THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW
(CASE STUDY OF ROHINGYA REFUGEES IN ACEH)

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Abstract - The protection of refugee is the duty to all civilized nation in the world. It is a human rights and humanitarian value that every state must take responsible with. Among several kinds of protections, there is one of the most important one which is stated in article 33 of the 1951 Convention on the Status of Refugee, the non-refoulment principle. This principle has become customary international and also has been received the jus cogens status. The purpose of this thesis is to understand the role of Jus cogens principle of non-refoulment will effect Indonesia in giving assistance to the Rohingya refugees and to understand the protection given by Indonesia government to the Rohingya refugees. This research uses normative empirical research. The data in this study were obtained through the research libraries to acquire secondary data by way of studying the legislation, books, the internet and other scholarly works related to the problems of the research. Furthermore, fieldwork conducted for obtaining primary data by interviewing respondents and informants. The results of the research showed that the non-refoulment principle gives no effect to Indonesia in giving assistance to the Rohingya refugees. Indonesia actions were done base on humanitarian value, Indonesia Constitution, and Pancasila value, instead of 1951 Convention on the Status of the Refugee. Accordingly with the result above, it is suggested to the government of Indonesia, to produce a new clear legislation on the management of the international refugee. And then, to assimilate and promote the 1951 Convention on the Status of Refugee as an international standard in assisting refugee to the Indonesian bodies that concern about it. Furthermore, to Indonesia government particularly Aceh suggested that to produce a new regulation in regard with the emergency respond and also to maintain all the refugee facilities that had been built by volunteers or others country.

Keywords: Refugee, Non-refoulment, Aceh, Jus cogens.

INTRODUCTION

The Throughout the world and over the centuries, societies have welcomed frightened, weary strangers, the victims of persecution and violence. This humanitarian tradition of offering sanctuary is often now played out on television screens across the globe as war and large-scale persecution produce millions of refugees and internally displaced persons. Yet even as people continue to flee from threats to their lives and freedom, governments are, for many reasons, finding it increasingly difficult to reconcile their humanitarian impulses and obligations with their domestic needs and political realities.¹

¹ Kate Jastram and Marilyn Achiron , Refugee Protection: A Guide to International Refugee Law , UNHCR, p.5. Accessed from www.unhcr.org/3d4aba564.pdf, on October 10, 2016, at 08.15 PM
towards refugee. The protection is stated in article 33 of the 1951 Convention on the Status of Refugee, which then named by non-refoulement principle.

Certainly, one of the most essential components of refugee is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement which is widely accepted by States. It then considered as a customary international law applicable to any refugee, asylum-seeker, or foreigner who needs some form of shelter from the State having control over them.\(^2\) Pursuant to Article 42 paragraph (1) of the 1951 Refugee Convention, Article 33 of the 1951 Refugee Convention is one of the provisions which State may not make reservations. This nature is restated in Article VII paragraph (1) of the 1967 Protocol. Non-refoulement principle contained in Article 33 of the 1951 Refugee Convention also binds States which are not party to the 1951 Refugee Convention.\(^3\) Furthermore, UNHCR Executive Committee stipulates that non-refoulement principle is an advancement of peremptory norm in international law or \textit{Jus cogens} which is a basic principle of international law accepted by States as non-derogable rights.\(^4\)

Based on description of the background above, the researcher raise a number of issues to be discussed:

1. How far the \textit{Jus cogens} principle of non-refoulement will effect Indonesia in giving assistance to the Rohingya’s refugees?
2. How is the protection given by Indonesia government to the Rohingya’s refugees?

**RESEARCH METHODOLOGY**

Legal research is a process in identifying and retrieving the information in supporting the legal decision making. The legal research includes steps in finding primary law sources, searching the secondary authority such law reviews, and searching non legal source in investigative and supporting information.\(^5\) The method of research is diverse of each how the

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nature of research was set. In methodology of research, the researcher outlines how the research will be conducted.

The nature of this research is normative empirical as drawn from the conduct of the research. Normative empirical method is a combination between normative legal approach and empirical legal approach. The normative-empirical method used to observe the implementation of the legislations as normative resources in every particular legal action happened in society. There are three legal approaches used in this method which are; non judicial case, judicial case, and live case. In this thesis, non judicial case approach will be used in observing the problem that raised in this thesis.

1. Operational Variable Research Definition
   a. Refugee is someone 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.\(^6\)
   b. Protection is all activities aimed at obtaining respect for individual rights in accordance with the letter and spirit of the relevant bodies of law (namely, Human Rights Law, International Humanitarian Law, Migration Law and Refugee Law).\(^7\)
   c. Aceh is located in the most west of Archipelago Islands. This region has a strategic position as the gate of trading and cultural traffic, which has been connecting East and West since the past centuries. Aceh region is known as a transit place of Chinese, Europe, India and Arabic merchants. This relationship made Aceh region as the first entrance of culture and religion into the Archipelago. According to the history, Aceh is the first place of Islamic dissemination in Indonesia where the first Islamic empires have established in Peureulak and Pasai. Sultan Ali Mughayatsyah had established the empire and located capital city in Bandar Aceh Darussalam (now called with Banda Aceh).\(^8\)

\(^6\) Article 1 (A) Paragraph 2 of Convention Convention Relating to the Status of Refugees 1951
\(^7\) International Migration Law, *Glossary On Migration*, International Organization for Migration, 2004, p 49
\(^8\) Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT), Accessed from http://www.imtgt.org/indonesia_aceh.htm, On 17 August of 2016 at 22.28 PM
d. Rohingya is a generic term referring to the Sunni Muslim inhabitants of Arakan, the historical name of a Myanmar border region which has a long history of isolation from the rest of the country. Since 1989, this region has been officially designated as the Rakhine State. However the majority of people of concern are from the northern part of the Rakhine State, from the three townships of Maungdaw, Buthidaung and Rathedaung. It is thought that the Rohingya are of mixed ancestry, tracing their origins both to outsiders (Arabs, Moors, Turks, Persians, Moguls and Pathans) and to local Bengali and Rakhine. They speak a version of Chittagonian, a regional dialect of Bengali which is also used extensively throughout south-eastern Bangladesh. The Rohingya are virtually friendless amongst Myanmar’s other ethnic, linguistic and religious communities. They were not formally recognized as one of the country’s official national groups when the country gained independence in 1947, and they were excluded from both full and associate citizenship when these categories were introduced by the 1982 Citizenship Act.9

2. Type and Research Approach

The method that will be used in conducting the research is normative empirical research. This method is used to analyze the legal rules that have been provided relating to the protection of refugees in Indonesia. This method is also used to find the facts relating to the implementation of these rules.

This method will explain in detail, systematically and comprehensively, about the rules and obligations owned by Indonesia towards Rohingya refugees. Furthermore, this method is also expected to explain the actual facts about how these obligations executed. It is also expected to be able to answer the research questions that inferred to legal basis instrument and the application of the instrument to the issue of refugee in international operation and national operation lifted in this research.

DISCUSSION

a. The effect of Jus cogens status of principle Non-refoulment to Indonesia in giving assistance to the Rohingya refugee’s rights.

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9 Esther Kiragu (et al), States of denial A review of UNHCR’s response to the protracted situation of stateless Rohingya refugees in Bangladesh, UNHCR Policy Development And Evaluation Service (PDES), 2011, p 7
The non-refoulement principle under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion” criteria)\(^{10}\) and does not come within the scope of one of its exclusion provisions.\(^{11}\) Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.\(^{12}\) It follows that the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared.\(^{13}\) The principle of non-refoulement is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.

Indonesia is a non state party of the Refugee Convention. However, Indonesia still bound by one of principle that emerge from that convention, which is non-refoulement

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\(^{10}\) Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee” shall apply to any person who “owing to a 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 [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it”.

\(^{11}\) Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because:

- they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because

- they are not 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 rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because

- they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).


\(^{13}\) This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) “Non-refoulement” (1977), para. (c) (reaffirming “the fundamental importance of the principle of non-refoulement … of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.”). The UNHCR Executive Committee is an intergovernmental group currently consisting of 70 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.
principle. That statement is in line with the advisory opinion of the UNHCR toward the non-refoulement principle;

UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, inter alia, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations. Moreover, exercising its supervisory function, UNHCR has closely followed the practice of Governments in relation to the application of the principle of non-refoulement, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR’s experience, States have overwhelmingly indicated that they accept the principle of non-refoulement as binding, as demonstrated, inter alia, in numerous instances where States have responded to UNHCR’s representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle.\(^\text{14}\)

The *jus cogens* status of the non-refoulement principle affects Indonesia practically but indirectly. It means that even the principle gives effect to Indonesia, most of Indonesia action in giving assistance to the Rohingya refugee is not base on the non-refoulement principle. Most of Indonesian government action was done under the humanitarian concept and Pancasila concept.\(^\text{15}\) Also, the regulations and policies that created by Indonesia government regarding the management of refugee are not based on the non-refoulement principle, all of the legislation producing by considering humanitarian value, Pancasila, and local value that exist in Indonesia.

In addition, the *jus cogens* status of the non-refoulement principle also has no direct effect toward Indonesia legislation. The Circular of Director General of Immigration Number F-IL.01.10-1297 on the Management of Foreigner Who Declaring as Asylum Seeker which used by Indonesia in giving assistance to Rohingya refugee also does not mentions the non-refoulement principle as it consideration. In brief, none of the regulation affected by the *jus cogens* status of the non-refoulement system.

b. The protection given by Indonesia government to the Rohingya refugees.

Indonesia, as explained in previous chapter, obliges to not expel refugee from its territory. This condition put Indonesia into a transit states to the Rohingya refugee. It is

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\(^{15}\) Interview result of Mr. Afrizal, the Head of Surveillance and Prosecution of Immigration on the Migration Office II Class, Langsa City, on December 2\(^{nd}\), 2016.
mean that as long as the Rohingya refugee still staying at Indonesia territory, Indonesia has an obligation to at least fulfilling their basic rights, such as food, healthy, and temporary place to live.

Regarding to the Rohingya refugee which is concentrate in Aceh, Indonesia, through the government of Aceh has fulfilling its obligation in line with the protection of refugee rights. From nine rights that stipulated in the Refugee Convention, Indonesia has protect and fulfill five rights which are; (a) Non-discrimination (Article 3), (b) Freedom of religion (Article 4), (c) The right to public relief and assistance (Article 23), (d) Freedom of movement within the territory (Article 26), (e) The right not to be expelled from a country [unless the refugee poses a threat to national security or the public order] (Article 33).

All of those rights above fulfilled by Indonesian government through Aceh government with the help of several NGO and local institution. Aceh government has establish task force which consist of several NGOs such as Save the Children, Rumah Zakat, and local institution such as Social Department, Immigration Office, Local Secretary District, and several others institution. The task force then work together with international organization which set up by UN to handle this condition, namely UNHCR and IOM. Therefore all the protections given by Indonesia through Aceh government are done by the task force coordinating with IOM and UNHCR.

CONCLUSION

The non-refoulment principle gives no effect to Indonesia in giving assistance to the Rohingya’s refugees, even though it has received the status of customary international law as well as jus cogens principle. Indonesia in giving assistance to the refugee, use the humanitarian values and Pancasila as it groundwork. However, it does not mean that Indonesia violating the international standard because of the methods that used in assisting the refugees are similar with the International standard.

Regarding the protection of refugee, Indonesia not yet has any sufficient legislation. Then, as an non state parties to the convention of the status of the refugee 1951, Indonesia does not have any duty to accept refugees to enter its territory. In the other hand, there are lots of refugees that came to Indonesia, and yet Indonesia still accepted it and assisted it well.

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16 Interview result with Mr. Yusman and Mrs. Sriwahyuni S.Pd, the Task Force Staff in Bayeun Shelter, east Aceh , on December 3rd, 2016
Therefore, it can be concluded that Indonesia has protect and promote the rights of refugees remarkably.

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