CHAPTER I

INTRODUCTION

A. Context of Study

Indonesia is one of the biggest countries that have migrant workers which work around the world. Two-thirds of the 3.2 million of Indonesian citizens who live abroad are registered as Indonesian workers, spread though out in the Asia-pacific region, East-central America, and Europe. Statistics show the majority of those numbers are women who work in the in formal sector as domestic workers.[1]

Large numbers of Indonesian migrant workers are placed in Malaysia, Saudi Arabia, Hong Kong, and other countries. Many cases which are faced by Indonesian migrant workers in host countries such as in Malaysia and Saudi Arabia are maltreatment, physical abuse, unpaid salary, and also undocumented migrant workers.

The United Nations defines migrant worker as an engaged person or has been engaged in a remunerated activity outside from their national country.[2] It means that undocumented migrant workers are people who leave their own country illegally and work outside their country without any legal documents. The term 'undocumented' mean that they do not have any legal document to run a job outside their own country.

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[1] Teguh Wardoyo, 2010, "Diplomasi Perlindungan Tenaga Kerja Indonesia di Luar Negeri", *Jurnal Diplomasi*, p.45-46

[2] The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 2 point 1

The Indonesian ministry of labor and transmigration has already issued a ministry regulation Number 44 A/MEN/2002 concerning placement and protection of Indonesian migrant worker which later has been replaced with Law Number 39 of 2004 concerning placement and protection of Indonesian migrant worker abroad. Nevertheless, most of factual cases show that many Indonesian migrant workers had no intention to obey the applicable law. Therefore, this situation raises issue of illegal migrant worker (undocumented migrant worker).[3]

There are several factors that make people prefer to work abroad. Economical aspect is one of many factors which influence people to work abroad. It is because there are some difficulties in getting a job and having an appropriate income in Indonesia. Another factor is a limitation over the availability of the jobs. In fact there are more worker available than the jobs vacancies. Law number 39 of 2004 concerning placement and protection of Indonesian migrant worker abroad regulates procedures in getting a permission to become a migrant worker. The last factor is coming out from the applicable law. The law contributes some difficulties to the people who ask a permission grants to become a migrant worker. Some difficulties can be found by analyzing conditions to become a migrant worker as determined by the law. For instance minimum access for education, difficulties to pass the selection test to be an Indonesian migrant

[3]Muslan Abdurahman, *Ketidak patuhan TKI Sebuah Efek Diskriminasi Hukum*, UMM Press, Malang, 2006. p.28

worker, and so forth. Those difficulties force people to choose work illegally abroad due to the difficulties as determined by the law.[4]

As the result, it creates high possibility to raise disputes between the migrant worker's national country and the host country. Indonesia and Malaysia often have disputes and cases that related to the illegal migrant workers. The only reason of why Indonesian migrant workers are able to easily enter into the territory of Malaysia because of the geographical condition between both countries. Indonesia and Malaysia are the neighborhood country. Besides, those countries have border between each other territory. Therefore, Indonesian migrant workers are able to easily enter into the Malaysian territory illegally.[5] Similar case also happens between the United State of America and Mexico. Due to the direct geographical condition of both countries, many Mexican migrant workers are able to easily enter into the United State of America's territory illegally. Those immigrants start to trespass country border illegally because their own country not able to provide them appropriate jobs and appropriate salary.[6]

According to data, in 2010, the International Organization for Migration (IOM) estimated that that there are 214 million international migrants worldwide, that is, persons living and/or working in a country other than that of their birth or

[4] *Ibid*., p.161-163

[5] Tenaga Kerja Indonesia Paling Banyak Tersebar di Malaysia, http://finance.detik.com/read/2012/09/26/170223/2038424/4/tenaga-kerja-indonesia-paling-banyak-tersebar-di-malaysia accessed on September 6, 2012

[6] Migrasi Tenaga Kerja dari Indonesia, http://www.iom.int/jahia/webdav/shared/shared/mainsite/published_docs/Final-LM-Report-Bahasa-Indonesia.pdf accessed on september 6, 2012

citizenship.[7] The total number of international migrants has increased over the last 10 years from an estimated 150 million in 2000 to 214 million persons in 2010, i.e., 3.1% of the world's population are migrants. In other words, one of out of every 33 persons in the world today is a migrant and migrants would constitute the fifth most populous country in the world.[8] However, it is hard to provide an exact number of undocumented migrants, precisely because of their illegal status.

Undocumented migrant worker is a serious problem that has to be overcome by Indonesian government and also other governments in the world. As sending country of migrant worker, this problem becomes serious when Indonesian citizens work abroad illegally (undocumented). The problem occurs when Indonesian illegal workers need protection for unfair treatment, physical abuse, unpaid salary, ant other problems. The receiving country also faced the serious problems due to immigrant workers illegal method in entering the receiving country. It provides no information about them in the territory of receiving country and definitely, they do not pay the taxes for coming and work in the receiving country.[9]

Undocumented migrant workers cause losses to the both receiving and sending countries. The one of losses that is can be obtained by both parties such as income from taxes that actually should be paid by them. These taxes include entry

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[7] International Organization for Migration, *World Migration Report 2011: Communicating Effectively About Migration*, http://www.iom.int/jahia/webdav/shared/shared/mainsite/published_docs/wmr-2010/WMR%202010_FINAL_23_11_2010.pdf accessed on September 26, 2012

[8] International Organization of Migration, http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en accessed on September 26, 2012

[9] Mekanisme Hak Asasi Buruh Migran, buruhmigran.or.id/2010/12/16/mekanisme-hak-asasi-buruh-migran/ accessed on September 7, 2012

tax, income tax, and also other taxes appropriate with the place of work.[10] Another loss that caused by undocumented migrant workers to the receiving country is dispute between receiving country and sending country because both parties blame each other and make the relationship among both countries become tense.[11] Nevertheless, even they are cause losses to the receiving country and sending country, they are still human beings that need a protection. It is obligation of the both receiving and sending countries to protect their rights, because their existences also caused by neglect of both countries.[12]

Undocumented migrant workers are susceptible to get abuse and other harmful actions committed by the employers, such as low salary, irrational working time, physical abuse, inappropriate treatments, unpaid salary, and so forth. Therefore, a protection as a person and citizen is the only thing they need when they deal with those problems in the receiving country.

Protecting citizen is one of the absolute functions of any government in the world. One of the methods to protect the citizen is that each country has to put serious attempt in order to avoid their citizens to become illegal migrant workers. Nevertheless, it is undeniable that many illegal migrant workers exist in throughout the world. Therefore, the receiving country that find any illegal

[10] Elisabeth J. Sweeney Yu, 2006, " Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private Rico Litigation and Public Policy", westlaw journal, p.917-919

[11] Nestapa Buruh Migran, http://m.liputan6.com/read/233217/nestapa-buruh-migran accessed December 28, 2012

[12] Masalah Buruh Migran, http://nasional.kompas.com/read/2012/05/02/04273153/masalah.buruh.migran accessed on December 28, 2012

migrant workers which stay in their territory should protect them and the receiving country has to send them back to their own country.

ASEAN has already provided the protection of migrant worker. The 13th ASEAN Summit held in Cebu, Philippines in 2007 adopted ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (hereinafter called the AMW Declaration), and constitutes one of the follow up measures taken up due to the establishment of an ASEAN community. AMW Declaration contains obligation for both sending and receiving countries to provide protection and promotion the rights of migrant workers. Furthermore, AMW Declaration mandates to establish an ASEAN legal instrument to ensure the guarantee on the protection of the rights of the migrants (hereinafter called the AMW Instrument).[13]Although ASEAN has provided such declaration, this declaration has not provided any specific regulations to protect undocumented migrant worker.[14]

United Nation also has United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This statute also provides fully and widely protection toward migrant worker. Nevertheless, this convention also do not provide any regulation to protect undocumented migrant worker, included the rights of undocumented migrant workers. However, the problems of undocumented migrants have been recognized by the international

[13] ASEAN Web, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, http://www.asean.org/19264.htm, accessed on September 26, 2012

[14] Migrant Workers' Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore, and Thailand, http://www.fes-asia.org/media/publication/2012_MigrantWorkersRightaToSocialProtectionInASEAN_Hall.pdfg accessed on September 26, 2012

community and have prompted response from the United Nations and the International Labor Organization (ILO). Both the United Nations and ILO have issued declarations and promulgated human rights accords that encompass all individuals, including undocumented migrant workers.[15]

Based on the human rights perspective, an undocumented migrant worker must be protected. In reason referred to the Universal Declaration on Human Rights article 1, it stated, *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*[16] It means that all human beings are equal including undocumented migrant worker. Therefore, an undocumented migrant worker has the rights to get protection and appropriate treatments.

B. Statement of Problems

I. What are factors that cause the existences of Indonesian undocumented migrant workers?
II. How does International Human Rights Law protect the undocumented migrant workers since it caused loss to the receiving country?

C. Research Objectives

1. The aim of this thesis is to learn further on the factors that cause the phenomena of the undocumented migrant workers especially Indonesian undocumented migrant workers.

[15] Laura Jakubowski, 2007, "International Commerce and Undocumented Workers: Using Trade to Secure Labor Rights", westlaw journal, p.513-516
[16] Universal Declaration of Human Right article 1

2. This thesis will analyze of how far International Human Rights Law can protect the rights of undocumented migrant workers.

D. Definition of Technical Terms

The terms that are used in this thesis were clearly explained to make the analysis understandable.

United Nation classifies migrant worker as follows: “The term "migrant worker" refers to a person who is engaged or has been engaged in a remunerated activity in a Country of which he or she is not a national.”[17]

ASEAN uses many terms as the reference to the status of migrants who enter and work in the foreign country with no legal authorization, as follows:

1. Illegal Migrant Workers

   This term is a negative one which Elie Wiesel, the Nobel Prize winner once country that a human being cannot be illegal. Therefore, it is unacceptable.[18]

2. Undocumented Migrant Workers

   This term was recommended in the 1994 during International Conference on Population and Development. However, this term is considered incomplete since it does not cover certain unlawful migration cases such as

[17] Migrant Worker Convention, *Loc.Cit.*, article 2 point 1

[18] Piyasiri Wickramasekera, 2002, “Asian Labour Migration : Issues and Challenges in an Era of Globalization”, International Migration Papers, p.1

tourist or over stay who may undertake unemployment in the host country.[19]

3. Irregular Migrant Workers

This term is considered more complete in covering various points of migration process such as departure, transit, entry, and return. This term is also recommended by the International Symposium on Migration in Bangkok and used in the Bangkok Declaration on Irregular Migration (1999) (hereinafter called Bangkok Declaration) and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter called CRMW). [20]

However, for practical purposes, in this thesis, the term "Undocumented Migrant Workers" and "Irregular Migrant Workers" were used in the similar sense, namely refers to labors that enter and work in the foreign country with no legal authorization. The first one was used more frequently, simply to be in accordance with the one laid out in the AMW Declaration.[21]

The term "human rights" refers to rights that are considered universal to humanity, regardless of citizenship, residency status, ethnicity, gender, or other

[19] *Ibid.*, p.1
[20] *Ibid.*, p.2
[21] *Ibid.*, p.2

considerations.[22] The fundamental rights that humans have by the fact of being human, and that are neither created nor can be abrogated by any government.

Other values can be derived from those fundamental rights and they can help to define more precisely how in practice people and societies should co-exist. They are:

1. Freedom: It is because the human will is an important part of human dignity. To be forced to do something against our will demeans the human spirit.

2. Respect for others: Lack of respect for someone may lead to failure in appreciating their individuality and essential dignity.

3. Non-discrimination: Equality in human dignity means we should not judge people on the basis of non-relevant physical (or other) characteristics.

4. Tolerance: Intolerance indicates a lack of respect for difference; and equality does not signify identity or uniformity.

5. Justice: People are equal in their humanity and they deserve fair treatment.

6. Responsibility: Respecting the rights of others entails responsibility for one's actions.[23]

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[22]Human Right Definition, http://civilliberty.about.com/od/internationalhumanrights/g/Human-Rights-Definition. htm accessed on September 28, 2012

[23] 4.1 Understanding Human Rights, http://eycb.coe.int/compass/en/chapter_4/4_1.html accessed on September 28, 2012

The term "Non-Discrimination" refer to prohibition of discrimination, establishment practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality, or religion cannot be permitted. A failure to treat all persons equally where no reasonable distinction can be found between those favored and not favored.[24] It is clear that non-discrimination is no differentiation treatment can be given among people, all people deserve gat the same treatment no matter their race, age, sex, nationality or religion.

E. Theoretical Framework

The highlighted phenomenon of highly growing numbers of the international migrant workers has made the United Nation to provide regulation of migrant worker's rights protection. More than 214 million people are migrant workers all in around the world.[25] Such number also includes undocumented migrant workers. This is the reason of United Nation issued The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families on 1990. This convention regulates concerning the protection toward migrant worker and their family member. This convention has not provided explicit protections toward undocumented migrant worker.

[24] Black's Law Dictionary

[25] WMR 2012 English, http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf accessed on October 10, 2012

The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has not clearly mentioned about the protection toward undocumented migrant worker. There is no any regulation that provides the protection toward undocumented migrant worker.

The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families offers a definition of 'migrant worker', as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a Country of which he or she is not a national'.[26]

The convention clarifies in Article 5 that migrant worker and members of their families are:

1. Considered as *documented* or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the Country of employment pursuant to the law of that Country and to international agreements to which that Country is a party; and
2. Considered as *non-documented* or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present Article.[27]

During the 12th ASEAN Summit held in Cebu, Philippines, on 13 January 2007, ASEAN Leaders signed ASEAN Declaration on the Protection and

[26] Migrant Worker Convention, *Loc.Cit.*, article 2
[27] *Ibid.*, article 5

Promotion of the Rights of Migrant Workers (AMW Declaration).[28] The consideration part of the AMW Declaration reflects that the signing of the AMW Declaration purported to sustain the establishment of ASEAN Community along with the ASEAN commitment on promotion and protection of human rights. On the other hand, it also contains formal recognition upon the contribution of migrant workers to the society and economy of both receiving country and sending country of ASEAN and as well as acknowledgement upon the need to address cases of abuse and violence against migrant workers whenever such cases occur.

AMW Declaration basically consists of three main parts, namely General Principles, Obligations of Receiving and Sending Country, and Commitments by ASEAN, which in details are as follows:

1. General Principles:
    a. Both the receiving country and sending country shall strengthen the political, economic and social pillars of the ASEAN Community by promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN Member Countries;
    b. The receiving country and the sending country shall, for humanitarian reasons, closely cooperate to resolve the cases of

[28] ASEAN Web, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, http://www.asean.org/19264.htm, accessed on September 26, 2012

migrant workers who, through no fault of their own, have subsequently become undocumented;

c. The receiving country and the sending country shall take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving country of their laws, regulations and policies; and

d. Nothing in the present Declaration shall be interpreted as implying the regularization of the situation of migrant workers who are undocumented.[29]

2. Obligations of Receiving Country

Pursuant to the prevailing laws, regulations and policies of the respective receiving country, the receiving country will:

a. Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers;

b. Work towards the achievement of harmony and tolerance between receiving country and migrant workers;

c. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving country, provided that they fulfill the requirements under

[29] *Ibid.*

applicable laws, regulations and policies of the said country, bilateral agreements and multilateral treaties;

d. Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
e. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving country; and
f. Facilitate the exercise of consular functions to consular or diplomatic authorities of country of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving country and in accordance with the Vienna Convention on Consular Relations.[30]

3. Obligations of Sending Country

Pursuant to the prevailing laws, regulations and policies of the respective sending country, the sending country will:

a. Enhance measures related to the promotion and protection of the rights of migrant workers;
b. Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;

[30] *Ibid.*

c. Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and
d. Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation, and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.[31]

Although the AMW Declaration provided so many protections toward migrant workers, there is no any single provision which regulates about undocumented migrant worker in the declaration.

Indonesia as one of the biggest sending country of migrant worker has regulation to protect the right of Indonesian migrant worker. Law Number 39 of 2004 concerning placement and protection Indonesian migrant worker is the regulation that provides protection toward Indonesian migrant worker. This law provides the protection towards the interest of the Indonesian migrant worker as Indonesian citizen abroad.

Discussion about migrant worker documented or undocumented is always related to person because migrant worker is personal matter. Every personal matter must be close to human rights perspective. Therefore, Universal

[31] *Ibid.*

Declaration on Human Rights (UDHR) shall be one of the sources to complete this thesis.

Article 23 point 1 of UDHR stated that: "*Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.*"[32] It means that everyone can freely choose the job they want, including undocumented migrant worker.

Article 23 point 2 of UDHR stated that: "*Everyone, without any discrimination, has the right to equal pay for equal work.*"[33] It means that everyone has right to get equal treatment without any discrimination during work, including undocumented migrant worker. There are also other articles on the UDHR that can be determined as the basic provision to protect undocumented migrant worker.

F. Research Method

1. Object of Research
    a. Protection of undocumented migrant worker
    b. The rights of undocumented migrant worker that should be protected
    c. The obligations of sending country and receiving country to protect undocumented migrant worker

[32] UDHR, *Loc.Cit,.* Article 23 point 1
[33] *Ibid.,* Article 23 point 2

2. Legal Materials

   a. Primary: The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers; Law No. 39 of 2004 about placement and protection of Indonesian migrant worker abroad; Memorandum of Understanding between Indonesia and Malaysia according Indonesian migrant worker; and Universal Declaration of Human Right.

   b. Secondary: books and journal related to the protection toward undocumented migrant worker.

3. Method of Gathering Legal Materials

   The method in collecting legal materials was by using library studies and documentation. The writer collected the data from book that related to the protection toward undocumented migrant worker, some journal were also used as reference to understand deeply about protection toward undocumented migrant worker.

4. Approach Method

   This thesis is used the normative approach by analyzing the problems from the point of view of legal regulation, convention, declaration and rules.

5. Method of Legal Materials Analysis

The writer used the descriptive qualitative method. The obtained data was descriptively presented. They were elaborated and analyzed in accordance to the regulation, convention, declaration, and rules that related to the implementation of protection toward undocumented migrant worker.