

CHAPTER II

LITERATURE REVIEW

A. CONCEPTUAL FRAMEWORK

1. General Reviews on the Refugees

a. Definition of Refugees

The terms and definitions of refugees (refugee) first appeared at the time of the First World War, which is regarded as the culmination of the process of building a state.¹ The refugees who are victims of world war are people who are very poor and can not earn a living and improve their living standards without the help of the protection of the country in which they are located. Their departure also out of necessity, as a result they do not take care of the documents (letters) journey that is needed as they walked across their borders to go to flee to another country. The situation is very difficult and that inspired the emergence of a definition of refugee.²

Malcom Proudfoot gives a definition by seeing the situation of refugees of World War II. Although it wasn't given a direct definition regarding the refugees, the definition is as below:

¹ Peter J.Taylor, Political Geography World Economy, Nation State and Locality, Es Sex : Longman, ed. 1993.

² Daniele Joly, Haven or Hell : Asylum Policies and Refugee in Europe, London : Mac Millan Press,1966

“These forced movements, ...were the result of the persecution, forcible deportation, or flight of Jews and political opponents of the authoritarian governments; the transference of ethnic population back to their homeland or to newly created provinces acquired by war or treaty; the arbitrary rearrangement of prewar boundaries of sovereign states; the mass flight of the air and the terror of bombardment from the air and under the threat or pressure of advance or retreat of armies over immense areas of Europe; the forced removal of populations from coastal or defense areas under military dictation; and the deportation for forced labour to bolster the German war effort.”

The 1951 Refugee Convention spells out that a refugee is someone 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 nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country."

From above opinion can be concluded that refugees are people who are forced to move elsewhere due to persecution, forced deportation, or the expulsion of the certain ethnic and the political opposition of the ruling government, the return of a certain ethnicity to their home countries or new provinces arising by war or treaty, the determination of the boundary unilaterally before the war the displacement of the civilian population on a large scale as a result of air strikes and pressure or threat from the military in some areas of Europe relocated forcibly residents from coastal

areas or areas of defense by military orders, and repatriation of forced labor to participate in the war.

There were differences between the definition of refugee before and after year 1951. The principal of the definition of refugees in international convention before year 1951 is that there was geographical delimitation. And thus the protection under international convention was only given to those peoples whom came from certain areas recognized by the convention only.

The definition of refugees after year 1951 was define generally, not only limited to certain area but only there was time delimitation. The time delimitation means that only for those who have flee their before date 1st January 1951. Therefore those whom flee from their land after 1st January 1951 are not considered as refugees under the international convention and do not have protection under such convention.

b. History of Refugees

The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest hallmarks of civilization. References to it have been found in texts written 3,500 years ago, during the blossoming of the great early empires in the Middle East such as the Hittites, Babylonians, Assyrians and ancient Egyptians. Over three millennia later, protecting refugees was made the core mandate of the UN refugee agency, which was set up to look after refugees, specifically those waiting to return home at the end of World War II.

The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty. Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception. It goes some way to alleviate the plight of those affected by breaches of human rights standards or by the collapse of an existing social order in the wake of revolution, civil strife, or aggression; but it is incomplete so far as refugees and asylum seekers may still be denied even temporary protection, safe return to their homes, or compensation³

The existence of the class of refugees in international law not only entails legal consequences for States, but also the entitlement and the responsibility to exercise protection on behalf of refugees. The Office of the United Nations High Commissioner for Refugees (UNHCR) is the agency presently entrusted with this function, as the representative of the international community, but States also have a protecting role, even though their material interests are not engaged, and not withstanding their common reluctance to take up the cause.⁴ Moreover, the 'interest' of the international community is expanding, and this is raising new legal and

³ Sadruddin Aga Khan, Study on Human Rights and Mass Exoduses: UN doc. E/CN.4/1503, para. 9.

⁴ Cf. *R (on the application of Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs (UNHCR intervening)* [2006] EWCA Civ 1279.

institutional questions on issues such as internal displacement, complex humanitarian emergencies, and the 'responsibility to protect'.

The community of nations is responsible in a general sense for finding solutions and in providing international protection to refugees. This special mandate was entrusted to UNHCR in relatively unambiguous terms in 1950, and as an actor on the international plane its practice has contributed greatly to the formation of legal structures and the development and consolidation of rules and standards. Since the early 1990s, however, UNHCR has often given the impression of an agency in search of a purpose, anxious to be seen to be active and to claim turf in the 'humanitarian space', particularly in relation to other international organizations. This has led at times to a loss of priority for its special responsibility for the protection of refugees, although some of the ground has been made up recently through the Global Consultations process and other promotional work. The backing of key players, both donors and members generally of the UNHCR Executive Committee, will be essential if protection is once again to acquire primary importance, although there is a danger it may be overcome by concerns of the moment or longer, including security, migration, and globalization. In addition, the UN's capacity to respond effectively to complex and other humanitarian emergencies, including both internal and external displacement, is under review, and both UNHCR and other bodies, such as the Office of the United Nations High Commissioner for Human Rights, will need to ensure that

protection principles are effectively integrated into policy planning and implementation.⁵

c. Determination of Refugee Status

The refugee status assessment / declaration were just a saying of what is already there. This contrasts with the constitutive for creating a new status. So, in other words, the person does not become a refugee because of recognition, but the recognition was held because he was already refugees

Someone to be called refugees if they have met the requirements stipulated, for example L 1951 Convention, this means that refugee status had been there before the concerned expressed formally or officially. Therefore, the recognition of a person becoming refugees do not actually make people become refugees but recognition but only it stated that the person is a refugee.

Determination of a person to become refugees (Refugee Status) is actually a process that occurs in two stages:

- i. Discovery and determination from the fact that there is indeed that person is a Refugee.

⁵ See Goodwin-Gill, G. S. 'Protection and Assistance for Refugees and the Displaced: Institutional Dimensions, Institutional Challenges', Paper presented at a Workshop on 'Refugee Protection in International Law: Contemporary Challenges', Refugee Studies Centre, University of Oxford, 24 Apr. 2006 <<http://refugeelaw.quehlox.ac.uk>>

ii. The fact is connected with those requirements under the 1951 Convention and Protocol of 1967. After that, whether the relevant connected is a refugee or not.

At first the refugee status is not called refugees, they are asylum seekers, where asylum seekers are people who have applied for protection, but his request was in the process of determining. If the petition is an asylum seeker is accepted, then it will be referred to as refugees, and this gives him the rights and obligations in accordance with the legislation of the country that received it.

Practical determination whether someone called refugees or not, given by specific government agencies in the country that he had visit or UN refugee agency UNHCR. The percentage of asylum applications received is various considerably from one country to another, even for the same country. After waiting process over the years, the asylum seekers who get a negative answer can not be expatriation, which makes them stranded. The asylum seekers who do not leave the country which he visited usually regarded as undocumented immigrants. Asylum seekers, especially those whose applications are not accepted, more and more are housed in detention.

Very impossible for asylum seekers to leave their home country without bringing sufficient documents and visas. So, many asylum seekers are forced to choose the expensive and dangerous journey to enter countries is not fair where they

could obtain refugee status.⁶ Often the terminology of asylum seekers and refugees caused confusion. An asylum seeker is someone who identifies himself as a refugee, but their request for protection has not been completed to be considered. Asylum seekers who have registered can then apply for refugee status through procedures depth assessment by the UNHCR, which is referred to as the Refugee Status Determination or Refugee Status Determination (RSD). These procedures include:

- i. Registration on the Asylum Seekers.

Before starting this phase, UNHCR officers skilled in the art provide entry form and provide some sort of briefing on the process that will be done to the asylum seekers. Briefing done is accompanied by an interpreter reliable based on the needs at the time of registration, the language is used.

Then later, the asylum seekers entered the stage of registration. In this registration stage, the asylum seekers are recorded all the details, from the name, origin, ethnicity, religion, citizenship, language used, the date of departure from the country of origin, transit, family data, the reasons run from the country, and so forth.

Once this phase is completed, UNHCR will provide a sort of attestation letter, or a letter stating that the person is following the process of refugee status determination. Since this is still an early stage, then the attestation letter is issued asylum seeker certificate. The term of this certificate used varies. For those who are

⁶ <http://jrs.or.id/refugee/> access on 5 March 2015

categorized as minor, woman, or parents, or we often refer to as a group vulnerable (vulnerable), they will usually get a faster initial round of interviews. The term of this certificate depends period of the early stages of the interview. But for the regular class, they usually will get a certificate for a period of two months. After two months, they were asked to come back to the UNHCR to then obtain renewal of a certificate already granted along ascertain the early stages of the interview date. Selection of the date of the interview is also based on the availability of interpreters available, such as when the Dutch language interpreter present on Friday, then schedule them was placed on Friday. Studies examining this matter, stating that the interview schedules drawn up by the UNHCR have reached the following year. So he could be this year's list, but getting the interview schedule next year.

Attestation letter issued by UNHCR's own principle of non-refoulement, a principle that has been recognized in customary international law, that a country must not return people suspected as refugees to countries where people are afraid to be persecuted or tortured.⁷

ii. Interview

Interview early stages or are referred to as 1st instance interview is an interview conducted by a UNHCR officer to dig deeper into the case of an asylum seeker before being given advice on his case is accepted or rejected. In each of these

⁷ Lettredecreance.Blogspot.Com/2013/05/Proses-Penentuan-Status-Pengungsi.Html access on 5 March 2015

interviews, they are usually accompanied by a trained interpreter. The question posed is detail, and the UNHCR officer has stated that all statements submitted during the interview process is confidential and there will be no other party knows except UNHCR itself.

Before the start of the interview, the officer usually already know the number of cases that will be encountered as well as hold small-scale research on the countries of origin of asylum seekers, country information, other cases are similar to the reasons asylum seekers fled the country, and so forth.

The interview process usually takes a long time. One asylum-seekers usually takes about 4 to 5 hours.⁸

iii. Refugee Status Determination

The process of refugee status determination or usually called with the Refugee Status Determination (RSD), is a stage where the officer has completed the interview in the first stage, is responsible for the resolution of the case, to provide a report and recommendation whether their case was rejected or accepted by UNHCR , In this phase, the officer is writing a kind of pre-defined report format by the UNHCR center in Geneva, in English, which thickness achieves a minimum of 10 pages for one case. In this stage, they dig up all the information obtained in the interview stage, from information Country of Information (COI), news updates regarding the conflict

⁸ *ibid*

regions where the asylum seekers claiming to come from there, as well as the guidelines of the UNHCR center about certain things. Moreover, for some specific cases, often the officer is also corresponded with the other parts of the world other officer who happened ever handle a case or asylum seekers is ever seeking asylum in other countries.

The task of the officer is almost like the job of a judge. But the difference, if a judge to decide a person's guilt or innocence should use an assembly, and assisted by a scribe to record the decision, then for UNHCR officer this, they themselves do start the interview stage, dig cases, to provide recommendations and typed them. They are sometimes still have to work on other cases which, if calculated count there were about 20 cases per month.⁹

iv. Status Granting / Case Refusal

After an officer solved a case, then the officer recommends the case to the higher officer to do to re-review. Often inspection started from the core of the case, the reason, the basis of the recommendations, even to grammar and writing semicolon. It's all aimed at creating a qualified recommendation. The higher officer usually calls the officer who worked on the case to find out more detail why the case is to be accepted or rejected. Then follow with the finalization. For those who received the case and declared eligible as a refugee, then they are granted refugee

⁹ *Ibid*

status internationally. UNHCR forthwith notify the person to be given the good news, and asked him to come to the UNHCR to swap their attestation letter that had become refugee asylum seeker certificate. As for those who rejected the case, UNHCR has the right to not give a reason, and they have the right to appeal which the period is given for a month. Appeals are given in writing, along with reasons. Usually the rejected asylum seekers who then provides a variety of new facts or any other story in the hope their status will be reconsidered by the UNHCR.

If their appeal request received by the UNHCR, the UNHCR will give a new timetable for them to come back to interview additional or appeal interview. However, the interview is not a necessity. If the officer who handles had enough information given at the time of filing an appeal letter, then it is no longer necessary.¹⁰

d. Rights and Obligation of Refugee under International Law

A person who is a refugee has a number of important rights under the Refugee Convention, including:

- i. the right not to be returned to the country where they have a well-founded fear of persecution (article 33);
- ii. the right not to be discriminated against or penalized because they are a refugee (article 3);

¹⁰ *ibid*

- iii. the right to equal access to the courts (article 16);
- iv. freedom of religion (article 4) and movement (article 26);
- v. the right to education (article 22) and employment (article 17); and
- vi. access to travel documents (article 28)

Article 31 of the Refugee Convention prohibits penalizing asylum seekers based on the manner of their arrival into the country from which they are seeking protection. However, asylum seekers and refugees also have rights under other international agreements which are shared by the general population in countries party to these agreements. Simply complying with the rights outlined in the Refugee Convention does not satisfy a country's duty to protect the general rights of asylum seekers and refugees under these other agreements. These agreements, all of which consider as general rights, include the International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989), and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (1984).

While aside from rights given to the refugee, convention of refugee also stated the obligation of refugee which stated in the Refugee Convention article 2,

“Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”

With above article, refugees are all required to obey the law and regulations in which the country he find himself in.

e. Principles of Non-refoulement as a Norm of Customary International Law

The word non-refoulement derives from the French *refouler*, which means to drive back or to repel. Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.¹¹ This law institute is often regarded as one of the most important principles of refugee and immigration law.

Although the principle of non-refoulement was present in international dialogue during the era of the League of Nations, it was not formally codified until the 1951 Refugee Convention. The influx of refugees into the Allied countries following World War II (1939 -1945) and the ensuing challenges this influx presented, underscored the need for formal international standards and obligations regarding the treatment of refugees. The 1951 Convention Relating to the Status of Refugees and 1967 Protocol set forth formal legal obligations regarding the treatment of refugees, defined as persons who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or

¹¹ Lauterpacht, Sir Elihu and Daniel Bethlehem, "The scope and content of the principle of non-refoulement: Opinon", UNHCR: 20 June 2001.

political opinion, are outside their country of nationality and are either unwilling or unable to avail themselves of the protection of that country (Article 1).

The principle of non-refoulement is codified in its best-known form in the 1951 Refugee Convention. Article 33(1) states:

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 particular opinion.

In addition to the 1951 Refugee Convention, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Article 3) and the 1966 International Covenant on Civil and Political Rights (ICCPR) (Article 7) all prohibit refoulement. Of these three treaties, at least one is in force in some 169 States. Thus, an overwhelming majority of the world’s States are bound by treaty law to respect the principle of non-refoulement.¹²

In addition, there are a number of other regional instruments and non-binding documents which reaffirm the principle of non-refoulement. These include:

- i. 1966 Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee (Article III(3))

¹² Lauterpacht, Sir Elihu and Daniel Bethlehem, “The scope and content of the principle of non-refoulement: Opinon”, UNHCR: 20 June 2001, p. 5.

- ii. 1967 Declaration on Territorial Asylum adopted by the United Nations General Assembly (Res 2132 (XXII) 14 December, Article 3)
- iii. 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (Article II(3))
- iv. 1969 American Convention on Human Rights (Article 22(8))
- v. 1984 Cartagena Declaration (Section III, paragraph 5)

The non-refoulement principle has also been invoked in discussions of extradition. Both the 1957 European Convention on Extradition (Article 3(2)) and the 1981 Inter-American Convention on Extradition (Article 4(5)) preclude extradition in cases where a person will be prosecuted or punished as a result of his or her race, religion, nationality or political opinion.¹³ Additionally, the legislation implementing CAT obligations in the United States (CFR Title 8, 208.16-208.18 and 1208.16-1208.18) prohibit the removal of aliens to countries where they are more likely than not to face torture.¹⁴

International bodies have also affirmed the principle of non-refoulement. For example, the European Court of Human Rights (ECHR) has interpreted the 1950 European Convention for the Protection of Human Rights and Fundamental

¹³ *Supra* ii

¹⁴ "The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens," Michael John Garcia, Congressional Research Service: March 11, 2004, pg. 8.

Freedoms (Article 3) to prohibit refoulement and the principle is reaffirmed in more than 30 United Nations General Assembly Resolutions.¹⁵

There is, however, debate about the scope of non-refoulement. For example, in *Soering v. UK* (7 July 1989), the ECHR found that more favorable human rights conditions in a claimant's host country than in a claimant's country of origin did not provide grounds asserting claims of non-refoulement.

Finally, scholars argue that State practice since the 1951 Refugee Convention has provided persuasive evidence that the principle has obtained the status of customary international law. No state has formally or informally opposed the principle but instead, where there have been objections to its application, States have challenged the refugee status of the individual concerned or have invoked exceptions to the principle.¹⁶

f. Principles of Jus Cogens

Jus cogens in international law is a set of principles or norms of international law that the entry into force can not be changed and should not be ignored, and therefore can apply to cancel an agreement between countries in terms of the agreement were not in accordance with one of the principles or norms. In Article 64

¹⁵ Röhl, Katharina, "Fleeing Violence and Poverty: non refoulement obligations under the European Convention on Human Rights", Working Paper No. 11, New Issues in Refugee Research, UNCHR, Evaluation and Policy Analysis Unit, January 2005, p. 8.

¹⁶ Goodwin-Gill, Guy S., *The Refugee in International Law*, Oxford: Oxford UP, 1996, 2nd ed, p. 167-169. For a discussion of State conduct related to refoulement, see also pp 129-137.

of the Vienna Convention on the law of treaties internasional ditentukan that, Jus cogens is one of the customary of International Law.¹⁷

The principle of jus cogens by experts referred to as rules that restrict the will of the state, as claimed by Rozakis:¹⁸

“... Although countries have the freedom to form the law, are free to regulate their own behavior, but freedom has its limits, there are rules of law that restrict the will of the state, threatening the rule of law to the invalidity of any agreements made by countries to the contrary. This rule of law is called Jus Cogens.”¹⁹

JG Starke explained that Jus cogens is a set of principles or norms that can not be changed (peremptory) and should not be overlooked, and which could therefore apply to cancel a treaty or an agreement between the countries in terms of treaty or agreement that does not correspond to one of the principles or norms. In accordance with Article 53 of the Rome Convention on the Law of Treaties dated May 23, 1969, there is an additional characteristic of the norm jus cogens that norms can only be changed by international legal norms arising later which also has the same character. The aim is the principle of jus cogens in international law is something that is accepted by the international community as a whole, and can only be changed by a principle which has the character of a similar type came later, and thus an association

¹⁷ Yudha bhakti. Pengertian jus cogens dalam konvensi WINA 1969 tentang hukum perjanjian internasional

¹⁸ *Ibid*

¹⁹ *Ibid*

of regional can not change or ignore the principle that in no case the existence of a decision for that purpose by the entire international community.²⁰

B. LEGAL FRAMEWORK

1. The fourth Geneva Convention Relative to the Protection of Civillian persons in time of war

Convention made in Geneva on August 12, 1949 in addition to the protection of war victims are also set on refugees because of such refugees considered in the category of protected persons. The refugees who are not protected from any country should not be treated as an enemy. The regulation are contained in Article 44 of this Convention which states as follows:

"in applying the measures of control Mentioned in the present convention, the detaining power shall not treats the as the enemy aliens exclusively on the basic of their nationality de jure of an enemy state , refugees who do not, in fact, enjoy the protection of any government."

The Convention also has the additional protocol namely Additional Protocol to the Geneva Conventions *of 12 August 1949*. In this protocol arrangements of refugee contained in Article 73 which states:

"Persons who, before the beginning of the Hostilities, were Considered as stateless persons or refugees under the relevant international instruments accepted by

²⁰ J.G Starke, pengantar Hukum Internasional Edisi Kesepuluh

the parties concerned or under the national legislation of the state of refugees or state of residence shall be protected persons within the meaning of parts I and III of the Fourth Convention, in all circumstance and without any adverse distinction.”

2. Convention Relating to the status of Refugees

This Convention was ratified on July 28, 1951 by the United Nations Conference of plenipotentiaries on the status of refugees and stateless persons were confirmed by a resolution of General assembly of nations (UN) 429 (V) on 14 December 1950. The Convention entered into force on dated 22 April 1954. This Convention contains a common definition of refugee in Article 1A (2) Convention Relating to the status of refugees in 1951.

In the 1951 convention is a convention that protects refugees and provide assistance to refugees, there are some protections provided from this convention.²¹

First, there is no discrimination. Participating countries Convention should not treat refugees under both political discrimination with respect to race, religion or country of origin or the color of their skin and have the freedom to practice their religion (Article 3 and 4).

Second, regarding the personal status of refugees set in accordance with the law where they are domiciled. If they do not have a domicile, their personal status

²¹ Sri Setianingsih Suwardi, “Aspek Hukum Masalah Peng-ungsi Internasional”, Jurnal HI, Vol.2 No.1 year 2004, Jakarta:LPHI FH UI,pg.35.

governed by the laws under which they are (place of residence). Rights relating to marriage must be recognized by the State Parties to the Convention and the Protocol (Article 12).

Third, a refugee has the same rights in terms of property rights have or have both mobile and fixed, and save it as much as anyone else, and also be able to transfer its assets to a country where he will settle (Articles 13, 14 and 30).

Fourth, the Convention states parties must recognize freedom of association with the refugees to establish associations including trade associations throughout the association is non-profit and non-political (Article 15) It is the right of association.

Fifth, a refugee will have the freedom to litigation in front of courts (Article 16).

Sixth, is entitled to get a job and set up a trading company and other activities, in which the free work must be in accordance with the provisions that have been recognized, as example a certification, the point is to know the expertise to be placed on a suitable job of Articles 17, 18 and 19.

Seventh, each refugee will receive equal treatment with other citizens of the right to education under Article 22.

Eighth, each refugee will be able to enjoy the rights to social welfare, such as the right to work, housing, wages of the work they do Articles 20 and 22. It is the right to social welfare.

Ninth, every refugee is entitled to identity papers and documents a trip to the outside of the territory of the country where he was placed except for reasons of security and public interest. The travel documents issued on an international agreement will be recognized by the State Parties to the Convention Article 27 and 28. In addition to the rights of refugees mentioned above, the Convention has also outlined the obligations of refugees as contained in Article 2 of the Convention: Every refugee has duties to the country in the which he finds himself, the which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order. Under Article 2 above, each refugee is obliged to comply with all applicable laws and regulations or provisions to create public order in the country in which he is placed.

3. Protocol Relating to the status of Refugees in 1967

This protocol was approved by the Economic and Social Council by resolution 1186 (XLI) on 18 November 1966 by the UN General Assembly by resolution 2198 (XXI). This Protocol entered into force on 4 October 1947. The state can become a participant of this 1967 protocol without being a participant of the 1951 Convention in Article 1 (2) of this Protocol, the definition of refugee in the 1951

Convention was expanded by removing the words "as a result of events that occurred prior to January 1, 1951 and ... "and also negate the words" ... as a result of the events referred." Article 1 (2) protocol in 1967 stated as follows:

“For the purpose of the present Protocol, the term "refugees" shall, except as regard the application of paragraph 3 of this article, mean any person within the definition of article 1 of the convention as if the words "As a results of events occurring before 1 January 1951 and ... "and the word" ... a results of such an event ." In article 1 (2) were omitted.”

The expansion of the definition of refugees and the Protocol Relating to the status of refugees is intended to overcome the problems of refugees that occurred after the war world II, especially refugees arising from political conflicts Africa in 1950 and 1960.

4. The Convention Relating to the Status of Stateless Persons (1954)

Convention concerning the people who do not have the citizens of this country passed through a conference attended by plenipotentiaries of the countries on 28 September 1954 through a resolution of the Council of Social and Economic numbers 526 (XVII) of 26 April 1954 and enforced on dated June 6, 1960, in accordance with the provisions of Article 39 of the Convention. The complete

Convention in 1954 was named the Convention Relating to the Status of Stateless Persons.²²

1954 Convention consists of 42 Articles contained in Chapter 6. Several Articles that need to be known as Article 1, which provides formulas for "stateless person", a general obligation that must be obeyed by them, the rights attached to him as a human being, like the right to practice religion and religious education to their children, rights of survival residence, the right to own movables and immovable, including the rights to works of art and industrial property rights, the right to association, the right to get a job and a decent life. Rights in the field of welfare, such as housing, public education and the freedom to move. State Parties to the Convention in 1954 also required issuing identity cards to people who do not have citizenship in their countries, also including travel documents. The Convention also regulates the sailors (seamen) who do not have the citizens.

5. The Convention on the Reduction of statelessness (1961)

The Convention was adopted on 30 August 1961 by UN General Assembly Resolution No. 896 (IX) on 4 December 1954. The 1961 Convention consists of 21 Articles. The regulation on the reduction of the number of people who do not have the citizens in the territory of the State Party to give citizenship to their children born

²² Achamd Romsan, dkk, *Pengantar Hukum Pengungsi Internasional, Hukum Internasional dan Prinsip-Prinsip Perlindungan Internasional*, Bandung, Sanic Offset, 2003,pg. 90.

in the country. Granting citizenship status it is an obligation of the convention of 1961 with the provisions in force in the country.

One thing worth knowing is the children born from people who do not have the status of citizens on a ship, an aircraft is considered born in the territory of the flag of the country where the aircraft or vessel is registered. The Convention also regulates the loss of citizenship from people who do not have a citizen through marriage, dissolution, or for getting citizenship status of the other.²³

C. Roles and Role of the United Nations High Commissioner for Refugees (UNHCR) in the Refugee Protection Armed Conflict

The United Nations has set up an agency UNHCR to fulfill the rights of refugees as set forth in the Universal Declaration of Human Rights (UDHR). On the second point mentioned the Universal Declaration of these rights include the right to life, the right to liberty and security of person, which is not a condition they can be in the country and he was not able to be given by the government. Against these refugees, UNHCR has a primary function to provide international protection, provide long-term solutions to the refugee problem and to promote international refugee law.

UNHCR institutions have procedures for granting assistance related to the fulfillment of Human Rights (HAM) in the form of international protection. In general, this concept contains the prevention of refoulement, assistance in processing

²³ Document Series Symbol: ST/HR/, Secretariat Center for Human Rights.

of asylum seekers, legal counsel and aid, promoting arrangements for the physical security for refugees, promoting and assisting voluntary repatriation, and helping refugees to resettle.²⁴ UNHCR duty to lead and coordinate measures international-step in providing protection to refugees and resolve refugee problems due to conflict or war conditions. UNHCR is also providing security and the rights of refugees, guarantees that every person has the right to seek asylum, a place that is safe in other regions or in other countries. Besides focusing on the UNHCR as well people who do not have citizenship or former refugees in other countries who feel safe to return to his country. Among persons of concern to UNHCR, great attention is given to people who are vulnerable, namely women, mothers who are not accompanied by her husband, children under 18 years, parents or elderly and disabled. Forms task of UNHCR in addressing the refugee armed conflict are as follows:

1. Advocacy

UNHCR to defend and protect refugees, asylum seekers, internally displaced and those who do not has citizenship. The defense is the basis of the protection strategy against them with. Use in combination with activities such as information dissemination, monitoring and negotiation. This can help change policies and services at national, regional or global in order to protect people by negotiating.

²⁴ Wagiman, *Hukum Pengungsi Internasional* pg.189

In search of asylum, UNHCR worked within the structure of the political, economic, social and national that directly affect the lives of refugees and others of concern to bring the policies, practices and laws into compliance with international standards. In a situation of forced displacement, UNHCR is trying to lobby the government and other decision-makers, non-governmental partners and the wider community to adopt practices ensure the protection of people of concern to UNHCR.

2. Assistance

UNHCR is providing emergency assistance in the form of clean water and sanitation and health care, refugee camps, and other relief items, such as blankets, sleeping mats, jerry cans, household goods and sometimes food. Other important assistance that we provide, or assist in providing, including refugee registration, assistance and advice on asylum applications, education, counseling and so forth for people forced to leave their homes because of natural disasters or because their country is in a state of war. Besides UNHCR is also involved in a program of local integration or reintegration with the government in projects that generate revenues aimed at the restoration of infrastructure and other assistance.

3. Asylum and Migration

UNHCR works closely with governments around the world to help them respond to some of the challenges associated with people - people who seek asylum in another country. Every day many people around the world who are struggling to

seek asylum in another country for the sake of a better life and in spite of the conflict in their country. But a lot of those moving illegally struggle to seek asylum to another country. To overcome the challenge of protecting refugees in migration flows mix, the UN High Commissioner for Refugees organized a two-day regional conference on Refugee Protection and International Migration in Dakar, Senegal, in November 2008. It is based on Protection Challenges Dialogue launched by UNHCR in Geneva in December 2007.

4. Continuous Solutions

The main objective of UNHCR is to protect the rights and welfare of refugees, help find long-term solutions that will enable them to rebuild their lives in dignity and peace. There are three solutions open to refugees where UNHCR can assist repatriation, local integration, or build a settlement in a third country in a situation where it is impossible for someone to get back home to country or remain in their countries of refuge. UNHCR help find durable solutions for refugees around the world every year. But for several million refugees and a large number of internally displaced persons in other parts of the world, this solution did not work. UNHCR has highlighted. This situation protracted efforts to find solutions for refugees like in Gaza.

5. Preparedness to emergencies

UNHCR frequently faced with a sudden emergency requiring immediate response, such like wars and natural disasters. UNHCR is providing emergency assistance of civil and long-term rehabilitation for refugees. To prepare for and respond to emergencies, UNHCR has been gathering people with a range of key skills who are ready to move anywhere and at that time also. UNHCR can mobilize more than 300 trained personnel within 72 hours. The agency has also set up emergency stocks of relief items non - food in Copenhagen and Dubai. To maintain preparedness, UNHCR has developed training programs that are held regularly including Workshop Emergency Management (WEM) which prepares all volunteers UNHCR in development planning team, system financial operations and administration, partnerships operational, communication and negotiation skills, security, coordination of information and telecommunications and humanitarian protection. UNHCR also contribute to inter-agency initiatives to improve early warning and preparedness.

6. Protection

Governments normally guarantee the human rights and physical security of their citizens. But when people have become refugees protection of the government seemed to disappear. Refugees do not have the protection of their country. UNHCR provides protection against 33.9 million stateless persons include guaranteeing human

rights of people who wish to seek asylum. In many countries, UNHCR staff work together with other partners in a variety of locations ranging from big cities to the remote camps and border areas. They strive to provide protection and minimize the threat of violence in the country of refuge or asylum. They also seek to provide at least minimal care shelter, food, water and medical assistance to any exodus of refugees, while they also prioritize the special needs of women, children, the elderly and the disabled. core activities in the field of protection, seeks to help countries meet their international legal obligations to protect refugees. Through livelihood programs, UNHCR also developed capacities: helping refugees become self-sufficient in their places of displacement and increase the chances of finding durable solutions for refugees.

As explained above, that the UNHCR is an agency that has a fixed procedure in providing assistance related to the fulfillment of Human Rights in the form of international protection, if the offending application of effective human rights, the application of human rights should be viewed in context. The principles contained in the universal nature of human rights but on the other hand can not be applied equally in different contexts. Human rights principles that are universal in the sense that none of the country in the world that can chests and say that he does not have a human rights issue.

UNHCR was formed as a manifestation of human rights which have a special role in human rights concerning the handling of refugees. In general, this concept

contains preventive how to keep the existing refugee repatriation, aid in the asylum process, assistance and legal advice, promotion and implementation of physical security for the refugees, promoting and assisting voluntary repatriation, and helping refugees to resettle.

Confidence in the credibility of UNHCR as an agency dealing with refugees with the mandate to provide protection against international refugee is an expectation that in the future UNHCR is able to provide solutions that are permanent to refugees by helping governments, other actors or organizations humanity related to facilitating the repatriation (repatriation) for refugees.

Since it started, UNHCR has handled many cases of people displaced by a conflict or war in various countries. One of them, the early 21st century, UNHCR has helped the largest refugee crisis in Africa such as in the Democratic Republic of Congo and Somalia, as well as in Asia, particularly in refugee situations in Afghanistan, which lasted for 30 years. At the same time, UNHCR was asked to use its expertise to overcome the problems of internally displaced persons affected by the conflict. In addition, UNHCR's role also extends to dealing with assistance for people without citizenship, a group of people that amounts to millions but invisible, while they face the danger of losing their basic rights because it has no nationality. In some parts of the world such as Africa and Latin America, UNHCR's original mandate set in 1951 has been reinforced by the agreement on regional legal instruments.

The role of UNHCR at this time can be said the biggest problem is no problem of conflict in Syria refugee cases in which the impact of the war most Syrian citizens fled to the country - other countries. From the data released by UNHCR October 10, 2013 the number of refugees from Syria in the Turkish State amounted to 504 415, in Iraq 196 669, in Jordan 540 656, Egypt 125 906, and in Lebanon reached 789 954 people, where UNHCR should be able to protect the rights and obligations of refugees conflict syria this, Besides protecting the rights and taking care of refugees, UNHCR has the main objective to find durable solutions for refugees who will give them a chance to rebuild their lives in peace appropriately. Indonesian's Regulation Relating to the Status of Refugees

D. THEORY FRAMEWORK

1. Legal Protection Theory

According to Fitzgerald, Salmond's theory of legal protection that the law aims to integrate dam coordinating the various interests in the community, protection against certain interests can be done by limiting various interests in others.²⁵ The importance of law is taking care of the human rights and interests, so that the law has the highest authority to determine the benefit of mankind that needs to be regulated and protected.²⁶ Legal protection should view the phases of how the law is born which that legal protection was born of a provision of the law and all legal regulations

²⁵ Satijipto Raharjo, Ilmu Hukum (Bandung : PT. Citra Aditya Bakti, 2000) Pg 53.

²⁶ Ibid. Pg 69.

given by the people or society which basically the result from community agreement to regulate the relationship between the behavior of members to members of the community and between the individual and the government that is considered to represent the interests of society.

According Satjipto Rahardjo, legal protection is to give shelter to human rights and the protection given to the community to enjoy all the rights granted by law.²⁷

The principle of legal protection theory originated from the conceptual of humans rights protection. The dominant aspect of this concept is the existency of rights and obligation of every individuals and it is above the aspect of rights of the state or any other political organization. Such rights are considered as an absolute and inviolable. Such thought give born to the theory of legal protection. This theory plays the role of represent the purposes of modern law these days. The purpose of law can be grouped into three major function and those are to serve legal protection, justice and expediency.

According to Phillipus M. Hadjon, there are two types of legal protection, such as Preventive Legal Protection and Repressive Legal Protection.²⁸ The preventive legal is aiming to prevent conflicts using the rules and regulations, while the repressive legal protection is aiming to prevent any conflicts using the agreement

²⁷ Ibid. Pg 54.

²⁸ Phillipus Raharjo, *Perlindungan Hukum Bagi Rakyat di Indonesia*, first edition, limited edition, (Surabaya: Peradaban, 2007), pg. 2.

of the parties.²⁹ It means that legal protection is a protection given to 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. Meanwhile, According to Philip M. Hadjon, that legal protection for the society is the government's preventive and repressive action.³⁰ Legal Protection of preventive aims to prevent disputes, which direct the actions of the government to be cautious in making decisions based on discretion and repressive protection aims to prevent disputes, including handling in the judiciary.³¹

Legal protection is an overview of the function of the law to realize the objectives of law, which is fairness, expediency and legal certainty. Legal protection is a protection granted to subjects of law in accordance with the law, whether it is in the form of preventive and repressive, whether in writing or not writing in order to enforce the rule of law. Virtually every person entitled to protection from the law. Almost all legal relationship should have protection from the law. Therefore, there are many kinds of legal protection.

²⁹ Ibid, pg. 3-5.

³⁰ Pjillipus M. Hadjon, *Perlindungan Hukum bagi Rakyat Indonesia* (Surabaya : PT. Bina Ilmu, 1987) Pg 2.

³¹ Maria Alfons, *Implentasi Perlindungan Indikasi Geografis Atas Produk-Produk Masyarakat Lokal Dalam Prespektif Hak kekayaan Intelektual.* (Malang : Universitas Brawijaya, 2010) Pg 18.

2. Monoism and Dualism Theory

Basic of international law to come into force is contained in two preliminary views called voluntarism, act as the based for international law to come into force and even the question of whether or not there is an international law based on the willingness of states that are the basis of the theory of dualism. The other approach is the objective that considers existing and entry into force of international law is separated from the willingness of states is the basis of the theoretical foundations of monism.³²

The different views had consequences for different because the angle of view of dualism would result in that international law and national law as two sets of legal instruments coexisted side by side but separated, while the view of the monoism think of it as two elements of the unity of legal instruments.³³

The view of this dualism has important consequences. One result of the most important subjects in this dualism theory is that according to this view, rules of legal instruments might not originate or based on other legal instruments. In other words, in the theory of dualism is no place for legal issues of international law hierarchy between national law and international law because essentially both the laws were not only different and independent but also be separated one from the other.

³² Moctar Kusumaatmadja. *Pengantar Hukum Internasional ; Pengertian, Batasan, dan Istilah Hukum internasional.*, 2003, PT ALUMNI: Bandung, Pg 52.

³³ *Ibid.*

The second consequence according to this view there can be no contradiction between the two legal instruments which may only designation (renvoi). Another important result also of the view of this dualism is that international law requires the transformation into national law before it can apply within the national legal environment.

Dualism theory once is very influential in Germany and Italy. The leaders of these theory are Heinrich Triepel who wrote the book "Volkerrecht und Landersrecht" (1899) and Anzilotti, from positivism theory who wrote the book "Corso di Diritto Internazionale" (1923). According the understanding through this dualism theory is rooted in the theory that the international law and national law is two or whose legal system separated from each other.

The reasons put forward by adherents of dualism for their view is based on formal reasons also reasons based on the reality. Among the most important reasons put forward the following matters: (1) both the legal instruments of international law and national laws have different sources. The national law rooted in the will of the state, while international law rooted in a common will (state community); (2) The second legal instrument that different legal subject. The subject of national laws is the individual / legal entity (civil / public), while the subject of international law is the state; (3) as the rule of law, national law and international law appeared also differences in the structure (executive, legislative, judicial).

The legal consequences of Dualism are,

- i. Both systems are unlikely to base / sourced to one another. (There are no legal issues of international law's hierarchy)
- ii. There may be no conflict among them, there is only designation (renvoi).
- iii. To enforce international law into national law, it is necessary to have legal transformation.

Theory of Monism is founded on the idea of uniform entire law governing human life. The framework of this theory is thinking international law and domestic law are two parts of the larger unity that the laws governing human life.

Simplify, theory of monism assume that there is only one legal system in the world that govern human life: international law and national law is a unitary legal system but raise the issue of the hierarchy relationship between international law and national law: Monism with the primacy of national law and Monism with the primacy of international law.

The view by dualism is denied by the group of monoism on the grounds that,

- i. Although both the legal system has different terms, but the subject remains the same law.
- ii. Both have binding legal force. When international law is recognize of as a legal system. It is impossible to deny that international law and national

laws are part of a unity of jurisprudence and therefore these two legal instruments both have the binding force whether against individuals or the state.³⁴

Monoism with the primacy of national law assumed that national law is the primacy law rather than international law; International law is a continuation of a national law for foreign affairs and assume that international law is sourced from national law

Monism with the primacy of international law assumed that international law is a higher law than the national law; considers that the national law is subject to international law and the binding force sourced from a "delegation" of authority of international law monism.

³⁴ Dr. Boer Mauna. *Hukum Internasional (Pengertian, Peranan dan Fungsi Dalam Era Dinamika Global)*, 2003, PT ALUMNI: Bandung, Pg 12.