STATE RESPONSIBILITY FOR EX EAST TIMOR REFUGEE RELATED TO THE SUCCESSION OF STATE

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I. Preface

Refugee is a person or group of person who has been forced to leave their country, friend and relatives because they are frightened of their safety, privacy and their family. A decision to leave is a difficult reason because they will life in unpredictable situation. Natural disaster such as earthquake, flood or human made disaster such as war, ethnic conflict could force people to flee from their habitants.

The law terminology of 'asylum' and Refugee has a very different meaning. Asylum meaning is really close to refugee. Refugee status is final result of seeking asylum from another country. A refugee is always also asylum seeker because before a person is determined as refugee he is a asylum seeker. In other hand, asylum seeker is not always a refugee, he will be a refugee after his status is recognized by international or national law instrument.

In this paper, the terminology of refugee means that a person who flee from their inhabitant because of persecution to another country (trans boundaries). Therefore, refugee does not seceive national protection anymore, but they got international protection. The meaning of refugee which has been stated above is based on The Convention Relating to the Status of Refugee 1951 and New York Protocol 1967.

Refugee is a person who lives in another country because of their legal frightened as result from the difference of tribe, religion, nationality, member of social or political group, and inability of their state to protect them. A person who has determined as refugee will obtain refugee's right, protection and duty.

This paper will discuss Ex East Timor refugee who stay in Nusa Tenggara Timur (NTT). East Timor separation from Republic of Indonesia has caused many problems. Some of residual issues are refugee problem, violation of human rights and state responsibility in case of state succession. These residual issues are potentially giving dreadful effect for Indonesia and East Timor bilateral relation. Moreover, Indonesia has not done ratification or accession the 1951 Convention Geneva otherwise New York Protocol 1967. In fact, there are a lot of people from Vietnam, Afghanistan, Iraq, Palestine, Myanmar, Africa countries and East Timor has come to Indonesia for finding asylum applications in Indonesia (until 30 Sept 2009 ± 2617).[1]

[1] UNHCR, A10.Point.Plan of Action, Jakarta. Indonesia, 30-10-2009

East Timor refugee is chose to be discussed in this paper for the reason that :

1. In the beginning, East Timor is one of Indonesia province which has been evacuated from Portuguese colony by Indonesia.
2. Based on state responsibility principles, East Timor has a duty to solve its refugee problem because they are East Timor citizen.
3. Indonesia Government has not done yet the ratification of any refugee convention. East Timor refugee problem is very different from Vietnamese refugee in Galang island. Vietnamese refugee in Galang Island or known as ship man, stopped by Indonesia while they are waiting for third country which will accept them as their citizen. Indonesia government has no responsibility for Vietnamese refugee's life and it will not cause any international political problem.

Situation in Indonesia related with refugee problem is dilemmatic. Not only Indonesia is not a party of any international refugee instrument, but also Indonesia does not have any national refugee instrument. In the other hand, Indonesia has been faced with refugee problem or asylum seeker who want to be recognized as a refugee although Indonesia is not a destination country. In the same time, Indonesia had to give equal treatment to uphold human rights, especially after Indonesia have national human rights instrument such as Decision of the People's Concultative Assembly No. XVII/MPR/1998, amendment of Undang-Undang Dasar 1945 , Law Tap MPR No. 39 tahun 1999, about Law No 37 tahun 1999, about ratification of convention against torture and other cruel, inhuman, degrading treatment or punishment by Law no 5 tahun 1998 , Law No. 26 tahun 2000, Law No. 11 and 12 tahun 2005.

The law has led to vacancies in Indonesia related to how to anticipate the entry of refugees and asylum-seekers or to the jurisdiction of the State of Indonesia. The absence of legal instruments to anticipate the problems of refugees and asylum seekers has created a fairly complex implications for refugees and asylum seekers both legally, economically, and socio-cultural in Indonesia. The complexity of the problem of refugees and asylum seekers become increasingly complex as they may develop into problems between countries, international, and since the issue of refugees and asylum seekers in it associated with the process of human migration across territorial boundaries.

From background problems, as already mentioned above, refugee protection is primarily responsibility of each country. Protection to the refugee and / or asylum seekers is a classic problem that has become international issues for a long time. Receiving countries for a long tame provide protection for foreign nationals who are victims of oppression or violence in the region where he lived. The substance of the 1951 Geneva Convention and 1967 Protocol is the protection of human rights (refugee) that the level of human rights into the category of non-derogable human rights, means that rights cannot be reduced under any circumstances. In Related with these, few issues will be discussed in this paper are:

I. Protection of refugee under the 1951 Geneva Convention and 1967 Protocol
II. Handling of refugee issues and barriers
III. State responsibility for refugee
IV. Conclusions and recommendations

II. Protection of refugee under Genewa 1951 Convention and 1967 Protocol

According to the 1951 Convention a person is told as a refugee if:

A Refugee is a person who:

1. Is outside his / her country of nationality.
2. Has a well founded fear of persecution.
3. For reasons of race, religion, nationality, membership of a particular social group, political opinion.
4. Is Unable or, owing to such fear, is unwilling to avail himself of the protection of his country.[2]

From the definition of refugees can be concluded that the state ultimately has the responsibility to protect its citizens and foreigners who live in the country. But the reality is often the case the country concerned is not able to perform these responsibilities for various reasons. When the government cannot afford, and do not want (Unable, ar unwilling) to provide protection to its citizens, it often happens one must leave the country of origin and seek protection in other countries. From the description it seems that the problem of refugees and asylum seekers has always been national and international issues.

National issues here mean the state responsibility, while the international issues related to inter-state cooperation in tackling the refugee problem. This means that each country has the rights and obligation in handling the refugee problem which is basically a humanitarian problem, keeping in mind respect for the sovereignty of the state-owned. In terms of The 1951 Convention refugee has provided clues about the treatment to be given to refugees, amor.g others:

National Treatment. In this case related to provisions to be given the freedom to run their religion, access to courts, legal aid, etc.;

1. Treatment is provided by the state in which he used to live which includes the protection of industrial propertes, inventions, trademarks, rights to literary works, scientific works, etc.;
2. Most favored treatment / treatment in related with the right to participate in non-political organization, formed organizations, non-profit, or trade organizations (trade union);
3. To get the same treatment to foreigners who are in the country. For example treatment to have a movable property and unmovable, right of profit, right of housing,

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2 A complete understanding of these refugees can be found in Chapter I General Provisions, Article 1 paragraph 2 letter A. 1951 Convention should also be read in conjunction with the protocol in 1967 because they are complementary

and so on.[3]

The 1951 Geneva Conventions are a foundation for international refugee law, was designed at the end of World War II, Therefore the definition of refugee is defined in it focused on people who are outside the country of origin and become refugees as a result of events occurring in Europe before 1 January 1951 . Refugee problem in its development increased in the late 1950s and early 1960s, so it is deemed necessary to extend the time and geographic scope of Convention on the Status of Refugees. The next development is designed and agreed upon an additional protocol to the Convention on the Status of Refugees: 1951 Convention and 1967 Protocol on the Status of Refugees. From these two international instruments, it is clear that refugees had same characteristics, namely they do not want and can no longer get the national protection of the country of origin for various reasons. As Nehemiah Robinson stated that: [4]

Whatever their origin, all these persons had one characteristic in common: they were Foreigners in the country which received them, but differed from other Foreigners of the same origin in that they did not enjoy the protection of their country and they could not or did not want to return to their former homeland for fear of persecution.

1967 New York Protocol on the Status of Refugees.

New York Protocol on the Status of Refugees 1967, although related and contain substances that are attached to the Geneva Conventions of 1951; is a independent instrument. 1967 New York Protocol has a time limit and geographical boundaries refugee definition contained in the 1951 Geneva Convention on the Status of Refugees.

Simultaneously Convention on the Status of Refugees 1951 and Protocol of 1967 New York Refugee includes the following three main issues are:

1. The fundamental definition of refugees, and the formula relating to the provisions concerning termination of, and exclusion from refugee status.
2. The legal status of refugees in asylum countries, their rights and obligations, including the right to be protected against forced return, or refoullement, to areas where their life or freedom would be threatened.
3. State obligations, including to cooperate with UNHCR in carrying out its functions and to facilitate UNHCR's duty of supervising the implementation of the 1951 Gereva Convention.

By doing the New York Protocol of accession in 1967, means the country concerned have agreed to implement most of 1951 Convention Article 3 (Article 2 through Article 34) of all people covered by the refugee definition set out in the 1967 Protocol. Even so, most countries prefer good accession Convention and 1951 Protocol in 1967. By doing so, these countries argued that the treaty is a central system of refugee protection internationally. [5]

The 1951 Geneva Convention also confirmed the function of the UNHCR in charge of providing international protection to refugees, with the inclusion of provisions that require states parties to the 1951 Convention to cooperate with the UNHCR. The 1951 Geneva Convention, also defined the rights and obligations granted fundamental to the refugees, and the system of international protection granted to refugees absolute because they no longer have national protection, particularly the principle of non-refoulment which is the heart international refugee protection.[6]

One important thing to remember is that the adoption of legal instruments of refugees into the national legal system of Indonesia must be balanced with the implementation of these legal instruments in a consistent and sustainable, both in legal, procedural, or administrative. Such implementation is necessary so that the necessary resources to enforce the various problems of refugees can be optimally used. Indonesia's commitment to enforce and protec of human rights, especially to refugees and asylum seekers in the territory of Indonesia is a contribution to a very large for the enforcement of universal human rights. It Would need to be emphasized that the protection of refugees and asylum seekers is a humanitary act, friendly, and non-political. In this context, the instrument measures the institutionalization of refugee law are also helping raise the image of Indonesia as a country that cares about humanitarian issues and protection of human rights.

III. Handling of refugee issues and barriers

Differences why people become refugees resulted in differ treatment or assistance For refugees caused by natural disasters, relief aid is needed temporary assistance until they have their own lives. Even refugees are caused by human actions, but it needs protection the protection canld be suchas, asylum granted, guarantee for not be returned to their home countries, non-refoulement, Repatriation, resettlement. In discussing this refugee problem, the important thing is to define who can be categorized as refugees, the rights and obligations if that can be applied to refugees.

It seems reasonable to state that the refugee problem

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3 S.Prakash Sinha, *Asylum and International Law*. The Hague, Matinus Nijhoff, 1971, p.107-108.

4 Nehemiah Robinson, *Convention Relating To The Status of Refugee, Its History, Contents and Interpretations*, Division of The UNHCR, 1997, p. 1.

5 Sigit Riyanto, *Urgensi Legislasi Hukum pengungsi dan Kendalanya di Indonesia*, Workshop on Human Rights and Refugee Law for Imigration Officials in Indonesia, Surabaya . 14 –16 Desember 2004.

6 Enny Soeprapto, *Prinsip-prinsipDasar Hukum Pengungsi Internasional, sebuah catatan seminar hukum pengungsi internasional*, UNHCR incorporation with University of Surabaya, 28 Juli 2000, p.50.

existed since the beginning of human civilization and it is essentially humanitarian issues, so for a long time refugees is handled by all of humanity. Principle on the protection of refugees is responsibility of each country. Protection of refugees is a classial problem and has been international issues for a long time. Many countries provide protection for foreign nationals who are victims of oppression or violence in the previous region where he lived. This humanitarian tradition institutionalized by International Convention on refugees into the 21st century

By ratifying international instruments on refugees, the problem of refugees protection granted on the basis of international customary law, have obtained an affirmation of international law, particularly refugee law. The law of international refugee contains principles of international law are universal. The principles of universal international law that contains in international refugee law are essentially an affirmation of the international common law or Customary International Law. Therefore, the principle of universal principles of international law contained in refugee law is binding on any country, without considering whether those countries have become party or not in the Convention.

There are at least five general principles related with international refugee law , like the principle of asylum, non extradition, non-refoulement, the rights and obligations of the state of the refugees, easiness, facilities, provided by the countries concerned to the refugees. [7]

From description above, the 1951 Geneva Convention is the starting point of any discussion or the refugee problem. This Convention is one of the two devices other refugee Convention, Protocol of 1967. In some ways this Convention is seen as road opening because it was the first time in history, the Convention has provided a general definition of a refugee. The 1951 Geneva Convention on the Status of Refugees was designed at the end of World War II, and the definition of refugee is defined in it focused on people who are outside the country of origin and become refugees as a result of events occurring in Europe before January 1, 1951. Regarding the issue of refugees has increased in the late 1950s and early 1960s, it was considered necessary to expand the geographical coverage and time of the 1951 Convention. Its development has been designed and agreed on an Additional Protocol to the Convention on the Status of Refugees, the 1967 Protocol.

Refugee problem is as old as human kind. In a general sense refugee is a person or a group of people who for some reason forced to leave their homelands to other areas both in his own country, or to other country. Basically, the problem of refugees, a humanitarian issue and handled in accordance with humanitarian principles as well. In the case of refugees as a result of natural disaster, then the treatment can be simple to say, because their main need is shelter and basic need is a place to save themselves, until they can return to their home areas after the condition is possible. In this case, the priority of aid, and assistance, are food, water, clothing, sanitation, health and so on. While human refugees are victims of disaster by constant interference of the individual or fundamental freedoms, persecution, because of race, color, ethnic origin, religion, social group, or political opinion. Especially as this they were forced to leave their country of origin, seek security and safety outside ther country it also remains a humanitarian issue and dealt with humanitarian as well.[8]

Such people not only need help, relief, aid, and assistance, for their survival, but also other vital needs such as, international protection, since they are no longer have government's protection of their country.

The 1951 Geneva Convention contains three chapters that govern the protection of refugees, firstly article 31, refugees residing illegally in the refugee country secordly , Article 32, expulsions, and therdly Article 33, Prohibition of expulsion or return, or commonly known as non-refoulement. This principle prohibits the return of refugees to their home country where survival or freedom are threatened, (because differences in race, religion, nationality, and member in a particular social group) is the basic pillars of international protection, which often also called the heart of refugees international protection. Thus the importance of *non*-refoulement principle is so that it should be accepted and respected as a ius cogens in international law.

S. Prakash Sinha gives refugees the following terms: "The international political refugee may defined as a person who is forced to leave or stay out his state of nationality or habitual residence for political reasons arising from occuring events between that state and its citizens which make his stay there imposible or Intolerable, and who has taken refugee in another state without having acquired a new nationality."[9]

From this opinion, be emphasized that in general, a refugee must meet the following criteria:

1. The reason must be based on political factors
2. Political issues arise between the state and its citizens;
3. There are circumstances that require the person to leave the country or place of residence, either voluntarily or forced;
4. Returned to their home country or place of stay is not possible, because it is very dangerous to himself;
5. The person must ask for refugee status in another country;
6. Person does not get a new citizenship.

In dealing with refugee issues often involve United Nations specialized agencies of UNHCR. UNHCR is

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7 Look Asylum in Ian Brownlie, *Principles of Public International Law*, Third Edition, The English Language Book society and Oxford University Press, 1979, Chapter XVI, Diplomatic and Consular Relations, p. 344 – 361.

8 Enny I, *Op Cit* , p. 3.

9 S.Prakash Sinha, *Op.Cit*, p.95.

international organization and the Sui Generis. Status of International Organizations, as the subject of international law is now no doubt. International organizations such as the United Nations have rights and obligations stipulated in its articles of association. Previous indeed debatable whether the UN can be referred as the subject of international law However, this problem was answered after the Advisory Opinion given by the International Court in the case of Reparation of Injuries. This case stems from the killing of Prince Bernadotte of Sweden in Israel while serving as a member of the UN Commission in 1958. The General Assembly requested a legal opinion to the International Court of Justice on whether the UN has the legal capacity to file compensation claims or not. The Court stated that the advisory position of the United Nations and specialized agencies of other (Specialized Agencies) The United Nations as an international legal subject no doubt. An international organizations must have a juridical personality according to the Schemers stated as follows:

1. Formed by an international treaty
2. Having a separate organ of the member states
3. Governed by public law[10]

We have international governmental organization and non-governmental organization. Even more non-governmental organization that develops quite rapidly and this is the answer to real need in international affairs.[11]

International law commission to formulate the legal status of an international organization are:[12]

a. International organizations shall enjoy legal personality under international law and under the internal law of their member states. They shall have the capacity, to the extent compatible with the instrument establishing them to:
   i. Contract
   ii. Acquire and dispose of movable and immovable
   iii. Institute legal proceedings
b. The capacity of an international organization to conclude treaties

Thus, the juridical personality of an international organization that could include internal juridical (Article 104 UN Charter) and the international juridical personality of others can make international agreements with member countries or other international organizations, have the right passive legation to make contact with the missions permanent member states who want, right active legacy of the international organization itself can have a diplomatic mission in a particular country or other international organizations, the right to file international complaint for damages suffered as well as financial autonomy and their own budgets. As a consequence of the rights and authority that belongs to the international organizations it also have responsibility as subject to the rules of international law. These rights can be a privilege granted to foreign diplomatic missions located in one country with the aim of the international organization can obtain the necessary freedom in the framework of implementation of its duties. One of the privileges granted to international organizations is not to be disturbed by international offices.

In the previous section it is already mentioned that for a long time dealt with the refugee problem for humanity, attention of the international community is also focused on the refugees will need material assistance for their survival. This perception changed after World War I (1914-1918), Bolshevik Revolution in Russia (1917), and collapse of the Ottoman Empire (1918), which resulted in existence of millions of people who are outside or forced to leave their native land. International community finally realized that the needs of people who are outside or forced to leave his native land was not limited to material assistance just for survival, but more than that such treatment that allows them to live honorable origin abroad who had They leave.[13]

Needs of people who are outside or forced to leave his native country in addition to material assistance is also of international protection, given that these people no longer get the national protection from their home country governments.

After the LBB disbanded due to various factors, the UN stand, and under this United Nations body established to deal with refugees is UNHCR. Almost 58 years ago, exactly on the date of January 1, 1951 when UNHCR began his task, the number of refugees in the care of only about one million people, and almost entirely in Europe. Refugee problem is considered by the international community when it is temporary. Thus, UNHCR is also intended as a temporary body also, and the UN General Assembly set a UNHCR presence for three years, with the expectation that approximately one million refugees in the care of her would be solved.

But the reality is not so, because the resolution of about one million refugees are not yet completed, has emerged and the number of new refugees continue to increase from year to year. Consequently the presence of UNHCR was also renewed every three years time, and since 1964 was extended five years, until now. Besides the task of UNHCR is also increasing, as requested by the UN General Assembly to help the people, who even according to the UNHCR Statute can not be categorized as refugees, but they are in situations similar to refugees, persons like refugee. The large number of refugees, a burden that must be borne by the reservoir states while, at the moment there are 29 countries have become temporary shelters. Three of them hold for a while about more than one million people. These countries are Iran's 2 million, Pakistan 1.2 million and Germany is about 1,

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10 Schemers, *International Institutional Law*, Sijthoft, Leiden. 1980, p.20-23.

11 DW Bowett, *Hukum Organisasi Internasional*, Sinar Grafika, 1991,p.1.

12 Report of the International Law Commission on Realtions Between States and International Organization, Yearbook of the International Law Commission, 1987, Vol.9.

13 Enny Soeprapto, *Konsep Perlindungan Internasional Pengungsi dan Pelaksanaannya*, Makalah, Universitas Surabaya, 1998, hal. 6.

26 million. Regarding the existence of fatigue, fatigue, among the countries of traditional donors to provide assistance, and almost no prospect of settlement of refugees in third countries,' causing the refugee problem became more complicated solution.

Since the last few years, UNHCR has implemented a new concept in an effort to find solutions for the refugee problem, they return to their home country of each and the creation of conditions in the country so that people who have returned do not run away anymore , and the new refugees did not happen again. This effort to involve various stakeholders, including countries of origin and the countries of the reservoir while the refugees, donor countries, agencies regional, organizations, non-governmental organizations both nationally and internationally, the United Nations political organizations, development agencies, as well as humanitarian agencies, both nationally and internationally.

Such solutions have been applied among others in Southeast Asia, including Indonesia, the boat people, boat people, from Vietnam. Some approaches used in dealing with problems of Vietnamese refugees is as follows:[14]

1. Negotiations with countries that can be taken to accommodate the refugees, final destination, which speeds up the process of placement of refugees to third countries;
2. Build Processing Center on Galang Island and cooperate with other countries especially the United Nations (UN High Commissioner for Refugees, UNHCR). The aim is to attract world opinion against the settlement of the refugee problem is not only a regional problem only, but a world problem because it involves humanity and justice. By engaging the world, means that the solution must be addressed together;
3. Government of the Republic of Indonesia at the approach of Vietnam, which is the source of many refugees who came to the territory of Indonesia, so they do a constructive policies to restrict the flow of refugees into the ASEAN countries. Further stressed to them, so they also realize the consequences of political, social and economic well-vulnerabilities vulnerability that has been generated by these refugees.

Very large number of refugees and other people who are not formally can be classified as refugees but as the fate of refugees who need protection and assistance, is partly because more dilemmatic the refugee problem and the more difficult the search for a permanent settlement of refugees problem. In addition, still wake of internal conflicts or inter-communal in various countries, many people who claim his right soul or freedom is threatened in their country that tried to enter other countries as a sanctuary, and they were really nothing other than economic migrants or migrants who are looking for personal enjoyment. Also another problem is the growing difficulty of asylum seekers obtain asylum in developed countries, not always easily obtained agreement from the state to accept their refugees back, do not always able to return the refugees because conditions in their home country have not conducive for their safety, and the development of feelings of fatigue in donor countries for not visiting the traditional completion of the refugee problem. Taking into account these issues, it seems clear that the issue of asylum is a humanitarian issue and legal issues. This is explicitly stated by Enny Soeprapto as follows:[15]

> *Asylum is an institution of both humanitarian and legal nature. It is humanitarian as its objective is to save a person from a real or potential persecution. Asylum is also of a legal nature, as once granted asylum, the person's status as asylum would have rights and obligations derived there from as may be accorded or imposed by the country of asylum under its national legislation or under the relevant international instruments, once there are national and or regional instruments, of a legally binding nature.*

The prospect is bleak exacerbated by the growing problems of people without citizenship since the beginning of this decade. The situation is mainly caused by the disintegration of some federal states are multiethnic, like the Soviet Union split into fifteen sovereign nations, and Yugoslavia are now four independent countries, as well as a split Czechoslovakia into two countries, as well as stateless people and refugees due to the loss of East Timor from the Indonesian Government to discuss the writing of this paper.

The people there were so affordable by international protection from the Statute of UNHCR, but some are not, because they are not recognized as a refugee. If the note issue of refugees should not be cause tensions between the country of origin and the state refugee reservoirs, except that the refugee problem should not also be a cause disruption of international peace and security. Solidarity and international cooperation is required to seek resolution refugee problem faced by the international community today and in the future. Jovan Patrnogic states that: "It is generally accepted that refugee problems must be approached in the international community, while bearing in mind the need to respect humanitarian principles which are an obligation to all. To implement these principles of the highest importance, what is needed is solidarity."[16]

Until now the Government of Indonesia has not ratified the 1951 Convention and 1967 Protocol on the Status of Refugees. This certainly must be considered carefully, given Indonesia's geographical position linking the two continents and two oceans. Indonesia is not a final destination of the refugees, but the Indonesian territory that is wide enough this can be a haven of refugees, such as Shore Island that served as temporary housing for refugees from Indo China.

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14 Nyoman Sulaksmi, *Perlindungan Hukum Bagi Pengungsi Vietnam Oleh Pemerintah Republik Indonesia*, Surabaya, 1992, p. 39.

15 Enny Soeprapto, *International Protection of Refugees and Basic Principles of Refugee Law, An analysis*, Trisakti University, Jakarta, 1998. p.40

16 Jovan Patrnogic, *Introduction to International Refugee Law*, International Institute of Humanitarian Law, Italy, 1996. p.71.

Appeal to countries became parties to the 1951 Convention and 1967 Protocol, also appear to be carried out by UNHCR as the international authority on behalf of the United Nations in providing international protection to refugees under UNHCR's mandate. There are nine things to the UNHCR mandate, one of which is made and to encourage ratification of international conventions for the protection of refugees, supervising their application and proposing changes.

We have difficulty in handling the refugee can be illustrated through the handling of two models as follows:

1. **Security model**

   This model is more emphasis on the rights of the ruler (the state), because refugees are often seen as a threat to disrupt the country, so that should always be controlled. This security model consists of two sections, namely control, internal, and protect, external. Internal approach is a direct control mechanism to the community, for example in the form of regulations governing refugees, immigration issues and others. While the external approach focused on foreign policy, the role of the UN and others.

2. **The individual rights model**

   This model is more emphasis on individual rights, because the refugees is seen as individuals who should be protected according to the 1951 Convention and 1967 Protocol. Besides that they also should receive protection under human rights doctrines. Refugees should get justice and protection from persecution or torture in accordance with the dignity of humanity.

The most important thing to do in dealing with refugees is a political policy of bilateral inter country of origin of refugees, the country of origin, the refugee receiving country, the host country.[17] Development of rules of law for the protection of these refugees can be implemented in several ways, namely:

1. Accessing legal instruments / international human rights of refugees, among others the following 1951 Convention Protocol 1967;
2. Develop legal instruments / regional human rights. It can be seen from what is done in the Organization of African unity (the Organization of African Union) through the Convention of 1969, and European countries through the 1985 Schengen Convention and Dubin 1990, and the countries of Latin America through the 1984 Cartagena Declaration;
3. Develop national legislation on refugees, this legislation should be done by developing a comprehensive national law and not contrary to the universal principles of refugee protection.

IV. State Responsibility Against Refugee Problem.

Responsibility means the obligation of providing an answer to a calculation of what happens and the obligation to give the recovery of damages that may be incurred. According to the responsibility of international law arising in this country that country impair other countries.[18]

Malanczuk stated that : " If a states violates a rule of customary international law or ignores an obligations of a treaty it has concluded, it commits a breach of international law and thereby a so called internationally wrongful act."[19]

Characteristic of international wrongful act can be seen in article 2 and article 3 of Responsibility of States for International Wrongful Act 2001 :

Article 2, Elements of an internationally wrongful act of a state

"There is an internationally wrongful act of a state when conduct consisting of an action or omission :

a. Is attributable to the state under international law; and
b. Constitutes a breach of an international obligation of a state."

Article 3, Characterization of an act of a state as internationally wrongful act.

The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Responsibility is closely linked to state a condition that the fundamental principle of international law, the state or an injured party to be entitled to obtain compensation for damages suffered. State responsibility with regard to the determination about what the basis of the situation and how the state could be deemed to have done the wrong act internationally[20]

The background incidence of state responsibility in international law is that no one country can also enjoy their rights without respecting the rights of other countries. [21]

Any violation of the rights of other countries must lead the country account for it. Recovery of violation can be pecuniary reparation or satisfaction. Satisfaction is a recovery for acts that violate the honor of the state, which can be done through diplomatic negotiations and simply stated in the formal apology or assurance would not be a repeat act. While pecuniary reparation was done when the violations caused material losses.

State responsibility is closely related to rights and basic obligation of the state. Even also connected with permanent

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17 Heru Susetyo, *Kebijakan Penanganan Internally Displaced Person (IDPs) di Indonesia dan Dunia Internasional*, Jurnal Hukum Internasional, Faculty of Law, University of Indonesia, Jakarta, Vol.2 No.1.October 2004,p.160.

18 Sugeng Istanto, *Hukum Internasional*, Atmajaya, Yogyakarta, 1991, p.77

19 Peter Malanczuk, *Modern Intraduction to Internatiobal Law*, Routledje Seventh Revised Edition. New York, 1997, p.254

20 Yudha Bhakti Ardhiwisastra, *Op.Cit*, p.4..

21 Huala Adolf, *Aspek-Aspek Negara dalam Hukum Internasional*, PT Raja Grafindo Persada, Jakarta, 1996, p.173

rights over the resources in addition to its natural resources associated with the principles of international law concerning friendship and cooperation.

In international law doctrine, there are two theories about the state error that discuss whether the state's responsibility for her actions that violate the law or negligence, or whether it was absolutely necessary to prove fault or intention, the will of the actions of officers or agents. Two theories are:

a. Objective theory also called theory of risk. According to this theory of state responsibility is absolute, strict. If the officer or agent of the state has done the action resulting in damage to others, then the state is responsible under international law without a proven whether such action is carried out with good intentions or bad.
b. Subjective theory or the theory of errors. According to this theory of liability is determined by the element errors, dolus, or negligence, culpa, the officer or agent of the country concerned.[22]

Organ of state action, representatives or state officials may give rise to state responsibility if: 1. action is a violation of international law; 2. according to international law violations can be delegated to the state.[23]

1. Actions that can be delegated to the state (as listed in number 2 above) are: state organs act in his official capacity;
2. unity of action 'entities' existing areas in the country, or unity of action outside the formal structure of the central government or local government, but legally authorized to carry out elements of governmental authority;
3. actions of individuals or groups who act on behalf of the state or in fact carrying out elements of government authority in the absence of official authorities and in circumstances which justify such activities.[24]

State responsibility under international law arises only because of violations of international law. Accountability will remain arise even if the national law concerned countries such acts are not illegal. In other words, a country cannot make it to national law as an excuse to avoid liability established by international law. State liability can only be rejected on the grounds of emergency and self-defense.

Generally expressed by international legal experts in analyzing the state's responsibility is only at this stage suggests the terms, characteristics alone. As stated Shaw, who became an important characteristic of this state's responsibility depends on the basic factors of the following:

(a) First, the existence of an international legal obligations that apply between two specific countries;
(b) Second, the existence of an act or omission which violates international legal obligations that bears the responsibility of the state;
(c) Third, any damage or loss as a result of unlawful acts or omissions.[25]

As already explained earlier that the refugee issue to talk is basically a talk on Human Rights in which the refugees are not getting the national protection of citizenship or state origin these refugees do not want to take advantage of the protection of the country of origin because of different religions, race, nationality, political opinion, or membership in a particular social group. At the 1951 Convention and 1967 Protocol has been arranged in detail about the rights and obligations acquired rights of refugees and the real derivatives obtained from the Universal Declaration of Human Rights (UDHR) in 1948, particularly Article 1 UDHR, which is as follows: "All people are born free and equal in dignity and rights equal. They are endowed with reason and conscience and should act towards one another in brotherhood. "

Article 2 of UDHR provides that: "Everyone is entitled to all rights and freedoms set forth in this Declaration without any exceptions, such as the distinction of race, color, sex, language, religion, political or other views, so long -nationality and social proposals, property, birth or other status. Furthermore, no distinction will be held on the basis of the political, legal and international position of the country or region from which a person belongs, whether an independent state, the shape of a trust territories, colonies or under other limitation of sovereignty. " In the case of refugees that could result in loss of citizenship status of refugees, the UDHR, Article 15 provides:

1. Every person has the right to a nationality
2. No one arbitrarily be revoked or denied citizenship only to change his nationality.

Line in the International Covenant on Civil and Political Rights established by the UN General Assembly Resolution 2200 A (XXI) dated December 16, 1966, which was ratified by Indonesia with the law number 12 of 2005, in Article 2 provides: "Each state party in this covenant for all persons in its territory and subject to its territory and subject to the jurisdiction, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national origin or social, wealth, birth or other status. " Article 3 provides: "States parties are committed to covenant rights guarantee the equal of men and women to enjoy all civil and political rights set forth in this Covenant."

Should be considered that the additional protocol, additional protocol of civil and political rights set up a complaints procedure against countries that participants can be done by concerned citizens, provided that such

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22 Ibid,

23 Mohd. Burhan Tsani, *Hukum dan Hubungan Internasional*, Liberty, Yogyakarta, 1990, p.48

24 ***Ibid***, p. 48-49

25 ***Ibid***, p. 174-175.

citizens have been through the relevant resolution efforts in the national scope, exhaustion on local remedies. This can be seen in Article 2 and Article 3 of the Additional Protocol, which is as follows: Article 2 " Subject to the provisions, people who claim that the rights set forth in the Covenant have been violated, and have used all the remedies in the country, can deliver written communication to the committee for discussion. " Article 3 "The Committee will consider a communication is not named or considered as an abuse of the rights of communication delivery, or not in accordance with the provisions of the Covenant."

At the beginning of Human Rights are the moral rights of the highest order, then develops as a Human Rights based on the rights of the International Covenant. As a consequence of membership of the International Convention participants are many countries that have law of human rights, so that human rights become the rights that have been used in a country.[26] Currently according DJ Harris, there are three generations of human rights. The first generation of civil rights and the politics that comes from the natural law teaching of John Locke, Rousseau and other writers who are priorities for western countries. The next second generation of economic rights, social, and cultural, known in the 20th century to acknowledge the teachings of socialism. While the third generation comes around in the 1970s supported by the majority of developing countries, which in addition to the two types of rights mentioned above, there are group rights (collective group right), such as self-determination (self-determination) and the right to development (the right to development) in 1986.[27]

Succession issues in many cases can be done through a special arrangement between the successor state (successor state) and the state replaced (predecessor state) or it could be between the successor states and other countries concerned. In this succession rights is very difficult to formulate general provisions that apply to all circumstances. At least there are two different groups of experts on the issue of succession opinion this country. The first group wants the principle of continuity is precisely termed as the succession of states' rights and international obligations despite the change in sovereign territory. This is necessary to avoid legal confusion and maintain the stability of international relations. According to this traditional approach, in general successor states (successor state) to continue the rights and international obligations carried by the state that replaced (predecessor state).[28]

1. Some common ways to obtain citizenship by Malanczuk are:

Through the birth. Some countries give citizenship to children born in the region based on its territory (the principle of Jus Soli), while the countries that others providing citizenship to a child based on the nationality of the parents (The principle of Jus sanguinis) and in several other countries granting citizenship based on other things;

2. Through marriage;
3. Through the adoption or legitimation;
4. Through naturalist. Technically, this refers to a situation where foreigners granted citizenship by other countries on the basis of his own request, but sometimes the terminology used in the sense of naturalization wider reaching changes to citizenship after birth.[29]

Thus, referring to the opinions mentioned above in the case of the loss of East Timor from the hands of the Republic of Indonesia will have to be a comprehensive bilateral agreement and durable solutions, so that bilateral relations between countries can work well. The substance of the bilateral agreement is a continuation of the independence option or special autonomy may be related to the choosing of citizenship and other state assets or public property. Every sovereign country has the right to determine who can be prepared citizens. In determining who the citizens, there are restrictions established by international law and national law. In practice, there is a system ius soli and ius sanguinis system. The consequences of the implementation of these systems is no uniformity in the rules of citizenship. Thus in fact will cause a problem of people without citizenship and dual citizenship.[30]

Citizenship is an important factor for the individual, because the citizenship he may have identity, as a basis to get protection of his country, and as a basis for civil rights and political. A citizen automatically get the right to decide where to stay in the country, obtain a passport and protection of the country when traveling abroad. In addition stateless person who has the right to obtain employment, public facility, and participate in political life, and have access to a case in court. The rights are not owned by people who do not have citizenship.

According to the International Law stateless person is someone who is not considered as citizens of a country in the implementation of the law. [31]

In this paper, which meant no nationality is interpreted broadly, individuals who do not enjoy the status of effective

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26 Koesrianti, *Implementasi Hukum Internasional dalam Kasus Pelanggaran HAM Berat di Indonesia*, Jurnal Dinamika, HAM, Pusham UBAYA, Surabaya, Vol.6 No.3, Oktober 2006, p.201.

27 Harris,DJ, (ases and Materials on International Law, Sweet x Maxwell, titth Edition, London, 1998, p.99.

28 Boer Mauna, *Hukum Internasional :Pengertian, Peranan dan fungsi dalam Era Dinamika, Global*, Alumni, Bandung, 2005, p40

29 Peter Malanczuk,*Ibid*,p.263.

30 Someone became refugees because of persecution is well on the grounds of race, religion, opinion, certain social groups and others. While stateless person caused by reason of ius soli and ius sanguinis citizenship in the system or for some reason their citizenship revoked. Individuals who meet this requirement is not de jure stateless, stateless whereas de facto is the individual who cannot establish citizenship or nationality to be a dispute between one or more countries.

citizenship or effective nationality, and consequently cannot enjoy the rights associated with citizenship. And in Article 15 of the Declaration of Rights of Man in 1948 to determine: "(1). Everyone has the right to a Nationality; (2). No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

If connected between the refugees and those who do not have citizenship both are people who do not get protection. Only difference is, if the de facto refugees do not get protection from their country, while the people who do not have citizenship, the de jure person is not there to protect the country.

Chose this citizenship issue had occurred at the time of the emergence of citizen charter agreement (PPPWN) on December 27, 1949. At the time it happened the transfer of sovereignty from the Dutch royal to RIS, as a result of the round table conference held in The Hague. PPPWN as stipulated in the LN 1950-2 is one of the attachment plaque transfer of sovereignty. One of the consequences of the transfer of sovereignty is the division between the citizens and the Dutch royal RIS. This means that both countries should determine who become citizens of their countries, after the RIS fully sovereign, free from Dutch colonialism. PPPWN included in the 2-year period to use the option rights or the rights repudiation. To implement PPPWN, the Government of Indonesia issued Regulation No. 1 of 1950 which govern the usage of the right repudiation option. This citizenship issue it had occurred between RI and China. At that time there bipatride problem solved by removing one owned citizenship. This is stipulated in the law number 2 of 1958 dated 27 January 1958, whose goal is to solve the existing problem of citizenship and prevent bipatride. This problem can be understood because of the nationality law is known there can be some other principle of loyalty nomo principle, the principle of national interests, non discrimination, protection of citizens and human rights, transparency, and apatride. It seems the two phenomena above can be analogous to solve East Timor refugees citizenship problem.

V. Conclusions and Recommendations

V.1 Conclusions

1. Ratification of the 1951 Geneva Convention 1951 and 1967 Protocol is something urgent to be done, because with permanent stay in Indonesia is a state responsibility, state responsibility, to protect its citizens and to protect foreigners living in the State.
2. In line with the spirit, as mentioned above then, the Head of state and government of Indonesia and East Timor have agreed to form a Commission of Truth and Friendship (Komisi Kebenaran dan Rekonsiliasi – KKP) Indonesia with East Timor in December 2004 at the insistence of the United Nations. With the formation of the KKP, the more benefit from the Indonesian side, because of the many human rights violators who are Indonesian citizens. As a new nation, which still has a large dependence on the neighboring country, East Timor receive CTF formation as a solution, with the assumption that in the future Indonesia still maintain good relations with East Timor.
3. For Indonesia and East Timor as a new democratic country, there is a need for balance between the principles of justice and the establishment of peace and stability. Realize the truth and promote friendship is a necessary part of the process of healing old wounds between the two countries. Increase friendship is chosen at the suggestion of the East Timorese government who believe that reconciliation between Indonesia and East Timor which shows that reconciliation between Indonesia and East Timor achieved so that more effort is needed in the form of increased friendship.
4. Legal efforts undertaken by the Indonesian government to overcome the problem of East Timor refugees in NTT was giving aid, assistance, and not a rescue, relief. Providing assistance in the form of shelter and food and health facilities. Mason has not law above the maximum.
5. From the institutional aspect, the difficulty in handling the refugee problem can be illustrated through a security model or the security model more emphasis on the rights of the ruler or the State. This is because refugees are often viewed as a disturbing threat that must be controlled by state. This security model includes aspects of internal control mechanism to direct to the public in the form of regulations governing the matter of refugees, immigration, external aspect focused on the UN's role as international organizations that are universal, as well as foreign policy.

   Another approach is to model individual rights or the individual rights model. Since the refugees are individuals who must be protected according to the 1951 Convention and 1967 Protocol. Refugees should get justice and protection from persecution or torture in accordance with the dignity of the humanity.
6. From the aspect of the rule of law, the legal vacuum, because there is no comprehensive rules to regulate asylum seekers and refugees in Indonesian positive law, weakens coordination among agencies in the field, therefore, necessary legal arrangements that can ensure legal certainty. In many cases, local government objections received an additional burden of the arrival of strangers. Sharp distinction between local culture and foreign culture, refugees, brings potential social conflict. Besides assimilation between male asylum seekers or refugees with local women, it leaves the burden of children who turned out during repatriation or resettlement is not performed as well.

V.2 Recommendations

1. Indonesia Government needs to be better prepared than the technical aspects, political and juridical ratification in The 1951 Geneva Convention and Protocol in 1967. For the political will of the government to immediately become party to this convention is expected. This is based on the grounds that the substance of the two

instruments of international law it is charged on Human Rights, and Indonesia also uphold human rights as mandated by the variety of national legislation (Ketetapan MPR no. XVII / 1998, Undang-Undang 39/1999, Undang-Undang no. 37 / 1999 and others).

2. When making its own rules about the refugees cannot be done because it requires adequate preparation in short time steps could be an amendment to immigration legislation on refugee issues by entering in it.

For refugees, there needs to be follow-up of an independent or giving option of special autonomy for Eks East Timor refugees in NTT concerning their citizenship status in order to avoid apatride or bipatride. Options citizenship was stated in the bilateral agreement between the two countries are comprehensive in nature. This is important because the right to citizenship is protected by Article 1, 2, 15, Universal Declaration of Human Rights 1948, Article 2 and Article 3 of the International Covenant on Civil and Political Rights. In addition, the right to citizenship is also protected in the Undang-Undang No 12 year 2006 about citizenship and Undang-Undang No 39 of 1999 on human rights.

References

Boer Mauna, *Hukum Internasional :Pengertian, Peranan dan fungsi dalam Era Dinamika, Global,* Alumni, Bandung, 2005

DW Bowett, *Hukum Organisasi Internasional,* Sinar Grafika, 1991

Enny Soeprapto, *Prinsip-prinsipDasar Hukum Pengungsi Internasional, sebuah catatan seminar hukum pengungsi internasional,* UNHCR incorporation with University of Surabaya, 28 Juli 2000,

----------, *Konsep Perlindungan Internasional Pengungsi dan Pelaksanaannya,* Makalah, Universitas Surabaya, 1998.

---------- *International Protection of Refugees and Basic Principles of Refugee Law, An analysis,* Trisakti University, Jakarta, 1998.

Heru Susetyo, *Kebijakan Penanganan Internally Displaced Person (IDPs) di Indonesia dan Dunia Internasional,* Jurnal Hukum Internasional, Faculty of Law, University of Indonesia, Jakarta, Vol.2 No.1.October 2004.

Huala Adolf, *Aspek-Aspek Negara dalam Hukum Internasional,* PT Raja Grafindo Persada, Jakarta, 1996.

Harris,DJ, *Cases and Materials on International Law,* Sweet x Maxwell, titth Edition, London, 1998.

----------,, *Aspek-Aspek Negara dalam Hukum Internasional,* PT Raja Grafindo Persada, Jakarta, 1996.

Jovan Patrnogic, *Introduction to International Refugee Law,* International Institute of Humanitarian Law, Italy, 1996.

----------, *Introduction to International Refugee Law,* International Institute of Humanitarian Law, Italy, 1996.

Koesrianti, *Implementasi Hukum Internasional dalam Kasus Pelanggaran HAM Berat di Indonesia,* Jurnal A complete understanding of these refugees can be found in Chapter I General Provisions, Article 1 paragraph 2 letter A. 1951 Convention should also be read in conjunction with the protocol in 1967 because they are complementary.

Brownlie, *Principles of Public International Law,* Third Edition, The English Language Book society and Oxford University Press, 1979, Chapter XVI, Diplomatic and Consular Relations..

Peter Malanczuk, *Modern Intraduction to Internatiobal Law,* Routledje Seventh Revised Edition. New York, 1997.

Mohd. Burhan Tsani, *Hukum dan Hubungan Internasional,* Liberty, Yogyakarta, 1990.

Nehemiah Robinson, *Convention Relating To The Status of Refugee, Its History, Contents and Interpretations,* Division of The UNHCR, 1997.

Nyoman Sulastrsmi, *Perlindungan Hukum Bagi Pengungsi Vietnam Oleh Pemerintah Republik Indonesia,* Surabaya, 1992.

S.Prakash Sinha, *Asylum and International Law.* The Hague, Matinus Nijhoff, 1971.

Sigit Riyanto, *Urgensi Legislasi Hukum pengungsi dan Kendalanya di Indonesia*, Workshop on Human Rights and Refugee Law for Imigration Officials in Indonesia, Surabaya . 14 –16 Desember 2004.

Schermers, *International Institutional Law*, Sijthoft, Leiden. 1980.

Sugeng Istanto, *Hukum Internasional*, Atmajaya, Yogyakarta, 1991.

Report of the International Law Commission on Realtions Between States and International Organization, Yearbook of the International Law Commission, 1987, Vol.9.

Dinamika, HAM, Pusham UBAYA, Surabaya, Vol.6 No.3, Oktober 2006.