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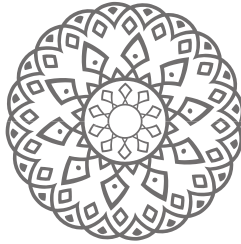
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# THE ROHINGYA'S MUSLIM ASYLUM SEEKERS IN SOUTHEAST ASIA: FROM NATIONAL TO INTERNATIONAL LAW PERSPECTIVE

*Khamami Zada*

**Abstrak:** Pencari suaka Rohingya akhir-akhir ini telah menjadi isu global. Hukum internasional, hukum regional di Asia Tenggara, dan hukum nasional di Indonesia dan Malaysia sesungguhnya telah menyediakan basis hukum yang menegaskan bahwa mereka memiliki hak untuk mencari suaka dan mendapatkan perlindungan. Dengan pendekatan normatif-empiris, studi ini menganalisis kepatuhan negara Indonesia dan Malaysia dalam menerapkan hukum internasional, regional, dan nasional dalam memperlakukan pengungsi dan pencari suaka Rohingya di negaranya masing-masing. Studi ini menemukan bahwa Pemerintah Indonesia dan Malaysia menghormati hukum kebiasaan internasional, hukum regional, dan hukum nasional untuk memenuhi hak-hak dan melindungi mereka. Hal ini berimplikasi pada perlindungan pencari suaka Rohingya di negara tujuan.

**Kata kunci:** pencari suaka, Rohingya, hukum internasional

**Abstract:** The Rohingya's Muslim asylum seekers have recently been global issues. International, regional, and national law have provided legal basis that they have the right to look for asylum and to be protected. By normative and empiric approach, this study analyze the respect of Indonesian and Malaysian goverment to international, regional, and national law on refugees. This study found that both of Indonesian and Malaysiaan goverment have respected the international customary law, regional law, and national law that fulfill their rights to seek asylum, have agreed that they welcomed them and will take care of them. The implication is to protect them in some areas in ththese country.

**Keywords:** Rohingya, asylum seekers, international law

**ملخص:** كانت قضية طلب اللجوء من طرف شعب راهنجا بمينمار أصبحت قضية دولية تثار عنها على مستوى العالم، وان القانون الدولي والقانون والمنطقي بشرق آسيا والقانون الوطني الاندونيسي والماليزي صرحت بكفالة حقوق طلب الالتجاء وضمان الحماية كما يقتضيه الدستور المعمول به. ومن وجهة نظر نظرية وتطبيقية كانت هذه الدراسة تحلل مدى حضور قانون دولتي اندونيسيا وماليزيا للقانون الدولي والمنطقي والوطني في التعامل مع طالبي اللجوء والحماية السياسية من بعض شعب راهنجا في كلتا الدولتين . كما اشارت ان هذه الدراسة تبرز بان حكومتى اندونيسيا وماليزيا احترمت الدساتير واللوائح الدولية والعالمية والوطنية المعتادة المعمول بها لأجل الحفاظ على حقوقهم وحمايتهم ورعايتهم. وهذا الأمر مما يودى الى حماية طالبي الالتجاء بعض شعب راهنجا في الدولة المقصودة.

**الكلمات المفتاحية:** طالبي اللجوء، راهنجا، القانون الدولي، المواطنة

## Introduction

Rohingya is a Muslim ethnic group living in the state of Rakhine, northern Myanmar, which previously known as Arakan. The history can be traced back to the beginning of 7<sup>th</sup> century when the Muslim Arab traders stayed and lived in this region. They are similar to Southern Asia people, especially Bengali, with regards to their physical traits, language and culture. Because of these characteristics, they are strikingly different to the majority ethnic living in Burma (Ragland, 1994:304-305). The similarity to Bengali makes them forced to leave their own country. Rohingya is one of the ethnics who get very unfair treatment from their own government. Their houses were burnt into ashes, they were physically beaten by Myanmar military, suffered mentally, had no access to education, and lived in poverty. Ironically, they were stateless and thus they fled their country.

Historically, Arakan was a region which fought for their freedom from the British colony. Having their freedom and independence, some of the Arakan fighters wanted Arakan as an autonomous region under Burma while the others wanted to be an independent Islamic state. Burma Constitution 1947 did not accept the demands of Arakan Muslim. Consequently, Arakan was not a part of the political dominance in Burma. In the next years, Muslim faction in Arakan continuously pressed the Government to fulfill their demands to be an independent state, although it was never successful.

The Rohingyas fled from Burma in a series of waves. The first was in the middle of 1960s after the coup d'état of General Ne Win in Rangoon which destroyed Arakan, mainly in economy. It led many Muslims and Buddhists to leave the province for more prosperous regions. Muslims who preferred to stay on the province lived with the fear of government's torture. Their status as legitimate citizen was questionable by the authority and those who do not have proper citizenship document gets uncertain future to live there as eligible citizen (Ragland, 1994:304-305). They were finally forced to migrate to Bangladesh, Thailand, India, Pakistan, Saudi Arabia and Malaysia.

In 1970s, as a response to the government's policy, the Rohingya's Patriotic Front and the other opposition groups including Arakan Rohingya Islamic Front were established. The Patriotic Front distributed



weapons to hundreds of people living surrounding Naaf River with some supports from Bangladesh. However, this Front couldn't harm the Burma's military (Ragland, 1994:306-307).

The second wave occurred in 1978 when the Burmese military started huge attack in Arakan (Human Rights Watch, 2009: 6), towards opposition groups including Arakan Communist Party and Rohingya's Mujahidins. This attack was named "Ye The Ha". In this Naga Min operation, the government soldiers killed, raped and tortured the targeted Muslim population and forced them to return to Bangladesh. The soldier burned villages and destroyed mosques. In April 1978, a thousand of Muslims fled and in July more than 200,000 refugees lived in the camp on the side of Naaf river, Bangladesh.

The Bangladeshi Government didn't allow any foreign diplomats and reporters to visit the camps that were monitored by United Nations High Commissioner for Refugees (UNHCR). Because the condition in the camps got worsened, The Bangladesh decided to force the refugee back to Arakan. To avoid political conflict with the Bangladeshi Government, the Burma's government agreed with this policy but the refugees refused. To make them return voluntarily, the Bangladesh stopped providing them food. As a result, 7000 of them, including children, died. Having monitored the situation, the refugees finally decided to return to Arakan in 1979 (Ragland, 1994: 307-308).

Having returned from Bangladesh, nothing changed as they still faced unfair and discriminative treatment. Military regime under General Ne Win issued Citizenship Law 1982 which recognized 135 ethnics and the Rohingya was not one of them. This law made them stateless. They were claimed by majority of people and the Government as not of Myanmar origin, instead, they were considered as newcomers from Bangladesh (Parnini, 2012). They had no recognition and thus they didn't get citizenship. Citizenship in Myanmar is defined in the ethnic category under the name Tai Yin Tha. Before 1982, Tai Yin Tha is broadly defined which open the possibilities to include the Rohingya. After the enactment of the Citizenship Law, the Rohingya (as other minority group including Indian and Chinese people) were excluded and they did not have citizenship. This law supports the

principles of association and naturalization for whomever agreed to this policy (Rights Trust and Institute of Human Rights and Peace Studies, 2014: 7).

The third wave happened in 1990s. In the election held that year, the Rohingya's Muslims supported opposition party and refused to give their votes to National Unity Party that was backed up by the military. As the opposition party lost, the military ruled almost all parts of Arakan. The military tortured, raped and perpetrated other crimes and treated the people discriminatively (Ragland, 1994: 308). This worrying situation in Arakan caused some of the Rohingya to leave for Bangladesh. At this time, The Bangladesh Government permitted and sought for international aid. In 1992, United Nations suggested that Bangladesh and Burma to reach agreement to solve the refugee issue of the Rohingya. In April 28th, 1992, the two Governments agreed to return the refugee in 6 months. Unfortunately, Burmese refused the UNCHR monitoring to make sure the safety of the refugees. Despite the agreement, the refugees refused to return to Burma by protesting the Bangladesh. The two Governments then agreed to postpone the return of the refugees. In September 22th, 1992, the Bangladeshi Government secretly returned the refugees but they refused to do so if the government didn't allow UNHCR monitoring. During 1993, MoU between Bangladesh and UNCHR were agreed that the refugees will voluntarily leave and that UNCHR will get access in the camp. On the other hand, the Burma Government also reached agreement with UN in the process of refugees return to Arakan (Ragland, 1994: 311-314).

The fourth wave occurred in 2012 when the military and Buddhist group perpetrated violence against the Rohingya. This incident was triggered by robbery, rape accusation and murder of a Buddhist woman in Ramri Township. The majority accused the Rohingya's Muslims as the perpetrator (Lowenstein, 2015: 18). As a consequence, a series of attacks and raids occurred and led Rohingya to flee their region. They left their country to the neighboring countries such as Bangladesh, Saudi Arabia, Malaysia, Thailand, and Indonesia (Equal Rights Trust and Institute of Human Rights and Peace Studies, 2014: 12-13).

Recently, after violence broke out in Myanmar's Rakhine state on August 25, 2017 more than 500,000 Rohingya's Muslim refugees

crossed into Bangladesh. They are women, children, newborn babies, and elderly people (UNHCR, 2017). The Government of Bangladesh, local charities and volunteers, the UN and NGOs are working to help them. They attempt to protect refugees and ensure them to get basic shelter and acceptable living conditions (UNHCR, 2017). The general secretary, Antonio Guterres ask an authority of Myanmar to stop the activity of military and the violence (Lemond.fr, 2017).

### **Asylum Seekers in National and International Laws**

The increasing number of refugees and asylum seekers who had been prosecuted in their own countries oblige international community to protect them. UN as the representative of world countries has realized how refugees and asylum seekers have lost their rights to live without physical and non-physical threats simply because of differences in religion, ethnics and groups. UN has established the human rights declaration as a guide for its members to protect people's human rights.

As for the asylum seekers, UN has formulated legal basis in the form of Universal Declaration of Human Rights (UDHR). One of them is article 13 which states the freedom for refugees to leave from and return to their countries. (1) "Everyone has the right to freedom of movement and residence within the borders of each state". (2) "Everyone has the right to leave any country, including his own, and to return to his country." In addition, article 14 gives them freedom to seek for asylum. (1) "Everyone has the right to seek and to enjoy in other countries asylum from persecution." (2) "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". Act 15 grants them a right to have citizenship. (1) "Everyone has the right to a nationality". (2) "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

These acts assert that they have right to look for asylum so that they can be free from any forms of prosecution. This gives a clear statement that they are fully protected by the declaration and may seek asylum from other countries. The offer of asylum means that they must be saved from psychological and physical violence.

The UN declaration on Territorial Asylum (1967) states a number of basic principles on asylum territory. It is stated that the giving of asylum region “is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State.” In details, the UN General Assembly on their meeting on December 14th 1967 has agreed a resolution that world countries, in dealing with asylum seekers, should consider: (a). “Everyone has the right to seek and to enjoy in other countries asylum from persecution”; (b). “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.

This declaration highly values the basic humanitarian principles to not force back the seekers and reminds us of articles 13 and 14 of UDHR which simultaneously suggest the right to flee and return and the right to seek and enjoy asylum.

Asylum seeker issue is not regulated only in the Universal Declaration of Human Rights (UDHR), but more specifically, it is also regulated in the 1951 convention of refugee status and the 1967 protocol. The convention defines refugee as “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”.

This convention is the main foundation for international protection towards refugees which has been valid since April 22 1954, and it has been amended once, resulting in the 1967 protocol by which the geographical and time limitation which was mentioned in the 1951 convention were erased. At the beginning, the 1951 convention, as a law instrument after the second world war, only define refugees as any people who left their countries because of any incidents before January 1st 1951 in European territories. The 1967 protocol erased such limitations, thus making the 1951 convention universal and can be applied to refugees outside of European regions. The convention is

also supported by the movement of refugees in some areas and also by development of international law of human rights.

Therefore, a refugee, according to the convention is anyone who cannot or who is not willing to return to his/her homeland because of having fear of persecution due to difference in race, religion, nationality, membership of particular social group or political ideology. At length, it is stated in article 1: (1) "Has been considered a refugee under the Arrangements of May 12, 1926 and June 30, 1928 or under the Conventions of October, 28 1933 and 10 February 1938, the Protocol of September 14, 1939 or the Constitution of the International Refugee Organization"; (2) "As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Its definition in the 1984 Cartagena Declaration (Part III, Article 3) is similar to the definition in the convention, which "includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".<sup>1</sup>

But, this convention is not applicable for people who have committed war crime or wrongdoing in humanity, serious non-political wrongdoing, or guilty for any actions which contradict with the goals and the principles of the UN. This is also not applicable for any refugees who have obtained protection or assistance from any UN bodies other than UNHCR, such as refugees from Palestine who have been protected under United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). In addition, this is also not applicable to refugees who have equal status to citizens in the asylum granting countries (UNHCR, 2015).

Based on the two definitions, the Rohingya's Muslims who arrived in Indonesia and Malaysia and looked for protections are indeed refugee

and asylum seeker. It is proven by their condition being forced to flee their homeland due to the Myanmar Government prosecution for a long time and their willingness to get asylum from third countries, especially Australia. They believed that if they got Asylum from Australia, their life would be better and thus prosperous (Interview with Rohingya Asylum Seekers, 2015).

As refugees and asylum seekers, the Rohingya's Muslims absolutely have a number of rights as explicitly stated in the 1951 convention, and they are: non-discrimination right (act 3 and 4), private status right (act 12), opportunity to ownership (act 13, 14 and 30), right to assemble in group (act 15), right to get justice in court (act 16), right to productive jobs (act 17, 18, 19), right for education and teaching (act 22) right for free movement (act 26), right for social welfare (act 20 & 22), right for recognition cards and travel documents (act 27 & 28), and right to not get expelled (act 31, 32 and 33). These rights are embedded in every selves of refugees living in many countries who had ratified the convention. This means that these rights are applicable also for asylum seekers in Indonesia and Malaysia, including the Rohingya's Muslims.

On the other hand, the 1951 convention contains a number of fundamental principles that protect refugees and asylum seekers, such as the Rohingya's Muslims. First, it is the non-discrimination principle. This means that they must be treated fairly in whatever countries and conditions. Whatever the cause of discrimination is, such as difference in sex, age, disability, sexual orientation and others, will never be justified. It is in accordance with article 3: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin. They are given freedom to practice their religion and belief and get religious education for their children as in act 4: "The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children". This gives affirmation that the refugees and asylum seekers must be protected from any discriminatory treatment in the target countries.

The second is the non-penalization principle. Refugees cannot

be punished because of their without-permission entry or illegal stay so that they can reach their target countries. It means that countries are forbidden to punish them because of violation of immigration procedures or other law-breaking which related to asylum seeking or being detained without legal process for seeking asylum. This is stated in article 31: (1). “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. (2). “The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”.

The Third is the non-refoulement principle. Because the Rohingya’s Muslims live outside of their country, based on international law, they cannot be forced back to their homeland. This is in accordance with article 33, the 1951 convention (1) “No Contracting State shall expel or return (refouler) a refugee in any manner whatever 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”. (2) “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

This principle also can be found in the other international human right instruments such as in article 3 the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which state that, “No state party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

In addition, the general commentary of International Covenant on Civil and Political Rights (ICCPR) No. 31 summarized the obligation of this principle as follows: “Moreover, the Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 ICCPR, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters”. Article 2 ICCPR which relates to this principle states: “Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Article 3 the Convention on the Rights of the Child (CAT) also states that “No state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture”. It means that any destination countries of refugees and asylum seekers are not allowed to push them back home. They are free to look for asylum. The destination countries are only permitted to send them to the third country (Hamid, 2002: 42, Widagdo, 2008: 174-175, Foster, 2008: 64).

But there are some exceptions from the principle of non-refoulement that can only be applied in particular conditions such as what was stated in article 33 No. 2 of the 1951 convention. These exceptions can be applied if the refugee is a serious threat to the state security in where he looks for asylum or that refugee has been judged by the court as a person who cannot file objection for very serious crime and in consequence still become a threat for society where he seeks for asylum. This exception requires the application of the procedures which guarantee a follow up action in the form of strict investigation. But the article 33 no. 2 of the convention 1951 cannot be applied if



the transfer leads to torture or punishment that is cruel, inhuman and derogatory. The prohibition of the application is an inseparable part from the prohibition of torture and bad treatment as it is in accordance with act 3 of the UN 1984 convention on anti-torture, such as article 7 of the 1966 international law on civil rights and politics and law of regional human rights.

Although Indonesia and Malaysia haven't ratified the convention yet, they can't force them back to Myanmar. The non-refoulement principle states that they must be protected from the repeat of the same prosecution in their homeland. They have to be assured not to return for whatever reasons unless they want to do so. In this regards, UNHCR's duty is merely to support and ensure that the principle was held and implemented by the countries to where the refugees headed (interview with UNHCR officer, 2015). The regulation on refugees and asylum seekers can be understood as the international customary law which bind all countries including Indonesia and Malaysia. Hence, UNHCR duty is to ensure that refugees and asylum seekers were not forced back home by the Governments of Indonesia and Malaysia.

Although the right to seek the asylum was recognized by the international law, this right is limited only in terms of seeking and enjoying the asylum privilege and there is no obligation for the asylum-requested country for giving asylum. Therefore, such countries have the absolute authority to assess and evaluate arguments proposed by the asylum seekers without having obligation to convey the arguments to whoever requested or asked including the presidents or prime ministers of countries where the seekers come from.

During its practice in tens of years, Malaysia as prime destination of refugees and asylum seekers has never forced them back to their homelands. They lived in a number of places (mainly in Kuala Lumpur) as illegal immigrant without having proper documents. They were permitted to stay in Malaysia and there is no refoulement policy. This is similar to Government of Indonesia's policy. Both the Government of Malaysia and of Indonesia have applied the principle of refoulement.

Beside of these principles and governments policies, they got juridical legitimation in the 1962 Vienna Convention article 41 (3)

which states special agreement which will enable them to get chance of bilateral recognition, right to give asylum to political refugees in the foreign circumstances, to give entry allowance to asylum seekers, to give good treatment to them and to give the status of being refugees. In this case, the Governments of Malaysia and of Indonesia were countries that ever blocked the Rohingya's Muslim to not enter their territories, but the two Governments finally permitted them to land their boats and stay in the regions (Interview with Rahardiansyah, ACT, 2015).

The non-refoulement principle and the entry permission given by the two Governments were indeed strategic policies so that the seekers get human rights protection. Moreover, the Governments of Indonesia and of Malaysia did not force them back to their homelands and even let them to enter their respective regions and stay. This asserts that the two Governments respected the international law on refugees and asylum seekers.

The 1949 Geneva Conventions and the Protocols Additional to the Geneva Conventions of 1949 also placed non-combatants people to be granted right to not get physical and mental violations, torture, rape and murder. This is strikingly different to what had been experienced by Rohingya who suffered a lot from torture, rape and various types of violence in Myanmar. The Myanmar Government in fact has violated the mentioned principle in the conventions as Rohingya experienced torture, rape and murder.

After their citizenship status was removed in the 1982 citizenship law by their government, the Rohingya's Muslims were considered stateless. This is in accordance with the 1954 Statelessness Convention which define a stateless person is "someone who is not considered as a national by any state under the operation of its law". The fair treatment towards stateless people is by giving them citizenship as it is stated in the article 1: "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected".

The Rohingya's Muslims also must be treated without discrimination. Article 3, the 1954 Statelessness Convention states that: "The Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin". More specifically, article 4 states: "The Contracting States shall accord to stateless persons within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children. The 1961 Convention on the Reduction of Statelessness also obliges the ratified countries to grant citizenship to anyone born in their territories.

To protect human rights, UN also adopted a number of international conventions and covenants. Some of them are the International Covenant on Civil and Political Rights, G. A. Res 2200A (XXI), 1976 (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. A/RES/47/133, 1969 (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. A/RES/34/180, 1979 (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. A/RES/39/46, 1987 (CAT), the Convention on the Rights of the Child, G.A. Res. A/RES/44/25, 1989 (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U/N/ Doc./A/RES/45/158, 18 December 1990 (CMW), the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, 2000 (UNTOC), the Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006 (CRPD), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, 2000 (UNTOC Trafficking Protocol), the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res.55/25, 2004 (UNTOC Smuggling Protocol), and the Body of Principles for the Protection of All Persons Under Any Form of Detention (1988).

## Southeast Asian Countries which ratified International Covenants and Conventions

<b>Covenant/Convention</b>	<b>Myanmar</b>	<b>Malaysia</b>	<b>Thailand</b>	<b>Indonesia</b>
International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. A/RES/47/133, 1969 (ICERD)	-	-	28/1/2003	25/6/1999
International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. A/RES/47/133, 1969 (ICESCR)	-	-	5/9/1999	23/2/2006
International Covenant on Civil and Political Rights, G. A. Res 2200A (XXI), 1976 (ICCPR)	-	-	29/10/1996	23/2/2006
Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. A/RES/34/180, 1979 (CEDAW)	22/7/1997	5/7/1995	9/8/1985	13/9/1984
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. A/RES/39/46, 1987 (CAT)	-	-	2/10/2007	28/10/1998
Convention on the Rights of the Child, G.A. Res. A/RES/44/25, 1989 (CRC)	15/7/1991	17/2/1995	27/3/1992	5/9/1990
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U/N/Doc./A/RES/45/158, 18 December 1990 (CMW)	-	-	-	Signed only 22/9/2004
Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006 (CRPD)	7/12/2011	19/7/2010	29/7/2008	Signed only 30/3/2007
United Nations Convention against Transnational Organised Crime, G.A. Res. 55/25, 2000 (UNTOC)	30/3/2004	24/9/2004	17/10/2013	20/4/2009

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, G.A. Res. 55/25, 2000 (UNTOC Trafficking Protocol)	30/3/2004	26/2/2009	17/10/2013	28/9/2009
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, 2004 (UNTOC Smuggling Protocol)	30/3/2004		Signed only 18/12/2001	28/9/2009

See Equal Rights Trust and Institute of Human Rights and Peace Studies, Mahidol University, *Equal Only in Name The Human Rights of Stateless Rohingya in Malaysia*, (United Kingdom: IHRP, 2014), p. 21

Every country that had ratified above covenants and convention must fulfill any stated rights within. The two Governments, Government of Indonesia and of Malaysia had ratified all of them so that they have to recognize the rights and grant to the needed people. So the two Governments are obliged to protect refugees and asylum seekers in their respective regions, especially their rights not be the victim of human trafficking and smuggling, right to avoid violation, race discrimination, gender discrimination, the disabled and children discrimination. The women and children of the Rohingya's Muslim must be ensured so that they get specific rights in the international law.

The above conventions can be understood as part of customary international law (Ragland, 1994:327) that bind all countries, including Indonesia and Malaysia, regardless of they have ratified them or not. Some of them are the non-refoulement principle which has been the customary international law and thus it binds all countries, regardless of them having ratified the 1951 refugee convention or not. This principle also means that every country are obliged to protect them from getting torture of violence where they lived. Even, Indonesia is one of the ASEAN members who had ratified the convention. Other than the non-refoulement, other customary law is the right for leaving

person's homeland to obtain asylum. The target countries can grant them asylum or reject based on fair procedures and on the basis of international standard (Yolanda, 2014: 43).

In addition, as ASEAN members, Government of Indonesia and of Malaysia also signed ASEAN Human Rights Declaration in 2012 which reflected the implementation of human rights in Southeast Asia and both of them are also actively participating in the ASEAN Inter-Governmental Commission on Human Rights (AICHR) and ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Even Malaysia in the meantime is the chairperson of ASEAN (Clarke, 2012: 1-27).

ASEAN Human Rights Declaration stated that every persons has right to seek and accept asylum in other country in accordance with the international agreement and law which is prevalent (Article 16) and: "Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements (Act 16). The phrase "applicable international agreements" refers to the UDHR, the Vienna Declaration, and the Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees (Yolanda, 2014: 42). In addition, this stated: "Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality" (article 18). Ratification on a number of international instruments such as the ICCPR, CRC, CEDAW, CPRD, ICERD, ICRMW, and the Convention on the Nationality of Married Women by a number of ASEAN members truly gives obligation to protect the asylum seekers' citizenship. With all of these conventions and laws' legal validity, Government of Indonesia and of Malaysia truly have obligation to protect them and their human rights.

Specifically, in order to assure that they get such protection, the both of Governments are obliged to create policies to identify, register and take care of them. Unfortunately, in the Immigration Act 1959/1963, the government of Malaysia called them "illegal immigrants" stated in the Immigration Act; the Employment Act 1955/1998; and the Penal Code (Kaur, 2015: 81). They were considered breaking the law when entering Malaysia, and they also stayed there without permission, overstays from the given time limit in their visa or other

permission documentations. As its consequence, they can be detained, prosecuted, fined and even forced back home (refoulement). In reality, the Malaysian government put their (blind eyes) on the arrival of the Rohingya's Muslims refugees who were not registered by UNHCR in Malaysia (Equal Rights Trust and Institute of Human Rights and Peace Studies, 2014: 26-32).

But at the end of 2012, the Government started to pave the way for them. They entered Malaysian territories through roads and seas. Unlike Thailand, the Malaysian Government let them enter their territories. As an example was what happened in December 2013 in which the Malaysian Government allowed them to enter the region and rescued them in the Bay of Bengal. UNHCR also registered them. The change of policy was caused after the Malaysian Government had seen the suffered the Rohingya's Muslims as they were forced to leave Myanmar and rejected by Thailand and Singapore. They were welcomed and given shelters, health aids and food (Equal Rights Trust and Institute of Human Rights and Peace Studies, 2014: 17, 54-55).

With respects to the national laws in Indonesia and Malaysia, the two also have few related regulations that might be used to grant entry permission, to provide shelters and even to give citizenship status. In Malaysian constitution as an example, they had law on human rights fulfillment in the light of equality and non-discrimination principle. Article 8 states that everyone is equal before the law and there must be no discrimination based on religion, race and gender. In its practice, however, discrimination was experienced by the Rohingya's Muslims living in Malaysia, on the one hand they were employed in factory and farms which help the Malaysian sector of economy while on the other hand they also suffered from discrimination, xenophobia and racism from local people (Equal Rights Trust and Institute of Human Rights and Peace Studies, 2014: 26). The constitution of Malaysia also states that children born in Malaysia obtain citizenship directly. But unfortunately this regulation is not applicable to the children of them who were born in Malaysia because their parents did not have marriage documentations and they were afraid of being detained by Malaysian police because they stayed there without valid permission (Suan, 2006: 115,118).

In Indonesia, the constitution, article 28 states that “everyone has rights to be free from torture or any treatment which derogate human dignity and to get political asylum from other countries”. This gives strong legitimation that Indonesia recognize the political asylum from non-Indonesian citizens as the right of every human regardless of where they come from (Asshiddieqi, 2009: 120). Indonesia believes that everyone who have been tortured by their own countries have right to obtain asylum from other country. Article 24 of *Ketetapan MPR NO.XVII/MPR/1998* dated November 13 1998 can be the strong legal foundation in treating asylum seekers (Mauna, 2000: 470). The law no. 5 year 1998 on the ratification on Convention Against Torture and Other Violent, Inhumane, Non-Derogatory to Dignity Treatment stated “there must be no country who refused to force back or extradite someone to his origin country while having strong reason that he will be in danger by being the target of prosecution”. Law no. 11 year 2005 on the ratification on Convention on Civil Rights and Politics article 7 states: “everyone is not allowed to be the object of torture of inhumane punishment” and Article 12 no. 2: “everyone is free to leave any countries including his own”.

In details, law no. 37 year 1999 on overseas relations is regulated in Unit VI on the Asylum Grant and Refugee Issues which explained the procedures to grant asylum states that the authority to grant asylum from is on the hand of the president in accordance with the national law by also paying attention to other related laws, customs and international practices. Law no. 5 year 2011 on Immigration, and the regulation by head of immigration department No IMI-1489 year 2010 in the Procedure in Handling Illegal Immigrants and also the Government regulation no. 31 year 2013 on Immigration.

Indonesia and Malaysia have agreed that they welcomed the refugees and asylum seekers and will take care of them in one-year time limit. Joko Widodo as the President of Indonesia and Mohamad Najib as the Prime Minister of Malaysia agreed to provide temporary shelters to them until they obtained asylum from the third country in one year limit (Xiong, 2015: 2). This bilateral agreement gives hope to rescue and deal with them at ease.

Even to tackle down this refuge issue, three ASEAN countries - Indonesia, Malaysia and Thailand- held a meeting in Kuala Lumpur in



May 20 2015. The three Foreign Ministers conveyed their sympathy over the situation suffered by a thousand of Rohingya ethnics, including the 6000 to 8000 others who floated over Andaman Sea and Malaka Strait, as reported by UNHCR. The three Ministers agreed that the issue of Rohingya has become regional issue which requires joint treatments, and no ASEAN countries can deal with this alone. On behalf of humanity, these Foreign Ministers committed to find comprehensive solutions which involve the sending country, the transit country and the receiving country through burden sharing and shared responsibility. Such commitment is required to prevent this issue of irregular migrant evolve into humanitarian crisis in South East Asia region (*Masyarakat ASEAN*, 2015: 10).

Malaysia and Indonesia have taken their stance that they will welcome the Rohingya asylum seekers who were floating in sea. The Foreign Ministers of the two countries after having consultation with Thailand Foreign Minister in Putrajaya, Malaysia stated. "Indonesia and Malaysia agreed to give humanitarian aids to 7000 illegal immigrants who were floating in sea". Malaysia and Indonesia were also ready to build temporary shelters for them for one-year stay. Malaysian Foreign Minister Anifah Aman and Indonesian Foreign Minister Retno Marsudi also invited other countries to join the efforts. Anifah Aman asserted that the rejection of boats and forcing them back to the seas will never occur again". The Rohingya asylum seekers who were rescued were brought to harbor of Julok village, Kuta Binje, Aceh. Indonesia and Malaysia will treat them and take care of them. However, Anifah Aman confirmed that Malaysia will only accept those floating in the sea and do not intend to accept new asylum seekers.

On the organization level, ASEAN apply non-interference principle which prohibit interference on other ASEAN members' domestic affairs. 9 ASEAN members, excluding Myanmar, cannot issue political decision that will oblige Myanmar to revise its policy on the statelessness status of the Rohingya. Also they don't have authority to force or even politically request Myanmar to treat the Rohingya humanly. It is absolutely Myanmar's right to do and ASEAN can only appreciate the advanced situation if any, and practically can only save them and give them humanitarian aids.

Here are some steps taken by the Foreign Ministers of Indonesia, Malaysia and Thailand with respects to the Rohingya issue: a. Conducting SAR operation to save those floating in the sea; b. conducting coordinated sea patrol and facilitating evacuation in the sea when the boats full of people were found ; c provide humanitarian aids, including shelters, food, medicine, and other needs for dumped migrants in the territories of the three countries; d. improving cooperation and coordination with UNHCR and IOM in identifying and verifying, including seeking for third country to the process of resettlement; e. activating AHA resources-ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management - to solve this crisis (*Masyarakat ASEAN*, 2015: 10-11).

This asylum seekers issue put ASEAN at big stake and the world put attention to them massively. This is the credibility of this regional community established in the cold war era. Many analysts think why ASEAN contributed in creating complexity on their region is the countries of ASEAN agreed the principle of non-interference, so they do not to take part into any domestic issues of the members. The principle made ASEAN must be very careful and wise to decide which approach to use and mainly on how to solve this issue (Muhamad, 2015: 6).

## **Conclusion**

United Nations has formulated legal basis that asylum seekers have right to look for asylum in the Universal Declaration of Human Rights. The UN also issues the declaration on Territorial Asylum (1967) states a number of basic humanitarian principles to not force back the seekers and the right to flee and return and the right to seek and enjoy asylum. The 1951 Convention of Refugee status and the 1967 protocol is also the main foundation for international protection towards refugees. This contains a number of fundamental principles that protect refugees and asylum seekers, including the Rohingya's Muslims asylum seekers. The first is the non-discrimination principle. It means that they must be treated fairly in whatever countries and conditions. The second is the non-penalization principle. Refugees cannot be punished because they enter a country without permission or illegal stay. It means that countries are forbidden to punish them because of violation of immigration procedures or other law-breaking

related to asylum seeking or being detained without legal process for seeking asylum. The Third is the non-refoulement principle. This principle states that they must be protected from the repeat of the same prosecution in their homeland. They have to be assured not to return for whatever reasons unless they want to do so. These regulations on refugees and asylum seekers can be understood as the international customary law which bind all countries, including Indonesia and Malaysia.

Meanwhile, Indonesia and Malaysia signed ASEAN Human Rights Declaration in 2012 which reflected the implementation of human rights in Southeast Asia and both of them are also actively participating in the ASEAN Inter-Governmental Commission on Human Rights (AICHR) and ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). This Declaration states that every persons has right to seek and accept asylum in other country in accordance with the international agreement and law. Specially, the constitution of Indonesia and of Malaysia give strong legitimation to recognize the political asylum as the right of every human regardless of where they come from. Indonesia and Malaysia believes that everyone who have been tortured by their own countries have right to obtain asylum from other country. Therefore, Indonesia and Malaysia have agreed that they welcomed the refugees and asylum seekers and will take care of them.[]

## Endnotes

1. The Montevideo Agreement on International Civil Laws 1889 is a legal, regional instrument in North America that closely relates to the refugee and asylum seekers issue. The other instrument is Caracas Convention 1954 on Asylum Territory. Cartagena Declaration on Refugees confirms the legal foundation for North American refugees and asylum seekers. This declaration although did not bind countries in that region, but it is applied in a number of Latin Ameruca and had been modified and included in domestic laws in countries in the region.

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