

CHAPTER II

LITERATURE REVIEW

A. Asylum

Asylum is a form of protection extended to individuals by the state in charge. An asylum-seekers different with refugee, asylum-seekers is person or group who seek for refugee status. Asylum seekers must prove that they have a well-founded fear of future persecution based on race, religion, nationality, membership in a particular social group, and/or political opinion.

The Universal Declaration of Human Rights 1948 is the basic instrument of human rights which regulate the right of every person to seek asylum by reason of a threat of persecution in their home country. The Declarations on Territorial Asylum is an international instrument to regulate more details about the asylum.

1. The Background of Asylum

International law commission in its meeting at Bath in 1950 defines asylum as protection given by a country in the region or elsewhere that are in supervisory organs, to someone who comes asking (the Application in Latin America of International Declarations

and Conventions Relating to Asylum, A Study of the International Commission of Jurists, Geneva, on September 1975).⁸

In the early development of the asylum, the right to the protection given to places of worship and to the state against a foreign national who is in fugitive status without considering the type of crime or the perpetration of the offense. So, a kind of ordinary crime cannot be extradited.⁹

On asylum protection, there is one important aspect which is non-refoulement principle. This principle is a basic fundamental law of refugee law. The concept of the core principles is to forbid states to return or expel a person/group of people in the region where their life or freedom is threatened.¹⁰

The principle of non-refoulement is part of customary international law. Thus, all countries are legally bound by the prohibition on returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion.¹¹

⁸Atik Krustiyati, 2010, *Penanganan Pengungsi di Indonesia: Tinjauan Aspek Hukum Internasional dan Nasional*, Surabaya: Brilian Internasional, p. 3

⁹Iman Prihandono, *Pemberian Suaka oleh Negara: Kasus Pemberian Suaka oleh Pemerintah Australia Kepada 42 WNI Asal Papua*, www.imanprihandono.files.wordpress.com/2008/07/pemberiansuaka.pdf, p. 4, downloaded on February, 24, 2013 at 2:00 a.m.

¹⁰Wagiman, 2012, *Hukum Pengungsi Internasional*, Jakarta Timur: Sinar Grafika, p. 92

¹¹ UNHCR, 2005, *An Introduction to International Protection: Protecting Persons of Concern to UNHCR*, UNHCR, p. 28

2. International Instruments Relating to the Asylum

a. Universal Declaration of Human Rights

Enacted by the General Assembly of United Nations on December 10, 1948 through Resolution 217 A (III). Article 14 of the Universal Declaration of Human Rights, states that:

- 1) *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
- 2) *This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

Therefore, granting entry permits to asylum seekers as well as the treatment given to them is important based on international law. This is to ensure the protection of human rights implementation, so that asylum seekers are not forcibly returned to their home country or place where he/she faces persecution.

b. Declarations on Territorial Asylum

Enacted by the General Assembly of United Nations on December 14, 1967 through Resolution 2312 (XXII). The opening sections of this declaration says that the Declarations on Territorial Asylum refers to the Universal Declaration of Human Rights Article 13 and 14 relating to the right to seek asylum because of the persecution, right to leave and return to his country. In Article 1, paragraph 1 stated:

“Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human

Rights, including persons struggling against colonialism, shall be respected by all other States."

B. Refugees

1. The Definition and Scope of Refugee

The disaster, in particular man-made disasters, such as war, ethnic conflict, and discrimination make people in small or large number move from one place to another, even this movement to transcend national boundaries. This group is in a very vulnerable condition, they do not get protection from their own country, and often their own government that persecuted them.

Black's Law Dictionary defines refugee as *a person who arrives in a country to settle there permanently; a person who immigrates.*¹² While in Article 1A (2) 1951 Convention Relating to the Status of Refugee, defines refugee as:

".... any person who: "As a result of events occurring before 1 January 1951 and 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."

¹² Bryan A. Garner, 1999, *Black's Law Dictionary*, Eight Edition, Thomson West, St. Paul Minn, 1999, p. 1307

Then the definition of refugee in 1951 Convention expanded in Article 1 (2) Protocol Relating to the Status of Refugee 1967:

“For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” and the words “... a result of such events”, in article 1 A (2) were omitted.”

There are some inclusion clauses to the definition of refugee in 1951 Convention. These clauses become the consideration for determining the status of refugee, such as:¹³

a. Well-founded fear

The person concerned must have good reason for fearing return to his/her home country. There are both a subjective element (the person’s fear) and an objective element (external evidence “justifying” this fear) to the well-founded fear. Generally, the former is deduced by examining an individual’s statements and behavior. The latter requires an assessment of the conditions in the country of origin, among other factors. In some cases, when a person has left a country in which human rights violations are widespread and severe, the objective evidence may be sufficient on its own to establish a well-founded fear.

b. Persecution

The core concept of persecution was deliberately not defined in the 1951 Convention, suggesting that the drafters intended

¹³ UNHCR, 2005, *An Introduction to International...*, *Op.cit.*, p. 57

country of nationality or habitual residence is only a refugee if this unwillingness is related to a well-founded fear of persecution.

Articles 1D and 1E of the 1951 Convention define the circumstances under which persons who otherwise qualify for refugee status under the inclusion clauses are nevertheless denied such status because they do not need international protection. These provisions apply to:¹⁴

- a. Individuals receiving United Nations protection or assistance other than from UNHCR.
- b. Individuals who are not considered to be in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the same rights and obligations as nationals in that country.

Article 1F of the Convention is intended to exclude from refugee status those who do not deserve such status because of their responsibility for certain serious acts. This provision applies if there are serious reasons for believing that an individual has:¹⁵

- a. Committed a crime against peace, a war crime, or a crime against humanity;
- b. Committed a serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee;

¹⁴ *Ibid.*, p. 58

¹⁵ *Ibid.*, p. 59

interpretations of the term to be sufficiently flexible to encompass various and changing forms of persecution. Persecution is understood to comprise serious human rights abuses or other serious harm often, but not always, perpetrated in a systematic or repetitive way. Thus, death, torture, physical assault, unjustified imprisonment, and illegitimate restrictions on political or religious activities are all examples of persecution. Discrimination will not normally amount to persecution in itself, but particularly severe discrimination will usually qualify as persecution on cumulative grounds. In contrast, neither natural disasters nor poor economic conditions are considered to be persecution.

c. **Reasons of Race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion**

To be a Convention refugee, a person must have a well-founded fear of persecution for one of these reasons:

- 1) Race is understood to cover all ethnic groupings often referred to as races.
- 2) Religion comprises any belief system held by an individual. The right to freedom of religion under human rights instruments includes the freedom to change religion and to manifest it in public or private, whether through teaching, practice, worship or observance, as well as the right not to have any religion.

- 3) Nationality is not confined only to citizenship but refers also to membership of any ethnic, religious, cultural or linguistic community.
- 4) A particular social group is a group of persons who either share a common characteristic, other than the risk of persecution, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of fundamental rights. Political opinion covers the holding or expression of views on any matter regarding the State, government or public policy.

d. Outside the Country of Nationality/Former Habitual Residence

A person cannot be a refugee if he/she is still within the territory of his/her home country. This does not, however, mean that the fear of persecution must have arisen because of events that took place while the person was still in that country.

e. Unable or Unwilling to Avail Him- or Herself of that Country's Protection

Persecution by the authorities of the home country is often the reason why a refugee is unable to avail himself/herself of national protection. Circumstances beyond his/her control, such as an ongoing civil war, may also prevent him/her from seeking that country's protection. A person who refuses to seek the protection of his/her

- c. Been guilty of acts contrary to the purposes and principles of the United Nations.

Under Article 1C of the 1951 Convention, refugee status comes to an end when the person concerned:¹⁶

- a. Voluntarily accepts the protection of his/her country of nationality;
 - b. Voluntarily re-acquires his/her nationality after losing it;
 - c. Acquires a new nationality and enjoys the protection of that country;
 - d. Has voluntarily re-established himself/herself in the country he/she fled because of fear of persecution;
 - e. Can no longer refuse to accept the protection of this country because the circumstances that led to recognition as a refugee have ceased to exist;
 - f. Has no nationality but can no longer refused to accept the protection of his/her country of habitual residence because the circumstances that led to recognition as a refugee has ceased to exist.
2. International Instruments Relating to the Refugee

Refugees are very vulnerable to ill-treatment or persecution by the authorities in any country where they have been displaced. As individuals, community groups, and as human beings they are entitled

¹⁶ *Ibid.*, p. 59 – 60

to humane treatment. Therefore, the refugee needs international protection. There are some instruments which regulated the refugee:

a. The 1951 Convention relating to the Status of Refugees

The 1951 Convention is the starting point for any discussion about international refugee law. It is one of only two universal refugee instruments; the second is the 1967 Protocol to the 1951 Convention. The Convention was a groundbreaking instrument in several ways, most significantly because, for the first time in international law, it provided a general definition of a refugee.

The 1951 Convention also declares that:¹⁷

- 1) Protection must be extended to all refugees without discrimination;
- 2) Minimum standards of treatment must be observed in relation to refugees, who, for their part, have certain duties towards the State that hosts them;
- 3) Expulsion of a refugee from the country of asylum is of such gravity that it should only take place in exceptional circumstances, on the basis of national security or public order risks;

¹⁷ *Ibid.*, p. 26 – 27

- 4) As the provision of asylum may place an undue burden on certain States, satisfactory solutions can only be achieved through international cooperation;
- 5) Protecting refugees is a humanitarian gesture, and so the granting of asylum should not cause tension between States;
- 6) States must cooperate with UNHCR in the exercise of its functions and facilitate its task of supervising the proper implementation of the Convention.

This Convention was drafted in response to refugee problems that existed in post-war Europe. As such, there are two major limitations on its application. First, although the refugee definition is generic, it only concerns people who fled their countries of origin as a result of events taking place before 1951. Second, States becoming Parties to the Convention have the option of restricting its application to refugees in Europe only.

b. The 1967 Protocol relating to the Status of Refugees

The aim of the 1967 Protocol was to acknowledge the applicability of the 1951 Convention to contemporary refugee movements. The Protocol is an independent instrument to which States may accede without becoming Parties to the 1951 Convention, though this rarely happens. States Parties to the Protocol agree to apply the provisions of the Convention to

refugees who meet the Convention's definition but without the Convention's time or geographical limitations.

When becoming Parties to the Convention and/or the Protocol, States may expressly mention that they will not apply, or will only apply with modifications, certain articles of the Convention. These reservations cannot, however, be made in relation to key provisions, including Article 1 (the refugee definition), Article 3 (non-discrimination based on race, religion or country of origin) and Article 33 (non-refoulement), provisions which all Parties to the Convention and/or Protocol must accept.

3. The Indonesian Regulation Relating to the Refugee

Before someone recognized his/her status as a refugee, he/she was an asylum seeker.¹⁸ Institution of asylum in Indonesia was first recognized through the Prime Minister's Circular Letter No. 11/RI/1956 Protection on Political Escape.¹⁹ Article 1 states that:

"To political escape, who enters and exists in Indonesia will be given protection under human rights and fundamental freedoms, in accordance with customary international law."

Furthermore, the recognition of the institution of asylum was strengthened by the People's Consultative Assembly Decree No. XVII/MPR/1998 on Human Rights.²⁰ Article 24 states that:

¹⁸ Sulaiman Hamid, 2002, *Lembaga Suaka dalam Hukum Internasional*, Jakarta: PT Raja Grafindo Persada, p. 39

¹⁹ Atik Krustiyati, *Op.cit.*, p. 7

²⁰ *Ibid*

“Everyone has the right to seek asylum for political protection from other countries.”

In 1999, the Government issued the Law No. 39 of 1999 on Human Rights which recognizes the right to seek asylum. Article 28 (1) states that:

- a. Everyone has the right to seek asylum for political protection from other countries.
- b. Rights referred to in paragraph (1) do not apply to those who commit non-political crimes or acts contrary to the purposes and principles of the United Nations.

In explanation of the article said that a decisive action, including political or non-political crime, is defined by country that accepts the asylum seekers.²¹

Then in the second amendment of the Constitution of 1945, the provisions regarding asylum institutions were included in Section 28G (2), which states that:

“Every person has the right to be free from torture or degrading treatment of human dignity and the right to obtain political asylum from another country.”

An initial handling of the issues relating to asylum seekers and refugees in Indonesia, referring to the Law No. 6 of 2011 on

²¹ Indonesia, the Law on Human Rights, Law No. 39 of 1999, the explanation of Article 28 paragraph (2)

Immigration.²² This due to both asylum seekers and refugees are foreigners entering Indonesian territory, so that its provisions are equated with other foreigners entering Indonesia.

In Article 83 paragraph (1) letter b of the Law No. 6 of 2011 stated that:

“The immigration officer authority put foreigners in immigration detention or immigration detention space if the foreign person located in the territory of Indonesia without a valid travel document.”

C. UNHCR as One International Organization that Handles Problems of Refugees

In the international, UNHCR is the special organization handles to refugee. The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country. It also has a mandate to help stateless people.²³

²² Indonesia, the Law on Immigration, Law No.6 of 2011

²³ UNHCR, *Office of the United Nations High Commissioner for Refugees*, <http://www.unhcr.org/pages/49c3646c2.html>, accessed on February, 24, 2013 at 2:30 a.m.

As stated in Article 6 of the 1950 Statute of the UNHCR, the authority to provide international protection, include:

1. (i) *Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.*
(ii) *Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, 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, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.*
2. *Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.*

UNHCR's core mandate has been originally set out in its Statute, annexed to Resolution 428 (V) of the United Nations General Assembly of 1950. It has been subsequently broadened by resolutions of the General Assembly and its Economic and Social Council (ECOSOC). UNHCR's mandate is to provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them.²⁴

²⁴ UNHCR, 2005, *An Introduction to International...*, *Op.cit.*, p. 7

Persons in need of international protection:

1. Refugees and Asylum-Seekers

An asylum-seeker is an individual who is seeking international protection whether as an individual or on a group basis. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.²⁵

2. Returnees

Returnees are former refugees or internally displaced persons (IDPs) who return to their country or area of origin, whether spontaneously or in an organized manner. It is crucial that they return voluntarily in safety and dignity to at least minimum conditions of physical, legal and material safety.²⁶

3. Stateless Persons

These are men, women and children who are not considered to be nationals by any State. As such, they are without any effective national protection and may face discrimination when it comes to accessing rights generally available to nationals.²⁷

4. Internally Displaced Persons (IDPs)

²⁵ *Ibid.*, p. 13

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 14

Internally displaced persons (IDPs) are people who have been forced to flee their homes as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters and who are within the territory of their own country. UNHCR is only involved with IDPs under certain conditions.²⁸

A durable solution for refugees is one that ends the cycle of displacement by resolving their plight so that they can lead normal lives. Traditionally, one of three durable solutions is pursued:²⁹

1. Voluntary repatriation, in which refugees return in safety and with dignity to their country of origin;
2. Local integration, in which the country of asylum provides residency;
3. Resettlement, in which refugees are transferred from the country of asylum to a third State willing to admit them on a permanent basis.

While there is no formal hierarchy among the durable solutions, voluntary repatriation is the solution sought and attained by most refugees. Although UNHCR has a role in relation to each of the durable solutions, the success of any of them is dependent on the various interested parties, including affected countries, working in partnership.

²⁸ *Ibid*

²⁹ *Ibid.*, p. 137