

## CHAPTER II

### LITERATURE REVIEW

This chapter consists of three types of frameworks, namely Conceptual Framework, Legal Framework, and Theoretical Framework.

#### A. Conceptual Framework

The conceptual framework that the researcher uses for this research are:

##### 1. International Human Rights Law

###### a. Definition of International Human Rights Law

International human rights law refers to that body of international law created to promote and protect human rights at the international, regional, and domestic levels.

They are mainly obligations which states are bound to obey.

It is primarily made up of treaties, agreements between states and customary international law. Declarations,

guidelines, and principles adopted at the international level

contribute to the understanding, implementation, and

development of the international law. Enforcement of

international human rights law can occur on domestic,

regional or international level.<sup>11</sup>

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<sup>11</sup>US Legal. "International Human Rights Law and Legal Definitions"  
<http://definitions.uslegal.com/i/international-human-rights-law/>. downloaded on April 21, 2015

In 1948, the United Nations' New Commission set out to draft the document that became the Universal Declaration of Human Rights. Eleanor Roosevelt, the chairman of the commission credited with its inspiration, referred to the Declaration as the "international Magna Carta for all mankind." It was adopted by the United Nations on December 10, 1948.

#### b. History of International Human Rights Law

The idea of human rights emerged stronger after World War II. The extermination by Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities horrified the world. Trials were held in Nuremberg and Tokyo after World War II, and officials from the defeated countries were punished for committing war crimes, "crimes against peace," and "crimes against humanity."<sup>12</sup>

Governments then committed themselves to establishing the United Nations, with the primary goal of bolstering international peace and preventing conflict. People wanted to ensure that never again would anyone be unjustly denied life, freedom, food, shelter, and nationality.

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<sup>12</sup> David Shiman, *Teaching Human Rights*, (Denver: Center for Teaching International Relations Publications, U of Denver, 1993): 6

The essence of these emerging human rights principles was captured in President Franklin Delano Roosevelt's 1941 State of the Union Address when he spoke of a world founded on four essential freedoms: freedom of speech and religion and freedom from want and fear. The calls came from across the globe for human rights standards to protect citizens from abuses by their governments, standards against which nations could be held accountable for the treatment of those living within their borders. These voices played a critical role in the San Francisco meeting that drafted the *United Nations Charter* in 1945.<sup>13</sup>

#### 1). The Universal Declaration of Human Rights

*Member states* of the United Nations pledged to promote respect for the human rights of all. To advance this goal, the UN established a *Commission on Human Rights* and charged it with the task of drafting a document spelling out the meaning of the fundamental rights and freedoms proclaimed in the Charter. The Commission, guided by Eleanor Roosevelt's

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<sup>13</sup> *Ibid.*



forceful leadership, captured the world's attention.

On December 10, 1948, the *Universal Declaration of Human Rights (UDHR)* was adopted by the 56 members of the United Nations. The vote was unanimous, although eight nations chose to abstain.

The UDHR, commonly referred to as the international Magna Carta, extended the revolution in international law ushered in by the United Nations Charter – namely, that how a government treats its own citizens is now a matter of legitimate international concern, and not simply a domestic issue.<sup>14</sup> It claims that all rights are *interdependent* and *indivisible*. Its Preamble eloquently asserts that:

*[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.*

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<sup>14</sup> *Ibid.*

The influence of the UDHR has been substantial. Its principles have been incorporated into the constitutions of most of the more than 185 nations now in the UN.

Although a *declaration* is not a legally binding document, the Universal Declaration has achieved the status of *customary international law* because people regard it "as a common standard of achievement for all people and all nations."

## 2) The Human Rights Covenants

With the goal of establishing mechanisms for enforcing the UDHR, the UN Commission on Human Rights proceeded to draft two *treaties*: the International Covenant on Civil and Political Rights (ICCPR) and its optional *Protocol* and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together with the Universal Declaration, they are commonly referred to as the *International Bill of Human Rights*. The ICCPR focuses on such issues as the right to

life, freedom of speech, religion, and voting.

The ICESCR focuses on such issues as food, education, health, and shelter. Both *covenants* trumpet the extension of rights to all persons and prohibit discrimination.

As of 1997, over 130 nations have *ratified* these covenants. The United States, however, has ratified only the ICCPR, and even that with many reservations, or formal exceptions, to its full compliance.<sup>15</sup>

### 3) Subsequent Human Rights Documents

In addition to the covenants in the International Bill of Human Rights, the United Nations has adopted more than 20 principal treaties further elaborating human rights. These include conventions to prevent and prohibit specific abuses like torture and *genocide* and to protect especially vulnerable populations, such as refugees (Convention Relating to the Status of Refugees, 1951), women (*Convention on the Elimination of All Forms of Discrimination*

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<sup>15</sup> *Ibid.*



against Women, 1979), and children (Convention on the Rights of the Child, 1989).

In Europe, the Americas, and Africa, regional documents for the protection and promotion of human rights extend the International Bill of Human Rights. For example, African states have created their own Charter of Human and People's Rights (1981), and Muslim states have created the Cairo Declaration on Human Rights in Islam (1990). The dramatic changes in Eastern Europe, Africa, and Latin America since 1989 have powerfully demonstrated a surge in demand for respect of human rights. Popular movements in China, Korea, and other Asian nations reveal a similar commitment to these principles.

#### 4) The Role of Nongovernmental Organizations

Globally the champions of human rights have most often been citizens, not government officials. In particular, *nongovernmental organizations (NGOs)* have played a cardinal role in focusing the international community on

human rights issues. For example, NGO activities surrounding the 1995 United Nations Fourth World Conference on Women in Beijing, China, drew unprecedented attention to serious violations of the human rights of women. NGOs such as Amnesty International, the Antislavery Society, the International Commission of Jurists, the International Working Group on Indigenous Affairs, Human Rights Watch, Minnesota Advocates for Human Rights, and Survivors International monitor the actions of governments and pressure them to act according to human rights principles.

Government officials who understand the human rights framework can also affect far reaching change for freedom. Many United States Presidents such as Abraham Lincoln, Franklin Roosevelt, Lyndon B. Johnson, and Jimmy Carter have taken strong stands for human rights. In other countries leaders like Nelson Mandela and Václav Havel have brought about great changes under the banner of human rights



### c. Sources of International Human Rights Law

Since International Human Rights Law is an integral part of Public International Law, its sources defined in Article 38 of the Statute of the International Court of Justice (ICJ Statute).

Article 38:

- 1) "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b) international custom, as evidence of a general practice accepted as law;
  - c) the general principles of law recognized by civilized nations;
  - d) subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

These sources will be analysed below.<sup>16</sup>

### 1) International Conventions/Treaties

International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any particular treaty (states parties). The main particularity of human rights treaties is that they impose obligations on states about the manner in which they treat all individuals within their jurisdiction.

Even though the sources of international law are not hierarchical, treaties have some degree of primacy. More than forty major international conventions for the protection of human rights have been adopted. International human rights treaties bear various titles, including ‘covenant’, ‘convention’ and ‘protocol’; but what they share are the explicit indication of states parties to be bound by their terms.

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<sup>16</sup> Icelandic Human Rights Centre, “Sources of International Law”, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/sources-of-international-law>, downloaded on April 20, 2015.

## 2) International Custom

While treaties are only binding upon parties to a treaty, states can also be bound by rules of customary international law. However, this requires that there is usage to be found in the practice of states and considered by those states as practice. Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to 'general practice accepted as law'. In order to become international customary law, the 'general practice' needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (*opinio juris et necessitatis*). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty.

Based on the interview with Mr. Wagiman, he said that one of the important features of customary international law is that customary law may, under certain circumstances,



lead to universal jurisdiction or application. In addition, there also exists a class of customary international law, *jus cogens*, or peremptory norms of general international law, which are norms accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted.

Mr. Wagiman said “the more a particular provision is quoted, the higher possibility it is considered *jus cogens*.”<sup>17</sup> Under the Vienna Convention on the Law of Treaties (VCLT) any treaty which conflicts with a peremptory norm is void.

Many scholars argue that some standards laid down in the Universal Declaration of Human Rights (which in formal terms is only a resolution of the United Nations General Assembly and as such not legally binding) have become part of customary international law as a result of subsequent practice; therefore, they would be binding upon all states. Within the realm of human rights law the distinction

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<sup>17</sup> Interview with Mr. Wagiman, Hotel Novotel, on June 11, 2015.

between concepts of customary law, treaty law and general principles of law are often unclear.

Before the drafting of the 1951 Refugee Convention, refugees problems were solved using customary law. According to Starke, International Customary Law has a higher position than treaties/convention. As stated by Starke, “The material source of international law may be defined as the actual materials from which an international lawyer determine the rule application to a given situation. These materials fall into five principal categories : 1) Custom, 2) Treaties, 3) Decisions of judicial or arbitral tribunal 4) Juristic Wovk, 5) Decisions or determinations of organs of international institution”

### 3) General Principles of Law

States are also bound by general principles of law. It is the legal principles common to major legal systems. In the application of both national and international law, general or guiding principles are used. In international law they have been defined as

‘logical propositions resulting from judicial reasoning on the basis of existing pieces of international law’.

At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether interference with a human right may be justified. General principles are used because no legislation is able to provide answers to every question and to every possible situation that arises. Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed. General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases.



#### 4) Judicial Decisions and Teachings

The decisions of international courts and tribunals, as well as those of municipal (domestic) courts and significant scholarly writing relative to human rights may play a subsidiary role in helping to determine rules of International Human Rights Law. As for the judicial decisions, Article 38 of the Statute of the International Court of Justice is not confined to international decisions (such as the judgements of the International Court of Justice, the Inter-American Court, the European Court and the future African Court on Justice and Human Rights); decisions of national tribunals relating to human rights are also subsidiary sources of law.

The writings of scholars contribute to the development and analysis of human rights law. Compared to the formal standard setting of international organs the impact is indirect.

Nevertheless, influential contributions have been made by scholars and experts working in human rights fora, for instance, in the UN Sub-Commission on the Promotion and Protection of

Human Rights, as well as by highly regarded NGOs, such as Amnesty International and the International Commission of Jurists.

#### d. Principles of International Human Rights Law

The core principles of international human rights first set out in the UDHR, as elaborated in the following:<sup>18</sup>

##### 1) The Principle of Universality

Human rights must be afforded to everyone, without exception. The entire premise of the framework is that people are entitled to these rights simply by virtue of being human.<sup>19</sup>

##### 2) Principle of Interdependence and Indivisibility

Human rights are indivisible and interdependent, which means that in order to guarantee civil and political rights, the government must also ensure economic, social and cultural rights (and vice versa). The indivisibility principle recognizes that if a government violates rights such as health, it necessarily affects people's ability to exercise other rights such as the right to life.

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<sup>18</sup> UN, "The Foundation of International Human Rights Law", [http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml), downloaded on May 25, 2015,

<sup>19</sup> NESRI, "What Are the Basic Principles of Human Rights Framework", <https://www.nesri.org/programs/what-are-the-basic-principles-of-the-human-rights-framework>, downloaded May 25, 2015.



### 3) Principle of Equality and Non-Discrimination

Human rights must be guaranteed without discrimination of any kind. This includes not only purposeful discrimination, but also protection from policies and practices which may have a discriminatory effect

### 2. Refugee

Statistical Snapshot*	
<b>Residing in Thailand [1]</b>	
Refugees [2]	130,238
Asylum Seekers [3]	7,931
Returned Refugees [4]	0
Internally Displaced Persons (IDPs) [5]	0
Returned IDPs [6]	0
Stateless Persons [7]	506,197
Various [8]	395
<b>Total Population of Concern</b>	<b>644,761</b>
<b>Originating from Thailand [1]</b>	
Refugees [2]	233
Asylum Seekers [3]	413
Returned Refugees [4]	0
Internally Displaced Persons (IDPs) [5]	0
Returned IDPs [6]	0
Various [8]	0
<b>Total Population of Concern</b>	<b>646</b>
Notes +	* As at December 2014

Figure 2.1 Refugee Statistics in Thailand in 2014

Source <http://www.unhcr.org/pages/49e489646.html#>



Statistical Snapshot*	
<b>Residing in Bangladesh [1]</b>	
Refugees [2]	232,472
Asylum Seekers [3]	13
Returned Refugees [4]	0
Internally Displaced Persons (IDPs) [5]	0
Returned IDPs [6]	0
Stateless Persons [7]	0
Various [8]	0
<b>Total Population of Concern</b>	<b>232,485</b>
<b>Originating from Bangladesh [1]</b>	
Refugees [2]	10,867
Asylum Seekers [3]	21,612
Returned Refugees [4]	0
Internally Displaced Persons (IDPs) [5]	0
Returned IDPs [6]	0
Various [8]	14
<b>Total Population of Concern</b>	<b>32,493</b>
Notes +	* As at December 2014

Figure 2.2 Refugee Statistics in Bangladesh in 2014

Source <http://www.unhcr.org/pages/49e489646.html#>

a. Definition

According to the 1951 Convention relating to the Status of Refugees, a refugee is someone who:

- Has a well-founded fear of persecution because of his/her Race, Religion, Nationality, Membership in a particular social group, or Political opinion;
- Is outside his/her country of origin; and
- Is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution

While the definition in the Refugee Convention has been used by international organizations such as the United Nations, the term continues to be misunderstood and is often used inconsistently in every day language. Media stories, for example, often confuse refugees with people migrating for economic reasons (“economic migrants”) and persecuted groups who remain within their own country and don’t cross an international border (“internally displaced persons”).

The reasons for persecution must be because of one of the five grounds listed in article 1 A(2) of the Refugee Convention: race, religion, nationality, membership of a particular social group or political opinion. Persecution based on any other ground will not be considered.<sup>20</sup>

*Race* is used in the broadest sense and includes ethnic groups and social groups of common descent.

*Religion* also has a broad meaning, including identification with a group that tends to share common traditions or beliefs, as well as the active practice of religion.

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<sup>20</sup> Human Rights Education Associates, “STUDY GUIDE: The Rights of Refugees”, <http://www1.umn.edu/humanrts/edumat/studyguides/refugees.htm>, downloaded on April 20, 2015.

*Nationality* includes an individual's citizenship. Persecution of ethnic, linguistic and cultural groups within a population also may be termed persecution based on nationality.

*A particular social group* refers to people who share a similar background, habits or social status. This category often overlaps with persecution based on one of the other four grounds. It has applied to families of capitalists, landowners, homosexuals, entrepreneurs and former members of the military.

*Political opinion* refers to ideas not tolerated by the authorities, including opinions critical of government policies and methods. It includes opinions attributed to individuals (*i.e.*, the authorities think a person has a certain political opinion) even if the individual does not in fact hold that opinion. Individuals who conceal their political opinions until after they have fled their countries may qualify for refugee status if they can show that their views are likely to subject them to persecution if they return home.

Definitions come into play when countries and organizations attempt to determine who is and who is not a refugee. *Asylum seekers*—that is, those who are seeking refugee status in another country-- normally need to establish



individually that their fear of persecution is well-founded and undergo a legal procedure in which the host country decides if she or he qualifies for refugee status. However, during a mass exodus, it may not be possible for a host country to carry out individual screening. In such circumstances, particularly when civilians are fleeing for similar reasons, a 'group' determination of refugee status may be declared, whereby each civilian is considered a refugee, in the absence of evidence to the contrary.<sup>21</sup>

#### b. The Rights of Refugees

International law recognizes the right to seek asylum, but does not oblige states to provide it. Nations at times offer 'temporary protection' when they face a sudden mass influx of people and their regular asylum systems would be overwhelmed. In such circumstances people can be speedily admitted to safe countries, but without any guarantee of permanent asylum. Thus 'temporary protection' is helpful to both governments and asylum seekers in specific circumstances. Yet it only complements and does not substitute for the wider protection measures offered by the Refugee Convention.<sup>22</sup>

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

Refugee protection and assistance organizations

generally promote three "durable solutions" to the fate of refugees:

- *Voluntary repatriation* : refugees are able to return to their home country because their lives and liberty are no longer threatened;
- *Local integration*: host governments allow refugees to integrate into the country of first asylum; and
- *Resettlement in a third country* : repatriation is unsafe and the first-asylum country refuses local integration.

Most of the world's refugees wait for durable solutions for their predicament. While most have been granted provisional or temporary asylum in neighboring countries, they are not able to regularize their status or integrate. Their rights to move and work are often highly restricted, and educational and recreational opportunities are often nonexistent or severely lacking. These refugees may also be subject to attack, either by local security forces or by cross-border incursions from the country of origin.<sup>23</sup>

Most of the rights crucial to refugee protection are also the fundamental rights stated in the 1948 Universal Declaration

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<sup>23</sup> *Ibid.*

of Human Rights: Right to life, liberty and security of person; Right to seek and enjoy asylum ; Freedom from torture, or cruel, inhuman or degrading treatment or punishment; Freedom from slavery or servitude; Recognition as a person before the law; Freedom of thought, conscience, and religion; Freedom from arbitrary arrest and detention; Freedom from arbitrary interference in privacy, home and family; Freedom of opinion and expression; Right to be educated<sup>24</sup>; Right to participate in the cultural life of a community.

### 3. Stateless Persons

A stateless person is someone who is not considered to be a national by any State under the operation of its law. He/she may be, but is not necessarily, a refugee. There are millions of stateless persons around the world. In 1996, the UN General Assembly called on UNHCR to promote accession to the two international conventions on statelessness and to provide governments with technical and legal advice on their nationality legislation. UNHCR thus works with governments drafting nationality legislation, helps coordinate emerging legal systems, assists and advises on individual and group cases of statelessness, and helps negotiate treaties related to statelessness. UNHCR's involvement with stateless persons is based on the strong links between statelessness

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<sup>24</sup> Jastram, Kate, Achiron, Marilyn, "REFUGEE PROTECTION: A Guide to International Refugee Law", [http://www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf), downloaded on April 20, 2015



and displacement. For example: Displacement can cause statelessness (when, for example, a person's displacement is followed or accompanied by a redrawing of territorial boundaries). Displacement can be a consequence of statelessness (when stateless and denationalized populations are forced to leave their usual place or residence). Statelessness can be an obstacle to the resolution of refugee problems (when, for example, countries refuse to readmit former refugees on grounds of statelessness). Statelessness is a problem that States should resolve. Governments must take steps to ensure they do not withdraw or withhold the benefits of citizenship from whole sections of the population who can demonstrate a genuine and effective link with that country and who, without State action, would otherwise be stateless.

#### 4. Internal Displaced Persons (IDP)

A special category of people who may have been forced to flee their homes for the same reasons as refugees but they have not crossed an international border. These people are called *internally displaced persons*. By the end of 2000, there were approximately 11.5 million refugees around the world who had fled their countries for a variety of reasons and an even greater number of internally displaced persons, between 20 – 25 million, who had abandoned their homes for similar reasons. Increasingly the majority of current conflicts in the world involve disputes between political or ethnic

groups within countries rather than wars between countries. Given this trend, the number of persons caught up in conflicts in their own countries and forced to leave their homes is likely to increase.

Internally displaced persons (IDPs) are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.<sup>25</sup>

Internally displaced persons, who now constitute some 22 million persons, are persons whose situation is similar to that of refugees. However, there are several differences between IDPs and refugees. First, IDPs are not the subject of a treaty adopted at the universal level, although the Guiding Principles are based on binding international human rights and humanitarian law. Second, as opposed to refugees, IDPs have not crossed an international border from their country of origin. Third, the definition of IDPs in the Guiding Principles is significantly broader than the refugee definition, including those displaced by armed conflict, human rights violations and natural disasters, while the refugee definition

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<sup>25</sup> Geneva Academy, "International Refugee Law", [http://www.geneva-academy.ch/RULAC/international\\_refugee\\_law.php](http://www.geneva-academy.ch/RULAC/international_refugee_law.php), downloaded on April 20, 2015



is restricted to those with a well-founded fear of being persecuted on at least one of five grounds.

#### 5. Returned IDPs

Returned IDPs refers to internally displaced persons who have returned to their place of origin or habitual residence. In returnee situations, UNHCR seeks to reintegrate former IDPs as soon as possible by targeting both returnees as well as receiving communities. Partners are actively engaged to provide development assistance. For statistical purposes, only IDPs who have returned during the calendar year (January-December) are included in the population of concern to UNHCR. In practice, operations may assist returnees for longer or shorter periods, however.<sup>26</sup>

#### 6. Other groups or Persons Of Concern

Other groups or persons of concern refers to individuals who do not necessarily fall directly into any of the groups above but to whom UNHCR has extended its protection and/or assistance services, based on humanitarian or other special grounds. “Persons of concern to UNHCR” are all persons whose protection and assistance needs are of interest to UNHCR.

They include:

- Refugees under the Refugee Convention

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<sup>26</sup> UNHCR, “UNHCR Data Statistical Online Population Database”, <http://www.unhcr.org/45c06c662.html#>, downloaded on April 25, 2015



- Persons fleeing conflict or serious disturbances of the public order (i.e., refugees under the OAU Convention and Cartagena Declaration definitions)
- Returnees (i.e., former refugees)
- Stateless persons
- Internally displaced persons (in some situations)

## 7. Women's Rights

The World Conference on Human Rights reaffirmed clearly that the human rights of women throughout the life cycle are an inalienable, integral and indivisible part of universal human rights.

That's why many conventions uphold the principle of non-discrimination on the grounds of gender.<sup>27</sup>

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women as “any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the

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<sup>27</sup> UN Women, “Human Rights of Women”, <http://www.un.org/womenwatch/daw/beijing/platform/human.htm>, downloaded on April 27, 2015

political, economic, social, cultural, civil, or any other field”

(CEDAW 1979, Art. 1)<sup>28</sup>

#### 8. The principle of non-refoulement

A refugee’s right to be protected against forcible return, or refoulement, is set out in the 1951 Convention relating to the Status of Refugees: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 33(1).

Refoulement is also prohibited explicitly or through interpretation by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the Fourth Geneva Convention of 1949 (Art. 45, para. 4), the International Covenant on Civil and Political Rights (Article 7), the Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5). It is widely accepted that the prohibition of refoulement is part of customary international law. This means that even States that are not party to the Refugee Convention must respect the principle of non-refoulement. States have an obligation under the Refugee

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<sup>28</sup> Global Detention Project, “Migration-Related Detention and International Law”, <http://www.globaldetentionproject.org/law/legal-framework/international/treaties-and-protocols.html>, downloaded on April 27, 2015

Convention and under customary international law to respect the principle of non-refoulement. When this principle is violated or threatens to be, UNHCR respond by intervening with relevant authorities, and if it deems necessary, will inform the public. In some circumstances, persons facing refoulement may have recourse to relevant human rights mechanisms.<sup>29</sup>

#### 9. The Principle of International Solidarity

The principle of solidarity dictates that the refugee is a person of concern to the international community rather a problem of a particular state. Given the reality that most of the refugees both originate from and seek refuge in some of the poorest parts of the world, neither the country of origin nor the country of asylum can be expected to discharge their respective responsibilities without the political and financial support of the international community.<sup>30</sup> The principle of international solidarity establishes that states have an obligation to share the responsibility of finding solutions for the people who have been deprived of a community. The international solidarity principle is central to both protection and solutions of refugee problems.<sup>31</sup>

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<sup>29</sup> Jastram, Kate, *Op. Cit.*

<sup>30</sup> Irene Khan, “The Refugee Problem: Forging a New Strategy”, *Bulletin on IHL and Refugee Law*, Vol.1, No.1, (1996), p.119.

<sup>31</sup> *Ibid.*



## 10. The Principle of Responsibility to Protect (R2P)

In order to protect the Rohingya, the principle of R2P is an important international norm to apply to resolve the human rights violations in Myanmar because it obligates states to safeguard their populations from crimes such as ethnic cleansing and genocide.<sup>32</sup>

The Myanmar government is responsible under R2P to protect the Rohingya since, despite their stateless status, ***“they are human beings living within the territory of Myanmar.”*** An international response under this framework is necessary because the Myanmar government is unwilling and unable to protect the Rohingya.

Moreover, the Rohingya refugees from Myanmar are adversely affecting at least four ASEAN member nations and Bangladesh.

Without some intervention from of the international community, the gross human rights violations against the Rohingya will continue. the R2P principle was unanimously endorsed at the United Nations General Assembly on October 24, 2005, when world leaders committed themselves to *“take collective action . . .*

*should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.”* The R2P principle

entails four pledges.<sup>33</sup> First, all states have the “responsibility to protect their own citizens from genocide, ethnic cleansing, war

<sup>32</sup> Rohingya Blogger, “Rohingya and Responsibility to Protection”, <http://www.rohingyablogger.com/2015/06/rohingya-and-responsibility-to.html#sthash.whytyOak.dpuf>, downloaded on July 8, 2015

<sup>33</sup> *Ibid.*

crimes and crimes against humanity.” Second, the international community must help states with this responsibility, including capacity building and assistance. Third, the international community has the obligation to pursue peaceful means, such as diplomatic and humanitarian channels, to protect people from genocide, ethnic cleansing, and mass atrocities. Fourth, the UN Security Council will implement its powers under Chapter VII of the UN Charter should all peaceful means fail to protect the afflicted population from the mass atrocities.

#### 11. United Nations High Commissioner for Refugees (UNHCR)

As a humanitarian and non-political organization, UNHCR is mandated by the United Nations to protect refugees and help them find solutions to their plight. As the problem of displacement has grown in complexity over the past half century, UNHCR has also grown to meet the challenge. The Office, founded in 1950, has expanded from a relatively small, specialized agency with an envisioned three-year lifespan to an organization of over 4,000 staff members with offices in nearly 120 countries and an annual budget of US\$1 billion. In addition to offering legal protection, UNHCR now also provides material relief in major emergencies, either directly or through partner agencies. In its first fifty years, UNHCR has protected and assisted more than 50 million people and its work has earned two Nobel Peace Prizes. At the



international level, UNHCR promotes international refugee agreements and monitors government compliance with international refugee law. UNHCR staffs promote refugee law among all people who are involved in refugee protection, including border guards, journalists, NGOs, lawyers, judges and senior governmental officials. At the field level, UNHCR staff work to protect refugees through a wide variety of activities, including responding to emergencies, relocating refugee camps away from border areas to improve safety; ensuring that refugee women have a say in food distribution and social services; reuniting separated families; providing information to refugees on conditions in their home country so they can make informed decisions about return; documenting a refugee's need for resettlement to a second country of asylum; visiting detention centres; and giving advice to governments on draft refugee laws, policies and practices.

The Refugee Convention and Protocol provide States Parties with a legal foundation for refugee protection. For its part, UNHCR has been given a mandate to provide international protection to refugees and seek permanent solutions to their problems through its Statute, adopted by the UN General Assembly in December 1950. The Statute sets forth the High Commissioner's functions, including his/her authority to protect refugees as defined in terms similar, although not identical, to the Refugee Convention.



Over the years, the General Assembly has expanded UNHCR's responsibility to include protecting various groups of people who are not covered by the Refugee Convention and Protocol. Some of these people are known as "mandate" refugees; others are returnees, stateless persons and, in some situations, internally displaced persons. UNHCR's mandate is now, therefore, significantly more extensive than the responsibilities assumed by States Parties to the Refugee Convention and Protocol. One of the challenges facing refugees and countries of asylum today consists of bridging the "protection gap" which exists in situations where UNHCR seeks to protect persons with respect to whom concerned States do not recognize that they have a responsibility under any of the refugee instruments.

A comparison of UNHCR's Statute and the Refugee Convention and Protocol:<sup>34</sup>

- *The Statute* serves as UNHCR's constitution. It sets forth the High Commissioner's functions and responsibilities and includes a definition of persons on behalf of whom the High Commissioner can act. This definition has been expanded in various UN General Assembly resolutions.
- *The Refugee Convention* is an international treaty that is binding upon the signatory States. It specifies the rights and

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<sup>34</sup> Jastram, Kate, Op. Cit.

obligations of persons who are recognized as refugees according to the definition contained in the Convention.

- *Mandate refugees* are persons considered by UNHCR to be refugees according to its Statute or under the broader mandate given by the General Assembly. UNHCR's determination of refugee status is not dependent upon the country of asylum being party to the Refugee Convention or Protocol.
- *Convention refugees* are persons recognized as refugees by the authorities of States that have acceded to the Convention and/or Protocol. As such, they are entitled to claim the rights and benefits that those States have agreed to accord to refugees.

UNHCR seeks long-term solutions to the plight of refugees by helping refugees repatriate to their home country, if conditions are conducive to return, integrate into their countries of asylum, or resettle in second countries of asylum. UNHCR assists with repatriation and ensures it is voluntary. UNHCR's primary purpose is to safeguard the rights and well-being of refugees. UNHCR strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, and to return home voluntarily.<sup>35</sup>

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<sup>35</sup> Coutts, Evan, *Op. Cit.*

## 12. Country Profile of Thailand



Figure 2.3 Map of Thailand

The official name of Thailand is Kingdom of Thailand. In Thai language, it's called Prathet Thai. (Prathet means country). Around until 1939, the country was known as "Siam" and then it was changed to the current name, "Prathet Thai", or "Thailand" once. However, it was renamed back to "Siam" from 1945 to 1949, then back to "Thailand" on May 11, 1949. "Thai" means "free", therefore, "Thailand" means "Land of the Free." It must show their pride about the fact that Thailand is the only one country that has never been colonized in Southeast Asia while other countries around were colonized by Great Britain and France.<sup>36</sup>

The king is highly respected by all the people. Pictures of the king and queen can be seen all over the country such as in shops, homes, along the streets, in taxis and so on. The current national flag of Thailand was adopted on September 28 in 1917 (B.E.2460) by Rama VI (King Vajiravudh). (Until then, the design

<sup>36</sup> Thai Smile, "Thailand General Information", [http://www.thaismile.jp/e\\_general\\_info\\_of\\_Thailand.html](http://www.thaismile.jp/e_general_info_of_Thailand.html), downloaded on April 25, 2015



of a white elephant on a red background had been used since the era of Rama IV.) The national flag of Thailand is called "Thong Trairong"; Blue stripe in the middle, white bands up and down of it, and red stripes sandwiches them. Approximately 513,000 square kilometers. Almost the same size as France and about 1.4 times larger than Japan. The shape is very interesting; if you see the northern part as an ear, Bangkok area as a mouth and the southern part as a nose, the whole land looks a profile of an elephant. The Thai currency is called Baht. It's simply called "Baht" or "Thai Baht".<sup>37</sup>

### 13. Country Profile of Bangladesh



Figure 2.4 Map of Bangladesh

<sup>37</sup> *Ibid.*

Bangladesh is one of the world's most densely populated countries, with its people crammed into a delta of rivers that empties into the Bay of Bengal. Poverty is deep and widespread, but Bangladesh has in recent years reduced population growth and improved health and education. Some economists see it as one of the "Next Eleven" tier of developing countries with potential for serious foreign-investment-led growth. The major employer is agriculture, but it is unable to meet the demand for jobs. So, many Bangladeshis - in common with citizens from other countries in the region - seek work abroad, sometimes illegally.<sup>38</sup>

The country is trying to diversify its economy, with industrial development a priority. Overseas investors have pumped money into manufacturing and the energy sector. The collapse of a garment factory in 2013 with the loss of more than 1,000 lives brought workers out onto the streets to demand better conditions. Onshore and offshore gas reserves could provide a chance for future prosperity. There has been a debate about whether the reserves should be kept for domestic use or exported. International companies are involved in the gas sector.

Formerly East Pakistan, Bangladesh came into being only in 1971, when the two parts of Pakistan split after a bitter war which drew in neighbouring India. Bangladesh spent 15 years

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<sup>38</sup> BBC, "Bangladesh Country Profile". <http://www.bbc.com/news/world-south-asia-12650940>, downloaded on May 11, 2015.



under military rule and, although democracy was restored in 1990, the political scene remains volatile. Antagonism between the main parties - the Awami League and Bangladesh Nationalist Party - to a large degree reflects personal animosity between leaders rather than substantial ideological differences. Most opposition parties boycotted the 2014 elections, and the Bangladesh Nationalist Party is leading a campaign of civil disobedience to have the Awami League government step down in favour of a caretaker administration to hold fresh elections. Political tensions often spill over into violence, in which hundreds of people have died in recent years.

Islamist extremism has been rising in the usually tolerant country. The government is conducting a sustained campaign of arrests against Islamists, many of whom accuse the authorities of using security fears to suppress legitimate opposition.

The low-lying country is vulnerable to flooding and cyclones, and stands to be badly affected by any rises in sea levels.<sup>39</sup>

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<sup>39</sup> *Ibid.*



## B. Legal Framework

The international community have provided many contributions for the development of international human rights law. Some of the contributions are regulations relating to refugees. Some of the important regulations relative to refugees and penalties for breaching international law are as following:

- a. Universal Declaration of Human Rights (UDHR), its preamble and Article 1, provides the inherent rights of all beings:

“Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people....All human beings are born free and equal in dignity and rights.”<sup>40</sup>

Article 3:

“Everyone has the right to life, liberty and security of person”

Article 4:

“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”

Article 14(1):

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

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<sup>40</sup> Human Rights Commission. International Human Rights Law, “What Are Human Rights?” <http://www.humanrights.com/what-are-human-rights/international-human-rights-law.html>, downloaded on April 21, 2015

- b. International Covenant on Civil and Political Rights (ICCPR) – Acceded by Thailand in 1966, by Bangladesh in 2000, Article 2(1):<sup>41</sup>

"Each State party [to the ICCPR] must ensure the rights in the Covenant to all individuals within its territory and subject to its jurisdiction."

In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."

Article 7:

"... prohibits states parties from exposing persons to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."

Article 9:<sup>42</sup>

(1) "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established in law"

(4) "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"

Article 10(1):

<sup>41</sup> Human Rights Education Associates, *Op. Cit.*

<sup>42</sup> Global Detention Project, *Op. Cit.*

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”

Article 12:

- (1) “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”
- (2) “Everyone shall be free to leave any country, including his own”

- c. International Covenant on Economic, Social and Cultural Rights (ICESCR) ; Ratified by Thailand in 1999, and acceded by Bangladesh in 1998,<sup>43</sup>

Article 17 — regarding wage-earning employment

- “1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.
2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:
  - (a) He has completed three years’ residence in the country.
  - (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

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<sup>43</sup> *Ibid.*



(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programs of labour recruitment or under immigration schemes.”

Article 18—regarding self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19—regarding practicing a profession

“1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavors consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.”

d. Convention Relating to the Status of Refugees (1951)

This was the first international agreement covering the most fundamental aspects of a refugee’s life. It spelled

out a set of human rights that should be at least equivalent to freedoms enjoyed by foreign nationals living legally in a given country and in many cases those of citizens of that state. It recognized the international scope of refugee crisis and necessity of international cooperation -- including burden-sharing among states -- in tackling the problem. As of 1 October 2002, 141 countries had ratified the Refugee Convention.

Articles 12 - 30 of the Refugee Convention set out the rights which individuals are entitled to once they have been recognised as Convention refugees:<sup>44</sup>

- All refugees must be granted identity papers and travel documents that allow them to travel outside the country
- Refugees must receive *the same treatment as nationals of the receiving country* with regard to the following rights:
  - Free exercise of religion and religious education
  - Free access to the courts, including legal assistance
  - Access to elementary education
  - Access to public relief and assistance

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<sup>44</sup> Human Rights Education Associates, *Op. Cit.*

- Protection provided by social security
- Protection of intellectual property, such as inventions and trade names
- Protection of literary, artistic and scientific work
- Equal treatment by taxing authorities
- Refugees must receive *the most favourable treatment provided to nationals of a foreign country* with regard to the following rights:
  - The right to belong to trade unions
  - The right to belong to other non-political nonprofit organizations
  - The right to engage in wage-earning employment
- Refugees must receive *the most favourable treatment possible, which must be at least as favourable to that accorded aliens generally in the same circumstances*, with regard to the following rights:
  - The right to own property
  - The right to practice a profession
  - The right to self-employment
  - Access to housing
  - Access to higher education



- Refugees must receive *the same treatment as that accorded to aliens generally* with regard to the following rights:
  - The right to choose their place of residence
  - The right to move freely within the country
  - Free exercise of religion and religious education
  - Free access to the courts, including legal assistance
  - Access to elementary education
  - Access to public relief and assistance
  - Protection provided by social security
  - Protection of intellectual property, such as inventions and trade names
  - Protection of literary, artistic and scientific work
  - Equal treatment by taxing authorities

Prohibition on the forced return of a refugee is called *nonrefoulement* and is one of the most fundamental principles in international refugee law. This principle is laid out in Article 33 of the Convention Relating to the Status of Refugees, which says that no state "shall expel or return ('refouler' in French) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would

be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

e. Protocol Relating to the Status of Refugees (1967)

Removes the geographical and time limitations written into the original Refugee Convention under which mainly Europeans involved in events occurring before 1 January 1951 could apply for refugee status.

f. Convention of the Elimination of All Forms of Discrimination against Women (CEDAW); Ratified by Thailand and Bangladesh in 2002, provides:

Article 6:

" States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women"

g. Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression

Article 39

" The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

#### Article 40

“ In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.”

#### Article 41

“ The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

#### Article 42

“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

#### Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of



passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

#### h. National Legal System of Thailand Relating to Refugee

Thailand has been faced with the challenging and delicate task of controlling its porous borders while also offering protection to victims of persecution. The law and policy framework in Thailand and the entire region appears to focus more on border control and less on protection. Consequently, refugees are not always identified as such, do not always receive protection and remain vulnerable to human rights abuse.

The countries concerned do not have strong refugee protection frameworks in place and Rohingya refugees are rarely recognized as such.

Consequently, the identification of victims of

trafficking has taken on a level of importance in the region which is in itself an indication of the weakness of any existing national refugee protection frameworks.<sup>45</sup>

Over the years, the Thai government has treated refugee situations as temporary humanitarian issues to be handled from the purview of foreign affairs. Protection, under this purview, is framed by Thailand as the responsibility of the international community with Thailand contributing ad hoc assistance as a member of that community. Thailand has no permanent domestic legal and administrative frameworks for determining asylum claims and protecting refugee rights and the international community is only able to contribute to protecting asylum-seekers and refugees in Thailand on an ad hoc basis, with permission of the Thai government, leading to many gaps in provision of protection, as in the case of the Rohingya.

Like many other countries in the Asian region, Thailand has not signed the Refugee Convention, although it is along with Bangladesh,

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<sup>45</sup> Equal Rights Trust, *Op. Cit.*

India, and Pakistan a member of the ExCom, a body which has been at the forefront of developing standards and guidelines to protect refugees. There is no regional refugee instrument in Asia, such as exist in Africa and Latin America and which go further than the Refugee Convention in providing specific legal standards for the treatment of refugees. In addition, Thailand has no domestic legislation covering the treatment of refugees. The 1979 Immigration Act (amended in 1980) is the only relevant piece of legislation, and under this law all undocumented asylum-seekers are considered "illegal immigrants" and liable to summary deportation.<sup>46</sup> Appeals by asylum-seekers against deportation are rare since, although such appeals can generally be made to the Ministry of Interior, they are not allowed in the case of those without passports, equivalent identification documents, or visas.

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<sup>46</sup> Thailand, Immigration Act 1979, Article 12.



i. National Legal System of Bangladesh Relating to Refugees

There is no national legislation governing the administration of refugee affairs in Bangladesh, and the legislation applicable to foreigners (the Foreigners Act 1946) and admission (the Control of Entry Act 1952) make no explicit reference to refugees. Administratively, the Ministry of Food and Disaster Management (MFDM) is responsible for refugee related issues and coordinating activities in relation to camp based refugees. It in turn has designated responsibility for a range of camp administrative matters (management, delivery of assistance, health care, water and sanitation and camp maintenance) to the Office of the Refugee Relief and Repatriation Commissioner (RRRC). Other general provisions of Bangladesh law apply to refugees in principle, although they are not necessarily observed in practice. Several articles in the Constitution, for example, arguably have a bearing on refugee affairs including: The obligation to ‘support oppressed people throughout the world waging a just struggle against imperialism,

colonialism and racism’ (art. 24(1) (c)); the obligation to ‘base its international relations on the principles and respect for international law and the principles enunciated in the UN Charter’ (art. 25); the obligation to protect every citizen and ‘every other person within Bangladesh for the time being’ (art. 31); the obligation that ‘no person shall be deprived of life and liberty save in accordance with the law’ (art. 32). In addition, article 28 and 29 of the Constitution, the Prevention of Violence against Women and Children Act (last amendment 2003), Dowry Prohibition Act 1980, Cruelty to Women (Deterrent Punishment) Ordinance 1983, and some sections of the Penal Code provide procedures for the protection from violence against women.<sup>47</sup> Sections 3 Foreigners Act of 1946, though this law does not specifically mention about refugee, the Ministry of Home Affairs may issue residential permits to any foreigner who can include refugees.<sup>48</sup>

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<sup>47</sup> UNHCR, “Analysis of Gap in the Protection of Rohingya Refugees”, <http://www.unhcr.org/46fa1af32.pdf>. downloaded on May 11, 2015

<sup>48</sup> Abdullah Al Faruque, “Plight of Rohingya Refugees in Bangladesh: Legal Aspect of the Problems”, [http://www.culaw.ac.bd/files/plight\\_of\\_ruhingyas.pdf](http://www.culaw.ac.bd/files/plight_of_ruhingyas.pdf) , downloaded on April 25, 2015.

## C. Theoretical Framework

### 1. Legal Protection Theory/*Rechtsbscherming Theory*

Legal protection is a representation of the implementation of the function of law to reach three purposes of law, such as justice, expediency, and legal certainty. According to Satjipto Raharjo, Legal Protection is to give aegis towards the human rights which were violated and the protection is given to the society so they can benefit all the rights that law have given to them.<sup>49</sup>

According to Phillipus M. Hadjon, there are two types of legal protection, such as Preventive Legal Protection and Repressive Legal Protection.<sup>50</sup> The preventive legal protection is aiming to prevent conflicts using the rules and regulations, while the repressive legal protection is aiming to prevent conflicts using the agreement of the parties.<sup>51</sup> It means that legal protection is a protection given to a society or subject of law according to the rules or regulations of law, even if it is the preventive legal protection or repressive legal protection, written or unwritten, in order to establish the rule of law.

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<sup>49</sup> Satjipto Raharjo, *Ilmu Hukum*, (Bandung: PT. Citra Aditya Bakti, 2000), pg.54.

<sup>50</sup> Philipus Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, first edition, limited edition, (Surabaya: Peradaban, 2007), pg.2.

<sup>51</sup> *Ibid*, pg.3-5.