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Editorial Office: Faculty of Law, Sriwijaya University Jalan Srijaya Negara, Palembang, South Sumatra 30139, Indonesia.

Phone: +62711-580063 Fax: +62711-581179

E-mail: sriwijalayalawreview@unsri.ac.id | sriwijalayalawreview@gmail.com

Website: <http://journal.fh.unsri.ac.id/index.php/sriwijalayalawreview>

The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia

M. Alvi Syahrin¹

Abstract: The expulsion of refugees, either by the state party or by the non-state party to the 1951 Refugee Convention or countries has protracted the refugees' suffering. Some countries which are the parties to the 1951 Convention even drive out the refugees to outside their national territory for reasons that the refugees were threatening national security or disturbing public order in the country. In the discussion, it is found that firstly, the principle of *non-refoulement* is a *jus cogen* and has become customary international law. The *non-refoulement* principle has legal binding power to both the State party and the non-State party to the 1951 Refugee Convention.

Secondly, according to Article 32 paragraph 1 of the 1951 Convention, the implementation of the principle of *non-refoulement* is not absolute. Exceptions can only be made if the refugees concerned become a threat to national security and disturb public. Thirdly, Indonesia has not yet the State Party to the Refugee Convention of 1951 but Indonesia is subject to the principle of *non-refoulement*. This is because (i) Indonesia has ratified the Convention against Torture, the Fourth Geneva Convention Relative to the Protection of Civilian Person in Time of War and the ICCPR/International Covenant on Civil and Political Rights (set on the principle of *non-refoulement*), (ii) the obligation of the state to rule of customary international law (based on the moral and ethical aspects of the enforcement of international law), and (iii) there is legal instrument issued by the government related to the principle of the principle of *non-refoulement*; Fourth, there is no written sanctions imposed on Indonesia if violations of international law are with regard to the refugee problems.

Keywords: asylum seekers; expulsion; *non-refoulement* principle; ratification; refugees

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¹ Immigration Officer, General Directorate of Immigration
Student of Legal Studies Doctoral Program,
University of Borobudur
E-mail: ma.syahrin@gmail.com

INTRODUCTION

The problem of refugees is now a common concern of the international community. The forerunner and the focus of concern are felt especially after the Second world war. Thousands of people were displaced, particularly those who were from countries that were defeated in the Second World War. Some of the refugees enter the destination country

without travel documents, such as passport¹.

The adoption of the Refugee Convention on, July 28, 1951 (hereinafter referred to as the 1951 Convention) and its Protocol of January 31, 1967 (hereinafter referred to as the 1967 Protocol) are concern of the countries in the world to overcome the refugee problems. The setting of refugees was also included in the discussion of international law.

International refugee law is a part of international law and was made to ensure the security and safety of international refugees displaced in the destination country. In addition to providing protection in the country of destination, international refugees are also protected by the countries through which they transit on the way to the destination country. Thus, discussing international refugee law would be optimal if judging from the perspective of international law which positioning as a legal umbrella. International law itself has a long history even as old as the national law of nations. It grew and developed from the contributions of national laws.²

The displacement of people is a form of population transfer which has different characteristics from other forms of population movement. Such traits that distinguish refugees with other migrant

categories and the effect on the protective mechanism are applied to them.³ The movement of the populations in the territorial area of the country and that has been crossing national boundaries is an event that has long existed in human history and become more common today.⁴ From the perspective of the recipient country, refugee flows in addition to a humanitarian problem also have an impact on the security, economic and socio-political balance in the country where they had fled.⁵ In some studies, pollution and environmental degradation were blamed to be the cause of conflict,⁶ internal problems in the country and reduction of international aid for the refugees resulted in more and more countries close borders of refugees in large numbers⁷.

The expulsion of refugees, either by countries that have become party to the 1951 Convention or countries which have not become parties to the Convention, has increased the suffering of refugees to become more protracted. Some countries

¹ Annalisa Yahanan, Febrian, and Rohani Abdul Karim, "The Protection of Consumer Rights for Aviation Safety and Security in Indonesia and Malaysia", *Sriwijaya Law Review*, Vol. 1 Issue 1, January (2017), p37.

² <http://muhammadalvisyahrin.blogspot.com/2014/10/posisi-dan-perkembangan-hukum-pengungsi.html>, retrieved on June 26, 2015.

³ Jovan Patrnogic, 1996, *Introduction to International Refugee Law*, Papers that presented on Refugee Law Courses, the International Institute of Humanitarian Law, San Remo, Italy, p9.

⁴ Myron Weiner, 1997, *Global Movement, Global Walls: Responses to Migration 1885-1925*, Global History and Migration, Oxford: Westview Press, p131.

⁵ Gill Loescher, 1993, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, New York: Oxford University Press, p11.

⁶ Achmad Romsan *et.al.*, *Climate Change and Community Enviromental Conflicts: Are They Correlated?*, *Sriwijaya Law Review*, Vol. 1 Issue 1, January (2017), p71.

⁷ UNHCR, 1998, *The State of the World's Refugees 1997-1998, A Humanitarian Agenda*, New York: Oxford University Press, p. 51.

which are parties to the 1951 Convention even expel the refugees on the grounds that the refugees are threatening national security or disturbing public order in the country.

Expulsion of refugees conducted by a state party to the 1951 Convention contrary to the provisions of Article 33 of the 1951 Convention on the prohibition of expulsion. Prohibition of expulsion is popularly known by the term the principle of non-*refoulement* is a landmark in international law. The Article above stipulates that countries party to the present Convention shall not expel or return a refugee in any manner, to the borders of the state party that will threaten the lives and freedom of refugees for reasons of race, religion, nationality, membership of a particular social group or because of political opinion.⁸ Article 33 contains the principle of non-*refoulement* included in the chapters that cannot be reserved and the principles are also binding on those countries not party to the 1951 Convention.⁹

Although Indonesia is not a party to the 1951 Convention, in practice Indonesia has consistently applied this principle when faced with an exodus of Vietnamese refugees.¹⁰ The government has yet to introduce legislation to ratify the Convention Relating to the Status of Refugees. But on behalf of human rights, Parliament fully supports the Government's plan to ratify the 1951 Conven-

tion.¹¹ It should be the process of ratification of the Convention and United Nations Commissioner for Refugees (UNHCR) appreciates Indonesia's commitment to uphold human rights.¹² Even though, geographically Indonesia is strategic but Indonesia, from the refugees themselves is not a final destination for the refugees.

Waiver of the minimum rights of refugees and people displaced within the country is another dimension of the relationship between the two issues. During the process of asylum seekers, the number of people who are facing restrictive measures causing them to have access to a safe area is growing. In some instances, asylum-seekers and refugees are detained or forcibly returned to areas where their lives, liberty and security are threatened. Some of them were attacked by armed groups, or recruited into armed forces and forced to fight for one side or the other in civil conflicts. Asylum seekers and refugees are also victims of racist aggression. The refugees have rights that must be respected before, during and after the asylum process. Respect for human rights is a necessary condition for both preventing and resolving today's refugee flows.

Therefore, the refugee problems have become an international issue that must be addressed. International community commit to oppose all forms of human rights violations, war crimes, crimes against humanity, genocide, or other

⁸ Article 33 of the 1951 Convention.

⁹ Note 3, p19.

¹⁰ Enny Soeprapto, *Bijaksanakah RI Menolak Ratifikasi Konvensi PBB tentang Pengungsi*, look at <http://www.sinarharapan.co.id/berita/0109/25/lu03.html>, September 2011.

¹¹ Tosari Wijaya, *DPR Dukung Ratifikasi Konvensi Tentang Pengungsi*, tersedia di <http://www.gatra.com/2006-06-20/artikel.html>, accessed on June 26, 2015.

¹² Note 11.

crimes, which makes the embryo of the birth of refugees.¹³ Throughout human history any hemisphere always forced to flee from his birthplace find shelter from persecution, violence, and armed conflict, but it was only in the early 20th century, some countries realize that to protect refugees, global cooperation is needed.¹⁴

Each state has a general duty to provide international protection as a liability which is based on international law, including international human rights law and international customary law. So countries which become participants / signatories to the 1951 Convention relating to the status of refugees and / or its 1967 Protocol have obligations as stated in the legal instruments set out in the 1951 Convention (on the legal framework for the protection of refugees and asylum seekers).

Nevertheless, in reality, many countries when dealing with refugees do not conform to international standards as set out in the 1951 Convention and the 1967 Protocol, such the conformity to the *non-refoulement* principle. Thailand, is one of the example where Article 33 of the 1951 Convention had been inflicted as in the case of the Rohingya Refugees. Myanmar should have been able to follow the practice of Canada or Australia which

still retaining political multiculturalism without losing its identity.¹⁵

One can imagine, if many countries are committing the same thing as what Thailand had expel the refugees who came to its territory. Even though, Thailand has not yet ratified the 1951 Convention and the 1967 Protocol. This is inversely proportional to Indonesian practice where Indonesia is still not the Party to The 1951 Convention and The 1967 Protocol to July 2015.

However, Indonesia has compliance to help many refugees who stop over in its territory and handle the refugees based on the appropriate handling as it is stipulated in the Convention, 1951, such as Article 3 concerning non- discrimination against refugees from any country, the reunion (Article 20), place of residence (Article 21), education (Article 22), help the public (Article 23), and prohibitions the expulsion of non-*refoulement* (Article 33). The respect of refugees' rights has been done by Indonesia from 1975 onwards and also parallel with the 1945 Constitution which states that every person has the right to freedom from torture or degrading treatment of human dignity and the right to obtain political asylum from another country.¹⁶

When the civil war between South Vietnam and North Vietnam (Vietcong) took place, there were approximately 250 thousand refugees landed on the Galang

¹³ Kadarudin, "Penanganan Pemerintah Indonesia Terhadap Pengungsi Rohingya Menurut Konvensi 1951", *Jurnal Hukum Internasional Jurisdictionary* Vol. 1 No. 6, Juni (2010), p114.

¹⁴ UNHCR, 2005, *Pengenalan Tentang Perlindungan Internasional, Melindungi Orang-Orang yang Menjadi Perhatian UNHCR*, Switzerland: Komisariat Tinggi PBB untuk Urusan Pengungsi, p5.

¹⁵ Hendra Nurtjahjo, 2005, *Ilmu Negara Pengembangan Teori Bernegara dan Suplemen*, Jakarta: Rajawali Pers, p58.

¹⁶ Fandi Ahmad dan Tim Setia Kawan, 2004, *UUD 1945 Amandemen Pertama–Keempat (1999-2002)*, Jakarta: Setia Kawan, p23.

Island, in the Riau Islands, Indonesia. On humanitarian grounds, the Indonesian government decided to cooperate with the UNHCR to make a shelter for Vietnam refugees funded by UNHCR. For eighteen years the refugees are residing in Indonesia until 1996 UNHCR decided to repatriate the refugees to their country of origin due to insufficient funds to finance the shelter, so it was disbanded and closed.

The incident did not end up there, after the return of the refugees from Vietnam, Indonesia today has become a transit country for migrants, asylum seekers and refugees to the country of destination Australia. Until June 30, 2014, there were 10.116 refugees and asylum seekers registered by UNHCR in Indonesia, where 6286 people are asylum seekers and 3,830 people are refugees. Of these, there were 7910 males and 2206 females. Among the refugees and asylum seekers registered, there were 2,507 children in which 798 of them are separated children. Afghanistan, Myanmar, Sri Lanka, Pakistan, Iran, and Iraq are the main countries of origin of refugees and asylum seekers who are in Indonesia.¹⁷ The immigrants, asylum seekers and refugees came from Algeria, Afghanistan, Iran, China, Sri Lanka and Rohingya coming from Myanmar and Bangladesh.

Based on the discussion above, there are interesting things to be studied in this paper, namely: First, why do the non-State Party to the 1951 Convention also

respect the principle of non- *refoulement*? Second, is the application of the principle of non-*refoulement* absolute? Third, what is the urgency for Indonesia to implement the principle of non-*refoulement*? Fourth, are there any sanctions that may be imposed to Indonesia if it expel the refugees who come into the region?

ANALYSIS AND DISCUSSION

The Principle of Non-*Refoulement*

The principle of non- *refoulement* reflects on the minimum protection based on humanitarian grounds listed in Article 33 of the 1951 Convention Relating to the Status of Refugees. Article 33 addresses several important things.¹⁸ First, the 1951 Convention is only binding on those countries that have become parties to the Convention. Under Article I (2) the 1967 Protocol, a country which is not a party to the 1951 Convention but is a party to the Protocol, also bound by Article 2 to Article 34 of the Convention, 1951. Accordingly, Article 33 of the 1951 Convention binds the countries that are parties to the 1951 Convention or The 1967 Protocol, or bind to both instruments.

Second, the 1951 Convention is a humanitarian convention. It is clearly stated in the opening paragraphs of the 1951 Convention suggests that the United Nations cares refugees and IDPs to get protection of their basic rights and freedoms as set forth in the Universal Declaration of Human Rights. This is a recognition of the entire country against

¹⁷ <http://suaka.or.id/2014/07/23/perkembangan-isu-pengungsi-dan-pencari-suaka-di-indonesia/> accessed on Sunday, August 2, 2015.

¹⁸ Sir Elihu Lauterpacht and Daniel Bethlehem, 2001, *The Scope and Content of the Principle of Non-Refoulement*, United Nations High Commissioner for Refugees, p20-21.

social and humanitarian aspects of the problem of refugees.

Third, the prohibition of expulsion contains a special thing. This is supported by Article 42 paragraph (1) of the 1951 Convention which excludes Article 33 of the act of reservation. Thus, the prohibition of expulsion under Article 33 of the 1951 Convention is a non-derogable obligation that become the humanity foundation for the 1951 Convention. This obligation is reaffirmed by Article VII paragraph (1) Protocol 1967. UNHCR's Executive Committee even further established that the principle of non-*refoulement* is a peremptory norm has been regarded as customary international law. Meaning the entire states either has become a Contracting State or not, prohibits the expulsion, obliged not to return or extradite a person to a country where life or safety of that person truly is in danger.¹⁹

Peremptory norm or *jus cogens* is a basic principle of international law accepted by states as a norm that cannot be ignored. As a peremptory norm or *jus cogens*, the principle of non-*refoulement* must be respected in all circumstances and cannot be altered. This is a fundamental principle for the benefit of everyone, regardless of whether the country is already a party to the 1951 Convention or not and regardless of whether or not the person's status is already granted as a refugee.

Exceptions in Application of the Principle of Non-*Refoulement*

In practice the application of the principle of non-*refoulement* is not an absolute. Under Article 33, paragraph 2 of the 1951 Convention does not apply if the refugee's existence is a threat to national security or disturb public order in the country where he sought refuge.

According to Article 33, paragraph 2 of the 1951 Convention, the prohibition for refugees returned back by force to a country where he might be suffering persecution does not apply to refugees who threaten the security of the country, or he has got the final verdict from the judges for serious crimes he had committed, as well as endangering the public local state. However, this provision only applies to a very urgent exceptions. That means, if the exceptions would apply, then it must be proven that there is a direct relationship between the presences of refugees in a country with the country's national security threatened.²⁰

Expulsion of refugees will only be done as the implementation of a decision reached in accordance with due process of law. Except when reasons of national security require coercive other refugees to be allowed to submit evidence to clear themselves, and appealed to the relevant authorities²¹. Exceptions of adoption of non-*refoulement* principle requires the element of threat to national security and disruption of public order in the country concerned. For Indonesia, the security is not only in the context of the internal

¹⁹UNHCR, *Refugee Protection: A Guide to International Refugee Law*, December 2001.

²⁰ <http://www.hrw.org/press/2001/11/eusecurity.html>, accessed on June 26, 2015.

²¹1951 Convention concerning Refugees, Article 32 Paragraph 2.

security of a country, but also in the system of food safety, health, finance and trade.²² Threats include obstacles, challenges and distractions. In a narrow sense, the threat can be planned or residual.²³ Threats can be planned as subversion and insurgency in the country and infiltration, subversion, sabotage and invasion. Residual threats are various circumstances in which society is economic insecurity, social and political, if not handled comprehensively in time, will lead to riots that can be used by elements of subversion or insurgents for their own interests.²⁴

It should be understood that the flow of refugees in large numbers could have impacted on the economy, changing the ethnic balance, a source of conflict, which can even lead to political unrest local and national level in a country. Walter Lippmann as quoted by Kusnanto Anggoro stating that a country is safe as long as the people cannot be forced to sacrifice values that are important and if it can avoid a war or if forced to fight, can come out a winner.²⁵

Public order is a state in which the government and people can operate in an orderly and organized. Given the

elements mentioned above, if Indonesia must make expulsion of refugees, then some legislation is well worth following into the considerations, such as Law No. 6 Year 2011 on Immigration, Criminal Code Book Three Chapter II of the Violation of Public Order, the Presidential Decree No. 7 of 2008 on Public Policy National Defense and Law No. 20 of 1982 on Basic Provisions of Defence and Security of the Republic of Indonesia, Law No. 6 Year 2011 on Immigration, Law No. 7 of 1984 on Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, Presidential Decree No. 36 of 1990 on Ratification of the Convention on the Rights of the Child, Act No. 5 of 1998 on Ratification of the Convention against Torture and Degrading Treatment or Punishment Other Cruel, Inhuman or Degrading Human Dignity and Government Regulation No. 30 Year 1994 on Procedures for the Prevention and deterrence as well as implementing regulations.

Furthermore, from the perspective of immigration laws, restrictions must be understood within the concept of the principle of non-*refoulement* which is the politics of immigration laws that were adopted by Indonesia today. It is a selective policy based on the principle of expediency. That is, only foreigners who bring benefits to the country to enter and stay in Indonesia. The stranger must have travel documents and visas which are legitimate and valid, so that not all asylum seekers or refugees even get an absolute guarantee to stay in Indonesia under the guise of the principle of non-*refoulement*. So this selective policy was

²²Ann Tickner, 1994, *Re-visioning Security: International Relations Theory Today* London: Ken Booth dan Steve Smith, p180.

²³Sjaafroedin Bahar, 1994, *Pendidikan Pendahuluan Bela Negara Tahap Lanjutan* Jakarta: Intermedia, , p68.

²⁴Note 23, p71.

²⁵Kusnanto Anggoro, *Keamanan Nasional, Pertahanan Negara dan Ketertiban Umum*, Opposition Paper on *Seminar Pembangunan Hukum Nasional VIII* that presented by Badan Pembinaan Hukum Nasional, Departemen Kehakiman dan HAM RI, Hotel Kartika Plaza, Denpasar, Bali, 14 July 2003.

the one who indirectly become a filter for the application of the principle of non-*refoulement* in Indonesia.

Application of The Principle of Non-*Refoulement* in Indonesia

Non-*refoulement* is not the same as the deportation or forcible transfer. Deportation or expulsion occurs when foreign nationals found guilty of acts contrary to the interests of the country concerned or she suspects a crime in one country and flee from the judicial process.²⁶ The principle of non-*refoulement* is not only found in the 1951 Convention, but is implied to be found in Article 3 of the Convention Against Torture, Article 45 paragraph 4 of the Fourth Geneva Convention of 1949, Article 13 of the International Covenant on Civil and Political Rights 1966, Article 24 of the MPR Decree No. XVII / 1998 on Human Rights, Article 28 G, paragraph 2 of the 1945 Constitution, Article 28, paragraphs 1 and 2 of Law No. 39/1999 on Human Rights, Article 26-28 of Law No. 37/1999 on Foreign Relations.

The implementation of the principle of non-*refoulement* in Indonesia carried out by letter of the Director General of Immigration's Letter Number F-IL.01.10-1297 Handling Illegal Immigrants and the Director General of Immigration's Regulation Number IMI-0352.GR.02.07 Year 2016 signed on 19 April 2016, which aimed to provide guidance regarding the treatment of foreigners who

declare themselves as asylum seekers or refugees.

The Director General's letter also confirmed, if there is a stranger that claimed to seek asylum upon arrival in Indonesia, he is not subjected to immigration measures in the form of deportation to the country who threatens the life and freedom. The content of this letter is in accordance with the principle of non-*refoulement*.

Furthermore, the letter warned that if among strangers is believed there is an indication as asylum seekers or refugees, local officials immediately contact the UNHCR to determine their status. In case of arrival of asylum seekers being examined at Immigration Checkpoint that far from the UNHCR office, then the officer must coordinate and deal with the person in charge of transportation means while awaiting the arrival of officials from the UNHCR.

In that letter it is specified that foreigners who have obtained a Certificate of Attestation Letter, refugees and or someone that is under the protection of UNHCR, would not question the status of residence permit while in Indonesia. If the foreigners who have acquired the status of UNHCR as asylum seekers or refugees are not abiding by the law, then it was processed in accordance with the legal provisions in force in Indonesia.

The contents of the letter relating to Article 75 of Law No. 6 Year 2011 on Immigration which states immigration measures carried out against foreigners residing in Indonesia that carry out dangerous activities, or suspected will

²⁶Sigit Riyanto, *Prinsip Non-Refoulement dan Relevansinya dalam Sistem Hukum internasional*, *Mimbar Hukum*, Vol 22, No. 3, Oktober (2010), p435.

endanger security and public order, or does not respect or obey the laws and applicable regulations.

Based on legal science, government should apply legal consideration on the implementation of the principle of non-refoulement²⁷ Therefore, the legal arrangements to reject and remove foreigners should certainly consider human rights as stipulated in the 1945 Constitution and the international conventions that already ratified by the Government of Indonesia.

Sanctions

This sanctions need to be distinguished here by criminal law imposed when there is an officers who has committed serious violations of human rights, such as those in Rwanda and the former Yugoslavia. There is no written sanction imposed on Indonesia, if it violate to international law with regard to the refugee problem.

CONCLUSION

First, the principle of *non-refoulement* is also binding on those who are not the parties to the 1951 Convention. It's because of the principle of *jus cogens* and is a peremptory norm. As a peremptory norm, *jus cogens* and the principle of non-refoulement have become customary international law. Hence, the legal binding power encompass also the countries that are not parties to the 1951 Convention.

²⁷ Edy Lisdiyono, "Improving Legal Argument Critically in the Litigation Mechanism in Indonesia (An Empirical Study of Enviromental Verdicts)", *Sriwijaya Law Review*, Vol. 1 Issue 1, January (2017), p95.

Second, based on Article 32 paragraph 1 of the 1951 Convention, the implementation of the principle of non-refoulement is not absolute. Exceptions can only be made if the refugees concerned are a threat to national security and disturb public.

Third, the fundamental reason for Indonesia to implement the principle of non-refoulement are (i) Indonesia has ratified the Convention against Torture, the Fourth Geneva Convention, and the International Covenant on Civil and Political Rights (set on the principle of non-refoulement), (ii) the State's obligation to the rule of customary international laws (based on moral and ethical aspects of the enforcement of international law), and (iii) there is legal instrument issued by the government related to the principle of non-refoulement.

Fourth, there is no written sanctions imposed on Indonesia if violations of international law are with regard to the refugee problems.

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