

## CHAPTER TWO

### LITERATURE REVIEW

#### A. Asylum Seekers

‘Asylum seeker’ is a popular term nowadays. It is prominent in printed media and television screens. It is discussed everywhere in parliaments, regional assemblies, women’s associations and working men’s clubs. An Asylum Seeker is someone who requests the status as the asylum. Asylum Seeker is a term that is usually used for people who would like to register as a refugee at the UNHCR office, stating that they require international protection on grounds appropriate to Article 1A in the Refugees Convention.<sup>1</sup>

Asylum seekers may not necessarily be a refugee, but refugees are asylum seekers who have been assigned their status to refugee. Asylum seeker is general term for a person who has not yet received a decision on his or her claim for refugee status. Asylum seeker must register themselves in advance for processing status, and registration is submitted to UNHCR. Indonesia has neither ratification of the 1951 Convention on the Status of Refugees or its 1967 Protocol, and nor having legal framework and system of refugee status

---

<sup>1</sup>David J. Whittaker, 2006, *Asylum Seekers and Refugees the Contemporary World*, Routledge, p. 1

determination. In connection with the situation, UNHCR becomes the agency that processes the requests for refugee status in Indonesia.<sup>2</sup>

UNHCR carries out the procedure of Refugees Status Determination (RSD), which begins with the registration. After registration, UNHCR will conduct individual interviews, accompanied by a competent interpreter. The process bears a reasonable decision that determines whether refugee requested status is accepted or rejected. It gives each individual a chance (one) to ask for an appeal if the application is rejected.

When they are accepted as refugees, they receive protection from UNHCR to find a long-term solution, which is usually followed by placement to another country. For this purpose, UNHCR then closely communicate with the country that has the potential to receive refugees. At the end of January 2016, as many as 7,616 asylum seekers and 6,063 refugees were registered at UNHCR Jakarta.<sup>3</sup>

## **B. Refugee**

Migration, whether voluntary or forced, has always been a characteristic of individual and collocative human behavior. Refugee flows and human displacement have, ad infinitum, been a feature, and consequence, of conflict

---

<sup>2</sup> UNHCR, 2016, "Penentuan Status Pengungsi", taken from <http://www.unhcr.or.id/id/tugas-a-kegiatan/penentuan-status-pengungsi> accessed on Tuesday, November 8<sup>th</sup>, 2016, 1:10 p.m.

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

within and between society.<sup>4</sup> In 1945 a Specialized Agency of the recently formed by United Nations the United Nations High Commission for Refugees (UNHCR) was given the task in Geneva to frame a tight definition of the term refugee. This would be a modern, legal enactment of the ancient tradition of furnishing asylum to anyone at risk and danger. The definition is the one that used today, and given the scale and diversity of human movement. It remains more than ever necessary to use it to separate very precisely those who are to be distinguished as victims of persecution.

A convention was eventually drawn up after seven arduous months of discussion and published by the UNHCR in July 1951 to give a very clear definition of refugee:

“A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/ her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail himself/her self of the protection of that country, or to return there, for fear of persecution.”<sup>5</sup>

Refugee protection is a form of international concern in which the protection is regulated in the 1951 Convention and 1967 Protocol governing principles and the rights and obligations of refugees. Refugees themselves urgently need protection. It is very substantial for the refugees.<sup>6</sup> Every country

---

<sup>4</sup> Edward Newman and Joanne van Selm, 2003, *Refugee and Forced Displacement*, The United Nations University, p. 3.

<sup>5</sup> David J. Whittaker, 2006, *Asylum Seekers and Refugees the Contemporary World*, Routledge, p. 2.

<sup>6</sup>James C. Hathaway, 2005, *The Rights of Refugee under International Law*, Cambridge University, p. 77.

has a general duty to provide International protection as obligations grounded in International law, including International human rights law and International customary law.

Refugee entering into a country will get a guaranteed provision of legal protection of that country. It is prohibited for state parties to return the refugees or those who claim to be asylum seekers to their home country by any forces. This is related to the principle that absolutely must be obeyed by the state party not to return refugees to the country where he or she felt threatened the safety and freedom (non-refoulement principle).

### **C. 1951 Refugee Conventions**

By 1950, the international community recognized that the Refugee problem sparked by the Second World War was not a temporary issue. So many years after the war, were 1,25 million refugees in Europe. **The presence in a foreign country does not result in any further legal protection of their country of origin. The 1951 Refugee Convention is the key legal document that forms the legal basis related to the status of Refugee. Signed by 144 State parties, it defines the term ‘refugee’ and outlines the rights of the displaced, as well as the legal obligations of States to protect them.<sup>7</sup>Indonesia is one of the countries which experienced the arrival of**

---

<sup>7</sup>UNHCR, 2016, “The 1951 Refugee Convention”, taken from <http://www.unhcr.org/1951-refugee-convention.html> accessed on Tuesday, November 8<sup>th</sup>, 2016, 10:13 a.m.

**refugees in a large number; unfortunately, Indonesia does not belong to the state party of 1951 Refugee Convention.**

In 1950, the U.N. General Assembly established U.N. High Commissioner for Refugee. While initially focused on the resettlement of more than one million refugees displaced during World War II, the high commissioner is now concerned with displaced persons worldwide. The high commissioner is appointed by the secretary-general with the approval of the U.N. General Assembly (with due regard being paid to geographical rotation) for a four commissioner for Refugee (UNHCR).<sup>8</sup>

In performing its functions, the UNHCR monitors whether states are abiding by the U.N. Convention relating to the status of refugee and its associated protocol. While the United States is not a party convention, it is derivatively bound to the convention's core provisions through its adherence to the protocol.<sup>9</sup> UNHCR was founded with a mandate to provide International protection to refugees and seek a permanent solution to the problem in cooperation with national governments, NGOs, and other International organizations. UNHCR's task is to provide protection for refugees by putting together international treaties and supervising their application.

---

<sup>8</sup> Sean D. Murphy, 2012, *Principles of International Law*, Washington, D.C., Concise Hornbooks, p. 369.

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

The most essential component of refugee status and asylum is protection against the sending back to their homelands where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement which, as will be seen below, is widely accepted by States.<sup>10</sup> In fact many countries which are then dealing with Refugees do not act accordingly with the International standards that have been regulated in the 1951 Convention and 1967 Protocol and even breach the principle of the return of Refugees or (non-refoulment) that has become the customary International law. The rule of non-refoulement has been applied and followed by states even before the adoption of the 1951 Convention relating to the Status of Refugee.<sup>11</sup>

### **1. The Principle of Non-Refoulement**

The principle of non-refoulement is a prohibition of a state to reject, return or send back a refugee to a territory where he or she will be dealing with things that could endanger his or her life as persecution, murder and so for reasons related to race, religion, nationality, membership in a particular social organization, or because of his or her political beliefs. On

---

<sup>10</sup> Aryuni Yuliatiningsih, 2016, “Perlindungan Pengungsi dalam Prespektif Hukum Internasional dan Hukum Islam” taken from [http://download.portalgaruda.org/article.php?article=260743&val=7042&title=PERLINDUNGAN%20PENGUNGSI%20DALAM%20PERSPEKTIF%20HUKUM%20INTERNASIONAL%20DAN%20HUKUM%20ISLAM%20\(Studi%20Terhadap%20Kasus%20Manusia%20Perahu%20Rohingya\)](http://download.portalgaruda.org/article.php?article=260743&val=7042&title=PERLINDUNGAN%20PENGUNGSI%20DALAM%20PERSPEKTIF%20HUKUM%20INTERNASIONAL%20DAN%20HUKUM%20ISLAM%20(Studi%20Terhadap%20Kasus%20Manusia%20Perahu%20Rohingya)) accessed on Tuesday, November 8<sup>th</sup>, 2016, 3:03 p.m.

<sup>11</sup>Dina Imam Supaat, 2013, “Escaping The Principle of Non-Refoulment”, *International Journal of Business, Economics and Law*, Vol. 2 No. 3, 2013, ISSN 2289-1552, Malaysia, p. 86.

the universal level, the first one had been made in the 1951 United Nations Convention relating to the Status of refugees, which, in Article 33(1), mentions that:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>12</sup>

The principle of *non-refoulement* is the cornerstone of asylum and refugee of international law. Following from the right to seek and enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights,<sup>13</sup> this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to be free from torture or cruel, inhuman or degrading treatment or punishment, and to have liberty and security. These and other rights are threatened when a refugee is returned to persecution or danger.<sup>14</sup>

Refugees are people who are in a very fragile situation. They are not getting protection from their own country, often own government threatening to persecute them. Refugees entitled to certain rights such as

---

<sup>12</sup> United Nation 1951 Refugee Convention related to the Status of Refugee

<sup>13</sup>The Universal Declaration of Human Rights

<sup>14</sup>UN High Commissioners for Refugees, 2016, “UNHCR Note on the Principle of Non-Refoulement”, taken from <http://www.refworld.org/docid/438c6d972.html> accessed on Tuesday, November 8<sup>th</sup>, 2016, 3:13 p.m.

protection and assistance adapted to the particular condition. This principle (non-refoulement) is basically concerned with the principle of the protection of human rights law, particularly in relation to the prohibition of acts of torture or punishment are rude and humanity degrading treatment.

## **2. The Principle of Non-Refoulement as Jus Cogens**

The notion of Jus Cogens in international law encompasses the notion of pre-peremptory norms international law. In this regard, a view has been formed that certain overriding principles of international law exist which forms a body of Jus Cogens.<sup>15</sup> In the system of international law, the concept of Jus Cogens or often also refers to the norm enforcer of international law (a peremptory norm of international law) which is a legal provision that has been accepted and recognized by the international community and the provisions of the law that cannot be set aside or be defeated by other law. The coercive legal norms in the Vienna Convention of 1969 is the recognition and affirmation of the international community,<sup>16</sup> especially the countries of the fact that the system of international law. The state is not being able to formulate a rule that deviate by Jus Cogens, both

---

<sup>15</sup>Rafael Nieto Navia, 2016, "International Peremptory Norms (Jus Cogens) and International Humanitarian Law", taken from <http://www.iccnw.org/documents/WritingColombiaEng.pdf>, accessed on Tuesday, November 8<sup>th</sup>, 2016, 7:07 p.m.

<sup>16</sup>1969 Vienna Convention on the Law of Treaties



in relation to other countries as well as in the respective national legal frameworks each country.<sup>17</sup>

The principle of non-refoulement is a norm of international law embodied in the international conventions in the Article 33 of the 1951 Refugee Convention.<sup>18</sup> The principle of non-refoulement also has become customary international law that is practiced by the countries even before this principle was formulated in international instruments. A country that practice the principle of non-refoulement is not limited to the countries that are parties to the 1951 Refugee Convention. The other countries that are not the parties of 1951 Refugee Convention, in fact the nonparties country is should respect and adhere the principle of non-refoulement. In the next development, especially in the legal instruments accepted by the international community with regard to refugee protection issues, the principle of non-refoulement is also reaffirmed and even are explicitly recognized as Jus Cogens.<sup>19</sup> As a Jus Cogens principle of non-refoulement must be respected under all circumstances and cannot be converted.

---

<sup>17</sup>Maw Birawaar, 2016, “Non-Refoulement Principles In The International Legal System”, taken from <https://maxbhirawaar.wordpress.com/2012/06/17/non-refoulement-principles-in-the-international-legal-system/>, , accessed on Tuesday, November 8<sup>th</sup>, 2016, 7:17 p.m.

<sup>18</sup>United Nation 1951 Refugee Convention related to the Status of Refugee

<sup>19</sup>Rafael Nieto Navia, 2016, *Op. Cit.*