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# Human Rights Aspects on Cross Border Refugee Problems

Achmad Romsan

*Currently, refugee problems are a matter for the international society. In practice, their rights are objects for violations frequently. However, as an individual, refugee has the right for protection under national law and international law. In addition, a Refugee possesses the human rights which applied generally. This article discusses refugee problems from the perspective of human rights consisted within the international conventions and national legal rules.*

**Keywords:** refugee, human rights, international conventions, national legal rules

## I. Introduction

The history of the handling refugees resulting from events that occurred before 1951, until the formation of an international organization reflects that the refugee problem is not only the domestic affairs of state<sup>2</sup> but has become concern for international society<sup>3</sup>.

It is marked by ratification of the international convention on refugees in 1951 on the Determination for Refugee Status. The high number of political unrest in several developing States after 1951<sup>4</sup> make the existing refu-

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<sup>2</sup> 'Penanganan pengungsi yang terjadi sebagai akibat Perang Dunia ke II di Eropa' in Romsan Achmad, Usmawadi, M Djamil Usamy, Zuhir Mada Apriadi,

Pengantar Hukum Pengungsi Internasional: Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional, UNHCR Jakarta 2003

<sup>3</sup> Refugee will become an international problem if the Refugees stayed in other States out of their HostState. This criterion is used to define someone as a Refugee or an Asylum seeker.

<sup>4</sup> Refugee Convention 1951 Article A (2) provides limitation to be categorized as refugee, to the events occurred before 1951. The term "refugee" shall apply to any person who : (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being prosecuted for reasons of race, religion, nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return it.

gee definition in the Convention of 1951<sup>5</sup> cannot be applied. It also encourages the emergence of similar convention applied in some regions such as South America<sup>6</sup>, and Africa<sup>7</sup> by adopting the definition of refugee in the Refugee Convention 1951 with the adjustment from the characteristics of events occurring in the region. This is evidence that the handling of the refugee problem has become matter in the international society.

Although refugees is always a problem in every human civilization, but there are a group of people who are vulnerable and treated unjustly, being rejected in the border of state, it forcibly discharged, discrimination, rape, and sexual harassment is common to refugees. All of them are lead to violations of individual rights of refugees.

As individuals, as human beings and as members of community groups, refugees are entitled to humane treatment, legal protection in both national and international law. The rights are owned by the refugees is the same as the rights possessed by citizens of States where they sought refuge, such as the right to life, the right to protection from torture, the right to acquire citizenship, the right to move, the right to education, employment and fair wages, rights to health, the right to religion and religious education for their children. Thus, human rights are inherent to himself a refugee is universal, covering civil rights, political, economic, social and cultural, which applies to all people, all citizens, and to stateless person.<sup>8</sup> Refugees can also enjoy specific human rights related to the status of those who are vulnerable such as the right to seek asylum, freedom of movement, obtain a nationality, and receive protection and assistance in economic, social and cultural rights<sup>9</sup>, not to be repatriated by force (*non-refoulement*).<sup>10</sup> Therefore, the rights of refugees are also human rights (Refugees' rights are human rights) that apply universally.

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<sup>5</sup> Refugee definition is expanded as stated in Protocol 1967 on Refugees.

<sup>6</sup> Cartagena Declaration on Refugees, Nov 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS, Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

<sup>7</sup> Convention Governing the Specific Aspects of Refugee Problems in Afrika (1969).

<sup>8</sup> ICCPR 1988. The Convention bound to states if it was ratified by the States according to the Principles of International Law.

<sup>9</sup> Universal Declaration of Human Rights 1948.

<sup>10</sup> Recent cases in 2010, there are 2 groups of Refugees and Asylum seeker that repatriated by force to their home country, Thailand, which deported Hmong Refugees to Laos and Cambodia and Uighur to China ((Refoulement in the Asia Pacific (lih. Alex Pags, 8 January 2010, 04: 18 PM "Refoulement in the Asia Pacific", [http:// www.amnesty.org.au/ refugees/comments/22395/](http://www.amnesty.org.au/refugees/comments/22395/). Accessed on 28 Januari 2010, 10.30 a.m); Article 33 on 1951 Convention on "Non-Refoulement").

This paper analyzes the issue of refugees from Human Rights perspective, both in international convention and national regulations.

## **II. Human Rights Refugee and its Problems in the National Law**

The human rights of refugees and its implementation in national law are as complicated as human rights in national law. Human rights will become a sensitive issue if it connected with economic development and democracy. Often the ideologies, values, culture and customs is considered a specific case, thus the element of Human Rights universality<sup>11</sup> cannot be entered and applied to each individual<sup>12</sup>. Such arguments are certainly difficult to sustain if it associated with the refugee's problem. Constitutional obligations to take an active role within the international order and security are an evidence of solidarity within the international society.<sup>13</sup> International cooperation in the handling of refugees is a must and international law is the last means to obtain a legal protection. Therefore, some rights of refugees are in line with the individual rights of citizens, must receive equal treatment as stated in several international conventions on human rights.<sup>14</sup>

## **III. International Bill of Human Rights**

Universal Declaration of Human Rights (UDHR) 1948<sup>15</sup> is the ideal form which had been adopted<sup>16</sup> by most States<sup>17</sup>. The Human Rights articles to every citizen must be similar to the refugee; the freedom to move and to residence within the border of each states and also the right to leave

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<sup>11</sup> Human Rights Relativism and Universalism, David Shiman, Human Rights Teaching, Center for Teaching International Relations, University of Denver, CO 80208, 1993.

<sup>12</sup> If States has ratified ICCPR 1966 and ICESCR to their national law, a gross Human Rights violation is no longer bound by national jurisdiction, but international jurisdiction.

<sup>13</sup> For example, Preamble of Indonesian Constitution stated the obligation to maintain international order.

<sup>14</sup> More or less 25 Conventions relates on the Human Right, had been signed, ratified, and accession by States also possessed by Refugees. United Nations, Human Rights, International Instruments: Chart of Ratification as at 31 December 1996, United Nations, New York and Geneva, 1997, ST/HR/4/Rev.15.

<sup>15</sup> Proclaimed and adopted by the United Nations General Assembly on 10 December 1948.

<sup>16</sup> Thus Universal Declaration of Human Rights is applicable based on the customary international law.

<sup>17</sup> Indonesia in RIS Constitution (1949-1959)((Presidential Decree RIS 31 Jan 1950 Nr. 48(c) Staatsblad 50-3)(du 6 Feb 1959) and Temporary Constitution on 1950-1959 had been adopted International Bill of Human Rights.

any country including his own and to return to his country<sup>18</sup>, the right to seek and enjoy in other countries asylum from persecution,<sup>19</sup> the right to a nationality<sup>20</sup>, freedom to discrimination without any distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>21</sup> In addition, human rights related to the equality before the law,<sup>22</sup> the right to an effective remedy by the competent national tribunals,<sup>23</sup> and freedom to be subjected to arbitrary arrest, detention or exile.<sup>24</sup> Freedom is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>25</sup> Everyone has the right to own property alone as well as in association with others and no one shall be deprived of his property.<sup>26</sup> The right to work,<sup>27</sup> health and medical care.<sup>28</sup> Rights to education.<sup>29</sup> Women and children refugee have the right to protection from sexual exploitation. Right to freedom of thought, conscience and religion.<sup>30</sup> Therefore, theoretically the individual rights are equal to Refugees.

Considering UDHR is a declaration,<sup>31</sup> it is hard to be bound by the states *per se*. Although many States had been adopted Human Rights provisions into their national law.<sup>32</sup> Ironically the implementations to these rights into national law have not been enjoyed by all citizens of concerned states. The constitutional rights, however, has not yet been into reality.<sup>33</sup>

What about the refugees who seek for protection in a country? For countries that have a ratified 1951 Refugee Convention, the 1967 Refugee

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<sup>18</sup> Article 13 the UDHR 1948.

<sup>19</sup> Article 14 (1) UDHR 1948.

<sup>20</sup> Article 15 (1) UDHR 1948

<sup>21</sup> Article 2 UDHR 1948

<sup>22</sup> Article 7 UDHR 1948

<sup>23</sup> Article 8 UDHR 1948

<sup>24</sup> Article 9 UDHR 1948

<sup>25</sup> Article 5 UDHR 1948

<sup>26</sup> Article 17 UDHR 1948

<sup>27</sup> Article 23 UDHR 1948

<sup>28</sup> Article 25 UDHR 1948

<sup>29</sup> Article 26 UDHR 1948

<sup>30</sup> Article 28 UDHR 1948

<sup>31</sup> To solve this problem, United Nations General Assembly on 16 December 1966 adopted two international covenants on Civil and Political Rights (ICCPR) and enforced since 23 March 1976. Up until October 2009, there are 79 signatory states and 165 member states in ICCPR. Further covenant is The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted on 3 January 1976. Up until December 2008, it more or less has 160 member states. However, no State has been ratified into their national law.

Protocol or regional instruments other refugees, have the legal mechanism. The implementation of human rights for refugee is in line with human rights for a citizen. Problems will arise if the state has not yet ratified the refugee's convention and the immigration laws are rigid, required visa and travel documents to enter its territory.<sup>34</sup> Meanwhile the refugee is a group of people who are forced to leave their home countries to seek refuge status in another country without travel documents.<sup>35</sup> Leaving home country is certainly hardest decision to be taken.<sup>36</sup>

United Nations High Commissioner for Refugees (UNHCR) is urged for the countries with or without ratified international instrument for the Refugees. The experience and the ability of this institution to handle refugee's problem is doubtless<sup>37</sup> or revised their immigration laws.

#### **IV. ICCPR and ICESCR**

International Covenant on Civil and Political Rights (ICCPR)<sup>38</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>39</sup> are international instruments on human rights ratified by the states.<sup>40</sup> The problem of these two legal instruments is, not every state has

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<sup>32</sup> For example: When Indonesia has adopted the National Constitution for Indonesian Federal States (RIS) (1949-1950), and Temporary National Constitution (1950-1959). Both Constitutions regulates comprehensively on Human Rights and the peak of human rights awareness in Indonesia. However, currently human rights awareness and protection degenerate when National Constitution 1945 adopted in 1959 up until Soeharto's administration collapsed in 1998. Human Rights awareness starts to grow in Habibie's administration, Megawati, Gus Dur and SBY. The problem is Human Rights provisions in the amendment of National Constitution 1945 do not possess adequate portion nor attempt to regulates Human Rights separately from 1945 National Constitution.

<sup>33</sup> Developing countries are still dealing with poverty, democracy, and non-conducive political climate are the main obstacles for individual rights.

<sup>34</sup> Article 3,4(2),5,6,8, Indonesian Immigration Laws no.9/1992.

<sup>35</sup> Refugee Convention 1951 and Refugees Protocol 1967

<sup>36</sup> Philippines is the only countries within ASEAN has revised its immigration laws, meanwhile Indonesia is still using circular letter of Director General for Immigration

<sup>37</sup> "Chapter III. Perlindungan Internasional Pengungsi" dalam Achmad Romsan, et.al., Pengantar Hukum Pengungsi Internasional: Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional, Badan PBB Urusan Pengungsi Perwakilan Regional Jakarta, 2003.

<sup>38</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>39</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Mar 23, 1976.

<sup>40</sup> These two international instruments were made because UDHR 1948 is merely a declaration without bounding rules based on international law.

declared itself to be bound by the provisions of the Covenant. For example, in 1994, no less than 130 countries have ratified the ICCPR into their national law. Indonesia became a party to the Covenant in 2007.

The political considerations for States before ratifying the ICCPR and the ICESCR are related to political rights and economic owned by a certain ethnic group.<sup>41</sup> The Juridical consequences for State is subject to the Covenant's provisions and every issue of human rights violations in the country are no longer subject to national jurisdiction.<sup>42</sup> Moreover, in the ICCPR contains several articles cannot be reserved by the states.<sup>43</sup> Clearly, the ICCPR is considered as a monster.

### **V. International Morality in the Human Rights Protection of the Refugee**

Regardless the opinion, pros and cons, which considered international law relies on international morality,<sup>44</sup> however, by met the requirements in both international human rights instruments, the ICCPR and the ICESCR have become international law and possess binding authority in international law.<sup>45</sup> This situation is strengthened by states dependence among others construct the human rights and refugee issues are common concern of international community. States' obligation to provide protection to refugee right has concluded in several international agreements. Despite the issue whether those States have ratified, adopted, accession to international instruments for refugee.<sup>46</sup>

One States' moral obligation must be imposed to the refugees are provisions of the 1951 Refugee Convention, such as: right to equal treatment<sup>47</sup>,

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<sup>41</sup> See Article 1 ICCPR.

<sup>42</sup> States are allowed to use reservation to their binding with international covenant (See, Mochtar Kusumaatmadja, *Pengantar Hukum Internasional*, Buku I: Bagian UMUM, penerbit Binacipta 1978, hal. 125.

<sup>43</sup> See Chapter 6,7,8 (para 1 and 2), 11,15,16 and article 18 ICCPR.

<sup>44</sup> International Law is not a law (properly so called) , see Dennis Llyod, *The Idea of Law* (Penguin revised edn, 1970), L.Henkin, *How Nations Beheve* (2nd edn, 1979), J.G.Merrills, *Anatomy of International Law* (2nd edn, 1981) in JG Starke, *Introduction to International Law*, ninth edn, Butterworths, 1984, page. 17.

<sup>45</sup> See Mochtar Kusumaatmadja, notes 44, page 42-50.

<sup>46</sup> See, *Supra*, foot note 11.

<sup>47</sup> Article 3 Refugee Convention 1951.

right to freedom to practice their religion and freedom as regards the religious education of their children,<sup>48</sup> right to housing,<sup>49</sup> the right to education,<sup>50</sup> right to work and social security,<sup>51</sup> the right to prohibition of expulsion or return (“refoulment”),<sup>52</sup> and rights to naturalization and assimilation.<sup>53</sup> The other Refugee rights which are imposed by several international instruments, for example UDHR 1948,<sup>54</sup> Convention Against Torture,<sup>55</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War,<sup>56</sup> Additional Protocol to the Geneva Conventions of 1949,<sup>57</sup> Convention relating to the Status of Stateless Persons,<sup>58</sup> Statelessness Reduction Convention,<sup>59</sup> ICCPR,<sup>60</sup> ICESCR,<sup>61</sup> CEDAW Convention<sup>62</sup> and the Convention on the Elimination of all forms of Discrimination,<sup>63</sup> Genocide Convention<sup>64</sup> and the Convention on the Rights of the Child.<sup>65</sup> Thus, most of international conventions relates to human rights and refugees contains refugees’ right to be implemented by the States.

## VI. Closing

Refugees are also human beings, who possess equal rights with the individuals. Therefore, refugees rights is human rights. However, viewed from its implementation in national law, not all of these rights can be implemented and enjoyed by the individual or refugees. UNHCR as an international organization dealing with refugee was crucial to encourage States to ratify the refugees’ convention.

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<sup>48</sup> Article 5 Refugee Convention 1951.

<sup>49</sup> Article 21 Refugee Convention 1951.

<sup>50</sup> Article 22 Refugee Convention 1951.

<sup>51</sup> Article 24 Refugee Convention 1951.

<sup>52</sup> Article 33 Refugee Convention 1951.

<sup>53</sup> Article 34 Refugee Convention 1951.

<sup>54</sup> For example: Article 8,13,15 UDHR 1948.

<sup>55</sup> Article 3.

<sup>56</sup> Article 44.

<sup>57</sup> Article 73.

<sup>58</sup> Article 4,16,17,21,22,23,24,26, and 31.

<sup>59</sup> See Article 1,4,8, and 9.

<sup>60</sup> See Article 2,12,13,14, and 26.

<sup>61</sup> See Article 11, 12, and 13.

<sup>62</sup> See Article 9.

<sup>63</sup> Article 2,5, and 6.

<sup>64</sup> Article 1.

<sup>65</sup> Article 7 and 22.



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