

Regionalism as a Solution to Refugee Protection in ASEAN

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Abstract

The problem of refugees has become a global phenomenon that brings widespread impacts to all involving parties. The humanitarian crisis of the Rohingya ethnic group increased the number of refugees in ASEAN who needs international protection. However, legal and political framework governing refugee protection in ASEAN is still very insignificant. This research is to answer whether regionalism is successful in resolving the problem of refugees in international level and whether a regionalism approach can be applied in ASEAN level to deal with refugees. This study used normative juridical research methods with literature study techniques. Based on the results, the study revealed that regionalism has successfully solved the problem of refugees. However, the development of regionalism needs to be improved to deal with mass-influx problems. Regionalism has succeeded in encouraging world regions such as Europe, Africa, and Latin America to form various binding regional mechanisms (CEAS, OAU Convention, and Cartagena Declaration). Compared to the universal approach, regionalism is a better option because of its flexible nature. It also provides choices to member states in handling refugee protection activities. Based on the comparison of regionalism practices from the three regions, the regionalism approach in ASEAN has a great potential to solve refugee problems more effectively.

Keywords: ASEAN, Refugee Protection, Regionalism

Pendekatan Regionalisme sebagai Solusi Penanganan Pengungsi di ASEAN

Abstrak

Permasalahan pengungsi saat ini telah menjadi fenomena global yang memberikan dampak menyeluruh terhadap seluruh pihak terkait. Krisis kemanusiaan yang terjadi pada kelompok etnis Rohingya membuat angka pengungsi di ASEAN yang semakin bertambah sehingga mereka membutuhkan perlindungan internasional. Namun, kerangka hukum dan politik yang mengatur perlindungan pengungsi di ASEAN masih sangat minim. Penelitian ini berusaha untuk menjawab apakah regionalisme berhasil dalam menyelesaikan permasalahan pengungsi di dunia dan apakah pendekatan regionalisme dapat diterapkan

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di ASEAN untuk menangani pengungsi. Penelitian ini menggunakan metode penelitian yuridis normatif dengan teknik studi kepustakaan. Dari penelitian yang dilakukan, ditemukan bahwa regionalisme telah berhasil menyelesaikan permasalahan pengungsi, meskipun perkembangan regionalisme perlu ditingkatkan dalam menghadapi permasalahan mass-influx. Regionalisme berhasil mendorong kawasan-kawasan dunia seperti Eropa, Afrika, dan Amerika Latin untuk membentuk berbagai mekanisme regional (CEAS, OAU Convention, dan Cartagena Declaration) yang bersifat mengikat. Dibandingkan dengan pendekatan universal, regionalisme menjadi opsi yang lebih baik karena sifatnya yang fleksibel, sehingga memberikan kebebasan kepada negara anggota untuk melakukan kegiatan perlindungan pengungsi secara nyata. Berkaca dari praktik regionalisme dari ketiga kawasan tersebut, pendekatan regionalisme di ASEAN berpotensi besar untuk menyelesaikan permasalahan pengungsi secara lebih efektif.

Kata kunci: ASEAN, Perlindungan Pengungsi, Regionalisme

A. Introduction

The refugee crisis has now developed into a global phenomenon that has a political, social, and economic impact on states, non-governmental organizations, and communities. Various events of conflict, persecution, and violence, in various parts of the world, as well as the failure of states to respect human rights values, have resulted in millions of people living in dangerous situations in their own states. Therefore, they need international protection.¹ The United Nations High Commissioner for Refugees (UNHCR) recorded a total world refugee population of 25.4 million in 2017. This figure is the highest refugee population in history since World War II.²

Southeast Asia has become a region bearing the role as main destination and transit of refugees in the world. The humanitarian crisis of the Rohingya ethnic group in Myanmar³, as well as the ongoing border conflicts and internal problems in Sri Lanka, Afghanistan, and Pakistan⁴, have increased the number of refugees in Southeast Asia annually. As of September 2014, UNHCR granted refugee status to 523,592 people in the Southeast Asian region.⁵ Another 2.7 million people are still categorized as people of concern, consisting of asylum seekers, stateless persons,

¹ Volker Türk and Madeline Garlick, "From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees", *International Journal of Refugee Law*, Vol. 28, No. 4, 2016, p. 656.

² UNHCR, "Global Trends: Forced Displacement in 2017", <https://www.unhcr.org/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html>, accessed on December 2018, pp. 13-14.

³ *Ibid.*

⁴ See M. Vincent and Birgitte Refslund Sorensen (eds.), *Caught Between Borders: Response Strategies of the Internally Displaced*, London: Pluto Press, 2001.

⁵ UNHCR Regional Office for South-East Asia, "Factsheet", <https://www.unhcr.org/protection/operations/519f67fc9/south-east-asia-fact-sheet.html>, accessed on January 2019.

or internally displaced persons who do not yet have the capacity to obtain legal protection because they have not been recognized as refugees according to the provisions of the international refugee law. At the end of 2017, the number of refugees in the Southeast Asian region increased to 848,519 people.⁶ The UNHCR is projecting a number of people of concern to 2.8 million by the end of 2019.⁷

As an organization aiming to maintain regional peace and stability with respect to justice, the rule of law among the nations of Southeast Asia, and adhering to the principles of the Charter of the United Nations (UN)⁸, the Association of Southeast Asian Nations (ASEAN) has a role to help member states to resolve various humanitarian crises internally. Unfortunately, ASEAN's efforts in creating the Southeast Asian as a safe, peaceful, and stable region have not been matched by ASEAN's attention to the increasingly complex refugee problem.

The evidence is the absence of a special mechanism to handle refugees. Of the ten ASEAN members, only Cambodia and the Philippines signed the 1951 Refugee Convention along with the 1967 Protocol.⁹ However, the two states do not yet have the commitment to deal with refugee issues. Therefore, the 1951 Refugee Convention and the 1967 Protocol do not work practically because the two states have not made instruments of their national law.¹⁰ The dispute among the Southeast Asian states to establish bureaucratic procedures and processes of the determination of refugee status makes UNHCR the only party to resolve the grant of refugee status.¹¹

Due to the absence of a clear legal and political framework to protect refugees or asylum seekers, the practice of refugee protection in Southeast Asia is still very minimal. The response of recipient countries to the refugee arrivals is still provisionally. For instance, the policies of states to deal with refugees are varies.¹² To be precise, as an ASEAN member state with the largest number of refugees, Thailand has received 150,000 refugees from Myanmar up to 2013.¹³ The Thailand

⁶ UNHCR, "UNHCR Population Statistics Database", http://popstats.unhcr.org/en/overview#_ga=2.135334769.1741089519.1551693524-1438321365.1530503120, accessed on March 2019.

⁷ UNHCR, "South-East Asia: Operational Information on the South-East Asia subregion", <http://reporting.unhcr.org/node/39>, accessed on March 2019.

⁸ ASEAN, "Overview", <https://asean.org/asean/about-asean/overview/>, accessed on January 2019.

⁹ UNHCR, "2015 UNHCR Regional Operations Profile – Asia and the Pacific", www.unhcr.org/pages/4a02d8ec6.html, accessed on December 2018.

¹⁰ Sara E. Davis, *Legitimising Rejection: International Refugee Law in Southeast Asia*, Leiden: Martinus Nijhoff Publishers, 2008, p. 5.

¹¹ See Vivit Muntarbhorn, *The Status of Refugees in Asia*, Oxford: Oxford University Press, 1992.

¹² Sara E. Davis, *op.cit.*, p. 5.

¹³ UNHCR, "UNHCR Country Operations Profile", <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e489646>, accessed on January 2019.

government does not categorize them as refugees but as displaced persons.¹⁴ They are located in temporary camps, where the life quality in the camps is under a decent standard of living. Refugees often do not get enough food rations and access to education for younger groups. They also receive violence treatment from local authorities. Their lives are threatened due to potential landslides.¹⁵

According to Davis¹⁶, at least there are four reason for ASEAN not to submit the international refugee legal regime. First, there is the principle of non-intervention, or the 'ASEAN Way'. Based on the principle, state sovereignty is absolute. Member states cannot interfere the internal problems of fellow member states.¹⁷ There is a concern that the ratification of international refugee law may put countries in a position to violate the principle.

Second, most ASEAN member states are developing countries. The application of international refugee law is difficult for them due to the high costs to provide sufficient protection for refugees. The governments of Laos, Malaysia, the Philippines, and Singapore have expressed their objections to UNHCR that the application of the 1951 Refugee Convention would create greater financial expenditure than their allocation for refugees. Classifying them as 'illegal immigrants' is considered more profitable because they can be employed in the 3-D sector (dirty, demanding, and difficult) and paid cheaply.¹⁸

Third, the arrival of migrants will worsen the social polemic that is currently experienced by many member states. Historically, the existence of diverse ethnics, cultures, and traditions in the Southeast Asian region has triggered pressures and conflicts. The governments make many efforts to reduce the tensions and to promote multicultural philosophy.¹⁹ The arrival of refugees is considered to disturb the social cohesion that has occurred in the communities. Therefore, they are better classified as a group that is separated from the local group.

Fourth, the characteristics of international refugee law, which contains human rights values from Europe or the West, are not in line with human rights values believed by eastern culture. For example, the right to grant asylum as stated in Article 14 of the Universal Declaration of Human Rights (UDHR), which is the basis for the formation of international refugee legal instruments, has no relevance to

¹⁴ Penelope Matthew and Tristan Harley, "Refugee Protection and Regional Cooperation in Southeast Asia", *field report*, Australia National University, March 2014, p. 7.

¹⁵ Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers", September 2012, pp. 28-59.

¹⁶ Sara E. Davis, *op.cit.*, pp. 9-15.

¹⁷ The principle of non-intervention is a fundamental principle of ASEAN in cooperation. See Article 2(C) Treaty of Amity and Cooperation in Southeast Asia 1976.

¹⁸ In some cases, Malaysia and Thailand have benefited economically from the arrival of Vietnamese and Burmese migrants because they were willing to do work that did not attract local people. See G. Battistella and Maruja M. B. Asis (eds.), *Unauthorized Migration in Southeast Asia*, Scalabrini Migration Center, 2003.

¹⁹ For example, the Singapore government requires that social events and housing placement must be carried out to encourage interracial marriages among the Chinese, Indian, and Malay populations.

the situation of states in Asia because, at the time of its preparation, many Asian states were still colonized.²⁰

The absence of a clear legal framework in managing refugee problems in the Southeast Asian region has raised a number of legal problems. The legal vacuum in ASEAN member countries at the regional and national levels in the case of legal status of refugees and their protection causes the handling of refugees often equated with the handling of illegal immigrants.²¹ The trend of irregular migration activities in the Southeast Asia region that involves illegal labor movement, human trafficking, and human smuggling makes the arrival of refugees in ASEAN seen as a part of irregular migration activities. Hence, ASEAN member states are preventive about the arrival of refugees to maintain internal sovereignty and security.²² The vacuum of international refugee law places a heavy burden on UNHCR to supervise and to handle the flow of refugees entering ASEAN region, while carrying out the process of refugee status determination at the same time.²³

Seeing the refugee movement in the Southeast Asian region, which took place on a large and global scale, it is undeniable that the refugee problem in ASEAN will not be solved by one state. Handling refugees in ASEAN requires a collective, comprehensive, and coordinated response by all member states. Thus, the regionalism approach has a great opportunity to answer the polemic on the problem of refugees in the Southeast Asian region.

B. Understanding Regionalism

The concept of regionalism has a complex history in the development of international law and relations.²⁴ Telò defines regionalism as the efforts of states to exercise regional control as a solution to the resolution of crisis because a centralized approach based on the policies of each state is seen to be no longer functioning.²⁵

In the field of international relations, Fawcett divides regionalism into two phases.²⁶ The first phase is old regionalism, which limits the implementation of

²⁰ B.S. Chimni, "The Geopolitics of Refugee Studies: A View from the South", *Journal of Refugee Studies*, Vol. 11, No. 4, 1998, pp. 350-374.

²¹ Linda Larsson, "Illegall Immigrants or Illegal Refugees? A Study of the Refugee Protection for Burmese Refugees in Thailand", *Thesis Lund Universitet*, 2008, p. 4.

²² The Council on East Asian Community, "Crisis Management in the ASEAN +3 Countries", http://www.ceac.jp/j/pdf/neat/14wg_1j.pdf, accessed on Maret 2019, p. 2.

²³ *Ibid.*

²⁴ Luk van Langenhove, *Building Regions: The Regionalization of World Order*, London: Routledge, 2011, pp. 1-2.

²⁵ Mario Telò, "Introduction: Globalization, New Regionalism and the Role of the European Union" in Mario Telò (ed.), *European Union and New Regionalism Regional Actors and Global Governance in a Post-Hegemonic Era, Second Edition*, Ashgate: Hampshire-Burlington, 2007, p. 7.

²⁶ *Ibid.*

regionalism to regional organizations, states only, with an exclusive and closed nature and oriented to enhance regional security from attacks by external threats. Examples of old regionalism can be seen from the formation of the North Atlantic Treaty Organization (NATO) in the North Atlantic region and the South East Asian Treaty Organization (SEATO) in the Southeast Asian region during the cold war.²⁷ The second phase is new regionalism, a modern school, which argues that regionalism can also involve both non-state and state actors to engage in formal and informal interactions to create open relationship and broaden scope of region. The formation of the World Trade Organization (WTO) or General Agreement on Tariffs and Trade (GATT) is embodiment of new regionalism because they are multilateral by involving relationship between state and non-state actors (multinational companies and non-governmental institutions) to carry out various activities in economics and business.²⁸

Klučka explains the role of regionalism can be realized through²⁹ (1) the existence of regional agreements with the object of agreement within the framework of geographical areas, or only binding on certain states in a region³⁰; and (2) the formation of regional organizations by states that are geographically close together.³¹ Article 52 (1) of the UN Charter contains provisions on the implementation of regionalism by states as follows.

“Nothing in the present Charter precludes the existence of for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such regional arrangements or agencies arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”

Seeing the above provisions, international law has recognized countries to make regional efforts, including through regional organizations, or whatever actions are needed, as long as they are in line with the principles and objectives of the United Nations, and aims to maintain international peace and security. The UN Charter gives power to organizations in solving local problems using their own methods. Thus, the regionalism approach is seen as more effective to settle refugee problems than the universal approach that prioritizes uniformity because

²⁷ Ján Klučka, *Regionalism and its Contribution to General International Law*, Kosice: UPJS, 2015, p. 30.

²⁸ *Ibid.*, p. 32.

²⁹ *Ibid.*, p. 39-43.

³⁰ For example, the Convention regarding the regime of navigation on the Danube, which binds the countries around the Danube River region; or the American Convention on Human Rights, which binds countries in the American region.

³¹ Joseph S. Nye, *International Regionalism*, Boston: Little, Brown, and Co., 1968, p. xii.

regionalism opens up greater opportunities for states of a region to create practical solutions that are appropriate to their regional situation.³²

The regionalism approach to handle refugees can be found in the regions of the European Union, Africa, and Latin America. The three regions have special regional mechanisms such as the Common European Asylum System, The Organization of African Unity Convention (OAU Convention), and the Mexico Declaration and Plan of Action to implement the provisions of the 1951 Refugee Convention and the 1967 Protocol.³³

C. Refugee Protection in the Context of International and Regional Law

1. Definition of Refugees

Article 1(A)(2) of the 1951 Refugee Convention contains a definition of refugees in general, which reads,

“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.”

The definition provides an understanding of refugees as people who leave their home country due to reasonable “fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.³⁴

2. The Procedures of Refugee Status Determination According to International Refugee Law

The Refugee Status Determination (RSD) is a legal or administrative process undertaken by a state government or the UNHCR to determine whether a person can be categorized as a refugee based on international, regional, or national law. The legal basis for the implementation of the procedures is contained in Article 9 of the 1951 Refugee Convention. The article gives freedom to states parties to carry out the RSD according to their respective policies. Although the implementation of

³² Susan Kneebone and Felicity Rawlings-Sanaei, “Introduction: Regionalism as a Response to a Global Challenge” in Susan Kneebone and Felicity Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead*, New York: Berghahn Books, 2007, p. 1.

³³ See Susan Kneebone, “Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs”, *International Journal of Human Rights*, Vol. 20, No. 2, 2016, pp. 153-172.

³⁴ See UNHCR Indonesia, “Pengungsi”, <https://www.unhcr.org/id/pengungsi>, accessed on February 2019.

the RSD is a state's responsibility, the UNHCR can also carry out the RSD based on the mandate of non-party state of the 1951 Refugee Convention and/or states that do not have procedures of refugee acceptance in a fair and efficient manner.

In general, the process of RSD is carried out as follows.

1. Applicant submits a claim for refugee status to recipient state.
2. After submitting a claim, the applicant must be able to prove the existence of an element of fear that is based on well-founded fear that causes the applicant to leave home country to the examiner country. Because the burden of proof lies with the applicant, the applicant is obliged to assist the examiner in completing the necessary evidence and provide clear answers about the situation at the interview stage.
3. The examiner then assesses the applicant's evidence and credibility to determine the subjective and objective elements. These two elements will be compared with the provisions of the 1951 Refugee Convention to determine whether refugee status can be granted or not.

The 1951 Refugee Convention in general regulates the refugee status determination on a case-by-case basis with regard to particular situation of each individual. However, in certain cases, states can take a prima-facie approach in the RSD, through granting refugee status directly to group members who come to receiving states in large numbers due to the situation of widespread conflict and violence in the country their origin. The decision to take a prima-facie approach is determined by state policy through regional or national law.

3. Universal Principles in the Concept of Refugee Protection

a. Non-Refoulement

Article 33(1) of the 1951 Refugee Convention regulates the principle of non-refoulement as the most basic and fundamental form of refugee protection. The concept of non-refoulement prohibits recipient countries from returning refugees or asylum seekers to their home territories, if there is a risk that could endanger refugees' lives due to their identity.

In practice the application of non-refoulement is not absolute. Article 33(2) of the 1951 Refugee Convention regulates the exclusion of the principle of non-refoulement of refugees whose existence could threaten national security or disturb public order in the country where they seek protection.³⁵ Expulsion of refugees can be done if the refugee has committed a serious crime that is considered to disturb public order by the recipient country based on a legal ruling that ensnared the refugee before.

³⁵ *Ibid.*

b. Durable Solutions

Durable Solutions is the idea of long-term refugee protection. The objective is that when refugees no longer need intensive assistance from the recipient country and are ready to live their normal lives back in a healthy and safe environment.³⁶ According to Goodwin-Gill, Durable Solutions can be successful if refugees have reached a level of independence to participate in social and economic activities of local communities in the areas where refugees are located.³⁷ Durable Solutions consists of three ways: voluntary repatriation, local integration, and third country resettlement.

c. Burden and Responsibility Sharing

According to Milner³⁸, burden and responsibility sharing is a form of international cooperation to deal with refugees through the mechanism of sharing the burdens and responsibilities of recipient countries equally. This idea arose due to the practice of non-refoulement, which made the admission of refugees in certain countries excessive, thus creating a burden in refugee protection for these countries.³⁹

The principle of burden and responsibility sharing can be seen in the Declaration of State Parties to the 1951 Convention and 1967 Protocol 2001, which states the implementation of the sharing of burdens and responsibilities must be based on a sense of solidarity by involving all members of the international community.⁴⁰ Although the burden and responsibility of sharing has broad approval, this principle does not create legal ties so that states have the freedom to do this principle.⁴¹

Practically, the sharing of burden and responsibility can be done in two ways. The first is to provide financial assistance to the largest refugee recipient countries to help smooth operations of refugee protection activities.⁴² The second is to distribute the burden of 'physical', acceptance of some groups of refugees from

³⁶ Ruchi Lal, "Durable solutions for protection of refugees and their correlation with social and economic rights", *International Journal of Law*, Vol. 3, Issue 1, January 2017, p. 40.

³⁷ Goodwin-Gill, "Refugee or Asylum: International Law and the Search for Solutions to the Refugee problem" in Howard Adelman and Michael Lanphier (eds.), *Refugee or Asylum: A Choice for Canada*, Toronto: York Publishing, 1990, p. 38.

³⁸ James Milner, "Burden-Sharing" in M. Gibney and R. Hansen (eds.), *Immigration and Asylum: From 1900 to the Present*, CLIO: ABC, 2005, pp. 56-57.

³⁹ *Ibid.*

⁴⁰ James Milner, "When Norms are not Enough Understanding the Principle and Practice of Burden and Responsibility Sharing for Refugees", *Global Leadership and Cooperation for Refugee Series Paper No. 2*, December 2016, p. 2.

⁴¹ *Ibid.*

⁴² Christina Boswell, "Burden-sharing in the New Age of Immigration", *Migration Information Source*, 2003, p. 1.

countries the first recipient country, which is determined based on the agreement of the two parties.⁴³

4. International Legal Framework for Refugee Protection

The International community has recognized the 1951 Refugee Convention and the 1967 Protocol as the main sources of international refugee law because of their universal and non-discriminatory characteristics. This is reflected by the statement of the UN General Assembly in the preparation of the New York Declaration for Refugees and Migrants as follows.⁴⁴

"We reaffirm the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime. We recognize the importance of their full and effective application by States parties and the values they embody. ... We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law"

Thus, the provisions of the 1951 Refugee Convention and the 1967 Protocol are references for the establishment of refugee protection instruments at the regional level. They also serve the same role on soft law.⁴⁵ In addition to the 1951 Refugee Convention and the 1967 Protocol, the UNHCR Statute is also one of the international refugee legal frameworks that is widely used in the development of refugee protection.⁴⁶

5. Regional Legal Frameworks for Refugee Protection⁴⁷

a. African Region

Regional refugee protection instruments in Africa consist of the OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa 1969 (OAU Convention) and the African Charter on Human and People's Right 1981 (Banjul Charter).⁴⁸ Almost all of the 53 states of Africa are parties to the 1951 Refugee

⁴³ See UNHCR, "The Strategic Use of Resettlement." EC/53/SC/CRP.10/Add. 1, 2003.

⁴⁴ See United Nations General Assembly, "New York Declaration for Refugees and Migrants", A/RES/71/1, 2016, para. 65.

⁴⁵ See Pedro Castanheira do Amaral, "Burden-Sharing as an Elusive Principle: State Discretion and Refugee Protection", a Thesis, Universitas Tillburg, Juni 2018, p. 25-40; The Refugee Law Reader, "International Framework for Refugee Protection", <http://www.refugeelawreader.org/en/ii-international-framework-for-refugee-protection.html>, accessed on February 2019.

⁴⁶ UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", HCR/IP/4/Eng/REV.1, January 1992, para. 13-19.

⁴⁷ See UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", *op.cit.*, para. 20-23.

⁴⁸ Jens Vedsted-Hansen, *The Refugee Law Reader: Cases, Documents, and Materials*, edisi ketujuh, Budapest: Aarhus, 2015, p. 137.

Convention and its protocol.⁴⁹ The OAU Convention provides an extension of the definition of refugees to be able to keep in line with the situation. There are two additional parts to the expansion of the definition of refugees according to the OAU Convention: (1) the definition of refugees that is identical to the definition of the 1951 Refugee Convention and its Protocols; and (2) the definition of refugees towards people who experience generalized violence or generalized violence so that they must leave the place its origin to seek asylum in the territory of other countries.⁵⁰ By this definition, people who leave their home countries due to war, widespread violence, or riots can be categorized as refugees.

The Banjul Charter, to be particular, is a regional human rights protection instrument, which serves as the main legal source of African states in the implementation of human rights protection efforts. The special characteristics of Banjul Charter can be seen from the recognition of group rights. In the development of regional refugee law in Africa, the Banjul Charter has the role of placing the OAU Convention as an important regional refugee protection instrument through the inclusion of the provisions of refugee rights and asylum seekers of the OAU Convention into the Banjul Charter principles.

b. Latin American Region

The development of the regional refugee legal regime in the Latin American region consists of two distinct parts. The first part deals with the policies and practices of each country in dealing with refugee, diplomatic, and territorial issues through its national legal system.⁵¹ The second part deals with collective action taken by member states in carrying out refugee protection based on a sense of solidarity and cooperation through the formation of the 1984 Cartagena Declaration.⁵²

The Cartagena Declaration was adopted on November 22, 1984 at the initiative of Latin American countries to adopt a regionalism approach to refugee management after seeing the implementation of the OAU Convention in the African region⁵³ and a report from the Inter-American Commission of Human

⁴⁹ *Ibid.*

⁵⁰ 'Generalized violence' in question includes acts of external aggression, occupation, and occupation from a foreign country, or matters that disturb other public order. See UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", op.cit., para. 22.

⁵¹ Liliana Lyra Jubilut. "Fora and Programmes for Refugees in Latin America" in Ademola Abbas and Fransisca Ippolito, *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*, Abingdon-on-Thames: Routledge, 2016, pp. 245-246.

⁵² *Ibid.*

⁵³ See 3rd Conclusion of Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 1984 (Cartagena Declaration).

Rights.⁵⁴ The contents of the Cartagena Declaration contain a reaffirmation of the universal principles of refugee protection in international refugee legal instruments, specifically in regard to (a) granting refugee status based on humanitarian, peace, and non-political values; (b) the nature of non-refoulement as a fundamental principle in international refugee law and can be used as *jus cogens*; and (c) the fact that minimum standards for refugee treatment are set by the 1951 Refugee Convention and its Protocol.

c. European Region

Refugee protection in the European region is carried out by two different regional organizations, namely the Council of Europe and the European Union.⁵⁵ The European Charter of Fundamental Rights forms the main legal basis for European Union member states in refugee protection. It is then transformed into concrete actions through the establishment of the Common European Asylum System (CEAS).⁵⁶ The objective of CEAS is to provide protection to asylum seekers to enter Europe safely by requiring all member states to apply for effective and standardized asylum procedures.⁵⁷ The formation of CEAS has produced various kinds of secondary legislation such as Dublin Regulations, Qualitative Directive (QD), Asylum Procedures Directive (APD), and Receptions Conditions Directive (RCD), which regulate all aspects of refugee reception, ranging from the responsibilities of recipient countries to the procedures for processing refugee status. The implementation of CEAS is inseparable from the case law issued by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) as a guide for member states in carrying out their specific protection functions.

d. ASEAN region

ASEAN is a regional organization founded in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. The main objective of ASEAN is to create a conducive environment in the Southeast Asian region by establishing good relationship among the states of the region and to maintain regional stability.⁵⁸ To realize the objective, ASEAN prioritizes the principle of non-intervention and respect for state sovereignty, which means that any regional problem resolution

⁵⁴ UNHCR, "The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984 – Discussion Document", *International Journal of Refugee Law*, 2006, p. 231.

⁵⁵ Tristan Harley and Penelope Matthew, *Refugees, Regionalism, and Responsibility*, Cheltenham: Edward Elgar Publishing, 2016, p. 36.

⁵⁶ *Ibid.*

⁵⁷ See Presidency Conclusions - Tampere European Council, SN 200/99, 1999, para. 13.

⁵⁸ See Colin Mc Innes and Mark G. Rolls, *Post-Cold War Security Issues in the Asia-Pacific Region*, Portland: Psychology Press, 2004.

focus on a consensus and consultation approach. ASEAN's regionalism approach to refugee management can be seen through the establishment of the 1989 Comprehensive Plan of Action for Indo-Chinese Refugees (CPA) to address the massive movement of Indochina refugees during 1975 to 1990; and the establishment of ASEAN human rights instruments⁵⁹, which contain implicit provisions related to protection of refugees.

In addition to the CPA mechanism, ASEAN also has several human rights mechanisms: (1) the ASEAN Declaration of Human Rights (ADHR) framework, which contains important provisions in the form of recipient countries' obligations to provide minimum protection to refugees and displaced persons seeking asylum in recipient country⁶⁰; (2) the ASEAN Intergovernmental Commission on Human Rights (AICHR), which mandates to promote human rights values, including encouraging ASEAN member states to ratify international human rights instruments⁶¹; and (3) the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC), as a supervisory commission for the implementation of human rights protection for women and children groups in the ASEAN region.⁶²

Protection of refugee rights at the ASEAN regional level is still considered problematic. At present, the ASEAN regional human rights framework has not been able to provide maximum refugee protection, because all provisions are not absolute. The lack of confirmation of the principle of non-refoulement and the equality of procedure for processing asylum applicants in the AHRD framework makes the member states potentially choosing not to follow applicable international refugee protection standards. The limited authority of AICHR and ACWC also makes this commission unable to encourage other countries to stop acts of human rights violations occurring in other countries.

D. Regionalism Competence in Dealing with Refugee Issues

Indicators of non-refoulement practice, RSD implementation, and durable solutions is used to measure the extent of European, African, and Latin American practices applying a regionalism approach in implementing refugee management. The embodiment of regionalism is seen from the existence of regional mechanisms originating from the formation of binding international agreements, soft-law, and various cooperation programs that have been carried out by the member states of the regional organizations.

⁵⁹ See ASEAN, "Towards an ASEAN Human Rights Mechanism", *Working Group for an ASEAN Human Rights Mechanism*, Manila, 1999.

⁶⁰ See Articles 3, 16, and 21 of the ASEAN Human Rights Declaration (AHRD).

⁶¹ See Articles 4(3), 4(4), 4(5), 4(6), 4(7) of the Terms of Reference AICHR.

⁶² See Articles 5(1) – 5(16) of the Terms of Reference ACWC.

1. Non-Refoulement Principles

The European Region has a set of provisions regarding the principle of non-refoulement that are listed in the main legal instruments of the European Union⁶³, CEAS⁶⁴, and case law.⁶⁵ At a glance, EU member states have a serious commitment in carrying out non-refoulement principles, such as the existence of rules such as the prohibition of erecting fences, conducting non-refoulement in extra-territorial territories, etc.⁶⁶ However, the wave of Syrian refugees arrival since 2014 has made European commitments to implement non-refoulement decline. The formation of an EU migration cooperation agreement with Libya and Turkey has caused a lot of criticism from various international organizations because it shows the low responsibility of the European region to carry out the non-refoulement principle.⁶⁷ The border closing for refugee makes them more vulnerable to violence and torture by the authorities. For example, the interception carried out by Libyan coast guards to prevent refugee ships from entering European Union waters has led to many refugees being detained without going through a fair legal process due to illegal migration.⁶⁸

The OAU Convention provisions in regulating the principle of non-refoulement enable refugee protection to be given to groups of people with a broader scope, without having to be accompanied by a strong burden of evidence.⁶⁹ States of Africa receive large numbers of refugees continuously.⁷⁰ Based on the report issued by US Committee for Refugees and Immigrants (USCRI)⁷¹, the states of Africa get

⁶³ See Articles 3 ECHR, 78(1) of the Treaty on the Functioning of the EU, and Article 18 of the Charter of Fundamental Rights of the European Union.

⁶⁴ CEAS sets limits on the application of the principle of non-refoulement to asylum seekers. An asylum seeker can be returned to the home country directly if the asylum seeker is proven to have committed a serious crime, or carries a threat to the security of member countries.

⁶⁵ See EtCHR, *M.S.S. v. Belgium and Greece*, 2011, para. 293; EtCHR, *Soering v. United Kingdom*, 1989.

⁶⁶ Vasiliki Kakosimou, "Non-Refoulement and Access to Asylum", *International Journal of Social Sciences*, Vol. 3, Issue 2, 2017, pp. 170-172.

⁶⁷ Nula Frei, "Circumventing Non-Refoulement or Fighting Illegal Migration?", <https://eumigrationlawblog.eu/circumventing-non-refoulement-or-fighting-illegal-migration/>, accessed on May 2019.

⁶⁸ United Nations Support Mission in Libya, "Desperate and Dangerous: Report on the human right situation of migrants and refugees in Libya", <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>, accessed on Desember 2018, pp. 25-50; see also Sally Hayden, "The EU's deal with Libya is sentencing refugees to death", <https://www.theguardian.com/commentisfree/2019/feb/05/eu-deal-libya-refugees-libyan-detention-centres>, accessed on Mei 2019.

⁶⁹ Jessica Rodger, "Defining the Parameters of the Non-Refoulement Principle", *Postgraduate research paper*, University of Wellington, 2001, para. 17.

⁷⁰ Olivia Bueno, "Perspectives of Refoulement in Africa", paper presented on *Canadian Council for Refugees Conference*, Toronto, 17 June 2006, p. 2.

⁷¹ Bruce Forster, "Report cards on refugee's rights", *World Refugee Survey*, 2009, p. 57.

the most "A" and "B" report cards as the highest value in the implementation of non-refoulement compared to other countries in the region.⁷²

The Latin American region has the Cartagena Declaration as a guideline for the implementation of non-refoulement. The non-refoulement mechanisms in the Latin America prohibit states from refusing asylum applications submitted at border posts and recognizes the principle of non-refoulement as a norm of coercion or *jus cogens* of international law.⁷³ Prior to the massive displacement of millions of Venezuelans due to internal situations, the upholding of the principle of non-refoulement as the norm of *jus cogens* had been practiced effectively by the Latin American states. However, presently, several states, such as Brazil and Mexico, are less open in welcoming the arrival of Venezuelan refugees.⁷⁴ According to an Amnesty International's report, the Mexican state also frequently conducts refoulement through acts of direct detention by the National Institute of Migration against arbitrary asylum applicants.⁷⁵

Based on the practices of regionalism in Europe, Africa, and Latin America, it can be concluded that the implementation of non-refoulement principle is not fully carried out when there is a mass influx of refugees. The factor of limited state revenue capacity is the main obstacle in the African and Latin American regions, considering that most of the states of Africa and Latin America are developing. However, compared to Europe, Africa and Latin America has carried out non-refoulement more effectively because of their solidarity and respect for regional values. On the contrary, the commitment of the European to prevent refugees from entering Europe, through the cooperation with third countries, shows that European states support refoulement actions that violate the provisions of international law.

2. Implementation of RSD

The success of RSD implementation can be seen from the level of RSD efficiency, the quality of decisions making in determining refugee status fairly, and the state's attitude in carrying out RSD responsibly.⁷⁶

⁷² African countries that have the highest value in implementing non-refoulement are Botswana, Malawi, Burundi, Congo, Ivory Coast, Ethiopia, Guinea, Senegal, Tanzania, and Uganda.

⁷³ See the Conclusion of Colloquium of Cartagena Declaration, para. 5.

⁷⁴ See Maiara Folly, "Venezuelan refugees inflame Brazil's already simmering migrant crisis", <https://theconversation.com/venezuelan-refugees-inflame-brazils-already-simmering-migrant-crisis-89008>, accessed on May 2019.

⁷⁵ Amnesty International, "Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americas Seeking Asylum", London: Amnesty International, 2018, p. 5.

⁷⁶ UNHCR, "Refugee Status Determination", *Executive Committee paper*, EC/67/SC/CRP.12, 2016, pp. 5-15.

The implementation of RSD by Europe, Africa, and Latin America has several prominent points. First, the European region has the most efficient and systematic RSD implementation system compared to the other two regions. The existence of a CEAS framework in the European region makes the member states carry out RSD procedures similarly, so that asylum applicants can know the extent to which application processing takes place without being overwhelmed by a sense of uncertainty. However, on the one hand, decision making, which is entirely the authority of the state, makes asylum seekers vulnerable to unjust decisions.

Second, the *prima-facie* approach shows a reflection of the characteristics of the African community that puts forward the values of unity. However, this approach is difficult to use today because it imposes economic burdens, especially if there have been many *prima-facie* refugees who have settled in receiving countries. This study is on the position that the shift in RSD trends in the African region from *prima-facie* to individual assessment is appropriate to ensure no abuse of refugee status requests, only that African states still need a great effort in establishing an integrated, efficient, and fair RSD procedure system for applicant's asylum.

Finally, ways of making decisions of refugee status in Latin America should be an example for other regions in carrying out a fair and humane RSD process that respects the basic rights of asylum applicants. The Latin American approach that invites communities to participate in RSD activities is an effective strategy that enhances the tolerance of local people in accepting refugees to be part of their community.

3. Durable Solutions

a. Resettlement

The practice of EU member states in carrying out resettlement activities is considered to be quite responsive and cooperative. Germany, France and Finland are the three largest countries that are open in accepting the relocation of refugees in large numbers.⁷⁷

In the African region, the UNHCR is the party that carry out intensive assistance to facilitate resettlement activities with member states. This is because the African region does not have legal instruments or mechanisms governing resettlement procedures, even though the African region actually needs resettlement process in the shortest possible time.⁷⁸ The high number of refugees in the African region that is not matched by the ability of recipient countries to provide maximum refugee

⁷⁷ European Commission, "Relocation and Resettlement", https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170613_factsheet_relocation_and_resettlement_en.pdf, accessed on May 2019. p. 1.

⁷⁸ UNHCR, "UNHCR Projected Global Resettlement Needs: 2019", <https://www.unhcr.org/5b28a7df4.pdf>, accessed on May 2019, p. 19.

protection makes many refugees in Africa live under standard conditions⁷⁹, so that the displacement of most refugees is needed to relieve the burden of the recipient country.

The Latin American region has had a special mechanism of resettlement programs since 2004, starting with the establishment of the Mexico Plan of Action. Through this action plan, states that are incorporated in the Southern Cone sub-region (including Argentina, Chile, and Paraguay) formed a solidarity resettlement program to move some refugees from Ecuador and Costa Rica.⁸⁰

b. Voluntarily repatriation

Following the end of conflicts such as in Nigeria, Afghanistan, Iraq, and Pakistan, voluntarily repatriation has become one of the durable solutions options of interest. The European and the African regions are the most active in establishing regional arrangements and establishing tripartite cooperation with states of origin to conduct voluntarily repatriation. On the other hand, the Latin American region does not make the option of voluntarily repatriation a top priority in implementing durable solutions in the end.

The voluntary repatriation in the European region began with the establishment of Return Directives, which aims to encourage refugees to return to their home countries voluntarily, by providing various assistance to support repatriation activities.⁸¹

In the African region, the OAU Convention regulates the implementation of voluntarily repatriation by emphasizing the creation of tripartite cooperation between recipient states, states of origin, and international organizations to carry out assistance efforts for refugees who want to be repatriated voluntarily.⁸² This was realized through the establishment of tripartite cooperation in various member states with the UNHCR, such as the establishment of the Tripartite Commission for the Voluntary Repatriation of Burundian Refugees between Tanzania, Burundi, and the UNHCR.⁸³

Provisions for the implementation of voluntarily repatriation in the Latin American region can be seen in the Cartagena Declaration⁸⁴, CIREFCA process⁸⁵,

⁷⁹ *Ibid.*, p. 22.

⁸⁰ Hiram Rulz, "Evaluation of Resettlement Programmes in Argentina, Brazil, Chile, Paraguay, and Uruguay", *UNHCR Research Paper*, 2015, p. 4.

⁸¹ See the preamble of the Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 Desember 2008 (Returns Directive), para. 10.

⁸² See Article 5 of the OAU Convention.

⁸³ UNHCR, "Update on UNHCR's operations in Africa", <https://reliefweb.int/sites/reliefweb.int/files/resources/59c284577.pdf>, accessed on May 2019.

⁸⁴ See Colloquium, Part II(f), II(n)-(o), Part III(12), III(13) of the *Cartagena Declaration*.

and the Brazil Plan of Action.⁸⁶ Voluntarily repatriation was the main activity in handling refugees in Latin America from 1981 to 1990. However, it did not work effectively because the returning refugees experienced persecution in their home states.⁸⁷

c. Local integration

The complexity of the implementation of local integration involves various aspects of law, economics, social, and culture. The governments often make local integration as the last option in carrying out durable solutions.⁸⁸ The granting of full citizenship status by the recipient country is the biggest dream of every refugee and the main goal of the realization of international protection based on the provisions of the 1951 Refugee Convention and the 1967 Protocol.⁸⁹

The European region has the most developed integration program compared to Africa and Latin America. The European Region has the Tampere Program and Action Plan of Integration arrangements, which focus on equal rights and obligations between refugees and original EU citizens. Providing access to education for refugee children, vocational training, or work skills for adult refugees, the provision of government housing are major programs that must be carried out by member states in ensuring integration activities run smoothly.⁹⁰

In the African Region, refugee integration activities are carried out in conjunction with migrant integration activities set out in the Migration Policy Framework for Africa (MPFA).⁹¹ The MPFA framework emphasizes recipient country governments to carry out integration activities that respect the rights of migrants, especially banning all forms of racist, xenophobic actions towards migrants and refugees, with the aim of fostering a close relationship between migrants and the local communities.⁹² The MPFA framework is implemented flexibly by various RECs

⁸⁵ See Central Evaluation Section, "Review of the CIREFCA Process", <https://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3bd410804&query=Review%20of%20the%20CIREFCA%20>, accessed on Mei 2019, para. 174.

⁸⁶ See Chapter 3 of the Brazil Plan of Action.

⁸⁷ Sheilagh Knight-Lira, "Repatriation under Conflict in Central America: Book Review", *Canada's Periodical on Refugees*, Vol. 12, No. 2, 1992, p. 26.

⁸⁸ UNHCR, "local integration", <https://www.unhcr.org/local-integration-49c3646c101.html>, accessed on May 2019.

⁸⁹ Karen Jacobsen, "The forgotten solution: local integration for refugees in developing countries", *Working Paper No. 45 New Issues in Refugee Research*, 2001, p. 1.

⁹⁰ See European Commission, "Europe: Integration Action Plan of Third-Country Nationals launched", <https://ec.europa.eu/migrant-integration/news/europe-integration-action-plan-of-third-country-nationals-launched>, accessed on May 2019.

⁹¹ See African Union, "Migration Policy Framework for Africa and Plan of Action", https://au.int/sites/default/files/documents/35956-doc-au-mpfa_2018-eng.pdf, accessed on May 2019.

⁹² E. Tendayi Achiume and Loren B. Landau, "The African Union migration and regional integration framework", *Policy & Practice Brief*, November 2015, p. 3.

to develop their respective policies in realizing the integration vision and mission of the MPFA.

Economic integration is the focus in Africa. The establishment of the Regional Economy Communities (REC) through the Abuja Treaty opens opportunities for refugees to gain freedom of work, relocation, and settling in sub-regional areas as long as they have the necessary travel documents.⁹³ At the national level, many states undertake self-reliance policies together with UNHCR to provide job training and business capital such as land and/or food seeds so that refugees can meet their own needs without always relying on government assistance.⁹⁴ Unfortunately, the self-reliance option and freedom of movement in sub-regional areas is not desirable by most refugee groups because of the low wage amount and high xenophobic attitudes of the local communities.⁹⁵

The Latin American region carries out its regional integration mechanism through the MERCOSUR framework as an economic and political block, which also regulates regional refugee protection through the Mercosur Declaration of Principles of International Refugee Protection instrument.⁹⁶ For example, MERCOSUR allows Venezuelan refugees to obtain special visas so they can work and have access to basic services.⁹⁷ In addition to the MERCOSUR mechanism, local integration in Latin America is also carried out through the City of Solidarity program by involving UNHCR to develop refugee independent skills so that they can integrate with local communities.⁹⁸

Comparing all regional practices in implementing refugee protection, the European region has an excellent refugee protection system looking at the quality of resources and the economic conditions of member states. However, the level of acceptance of European refugees is at the lowest level, due to Europe's strict policy in limiting the number of refugees entering its territory. In contrast, the African region is the largest refugee-receiving region in the world but the commitment of African states in providing protection for refugee rights in addition to non-refoulement is still weak due to various internal problems of the recipient states. This is certainly detrimental to refugees because they have to face uncertainty

⁹³ African Union, "Migration Policy Framework for Africa and Plan of Action", *op.cit.*, pp. 25-27.

⁹⁴ See Sharon Sylvia Nambuya, et.al., "Refugee Socio-Cultural Integration and Peaceful Co-Existence in Uganda", *Journal of Social Encounters*, Vol. 2, Issue 1, 2018, pp. 83-85.

⁹⁵ Alistair Boulton, "Local integration in West Africa", <https://www.fmreview.org/protracted/boulton>, accessed on May 2019.

⁹⁶ Renato Baumann, "Integration in Latin America – Trends and Challenges", *Economic Commission for Latin America and the Caribbean Office in Brazil*, 2008, p. 3.

⁹⁷ UNHCR, "Venezuela: Refugee Crisis Requires Concerted Regional Response", <https://www.hrw.org/news/2018/09/03/venezuela-refugee-crisis-requires-concerted-regional-response>, accessed on May 2019.

⁹⁸ UNHCR. "Latin America: working environment", *UNHCR Global Appeal 2009 Update*, 2009, p. 362,

about their future after suffering in their home countries. So far, only the Latin American region has succeeded in developing a proportional, balanced, burden-sharing responsibility and taking into account the interests of refugees as well as the capacity of recipient countries.

E. Regionalism Approach to Deal with Refugees in the ASEAN Region

The problem of refugees has always been a dilemma for ASEAN. Although ASEAN already has a commitment to respect human rights and international legal provisions, Petcharamesree considers the political will of ASEAN member countries to address the issue of refugees is still low. The main cause of ASEAN inability to create a regional mechanism governing refugee issues lies in the attitudes of ASEAN member states, which uphold the principle of non-intervention and respect for the state's sovereignty, also known as the ASEAN Way.⁹⁹

The special characteristics of ASEAN, which prioritize the formation of decisions based on consensus and informal procedures, make its member states unable to engage themselves in legal mechanisms.¹⁰⁰ So far, the willingness of member states to form regional legal mechanisms only covers economic issues and the integration of regional economic zones, such as the establishment of the ASEAN Free Trade Area (AFTA)¹⁰¹, which aims to increase regional income. On the other hand, ASEAN's attention to the humanitarian problem is still limited in the form of consensus, which only focuses on the presentation of general principles. Unfortunately, there is no measurable technical effort to resolve humanitarian problems concretely.¹⁰²

At a glance, the ASEAN Way has limited the ability of member states to put pressure on Myanmar to stop persecution and to work together to deal with refugees. However, this does not mean that the ASEAN Way will stop the handling of refugees in ASEAN. According to Dio Herdiawan Tobing, the practice of ASEAN Way is divided into two important norms: procedural and behavioral norms or attitudes.¹⁰³ Procedural norms focus on rules or customs that ASEAN member states need to respect in conducting negotiation and diplomacy activities. These norms include the principles for maintaining harmonious relations, sensitivity,

⁹⁹ S. Petcharamesree, "ASEAN and its Approach to Forced Migration Issues", *International Journal of Human Rights*, Vol. 20, Issue 2, 2015, p. 178.

¹⁰⁰ Rodolfo C. Severino, "The Asean Way and the Rule of Law", *personal statement, delivered at the International Law Conference on ASEAN Legal System and Regional Integration*, Universiti Malaya di Kuala Lumpur, September 3, 2001.

¹⁰¹ ASEAN, "ASEAN Free Trade Area (AFTA Council)", <https://asean.org/asean-economic-community/asean-free-trade-area-afta-council/>, accessed on August 2019.

¹⁰² Human Rights Working Group, "Migrant Workers' Rights in ASEAN Region: A Baseline Study", <https://hrwg.org/tag/asean-consensus/>, accessed on August 2019.

¹⁰³ Dio Herdiawan Tobing, "The Limits and Possibilities of the ASEAN Way: The Case of Rohingya as Humanitarian Issue in Southeast Asia", <https://knepublishing.com/index.php/Kne-Social/article/view/2331/5155>, accessed on August 2019.

politeness, and non-confrontation.¹⁰⁴ The norm of behavior emphasizes the commitment of member countries to respect state sovereignty or the principle of non-intervention. The reason for the formation of these behavioral norms is inseparable from historical factors, bearing in mind that many ASEAN member states have experienced colonialism and imperialism for years before independence.

Along with the development of international law, the application of the principle of non-intervention to resolve ASEAN regional problems is considered inappropriate. Many experts argue that the principle of non-intervention makes it difficult for member states to make decisions on issues that pertain to human rights violations and state sovereignty.¹⁰⁵ On the other hand, states that are perpetrators of human rights violations can use this principle to break away from legal responsibility for their actions. Therefore, the application of the ASEAN Way to overcome the problems of regional refugees must be able to balance the application of procedural norms and behavioral norms.

In bridging the implementation of the ASEAN Way, ASEAN has an alternative approach called constructive engagement. The Thai government originally introduced this method in 1991 to help Myanmar overcoming the political instability in the country.¹⁰⁶ At that time, amid international pressure on Myanmar's authoritarian stance and influenced by military forces, Thailand succeeded in persuading Myanmar to make the transition to democratization efforts by giving Myanmar a strategic position as a partner in economic cooperation with Thailand. This makes Myanmar slowly opening up to establish regional cooperation and join ASEAN member states.

Compared to the western states that apply diplomatic sanctions or isolation against countries deemed to violate regional law, constructive engagement uses the opening of bilateral and multilateral dialogs to encourage member states to work together to find solutions to certain problems. This dialogue effort is carried out slowly and gradually through subtle ways. It is also endeavored not to offend fellow member states even though the issues discussed are internal matters.

In the field of refugee protection management, the practice of constructive engagement can be seen from the efforts of Indonesia, Thailand, and Malaysia in holding an open dialogue with Myanmar to discuss the humanitarian crisis that occurred at Rakhine State and aiding Rohingya refugees on behalf of disaster reasons through the coordination of the AHA Center. Constructive engagement was

¹⁰⁴ N. Busse, "Constructivism and Southeast Asian Security", *The Pacific Review*, Vol. 12, No. 1, 1999, pp. 39-60.

¹⁰⁵ Jones L., *ASEAN, Sovereignty and intervention in Southeast Asia*, New York: Palgrave Macmillan, 2012, p. 4, 48.

¹⁰⁶ Lihat Leszek Buszynski, "Thailand and Myanmar: The perils of 'constructive engagement'", *The Pacific Review*, Vol. 11, Issue 2, 1998, pp. 290 – 305.

carried out to increase Myanmar's awareness of the humanitarian crisis that occurred, particularly towards the persecution of Rohingya groups.

Seeing the character of ASEAN, which focuses on a shared consensus, this study is on the position that the approach of regionalism to deal with refugees in ASEAN can be done through two stages. The first stage is the opening of an informal dialogue between member states' representatives to increase awareness of the increasing development of the regional refugee crisis. It should be understood that informal dialogue requires a gradual process, a long time, and the role of the largest refugee recipient member countries (Malaysia, Thailand, and Indonesia) to actively articulate the importance of implementing refugee protection in an integrated manner through regional forums. ASEAN is currently in its first phase. However, seeing trends in refugee protection in ASEAN, the results of ASEAN informal dialogues have shown the direction of developing better refugee protection, manifested by concrete actions by ASEAN member states to provide various humanitarian assistance to Rohingya refugees and make Myanmar a state open to member states' initiatives to help them with their internal problems.

In the second phase, ASEAN needs a special regional mechanism to regulate refugee protection, especially to deal with its crisis of Rohingya refugees. ASEAN previously had experience in overcoming the Indo-China refugee crisis through the establishment of the CPA mechanism. ASEAN's attention to refugees can also be found implicitly through the recognition of irregular migration activities at the Bali Process forum, the loading of asylum rights in ADHR provisions, the establishment of AICHR and ACWC, to the establishment of the AHA Center to coordinate assistance for displaced victims in Rakhine State as an emergency disaster. The establishment of a regional mechanism is the ultimate goal expected as a form of ASEAN's regionalism in dealing with the Rohingya refugee problem.

F. Conclusion

Regionalism has successfully solved the problem of refugees in the world. Overall, regionalism has been quite successful in resolving refugee problems comprehensively, although there are a number of challenges to the commitment of regional member states in implementing refugee protection during the mass-influx period. Of the three fields, regionalism is the most successfully implemented for the principle of non-refoulement, as an important principle in the scope of international human rights protection. It is followed by the technical and procedural of RSD stages. Finally, the most difficult is to do on durable solutions due to the internal capacity limitations of each state, accompanied by a variety of political interests that can damage the main objective of the implementation of international protection.

Regionalism approach can be applied as a solution for handling refugees in ASEAN. The ASEAN region has great potential in the approach of regionalism as a

solution to refugee management because the nature of inclusiveness and decision making based on mutual agreement. It makes ASEAN able to produce new regional mechanisms that are innovative and able to provide new approaches to refugee management in the present. Together with the constructive engagement approach, ASEAN can emulate a regional mechanism that has a refugee handling system properly and efficiently through regionalism practices that have been carried out by the three previous regions, particularly the Latin American region, which has been quite consistent in implementing refugee protection in all three fields of protection.

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