

10-31-2010

## REFUGEE AND EXTRADITION: COULD A REFUGEE BE EXTRADITED?

I Wayan Parthiana  
*Faculty of Law, Chatolic University of Parahyangan*

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

---

### Recommended Citation

Parthiana, I Wayan (2010) "REFUGEE AND EXTRADITION: COULD A REFUGEE BE EXTRADITED?," *Indonesian Journal of International Law*. Vol. 7: No. 4, Article 3.

DOI: 10.17304/ijil.vol7.4.242

Available at: <https://scholarhub.ui.ac.id/ijil/vol7/iss4/3>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

# Refugee and Extradition: Could a Refugee be extradited?

I Wayan Parthiana<sup>1</sup>

*Refugees are people who are basically forced to leave their homes because of security threats and threats to safety of body and soul, go to another place which he considered safer. There are refugees who fled within the territory of his own country but it is not uncommon that they cross state boundaries. But among so many refugees who cross national borders, sometimes there are some who (allegedly) as a criminal in their home country or in third countries. He used the privilege of becoming refugees in order to avoid criminal charges of the country that has jurisdiction over his crimes. These type of refugees or called illegal refugees, could be extradited as long as they met the principles and rules of law on extradition. While the legal refugees could not be extradited because they are not criminals except if recently it was discovered that they are criminals.*

**Keywords:** Illegal Refugees, Criminal Refugees, Extradition, Home Country, Requiring Country, Required Country, Person Required

## **I. Introduction**

In general, humans coexist safely and peacefully. They avoid vertical or horizontal conflicts as far as possible. But in reality, the conflict is sometimes difficult to avoid and has to be faced inevitably. Conflicts between individuals or groups, whether in large or small scale, come across human life periodically. Such conflict sometimes causes casualties, both human casualties and property. To avoid it, they were forced to move from their original residence to another place which they considered safer and more peaceful. In the ancient times, when the number of the human race is still very small compared to the extent of this earth, human movements from one place to another, for any reason, does not become a big issue.

When states began to form in the modern sense, ie, countries based on territorial principles, freedom and equality, where each country has an area

---

<sup>1</sup> Lecturer of International Law, Faculty of Law, Chatolic University of Parahyangan.

with definite boundaries and with a number of population (people) who inhabit the region<sup>2</sup>, it begin the distinction between residents of a country on the basis of nationality. There are people who belong as citizens of a country and some who are not citizens commonly known as a stranger.

The problem of population movement, especially from the territory of one state to another, is starting to become a problem of states or international problem. There is citizen who move voluntarily or on his own will, for example, caused by the will to obtain a better life in another country than in his own country, either permanently or for a limited period of time. But there are some who were forced to migrate due to circumstances, for example, because of armed conflict between two or more parties, either in domestic or international scale. They were forced to move by leaving the original place of residence elsewhere in the territory of his own country and some are moving to a place in another country due to the original place of residence in his own country was not safe and endanger themselves. These people are commonly known as refugees who generally differentiated between domestic refugees and international refugees (cross-country-border).

Especially on international refugee who despite being frequently occur before World War I, but World War I (1914-1919) have been recorded in history as one of the war that has caused such devastating consequences in the form of international refugee on a large scale. This encourage the League of Nations to approve the Agreement of May 12, 1926 and June 30, 1928, the Convention on October 28, 1933 and February 10, 1938 and Protocol 14 September 1939 which all relating to refugees issues.<sup>3</sup> This suggests that international refugee problem is already become a global problem that can no longer simply regarded as a bilateral issue.

Then World War II, a far more devastating than World War I, created a problem of refugees too, especially in Europe in a much larger scale with the various problems following it which couldn't be handled by countries in Europe, both by the countries who won wars (the allies), as well as by countries who lost the war (the shaft). This is the reason among others which encourage the United Nations General Assembly to hold an International

---

<sup>2</sup> I Wayan Parthiana, *Pengantar Hukum Internasional*, Bandung: Penerbit Mandar Maju, 2nd print, 2003, pp. 44-45.

<sup>3</sup> Article 1 A paragraph 1 of Geneva Convention on the Status of Refugee 1951.

Conference in Geneva (Switzerland) in 1951 which resulted in the establishment of Convention relating to the Status of Refugees.<sup>4</sup> Previously, precisely on December 4, 1950, the UN General Assembly has also ratified the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR),<sup>5</sup> which became the foundation for the establishment of a body that deals with refugees who are directly responsible to the General Assembly and the Economic and Social Council.<sup>6</sup> Since then, various international legal instruments on refugees started out well both in the UN framework and outside the UN framework.

One aspect of the refugee problem which do not receive many attention from scholars of international law in general, is whether a refugee could be extradited or not by the receiving country or host country (required country) due to his involvement in a crime or an offense subject to the criminal jurisdiction of the requesting country. This issue becomes relevant to be discussed because these refugees could be people of various backgrounds which one of them could be the people who are involved in a crime in another country. The main issue is, can a refugee in general, and a refugee who was involved in an offense in particular, be extradited by the host country to the country that has the criminal jurisdiction over that crimes?

## **II. Who Can Be Categorized As Refugee?**

The 1951 Geneva Convention on the Status of Refugees was colored by the situation of post-war world that still leaves the problem of refugees. Before the World War II, actually there are already some international legal instruments concerning refugees. That is why, in Article 1 A paragraph 1 of the Convention is affirmed, that refugee according to the present Convention, are persons who have been designated as refugees under the Agree-

---

<sup>4</sup> This Convention was adopted on 28 July 1951 by UN Conference on the Status of Refugee and Stateless people based on the General Assembly Resolution No 429 (V) on 14 December 1950. According to Article 43, this Convention was enter into force on 27 April 1954. See the text of the Convention in: Center for Human Rights, Jeneve: HUMAN RIGHTS; A COMPILATION OF INTERNATIONAL INSTRUMENTS, Volume I (Second Part), Universal Instruments, United Nations, New York, 1993, pp 634-650.

<sup>5</sup> *Ibid*, pp 655-660. While before, precisely on 1947, UN has established an institution to take care of the refugee problem, International Refugee Organisation (IRO), but it was only lasts lest than 2 years, because in 1950 it was replaced by UNHCR.

<sup>6</sup> See the United Nations System; a separate paper explaining structure of UN as a system.

ment May 12, 1926 and June 30, 1928 or under the Convention October 28, 1933 and February 10, 1938, Protocol 14 September 1939 or the Constitution of the International Refugee Organization.<sup>7</sup>

While Article 1 A paragraph 2 of the 1951 Geneva Convention asserted the definition of refugee in more general sense, with the formulation as follow:<sup>8</sup>

*“For the purposes of the present Convention, the term “refugee” shall apply to any person who: ..... Owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his 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, is unwilling to return to it.*

Although the problem of refugees in Europe is gradually been taken care off, but in the decade of fifties and sixties, even today, the problem of refugees was still popping up in several other regions in the world. On that basis, it is deemed necessary to expand the substance and scope of the refugees either the time or geographic scope of understanding of these refugees. Even the causes of the occurrence of refugee are increasingly expanded.

Therefore, the UN Economic and Social Council agreed on a protocol, namely, the Protocol Relating to the Status of Refugees under Resolution No. 1186 (XLI) on 18 November 1966 and taken over by the UN General Assembly by Resolution No. 1198 (XXI) on 16 December 1966. This Protocol entered into force on October 4, 1967.<sup>9</sup> This protocol is basically to

---

<sup>7</sup> See: UNHCR: PENGENALAN TENTANG PERLINDUNGAN INTERNASIONAL; Melindungi orang-orang yang menjadi perhatian UNHCR, Modul Pembelajaran Sendiri, 1 Januari 2005, pp 5-10.

<sup>8</sup> PENGENALAN TENTANG PERLINDUNGAN INTERNASIONAL; Melindungi orang-orang yang menjadi perhatian UNHCR; Modul Pelajaran Mandiri, UNHCR, 1 Januari 2005, p. 53. Explanation on elements of the refugee definition can be seen in: PERLINDUNGAN PENGUNGSI; Buku Petunjuk Hukum Pengungsi Internasional, UNHCR, 1989. Translated from: REFUGEE PROTECTION; A Guide to International Refugee Law, by Kate Jastram and Marilyn Achiron (UNHCR), translated into bahasa Indonesia by Enny Suprpto and Rama Slamet, pp. 11-12.

expand the understanding, the substance and scope of the refugees. In order for the Convention 1951 to remain valid and can include refugees that occurred after the year 1951, the words: "As a result of events occurring before 1 January 1951 and ...." and the words "as a result of Standard and Poor events" in Article 1 A paragraph 2 is removed.<sup>10</sup>

It turns out that these two international legal instruments, namely, the 1951 Convention and Protocol in 1967, still has not met the needs of countries in the region, such as in Africa and Latin America. That is why countries in the African continent who are members of the Organization of African Unity (OAU, now: African Union), in 1969 agreed on a separate convention on refugees, namely, Convention Governing the Specific Aspects of Refugee Problems in Africa on 1969 and entered into force on June 20, 1970.<sup>11</sup> This OAU Convention besides adding the terms stated in the 1951 Convention<sup>12</sup> also affirms or expand the understanding of refugees as can be found in Article 1 paragraph 2, which states:<sup>13</sup>

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbs public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Whereas in 1984, countries in continental Latin America agreed on the Declaration of Cartagena, Colombia, which support the definition of Refugee Convention 1951 and again expanded the understanding of refugees, as follow:<sup>14</sup>

---

<sup>9</sup> See: HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS ..... , Op. cit., pp. 651-654.

<sup>10</sup> UNHCR; Op. cit. p. 9.

<sup>11</sup> Achmad Romsan et.al.: PENGANTAR HUKUM PENGUNGSI INTERNASIONAL: Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional; Badan Perserikatan Bangsa-Bangsa Urusan Pengungsi Perwakilan Regional, Jakarta, Republik Indonesia, 1st ed., 2003, p. 128.

<sup>12</sup> See Article 1 paragraph 1 Convention OAU 1969 and compare with Article 1 Paragraph 2 Geneva Convention 1951.

<sup>13</sup> Taken from ORGANISATION OF AFRICAN UNITY (OAU) REFUGEE CONVENTION (CONVENTION CONCERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA) 1969 (1001 U. N. T. S. 46).

<sup>14</sup> Taken from: UNHCR: INTERVIEWING APPLICANTS FOR REFUGEE STATUS; Training Module, Training with UNHCR; Chapter 1, 1995, p. 3. For the complete text, see: Cartagena Declaration on Refugees, 1984, conclusion III. 3.

*.....have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.*

With the increasingly number of factors of why people flee with all their problems, the problem of refugees has become more complicated. Refugee problem is not only a problem between the country of origin and the receiving country that host the refugee, but it has turned into a humanitarian issue. In this case the United Nations High Commissioner for Refugees (UNHCR) as one of the UN organ that responsible to the UN General Assembly and Economic and Social Council, plays an important role in dealing with the problem of refugees, cooperation with countries in general, both country of origin of refugees in general and the host country in particular, as well as with international organizations, intergovernmental and non-government with regard to the refugee problem.<sup>15</sup>

It should be emphasized, although the international refugee entering the territory of a host country without any legal documents, their presence in the territory of the host country, can not be viewed as illegal. This is because their arrival to the host country is in urgent situations and in order to save themselves, so they cannot prepare themselves as in under normal conditions. Sometimes they walk or sail on the ocean for days at a distance of tens or even hundreds of kilometers from its country of origin and with limited supplies. They are a mass exodus so that the host country is not ready to accept the arrival of people in such large quantities in a short time, with the complex humanitarian problem.

### **III. Legal and Illegal Refugee**

Among the large number of refugees staying in the host country, it's certainly not all are truly refugees. Sometimes there are people who became refugees but actually involved in a criminal case in a country. They join and immerse themselves in the group of refugees. That is why they need to be

---

<sup>15</sup> Some governmental international organization concerning refugees, beside UNHCR, such as, United Nations Children Fund (UNICEF), World Food Programme (WFP), World Health Organisation (WHO), International Organisation for Migration (IOM), International Committee for the Red Cross (ICRC). See: PENGENALAN TENTANG PERLINDUNGAN INTERNASIONAL .... Op.cit., p. 14 -15.

screened, which one can be classified as refugees and which can not.

In this regard, UNHCR has the authority to do so as provided in its establishment statute and in other international legal instruments concerning refugees. Certainly this selection should be through a partnership with the host country because the screening was performed in the territory of the host country. Even if considered necessary, also with other related international organizations. They who are based on the screening results are classified as refugees, were given an identity or identification as evidence that they are really refugees. Thus, he enjoys the rights and obligations as well as receiving international protection. These are that could be classified as legal refugees. While those who do not qualify as refugees, called illegal refugees.<sup>16</sup>

What about those who do not qualify as refugees or the so-called illegal refugees? Who are they? How they should be treated, especially by the UNHCR and host countries? As an individual or individuals who do not qualify as refugees, they do not have the rights possessed by those who are classified as refugees. Toward illegal refugees, UNHCR, as well as the host country will not provide protection.

Actually, the formulator of the Geneva Convention 1951 has been aware of such groups that are not entitled to refugee status and therefore are not entitled to international protection.<sup>17</sup> This is confirmed in Article 1 F point a, b, and c of the Convention, which limitedly elaborate with the following sentence:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

---

<sup>16</sup> Those considered as legal refugee, are those (allegedly) committing a crime as stated in Article 1 F point a, b, and c Geneva Convention 1951 or other serious crimes such as terrorism, crimes under the jurisdiction of International Criminal Court, as can be see in part C of this Article. Therefore, besides illegal refugee, the term criminal refugee can also be used. In this paper, illegal refugee is used, simply as the anonym of legal refugee.

<sup>17</sup> UNHCR: PAKET INFORMASI MENGENAI AKSESI TERHADAP KONVENSI TAHUN 1951 DAN PROTOKOL TAHUN 1967 YANG BERKAITAN DENGAN STATUS PENGUNGSI; Prepared by Refugee Law Promotion International Protection Division, UNHCR, Geneva, no year, p. 20.



- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The inclusion crime in the a category, can not be separated from the influence of the London Agreement August 8, 1945 which is the foundation for the establishment of the International Military Tribunal in Nuremberg in 1945 and Tokyo in 1946 that defines the three typers of crimes as subject to the jurisdiction of the Court.<sup>18</sup> Both international military tribunal have prosecute a number of people accused as a perpetrator of one or more types of crimes at the time of World War II and those who found guilty have been sentenced. Echoes of the decisions of the Courts seemed to influence the designers of 1951 Convention text which in the end it listed in Article 1 F of Convention 1951.

As for those who are classified to commit non-political crimes or known as common crime (but serious / severe),<sup>19</sup> should not be granted refugee status. If granted refugee status he would enjoy impunity, while he should be responsible for his crime in the local court of the state that has criminal jurisdiction over him. This is clearly contrary to sense of justice of society in general, and the victims in particular. It could be suspected that his departure together with other refugees was in order to avoid lawsuits from states that have criminal jurisdiction over him.

Questions can be asked, what about the people who become refugees but they turned out as a perpetrator of political crime (political offence)? In general, the man accused as the perpetrators of political crimes are those who oppose the government or rulers who were in power in a country, that his political views differ or conflicting with the political views of these governments. This political view is a manifestation of political beliefs they adopt.

---

<sup>18</sup> About International Military Tribunal Nuremberg 1945 and Tokyo 1946, see, I Wayan Parthiana; HUKUM PIDANA INTERNASIONAL; Penerbit Yrama Widya, Cetakan Pertama, Bandung, 2006, p. 181-190.

<sup>19</sup> About what is called as serious non-political crime, Convention does not explain in detail, therefore it's still debatable. But, in relation to extradition law, all crimes that are able to be used as a ground or reason to extradite as stated in extradition agreements, can be categorized as a serious non-political crime.

This is one of the human rights, namely, the right to adopt political views (political opinion), that must be respected and protected by the individuals or by governments that were in power in one country even though his political views were in conflict with the political views of such government.

As a manifestation of respect and protection of human rights to adopt a political view, the prohibition to extradite a political offender (non-extradition of political criminal) has been recognized as one of the important principles in the extradition law. The problem is if a person accused as perpetrators of political crimes are to be refugees in a host country, then it is right to grant him refugee status. By granting refugee status means, to him have been given international protection and thus he should not be extraditable, which also means, his human rights to embrace a political beliefs are respected and protected.<sup>20</sup>

Finally, if a person who claimed himself as a refugee, has committed acts contrary to the purposes, objectives and principles of the UN. Subjects and purposes of the United Nations can be found in Article 1, paragraph 1-4 of UN Charter, namely, maintaining peace and international security (paragraph 1), to develop friendly relations among nations (paragraph 2), realizing international cooperation in resolving various international issues in various fields of human life (paragraph 3) and became the center of each step and action of harmonization of nations in order to achieve common objectives (paragraph 4).

While the principles of the United Nations can be found in Article 2 paragraph 1-7 of the Charter, the principles of equality and sovereignty of all member states (paragraph 1), fulfillment of all rights and obligations based on good faith as defined in Charter (paragraph 2), the peaceful settlement of international disputes so as not to endanger international peace and security and justice (paragraph 3), self-control from the use of violence in international relations against the territorial integrity or political independence of any state or by using any other ways contrary to the subjects and objectives of the United Nations (paragraph 4), all member states would help the UN in any action taken in accordance with the Charter (paragraph 5), countries which are not members of the UN are suggested to act in

---

<sup>20</sup> About political crime, political offence see: I Wayan Parthiana; EKSTRADISI DALAM HUKUM INTERNASIONAL MODERN; 1st ed., Penerbit Yrama Widya, Bandung, 2010, p. 313-394.

accordance with the principles of the Charter (paragraph 6) and the principle of not intervening in the domestic affairs of a country (paragraph 7).<sup>21</sup>

Article 1 and 2 of the UN Charter in international law doctrine are known as *jus cogens*,<sup>22</sup> ie, the rules of international law under any circumstances and for any reason should not be overlooked. Thus, any act of any person, whether state, private person or an institution, which conflicting with or override the rule of law which pertained *jus cogens*, not at all justifiable. Such acts are contrary to the sense of justice of mankind in general.

The three groups of people who do not get international protection as refugees according the the Convention 1951 Article 1 F above, have cover the conditions around that time (year 1951) while the Convention was established. However, if it's connected with the present conditions, it seems that the dividing into three groups containing deficiencies. This is because there are people in other categories, although do not commit crimes as mentioned above, but worth to be doubted if such a person is granted legal refugee status. Who are they?

In general, they are the people who belong to one or more of the groups below:<sup>23</sup>

1. Military personnel from one or both parties who are at war.
2. Militia members who support one of the parties at war.
3. People who are members of a terrorist group
4. People who have status as a prisoner of one or both countries at war and will be or are currently under his punishment in one of the two parties at war or in a third country.
5. The person suspected of committing one of four crimes that are subject to the criminal jurisdiction of the International Criminal Court, namely,

---

<sup>21</sup> See Article 1 and 2 UN Charter in: Joseph Modeste Sweeney, Covey T. Oliver, and Noyes E. Leech; *Documentary Supplement to Cases and Materials on THE INTERNATIONAL LEGAL SYSTEM*; Mineola New York, The Foundation Press Inc, 1991, pp. 2-3. Also in: Office of Public Information; *CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*; United Nations, New York, p. 3 – 5.

<sup>22</sup> About *jus cogens*, see: Christos L. Rozakis; *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES*; North Holland Publishing Company, Amsterdam-New York-Oxford, 1976.

<sup>23</sup> UNHCR: *KONVENSI 1951 MENGENAI STATUS PENGUNGSI DAN PROTOKOL 1967*; Penandatanganan dapat Membuat Seluruh Perbedaan ..... , pp. 9-10. Also in, UNHCR: *THE 1951 REFUGEE CONVENTION*; Questions and Answers, p. 15.

the crime of genocide, crimes against humanity, war crimes, and crimes of aggression (Article 5 paragraph 1 of the Rome Statute in 1998).

In general refugees were civilians who did not participate in armed conflicts or other events which threaten the safety of their lives. They become victims of armed conflict and that become one of the reasons of why they fled. If the person is a member of the military, especially if he is actively participating in armed conflicts and fought in it, it is only fitting he if he couldn't be classified as refugees and therefore do not need to be given international protection.

It's a different case if previously they had left their military status, either because they retire, or because they resigned from the military because of his own volition or was fired as a member of the military before the armed conflict occurs. In this case, he's back into society as ordinary civilians. Towards this people they are appropriately given refugee status.

The same thing applies to people who become active militia and fought in armed conflict. Although he was not military but when armed conflict was going on he is actively engage in combat. Thus, de facto, he was no different from members of the military. Therefore, if he evacuate with other civilians, this kind of people do not deserve to be classified as refugees.

Another group is those who classified as terrorists. As is well known, terrorism is feared by mankind and therefore condemned by almost all people in the world. Cases of crimes of terrorism that occurred on earth from the past until now, has caused innumerable victims. Terrorism may be regarded as enemies of humanity (*hostis Humani generis*, Enemy of mankind). Recently has appeared a tendency that the crime of terrorism subordinated to the universal jurisdiction by states, as already provided in national criminal law respectively. In conjunction with the refugee problem, if someone is suspected of committing a crime or involved in terrorism, then it is proper to classify him as an illegal refugee.

As for people who have the status as a prisoner for a serious non-political crime in a country, whether that country is their own country or a third country, or in a country at war, who had escaped from prison, the country concerned and then evacuated along with other civilians, actually are the same with the persons who is alleged to have committed serious non-political crimes as described above. The only difference is, their status as an

inmate while those belonging to the above ketegori was still a suspect, defendant, inmate status or not. In this case, even this kind of person should be treated the same as those which still existed as a suspect or defendant, such as has been stated above.

Regarding the four types of crimes that are subject to the criminal jurisdiction of the International Criminal Court, there is some overlap with the crimes specified in Article 1 F point a Convention 1951 as described above. Both characterize war crimes and crimes against humanity, but the 1951 Convention does not cover the crime of aggression and crimes of genocide, instead, the Rome Statute Article 5 paragraph 1 do not include crimes against peace. But because of the seriousness of crime of genocide and crimes of aggression, then a refugee who is alleged to have commit one or both of these crimes, naturally can not be classified as legal refugees but illegal refugees.

What about the civilian officials who actively supported the country's military at war? For example, providing logistical support to the army of his country or provide facilities to support the country's military. But after realizing that the troops they supports are about to be defeated, they escaped and later joined the displaced civilians who incidentally are their own people. Because they are a civil (not military), and during the armed conflict was in its position as provider of assistance / facilities and this was only granted in his capacity as civilian officials from their own country, then they still have the status of the civilian. Therefore, during the displacement as the other civilians they are equally treated. Thus, It is only fitting that they be treated the same as other refugees, ie, equally as legal refugees. Except if he was involved in war crimes, crimes against humanity, crimes of genocide, serious non-political crimes, has committed acts contrary to the purposes, objectives and principles of the UN or as a member of terrorist group.

#### **IV. Some Problems in Classification Practices**

In practice, the UNHCR and the host country will face some problems in the application of criteria set out in international law instruments on refugees who have been mentioned above, especially in classifying a person as a legal and illegal refugee. Indeed some of the refugees are easily classified as legal refugees and subsequently given legal identity as a refugee that can be used as authentic evidence after the fulfillment of refugee requirements

as provided in international law instruments concerning refugees.

But the problem is how to determine the displaced person who is classified as a perpetrator of one or more types of crimes specified in Article I F point (a), (b), and (c) 1951 Convention or the perpetrators of crimes subject to the criminal jurisdiction of the Criminal Court International, or classify them as members of the military or the militia of one of the parties in conflict, or as perpetrators of terrorism. Also, in determining whether the person concerned is in inmate's status as one who committ serious non-political crimes.

As individuals who are categorized into one or more of the crimes mentioned above, they can not be classified as refugees, they would have in any way trying to hide all indications and thus hoped that they would be classified as legal refugees. Of course in reality, there are some successful and some are not. The successful one are certainly going to get a legal refugee status while others are not, will be classified as illegal refugees.

For those who can not legally classified as refugees, based on one or more reasons mentioned above, they ought to be given clear information on why they are refused to be given legal refugee status. Don't they have a right to know about the reasons why they are classified as illegal refugees rather than refugees? The next problem, if there is one or more of those who refused to be classified as illegal refugees on the grounds that he was not as a perpetrator or involved in the alleged crimes to him, what legal action can they take?

If the national law of the host country does provide a channel to be taken, in accordance with the principle of territoriality, of course, the legal channel provided by national law of the host country is the most effective way. Or it can be taken to international level, as long as there is forum. For example, a settlement through the the international level, when the person concerned feels that his human rights has been violated as a result of the determination of their status as illegal refugees. For example, as applicable in the European region with the Commission on Human Rights (European Commission on Human Rights) and the European Court of Human Rights. However, it is not unfortunately in every region of the world having such a mechanism.

In addition, there is the possibility of someone who has been declared status as legal refugees, then it was only recently that the man known as has

been committing acts which can be categorized into one or more actions specified in Article 1 F (a), (b), and (c) 1951 Convention, as already described above. In this case, it is not wrong if his legal refugee status was revoked and he was declared as illegal refugees. All rights and international protection who has been received earlier, declared invalid after the cancellation of his legal refugee status.

By streamlining the application of criteria of refugees, UNHCR should cooperate with countries besides the host, also cooperate with international organizations, both intergovernmental and non-governmental that may have a more complete and accurate information about a refugee in determining whether he meets the qualification as legal refugees or not. Moreover when it comes to crimes that are subject to the criminal jurisdiction of the International Criminal Court, should the Prosecutor at the Court in accordance with their authority, is involved in such determination. Thus, errors or mistakes in the classification of someone as a legal refugee or not, will be reduced.

#### **V. How's the Treatment toward Illegal Refugees?**

The 1951 Geneva Convention on the Status of Refugees or other international law instruments on refugees, does not mention how to treat illegal refugees. This is only natural, because the purpose of the Convention was only to regulate those who are legally classified as refugees, who meet the criteria as a refugee as defined in the Convention. Those who are classified as illegal refugees are certainly outside the scope of the Convention. That they participate in a group of refugees, although they do not deserve the refugee status, shows that their intentions are not good. :

The question arises, how should we treat them? Because they are in the territory of the host country, then they are subject to the territorial jurisdiction of the country. As a foreigner residing in the territory of a country, they would have to obey all the rules of national law of the host country and international law concerning foreigners residing in the territory of a country. First, with respect to national legislation the country concerned, particularly the laws on immigration, among others, regulate the entry of foreigners into the territory of that country. Of course the host country will treat them as a person whose presence is illegal in its territory because its existence is not accompanied by legal documents, as is the existence of a

legal alien in the territory of a country. The host country is entitled to apply its domestic law against people like this and apply standards based on international law concerning the presence of strangers in a country.

It can be ascertained, that the existence of illegal refugees in the territory of a country is the same with legal refugee, ie, without any documents that could support it. However, those who are legally classified as refugees must be protected by the host country and host country should not punish them due to the illegal entry into the territory of that country, as affirmed in Article 31 paragraph 1 of the Geneva Conventions of 1951. They are under the authority of UNHCR. They have rights and assume liabilities as a refugee according to the norms of international law on refugees.

Instead, those who are classified as illegal refugees, their existence in the territory of the country concerned clearly illegal. In general terms, they are classified as illegal aliens. They are fully subject to the territorial jurisdiction of that country. However, treatment of host countries towards them remained to be done in the corridors of respect and protection of human rights.

#### **VI. Legal Remedy that Can be Done by Host Country**

One of the remedies that can be achieved by the host country in dealing with illegal refugees is by conducting a criminal trial based on the charges of violating immigration laws by entering the country illegally. The court may impose expulsion in the decision against him, requiring him to leave the country within a certain time limit after undergoing his sentence. Then after they finish serving his sentence, the person concerned must leave the territory of the country in time as specified in the verdict. The weakness of this way is, the solution is case by case and requires a relatively long time because the court will examine or judge the person to person, what more if it is quite a lot.

To which country he headed to, surely a person's own affairs. In practice, he will return to his own country when the situation and conditions in his country was stable. If he does not want to return to his country he could choose a third country, as long as the country is willing to accept him. But because he did not have any documents, surely he would face difficulties. Unless the country's embassy in the host country, willing to release the document that can be used as legal documents to go to the countries on its



target.

Other efforts which are even more effective are to deport them directly without the judicial process first. They were ordered to go or leave the country to return to the country from which he originally came, or country of citizenship. This action is legitimate, because as a sovereign country, that country is entitled to take action against anything or anyone in its territory, or course if they do no conflict with international law.

Questions can be raised, whether this action does not violate the human rights of the person concerned, because he was forced to return to the country from which he originally came while the country was the one he has avoided. In other words, he actually just left the country and did not want to go back there. However, due to its presence in the host country was illegal, then deport the host state action is legitimate. Deportation action must be viewed as a manifestation of the sovereignty of that country to maintain security and order within their country.

Worth to be emphasized here, that the deportation was not against the principle of "non refoulement"<sup>24</sup> which is one of the principle of refugee law. According to this principle, a refugee should not be forcibly returned to countries where he originally came. While these illegal refugees clearly did not belong as a refugee and therefore do not get international protection, based on this principle. Moreover, his presence in the host country is illegal. With deportation, then the affairs of the country concerned toward people who are classified as illegal refugees is finished.

The way above is only regarding the arrival and their illegal presence in the host country but not yet in regards to the crimes they committed in other countries or in countries where he came from, or the crimes they have committed in a place outside the territory of any country. The host country as long as it has criminal jurisdiction over the crime would have been entitled to prosecute the perpetrators according to its own national criminal law.

What if the host country does not have criminal jurisdiction over the crimes? Indeed as has been stated above, deportation is the most effective way. Problem of serious crime (non political) that he had done, is not the business of the host country, but the affairs of the country where the crimes were committed of the affairs of other countries who also have criminal jurisdiction over the crimes.

Ways as described above the common way accepted in the international world to treat foreigners whose presence in a country is not desired by various reasons. Now it will be reviewed, more specifically, a particular group of people classified as illegal refugees mentioned above. They are, illegal refugees who (allegedly) committed crimes that have been described above, such as non-political serious crimes, crimes against peace, crimes under international law, crimes against humanity, genocide, war crimes, crimes of aggression, terrorism, or have been taking action contrary to the purposes, objectives and principles of the UN Charter.

What action can be taken by host countries on the alleged illegal refugee who commit one or more of these crimes? As long as the host country has criminal jurisdiction over the crimes that, for example, on the basis of criminal jurisdiction based on universal principles, then the state can adjudicate itself based on its domestic criminal law against illegal refugees suspected of being the culprit. Only, in practice, countries may face difficulties in the process of verification, for example, obtain tools or goods at the evidence, considering the crime occurred in the territory of another country and also the evidence in the country, let alone the country being in situations of armed conflict. There is a legal institution which is called mutual assistance in criminal matters<sup>25</sup> but the question is, whether the host country and country or countries which have criminal jurisdiction over crimes are bound in an agreement. If there is no agreement, it will be difficult to obtain the evidence which turned out to be in that country, unless both parties agree to help each other based on the mutually prevailing good relations.

What action can be taken by host countries on the alleged illegal penggungsi become agents of one or more of these crimes? Throughout the host country has criminal jurisdiction over crimes that, for example, on the

---

<sup>24</sup> UNHCR: HUMAN RIGHTS AND REFUGEE PROTECTION; Part II, Specific Issues, Training Module, June 1996, Chapter IX, Refoulement, p. 149 -168.

<sup>25</sup> As an example the Treaty on Mutual Assistance in Criminal Matters among 8 countries in South East Asian, 29 November 2004. Indonesia has national regulations, Law No. 1 Year 2006 concerning reciprocal aid in criminal matters (UU tentang Bantuan Timbal Balik dalam Masalah-Masalah Pidana (LNRI Nomor 18 Tahun 2006). Also in Roma Statute 1998 (Part IX Article 86-102) Also in the Rome Statute in 1998 (Part IX, Section 86-102) there are special arrangements of cooperative mutual aid in judicial issues, including cooperation to get the person or the perpetrator of crimes and cooperation in matters of evidence. See the explanation in, I Wayan Parthiana: HUKUM PIDANA INTERNASIONAL; Penerbit Yrama Widya, 1st ed., 2006, p. 265 - 397.

basis of criminal jurisdiction based on universal principles, and then the state can adjudicate itself based on its domestic criminal law against illegal refugees suspected of being the culprit. Only, in practice, countries may face difficulties in the process of verification, for example, obtain tools or goods at the evidence, considering the crime occurred in the territory of another country and also the proof tools in the country, let alone the country being in situations of armed conflict. There is a legal institution which is called mutual assistance in criminal matters but the question is, whether the host country and country or countries which have criminal jurisdiction over crimes that are bound in a deal. If there is no agreement it will be difficult to obtain the means of proof which turned out to be in that, unless both parties agree to help each other based on the prevailing good relations mutually.

Nowadays, especially after the coming into force of the Statute of the International Criminal Court (Rome Statute in 1998) on June 18, 2002 and at the same time began the establishment of the Court under the Statute, the four types of crimes that are subject to the jurisdiction of the crime that happened afterward, the perpetrator may be filed and trial before the Court through a mechanism that is specified in the Statute. In principle, these mechanisms can be based on the initiative of the respective host countries that took them to the presence of the Court with the first states accept the jurisdiction of the Court, special for these crimes, or, the Court (the prosecutor at the Court) who actively took to the field to investigate about the existence of crimes subject to the criminal jurisdiction of the Court.

## **VII. Could a Refugee Be Extradited?**

### **A. What is Extradition?**

Before discussing the principal issues in question, first, extradition law must be understood. Below are some basic problems of extradition.

First, in general the law of extradition is a matter between states, in particular the problems between two countries, namely, requesting-state and requested-state. Requester-state is a country that has criminal jurisdiction over crimes or criminal acts performed by a person or called the person sought. While the required-state is a country where the person sought is located. Requested-state may have or not have criminal jurisdiction over crimes committed by person sought. As a sought person, he maybe has the status as a suspect or defendant or as an inmate.

Second, an extradition problems arise, starting from the earliest step, ie, a request from the requesting state to the required-state, so that the required-state extradite (submit) a person who was asked due to his crimes subject to the criminal jurisdiction of the requesting state, with the intent and purpose, to be judged by the requesting state for the crime (the culprit, the defendant) or to serve his sentence (the inmate). The requirement of prior demand is a prerequisite, that is, if no request from the requesting state, the state-requested can not be unilaterally extradite (submit) the person to the requesting state.

Third, the extradition was based on several principles, such as, the principle of a double crime, the principle of specificity, the principle not extraditing political offenders, the principle of not giving own citizens, the principle of ne / non bis in idem, and the expiry principle. In addition to these principles, there is a set of legal rules on extradition. Both principles and rules of law, is a limitation for the requesting state and the required-state in extraditing the person sought. If one of the principle or rule of law is not obeyed by one or two countries, then extradition should not be made.

Fourth, extradition as a matter of inter-state problem, about the procedure or mechanism of extradition, both procedures in filing a request by the requesting state to the required-state of the person sought, the procedures of the required-state notification to the requesting state of granting or rejecting the request, the procedure of self-conduct extradition (delivery) by requesting country if the request is granted by the required-state, all these things must be done through diplomatic channels. If not carried out through diplomatic channels, for example, the person who requested it be submitted directly by the state police, the police requested to the requesting state, these actions did not constitute extradition.

Fifth, all the principles and rules concerning the extradition laws are largely animated by human rights or may also be regarded as a manifestation of respect and protection of human rights in general, the human rights of people who have been requested in particular. Therefore, all the principles and rules concerning the extradition law, must be met or complied with by both parties. If one is not fulfilled, then the estradtion of the person sought can not be done.

Sixth, there are a number of countries in the world that requires an extradition treaty to be carried first on the person sought to be extradited. If

between the two countries are not bound by an extradition treaty, extradition can not be done. Conversely, there are a number of countries that do not require one. Countries in this second category, in his capacity as a state-required, are willing to extradite an offender or the person sought to the requesting state, even though between them are not bound by an extradition treaty. This applies reciprocity between the two countries. Extradition based on national law of each party and the principles and rules of law on extradition which has been recognized as customary international law.

### **B. Legal Refugee and Extradition**

Based on the description on extradition as mentioned above, the question of whether a refugee can be extradited, can be answered, that a legal refugee can not be extradited. There is some argument to be made to strengthen it, as follow:

First, he left the country in which he was a national of that country or domiciled in a country due to the threat to his life, not because they are involved in a criminal case or not because to avoid the criminal prosecution of the country where he was a national or from the third state.

Secondly, as pointed out above, to conduct extradition, first there must be a request from the requesting state, ie, the countries which have criminal jurisdiction and concerned to prosecute and / or punishing the person sought for the crimes committed. A refugee not formally associated with a crime or offense in that category, certainly can not be extradited. In fact there will be no state which requires extradition to the host country as a place of its displacement.

It's a different case if someone is already established as legal refugees, but only recently discovered that he was a perpetrator of a crime or criminal acts which are categorized into one or more of the crimes that have been outlined above. For example, for countries which have criminal jurisdiction over crimes turned out to know the existence of the person concerned as a refugee in the territory of the host country. Then that country (the requesting state) filed a request for extradition to the host country (the required-state) on the basis of an extradition treaty existing between the two sides and real crimes were classified as crimes that could serve as a basis for request of extradition (extraditable crimes). In this case, the host country in a position as a required-state must be coordinated with UNHCR as an insti-

tution that provides legal refugee status of the person concerned. If the reason is strong enough, the UNHCR may revoke the status of the person concerned as a legal refugee. With the cancellation he no longer considered as legal refugees but changed its status to illegal refugees. Furthermore, UNHCR handed over the person to the host country. Thus, UNHCR is no longer in a relationship with the person concerned. Furthermore, the host country is in a position as a requested-state will follow up the requests from the requesting state to extradite the person concerned. If the request is granted, then it continued with the extradition of the person concerned by the requested-state (host country) to the requesting state.

What if the requested-state refused the request from the requesting state to extradite the person concerned? Does the person concerned may demand the UNHCR to restore their refugee status? To answer this question, first we must know the reason of the required-state to reject the request. If the reason for the rejection of the required-state, for example, because the state-requested think that the crime is a political crime, in accordance with the principle of "non-extradition of political Criminals", the person concerned can ask the UNHCR to legal status as refugees being returned. However, if the UNHCR remains at its founding and maintaining what has been decided upon the person concerned, this is clearly a dispute between two parties, that settlement can be reached through such mechanisms as have been described above.

Conversely, if the crime is one or more of a serious non-political crime as specified in Article 1 F point (a), (b) and (c) or terrorism, crimes of genocide, crimes of aggression, although the demand to extradite was rejected by the required-state, but the reason for disapproval is not because of political crimes, but for other reasons, he can not claim to UNHCR to return his refugee status. He should still be viewed as illegal refugees, like other illegal refugees who had already declared as illegal refugees before him.

This exposure is simply an example, when a legal refugee whose legality have been canceled, can or can not demand recovery of legal status as a refugee in relation to the issue of extradition. In practice, the must be viewed and studied case by case, because in matters of extradition, the case with the other one is not always the same, even more difference.

### C. Legal and Illegal Refugee

Illegal refugees in the category as perpetrators of serious non-political crime, terrorism, crimes against peace, war crimes, crimes against humanity, crimes related to human rights, crimes of genocide, and crimes of aggression, basically can be extradited. Similarly, if an illegal refugee (allegedly) committed the crime other than the above can also be extradited by the host country (the requested-state) to the state that has criminal jurisdiction over crimes that (peasant-state).

Pengungsi ilegal dalam kategori sebagai pelaku kejahatan non-politik yang serius/berat, kejahatan terorisme, kejahatan terhadap perdamaian, kejahatan perang, kejahatan terhadap kemanusiaan, kejahatan berat mengenai hak asasi manusia, kejahatan genosida, dan kejahatan agresi, pada dasarnya dapat diekstradisikan. Demikian pula jika seorang pengungsi ilegal (diduga) melakukan kejahatan lain selain daripada semua kejahatan di atas juga dapat diekstradisikan oleh negara tuan rumah (negara-diminta) kepada negara yang memiliki yurisdiksi kriminal atas kejahatannya itu (negara-peminta).

However, extradition can only be done, as long as the crimes were classified as extraditable crimes as contained in the extradition treaty between the two parties. Conversely, if the extradition treaty between the two parties did not include such crimes as extraditable crimes, the person concerned would not be estradited, even if it was true that he was the culprit.

On the other hand, extradition can also be done even though the two countries are not bound by the extradition treaty, but both parties are willing to extradite based on good relationships on reciprocal condition and both parties agreed to extradite culprit. In this second case, the extradition done based on law or regulations of national legislation on extradition of each party and based on the principles and rules of international law on extradition which has been recognized as customary international law.

However, as has been described above, the initial step of the process of extradition is a request from the requesting state to the state-required to extradite a person concerned on the basis of the crimes committed. With no demand, extradition can not be done.

In practice, sometimes there are two or more countries which are making a request to the required-state. To which of the requesting state the person concerned will be extradited? In doctrine or in the extradition treaty, there are some points of considerations that can be used as reference by the

required-state, such as, demand for which of the requesting state received in advance, with the requesting state-of-state which has requested tied to an extradition treaty, severity of the offense if that type of crime weights are used as an excuse to ask extradition by each of the requesting state, in the territory of the requesting state which of the crimes were committed, in the territory of the requesting state where the crimes which cause the greatest casualties , and requesting that the state-Which is the country of citizenship of the person sought. However, regardless of the required-state decisions about which of the requesting state requests are granted by the required-state, requesting-state that his request was not granted, must be respected.

If the request is granted, continued with the process of extradition by the requested-state to the requesting state. Conversely, if the request is rejected, or if there is no country that submitted a request for extradition for someone who has the status of these illegal refugees, how should the treatment of requested-state or the host country against people like this? To demand legal status as refugees to the UNHCR seems to have no longer possible, except lately it found strong evidence that the person concerned did not engage in one or more of any crime.

In this case, the host country is fully able to enact laws or regulations in its national legislation upon the person concerned. The host country may prosecute the person, if they do have criminal jurisdiction over the crime and if found guilty will be sentenced to criminal punishment.

If the host country does not want the whereabouts of such persons in its territory, while on the other hand the host country has no criminal jurisdiction over the crimes, then the relevant country can deport such persons, by ordering him to leave the territory of that country. Same thing also applies to illegal refugees who have previously been tried and convicted by the host country with a permanent binding force and has finished taking his punishment. After he finished his punishment he can be ordered to leave the territory of that country, after the expiry of time limit that allowed him to be in the territory of the country.

### **VIII. Conclusion**

Based on the above discussion, it can be concluded, that only the persons who are classified as illegal refugees who (allegedly) as a perpetrator of a crime or offense alone, both in their status as a suspect, defendant, or



prisoner, that can be extradited by the host country in its position as a requested-state to the countries which have criminal jurisdiction over their crimes that in its capacity as the requesting state. While the legal refugees, can not be extradited because they are the ones that have been defined status as a refugee by UNHCR after going through a selection process in accordance with the provisions of international legal instruments concerning refugees. Unless it is recently known that there were strong allegations about their involvement in one or more serious offenses specified in Article 1 F point a, b, and c 1951 Geneva Conventions or other serious crimes which heavily growing lately, such as terrorism, genocide and aggression.

But it needs to be pointed out, that he was not extraditable because he was a refugees, but as an individual who become perpetrators of evil and wickedness that can be used as an excuse to the extradition both based on extradition agreement between parties, or based on the basis of good relations between the two parties in the case that parties are not bound by an extradition treaty. Although a person residing in a country with no status as refugees, whether its presence in the territory of a country is legal or illegal, as long as he is an alleged perpetrators of crimes that can be used as an excuse for extradition by the state that has criminal jurisdiction and the host state, extradition can be done, certainly when all the principles and rules of law on extradition are fulfilled.

#### **BIBLIOGRAPHY**

Center for Human Rights. *Human Rights; A Compilation Of International Instruments*. Volume I (Second Part). New York: Universal Instruments, United Nations, 1993.

Jastram, Kate & Marilyn Achiron. *Perlindungan Pengungsi; Buku Petunjuk Hukum Pengungsi Internasional*. UNHCR. 1989

Parthiana; I Wayan. *Ekstradisi Dalam Hukum Internasional Modern*. Bandung: Yrama Widya, Bandung, 2010

Parthiana; I Wayan. *Hukum Pidana Internasional*. Bandung: Yrama Widya. 2006

Parthiana, I Wayan. *Pengantar Hukum Internasional*. Bandung: Mandar, 2003

Romsan, Achmad, et. al. *Pengantar Hukum Pengungsi Internasional:*

*Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional; Badan Perserikatan Bangsa-Bangsa Urusan Pengungsi Perwakilan Regional. Jakarta: UNHCR Indonesia, 2003*

*UNHCR. Interviewing Applicants for Refugee Status; Training Module, Training with UNHCR. 1995*

*UNHCR. Pengenalan Tentang Perlindungan Internasional: Melindungi orang-orang yang menjadi perhatian UNHCR, Modul Pembelajaran Sendiri 2005*

*Sweeney, Joseph Modeste. et. al. Documentary Supplement to Cases and Materials on The International Legal System. New York: The Foundation Press Inc, 1991*