

VIOLETIONS OF INTERNATIONAL LAW BY THE GOVERNMENT OF AUSTRALIA IN PRACTICE OF TURN BACK THE BOAT MANAGEMENT POLICY FOR ASYLUM SEEKERS

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Abstract

Conflicts in several countries in Asia resulted in increasing number of refugees and asylum seekers. The need for protection and a decent life makes them willing to take any way to get protection in other countries, including by being illegal migrants. Australia, as a destination country for asylum seekers, imposed Operation Sovereign Borders by intercepting and returning ships carrying asylum seekers to protect the border while reducing the rate of illegal migrants coming into the country. In practice, this policy violates various provisions of international law, namely the principle of non-refoulement, human rights law, SAR obligation, the handling of migrant smuggling and violations of Indonesia sovereignty.

Keywords: Refugee, Illegal Migrant, turn back the boat, non-refoulement.

I. INTRODUCTION

Refugee crisis in various countries made refugees and asylum seekers perform a variety of ways to get out of its territory to the other country to obtain protection. The need for protection and a decent life make them as soon as possible should reach the country who are willing to give asylum to them. The need for transportation to reach destination country, exploited by irresponsible parties for profit. As a result, not a few of those who are victims of human smuggling practices with one of the country's favorite destinations, Australia.

Australia since January 22, 1954 has been committed to be an active state in protecting refugees by becoming a member of the Geneva Convention of 1951.¹From 1945 to 2010, the Australian government has received and completed more than 700.000 refugees who entered

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¹ Khalid Koser, "Australia and the 1951 Refugee Convention", Lowy Institute for International Policy, page 2, accessed via http://www.lowyinstitute.org/files/koser_australia_and_the_1951_refugee_convention_0.pdf.

its territory, including refugees from the second world war.²But lately some of the policies implemented by the government of Australia becoming the issue of the world, one of the practices is “turn back the boat”. That is Operation Sovereign Borders (OSB), border security cordon operation led by the military, as well as supported and assisted by various federal government agencies that became the implementation basis of this practice. High mortality asylum seekers who drowned at sea while attempting to Australia is the reason of elected Prime Minister Tony Abbott in carrying out this operation.³This operation aims to stop the arrival of the boat people who are considered as part of the practice of smuggling in the north-west coast of Australia as well as to protect border region of Australia.⁴

In an effort to combat the practice of smuggling, all ships whether flagged or not, departed from Indonesia sailing to Australia without a valid document will be returned to Indonesia. The seriousness of this practice seen from the rescue ships that have been purchased by Australia with the big amount of funding. These ships serve to lead back asylum seekers to the country of embarkation.

This turn back the boat practice resulted various reactions from the international community. Because the ships carried asylum seekers who sail from the country of origin to obtain protection. Interception and return of ships carrying asylum seekers, according to leaders of some states have violated the principles of refugee protection in international law and the sovereignty of the recipient country of the returned boats, especially Indonesia.⁵

² Janet Phillips, “Asylum Seekers and Refugees : What are the Facts?”, Australia Parliamentary Library, hlm. 2, accessed through <http://www.aph.gov.au/binaries/library/pubs/bn/sp/asylumfacts.pdf>.

³ The Coalition’s Operation Sovereign Borders Policy, (Blackall and Macquarie sts, 2013), page 3, accessed via <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

⁴ Liberal Party of Australia & The Nationals, The Coalition’s Operation Sovereign Borders Policy, 2013, accessed via http://lpaweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf.

⁵ Stuff.co.nz, Government Urged to Speak Out Against Australian Human Rights Record to UN, 9 November 2015, accessed via <http://www.stuff.co.nz/national/politics/73826436/Government-urged-to-speak-out-against-Australian-human-rights-record-to-UN>.

This article will discuss some of the violations of international law that occur in turn back the boat practice by the Australian Government. First, what are the facts in this turn back boat practice? What are the related international law rules to this practice? What are the kind of international law violation in this practice? Before answering these three problems, formerly will be discussed about refugees and illegal migrants in international law.

II. REFUGEE AND ILLEGAL MIGRANT IN INTERNATIONAL LAW

Rules relating to refugees under international law contained in the *Convention Relating to the Status of Refugee and Protocol Relating to the Status of Refugee 1967*. The 1951 Refugee Convention defines a refugee in Article 1A as well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. They are being outside the country where they normally reside, as a result of an event and can not or due to fear in such a way and does not intend to return to his country.⁶ While migrants are people who move. Migrants can change the status to refugee after obtaining refugee status if designated as such in the process of determining its status.

Illegal migrants are migrants who enter an area by the way that is not in accordance with the applicable immigration rules or can be said not to have the required documents. After passing the status determination process and designated as refugees, a person will acquire the rights, benefits, as well as the standard treatment as a combination of rights and protection of international refugee law. The standards must be upheld by signatory states of the 1951 Convention and the 1967 Protocol as well as those who are not bound by this instrument. The rights and benefits are:⁷

- Protection from things that can threaten the physical safety of refu-

⁶ John Frachnas, *Migration and Refugee Law: Principle and Practice in Australia*, (Cambridge: Cambridge University Press, 2005), page 176.

⁷ UNHCR, *Penentuan Status Pengungsi*, Departemen Perlindungan Internasional UNHCR, 2005, Art 17.

gees seeking asylum in the asylum country, on the other hand which obliges the country to implement the rules which guarantee the safety of refugees from all forms of crimes, torture, inhuman treatment and humiliation from the receiving state officials.

- Assistance to meet the physical and material needs such as food, shelter, clothing and health care. If at the beginning of the arrival of these refugees must rely on others to survive, that's where the role of the recipient country to provide access through the labor market and venture capital for the creation of the refugee self-reliance.
- Freedom of movement as same as the citizens who live in the country, unless the concerned pose a threat to security and public order.
- Access to courts in countries of asylum indefinitely.
- Adequate access to education, at least basic education and recreation for the children refugee.
- Reunification with family members in the country of asylum as soon as possible.

The rights and benefits mentioned above will be accommodated if the refugees have identity documents. This identity document issued by the asylum country, unless the party concerned has had travel documents.⁸ Asylum seekers who have obtained refugee status entitled to the assistance to find a permanent solution in which its application will depend on the circumstances of each refugee.

For migrants who are not classified as refugees, the form of protection given will be different. Broadly speaking, migrants can be classified as refugees and economic migrants. Both can be distinguished from the possibility of returning to the country where refugees can not return to their home countries because of the threat of persecution, while economic migrants can return home whenever they want. In fact, economic migrants travel to the other country to remind lives through jobs to be had in the destination country. Because it is different from asylum seekers, then its regulation will be different too. Regarding economic migrants set up under the *International Convention on the Protection of the Rights of All Migrant Workers and Their Family Members*, 1990 (Migrant Workers Convention) which is basically an application of the human rights for certain groups.

⁸ UNHCR, Convention on the Status of Refugee, Art 28.

Migrant workers, under the Convention is the people involved, engaged, or has engaged in an activity with the remuneration carried out in a country other than where he resides. Basic rights of migrant workers are guaranteed in this Convention. State has no international obligation to accept foreigners as citizens. As well as with non-refoulement, because they are not classified into refugees as defined in the 1951 Convention, that economic migrants are not entitled to protection under the principle of non-refoulement. Policies to accept it or not is entirely the right of the recipient country, other than that in Article 5 of the Convention on Migrant Workers states that migrant workers may, on entry, stay and engage in work in the host country if it complies with its own laws and international agreements to which the country is bound. Therefore, if a country is not involved in any agreements with the countries of origin of migrant workers, it is legally allowed for that country to refuse the entry of migrant workers into its territory. Unlike the refugees who will face the threat of persecution in their home countries, migrant workers will not receive any risks that jeopardize their safety if returned to their home country.

III. RELATED PROVISIONS

A. THE PRINCIPLE OF NON-REFOULEMENT

Rules about the principle of non-refoulement contained in the 1951 Convention Article 33, paragraph (1) which reads:

“No contracting states shall expel or return a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of any particular social group or political opinion”

Liability for the principle of non-refoulement is not only based on international instruments that contain it, but also one of the norms in customary international law that means obliging the international community as a whole to implement it. UNHCR argues that because Article 33 of the 1951 Convention is not an object of reservation, then it becomes a customary international law based on ongoing practice and recognition from the international community.

Enforcement of the principle of non-refoulement done by making the international instruments that specifically regulates the refugees such as the 1951 Convention and the 1967 Protocol or some instrument of protection of human rights such as the *Universal Declaration of Human Rights 1948* (1948 Universal Declaration of Human Right), the *Convention against Torture and Treatment inhuman or Punishment 1984* (1984 Convention against Torture and Cruel, inhuman or Degrading Treatment or Punishment) and the *UN Declaration on protection against Forced Disappearance of 1992* (1992 UN Declaration on the protection of All persons from Enforced Disappearance).

Article 33 of the 1951 Convention stipulates that refugees should not be denied or sent back to countries where their lives and freedom are threatened for reasons of race, religion, nationality, membership of a particular social group and political pastures. The principle of non-refoulement is a definite norm of international law or 'jus cogens' so as to form a public order in the international community.

This principle is a key principle of refugee protection because it is the only guarantee that refugee is not returned to the country of persecution. Thus it can be said that this principle applies to people who classified into a refugee under the 1951 Convention and asylum seekers who were to make a refugee status claim; only those who have obtained refugee status. When their determination status being processed, Guy S. Goodwin-Gill stated that the asylum seekers included in this principle implementation so the effective protection can be established. UNHCR's Executive Committee added that this principle is critical to be implemented without first seeing if someone had recently gained status as a refugee or not (whether individuals have been formally recognized as refugees or not)

Then, when the principle of non-refoulement come into force? Keep in mind, that the entry of asylum seekers illegally into the territory of a country does not exclude them from the protection of this principle, in the sense that asylum seekers who entered illegally remain in force for him the principle of non-refoulement.⁹Lauterpacht stated that the application of this principle is the absence of rejection at the border (no rejection at the frontier). The existence of non-refoulement principle as

⁹ UNHCR, Convention on the Status of Refugee, Art 31 (1).

stipulated in Article 33 of the 1951 Refugee Convention prohibits the return of refugees to areas that may endanger their safety as a derivative right to seek asylum.

The State can not make excuse for the silence of refugees about the possibility of risks they may face as a base to return them because of difficulties in communication. Emphasized by the UNHCR Executive Committee that as a minimum standard of refugee treatment, displaced persons must be accepted first by the first country where he sought asylum, or at least to accept them for a while.¹⁰

A country can be said to have committed violations of international law if it directly or indirectly result in expulsion or deportation of refugees, return to their origin country or a third country that is not safe for him, applying the rule that is obstructing the entry of refugees, expelling the illegal asylum seekers (stowaway asylum seekers), the absence of recognition of the extraterritorial character of this principle as a justification of interdiction on the high seas, or extradition to countries that could threaten the security, life and dignity of refugees.¹¹

From the description above, there are five important points regarding the protection of asylum-seekers in connection with border policy:

- a. Migrants must be given the opportunity to apply for asylum upon reaching the border of the recipient country;
- b. When asylum application is still under process, they should not be transferred to third countries until the process is completed;
- c. The process of status determination should be checked by the competent authorities of the state;
- d. If the application is rejected, they should be given the right to propose appeal to the courts;
- e. When the appeal process is ongoing, transfer to a third country can not be implemented.

Concerning relations with third countries, if a country want to transfer the refugees to a third country, the state must ensure that the third

¹⁰ Seline Trevisanut, "The Non-Refoulement at Sea and the Effectiveness of Asylum Protection", Max Planck Yearbook of International Law, vol. 12, page 210.

¹¹ Shirley Llain Arenilla, "Violation to the Principle of Non-rfoulement under the Asylum Policy of United Satess; Anuario Mexicano de Derecho International, vol XV, 2015, page 15.

country is a member of the Convention and related agreements. If not, then a third country can not be considered 'safe'. Also, the state must ensure that third countries will actually do the determination process of the transferred refugee.

B. HUMAN SMUGGLING (UNTOC AND THE PROTOCOL OF SMUGGLING BY LAND, SEA, AND AIR)

Since most of the carrying asylum seekers returned boats traveled without documents required, a trip they took can not be separated from the help of smugglers. The role of migrant smugglers in particular is huge in facilitating the travel of asylum seekers with rewards.

The smuggling of migrants is set in the *Protocol against the Smuggling of Migrants by Land, Sea, and Air 2000*. The adoption of the Protocol on Migrant Smuggling in 2000 as a complement to the *United Nations Convention on Transnational Organized Crime* (UNTOC) is a form of international response to this phenomenon. When signing this convention, states agreed to criminalize migrant smuggling in a comprehensive manner, making mechanisms of law enforcement and judicial cooperation, combating migrant smuggling and protect the rights of smuggled migrants.¹²

The purpose of this Protocol mentioned in Article 2, namely to prevent and combat the smuggling of migrants and promote cooperation between the parties in order to achieve objectives without injuring the rights of smuggled migrants. All the prevention, investigation and prosecution of the offenses established in this Protocol are transnational and involve organized group as well as the protection of the rights of people who become the object of crime is the scope of this Protocol.

Associated with actions that can be taken against indicated boats involved in smuggling, the protocol states:

“A State Party that has reasonable grounds to suspect that a boat is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a boat without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic

¹² *Ibid.*

*and international law.”*¹³

Even so, there are no further explanation of what is meant by “appropriate measures in accordance with relevant domestic and international law”. This journal interpret that action against non-flagged ship suspected of involvement in human smuggling can be justified to the extent not contrary to national law of the state that pursues as well as international law as a whole. In case of flagged ship, the Protocol on human smuggling requires the cooperation of the flag state before the action against ships carrying smuggled humans taken.¹⁴

C. LAW OF THE SEA (TERRITORIAL WATER, CONTIGUOUS ZONE, AND EXCLUSIVE ECONOMIC ZONE)

The ships carrying asylum seeker were stopped and returned to the waters of other countries through various different maritime zones. Therefore, it should be identified whether the returns are made legitimate by law in various maritime zones sea it passed. Concerning the rules, it will refer to the *United Nations Convention on the Law of the Sea* 1982 (UNCLOS). Some maritime zones associated namely:

1. Territorial sea

Sovereignty of a state on the Territorial Sea is limited to the obligation of a state to ensure the implementation of the right of innocent passage by foreign boats. The right of innocent passage is the right of every country, whether that country locked or not (land-locked). ‘Passage’ in UNCLOS is described as a navigation through the territorial sea without entering the internal water on the condition that the navigation must be continuously at a fixed velocity (*continuous and expeditious*). When passing in the territorial of a country, the foreign boats are required to rise to the surface and show the flag.

The meaning of innocent passage is not spelled out in UNCLOS, only clearly illustrated that a ship crossing in the category of non-innocence if it harm the interests of the State in terms of security, public policy, and fiscal policy. Furthermore, Article 19 paragraph (2) of UN-

¹³ Protocol againts the Smuggling of Migrants by Land, Sea, and Air 2000, Article 8 (2).

¹⁴ *Ibid.*

CLOS mentioned the category of activities that is not classified into “innocent”. So under this provision, the coastal state can not provide the right of innocent passage of foreign ships to pass in its territorial sea if the ship indicated doing one of the activities as mentioned in Article 19 paragraph (2) above.

2. Contiguous Zone

Provision about Contiguous Zone are contained in Article 33 of UNCLOS. Coastal state on its Contiguous Zone are entitled to form and apply the rules. The coastal State has control in to prevent and punish violations in the field of sanitary, customs, fiscal, tax and immigration. In the event of a conflict in the Contiguous Zone, there are no standard rules regarding the way to settle the conflict. The coastal State is entitled to make efforts to boarding the ship for the sake of prevention of violations of the laws of a coastal state by foreign ships.

Other countries at Contiguous zone of a country have rights and obligations that must be respected by the coastal States including:

Activities	Rights and Obligations
Navigation	Full Rights to sail voyage that is not contrary to the rules of Article 58 paragraphs 1-2, 87, and 88-115) This right is limited by the coastal state authorities to board the ships to prevent the violations of the laws of a coastal state. Other countries can transfer historical objects with the consent of the coastal State (Article 303 paragraph 2)
Aviation	Full right of freedom of flight
Fisheries	Other countries do not have any rights in the fishery after the coastal States claiming the Exclusive Economic Zone.
Scientific Activities	The entire scientific activities to be undertaken by other countries in the zone must be approved by the coastal state after EEZ was claimed (Article 246)
Submarine cables	Right to install a submarine cable, but for the direction of the installation must be with the consent of the coastal States (Articles 58 and 79)
Mining	Other countries do not have the rights of mining
Environmental related provision	Other countries are required to understand the law of coastal state regarding sanitary and should know the rules associated with the pollution that is applied in the Exclusive Economic Zone (Article 33 and Part XII)

3. Exclusive Economic Zone

Exclusive Economic Zone in Article 55 of UNCLOS is defined as an area beyond and adjacent to the territorial sea, which is subject to the legal regime specifically set forth in this chapter pursuant to which the rights and jurisdiction of the coastal State and the rights and freedoms of other States, governed by the relevant provisions of this Convention.

In this zone, a coastal state has sovereign rights and exclusive rights in terms of exploration and exploitation of the natural wealth of biodiversity, non-biological natural resources, and natural resources of energy, and jurisdiction in the case of the construction of artificial islands and installations, marine scientific research, and the protection and maintenance natural resources.¹⁵

Other countries, in the Exclusive Economic Zone of a country can enjoy the freedoms contained in the high seas; freedom of navigation, freedom of overflight, as well as freedom of the laying of submarine cables and pipelines.¹⁶ Nevertheless, the freedom of navigation owned by other countries in the EEZ of a coastal state is not as free as freedom of navigation on the High Seas. This is because the provision in Article 58 paragraph (2) which states that the provisions of High Seas also applies in the EEZ as long as it does not contradict the rights and jurisdiction of coastal states. The coastal State in the EEZ has rights limited to the water column, if other countries hold military exercises there, the coastal state can not use its right to exploit natural resources. For this reason that is why freedom of navigation in the EEZ is not as free as freedom of navigation in High Seas.

D. SEARCH AND RESCUE

Search and Rescue (SAR) is an obligation that must be carried out against anyone in danger, including asylum-seekers even though assisted by smugglers to reach the destination country. There are three reference rules relating to the obligation of search and rescue:

1. International Convention on Safety Life at Sea 1948 (SOLAS Convention 1948)

¹⁵ UNCLOS, Article 58 (1).

¹⁶ *Ibid.*

In this convention, the international community suggest that the state has an obligation to provide SAR services at sea. These obligations are set out in Article 15 (a). This article shows that the 1948 SOLAS Convention only in phase of “suggestion” to the countries to make the rules on offshore surveillance and rescue people who are in danger around the coast that includes the establishment, operation and maintenance of facilities and infrastructure required. The state’s obligation in the SAR is further clarified by the adoption of fifth SOLAS Convention in 1974 where the SAR is an obligation and absolutely binding the state.

2. International Convention on Maritime Search and Rescue 1979 (SAR Convention)

This Convention was made with the aim to ensure that everyone who was in danger at sea get help. Although not explicitly called ‘asylum seekers’, but the word ‘everyone’ has the meaning that whoever is at sea in danger eligible for treatment, including asylum seekers. The Convention obliges countries to develop SAR services either individually or in cooperation with other countries and international organizations.

SAR services are search and rescue services. *Search* is an operation to find people in danger, while defined as a *rescue* operation to evacuate people in danger, provide initial medical or other needs and move to a safe place.¹⁷ Not only SAR services, this convention also obliges the parties to cooperate in the fulfillment of these obligations.¹⁸ State parties are required to coordinate agencies and SAR operations domestically and if required with neighboring countries. This Convention is designed to provide a legal framework to improve the cooperation agreement with neighboring countries in the distribution of SAR region without prejudice the national borders.¹⁹

3. Arrangement Between Australia and Indonesia for the Coordination of Search and Rescue Services

This is a bilateral agreement between Indonesia and Australia

¹⁷ MO, Adoption of Amendments to the International Convention on Maritime Search and Rescue 1979, Resolution MSC. 155 (78), Annex Chapter 1 Par 1.3.2.

¹⁸ Arthur Alan Severance, “The Duty to Render Assistance in the Satellite Age”, California International Law Journal, 2006, page 5.

¹⁹ IMO, op. Cit, Annex Chapter 2 Para 2.1.3.

regarding SAR. As members of the SAR Convention, both countries are obliged to establish cooperation in the field of SAR moreover Indonesia and Australia have adjacent SAR Region so that the cooperation in SAR service is very important.

Under this agreement, the two countries will exchange information related situations or hazards encountered, providing assistance with a maximum of SAR and perform actions on their respective territories and outside of the border. In addition, also determined the *rescue coordination center* (RCC), which is responsible for initiating SAR determined from the position of the ship in danger.²⁰

E. OPERATION SOVEREIGN BORDERS

Operation Sovereign Borders (OSB) is a military operation conducted by Australia, supported by several federal government agencies to tackle people smuggling while keeping the border region of Australia.²¹ To implement OSB, the government formed a *Joint Agency Task Force* (JATF) to ensure synergy of government in tackling smuggling and keep the border region. JATF assisted by three operational units, namely:

- a. *Disruption and deterrence Task Group*-led by the Australian Federal Police.
- b. *Detection, Interception and Transfer Task Group*-chaired by Australia's Border Army including *Border Maritime Command*.
- c. *Immigration Status Resolution Group* –led by *Department of Immigration and Border Protection*.

In addition to the three operational units above, this operation is also assisted by government agencies such as the *Australian Defence Force*,

²⁰ If the position of the boat is identified, the SAR action will be initiated by the responsible RCC for the SAR Area where the boat located. If it is unidentified, so the first RCC to take action is the RCC first known that a boat is in danger, RCC responsible for the area where boat last conduct radio contact, RCC of the destination country of the boat if the last radio contact conducted at the border of SAR Area. Arrangement between Australia and Indonesia for the Coordination of Search and Rescue Services tahun 2004, Paragraph 5.

²¹ The Coalition's Operation Sovereign Borders Policy, (Blackall and Macquarie sts, 2013), page 3, accessed via <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

*Maritime Border Command, Department of Foreign Affairs and Trade, the Office of National Assessments, the Australian Secret Intelligence Service, Department of Defence, Attorney-General's Department, Australian Signals Directorate, Australian Crime Commission, the Australian Maritime Safety Authority, Australian Federal Police, Australian Geospatial-Intelligence Organisation, the Department of Immigration and Border Protection, Australian Security Organisation Intelligence, and the Department of the Prime Minister and Cabinet.*²²

The action taken by the government under this operation are:

- a. Returning ship, by providing assistance to the process of returning to the countries of origin and transit.
- b. Intercepting *Suspected Irregular Entry Boat*(SIEV) coming from Sri Lanka and then returned the passengers, regardless of their status asylum seekers.
- c. Increasing the capacity of an offshore detention center on Manus Island and Nauru, even if classified as refugees they will not be disenfranchised in Australia.
- d. Providing some supplies such as orange life boat to return asylum seekers who arrive by boat are not feasible.
- e. Imposing TPV (Temporary Protection Visa) for asylum seekers who were waiting for determination of their status in Australia.
- f. Refusing to grant refugee status to people who are believed to have been deliberately damaged or eliminating their identity documents.

Official data released by the Australian Government only shows the number of returned boats to July 2015. However, an online media mentioned that 23 ships have been returned from the period of 2013 to February 2016.²³

The impact of this operation implementation directly felt by transit countries such as Indonesia and Malaysia for the asylum seekers who

²² Department of Immigration and Border Protection, Organisational Chart , Februari 2016, accessed via <https://www.border.gov.au/OperationSovereignBorders/Documents/osb-organisational-chart.pdf>.

²³ Australia Plus ABC-detikNews, "Sudah 23 Perahu Pencari Suaka Dicegat Petugas Australia", 5 Februari 2016, accessed via <http://news.detik.com/read/2016/02/05/121316/3135662/1513/sudah-23-perahu-pencari-suaka-dicegat-petugas-australia>.

returned to those states. Prime Minister Malcolm Fraser even stated that this policy is very ‘costly’, cruel, and dangerous.²⁴ International relations between Indonesia and Australia were disrupted because of the violation to Indonesian maritime border by the Australian Navy that many boats were returned to Indonesian water.²⁵

Implementation of this policy is full of secrecy, as the Australian Immigration Minister Scott Morrison and the Department of Immigration and Border Protection Australia limit access to information on all aspects of OSB policies, including:²⁶

- a. Number and the notification regarding the detected illegal entry boats.
- b. Number and the notification regarding the ship returned, towed back, and use of rescue boats of asylum seekers.
- c. Conditions and security incidents in offshore detention centers, including violence, starvation, torture, and other crimes.

Although this operation was launched at the era of Prime Minister Tony Abbott, operations and policies in this regard remain in force without being influenced by the change of Prime Minister in Australia.²⁷ Boat smugglers who tried to enter Australia or New Zealand heading through Australian waters will be intercepted and transferred in a secure manner.

F. FACTS AND STATISTICS OF VIOLATION

During the implementation of the OSB, there were several incidents occurred that initiated from notification of ship in danger, asylum seekers who died drowned in the sea, the interception of the ship, returns to the ship that made it to the Australian mainland. However, because

²⁴ Asylum Seekers Resource Centre, Operation Sovereign Borders, page 2, accessed via <http://www.asrc.org.au/wp-content/uploads/2013/07/Operation-Sovereign-Borders-May-2014.pdf>.

²⁵ ABC News, Marty Natalegawa Says Indonesia Will Not Accept Boats Which Have Been Turned Back, 16 July 2013, accessed via <http://www.abc.net.au/news/2013-07-16/marty-natelegawa-says-indonesia-will-not-accept-boats-which-hav/4822114>

²⁶ Asylum Seekers Resource Centre, op.Cit, hlm. 3.

²⁷ Department of Immigration and Border Protection, Operation Sovereign Borders: Fact Sheet, accessed via <http://www.border.gov.au/OperationSovereignBorders/Documents/fact-sheet-English.pdf>

the Australian Government remained silent regarding this matter, the competent authorities in this case the Department of Immigration and Border Protection Australia just released the statistical data and related efforts to search and rescue for boatin danger and illegal entry to Australian territory.

Due to the unavailability of data about the returned ships, then the writer collected data on the return of the boatfrom the information available on the electronic mass media in Indonesia and Australia. In addition, it will also attached the data of coordinate where the boats intercepted; obtained from the Directorate of Political and Regional Security, Ministry of Foreign Affairs of the Republic of Indonesia.

The following data is about the returned boats according to statistics released by the Australian Parliament.

Date	Number of Boats	Number of Crew	Number of Passenger
19 December 2013	1	2	47
24 December 2013	1	1	49
28 December 2013	1	2	38
6 January 2014	1	2	45
8 January 2014	1	2	25
15 January 2014	1	2	56
5 February 2014	1	2	36
24 February 2014	1	2	26
4 May 2014	1	2	18
4 May 2014	1	1	2
20 May 2014	1	2	1
6 July 2014	1	1	40
27 November 2014	1	-	37
9 February 2015	1	-	4
17 February 2015	1	-	-
22 March 2015	1	-	-
18 April 2015	1	-	46
June 2015	1	-	-
July 2015	1	-	-
Total	20	-	633

Number of Returned Boats Period 2013-2015²⁸

From the data above, here are the details of several incidents of returned boat that carried into the the territory of Indonesia

1. Boat Intercepted and Towed to Indonesian Waters

Two boats were found on December 19, 2013 near to Rote Island which located close to Christmas Island brought respectively 47 and 45 asylum seekers. Both boats were intercepted at the area located close to Christmas Island. Boats departed from the South Sulawesi on December 8, 2013 to the island of Ashmore Australia before then, on December 13 was intercepted and returned to Indonesian waters.²⁹

2. Boat Intercepted and Returned to Indonesian Waters

Two asylum seekers jumped from timber ships which they were when the boat returned to Indonesian water by Australian forces when they are heading to Australian territory. Both of these asylum seekers navigated to Christmas Island along with all 41 other asylum seekers, then intercepted by the Australian Navy. The Australian forces then examined the feasibility and availability of fuel and the engine of the ship. Then the forces boarded on the ship and towed the ship, the asylum seekers were promised that they would be taken to Darwin. But on the third day of the cruise, when most of the asylum seekers fell asleep, the Australian Forces took off the fuel container from the ship and left the ship drifted at the southern part of Java Island.³⁰

3. Boat Intercepted and the Asylum Seekers Were Tortured by Australian Forces

The boat departed on January 6, 2014 from the East Coast of Sulawesi. In the middle of the trip, the ship was damaged so that one

²⁸ Parliament of Australia, Boat Arrivals and Boat 'turnbacks' in Australia since 1976: a Quick Guide to the Statistics, accessed via http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/BoatTurnbacks

²⁹ ABC News, Indonesia Says Second Asylum Seeker Boat Forced Back by Australian Navy, accessed via <http://www.abc.net.au/news/2014-01-07/indonesia-says-second-boat-forced-back/5189332>

³⁰ The Sidney Morning Herald, Towed Asylum Seekers Said to Have Jumped, accessed via <http://www.smh.com.au/federal-politics/political-news/towed-asylum-seekers-said-to-have-jumped-20140119-312tb.html>

of the passengers asked for help by calling the emergency number. The next day, the ship has been located eight kilometers before reaching the Australian mainland. Once there, they were stopped by Australian soldiers and the soldiers boarded to their boat.

This is the moment when the violence occurred. From the information obtained by the Australian media journalists from asylum seekers who experienced the violence, some of them were beaten, sprayed with pepper, and were injected to sleep by the Australian Army. This action was performed when the asylum seekers refused to be returned to Indonesian waters.

Besides, they were dried in the sun for five hours and not allowed to use the restroom. Three asylum seekers forcibly placed his hand on a very hot and smoky ship engine so their hands burned while trying to retrieve a bag containing food near the restroom.³¹In this confession, news hunters try to request for a clarification from the Australian Forces, but they are not allowed.

4. Asylum Seekers Were Returned by Using Orange Life Boat.

Boat carrying 56 asylum seekers from Bangladesh and Pakistan was found at Indonesian water on January 5, 2014. After three days of sailing from Indonesia to Australian water, the boat was approached by Australian Navy patrol vessel. Passengers were transferred to an orange life boat named Stuart for security reasons and towed toward Indonesian water. On the next day, the life boat left with lack of fuel.³²

5. Boat Was Intercepted and Returned to Indonesia

Boat carrying 25 asylum seekers set off from Medan, North Sumatra towards Christmas Island. After ten days on a trip that almost reach Christmas Island, the boat was intercepted by Australian Navy. The navy ship fired the warning shots to the air to scare the boat before then towed it back to Indonesian water.³³

³¹ ABC News, Asylum Seekers on Board 'Burns' Boat Sepak Out, accessed via <http://www.abc.net.au/7.30/content/2014/s3970527.htm>.

³² The Sidney Morning Herald, First Lifeboat Used to Return 56 Asylum Seekers, accessed via <http://www.smh.com.au/federal-politics/political-news/first-lifeboat-used-to-return-56-asylum-seekers-20140116-30y0d.html>

³³ The Sydney Morning Herald, Australia Turns Back Asylum Seeker Boat from Indo-

6. The Boats Are Intercepted and Transferred to Orange Life Boat.

A boat carrying 36 asylum seekers from Iran, Pakistan, Bangladesh and Nepal departed from Indonesia to Australia. In the middle of the sea, they were intercepted by an Australian patrol ship and transferred to the orange-life boat named Triton, towed to the Indonesian water on February 5, 2015.

7. Two Boats Was Intercepted, Returned to the Indonesian Water with A Life Boat.

Indonesian Search and Rescue (SAR) Team evacuated 26 migrants from Pakistan, Bangladesh, Nepal, and Iran who were in a life boat stranded near Agripeni Beach, Kebumen, Central Java. These migrants departed from Central Java to Christmas Island on February 19, 2014. When boats was about to enter the Australian maritime border areas, it were intercepted by the Australian warship then they were transferred to life boats and their boats were burnt by the Australian army. Unlike the previous displacement, life boat used to transport asylum seekers back to Indonesia was equipped with a television, navigation equipment, batteries and food.³⁴

8. 41 Sri Lankan asylum seekers were returned.

A Sri Lankan ship carrying 41 asylum seekers was intercepted by the Australian border operation vessel by the end of June 2014, transferred to the Sri Lankan naval boats in the Mediterranean Sea on July 6, 2014. The move was made after the asylum seekers have to undergo enhanced screening process, 40 among them decided screened out. One person left voluntarily requested to be returned along with 40 others.³⁵

9. Ship was intercepted and returned to Vietnam

On March 20 2015, a ship carrying 45 asylum seekers from Vietnam was intercepted by the authorities of Australia and returned to Vietnam

nesia, accessed via <http://www.smh.com.au/federal-politics/political-news/australia-turns-back-asylum-seeker-boat-from-indonesia-20140115-30vds.html>

³⁴ SBS News, Asylum Seekers Say Australia Blew Up Boat, accessed via <http://www.sbs.com.au/news/article/2014/02/26/asylum-seekers-say-australia-blew-boat>

³⁵ The Guardian, Australia Returns Asylum Seekers to Sri Lanka in Sea Transfer, accessed via <http://www.theguardian.com/world/2014/jul/07/australia-asylum-seekers-sri-lanka-sea-transfer> pada 6 Juni 2016.

on April 18 after undergoing a screening enhanced process. Asylum seekers stranded after the ship hit a reef in West Timor.³⁶ In May 2015, 65 asylum seekers were reported stranded after their boat crashed on the reef in West Timor, East Nusa Tenggara. This ship was the second ship, after formerly their ship was intercepted and Australian authorities moved them to this ship. The ship then escorted by Australian authorities into Indonesian waters.

IV. VIOLATION OF INTERNATIONAL LAW IN THE IMPLEMENTATION OF OPERATION SOVEREIGN BORDERS

A. VIOLATION OF NON-REFOULEMENT PRINCIPLE

The principle of *non-refoulement* laid down in Article 33 of the Convention Relating to the Status of Refugee 1951 (1951 Convention). This principle is a statement of prohibition for the state parties of the convention to return asylum seekers to countries where their lives and freedom are threatened for reasons of race, religion, nationality, membership of a particular social group and political views.³⁷ Not only for the member states of the 1951 Convention, this principle is also binding to non-state parties of the convention as international customary law because it formed a public order in international community.³⁸ Moreover, as the convention stated that it is not the object of reservation, means that this principle is an important one and indisputable in the protection of refugees.³⁹

As one of the main principles of refugee protection, the objective of this principle is to ensure that asylum seekers in particular refugees, will not be returned returned to the area that could endanger their lives. As clearly stated on 1951 Convention, this principle applies to people who are classified as refugees under the 1951 Convention. People who

³⁶ UNSW Australia, "Factsheet 'Turning Back Boats'", Andrew & Renata Kaldor Centre for International Refugee Law, page 2.

³⁷ 1951 Convention on the Status of Refugee, Article 33.

³⁸ Shirley Llain Arenilla, "Violation to the Principle of Non-refoulement under the Asylum Policy of United State", *Anuario Mexicano de Derecho Internacional*, vol XV, 2015, page 288.

³⁹ 1951 Convention on the Status of Refugee, Art 42.

can be classified as refugees has been clearly spelled out in Article 1 of this Convention; those who are outside the country because the fear of extreme persecution for the reason of religion, race, nationality, membership of particular social group, or because of political opinions they hold or they are not having a nationality and being outside the country where they normally reside, as a result of an event or does not intend to return to his country because of the fear.⁴⁰

The Australian government did not release any news or impressed 'silence' regarding the location of the return of the ships. Therefore, this paper will refer to the data gathered from the mass media as well as recordings of interviews with asylum seekers who were in the returned ships.

Since the implementation of Operation Sovereign Borders started in 2013, there have been a number of boats carrying asylum seekers who were returned to Indonesian waters. Although data on the number of boats vary in one and other sources, but it is a certainty that the ship were returned, not only to the Indonesian waters. The return of asylum seekers violates the non-refoulement principle.

On this principle, subject of international law namely the state in particular is not allowed to return refugees or asylum seekers to a place that endanger the safety because their effort in seeking asylum is basically to live peace and freedom as part of human rights, so that the return is a violation to the principle of refugee protection.

Furthermore, it should be identified whether the protection of this principle only applies to people who have gone through the process of refugee status determination or also applies to people who have not been determined as refugee. The first thing to remember is the entry of asylum seekers illegally into the territory of a country does not exclude them from the protection of these principles so that they remain valid for the prohibition to be returned.⁴¹

The silence of the refugees of the risks that would be faced by

⁴⁰ *Ibid*, Art 1 A.

⁴¹ Tally Kritzman-Amir dan Thomas Spijkerboer, "On the Morality of Legality of Borders : Border Policies and Asylum Seekers", *Harvard Human Rights Journal*, vol. 26 number 1, page 15.

them can not be used as an excuse to justify their returns because in almost every case there is a communication barrier as a result of language differences. Executive Committee of the *United Nations High Commissioner of Refugee* (UNHCR) in one of the guidance they established, mentioned that as a form of minimum standards for refugee treatment, displaced persons must be accepted in advance by the country in which he is seeking asylum, or the state can accept them at least for a while.⁴²

On this return, Australia has committed violations of international law relating to violations of the principle of non-refoulement as it is directly or indirectly led to the expulsion of refugees and establish rules that hinder the entry of refugees. OSB enactment and application to intercept refugee ship that was sailing towards Australia water in the area close to Australia is clearly an attempt to obstruct the entry of refugees to the territory of Australia. Moreover, based on the clarification from the asylum seekers, the methods used in the interception were inappropriate.

In the terms of the exception, what Australia has committed does not meet any criteria of the exceptions to this principle; threat to national security and the criminal track record of refugees.⁴³ These two exceptions are applicable to refugees individually. Threats of crimes that can make recipient countries free of the obligation of non-refoulement should be a crime with specific impacts to the recipient country. Although the parameter of the specific impact of a crime against the security of a country varies one another, this paper sees in this case the presence of refugees in Australia does not pose a serious security threat and within the ability limit of security officials to secure conditions.⁴⁴

Thus, Australia as a member of the 1951 Convention should not return those refugees and asylum seekers boats. Although it has not been established that migrants are refugees who should be protected by the principle of non-refoulement, in accordance with the guidelines of

⁴² Seline Trevisanut, "The Non-Refoulement at Sea and the Effectiveness of Asylum Protection", *Max Planck Yearbook of International Law*, vol. 12, page 210.

⁴³ UNHCR. *Convention on the Status of Refugee*.

⁴⁴ This conclusion was made after observing cases involving refugees as actors in Australia are likely to be low and have no specific impact on the surrounding environment.

the United Nations High Commissioner of Refugees (UNHCR) such persons must first be given access to the fair and affective process of status determination effective as part of the implementation of non refoulement principle.

B. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Although there is still a debate about the application of obligations towards asylum seekers and refugees on the high seas, there are other obligations under human rights law applies not only to the certain categories of people but to all. These obligations stated in various multilateral treaties such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention againts Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Australia is member of both convention, where the obligations on non-refoulement is not limited to people who qualify as refugees but also to people who are at risk of violence or inhumane treatment if placed in the territory of a country.⁴⁵

Some agencies focusing on human rights recognized the extraterritorial applicability of the obligation in human rights context to avoid human rights violations by the state outside its territory. In the case of *Hirsi*⁴⁶, Italy argues that this case does not fall into the jurisdiction of the European Court of Human Rights (ECtHR) because the obligation to give aid at sea do not related to state jurisdiction. But ECtHR found that because illegal migrants were on board of an Italian vessel operated by the military of Australia, then Australia has indirectly considered to exercise effective control of the ship since boarding the ship until they give to the Libyan authorities. It is considered to be the starting point of human rights obligation for Italy thus it became the jurisdiction of

⁴⁵ Convention againts Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 3. ICCPR, Article 7.

⁴⁶ This is a case of Eritrea and Somali migrants who departed from Libya and intercepted at sea by the Italian Authorities and returned to Libya. The return of migrants to Libya without checking the formerly checking their status considered as a form of maltreatment and regarded as a form of expulsion. ECtHR- *Hirsi Jamaa and Others v Italy* (GC), Application No. 27765/09, accessed via <http://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509>

ECtHR to resolve the dispute in this regard.⁴⁷

Seeing what was done by Australia, it can be equated with the actions in the case of *Hirsi Italy*. In accordance with the details of incidents, where Australia boarding ships carrying asylum seekers then transferring passengers to another ship and led to Indonesian waters, then Australia has made effective control against ships carrying asylum seekers. Yet Fischer-Lescano, Lohr and Tohidipur stated that the physical presence and the use of force to move or return the ship to countries of origin or transit can be categorized as an effective control which may give rise to liability for the human rights of people who are under the effective control of them.⁴⁸

When Australia did effective control against ships carrying asylum seekers, then it is followed by obligations on human rights which includes non-refoulement. In the case of *Hirsi*, Italy declared had neglected its obligation of non-refoulement which they should have known the risks will be faced by the asylum seekers.

If Australia argues that the place of return in this case Indonesia as a “friendly” place for refugee or safe third country because of the presence of UNHCR, this is not entirely justified. Indonesia, although bound by the principle of non-refoulement as part of international practice, is not a state party of the 1951 Convention so that the duty to treat refugees with well will tend to be weaker than Australia which is a state party of the Convention so there are no guarantees for asylum seekers to put in well place in Indonesia. Besides Indonesia in its national law does not regulate the protection of refugees so that there is no definite guarantee for refugees to be treated well in Indonesia.

Australia effective control against asylum seekers arriving by boats that returned was not entirely successful. This failure proven by the condition of many ships that ran out of fuel and drifted in Indonesian water. Australia in this position, not managed to ensure that asylum-seekers were intercepted can arrive safely at least in the countries in which it is returned, even some of the boats were not equipped with

⁴⁷ Natalie Klein, “Assessing Australia’s Push Back The Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants”, *Melbourne Journal of International Law*, Vol. 15, page 21.

⁴⁸ *Ibid*, page 22.

sufficient supplies so that the risk of hunger is not inevitable.

C. LIABILITY FOR SEARCH AND RESCUE

Liabilities related to the search and rescue more discussed in a multilateral agreement in which Indonesia and Australia is a party, with a further agreement between Indonesia and Australia in the *Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*. Multilateral agreements in this regard are the *International Convention for the Safety of Life at Sea* (SOLAS Convention) and the *International Convention on Maritime Search and Rescue* (Search and Rescue Convention), which contains the obligation to provide assistance at sea.⁴⁹ According to these agreements as a state party, Australia should cooperate with other countries to coordinate associated to response to an alarm call from a ship in danger at sea, especially with Indonesia as a state with adjacent SAR regions. Australia is also bound by the obligation to coordinate with Indonesia regarding the rescue efforts carried out against ships carrying refugees under the provisions of the *Arrangement Between Australia and Indonesia for the Coordination of Search and Rescue Services* in 2004 which has been agreed by both states.

Important to the identify whether the ships transporting migrants in this case is in danger. Related to this, the EU Council Decision of 2010 provides a benchmark that can be seen from the seaworthiness of ships, the number of passengers compared to the size of the ship and passengers with special needs, as well as the presence of the crew and other navigation equipment.⁵⁰ If in fact the ship was not danger, then the validity of the interception of the ship will be in terms of the law of the sea.

If proven in danger, then Australia may request assistance from the nearest boat to get to the location of the boat and help the passenger on ships. The agreement with Indonesia states that the option to ask

⁴⁹ International Convention for the Safety Life at Sea.

⁵⁰ Council Decision of 26 April 2010 Supplementing the Schengen Borders Code as regards the Surveillance of the Sea External Borders in the Context of Operational Cooperation Coordinated by the European Agency for the management of Operational Cooperation at the External Borders of the Member States of the European Union, 2010, OJ L 111/20, annex 25.

for help from Indonesian SAR will depend on the location where the ship is located.⁵¹ In the *Search and Rescue Convention*, rescue action is defined as saving people in danger by giving medical assistance or other assistance as well as moving them to a safe place.⁵² Status of passenger who were on the boat in any manner would not affect the obligation to help the ship, so that even if the passengers are illegal migrants, the state parties, especially Australia is still obliged to provide aid.⁵³ On the existence of this rule, can be said that the action taken by Australia is in accordance with its obligation to help the ship in danger limited to boarding and moving the passengers to the more feasible ships.

The next question is whether then locating the migrants on life boat and then pushed back to Indonesian waters is in accordance with the criteria in the rescue effort that is “transfer to a safe place”. A safe place or “a place of safety” in the *IMO Guidelines 2004* indicated as a place where the rescue operation may be stopped for life safety of the people who had been in danger no longer threatened and their basic needs are well-fulfilled.⁵⁴ In fact, the ship given by the Australian authorities where the asylum seekers were moved for security reasons, does not meet the standards of security itself. The boat was not equipped with sufficient supplies during the trip, even numbers of boats were ran out of fuel in the middle of the ocean. So, if Australia argues that the transfer to the ship they facilitates are the part of the search and rescue efforts, the facts do not say so because instead of saving, would lead to misery.

No country is obliged to allow a discharge of illegal migrants rescued at sea on its territory. Search and Rescue Convention states that countries should grant the immediate entry in accordance with national rules of the country.⁵⁵ The state is not obliged to accept the people rescued at sea only for the reason of it is the nearest port. Likewise for countries conducting rescue, it is not mandatory for it to accept people who are saved in its territory. SOLAS amendments in 2004 states that the country responsible for search and rescue play a major role to ensure

⁵¹ Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services, annex Art 4-5.

⁵² Search and rescue Convention, Annex para 3.2.

⁵³ *Ibid*, annex para 2.1.10.

⁵⁴ Natalie Klein, op. Cit, page 14.

⁵⁵ Search and Rescue Convention, Annex Para 3.1.2.

cooperation and coordination between the parties in the agreement so that the burden owned by captain of the ship is reduced.⁵⁶ Therefore Australia is legally under no obligation to accept illegal migrants who have been rescued in Australian waters. However, the return of the ships into the territorial waters of Indonesia is not appropriate because it needs mutual regional arrangement so it can be executed. Even so, the return to the country of departure however, has the potential to violate refugee law and international human rights law so we need to notice its legality from the side of both laws.

D. VIOLATION OF THE SOVEREIGNTY OF INDONESIA

The return of boats carrying asylum seekers and refugee to Indonesian waters in terms of sovereignty, refers to the rules of UNCLOS a the main legal instrument governing maritime activities in the zone. The Convention contains rights and obligations of the state in various forms of activity in the different where Australia and Indonesia are bound to as the parties. Thus, to determine the legality of the activities carried out at sea can not be separated from the rules of UNCLOS.

Next will be identified to what extent these boats can be restored, or whether the return of the ship to the Indonesian water is appropriate with international law of the sea. Australian warship can only enter Indonesia's territorial sea by using the *right of innocent passage* that must be exercised in accordance with the provisions of Article 17-19 UNCLOS. As described above, passenger discharge on the Territorial Water is a violation of immigration laws that belong to the actions that are inconsistent with the *right of innocent passage*.

At the press conference released by the Australian Government, the competent authorities of Australia also admitted that during the execution of OSB in 2013 and 2014, the Australian navy personnel have violated the sovereignty of Indonesia in the sea up to six times. Writer have tried to find detailed data about a sixth of these violations associated with the coordinates of violations by first asking for data on the Indonesian Navy. Based on the interview with Mr. Kol. Kresno Buntoro, the Navy did not know the exact coordinates or maritime zone where the Australian warship has entered the sovereign territory of the

⁵⁶ SOLAS Amendments, IMO Dic MSC 78/26/Add.1, annex 3 para 4.

Republic of Indonesia.⁵⁷ Mr. Kresno said, ignorance is caused by the limited ability of patrol vessel in the territorial waters of the southern part of Indonesia in terms of both detection and alutista. This limitation is due to the high waves in the region so that it required a ship with a length of at least 100 meters, while the ships with such siza is limited.

The return to the Territorial Water, clearly violated the *rights of innocent passage* which is owned by Australia. The entry of Australian warship to Indonesian Territorial Water does not meet the characteristics of the right of innocent passage which is continuous with the specific purpose because the ship sailed aimlessly. The action of Australian warship belongs to one of the actions categorized as “non-innocent” in Article 19 paragraph (2) of UNCLOS that is loading people who legally conflict with immigration law because it makes these illegal migrants illegally enter Indonesian territory. Likewise the return to Contiguous Zone, Australia has violated immigration laws by bringing foreigners in a way that is not in accordance with existing rules.

Intended to obtain clarification from the Government of Australia, the writer has requested to conduct an interview to the Australian Embassy in Jakarta, but for the reason of limited human resources, the interview can not be done. Based on media reports relating to violation of the territorial of the Republic of Indonesia during the implementation of OSB, Indonesian government has sent a memorandum of protest to the Australian Embassy in Jakarta. In the memorandum, the Government of the Republic of Indonesia asked Australia to respect the territorial sovereignty of Indonesia as well as the understanding of the conditions of asylum seekers attempting to enter the territory of Australia for Indonesia as Australia was seemed “lazy” in dealing with asylum seekers.⁵⁸ The protest memorandum then answered with a Diplomatic Note which tend to be diplomatic and normative. In the Memorandum, the Australia only provide information on the coordinates where the interception was done and the reasons that the move was due to the

⁵⁷ Kol. Kresno Buntoro is the Sekretaris Dinas Hukum TNI AL (Vice of Law Department in Indonesian Navy). Interview conducted on Monday, 30 May 2016 at 17.15 in Faculty of Law, Universitas Indonesia.

⁵⁸ Data was obtained from Dumas Amali Radityo, a Diplomat at Directorate of Politic and Region Security, Ministry of Foreign Affairs Republic of Indonesia via interview conducted on May, 30, 2016.

condition of the crew and the immigrants who were on the ship in danger.⁵⁹

E. VIOLATION OF APPROPRIATE MEASURE PROVISION IN THE PROTOCOL ON SMUGGLING OF MIGRANTS

Under the rules on handling of migrants smuggling contained in Protocol against the Smuggling of Migrants by Land, Sea, and Air, member states must cooperate in preventing and cracking down on smuggling by sea refers to the provisions of existing international law. According to the rules set out in Chapter 2, If the member states have a compelling reason to declare that a boat involved in the practice of human trafficking, the country must notify the flag state of the ship and to request authorization from the flag state to take action against the ship which is in on the article referred to “appropriate measure”. Action can only be taken by the country after obtaining authorization from the flag state in which such authorization may be for boarding, chase boats, and take any other action deemed necessary to ships and people who are in he has found it on the basis of sufficient evidence.

V. CONCLUSION

Based on the description in the previous sections, can be concluded that the implementation of turn back the boat in Operation Sovereign Borders by Australian Government did not comply with some aspects of international law. In one side, Australia made the obligation of search and rescue as the basis for the interception against ships transporting migrants, but in fact the condition of the returned ship remained poor; no logistics and sufficient fuel. Australia can intercept the ship in danger locating outside of its territorial water and move it to a safer place as long as it is outside of Indonesian territory because legally, Australia has no obligation to accept passengers from that boat just because it is located in its territory.

Australia’s policy has no legal basis so it violates the provisions of international human rights law, especially the law of refugees. This pol-

⁵⁹ Data was obtained via interview with Ahmad Almaududy Amri, Diplomat at Directorate of Politic and Region Security, Ministry of Foreign Affairs Republic of Indonesia conducted on June, 1, 2016.

icy violates the principle of non-refoulement which includes a ban on the return to a place that could endanger the safety of refugees because Indonesia is not a safe third country so that the risk of persecution exists due to Indonesia is not a member state of the Geneva Conventions in 1951 and did not have rules on the protection of refugees in its national law. Although the ships entered Australian waters illegally, it is not impossible people who are in it are refugees seeking asylum, moreover the people came from countries with unstable political conditions. It is different if Australia return them after the process of status determination, that return can legally justified if it is proved that they are not refugees.

Violations of the sovereignty of Indonesia become an indisputable fact in the implementation of the OSB by Australia, as recognized by the Australian authorities. Towing back the boat to Indonesian water specifically to Territorial Water and Contiguous Zone does not comply with the provisions in law of the sea because it does not meet the category of ships that obtain right of innocent passage on the Territorial Sea and has violated immigration laws at Contiguous Zone.

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