REFUGEE BURDEN SHARING: AN EVOLVING REFUGEE PROTECTION CONCEPT?

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Abstract

This article discusses cooperation between states as part of the international community in handling and protecting the refugees which arrive in one's territory massively, observed from international law standpoint. The concept of cooperation, which is further known as burden sharing concept, is rooted from the principle of international cooperation and international solidarity which is developing as a principle agreed by states and are widely recognized as a general principle of law. The central question is how such concept exists under international law and how is the implementation by states, especially Indonesia. It concludes that burden sharing is a concept that is still evolving so that there is no rigid guidance in the implementation yet. Therefore, there are varieties of implementation mechanisms among states. In relation with Indonesia, it needs support from other countries in handling the mass influx of refugees, especially the Rohingya refugees. Finally, this article suggests that as part of international community, states should always assert their contribution in accommodating the mass influx of refugees which certainly would very burdening if it is handled only by one state.

Key words: international cooperation, burden sharing, international solidarity

Abstrak

Artikel ini membahas kerjasama antar Negara sebagai bagian dari masyarakat internasional dalam menangani dan melindungi para pengungsi yang tiba di wilayah tertentu secara besar-besaran, berdasarkan sudut pandang hukum internasional. Konsep kerjasama, yang selanjutnya dikenal dengan konsep pembagian beban (*burden-sharing*), berakar dari prinsip kerjasama internasional dan solidaritas internasional yang berkembang sebagai prinsip yang disepakati oleh Negara dan dikenal secara luas sebagai prinsip umum hukum. Pertanyaan utamanya adalah bagaimana konsep tersebut di bawah hukum internasional dan bagaimana pelaksanaannya oleh negara-negara, khususnya Indonesia. Tulisan ini menyimpulkan bahwa pembagian beban (*burden-sharing*) adalah konsep yang masih terus berkembang sehingga belum ada panduan yang kaku dalam pelaksanaannya. Oleh karena itu, ada beberapa jenis mekanisme pelaksanaan antarnegara. Berkaitan dengan Indonesia, dibutuhkan dukungan dari negara lain dalam menangani masuknya massa pengungsi, terutama pengungsi Rohingya. Akhirnya, artikel ini menunjukkan bahwa sebagai bagian dari masyarakat internasional, Negara harus selalu memberikan kontribusi mereka dalam mengakomodasi masuknya massa pengungsi yang tentunya akan sangat membebani jika ditangani hanya oleh satu negara.

Kata Kunci: Kerjasama internasional, *burden sharing*, solidaritas internasional

Introduction

Since the World War I (1914-1918) which is rooted in Balkan War (1912-1913), the mass influx of refugee problem has been a very important issue.¹ On that regime, approximately one until two million people were fleeing as refugees from the territory of Russia to Europe and Asia which subsequently caused the disturbance on the latter's political and economic sector.² Predicted to be solved in a short time, it turns out to be something uncontrollable seeing the rapid increase of the number of refugees each time until 65 million refugees are remaining today where Afghanistan, Syria, and Somalia contribute the most.³

In response to the above fact, states are imposed with the obligation to protect those refugees deriving from several sources of international law, one of which is the customary law of *non-refoulement*.⁴ This way of thinking appears by the fact that refugee issue equals to the human right issue. They both have the same standard and treatment. The law of human rights is living inseparably with the refugee law.⁵ Thus, it is safe to assume that fulfilling basic rights of refugees is equivalent to complying the law of human rights.

However, the world is left with a big question mark: Do states in the world, especially the destined states, have the same capability in protecting and accommodating the mass influx of refugees? Does the distribution of burden fair enough to those states? Is there any situation where at the same time there are states overwhelmed by a massive number of refugees and states which are not imposed by a burden of refugees even a little? Those questions relate us to the discussion on whether states need other states' assistance to comply with the human rights obligation and whether states must share other states' burden so that the equitable nuance among states is created.

Previously, the issue of refugees was a mere security issue handled by the state where its location is destined by the refugees. The refugee problem was only deemed as a domestic challenge which dealt only with state's national security department, without any interference with other state's authority. But in this modern era, the development of knowledge and information have shown us that human rights problem is something that must overcome not only by the affected states but also by other elements of the international

1 Gilbert Jagger, "On The History of the International Protection of Refugee", International Committee of the Red Cross 83, 2001, p. 727.

2 *Ibid.*

3 Tempo.Co, "PBB: JumlahPengungsi di SeluruhDuniaMencapai 65 Juta", available at <https://m.tempo.co/read/news/2016/06/20/115781566/pbb-jumlah-pengungsi-di-seluruh-dunia-mencapai-65-juta>, accessed 19 March 2017.

4 Kate Brattingham, "non-refoulement", available at, http://www.judicialmonitor.org/archive_0306/generalprinciples.html, accessed 19 March 2017.

5 ICRC, "Humanitarian Law, Human Rights, and Refugee Law – Three Pillars", available at <https://www.icrc.org/eng/resources/documents/statement/6t7g86.htm>, accessed on 11 July 2017.

community,⁶ including states and international organization as well as the NGO's. Pursuant to Schuck, states' cognition on this idea began simultaneously with the appointment of Fridtjof Nansen as the High Commissioner for Russian Refugee at the regime of League of Nations (1920).⁷ Since then, the international community has realized that they possess a vital role in dealing with this problem. In line with the above proposition, 1951 Convention on the Status of Refugee ("**1951 Convention**") in its preamble has stated that :

*"Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot, therefore, be achieved without international co-operation."*⁸

Furthermore, in 2004, the Executive Committee of the High Commissioner's Program held a meeting in United Nations General Assembly (UNGA) which was participated by states, international organization and NGOs to discuss on the issue of refugees in which the amount keeps increasing and triggered numerous disorder in

the economic and political sector. That meeting reached on several points of conclusion, such as

"Reaffirming that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and responsibility and burden sharing among all States"

*"Reaffirming the importance of international burden and responsibility sharing in reducing the burdens of host countries, especially developing countries."*⁹

Based on the above assertions, we can once again assume that the idea of burden sharing on refugee problem exists as has been repeatedly demonstrated by international law, thus it shows us the importance of this concept. The deeper concerns that will be discussed in this article are how this theory works under international law, which will be discussed in Part II, how it is enforced by international

6 Erika Feller, "The Evolution of International Refugee Protection Regime", UNCHR Journal of Law and Policy, 2001, p. 130.

7 Peter H. Schuck, "Refugee Burden-Sharing: A Modest Proposal", Yale Law School Legal Scholarship Repository, 1997, p. 252.

8 United Nations Convention on the Status of Refugees, opened for signature 28 July 1951, 137 UNTS 189, Preamble (entered into force 22 April 1954). [1951 Refugee Convention]

9 United Nations General Assembly A/AC.96/1003, "Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Program, 2004, p. 13.

law, which will be explained in Part III and how it is applied by states in facing refugee problems, which will be asserted in Part IV. The conclusion will be drawn on the last part of this article.

Discussion

A. The General Theory of Refugee Burden Sharing

As an important disclaimer, there is no fixed definition of burden sharing written in either international or national law instrument. However, the best inference we can make is by referring to the preamble of 1951 Refugee Convention which stipulates that “the grant of asylum may place unduly heavy burdens” and the solution “cannot, therefore, be achieved without international co-operation.”¹⁰ From this passage, we can see that the dynamic of people moving as refugees may burden one state to the extent that that state can no longer fulfill the refugees’ basic rights. It is important to be noted that this concept does not reduce state’s obligation in protecting the refugees, however, it helps the state which is in a situation where its domestic capability to give protection was no longer available by urging other states to give assistance due to the problem.¹¹

In regard to the usage of term ‘refugee,’ burden sharing concept covers not only people who are defined as the refugee under the 1951 Convention, but also people outside that definition who are in need of protection due to other factors other than well-founded fear of persecution, such as natural disaster and war.¹² This is because the crux of burden sharing concept in this context is the fulfillment of human rights obligation. In respect to the meaning of ‘burden,’ neither does it have the strict definition. However, according to UNHCR, ‘burden’ should be defined based on several aspects such as economic, social and politics, environment, as well as national security.¹³ Assessed from the economic point of view, the arrival of a large amount of refugees would cause the escalation of demand of food, energy, transportation, job, and public services including education, health, and water. From a social and political standpoint, the arrival would disturb the social and cultural stability of the local people. Observed from the eye of the environment, those refugee arrivals would impact ecosystem instability as the state will automatically use other alternative resources which are not within the allocation plan, for example, additional of soil, fuel, mineral or even food. Lastly, reviewed from a national

10 1951 Refugee Convention, *op.cit.*, Preamble.

11 Democratic Progress Institute, *The Refugee Crisis: Refugees, Conflict and International Law*, Democratic Progress Institute, 2016, p. 12.

12 Ebba Ahlgren, “In the Spirit of EU Burden-Sharing: Past and Present Challenges to Respond to Humanitarian Crisis,” Master Thesis Lund University, 2016, p. 11.

13 UNHCR, “Burden-Sharing – Discussion Paper Submitted by UNHCR Fifth Annual Plenary Meeting of the APC,” 2000, p. 2.

security standpoint, this refugee problem might threaten the peace and security of a state when the ratio of local population and the refugees seems to be equal. This is logical since the officer's focus would shift from the normal one into this particular issue.

The usage of 'burden' as a widely recognized terminology has long been debated and has changed gradually to the word 'responsibilities' where it sounds smoother. Pursuant to the European Parliament, this debate occurred on the basis that the word 'burden' seemed to show that accommodating refugees is something pernicious.¹⁴ Using 'responsibilities,' in exercising refugee protection, states would view the refugees not anymore as something burdening and harmful, but as an obligation that should be fulfilled. European Parliament also held that 'burden' is inappropriate to be used because burden sharing itself is a concept which is derived from Article 14(1) UDHR. However, to avoid confusion, this article would still use 'burden' in its explanation.

Generally, refugee burden-sharing concept is implemented without any strict guidelines as mentioned above. However, there is an obvious pattern which can be analyzed by looking at

the practice in various instances. Moreover, the Executive Committee of UNHCR has stated that international cooperation or burden sharing may be applied in several ways such as material assistance, financial assistance (sharing money) and people resettlement (sharing people).¹⁵

Firstly, material assistance is one of several measures for the state to share the burden of refugees shouldered by another state. Material assistance recognized in refugee law is assistance given by states or international organization to the receiving state at the time those refugees arrived.¹⁶ This type of assistance is urgent in nature since it deals with time and a massive amount of people. It supports and helps the receiving state to effectively accept the refugees in its border. According to UNHCR, this assistance is conducted by establishing a handling preparedness strategy by states and international organization, especially UNHCR itself.¹⁷

Secondly, financial assistance may be a suitable measure for states to share their burden of refugees. Financial assistance or sharing money mechanism is a method where it can reduce the financial burden of a state. This type of assistance can be done by the

¹⁴ European Parliament, *What System of Burden Sharing Between Member States for the Reception of Asylum Seekers?*, Directorate-General for Internal Policies, 2010, p. 26.

¹⁵ UNHCR, *Conclusions Adopted by the Executive Committee No. 22 (XXXII) of 1981 on the protection of asylum-seekers in situations of large-scale influx* (A/AC.96/601); *Conclusions No. 15 (XXX) of 1979* (f) and (g), (A/AC.96/572, para. 72 2); No. 52 (XXXIX) of 1988, (A/AC.96/721, para. 24); No 61 (XLI) of 1990 (g), (A/AC.97/760 para. 20) No. 77 (XLVI) of 1995 (o), (A/AC.96/860, para. 19); No. 80 (XLVII) of 1996, (a), (A/AC.96/878, para. 22); No. 85 (XLIX) of 1998 (o) and (p), (A/AC.96/911, para. 21), and No. 89 (LI) of 2000, (A/AC.96/944, para. 232).

¹⁶ UNHCR, "Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations," 2001, para. 6-7.

¹⁷ *Ibid.*

state directly or indirectly. The direct one is exercised by state providing assistance financially to the state where its territory is flooded by refugees,¹⁸ while the indirect one is implemented by states by relying on the international organization such as UNHCR. Here, the UNHCR collects and distributes the money to the states concerned.¹⁹

This method is frequently implemented misleadingly by not referring to the basic essence of this concept which is to share and distribute the burden in an equitable manner. Equitable here means that the money should be distributed proportionally by firstly making a measurement of the burden the state shouldered. Equitable here does not mean *equal* but proportional. The proportionality can be established by calculating the ratio between the number of arriving refugees and the state's capability. According to Thielemann, this way of burden sharing often missed the ultimate purpose because the institution which governs the distribution distributed the money equally to the states within its region regardless of the measurement mentioned previously. Because of that, the sharing money mechanism was executed without achieving the real goal since the state which needs the money the most did not receive the amount of money it deserves.²⁰ He argued that the institution should not give the most money to the state which accepts the

most refugees, however, it should give more consideration to the state with the biggest burden, and that is the challenge of such method.

Another alternative measure to do burden sharing is by sharing the number of refugees among states. On this method, the emphasis is on the number of refugees which is considered a burden and not as a financial problem even though they both have the correlation. When a state could reduce the number of refugees within its territory, it means that the state could also lessen its expenditure in providing basic needs for all the refugees. The mechanism is actually the same as the financial one, comprising the communication between the concerned states which will further be assisted by UNHCR. This sharing people mechanism is divided into two ways, which are *temporary stay measure* and *permanent resettlement*. Pursuant to UNHCR Indonesia, temporary stay measure is a mechanism under the scope of sharing people where the receiving states help another state by temporarily accepting and protecting the refugees until there are other measures that can be done such as permanent resettlement or repatriation.²¹

Temporary stay measure is argued as the first step in protecting mass influx of refugees since it would be very unwise if a state rejects the arrival of those massive refugees on the

18 Eiko R. Thielemann and Torun Dewan, "Why States Don't Defect: Refugee Protection and Implicit Burden-Sharing", 2007, p. 14.

19 UNHCR, "The State of the World's Refugees: In Search of Solidarity", The Office of UNHCR, 2012, p. 30.

20 Thielemann and Torun Dewan, *op.cit.*, p. 15.

21 Interview with Dina Hapsari, UNHCR Indonesia on 2 June 2017.

reason that they must first select who are qualified to be granted protection as a refugee.²²

Basically, it is every state's sovereignty to decide whether or not an entity can enter its territory, however, by looking at the condition and the circumstance, at the very least, the state must accept those refugees to enter its border at the time where there is no other measure to be executed rather than leaving them dying at the sea. Therefore, seeing that this measure does not diminish the obligation for a state to fulfill the basic needs of the refugees, thus it is burdening, international law demands states to also accept and accommodate those refugees even it is temporary in nature.

Normally, this measure is implemented based on interstate distance. Permanent resettlement is basically similar to temporary stay measure as they both share peoples, however, they are both different in nature. The only aspect that distinguishes them is the time of protection. In the permanent resettlement, the qualified refugees will be resettled permanently with a view of reaching naturalization permission, while the rest will be repatriated or handled with other available measures.²³ Here, the sense of cooperation can be identified when a state helps other states which are in a condition of not anymore able to permanently resettle the refugees based on the number and capability reason.

B. Burden Sharing: Goodwill or Obligation?

Question on what is the legal status of burden sharing has repeatedly been heard when we talk about refugee burden-sharing concept. Is burden sharing an obligation under international law or just a mere goodwill from states in handling refugee problems? Have states applied this concept to overcome the mass influx of refugee problem? Will states be considered as breaching international law if they did not do the burden sharing? Those questions depart from the dilemma carried by burden sharing concept since this concept confronts two contradictive interest which is the national security interest and the obligation to protect people located within its territory.

In accordance with the above concerns, up until today, there has not been any scholar explicitly explained burden sharing concept as an obligation under international law. Few scholars have tried to argue it but there is still an absence of consensus among them that burden sharing is something obliged under international law like the principle of *non-refoulement*. Even several scholars argue it as a mere states' willingness to participate in such mechanism.²⁴ Thielemann held that solidarity principle which is rooted from universalization principle is the background of states' willingness to do burden sharing.²⁵ This universalization principle requires states

²² *Ibid.*

²³ *Ibid.*

²⁴ Ahlgren, *op.cit.*, pp. 18-19; Eiko R. Thielemann, "Towards a Common EU Asylum Policy: The Political Economy of Refugee Burden-Sharing," University of Texas, 2006, p. 7.

to always do what they want other states to do as well to achieve the fairness principle.²⁶ This thought is also linked by Zeager and Thielemann with a famous theory in social science field called Prisoner's Dilemma theory.²⁷

In general, the theory that has repeatedly been applied in the economic, social and politic field, is a theory of planning steps in relation with the game that will be played which is often called as *the game theory*. This theory visualizes two criminal perpetrators, Mr. A and Mr. B., in a separate investigation room with one investigator in each room. Both perpetrators were asked several questions to reveal the truth. In this theory, if Mr. A makes a confession about the real chronology, Mr. A will be released while Mr. B will be detained and punished for his guilt. If both perpetrators make a confession, they both will be less punished, but if there is no attempt from both perpetrators to reveal the truth, they both may get no punishment at all. The conclusion of this story is that if either Mr. A or Mr. B fight only for each own interest, they can achieve it by easily revealing the truth to the investigators so that he will be released. However, if they consider sticking together supportively, they both will not make any confession.

This theory has subsequently linked with burden sharing concept in which state is

equated as the perpetrator and the refugee as the burden or punishment. For example, there are two perpetrators, refugee-receiving state and financially assisting state. The assisting state may at any time discontinue its assistance to the receiving state whenever the receiving state decides to reduce the acceptance of refugees. Conversely, the receiving state may at any time close its border from refugees thus the refugees flee to the assisting state's territory whenever the assisting state reluctant to financially support the receiving state. Therefore, both states would be benefitted if they cooperate with each other. Based on it, Thielemann concluded that burden sharing concept may be applied on a voluntary basis or in other words it is not an obligation to do burden sharing in facing a mass influx of refugee problem because if the cooperation potential between them was predicted to be absence, hence logically states would only do something that benefits themselves even though it would harm others.²⁸

On the other hand, burden sharing concept can also be argued as an obligation which binds states. In arguing a principle under international law as an international obligation, we must indeed make a reference to Article 38(1) of the ICJ Statute to identify which source of international law imposes the obligation, whether it is treaties, international

25 Ahlgren, *op.cit.*, p. 19.

26 *Ibid.*

27 *Ibid.*, p. 21; Avinash Dixit and Barry Nalebuff, "Prisoner's Dilemma", Library of Economics and Liberty, available at: <http://www.econlib.org/library/Enc/PrisonersDilemma.html> accessed on 19 May 2017.

28 Noll Gregor, "Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection", The Hague, 2000, p. 337-338.

custom or general principle of law. The source of law of burden sharing concept as an international obligation can be derived from international treaties and the general principle of law.

Treaty is one of the sources of the international law stipulated under Article 38(1)(a) ICJ Statute which is deemed by some scholars as the source imposing an obligation of burden sharing to states. This proposition is based on the fact that states have signed and ratified several international human rights law instruments. The primary international convention in refugee protection field is, of course, the 1951 Convention. The main purpose of this convention is to guarantee the fulfillment of basic rights that refugee must receive in one's territory seeing that those people could not enjoy their rights in their original state.²⁹ In relation to that, Judge Bingham in *Regina v. Immigration Officer at Prague Airport* stated that

“like most international conventions, the Refugee Convention represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the

*one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other.”*³⁰

Burden sharing itself is basically unregulated explicitly in this convention. However, as has been explained above, the fourth paragraph of the convention stipulates that refugee problem may cause the heavy burden to certain states and thus it needs international cooperation to achieve the solution.³¹ This preamble may be treated as an important point of burden sharing concept under 1951 Convention since it is deemed as the *object and purpose* of a convention,³² which has a significant value regardless of its absence in the convention's main body and even though the price is not as expensive as the main text.³³ This premise might be proven by referring to Article 31 and 32 of the VCLT about treaty interpretation. Now, the question would be whether the provision in preamble can be deemed as a basis for deriving an international obligation. VCLT and scholars have given guidance in that respect, and the answer is yes, the provision in the preamble of a convention should not be discredited.³⁴

According to Article 31, “the context for the purpose of the interpretation of a

29 Andreas Zimmermann, *ed.*, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford, 2011, p. 92.

30 *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others*, House of Lords, Session 2004-05, 2004UKHL 55 on appeal from 2003EWCA Civ 666, on Thursday 9 December 2004, para. 15.

31 1951 Refugee Convention, *op.cit.*, Preamble.

32 Max H. Hulme, “Preambles in Treaty Interpretation”, University of Pennsylvania Law Review, 2016, p. 1300.

33 *Ibid.*, p. 1289.

34 *Ibid.*, p. 1298; Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff, 2009, p. 427.

treaty shall comprise, in addition to the text, including its preamble and annexes,” which means in defining and interpreting a provision under a convention, we must take into account the provision under its preamble as it would expose the object and purpose of the convention as a whole.³⁵ Therefore, the meaning under the preamble of 1951 Convention must be taken into account and it arguably imposes 145 states³⁶ to cooperatively protect the refugees. Logically speaking, as states are part of international community, it would be unreasonable if they, on the reason that the main text does not regulate for states to cooperate with each other, are allowed to not assist other states which were in the severe situation. Another example of treaty that holds international cooperation or burden-sharing principle in its body is the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of the Refugee Problem in Africa, whereby Article 2(4) stated that :

“a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to the other Member States and through the OAU, and such other Member States shall

*in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.”*³⁷

Furthermore, the general principle of law may as well be considered a source of law which imposes an obligation of burden sharing in handling refugee problems. There exist many general principles to guide all subjects of international in conducting activities. One of which is *international solidarity*. This principle was established on the basis that states are *interdependent* despite the fact that each of them has their own sovereignty.³⁸ International solidarity principle rules that states, in overcoming and achieving the ultimate goal, have to cooperate with each other. This principle comprises international relation, including relation in the economic sector, the relation among all elements of the international community, cooperation and equitable share of the burden, and many more aspects are included.³⁹

International solidarity in general as a general principle of international law recognized by civilized nations is evidenced in UNGA resolution No. 2625 about

35 Hulme, *loc.cit.*

36 UNHCR, “State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”, available at <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>, accessed on 26 May 2017.

37 Organization of African Unity (OAU), Convention Governing the Specific Aspects of the Refugee Problem in Africa, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 24 June 1974), Art. 2(4). [OAU Convention on Refugee]

38 Ernst Sauer, “Universal Principles in International Law,” British Institute of International and Comparative Law 42, 1956, p. 186-187.

39 Shyami Puvimanasinghe, “International Solidarity in an Interdependent World”, OHCHR, 2013, p. 180.

Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which was made in 1970 by acclamation. This resolution contains codification of numerous principles not only the recognized one but also the one which is still progressively developing.⁴⁰ *International cooperation* as the heart of international solidarity is also included in the resolution.⁴¹ In respect to international cooperation, Shyami, Human Rights Officer of UNHCR, held that “the most manifest expression of solidarity in international law and policy is in international cooperation, which lies at the heart of solidarity.”⁴² This shows that international cooperation is interconnected with international solidarity as a general principle of international law. In resolution No. 2625, it is elucidated that :

“States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain

*international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination.”*⁴³

*“States shall co-operate with other States in the promotion of universal respect for, and observance of, human rights...”*⁴⁴

ECOSOC has confirmed that international cooperation is a widely recognized general principle of law.⁴⁵ Wolfrum also agrees with the above premise by making a reference to Lisbon Treaty and he further similarizes international cooperation principle with other general principles such as the principle of coordination and the principle of solidarity.⁴⁶ The principle of international solidarity is then included in various international law instruments such as UN Charter and UDHR. In UN Charter Article 1, 55 and 56, we can see that there is a guidance on international solidarity and its correlation with the UN, while Article 28 and 29 of UDHR cited international solidarity principle in it.⁴⁷

40 United Nations General Assembly, Resolution A/RES/25/2625 (1970), 24 October 1970, Preamble.

41 Puvimanasinghe, *op.cit.*, p. 180.

42 *Ibid.*, p. 181.

43 United Nations General Assembly, *loc.cit.*

44 *Ibid.*

45 ECOSOC, “International Cooperation (Rule 8)”, available at: <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/unesco-manual-for-activities-directed-at-underwater-cultural-heritage/unesco-manual/general-principles/international-cooperation/> accessed on 27 May 2017; SompongSucharitkul, “The Principle of Good-Neighborliness in International Law”, GGU Law Digital Commons (1996), p. 2-3; New Humanity, “Human Rights and International Solidarity”, available at: <http://www.new-humanity.org/it/pdf/english/human-rights/59-responses-to-the-questionnaire-prepared-by-the-ie-on-human-rights-and-int-solidarity/file.html> accessed on 27 May 2017.

46 RudigerWolfrum, “International Law,” OPIL, 2006, para. 40.

47 *Ibid.*, p. 182.

International solidarity has a very close attachment to burden sharing concept in handling refugee problems. It is important for the author to show the correlation between the principle of international solidarity and burden-sharing concept. According to the report made by UNHCR in 2001 entitled “Mechanism of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations,” the concept of burden sharing is rooted from the principle of international cooperation as well as international solidarity principle, which mandate the states to always input its contribution in sharing the burden shouldered by other states even though the former is not at all affected.⁴⁸

According to UNHCR, the link between burden-sharing and international solidarity principle can be derived from states’ commitment in various international legal instruments which contain related principles in human rights and national security area.⁴⁹ Article 2(2) of 1967 United Nations Declaration on Territorial Asylum held that if a state were in a difficult situation to fulfill the refugees’ basic rights, another state “shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden.”⁵⁰

Supportively, UNHCR through its Executive Committee Conclusion No. 22 explained that there are two reasons initiate the establishment of this concept which a mass influx of refugees may heavily burden a state and solutions could not be accomplished without any international cooperation.⁵¹

In this report, UNHCR elaborated six important points about burden sharing concept in facing refugees problem. Firstly, the massive number of refugees may create a massive burden on the state if it is handled independently, therefore causing failure of goals.⁵² Secondly, bilateral or multilateral as well as regional or universal could be the form of assistance by coordination from UNHCR,⁵³ which the regional one must be prioritized. Thirdly, burden sharing should be done by aiming to facilitate the refugee’s voluntary repatriation, to support the local integration resettlement and to provide an opportunity for permanent resettlement in the third country.⁵⁴ Next, burden sharing must be executed by providing not only financial assistance but also the emergency, technical and other assistance whatsoever until the fixed solution is discovered. Moreover, attention must be firmly paid in strengthening the existing

48 UNHCR, “Mechanisms of International Cooperation to Share Responsibilities”, Global Consultation on International Protection, 2001, para. 1-3.

49 1951 Refugee Convention, see note 8, Preamble; United Nations Declaration on Territorial Asylum, 14 December 1967, Art. 2(2); Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), Art. 1(1), 1(3) and 55; Organization of African Unity, OAU Convention on Refugee, see note 37, Art. II (4).

50 United Nations Declaration on Territorial Asylum, *op.cit.*, Art. 2(2).

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

mechanism or ensuring that the financial and technical assistance can be distributed directly towards the concerned states. Lastly, by referring to international solidarity principle, the government of each state shall ensure that measures which potentially cause movement of people are no longer occurring. But if it happened already, the original state must ease and facilitate the repatriation process.⁵⁵ This principle must, therefore, be applied into various refugee situations including the development and enhancement of standard of refugee service, assistance to other states in protecting refugees, research and exploration on solutions and support to the international organization in resolving the problem.⁵⁶

Goodwin-Gill opined that although every state have their own power to select people migrating to their territory, states are still imposed with an obligation to not prohibit people entering its border for security reason.⁵⁷ This proposition was further strengthened by Chetail who viewed that state had no longer the absolute power of discretion to close its border from people who were seeking for life protection since territorial sovereignty is even the foundation of international refugee law.⁵⁸ Based on that, it is safe to deem burden sharing as an international obligation rather than a mere goodwill from states as this concept is an extracted concept from international

solidarity and international cooperation principle. Despite the fact that there is no binding international legal instrument on refugee burden sharing, states still have to consider this as something binding deriving from other instruments and sources which implicitly contain burden sharing concept in their body.

C. How States Apply Burden Sharing: International Practices

As mentioned earlier, burden sharing is a concept, which has, not receives its firmness up until today. There are no rigid international law instruments stipulating this inside its text. That is why burden sharing in refugee field is being applied in various schemes. They are diverse from one region to another. Therefore, it is important to analyze instances and practices done by states due to protecting mass influx of refugees in order to understand the flow of this concept. In this part, the article will expose the practices in regions and will be followed by the explanation on how Indonesia views refugee burden-sharing concept.

International Conference on Central American Refugees (“CIREFCA”) may be said as a landmark commencement of refugee burden-sharing concept in the world. Basically, CIREFCA is an international conference on Central America’s refugee problem, however,

⁵⁵ *Ibid.*

⁵⁶ UNHCR, *op.cit.*, p. 2.

⁵⁷ Guy S. Goodwin-Gill, “The Dynamic of International Refugee Law”, *International Journal of Refugee Law*, 2013, p. 655.

⁵⁸ Vincent Chetail, “Are Refugees Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, *Oxford Scholarship Online*, 2014, p. 30, 71.

the participating states deemed it more as a *process*.⁵⁹ The main aim of this forum is to find the durable solution in handling refugee issues in collaboration with UNDP. Furthermore, CIREFCA is also recognized as a platform to promote states' needs on international cooperation, specifically cooperation within Central America. UNGA has subsequently released its resolution concerning CIREFCA at its 85th meeting in 1993. This resolution demonstrated aspiration from Central American states' which is raised in CIREFCA to promote international cooperation between states to always maintain the peace. It stated that it:

*“calls upon the international community, particularly the donor countries, to continue to strengthen their generous support for the Conference so as to consolidate the aims and objectives set at the Conference, and to continue to provide their valuable cooperation in the financing and implementation of the social and humanitarian programmes proposed for the period of transition to development, their own development programmes and those programmes relating to environmental protection which are designed to meet the needs of the uprooted populations.”*⁶⁰

CIREFCA was initiated as there had been a civil war in Central America between El Salvador, Nicaragua and Guatemala around 1980 which caused approximately 160.000 people died and a million others displaced. From that number, for about 150.000 people were labeled as refugees while 900.000 other were recognized as Internally Displaced Person (IDP).⁶¹ The implicit implementation of burden sharing was started when the conflict calmed as the states were simultaneously starting to create agreements on cooperation, one of which was the Tripartite Agreements for the Return of Nicaraguan and Guatemalan Refugees. Parallel with this, UNDP's Special Programme of Economic Cooperation for Central America (PEC) opened the opportunity for UNHCR to enhance the system of refugee protection, including the fulfillment of refugees' basic needs and the repatriation process. Here, UNHCR played a vital role from 1970 to 1980 in Central America.

Based on CIREFCA, states created their own target in accommodating the movement of refugees, and to support the accomplishment, CIREFCA put emphasize on collaboration between UNDP and UNHCR to support and guide states in achieving each of their goals. The goals themselves are varied. In Guatemala, the plan was focused on improving the health, education and sanitation facilities. In Honduras, much attentions were paid to UNHCR to always monitor the

59 Alexander Betts, “Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA”, UNHCR Evaluation and Policy Analysis Unit, 2006, p. 9.

60 United Nations General Assembly, Resolution 48/117, 24 March 1994.

61 *Ibid.*

refugee camps. In Nicaragua, the focus was directed to rehabilitation and reintegration of repatriated refugees from Honduras. In Costa Rica, the plan was created due to the reintegration of 250.000 refugees from El Salvador and Nicaragua into its labor market. In general, CIREFCA has contributed much as it had networked the states in Central America to have a cooperation with the total amount of more than 422 million dollars. In detail, the distribution of money was done 32% by UNDP, 25% by NGOs, 19% by UNHCR and 17% from states directly.⁶² Therefore, we can conclude that in Central America, the burden sharing was done by combining several types of burden sharing without any strict guidance even though the sharing money mechanism dominates.

The case of cooperation in protecting Syrian refugees is also a good example of burden sharing implementation. Begun with a soft conflict between the government and opposition which further turned into a chaotic civil war,⁶³ The Syrian conflict has killed more than 250.000 and has forced 4.5 million people to flee to neighboring countries such as Lebanon, Jordan, and Turkey with 6.5

million remaining in Syria.⁶⁴ Back then, it was predicted by the UN that around US\$ 3.2 billion was needed to protect more than 13.5 million people.⁶⁵ From that number, approximately one million people submitted resettlement requests to Europe in which Germany and Sweden accepted the most.⁶⁶

This burden really affected the neighboring countries and it further triggered those countries to address their aspirations in the World Economic Forum in 2015. In that forum, Minister of Planning and International Cooperation of Jordan held that “we need a Marshall Plan to provide support...we have over 1.4 million Syrians and this is creating challenges.”⁶⁷ He also asserted that the arrival of those refugees imposed a really massive burden to Jordan which has a very limited resource. In response to that, Antonio Guterres, the former chairman of UNHCR, appreciated Jordan’s action in assisting and accommodating the arriving refugees and said that “the international community is not coming together sufficiently to support the humanitarian needs of the Syrians and the Iraqis.”⁶⁸ Furthermore, he announced the public that

62 Alexander Betts, *op.cit.*, p. 11.

63 BBC.com, “Syria: The Story of the Conflict”, available at: <http://www.bbc.com/news/world-middle-east-26116868> accessed on 23 May 2017.

64 UNHCR, “Syria Emergency”, available at: <http://www.unhcr.org/syria-emergency.html> accessed on 23 May 2017.

65 *Ibid.*

66 Syrian Refugee, “The Syrian Refugee Crisis and Its Repercussions for the EU”, available at <http://syrianrefugees.eu> accessed on 23 May 2017.

67 World Economic Forum, “Leaders Call for International Help to Solve Syrian Refugee Crisis”, available at: <https://www.weforum.org/press/2015/05/leaders-call-for-international-help-to-solve-syrian-refugee-crisis/> accessed on 23 may 2017.

68 *Ibid.*

*“Europe cannot go on responding to this crisis with a piecemeal or incremental approach. No country can do it alone, and no country can refuse to do its part... The only way to solve this problem is for the Union and all member states to implement a common strategy, based on responsibility, solidarity, and trust... Concretely, this means taking urgent and courageous measures to stabilize the situation and then finding a way to truly share responsibility in the mid to longer term.”*⁶⁹

Syrian refugee issue has further motivated international community to establish the 2016 New York Declaration for Refugees and Migrants which had subsequently been adopted by the UN to become its resolution.⁷⁰ The ultimate concern of this instrument is the world’s need, especially the most affected states, on international cooperation in resolving mass influx of refugee problems.⁷¹

Participated by 193 states, this declaration is considered as states’ aspiration to together reach a commitment to handling this problem and as a reference for states to achieve the Global Compact on Refugees in 2018.⁷² Despite the fact that it is political in nature, this declaration has always been referred when it comes to the discussion of burden sharing around the world. With the Comprehensive Refugee Response Framework (CRRF) in it, states were guided in facing the refugee problems.⁷³

D. Indonesia’s Experience on Refugee’s Burden Sharing Management

From the above examples, we can presume that there is no codification of this rule and it is diverse among regions. Indonesia as a developing state also confirm the existence of this rule, but Indonesia views it from a different standpoint. As an important fact, many states remain to be the non-signatory of the 1951 Refugee Convention.⁷⁴ One of which is Indonesia.⁷⁵ It means that Indonesia is not

69 Melissa Fleming, “Statement by UN High Commissioner for Refugees, Antonio Guterres on Refugee Crisis in Europe”, available at: <http://www.unhcr.org/news/press/2015/9/55e9459f6/statement-un-high-commissioner-refugees-antonio-guterres-refugee-crisis.html> accessed on 23 May 2017.

70 Center for Mediterranean Integration (CIM), “UN Refugee Summit Issues a New Declaration for Refugees and Migrants”, available at: <http://cmimarseille.org/highlights/un-refugee-summit-issues-new-declaration-refugees-and-migrants> accessed on 28 May 2017; United Nations General Assembly, Resolution A/RES/71/1, 3 October 2016, p. 4.

71 UNHCR, “New York Declaration for Refugees and Migrants”, available at: <http://www.cpcnetwork.org/wp-content/uploads/2017/03/Quick-Guide-NY-Declaration.pdf> accessed on 24 May 2017.

72 Donald Kerwin, “The New York Declaration for Refugees and Migrants, Responsibility Sharing, and the US Resettlement Program”, available at: http://www.huffingtonpost.com/donald-kerwin/the-new-york-declaration_b_12494856.html accessed on 28 May 2017.

73 UNHCR, “Comprehensive Refugees Response Framework: from the New York Declaration to a Global Compact on Refugees,” CRRF Task Team 2016, p. 1.

74 VOA, “Indonesia Breaks Silence on Refugees with Presidential Decrees”, available at: <https://www.voanews.com/a/indonesia-breaks-silence-on-refugees-with-presidential-decree/3696079.html> accessed on 2 June 2017.

bound to the provisions of the Convention. This fact triggers people to question the way how Indonesia sees the international cooperation in protecting the refugees, whether states have the obligation to participate in shouldering the burden carried by Indonesia, and the way that concept be implemented in Indonesia. These questions would be answered in accordance with the following analysis.

The question on how Indonesia views the principle of international cooperation, especially burden sharing, can be determined by Indonesia representative's statement in various international conferences such as the New York Declaration and the 2015 Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia. On the former, Indonesia was represented by its former vice president, Muhammad Yusuf Kalla. According to UN,

“MUHAMMAD JUSUF KALLA, Vice-President of Indonesia, *said his country had long provided humanitarian aid to refugees and asylum seekers. In 1975, for example, it had taken in more than 250,000 people seeking refuge from Viet Nam. Today, a comprehensive approach was needed to tackle irregular migration, he said, adding that every country was responsible for creating the necessary enabling*

*environment. Describing the Bali process, he said it enabled regional countries to share responsibility in addressing irregular migration. Such challenges were too big for any country or region to handle alone, requiring better international cooperation. At the regional level, he urged the creation of situations more conducive to cooperation, while maintaining security and stability at the national level. He welcomed the road map for the adoption of a compact on safe orderly migration, emphasizing that commitments to ensuring safe migration, outlined in the 2030 Agenda, must be implemented.”*⁷⁶

UNHCR subsequently supported this statement by confirming that Indonesia, seen from its international behavior, had always acted in conformity with the idea of burden sharing. Kalla's above statement has shown us a fact that Indonesia had given its contribution and it has now been other states' turn to chip their contribution in. This declaration was made a year after the Rohingya refugees massively arrived in Indonesia, and on it, Kalla conveyed an invitation to all countries as the international community to also participate in the burden sharing process. Cited from the

⁷⁵ Ibid.

⁷⁶ United Nations, “General Assembly Adopts Declaration for Refugees and Migrants, as United Nations, International Organization for Migration Sign Key Agreement”, Meetings Coverage and Press Release 2016, available at: <https://www.un.org/press/en/2016/ga11820.doc.htm> accessed on 31 May 2017.

minutes of the meeting, Kalla held that “burden sharing and taking collective action does not mean...we share equitable international obligation under the Convention.”⁷⁷

On the 2015 Kuala Lumpur Declaration, which was participated by ASEAN states, the focus was not on the mechanism in facing the mass influx of refugees, but on the tasks and actions which should be done by ASEAN states to counter the root of refugee movements such as human trafficking and smuggling.⁷⁸ On that declaration, states noticed “the increasing challenges posed by the irregular movement of persons in this region, particularly the close connection between trafficking in persons and smuggling of migrants.”⁷⁹ This implies the stance of ASEAN states that human trafficking and smuggling are one of the main causes of refugee movements. The states also signed their commitment “to work together to address the irregular movement of persons irrespective of whether they are the countries of origin, transit, or destination.”⁸⁰ They viewed that the refugee problem around Asia “requires an immediate regional response,”⁸¹ not only for ASEAN but also “members of international community

to support the humanitarian and relief effort involved in dealing with challenges resulting from irregular movement...” The form of cooperation that was concerned on that forum is sharing of information and intelligence among countries in overcoming the refugee movement.

Seeing that burden sharing might be viewed from two different perspectives (affected of assisting state), Indonesia has been in those two situations. The situation where Indonesia acted as an assisting state occurred in 2015 when a massive influx of Rohingya refugees arrived in Aceh. Here, Indonesia, Malaysia, and Thailand initiated a meeting to agree on political commitment to facilitate the refugees floating on the ocean. To handle this problem, the foreign ministers of those three countries conducted a meeting in Malaysia discussing the measure to safe those people.⁸² Accommodating 7000 refugees in a cooperative manner between Indonesia and Malaysia was the result of the meeting. The form of sharing that was done here is the cooperation in providing temporary stay measure. In the minutes, it was stated that

77 Wapresri.go.id, “Statement by H.E. Mr. Jusuf Kalla Vice-President of The Republic of Indonesia at At The High-Level Plenary Meeting to Address Large Movements of Refugees and Migrants”, available at <http://www.wapresri.go.id/en/statement-by-h-e-mr-jusuf-kalla-vice-president-of-the-republic-of-indonesia-at-at-the-high-level-plenary-meeting-to-address-large-movements-of-refugees-and-migrants/> accessed on 8 July 2017.

78 ASEAN, “ASEAN Ministers Meet on Irregular Movement of Persons”, available at: <http://asean.org/asean-ministers-meet-on-irregular-movement-of-persons/> accessed on 2 June 2017.

79 ASEAN, “ASEAN Document Series 2015: Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia,” The ASEAN Secretariat Jakarta, 2015, p. 109.

80 *Ibid.*

81 *Ibid.*

82 Kompas.com, “Jokowi Pastikan Malaysia dan Thailand Siap Kerjasama Bantu Pengungsi Rohingya”, available at: <http://nasional.kompas.com/read/2015/05/23/13371261/Jokowi.Pastikan.Malaysia.dan.Thailand.Siap.Kerja.Sama.Bantu.Pengungsi.Rohingya> accessed on 6 June 2017.

“Malaysia, Indonesia and Thailand will continue to uphold their responsibilities and obligations under international law and in accordance with their respective domestic laws, including the provision of humanitarian assistance to the irregular migrants”

“Indonesia and Malaysia agreed to continue to provide humanitarian assistance to those 7000 irregular migrants still at sea. We also agreed to offer them temporary shelter provided that the resettlement and repatriation process will be done

*in one year by the international community. In the meantime, Malaysia and Indonesia invite other countries to join in this endeavor.”*⁸³

Indonesia has also been in the situation where states agreed to help to see the massive amount of refugees accommodated by Indonesia. Here, Indonesia’s burden was shared by several developed states such as United States, Canada, Norway, Sweden, New Zealand and Australia whereby those states resettled some amount of people from Indonesia. The distribution details can be seen in the following table:

Resettlement Processing		Submitted for Resettlement		Departed for Resettlement	
		April	2017 to Date	April	2017 to Date
Resettlement Country	Australia	56	443	6	22
	Canada	0	3	0	16
	New Zealand	0	49	0	7
	Norway	0	0	0	0
	Sweden	0	0	0	0
	USA	0	55	13	95
	Total	56	550	19	140
Status of Refugees Submitted to States				Persons	
Accepted, pending departure arrangements				261	
Pending decision by States				1,596	
Total				1,857	

Source: UNHCR Indonesia, Monthly Statistical Report, April 2017.

⁸³ Ministry of Foreign Affairs of Malaysia, Press Release: Joint Statement, Ministerial Meeting on Irregular Movement of People in Southeast Asia, 2015.

The sharing mechanism was not solely done by the states concerned. UNHCR and IOM played a pivotal role in distributing and facilitating the resettlement. UNHCR supported the distribution, while IOM provided and facilitated the logistics for the refugees.⁸⁴ According to UNHCR Indonesia, there has never been any practice of burden sharing conducted by Indonesia which was commenced by a binding legal instrument due to the dynamic of the concept's development.⁸⁵

E. Conclusion

The diversity of practices has shown us the dynamic of this concept even though it is executed as if there was a common goal among states in the area of burden sharing in managing the issues of refugees. The most important highlight of this article is that the regime where states must independently handle the refugee arriving on their territory has already evolved into a concept emphasizing international cooperation. It is apparent that massive amount of refugees may excessively burden states and cause impairment towards their economic, social, politic as well as their national security. This concept is important to

be acknowledged as it has unique merits in the development of international law. International cooperation and solidarity contributed the most to the creation of this concept, though they vary in the form of implementation. This is the reason why arguing burden sharing as an obligation under international law is safe.

International cooperation and burden sharing are interconnected. Unfortunately, the question of whether burden sharing is a form of states' goodwill or an international obligation has always been an appealing issue to be scrutinized. There is always a room for arguing that burden sharing is an international obligation deriving from states relation to numerous human rights treaties and the general principle of law having the same essence. As for Indonesia, in addition to being in the group of burden sharing supporter does not make it desirable enough to ratify the 1951 Refugee Convention up until today. Indonesia is arguably acting as both the affected state and the assisting state is seen from its behavior under international refugee law. Finally, it is safe to argue that Indonesia also continuously respects the customary international law of non-refoulement.

⁸⁴ Interview with Dina Hapsari, UNHCR Indonesia.

⁸⁵ *Ibid.*

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