3. Pre-organized stage-to-stage smuggling: this kind of smuggling provides facility to the smuggled migrants not to have negotiation with the local smugglers. There will be a local service providers negotiate with the smugglers for giving some facilities like

<sup>13</sup> Article 3 (a) of Protocols to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in Supplementing the United Nations Conventions on the Transnational Organized Crime, endorsed by GA Res 55/25 of 15 November 2000

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accommodation, etc. the local service providers are mostly the nationals or residents of the transit country and change from stage to stage. Further, the migrants during some parts of the journey are accompanied by the smugglers.

### **Actors behind the smuggling**

The actors of migrants smuggling may be different in every conduct. It can be the foreigner smuggler having local counterpart in Indonesia, or it can be local fishermen. By the reason of economic and in order to gain the enormous profit of such crime, local fishermen commit to involve in the smuggling. Moreover, several actors who may be involved in the migrants smuggling are:

1. Coordinator or organizer: the one in charge as the responsible person over whole smuggling crimes. The organizer can organize the method, routes, personnel, transport, and accommodation. The coordinator also has many connections due to this crime covers some regions.
2. Recruiters: recruiters are the one that have a primary relation with the migrants. They usually live on the country of origin and know well about the native language of migrants. They often tell the untruth about the process and reality in the destination country. before the migrants have been departed, the recruiters also collect the down payment of the migrants
3. Transporters or guides: since the purpose is to get the migrants into the cross borders, it needs several stages for the journey. In each stage, there must be a guide managing the operational part of smuggling, not only at the sea but

also the smuggling committed at land and air.

4. Spotters, drivers, messengers, enforcers: they are responsible for protecting the smuggling business as well as may conduct violence in order to make them pay smuggling fee that are still owed.
5. Service provider and suppliers: they work individually to provide the service for the smugglers migrant and the smuggled. For example, when the smuggled migrants and the smugglers harbor, the service providers provide the hotel, rent house, or apartment accommodation.

### **Smuggling fees and payment**

Generally speaking, the prospective migrants must pay some fees for the smuggling process. Fees are charged by the smugglers for some reasons:

- a. Profit: the smugglers conduct such deadly business in order to enrich themselves with money.
- b. Travel documents: because of it is a must to come to border area with necessary documents, it requires more cost money for the migrants to obtain the documents. Therefore, the smuggled migrants have to pay certain amount of money to obtain the travel documents.
- c. Transport (internationally): it covers the fee for the captain of the boat, the fuel of the boat or airplane, etc.
- d. Transport (locally): when the smuggled migrants harbor in the destination country or transit country, there must be a local service provider provide them such accommodation and driver. However, this also takes money.
- e. Accommodation: journey of smuggling takes some stages. From

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stage to stage they usually need a place to continue their journey.

- f. Corruption: this kind of crime aim to pay the officials to allow the smuggled migrants to cross the borders or to use fraudulent documents.

Further, the aforementioned elements are the reasons why the smuggling migrants categorized as the transnational crimes. Because the migrants smuggling is conducting in the broad areas, it creates the difficulties to detect the existence of smuggling migrant. Sometimes, when the driver of the boat is being intercepted by the border police and brought to the trial, the main actors of smuggling (the smugglers) are very difficult to be detected. The difficulties to detect such case, as well as the need of having a good arrangement in conducting the crime, the contribution of several actors to play certain roles, as well as the contribution of some officials in particular territories of a state meet the elements of transnational organized crime.

## **A. JUSTICE**

### **a. Substance**

Justice is the first virtue of social instituion. The meaning of justice itself is always related to the law enforcement. Law enforcement mostly reflects the manifestation of justice. Indonesian legal scholar, Satjipto Rahardjo defined the aw enforcement as a process to create and gain the legal desires to be a real. Legal desires then understood as a thought of legal institution which are reflected by the law.<sup>14</sup> Justice tends to be found through the authoritative institutions or even through the social dynamic. John Rawls said that justice are agreed to in an initial

situation which is fair.<sup>15</sup> Justice as a fairness begins with one of the most general of all choices which persons might make together with the choice of the principle of a concept of justice, which is to regulate all subsequent criticism and form of institutions.<sup>16</sup>

Legal substance is associated with the legal materials or legal products of the institutions. In this context, people smuggling, the substance deals with legislations, statutes, conventions, municipal law, concerning the people smuggling or transnational organized crime. The legal substance play important role in the eradication or prevention of transnational organized crime. Generally, United Nations has developed the legislations in order to eradicate the conduct of transnational Organized Crimes. The writer ensure that the legislations of transnational organized crimes specifically on the people smuggling covers some aspects such as human rights, criminal law, social development, etc. The legislation or legal products of it is supposed to reflect the justice. Therefore, the writer personally argue that justice is also a matter of hope and deals with future law.

In formulating the legal substance, the provisions are not supposed to be so difficult in implementation. The unclearness of a provision could hamper the implementation of the law. As a result, there will be more and more victims towards it.

As an example, in September 2013, Australian Prime Minister Kevin Rudd initiated a meeting with some countries which are the most affected by the irregular movements in the Asia-Pacific

<sup>14</sup> Satjipto Rahahardjo on Ali Masyhar, *Struggling of Criminal Policy on Social Order*, Unnes Press Semarang 2008), p.5

<sup>15</sup> John Rawls, *A Theory of Justice*, the Belknap Press of Harvard University Press Cambridge, 1999, p.12

<sup>16</sup> Ibid.

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region, in order to arrange a new policy regarding restriction of visa's issuance, for aiming the reduction of people smuggling and human trafficking in the region.<sup>17</sup> The conference called "Special Conference on the Irregular Movement of People" was held in Jakarta. Some of those countries are Indonesia as the host country, Afghanistan, Australia, Bangladesh, Cambodia, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Sri Lanka, and Thailand.

Such conference produced the Jakarta Declaration that highlighted the causes of irregular movements and entails the shared responsibilities of the most affected countries by such irregular movements. Christmas Island, which length only 500 kilometers from South Jakarta, is a popular destination of the migrants. However, numbers of boats sank on the Indonesian waters before their arrival to Christmas Island. As the result, Jakarta Declaration covers some aspects such as prevention, early detection, protection, and prosecution.

**b. Legal structures**

There is an international organisation that put the highly concern on this kind of crime called UNODC. United Nations Office on Drugs and Crime (UNODC) was a hybrid of two bodies (United Nations Drug Control Program and the Centre for International Crime Prevention). General objective of UNODC is to assist the Member States in their struggle against illicit drugs, crime, and terrorism. Kinds of crimes covered by UNODC are: corruption, drugs prevention, drug trafficking, firearms, fraudulent

medicines, human trafficking and migrant smuggling, money-laundering, piracy, terrorism prevention, etc.<sup>18</sup> Since 2000, UNODC also took concern on the human trafficking and migrant smuggling. Those two kinds of crime result disadvantages for society and the whole world. After being the concern of UNODC, UNODC then had an effort to formulate the legal instrument in order to meet the aims:

- f. To prevent and combat the smuggling of migrants
- g. To promote cooperation among State Parties to that end
- h. To protect the rights of smuggled migrant

Besides the UNODC, the involvement of officials in the domestic countries also have significant role.

The 1951 Convention on Refugees governs the obligation of State Parties to adhere the principle of non-refoulement. The non-refoulement principle of non-refoulement determine that no refugee shall be returned in any manner to any country where he or she would be at risk of persecution. The State Parties must not to remove resident refugees or keep them away from their territory.

The risk of being boat people is they must face the degrading inhumane treatment. Refugees are still vulnerable to arrest, detention corporal punishment and deportation. Further, they also find some more difficulties and become the subjects of other kinds of abuse. In order to make a living, they must work to generate income, but most of them are impossible to have a legal work permit. Thus, the refugees tend to be treated like slaves. They are forced to find employment in the informal sector

<sup>17</sup> Australia Get Pledges from Boat People Homeland,  
<http://www.thejakartapost.com/news/2013/08/21/australia-gets-pledges-boat-people-homelands.html>,  
accessed on 27 September 2013.

<sup>18</sup> <http://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html?ref=menu>, accessed on 27 September 2013.



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where they are vulnerable to exploitation. It happens when they are onboard and they probably die before the boat arrive in destination country, Australia. We found many cases of boat sink in Indonesian waters, after the investigation, they were known as the refugees seeking for sanctuary.

One side we all know that the flow of asylum seekers or refugees are protected under the Convention or other legislations. They also entail a freedom of movement. As one of the basic rights, all persons especially state as the duty bearers must comply with this thing and commit action in line with law (in protecting the refugees). States through its officials and Head of State must protect the rights of refugees. Another side told that even though the officials have made some legal products to protect the refugees, in fact they are found to be the victim of human rights violation. The 1951 Convention on Refugees and the Convention Against Transnational Organized Crimes declare their consistency to protect refugees. But the refugees get suffer on this.

### **c. Legal Culture**

Commonly, people smugglers are found to be the organized business smuggler that having the local counterparts usually in transit country or destination country. The counterparts in Indonesian territories are generally the Indonesian fishermen. The fishermen often drive the boat which consists of the smuggled migrants to sail to Christmas Island.

For instance, on April 2009 Hasanusi, an Indonesian fisherman, sailed into Christmas Island in his 12 metre wooden fishing boat with 38 Iraqi smuggled migrant onboard. He was intercepted by the Australian police border and brought to the Australian tribunal in

March 2010.<sup>19</sup> The prosecutor stated Hasanusi fulfilled the elements of transnational organized crime name migrant smuggling, "Hasanusi is a people smuggler, (having) equipped his boat with enough fuel, food and water for the journey."<sup>20</sup> Prosecutor claimed Hasanusi was paid twice more than the normal wage to bring the asylum seekers or smuggled migrant to Australian territory.

However, the fishermen testified that he had been hired to take the group on his fishing trip, after he was forced to come to Australian seas or he would be thrown to the sea otherwise. The final decision was issued by the jury to punish Hasanusi 6,5 years in jail. The jury issued his final decision by saying, "You are a simple uneducated fisherman from Indonesia. It must have been the money that made you do this. The people smugglers will always prey upon such people like you who need the money."

Since the smuggling of migrants is a highly profitable business with a relatively low risk of detection, the crime is becoming increasingly attractive to criminals. Smugglers of migrants are becoming more and more organized, establishing professional networks that transcend borders and regions. The nature of migrant smuggling is complex, involving two states and takes different forms in different parts of the world. It is flexible since the smugglers always change the method of smuggling as well as the route as improved border controls and to prevent interception from the border police.

It is such a dilemmatic condition for Indonesia since the poverty is the primary reason for citizens to commit the crime. They need more money to have a

<sup>19</sup> D. Guest, *Accused People Smuggler's Mutiny Fear*, *The Australian*, 16 March 2010.

<sup>20</sup> *Ibid.*

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living. In the place of working, they often meet the action of smuggling across the sea to come to Australia. The story of the Indonesian fishermen consistently draw a line that convicted people smugglers are coming from uneducated fishermen, and they somehow prefer to focus to earn money from such smuggling rather than from fishing.

Although not all of the fishermen involve in the organized crime, but this thing can be an effort to reduce the poverty faced by them. However, such action also threatens the life of the drivers and the smuggled migrant themselves. People smuggling requires any planning, organization, and implementation. This will be unfair since the native or fishermen will get punishment because of they are the one that can be easily detained by the officials, while the head of the smugglers still can commit their actions. Both fishermen and the refugees themselves are vulnerable to get suffer.

## B. LEGAL CERTAINTY

### I. Legal framework

The principle of legal certainty comprises number of aspects: **first**, legislation shall not be enacted retroactively; **second**, legitimate expectations; **third**, clarity of statutes; **fourth**, legislation should solve the matters conclusively; **fifth**, *vacatio legis*; and **six**, only publish the law that have a legal effect. The various subprinciples abovementioned must guarantee the stability for individual, which means the action of the people in life must be guaranteed by law. It says that the changes of law will not give sustainable effect for the next generation or in the future.

The enactment of law shall be applicable today and for the future. In

regard to the aspects/ subprinciples of legal certainty, The first subprinciple clearly determine to uphold the non-retroactive principle. This provision is accepted universally in either municipal law and international law. Legitimate expectation derived from usually an act or a decision subject to individual. The third subprinciple demands the comprehensive of the law emerge. The law making must be based on a reasonable ground, logic, and easy to be understood by the people. Without the clarity of the law, there must be uncertainty.

The fourth subprinciple determine that solution governed by law must be conclusive. This does not mean that the uncertainty about a legal-problem-solving is somehow in conflict with the principle of legality, because the uncertainty about an outcome is the very nature of legal disputes. The meaning of uncertainty in question is something different. It means that the whole legal system should provide the conclusive outcome in the end of the problem-solving-process/legal dispute.

Fifth is *vacatio legis*. This aspect deal with matters of time. The people or entities which might face the impact of a law shall be given enough time to adapt and to comply with the changes of the law. The last, the most important of legal certainty is that the law shall be published in the prescribed manner, since only published law have a obligatory force.

### II. Legal substance

According to the theory of Friedman, the legal substance have a linkage with the material of certain provision or legislation. In case of refugee, the legal documents having concern on the refugee are conventions, declaration, protocol, and the municipal law of a country. The substance of refugee legal documents are interrelated with another discipline like social science and movement, furthermore, this issue is

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also taking part in the human rights and humanitarian law in the international law.

It seems that the provision contained in the related legal documents is bias, since many refugees are still vulnerable to be the victim of persecution or degrading inhumane treatment. The 1951 Convention stipulate the rights of refugee, in which they cannot be limited to enjoy certain rights such as right of education, access of public health, freedom of movement, to not get penalties at the host country, right to seek asylum, etc. But the State parties of the convention like Australia even reject their existence and their coming as well.

However, the Conventions against Transnational Organized Crimes needs to be focused on certain area of the criminal happened. What the writer want to say is that since the transnational organized crime occurred often in certain areas, the necessity of States to commit towards the Convention will be different each other. In comes to a further action that some particular states create a bilateral cooperation to combat such crime. For example, Indonesia, Australia, Afghanistan, and other related States due to the people smuggling had intention to eradicate the people smuggling. As a result, the countries formulated Jakarta Declaration. such Declaration must consider the specific Convention which is Convention against Transnational Organized Crime. As previously mentioned that the 1951 Convention on Refugees provides the rights of movement for refugees, in reality it is so difficult to be implemented.

### **III. Legal structure**

The legal structure comprises of the legal enforcer, both official and the society. The legal structure is closely related to the government or official conduct. Given that the refugee have been

considered as illegal migrant, therefore, refugee must face the official like police, immigration, dll in the RSD process. The emergence of this legal enforcer is to advice and provide service for the refugee. Moreover, in Indonesia we have District Court but this Court does not have power to exercise jurisdiction over the refugee. because of the non ratification of 1951 Convention, Indonesia let the United Nations High Commissioner for Refugee (UNHCR) to open the office in Indonesia, and the power to conduct the RSD process was directly determined by the UNHCR.

It is important to know that refugees are not criminal person. Thus, the treaty conducted by the UNHCR does not mean the non-discrimination principle do not exist. The criteria of UNHCR to determine a refugee was based on the 1951 Convention, and after that there will be cross examination also conducted by the UNHCR for the purpose of RSD determination.

However, during the journey the boat people often do not bring any travel document at all. But they must across the border of territorial sea of a country. In this conduct, many official especially the immigration official commit the corruption. The smuggler of boat people often give them money for aiming that the boat people can pass the border even though they have no valid document.

We found many cases of the boat contained refugee sank in Indonesian waters, the position as non-signatory parties of 1951 Convention sometimes make Indonesia does not have concern on this. In other hands, they are still humans that need to be protected and guaranteed their rights.

Habermas, in his book of "Between Facts and Norms", he addresses the question of legal certainty in detail. Habermas argued that legal certainty requires the decisions of adjudication

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which is consistent with the framework of existing legal system. Which means, the claim to legitimacy of authority demands decision that are not only consisten in relation to legal system, but that should be justified rationally by the society.<sup>21</sup> It means that the officials in making a legal product or producing a legal decisions shall consider the society's perspective, therefore the society will accept such decisions.

To make the law be effective, it must be supported by the society. In order to prevent the victims of human smuggling the authoritative government must try to make an effective decisions. To make the effort of prevention be affective, the State in a law-making must provide the clarity on each provisions. It is hoped to have a strong legal basis for the head of smugglers to be punished (so, it is not only the fishermen or local counterparts that charge guilty and liable to a punsihment).

### IV. Legal culture: legal certainty on our living cultures

In Indonesia, as the transit country, many people have insufficient understanding about who refugee is. Where do they come from? Why do they come here? Even most poeple prejudice them by declaring them as the criminal person. The fact, they are the target of persecution in their country of origin, as well as their country of origin dectermine them as stateless.

In my perspective, the Indonesian people do not have enough knowledge about the refugee, this non-well understanding make citizen become not sympathetic with the existence of boat

people in the country. No one ever know that boat poeple are usually the victim of gross violation of human rights. The people must have an understanding on the value first, after, they hopefully can respect the boat people.

Another phenomenon is that some officials that has a task to keep the sea border somehow cooperated with the smuggoers. People can also found fraud in this kind of criminal. The smugglers tend to pay sum of money to the border-guardian or government officials in order to allow the boat pass the water territory. This is not a good fact because on the one hand the central government of each country is attempting to stop or prevent the people smuggling, while the officials in the location is helping the smuggler to pass the water territory.

The officials stay in a water terirtory must have a strong commitment and awareness that they have a good legal basis to prevent the smuggling happen. It is all about the safety and live of people. So, we must uphold the public interest.

## C. UTILITY

### I. Legal framework: Utility

The emergence of law must before the goodness of the people. The law should bring benefit to the society. According to Gustav Radbruch in his book of 5 Minutes of Legal Philosophy, Radbruch attempted to supplement the teaching with: Law is what benefits the poeple. The book describe that arbitrariness, breach of contract, and illegality (which somehow can be usually applied as the reason of justify) are law. Radbruch assured that only law is benefits the people, instead of the other way around: everything that benefits the people is law. Thus, in the principle of utility the public benefits preavil over the private benefit.

<sup>21</sup> Jurgen Habermas, *Between Fact and Norms: Countribution to a Discourse Theory of Law and Democracy*, Massachusetts Institute of Technology, 1996, p.194.

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In conclusion, Radbruch is sure that the government will enact the law (even though such law is tend to arbitrariness) that coprise the utility of the society. As mentioned also in the Bible, that we are to be obedient to the authorities who have power over us, in the other hand, it is also written that we are to obey God rather than men.

Along with the principle of justice, the benefits is the objectives of law. However in applying law for society, the three purposes of law: justice, benefits, and legal certainty, cannot always be united harmoniously. In his book, Radbruch defined that the principles of law are weightier than any enactment of law, therefore, in case of a law in conflict with the principles, the law itself must be close to invalidity. Later, this principle known as natural law or the law of reason.

### **II. Legal substance: Understanding utility on Its Substance**

Several legal instruments are success to be governed by UNODC. First, The United Nations Convention against Transnational Organized Crime was adopted by General Assembly Resolution 55/25 of 15 November 2000.<sup>22</sup> This Convention is the primary international instrument in fighting against the transnational crime. After become entry into force on September 2003, the Convention then supplemented by three Protocols: 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. Countries must become

parties to the Convention itself before they can become parties to any of the Protocols.

Protocol against the Smuggling of Migrants by Land, Sea and Air was adopted by United Nations General Assembly in 2000.<sup>23</sup> The protocol is supplementing the Convention on the Transnational Organized Crimes and referred to as the Smuggling Protocol.<sup>24</sup> The smuggling protocol entered into force on January 2004, then, the protocol is aimed to protect the right of migrants from any inhumane treatment and abuses subject to them. Since the smuggling of migrants has become a trend recently, the emergence of the protocol is necessary since the action of smuggling is often at high risk to the migrants and gains huge profit for the offenders. Further, it is hoping that the protocols can prevent and reduce the smuggler's influence in committing transnational organized crime.

Generally, smuggling of migrants is a crime involving the procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident. The smuggling of migrants requires the involvement in wider region as well as 'international actors'. In detail, article 3 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling of Migrants Protocol) 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*

<sup>22</sup> <http://www.unodc.org/unodc/treaties/CTOC/>, accessed on 27 September 2013.

<sup>23</sup>

<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html>, accessed on 25 October 2013

<sup>24</sup> *Ibid.*

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*person into a state party of which the person is not a national."*

Article 6 of the Protocol requires the criminalization of this conduct. In addition, article 6 requires States to criminalize the following conduct:

*"Enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means" in order to obtain a financial or other material benefit."*

In brief, here are several elements constitute migrant smuggling and related crimes:

- Either the procurement of an illegal entry or illegal residence of a person;
- Into or in a country of which that person is not a national or permanent resident;
- For the purpose of financial or other material benefit

However, this law stipulates that the migrants who voluntarily agree to use the smuggling service are not the subject of such crimes. It is stated: "By virtue of Article 5, migrants shall not become liable to criminal prosecution under the Smuggling of Migrants Protocol. It is therefore to be understood that the Protocol aims to target the migrant smugglers, NOT the people being smuggled."

Article 31 of the 1951 Refugee Convention governed,

*"The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are represent*

*in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

The Smuggling Protocol is concerned with the smuggling of migrants, not migration itself. It is important to determine that criminalization only liable for those who take profit of financial and material from such irregular movements. The Protocol does not intend to criminalize person that helping such illegal entry for humanitarian and non-profit purposes such as family members and non-governmental organization. In conclusion, the smuggled migrants, the non-governmental organizations that facilitate them in a transit country cannot be given the responsibility of punishment for such crimes.

Along with justice, the public benefit is an objective of the law. And of course laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course it is true that, owing to human imperfection, the three values of the law—public benefit, legal certainty, and justice—are not always united harmoniously in laws, and the only recourse, then, is to weigh whether validity is to be granted even to bad, harmful, or unjust laws for the sake of legal certainty, or whether validity is to be withheld because of their injustice or social harmfulness. One thing, however, must be indelibly impressed on the consciousness of the people as well as of jurists: There *can* be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them.

Legal substance, according to the theory of Friedman is incorporated with legal material or substance of legislations. In this case, the legal substance is the

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migrant people (commonly known as the boat people) related to the legal material like statutes, treaties or conventions, as well as municipal law that clearly provided in the chapter, article, or sub paragraph of such municipal law. None of the country actually welcome the coming of refugee flows. Since some states have ever ratified the Convention Relating to the Status of Refugee the utmost point is that they have to accept them and give them humane treatment. This also related with the basic principle of self determination that all person has prerogative rights to enjoy all kinds of human rights.

Historically, the 1951 Convention emerged because of the spontaneous mass movement as the cause of World War II. The Convention was in effort to protect the refugee movement that seek sanctuary outside border of their country. The scope of protection was expanded through the emergence of 1967 Protocol, which then protect the asylum seekers and refugee not only because of they were the victims of World War II but also they treated degrading inhumane treatment because of their background. Such Convention and Protocol are the highest legal legislation concerning the mass movement of refugees and asylum seekers. Each country (country of origin, transit country, and the destination country) have their own legislation or policies in treating the refugees and asylum seekers.

### **III. Legal structure: utility at law enforcement officers**

The law must bring benefits for the society. The law shall not include the public interest of the Party. In making the law, the official or government shall consider the effectiveness of the legal documents themselves. Ministry of Law and Human Rights constituted the Immigration Department are the legal

apparatus that have closed-relationship to deal with the boat people. Indonesia has not ratify the 1951 Convention and its 1967 Protocol. However, during the journey of the boat people that intent to board to Australia, they often stop their journey when they have arrived in Indonesian waters territory since they have no sufficient logistic, food, or even proper boat to continue their journey.

We often see that the boats of illegal migrants from Middle East, etc were drowned in our territorial sea leaving huge of the passengers died and remain only a few of survivor. The legal apparatus cannot just silent in dealing with this case. However, because the Indonesian government do not make any ratification towards the related Convention we apply the Law number 6 of 2011 concerning Immigration. Indonesian Immigration Act stated that the travelers that try to cross Indonesia territory without having sufficient legal documents are considered as illegal migrants, consequently they required to be placed on the Indonesian Detention Centre. The detention centre is supposed to be a temporary shelter of the asylum seekers or refugee. unfortunately, I might say that the treatment of the Immigration officers tends to violate the human rights. They often treated the illegal migrants (composed of women and children refugees) like they are a criminal person.

Whether the Indonesian municipal law regarding the immigration is guaranteeing the rights of refugees in Indonesia. The refugee will have several limitations due to their status as the refugee (not citizen). This circumstances make the official somehow treat the refugee like a criminal person and they treat improperly in detention centre or like in jail. The detention center is supposed to be a place for them in waiting for the RSD process, but, the treatment towards them

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reflects the degrading inhumane treatment. Another example is that a lot of fraud and corruption during the smuggling of migrants when they come to the territory of Indonesia. The smuggling migrant often pay the official therefore the smuggled migrant can enter the Indonesian territory. The illegal migrants or the smuggled migrants are the civilians and they have no understanding about the law. They are the victims of such criminalization.

In conclusion, the official must be aware that the refugee needs help and they need to be protected. They are seeking for safety so they do not deserve to be treated so. No one can choose to be refugee, no one has ever forced themselves to flee from their country or to pass the border of certain state for seeking the better life. By having the national legislation of immigration Act, the provision and the treatment of official government must take into account with the refugees benefit.

### **IV. Legal culture: Utility on Our Living Cultures**

Legal culture was very influence effectiveness and success law enforcement, because law is created for the people as a social tool. Legal culture itself divided into two terms, are: (1) Internal Legal Culture and (2) External Legal Culture. To change legal culture that have character individual-liberal become collective-social-religious not easy work to can be finished on short time. To change legal culture we must always understand about values, tradition, habit, and everything dominant attitude that apply on all of aspect alive. The number of western values that destroy pass globalization create domestic values lost. There would be no more effective way to conscious problem planting values collective-social-religious except with establishment of good character.

The limited enjoyment of rights of the boat people is getting worst day by day. The boat people are forced to flee from their home, because they want to seek the sanctuary. They are not supposed to be the victims in the transit country or in the destination country. The emergence of some non-profits organization help them to create the public awareness of all people including the society and also the official government to put the higher respect over the boat people.

### **Concluding Remarks**

#### **I. Conclusion**

In reality, there are some phenomenon which hamper the effort of prevention of people smuggling. The boat people are still vulnerable to human rights violation. Some officials also have a bit of inconsistency since in reality some of them allow the vessels bring the boat people pass the border. The legal instruments do not cover all parties committed to the smuggling. In fact, the fishermen or the local counterparts of the smugglers are also found guilty and get punishment rather than they who initiate the plan of smuggling.

#### **II. Recommendation**

The officials requires to strengthen the supervision in the water territorial to prevent the people smuggling. The border-guard of that area also needs to improve their awareness so that there will be no vessels pass illegally the border. It is about the life of many people. As humans the refugee also needs to be respected. The principle of justice requires to be upheld, otherwise the boat people will suffer the same things anymore.



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