

THE EFFORTS TO TERMINATE THE SITUATION WITH NO-CITIZENSHIP AND HUMAN RIGHTS VIOLATION OF ROHINGYA ETHNIC

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Abstract

The refusal to recognize citizenship of Rohingya ethnic by Myanmar government caused this ethnic without national and international protection. Statelessness situation is also became the entry point of other violation of human right such as ethnic cleansing and genocide which caused this ethnic became refugee. Some solutions offered to end this situation are: cooperate with UNHCR provide temporary shelter for those people; urge UNHCR granted refugee status for Rohingya; urge ASEAN conducted humanitarian diplomacy pursued Myanmar recognized citizenship of Rohingya ; applied R to P to end the gross violation on human right toward Rohingya if the threshold were fulfilled

Keywords: Rohingya, citizenship, human right

Abstrak

Penolakan pengakuan kewarganegaraan terhadap etnis Rohingya oleh pemerintah Myanmar telah menjadikan etnis ini tanpa perlindungan nasional maupun internasional. Penolakan ini juga menjadi pintu masuk bagi pelanggaran HAM yang lain seperti ethnic cleansing dan genocide yang menjadikan etnis ini terpaksa mengungsi ke Negara-negara sekitarnya. Beberapa solusi yang ditawarkan: pertama bekerjasama dengan UNHCR untuk dapat diberikannya status sebagai refugee kepada etnis rohingnya; memberi penampungan sementara dan memperlakukan mereka secara manusiawi; mendesak ASEAN melakukan diplomasi kemanusiaan terhadap Myanmar untuk dapat diakuiinya kewarganegaraan Rohingya; jika memenuhi syarat dapat menerapkan R to P untuk mengahiri pelanggaran HAM terhadap etnis Rohingya di Myanmar

Kata kunci: Rohingya; kewarganegaraan; hak asasi manusia

Preface

The last few years, the world witnessed the Rohingya ethnic violence which are wide-spread and systematically been categorized as ethnic cleansing and even genocide¹. Human Rights Watch report in 2013 said that there has been ethnic cleansing based on the evidence of mass arrests and detention with transgression against the detainees; also violence and expulsion or forcible transfer of a large scale; destruction of homes and mos-

ques, which is believed to be sponsored by the state security apparatus.²

Although on the surface looks like a religious conflict between majority and minority, but the real problem that happens there is very complex. Violence against ethnic Rohingya left by the Government of Myanmar. This omission cannot be separated from the ethnic status of stateless Rohingya in Myanmar. Ethnic Rohingya Muslim minority in fact is about 800,000 and live in Rakhine State,

¹ Katelyn Nawoyski, *Genocide Emergency: Violence Against the Rohingya and Other Muslims in Myanmar*, dalam *Genocide Watch* (March 29, 2013), available on website <http://genocidewatch.net/wp-content/uploads/2013/04/Myanmar-13-04-04-Genocide-Emergency-Rakhine-State.pdf>.

² Cresa L. Pugh, 2013, "Is Citizenship the Answer? Constructions of belonging and exclusion for the stateless Rohingya of Burma; Working Papers Paper 76, October 2013, this paper is also published on Working Paper No. 107, International Migration Institute, University of Oxford, available on website: www.imi.ox.ac.uk/pdfs/wp/2013-wp76, Retrieved August 2014.

western Myanmar.³ They are immigrants who came to Burma several centuries ago as a result of British colonization. They look to have the same physical appearance and language with Bangladesh when they are seen from their posture and language. The language that they use is related with Chitagonian language which is used by most southern border region of Bangladesh. Geographically, Arakan (Rakhine) most of them live in the bordering region between Bangladesh with the Arakan region of western Burma (Myanmar).⁴ Similarities and close relationship with Bangladesh has become one of the main reasons to the Government of Myanmar to not give citizenship to the ethnic Rohingya Muslims. Through the 1982 Citizenship Act of the Government of Myanmar, Rohingya is excluded from ethnic recognized in Myanmar.⁵ Ethnic Rohingya lose its national protection due to not having citizenship.

Hence the problem of statelessness is the root of all the problems of human rights violations affecting the ethnic Rohingya, it is very interesting to analyze the efforts of what can be done to put an end to the condition of statelessness and serious human rights violations against the Rohingya ethnic. This article is divided into four sections, the first is introduction, the second is the State's obligations to prevent and reduce the stateless persons under international law, the third is ending human rights violations through the R2P, and the fourth closing.

Discussion

³ Melissa Stewart, "Development in the International Field: "Rotting of the Flower": Persecution of the Rohingya Threatens Myanmar's Democratic Transition & Further Imperils the Right to a Nationality, Georgetown Immigration Law Journal, Vol. 27 Numb. 1, Winter, 2013. page 437

⁴ Jawahir Thontowi, "Perlakuan Pemerintah Myanmar terhadap Minoritas Muslim Rohingya Perspektif Sejarah dan Hukum Internasional", *Pandecta*, Vol. 8 No. 1 January 2013, available on website <http://journal.unnes.ac.id/nju/index.php/pandecta>, Retrieved July 2014

⁵ Engy Abdelkader, "Myanmar's Democracy Struggle: The Impact of Communal Violence Upon Rohingya Woman and Youth", in *Pacific Rim Law & Policy Journal*, 23 Pac. Rim L. & Pol'y J. 511, Vol 23, page 523.

State Obligations to Prevent and Reduce Stateless persons under International Law

Statelessness is a condition where a person does not have citizenship of any country. A person becomes stateless because he did not obtain citizenship by place of birth; or their origin country is not there anymore, or because no country is willing to accept and recognize him as a citizen. The created conditions of statelessness is caused by the governmental than the individual factors. The gap between international law and the sovereignty of every state allowed the emergence of the phenomenon of statelessness that does not only exist but continue to be relatively unfettered. The existence of state sovereignty allows the state to define citizenship for purposes of discrimination against certain groups.⁶

UNHCR has identified several factors which cause someone to be stateless in order to prevent and reduce the stateless persons. First cause according to UNHCR is the conflict between the principle of *ius soli* and *ius sanguinis*. Besides, there are conflicts between States which apply the principle of *jus domicilii* that recognizes citizenship to someone who has lived for a certain time in the country with state revoke the citizenship of citizens who have lived in a certain period in other countries. The conflict between the provisions potentially creates stateless persons.⁷ The factor causing the case according to the UNHCR is gender discrimination, independencies of new states and state succession.⁸

Citizenship status is very important for a person. It is as an entrance for the recognition of the other rights. Aristotle stated that by nature man is a political animal, has a group. Without recognition as a member of a group, the person is not truly a human.⁹ German phi-

⁶ Jay Milbrandt, "Stateless", *Cardozo Journal of International and Comparative Law*, Vol. 20 No. 1 2011. New York: Benjamin N. Cardozo School of Law, page 80

⁷ Andrés Ordoñez Buitrag, "Statelessness and Human Right; The Role of UNHCR", *EAFIT Journal of International Law*, Vol. 2 No. 2, July-December 2011, Medellín, Columbia: Universidad EAFIT, page 11

⁸ *Ibid.*

⁹ Cresa L. Pugh, *op.cit.*, page 9.

losopher even said that the status of statelessness as lacking the very "right to have rights".¹⁰ There are many implications caused by statelessness status such as a non-voting elect or chosen, the difficulty of getting a variety of access to some public services such as schools, social, safety, health, international travel, jobs, justice system, and so forth. Not only it is difficult to have access, even sometimes it is impossible for those who are stateless. A stateless is not only unequal before the law but there is no law that comes to them.¹¹

Further citizenship enable individuals receive both domestic and international protection and allow the state to intervene on behalf of its citizens under international law. Status of Stateless make someone become unprotected. Without citizenship means that they are not being able to obtain many rights including the fundamental rights of human rights law that should be recognized for each individual because he is a man, not because he is a citizen of a particular country. Although the national government actually has the primary responsibility for implementing the internationally recognize human rights within its own territory, where there are human rights because of a person's status as a human being not because someone is a citizen or not.¹²

Two instruments which specifically regulate the issue of citizenship is the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of statelessness. The background of this particular instrument issued cannot be separated from the condition after the Second World War in which thousands of people become stateless or refugees. History shows that the Nazis made all the Jews in the region become stateless.¹³

According to the 1954 convention, a stateless person is a person who is not considered as a national by any State under the operation of its law.¹⁴ This definition has been recognized as customary international law.¹⁵ Customary international law distinguishes stateless into two, namely the *de facto* and *de jure*. Stateless person *de jure* is people who are legally stateless, who are not recognized as a national by any State. *De jure* statelessness is recognized both by the Convention in 1954 and 1961. As the *de facto* formulation is more difficult but can be known that they are the people who have not been formally denied or deprived of nationality but who lack the ability to prove their nationality or, despite documentation, are denied access to many human rights that other citizens enjoy the *de jure* stateless focus on the infringement itself. The *de facto* stateless are rights that can be accessed through the citizenship itself.¹⁶

The 1961 Convention requires states parties to reduce and prevent statelessness status, giving protection to stateless persons. The state is obliged to give access to citizenship to children in danger of not having citizenship by being born in the country. The Convention also provides the same obligations in times of state succession.

In addition to the convention in 1954 and 1961 in the above actually still found some regional legal instruments such as the European convention on nationality, 1997. This convention requires states to avoid the state of statelessness; regulate loss and acquisition of citizenship. The Convention explicitly mentions the important things as follows: *first*, everyone has the right to a nationality; *se-*

duce and Avoid Statelessness", *Fordham International Law Journal*, Vol 34. June 2011, New York: Fordham University School of Law, page 1669.

¹⁴ Convention relating to the Status of Stateless Persons, article 1 (1), 1954

¹⁵ UNHCR, *Expert meeting "The concept of Stateless Persons under International Law" Summary conclusions*, meeting held at Prato, Italy, 27-28 May 2010. page 2.

¹⁶ Andrés Ordoñez Buitrag, "Statelessness and Human Right; The Role of UNHCR", *EAFIT Journal of International Law*, Vol. 2 No. 02 July-December 2011, Medellín, Columbia: Universidad EAFIT, page 10.

¹⁰ Hannah Arendt, "The Origins of Totalitarianism", quoted in: Matthew J Gibney, "Statelessness and the right to citizenship", *Forced Migration Review*, Oxford, Vol. 1 No. 32 April 2009, page 50.

¹¹ Cresa, *loc.cit.*

¹² ECOSOC Resolution 526A (XVII) from 26th April 1954

¹³ Jessica Parra, "Stateless Roma in The European Union: Reconciling The Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to re-

cond, statelessness shall be avoided; *third*, no one shall be arbitrarily deprived of his or her nationality; and *fourth*, non-discrimination¹⁷

Other regional legal instruments is the American declaration of the rights and duties of man, states that "Every person has the right to the nationality to the which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him"; also the American convention on human rights, which states: *first*, every person has the right to nationality; and *second*, every person has the right to nationality of the state in Whose territory he was born if he does not have the right to any other nationality

Furthermore, the African Charter on the rights and welfare of the child asserts as follows:

"State parties to the present Charter shall undertake to ensure their constitutional legislation recognize that the principle according to the which a child shall acquire the nationality of the state in the territory of where he has been born if at the time of the child birth he has not granted nationality by any other state in accordance with its laws".

Although it is not an instrument specifically governing citizenship, but the African Charter obliges state parties to ensure through legislation that children should be recognized to gain citizenship in which he was born if at the time he was born they don't get citizenship of another country according to law.

Furthermore, the Human Rights Council in its resolution A/HRC/10/35, asserted that:

"Calls upon all states to refrain from taking discriminatory measures and from enacting or maintaining legislation that would arbitrarily deprive persons of their nationality on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, espe-

cially if such measures and legislation render a person stateless"

Myanmar is not a state in all legal instruments above, especially those governing citizenship either specifically or in general. The country is only ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Article 7 CRC obliges States parties, including Myanmar for:

"...Shall ensure the implementation of these rights in accordance with national law and their obligations under the relevant international Instruments in this field, in particular where the child would otherwise be stateless".

Although Myanmar is not a party to the majority of the law instruments above, but as a member of the community of nations, Myanmar should remain subject to customary international law, in which what is regulated in the law instruments above the mostly has been recognized as customary international law. For instance, that the cause of the loss of citizenship under customary international law as practiced by many countries are as follows: *first*, citizenship was obtained by fraud or false statements; *second*, against duty of loyalty to the State/harm the vital interests of the State; *third*, swearing allegiance to another country and vice versa refused loyal to his country; and *fourth*, naturalization who live abroad for a certain time period in a row

Looking at the description above, it can be concluded that the denial of citizenship recognition to the ethnic Rohingya by government of Myanmar violate international legal obligations,¹⁸ given that: *first*, the State shall protect, fulfill, respect for human rights without discrimination, including to stateless persons; *second*, prohibition of discrimination based on nationality; *third*, the State shall prevent any stateless, because every person has the right to a nationality; and *fourth*, state

¹⁷ Ashraf Azad and Fareha Jasmin, "Durable Solutions to The Protracted Refugee Situation: The Case of Rohingya in Bangladesh, *Journal of Indian Research*, Vol. 1 No. 4, October-December 2013, India: Mewar University, page 28.

¹⁸ John Arendshorst, "The Dilemma of Non-Interference, Myanmar, Human Rights, and The ASEAN Charter, *Northwestern Journal of International Human Rights*, Vol 8, Fall 102, 2009, Chicago: Northwestern University School of Law, Page 105

where the child is born obliged to grant citizenship if the child is threatened stateless

As a member of ASEAN, Myanmar has violated the Charter which aims to strengthen democracy, good governance and enhance the rule of law ... to promote and protect human rights and fundamental freedoms,¹⁹ and to Enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare, and justice.²⁰ the ASEAN Charter also requires member states to "adhere to the principles of democracy and constitutional government,"²¹ and to have "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice,"²² as well as to uphold the United Nations Charter and other forms of international law, explicitly international humanitarian law.²³

As a member of the United Nations, Myanmar is required to promote "universal respect for, and Observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The State shall promote and protect human rights without discrimination based on race, sex, language, and religion.

Putting an end to statelessness status of Rohingya Muslims

There are some efforts that could be related to the condition of the stateless. The first is urged Myanmar as the country of origin to amend the Citizenship 1982. This effort could be done by each ASEAN country persuasively or through the mechanism of ASEAN as a regional organization. This is the best solution, although we recognize it is not easy to do since, as an independent state, Myanmar has sovereignty and international law based on the principle of non-intervention.

This condition is exacerbated by the principle of non-intervention are very firm

tends absolutely toward ASEAN known as the ASEAN Way. ASEAN Way is a mechanism of cooperation and conflict resolution in the region which is based on the principle of non-intervention diplomacy, mutual respect, consensus, dialogue and consultation, as well as a ban on the use of armed violence.²⁴ Nikolas Busse, as quoted by Gillian Goh, stated that the ASEAN Way is a method and norms used by organizations of ASEAN in dealing with situations of conflict in Southeast Asia.²⁵ The mechanism called ASEAN Way because ASEAN has its own way and style in dealing with the problems that occur in its region.²⁶

Ineffective application of the principle of non-intervention and rigid consensus in ASEAN Way, it is proposed the existence of alternative concepts like constructive intervention or also called as flexible engagement, or enhanced interaction. Flexible engagement is a conversation between all ASEAN members about the issues and domestic policy without intending to intervene.²⁷ Concept of Flexible engagement is then considerable to control the ASEAN members. Flexible engagement or constructive interventions allow intervention especially when internal problems could potentially disrupt regional stability, such as the problems of security and prosperity.²⁸ The existence of ASEAN through flexible engagement or constructive intervention ASEAN should be more bold and active in humanitarian diplomacy to address the humanitarian crisis

²⁴ Gillian Goh, *The ASEAN Way: Non-Intervention and ASEAN's Role in Conflict Management*, Page 115 available on website: <http://www.stanford.edu/group/sjeaa/journal3/geasia1.pdf>, Vol 3 No 1 Spring 2008. Retrieved 17 March 2013

²⁵ *Ibid.*

²⁶ Joel Vander Kooi, 2007, "The ASEAN Enhanced Dispute Settlement Mechanism: Doing it the ASEAN Way", in *New York International Law Review*, Vol. 20 No. 1, page 19.

²⁷ Ramcharan, Robin. "ASEAN and Non-interference: A Principle Maintained". *Contemporary Southeast Asia*, Vol. 22 No.1 2000, Gyeongbuk, Republic of Korea: Yeung Nam University, page 68.

²⁸ Jürgen Haacke, "The Concept of Flexible Engagement and The Practice of Enhanced Interaction: Intramural Challenges to The Asean Way", *The Pacific Review*, Vol 12, No. 4 1999. London: Taylor & Francis Ltd. page 583

¹⁹ ASEAN Charter, Article 5; view also at Article 1(7)

²⁰ *Ibid.* Article 1 (11).

²¹ *Ibid.* Article 2 (h).

²² *Ibid.* Article 2 (i).

²³ *Ibid.* Article 2 (j).

in Myanmar affecting the Rohingya ethnic group.

The second effort that can be done to end the status of the Rohingya Muslim statelessness is through UNHCR. Indonesia and other ASEAN countries should be able to help Rohingya ethnic to get refugees status under the protection of UNHCR. Indonesia has experienced working with the UNHCR in dealing with Vietnamese refugees in Galang Island also deal with East Timorese refugees after the 1999 debate then returned to their home country after a conducive situation. Not the least of the Vietnamese refugees obtain Indonesian citizenship, after being married to Indonesian citizens or have a decent job and settle for so long in Indonesia. The same thing should be made against ethnic Rohingya refugees. Third attempt to end statelessness status of the Rohingya Muslims is to help UNHCR find 3rd countries who are willing to accommodate the ethnic Rohingya refugees and once giving citizenship to ethnic Rohingya refugees.

Possibility of application of Responsibility to Protect (R2P) as a foundation for Ending Gross Human Rights Violations against Rohingya ethnic

Responsibility to Protect (R2P) is a norm that was born as a response to dissatisfaction with the norm of humanitarian intervention that is considered to have weaknesses. Both are a response to the humanitarian crisis that occurred in the territory of states. However, when the emergence of humanitarian intervention is considered as the right to intervene on behalf of humanity, while the emergence of R2P regarded as an obligation or liability of the state to protect the people living inside.

R2P has been accepted in the Summit Outcome Document of 2005 in particular paragraphs 138 and 139 and passed through the UNGA Resolution No. A/60/I dated October 24, 2005, and reaffirmed in the UN Security Council resolution No. S/RES/1674 April 2006. R2P provide what is called a set of clear or clearer guidelines of the code of conduct to determine when intervention is done correctly and

how the intervention should be done which includes three phases to prevent, to react and to build.²⁹

R2P should be done very selectively. International Commission on Intervention and State Sovereignty gives threshold to decide whether or not military intervention is necessary. The threshold is include:³⁰ just cause, right authority; right intention, last resort, proportional means and reasonable prospects. Not only the threshold, the international community also set three important pillars that constitute the implementation of R2P strategy is as follows.³¹

The *first*, the primary responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. The *second*, the international community's responsibility to encourage and assist states to fulfill their responsibility to protect. Related to this second pillar of the UN Secretary-General added that there are 4 aspects, including: encouraging states to meet pillar one their responsibilities (paragraph. 138); helping states to exercise their responsibility; helping states to build their capacity to protect; and assisting states "under stress before crises and conflicts break out".

The *third*, the international community's responsibility to take timely and decisive action to protect populations from four crimes through diplomatic, humanitarian and other peaceful means (principally in accordance with Chapters VI and VIII of the UN Charter) and, on a case-by-case base, should peaceful means 'PROVE inadequate' and national autho-

²⁹ Muladi, "Hakekat Norma R to P atau responsibility to Protect dan Ambang batas Justifikasinya, a paper in Upgrading Recent Issues of International Law doctrine, conducted by Asosiasi Pengajar Hukum Internasional in corporation with Fakultas Hukum Universitas Diponegoro, Semarang, 20-21 May 2011, Muladi, *op.cit.*, page 4

³⁰ *Ibid.*

³¹ High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia; "Mainstreaming the Responsibility to protect in Southeast Asia: Pathway Towards a Caring ASEAN Community, Report on the High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, presented at United Nations New York, 9 September 2014, page 11.

rities are manifestly failing to protect their populations, of more forceful means through Chapter VII of the UN Charter.

Implementation of R2P must be clear so it won't be abused. According to the ICRC, the implementation of R2P should refer to the four main principles of humanitarianism problem that was originally developed by the Inter-national Committee on the Red Cross (ICRC) are humanity; impartiality; neutrality and in-dependence.³²

Humanity refers to the basic goal of the elimination of human suffering by providing assistance and protection. The impartiality means that assistance and protection provided must be based on the principle of the needs/ interests without discrimination based on race, religion, ethnicity, or political ideology.³³ This principle is based on the assumption that all human beings are equal in worth and value. Both the principles of humanity and impartiality raises an awareness of the need of humanitarian imperative to provide assistance and protection wherever it is needed. Furthermore, neutrality refers to the understanding that agents of humanitarian intervention will not take sides, and that they are not partisan. They are required to refrain from engaging in hostilities or commit acts that are considered detrimental to the interests of one party without prior compromise with the two sides clashed. The principle of impartiality and neutrality will result an independency, a condition which ensures that humanitarian action exclusively focus on the welfare of humanity, free of political interests, religious or extraneous influences. The aim of this principle is to encourage confidence and all facility access to give assistance and protection to the release of political problems and conflicts of interest in humanity aspect.³⁴ Implementation of R2P should

follow the stages of the use of violence in order to impose sanctions in Chapter VII charter and should not violate key principles outlined in the UN Charter.

Closing

Conclusion

The Issue of a humanitarian crisis that happens to Rohingya can not be separated from the non-recognition of ethnic Rohingya citizenship status by Myanmar. Without nationality, Rohingya ethnic will be difficult to get other fundamental rights and also lose the protection of both nationally and internationally. Efforts to what can be done to end the statelessness of Rohingya ethnic conditions are as follows. The *first*, urges Myanmar to amend its Citizenship 1982 through humanitarian diplomacy conducted persuasively either by ASEAN and other international organizations. Both urged UNHCR to recognize the Rohingya ethnic status as refugees, given the many people who consider the Rohingya are not recognized as refugees as they flee motive was economic motives, not a fear of persecution as required by the Convention on refugee status. The *second*, ASEAN countries in cooperation with the UNHCR to give a human shelter or even allow it to further refugees become citizens. The *third*, ASEAN countries in cooperation with the UNHCR find a third country that is willing to give shelter while recognizing the citizenship of the Rohingya refugees.

The related efforts should be made to put an end to gross human rights violations against Rohingya ethnic is possible to apply R2P if any requirements or limits the application of R2P is fulfilled in the case of gross human rights violations in Myanmar.

Suggestion

The need to improve respect for human rights in ASEAN. This can be done with ASEAN to be more bold in taking decisions regarding the state of human rights violators.

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³² Richard Devetak, Anthony Burke and Jim George (ed), 2010, *An Introduction to International Relations Australian perspective*, Cambridge: Cambridge university press, page 330.

³³ Mortimer Sellers, "The Legitimacy of Humanitarian Intervention under International Law", *International Legal Theory*, 7 Int'l Legal Theory 67, Summer, 2011, page 77.

³⁴ *Ibid.*

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