

Asylum Seeker Protection under International Human Right Declarations: Case Study Malaysia and Australia

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Abstract

Most of the asylum seeker is the impact of armed conflict on the rise. While the setting status seekers were not enforced by the 1951 Convention relating participants to the Status of Refugees. Despite the fact that not a few conventions, declarations, resolutions are made on granting protection to asylum seekers. This is due to different points of view regarding the rights and obligations as well as the authority to maintain national security and public order of each state. Not only the problems in the receiving country but the searchers also rarely carry identity documents that can support the status and facilitate their continued life in the recipient country. The materials were obtained and analysed by describing the object of the study were analysed, namely the role of the implementation of the asylum seekers protection in Malaysia and Australia. Then the conclusion will be given to the material that has been analysed is or is based on the results of the discussion that has been done.

Keywords: asylum seeker, refugee, migration.

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1. Introduction

1.1 Background of Study

The threat of social, economic and political in the country or between countries cause problems in the communities. In large scale armed conflicts between groups were tapered and threatening as happened in the Middle East, Syria, Egypt and Lebanon. Situations of generalized violence, violation of human rights by natural or human-made disasters also a big problem which happened at countries. It is caused an exodus of the population to the different social and geographic. As for small scale, minorities who are marginalized because of certain reasons will come out of their home environment to find a new place that can protect them with a way to flee.

Historically there has been refugees along with the development of human as a result of threats to safety [1]. The exodus case of the people of Moses from Egypt to Palestine is based upon the treatment nobility of Thebes people, Aahmes, which makes the Semitic people in Egypt as slaves. Slavery occurs until the Fir'awn Ramses II in power and makes Moses and His people should be cross The Red Sea. The fear of slavery made by the power people

is the reason refuge in this case in addition to racial and religious grounds.

The threat of safety is the undermining of human rights which set out in the Universal Declaration of Human Rights (UDHR), article 3 that "everyone is entitled to life, liberty and safety as individuals". When individual or group are not got their rights to life, liberty and security they can find a new place that can provide these rights.

According the Convention Relating to the Status of Refugees 1951, article 1, refugees is a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it. People who flee from conflict or violence can be referred as refugees [2]. It makes refugees different from other types of the migrant. Asylum seekers are people who seeking international protection. An asylum seeker is someone whose claim has not yet been finally decided by United Nations High Commissioner for Refugees (UNHCR) or authorities of the country in which he or she has requested refugee status. Not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially asylum seeker.

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There is confusion in generally about asylum seekers, refugees, stateless persons and internally displaced people (IDPs). Concisely, the asylum seeker is a person who has fled their own country and applied for protection as a refugee. The refugee definition as written in the Convention Relating to the Status of Refugees 1951 article 1 and important is refugee means an asylum seeker whose application has been successful and already been granted protection. Asylum seekers and refugees flee their country for their own safety and cannot return unless the situation that forced them to leave improves.

Stateless person means a person who is not considered as a national by any state under the operation of its law [3]. They also consequently lack the protections flowing from citizenship. Whereas IDPs is people who are forcibly displaced within their countries of origin or habitual residence but have not crossed an internationally recognized state border. People may be internally displaced as a result of armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disaster.

Every country has the right to protect the asylum seeker in its territory, especially when under threat. The state has the authority under international law to interfere with providing asylum, both territorial asylum and diplomatic asylum. As well as with individuals, also have the right to obtain asylum in other countries, it is based on article 2, Universal Declaration that:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status....”

Malaysia is not a party to the 1951 Refugee Convention and has no domestic or administrative framework that governs refugees and their rights, as well as Thailand and Indonesia. However, as of September 2014, there are almost 150,000 refugees and asylum-seekers registered with UNHCR Malaysia [4]. In Malaysia, refugees do not have access to fundamental rights including legal status, safe and lawful employment, formal education and equal protection of the law, and detention. Asylum seekers are treated as illegal migrants, and illegal migrants are at risk of all forms of vulnerability in society.

1.2 Problem Statement

Most of the asylum seeker is the impact of armed conflict on the rise. While the setting status seekers were not enforced by the 1951 Convention relating participants to the Status of Refugees. Despite the fact that not a few conventions, declarations, resolutions are made on granting protection to asylum seekers. The fact is a lot of application into UNHCR and spends time, both for UNHCR in processing or asylum seekers waiting for a long time. It was not all of the applications will be accepted.

This is due to different of view regarding the rights and obligations as well as the authority to maintain national

security and public order of each state. Not only the problems in the host country but the searchers also rarely carry identity documents that can support the status and facilitate their continued life in the host country. Fundamentally protection of asylum seeker can be granted based on human rights. The right of every human being acquired in the womb.

There are many question about the regulation how to protect the asylum seekers during the process of filing status in Malaysia and Australia, how the rights and obligations of asylum seekers in Malaysia and Australia as a host country and how Malaysia and Australia responsible for the safety and respect the rights of asylum seekers, last how the responsibilities of the origin country of asylum seekers.

1.3 Methodology of the Study

The research methodology is normative, analyse and describe the instruments of international law that the legal basis for the implementation of the protection of asylum seekers in Malaysia and Australia. The approach used in this study is a statute approach.

Legal materials used include UN Charter, UDHR, Convention Relating to the Status of Refugees 1951, Guidance Note on Bilateral and/or Multilateral Arrangements Transfer of Asylum-Seekers, Asylum Procedures Directive (APD), Convention on Territorial Asylum 1954 and any relating convention and treaty about asylum. The website from UNHCR and government who ratification or not the convention, also from non-government organization around the world.

Technique analysis of material obtained in this research using descriptive analysis. The materials were obtained and analysed by describing the object of the study were analysed, namely the role of the implementation of the asylum seekers protection in Malaysia and Australia. Then the conclusion will be given to the material that has been analysed is or is based on the results of the discussion that has been done.

2. The causes and consequences of asylum seekers

The number of refugees who seeking asylum in developing countries increased by nearly half last year, reaching the highest level in 22 years, according to the UN. The UNHCR estimates that 866 thousand asylum requests in 2014, up 45% over the previous year and the highest figure since the start of the war in Bosnia. This increase was fuelled conflicts in Syria and Iraq. Followed by the United States, Turkey, Sweden and Italy. The top five recipient countries accounted for 60% of all new asylum seekers among the 44 countries included in the report [5]. This increase was associated with an increase in conflicts in Syria and Iraq which led to the worst humanitarian crisis. The European countries should open the door and help as much as possible to overcome the current situation is the same as when the Balkan wars in the 1990s disclosure.

The UN Convention relating to the Status of Refugees is the key international legal document relating to refugee protection. It defines who is a refugee and outlines the rights of refugees and the legal obligations of states towards refugees. It also underpins the work of UNHCR. There are currently 144 States Parties to the 1951 Convention and 145 to its 1967 Protocol, with 142 States Parties to both the Convention and Protocol.

Some commentators argue that the Convention is so dated as to no longer apply to the current realities of those in need of international protection [6]. One point concerns the Convention's definition of a refugee as a person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

This definition reflects that the Convention was drafted specifically to find solutions for those who had been displaced across Europe by Nazism and the Second World War. Hence, as originally drafted, it covered only those who were refugees as a result of "...events occurring before 1 January 1951..." and focused on "...events in Europe." These geographical and time constraints of the 1951 Convention were lifted by its 1967 Protocol, thus broadening its applicability. The definition of a refugee was further expanded in two regional complements to the 1951 Convention, the 1969 OAU Convention and the 1984 Cartagena Declaration, to cover particular circumstances in Africa and Central America respectively.

Nevertheless, significant gaps remain in the definition as it applies to contemporary circumstances. In particular, there is a growing consensus that over the next decade or so, the effects of environmental change are likely to compound other drivers of displacement, increasing migration pressures globally including in Australia [7]. It is clear that the definition of a refugee provided in the 1951 Convention does not refer to environmental causes for flight, but that at least some people forced from their homes principally by the effects of the environmental change will cross borders and require protection and assistance in 'refugee-like' situations.

The 1951 Convention specifies three durable solutions for refugees: to return to their own country voluntarily (voluntary repatriation), to integrate into the country where they find themselves (local integration), and to resettle in another country (third country resettlement). It is focuses on solutions is among the 1951 Convention's strengths, but also reflects the situation of the refugees for whom it was established people who had already been forced from their homes. Another critique is that neither the 1951 Convention nor UNHCR were originally envisaged to deal with new refugees after solutions had been found for those displaced across Europe after the Second World War.

In particular, the 1951 Convention does not refer to asylum seekers although it promotes the right to asylum and this is one of the main reasons why it has proved so hard to implement in contemporary circumstances. In contrast to the already displaced individuals that the 1951

Convention was established to cater for, an asylum seeker is someone who has left their country in search of international protection but is yet to be recognised as a refugee.

In other ways, though, the 1951 Convention is valid and applicable to current circumstances. First, it enumerates a set of rights for refugees, albeit relatively narrowly defined. In recognition of the fact that they have fled their home countries and no longer enjoy the legal protection afforded to citizens of a state, the 1951 Convention provides access to national courts for refugees, the right to employment and education, and a series of other social, economic, and civil rights on a par with nationals of the host country. The 1951 Convention also stipulates rights specific to refugees, including protection from penalties for illegal entry.

Second, the 1951 Convention is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalisation, and non-refoulement. The last is perhaps the most significant it refers to the right of refugees not to be returned to a country where they risk persecution. Non-refoulement remains the fundamental provision of international refugee protection, and is now considered a provision of customary international law, binding even on states not a party to the 1951 Convention. Third, the 1951 Convention lays down basic minimum standards for the treatment of refugees, without prejudice to states granting more favourable treatment.

Nevertheless, there is a strong argument that revising the 1951 Convention may jeopardise the rights, principles, and standards that it enshrines. In the current political climate, states would be inclined to negotiate a more restrictive Convention, rather than expanding the current refugee definition or reinforcing access to asylum systems for those arriving without authorisation. Opening up the 1951 Convention may also have implications for other treaties where the rights of refugees have their origins, for example, the UDHR. More prosaically, one of the great strengths of the 1951 Convention is its widespread ratification: it would likely take another half century to ratify a new Convention so completely.

3. The protection of asylum seekers during the process of filing status

The procedures for asylum applications in place in the world currently vary widely. Each member state has a different procedure and the terminology used to describe those procedures is often used differently in the various state. In case, the term accelerated procedure is used to mean several different things such quicker procedures with shorter or longer time limits for decisions an accelerated appeal procedure, the normal procedure but with less procedural safeguards (for example, restricted the right to personal interview); or, an accelerated procedure used in an admissibility phase. In this report, a distinction of the merits of the case, on the one hand, and admissibility procedures in which the merits of the case are not examined, on the other hand.

3.1 *The procedures in Malaysia*

There are almost 153,850 refugees and asylum-seekers registered with UNHCR Malaysia of September 2015 [8]. Asylum seekers do not have access to fundamental rights including legal status, safe and lawful employment, formal education and equal protection of the law and are at constant risk of arrest, detention and exploitation in Malaysia. The fact that protection is the key for people fleeing persecution because of race, religion, nationality, membership of a particular social group, or political opinion.

After the fall of Saigon in 1975, Vietnamese boat people started to arrive in Malaysia. Soon they were arriving in large numbers and Malaysia became the temporary home to more than 250,000 of them but Malaysia was only willing to act as an offshore processing entity as it deemed the influx of such vast numbers and their ethnic make-up (many were ethnic Chinese) as problematic.

Registration is the first step you have to undertake to seek international protection with UNHCR. Registration involves recording your personal data, travel route, the reason for seeking asylum as well as capturing your photo and fingerprints for identification purposes. There are two distinct registration procedures for non-Myanmar and Myanmar applicants.

The UNHCR in Malaysia start to use a new system in the mid of 2015 and called Status Verification Procedure (SVP) as a screening mechanism that precedes the former refugee status determination (RSD) process. This was implemented as part of a new global strategy by the organisation to update the RSD model with a pre-screening element so as to prioritise people with serious vulnerabilities [9]. The number of asylum applicants who apply to be supported by data collection systems capable

The current lack of appeal mechanism for SVP is of paramount concern as the brevity of the interview has resulted in a multitude of procedural errors and errors in the assessment of claims. Many unsuccessful applicants have explained that they did not have time to properly present their claim and were subsequently rejected.

The RSD system is a person seeking protection would approach UNHCR and receive an appointment card for a date years in the future. At the appointment, the applicant would formally register with UNHCR and get a 'UNHCR card'. The card verifies that they have ongoing refugee status determination needs. This card entitles the applicant to limited protection from detention and discounts for medical services. The applicant would then receive another appointment date for an RSD interview. It is waiting part and takes in a matter of years because a thousand waiting list.

The RSD interview typically takes three to four hours, and can involve more than one session to assess the credibility of the applicant's claims. The applicant can expect to receive an outcome within a few months.

Registration with the UNHCR includes a new pre-screening assessment start in the mid of 2015. This consists of a three-step assessment performed in a single day. In

addition to data collection and recording family details, the registration process also includes an assessment of claims to determine whether the applicant has international protection needs and a vulnerability assessment.

The length of the assessment of a claim is typically it is only one hour. If the applicant is successful in proving that they have international protection needs they will receive a 'Person of Concern Card'. This card provides the same benefits as the previous 'UNHCR Card'. If the applicant is not successful in this assessment, their involvement with UNHCR ends. An unsuccessful applicant does not receive a letter outlining UNHCR's reasons for the decision nor do they have a right to appeal the decision.

The vulnerability assessment is designed to identify particular risks that a person faces and provide services or possible resettlement. The UNHCR has identified the following vulnerability categories:

- a. survivors of sexual abuse or gender-based violence in their country of origin or Malaysia,
- b. survivors of violence or torture in their country of origin or Malaysia,
- c. woman alone or female head of household (without effective male protection),
- d. unaccompanied minors,
- e. elderly people without protection or assistance, and
- f. risks based on sexual orientation.

Those who fall into the vulnerability categories may have an additional interview to discuss how the vulnerability affects their life in Malaysia and to assess whether they have needs that can only be alleviated through resettlement in a third country.

Those who do not have vulnerabilities but otherwise have strong refugee claims currently have no access to registration with the UNHCR and thus cannot access protection offered by a UNHCR card in Malaysia. These people cannot access affordable medical services and have an increased risk of arrest and detention. The situation is exacerbated by the fact that UNHCR has had limited success in securing the release of asylum seekers in detention. As such, people from countries that would otherwise have high acceptance rates and would be prioritised risk indefinite detention in Malaysia, beyond the reach of international intervention.

As it stands, a 'walk in' strategy is yet to be implemented. UNHCR has not indicated when this situation will be rectified. This means that no person who arrives in Malaysia seeking protection can access the UNHCR unless they are released from detention through UNHCR intervention or referred by an NGO based on vulnerabilities.

In the absence of an effective 'walk-in' strategy, NGOs are currently the gatekeeper for access to the UNHCR. There are a very small number of refugee-specific NGOs in Malaysia, with only one dedicated to providing legal services. NGOs are less widely known than UNHCR and are ill-equipped to handle the volume of vulnerable cases. Therefore, many of the people that the new process is

aiming to prioritise are unlikely to be unable to access the UNHCR.

The combination of not implementing a 'walk in' strategy and prioritising groups based on nationality or ethnic identify means that the large majority of asylum seekers in Malaysia are effectively barred from seeking asylum through the UNHCR. The deficiencies in the implementation of SVP in Malaysia could result in an increased push factor, promoting onward travel from Malaysia to other countries who are unable or unwilling to process asylum seekers in a manner consistent with principles of international law.

3.2 *The procedures in Australia*

The number of people being held in immigration detention in Australia changes on a constant basis. As at 30 November 2015 there were 1,852 people held in immigration detention facilities and 585 in community detention. There is no set time limit to how long a person may be held in immigration detention in Australia. The period of time a person spends in detention may vary from a few weeks up to a few years, or even longer. As at 30 November 2015 the average period of time a person would spend in closed immigration detention was 446 days, but 436 people had been held in immigration detention for over 2 years.

It is clear that every person has the right to seek and enjoy asylum from persecution, serious human rights violations and other serious harm. This right is protected under the UDHR and a number of the 1951 Conventions to which Australia is a party. This means that Australia is obliged under international law to recognise the right to seek asylum and to ensure that laws and policies concerning asylum seekers adhere to the principles contained in the 1951 Convention, and other relevant instruments including the International Covenant on Civil and Political Rights (the ICCPR) its Second Optional Protocol aiming at the abolition of the death penalty; the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) and its Optional Protocol; the Convention on the Rights of the Child (CROC); and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Under the Humanitarian Program, Australia accepts a certain number of people every year who are refugees or have special humanitarian needs. The Humanitarian Program has two main components offshore resettlement for people who are found to be refugees (and others whose need for protection has been acknowledged) in another country before they come to Australia, and onshore protection for people who come to Australia with a valid visa and make a successful claim for asylum after they arrive. In addition, asylum seekers who arrived in Australia without a valid visa but are not transferred to Nauru or Manus Island may be granted temporary protection visas or safe haven enterprise visas.

Asylum seekers may arrive in Australia without a valid visa or other documentation for a number of reasons. For

example, a person who is fleeing persecution by the government of their country of origin might not be able to obtain a passport from officials in that country. Alternatively, a person fleeing persecution might travel without documentation to avoid being identified as they leave their country of origin in order to reduce the risk to themselves and their family.

Under the Migration Act 1958, asylum seekers who arrive in Australia without a valid visa must be held in immigration detention until they are granted a visa or removed from Australia.

There is no limit under Australian law to the length of time for which a person may be held in immigration detention. Some asylum seekers spend long periods of time in immigration detention waiting for their refugee claim to be assessed; waiting for the completion of health, identity and security checks; or awaiting removal from Australia if they have been found not to be a refugee nor someone who is owed 'complementary protection'.

While the legal framework for mandatory detention remains in place, over the past few years, increasing numbers of asylum seekers have been permitted to reside in the community while their claims for protection are assessed, after spending an initial period in closed detention. The Commission has welcomed the increased use of alternatives to closed immigration detention such as community detention and the grant of bridging visas, but remains concerned that thousands of asylum seekers and refugees are still held in closed immigration detention facilities.

Asylum seekers who arrive in Australia on a valid visa and then apply for protection, as part of the onshore protection program mentioned above, have their claims assessed through the refugee status determination and complementary protection system that applies under the Migration Act. The Department of Immigration and Border Protection (Department) will make a primary assessment as to whether the person is a refugee as defined by the Migration Act [10]. In some cases, a person may not be a refugee, but may nevertheless face significant human rights abuses, such as torture, if returned to his or her country of origin. If an asylum seeker is found not to be a refugee, the Department will assess whether he or she meets 'complementary protection' criteria that is whether he or she is owed protection under the ICCPR, CAT or CRC because if they were to be sent to another country there is a real risk they would suffer serious harm.

If a person is found to be a refugee or to be owed complementary protection, providing he or she satisfies health, identity and security requirements, he or she will be granted a protection visa. People who are refused protection by the Department at the primary stage have access to independent merits review by the Refugee Review Tribunal (RRT) or in some circumstances the Administrative Appeals Tribunal (AAT). In some circumstances, they can seek judicial review of decisions made by the RRT or the AAT. In some exceptional circumstances, they can seek Ministerial intervention to

allow them to remain in Australia on other humanitarian or compassionate grounds.

In August 2012, the Australian Government introduced a system of third country processing for asylum seekers who arrive in Australia by boat without a valid visa. Under this system, asylum seekers who have arrived by boat must be transferred to a third country as soon as is reasonably practicable unless the Minister for Immigration and Border Protection decides otherwise.

If asylum seekers are transferred to a third country, their claims for protection will be processed under that country's laws. For more information about the transfer of asylum seekers to third countries. If asylum seekers who arrive unauthorised by boat after August 2012 are allowed by the Minister to remain in Australia, they are only able to apply for temporary protection visas or safe haven enterprise visas – they are not able to apply for permanent protection. How their applications will be processed depends on when they arrived in Australia. If they arrived on or after 1 January 2014, they apply to the refugee status determination and complementary protection system that applies under the Migration Act the same way as for asylum seekers who had a valid visa.

Under the 'fast track' process, the Department will make a primary assessment of an asylum seeker's claim for protection. If the Department makes a negative assessment, fast track applicant will not be able to apply to the RRT for merits review of that decision. Instead, these applicants will only be able to apply to the newly established Immigration Assessment Authority (IAA) for a much more limited review of their application. The IAA generally will not hold hearings, and will not consider any information not raised by the applicant at the primary interview with the Department. Unlike the RRT, the IAA cannot make a decision to grant a (temporary) protection visa to an applicant if it determines that the Department wrongly refused one – it can only send the matter back to the Department for reconsideration.

3.3 *The comparison process between Malaysia and Australia*

The absence of a legal framework for managing the refugee issue in Malaysia is complicated by the migration context in Malaysia in which there are some 4 million migrants, 1.9 million of whom are undocumented and in an irregular situation. This creates great unpredictability in refugee's lives, as Malaysian law does not distinguish between refugees and asylum-seekers. The former thus become vulnerable to arrest for immigration offences and may be subject to detention, prosecution, whipping, and deportation, including refoulement.

Malaysia does not also have a specific government agency or body tasked or department to coordinate with UNHCR on refugee issues. UNHCR has been present in Malaysia since 1975 and cooperates with the Ministry of Foreign Affairs, Ministry of Home Affairs and the Immigration Department to respond to refugee issues. While UNHCR's relationship with the government has

steadily improved, the absence of a specific government agency or body tasked to coordinate with UNHCR on refugee issues constrains all efforts related to asylum in Malaysia. UNHCR maintains a constructive dialogue with the government, in the context of which UNHCR has continued to encourage the government to become a party to the 1951 Convention and its 1967 Protocol, as well as to the 1954 Convention relating to the Status of Stateless Persons and to the 1961 Convention on the Reduction of Statelessness. However, the government of Malaysia has indicated that it is not yet ready to accede to these international instruments.

Moreover, UNHCR has raised a number of specific proposals with the government, including the development of a legal and administrative framework to manage asylum, allowing refugees the right to work and improving refugee access to education and health. To date, the government has not officially responded to these proposals.

On the other hand, the Malaysian government has put in place ad hoc administrative arrangements to facilitate the work of UNHCR in providing assistance and protection to refugees and asylum-seekers, among which are the recognition by the government of UNHCR issued identity documents to asylum seekers and refugees, which has resulted in a significant decrease in the arrest and detention of individuals who possess them. UNHCR has also generally been given continued access to asylum seekers and refugees who are detained.

The Malaysian government has devolved the protection and assistance responsibility to UNHCR. UNHCR monitors detention facilities and works to secure the release of refugees while supporting health, education, and community self-reliance programmes and promoting durable solutions for refugees and asylum seekers. As the Malaysian government has not set up mechanisms to process asylum-seekers and refugees when they arrive in the territory, UNHCR continues to undertake these registration and refugee status determination responsibilities on its own.

Australia's commitment to upholding and promoting the rule of law requires legislative and policy responses to irregular migration to be clear and readily available, applied fairly and equally, and subject to appropriate oversight and review. Compliance with the rule of law also requires the Australian Government to observe and give effect to the international obligations it has voluntarily assumed including the right to seek asylum from persecution, serious human rights violations and other serious harm.

The implementation of the 1951 Convention where Australia as a member means that Australia is obliged under international law to recognise the right to seek asylum and to ensure that laws and policies concerning asylum seekers adhere to the principles contained in the Refugee Convention, and other relevant instruments including the International Covenant on Civil and Political Rights (the ICCPR) its Second Optional Protocol aiming at the abolition of the death penalty; the Convention against Torture and Other Cruel, Inhuman and Degrading

Treatment or Punishment (CAT) and its Optional Protocol; the Convention on the Rights of the Child (CROC); and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Between 2010 and 2011 Australia and Malaysia have agreement treaty handling refugee issues together. The agreement between Malaysia and Australia is basically aimed to prevent refugees to Australia through a dangerous path. According to the agreement, in the next four years, Australia could be deported 800 asylum seekers to Malaysia refugee camp. In contrast, Australia pledged at the same time to accept 4000 refugees from Malaysia that have previously been registered officially.

In this agreement guaranteed that the refugees will be respected and treated with dignity good. In addition, Australia is willing to take over the costs for transport and health services. In this way the expected increase in human trafficking would be minimized.

However, many experts said the policy is inhumane. Overall this could develop into a case precedent that exacerbates the problem of refugees in Asia-Pacific. UN doubted the rights of asylum seekers in Malaysia are not adequately protected because Malaysia did not sign the UN convention refugee protection.

Australia has previously been attempted to deport children to Malaysia without the assistance of their parents. Their goal consciously deporting children under age so that traffickers cannot specialize bring children to enter Australia illegally.

4. The rights and obligation of asylum seekers

The concept of international protection that develops gradually is currently applying a series of legal and institutional relationships. UNHCR's two main functions are to protect and find durable solutions to the problems faced by asylum seekers and refugees. In practice, the task of international protection includes the prevention of refoulment, assistance in the search process asylum, assistance and legal advice, the implementation of physical security for asylum seekers and refugees, assist voluntary repatriation and assist asylum seekers and refugees to resettle in the recipient country. All tasks and this protection is concretely embodied in article 8 of the Statute of UNHCR.

A number of universally recognized human rights also apply to asylum seekers and refugees. Including the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave the country and the right not to be forcibly repatriated.

4.1 Generally under the International Human Right Declaration

There is Resolution 217 A (III) of the UN General Assembly which endorsed the Universal Declaration on

December 10, 1948 that also incorporate asylum in article 14 that:

Everyone has the right to seek and obtain asylum in other countries to protect themselves from the pursuit.

This right does not apply to cases of pursuit which actually arise because the crimes were not related to politics or from acts contrary to the purposes and principles of the United Nations.

Granting entry permits for asylum seekers as well as the treatment given is essential for international law and for their protection. It is useful to ensure the implementation of human rights, so that asylum seekers are not forcibly returned to their home country and returned to face persecution.

Other than that the 1951 Convention and the 1967 Protocol on the Status of Refugees birth after World War II. The UN member states to encourage the birth of a collective agreement that now we are familiar with the 1951 Convention on the Status of Refugees. This convention originally applied to those seeking refuge in Europe prior to 1951. In 1967, a protocol to this convention then abolish restrictions on time and place previously formulated.

The Convention sets out minimum standards of treatment of refugees, including their basic rights. It also establishes their legal status and includes provisions concerning the right to gainful employment and welfare, the issue of identity papers and travel documents, concerning the application of the fiscal costs and their right to transfer their assets to another country where they have been admitted for the purposes permukiman back. Not only for people who have been displaced as a result of events that occurred prior to January 1st, 1951, but this convention also applies to refugees in previous years. This proves that the movement of refugees not only is the impact of World War II and post-war state of the other course.

4.2. The right and obligation of asylum seekers in Malaysia and Australia

All countries are the view that all people seeking protection should be treated with humanity and dignity and be provided with the services necessary to ensure that their basic needs are met, including publicly funded legal and migration advice.

Chief among these binding international obligations is the obligation of non-refoulment. This non-derogable obligation prohibits states from expelling or returning 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.

The principle of non-refoulment and other relevant obligations in the 1951 Conventions apply to all people seeking asylum regardless of their mode or time of arrival. These principles require that Australia [11]:

- a. Respect the internationally recognised right to seek asylum, and the system of refugee protection envisaged by the 1951 Convention, by providing durable (rather

- than temporary) protection outcomes for those found to invoke Australia's protection obligations,
- b. Enact robust safeguards in place to protect against refolement,
 - c. Enact and apply a consistent legal process for determining protection status that does not discriminate against applicants based on where they come from or how they arrive,
 - d. Ensure that asylum seekers who enter Australia are not penalised for doing so without a valid visa, or for their mode of arrival, provided they present themselves to the authorities without delay and show good cause for their entry or presence,
 - e. Recognise, protect and promote the individual rights of those seeking asylum as protected under the human rights Conventions to which Australia is a party. Such protected rights include: the right to education, the right to health care, the right not to be arbitrarily detained and the right to work,
 - f. Recognise, protect and promote the right for those who invoke Australia's protection obligations to be reunited with close family members, and
 - g. Recognise, protect and promote the rights of all children seeking protection in Australia, including those rights set out in CROC, which include the requirement that in all actions concerning children, the best interests of the child be a primary consideration.

As a matter of international law, these international obligations apply wherever Australia exercises effective control over, including custody of, a person. This includes in Australia's territorial waters, contiguous zone, and exclusive economic zone; on the high seas and within the territorial waters or other maritime areas of any other state (where Australia exercises custody or control of a person).

Placement in a third country is the only option available in countries that are not party to the 1951 Convention on the placement process in a third country or referred to in the third country resettlement began after being in a shelter or even frequently these refugees also did not stay in shelters because it is under complete his studies. An example is that many Somali students studying in Malaysia as well as seeking refugee status. Their reason cannot return to his homeland for fear to be killed or persecuted by the ruling party over differences of race, religion, nationality, and also participation in social or political activities.

The placement process is carried out at various stages. First, the return of refugees UNHCR will call to confirm everything that has been declared in all stages of the previous interview. When later found incompatibility with original identity will affect the case and the determination of its status as a refugee.

Third countries issued a statement received a number of refugees. Sometimes they also mention the special specifications, such as age range, gender, the last job prior to fleeing from his country, of his country and others. This amount is usually obtained with the UNHCR approach to third country representatives in their country duty or

announcements directly submitted by the country in question.

After all the data obtained is continued with the process of inserting a summary files recommendation and interview stages of resettlement, as well as supporting data such as birth certificate, school certificate and other data. The third country has the right to accept or reject the file and return it to the UNHCR without mentioning the reason. The process of inserting up to receive will take many months. If not accepted by a third country, the UNHCR will return approach and look for other third country quota information. If accepted, UNHCR will then make an appointment with the representatives of the country to conduct the interview stage in which the representatives of third countries who descended directly as an interviewer, accompanied by UNHCR officer.

After the interview by the party representatives then they will be given a schedule for medical tests. After everything is finished, then the refugees are then flown to a third country. In this third state they have rights like citizens, but for a certain period of time. If the country has been declared free of conflict, they must be willing to return to their home country. If not, they often take the option to become citizens remained in third countries because it has sufficient eligible to become citizens in third countries.

Beyond all that process, there is a process of Voluntary Repatriation, in other words, asylum seekers and refugees can voluntarily return to their country. They are required to fill out a statement and to drop his case to then helped back to his country. In the case of voluntary return of this, UHNCR collaboration with the International Organization for Migration (IOM), which is one of its tasks to assist voluntary repatriation of immigrants to their home country. They are headquartered in major cities and was subjected to asylum seekers and refugees, to have offices in several regions and regularly visited the existing immigration detention.

5. The responsible for the safety and respect the rights of asylum seekers

The granting of asylum in connection with the granting of entry permits for foreigners to a country. Some things to consider by the country concerned should come to the entry (admission) of aliens to countries not theirs (the recipient country) that a state is obliged to give permission to all foreigners, a state is obliged to give permission to all foreigners, provided that the country has the right to refuse certain groups, such as drug addicts, the certain diseased, and other undesirables, a country is bound to allow foreigners to enter its territory but may impose conditions with respect to their entry permits, a country is fully entitled to ban all foreigners, according to his will.

Based on the criteria of foreigners as described above, not all foreigners who come to a country as a foreigner within the meaning of foreigners by law. A tourist or foreign businessmen also a foreigner, but he is not a

stranger as an asylum seeker. But in point b), the other is not required, an ambiguous phrase that could be misinterpreted by various parties.

Asylum seekers and refugees have the right to all the rights and fundamental freedoms as stated in international human rights instrument. Thus, protection for asylum seekers and refugees should be seen in the context of the broader protection of human rights.

After World War II, with the creation of two different organizations each to deal with human rights and refugees, does not mean that these problems can be solved simply. The task of the United Nations in the field of human rights and duties UNHCR is inextricably linked, in the sense that both have the same goal of maintaining human dignity. UN human rights program aimed at addressing the rights of individuals in an area of the country.

Asylum seeker and refugee organization was established in order to restore at least the most basic rights to people who have left their country of origin. Besides the fundamental rights upheld by whom the civil, political, social, economic and cultural, for everyone, citizens and non-citizens, in the UDHR, the International Convention on Civil and Political Rights, and the International Convention on the Rights Economic, Social and Cultural Rights which together make up the International Bill of Human Rights.

- a. No one shall be subject to arbitrary arrest, detention or exile (Article 9 of the Universal Declaration);
- b. Everyone has the right to a nationality (article 15 UDHR);
- c. Every person has the right to freedom of movement and stays within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country (article 13 UDHR and article 12 of the International Covenant on Civil and Political Rights).

However, given the diversity of backgrounds of nations both in terms of historical, cultural, social, political, religious and economic growth, protection of human rights for all people is not easy. Differences that gave birth to the concept of this complex and diverse formulation for human rights.

Asylum report Indonesian Civil Society Network for Refugee Rights Protection, that more and more ships are returned based on the Australian border security operations. In fact since the election of Australia in 2013, Australia's policy on asylum seekers and refugees has changed significantly. Current policies include the asylum seeker returns to Indonesia, in ships they use, or after transfer to a new vessel which has Australia provide to sail back to Indonesian waters [12]. This is a violation of international law. As discussed earlier related to human rights. That asylum seeker and refugees also have the right, as stipulated in Article 3 of the Universal Declaration, that every person is entitled at life, liberty and safety as individuals. On the other hand, Australia Turn Back reasoned action was done in order to maintain the security

of the region is increasingly congested by the arrival of asylum seekers seeking refuge.

The Convention which is a form of a special agreement between the parties or multiple parties also has a settlement of the dispute. It is fair to other agreements to prevent problems in the future on the agreement. But the human rights-related conventions is not much that can be aligned to obey for the sake of peace together. The international community recognizes that human rights violations are a major cause of the mass exodus that later gave birth to asylum seekers and refugees. Meanwhile, efforts to provide assistance to the source of the problem is increasingly promoted in macro. Problems which give rise to growing concerns among the tendency to close doors to asylum seekers, the lack of tolerance, the rise of racism, xenophobia, aggression, tension, and national and ethnic strife that has increased in many places and affect many groups.

In practice, the application of the principle of non-refoulement is not absolute or absolute. Under Article 33 (2) of the 1951 Convention provides that "the application of the principle of non-refoulement does not apply when the presence of refugees threaten national security or disturb public order in the country where he sought refuge". Prohibition of forcing asylum seekers and refugees back to a country where he might be suffering persecution still not applied to those who threaten the security of the country or he has to get the final verdict from the judges for serious crimes he had done, and endanger the local country people. However, this provision only applies to exceptions urgent. It is appreciated that such exceptions will be applied, it must be proved that there is a direct relationship between the presence of asylum seekers and refugees in a country with the country's national security is threatened.

6. Conclusion and recommendation

6.1. Conclusion

Granting protection to asylum seekers is the responsibility of the entire international community, either by the government of a country or a social organization of independence. Increased filing asylum seeker status from year to year, show that the level of violations of human rights does not recede in conjunction with globalization and modernization of human.

- a. The mechanism of granting protection to asylum seekers starting from his arrival in a recipient country. In a country not a party to the 1951 Convention, UNHCR plays a direct role in determining the status of an asylum seeker. As for the states parties to the 1951 Convention, the government intervened in dealing with applicants with UNHCR which also supported. But in the two institutions equally protect the asylum seeker is in a submission process is not much different. Begins with registration, interviews and the final determination of the status. At each stage of the application process,

there are protocols that limit, either in terms of time, treatment of the applicant, and the absence of charges until the determination of the status. In order to strengthen the protection of asylum seekers many countries that respect human dignity participated by making an agreement in the form of conventions, recommendations and resolutions, both regional scale or by diplomatic and international relations. It is also useful to overcome the various problems arising from the process of filing status.

- b. There is no obligation for states to give asylum to the applicant. But there remains seeker asylum right to seek and enjoy not to seek or accept. It is often misunderstood by applicants who feel discrimination on the rejection status. On the other hand as a shield for the country to be antipathy to those who from the beginning of her human rights have been deprived for reasons such as the state has absolute authority to maintain national security and public order of their country. In fact there are no regulations requiring publication of the reasons for refusal asylum case, on the contrary there is a regulation that does not require the state giving a reason. It even happens country with intense diplomatic relations or neighbours. Meanwhile, when the absolute authority of the reasons that in the great-glorifying, the state can humble himself on behalf of human rights. Natural human rights of the most fundamental, the right to life.

6.2 Recommendation

Along with the modernization of much of the international community are concerned about the asylum seeker but not a few individuals or groups of countries that are not even aware of having hurt the asylum seeker on its policy. Evidenced by the many cases applicants were displaced.

- a. In the process of filing the status of the main problems in both the participants and non-participants Konveni 1951 is time. Do not wait for a short time asylum seeker. Since the beginning of registration to the interview stage of the fastest one month and nothing in

a matter of years. In some countries, shelter and living costs are also an issue. This needs to be step by step in concrete for the sake of their survival.

- b. The number of conventions, recommendations and resolutions are made, does not mean protection of the asylum seeker is resolved. For reasons of national security and public order states that reject the arrival of asylum seekers should consider them equal rights with citizens of countries that refused them. Is not that also the obligation of each of the international community to respect the human rights of every human being.

Reference

- [1] A. Romson, "Introduction to International Refugee Law: International Law and the Principles of International Protection", the United Nations Agency for Refugees Regional Representative Jakarta - Indonesia, Sanic Offset, London, 2003, Page 55.
- [2] UNHCR Press Release, Interpreting in a Refugee Context: Self Study Module 3, 2009.
- [3] Convention relating to the status of stateless person, article 1.
- [4] Asylum access Malaysia, available at <http://asylumaccess.org/program/malaysia/#sthash.5x3YivLJ.dpuf> 1 January 2016.
- [5] Asylum seekers increased by 45% because Syria and Iraq, available at http://www.bbc.com/indonesia/dunia/2015/03/150326_suaka_unhcr 3 January 2016.
- [6] Australia and the 1951 Convention. Available at <http://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention> 3 January 2016.
- [7] K. Koser, *Environmental Change and Migration: Implications for Australia*, Lowy Institute Analysis, Sydney: Lowy Institute for International Policy, 2012.
- [8] UNHCR Press Release 2014
- [9] Changes to Refugee Status Determination in Malaysia by Stephanie Less. Available at <http://ilareporter.org.au/2016/01/changes-to-refugee-status-determination-in-malaysia-stephanie-lee/>
- [10] Australia and Asylum Seekers. Available at <http://www.ima.border.gov.au/>
- [11] Law Council of Australia: Asylum Seeker Policy. Available at https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf
- [12] SUAKA Indonesian Civil Society Network for Refugee Rights Protection, Media Release: "Indonesia Should Continue Leadership on Refugee Rights and Demand Australia Stop the Turn Backs", by SUAKA Secretariat on 14/05/2014.