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## Asylum Seekers and Refugee Management: (Im)Balance Burden Sharing Case between Indonesia and Australia

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Article	Abstract
<p><b>Keywords:</b> Asylum seekers; Australia; Refugees; Burden-sharing; Indonesia.</p> <p><b>Article History</b> Received: Apr 28, 2021; Reviewed: Des 30, 2021; Accepted: Jan 20, 2022; Published: Jan 31, 2022.</p> <p><b>DOI:</b> 10.28946/slrev.Vol6.Iss1.1145.pp70-100</p>	<p>Since the 1970s, Indonesia has been acting as a transit country for asylum seekers and refugees to reach Australia and New Zealand. Being a non-state party to the Refugee Convention, Indonesia has become the strategic partner for Australia in managing the issue of asylum seekers and refugees. The two countries have been involved in many bilateral and regional arrangements to tackle the issues. The “Bali process” is one of Indonesia and Australia’s arrangements to lead the region in tackling forced migration and refugees. Unfortunately, despite their “common” interests, many of Australia’s policies towards asylum seekers have negatively impacted Indonesia in many ways. This paper uses desk study research with a normative approach to analyse nationally and internationally relevant laws and policies. This paper analyses the Bali Process as regional cooperation means of burden-sharing in which Indonesia and Australia play dominant roles while scrutinising how both countries implement the policies within their domestic realms. In addition, the dynamics within the two countries will also be examined to understand how they shape their policies. This paper argues that Indonesia has fulfilled its part by managing these protected persons within Indonesia. However, Australia seems to consistently try to shift its burden to Indonesia as its neighbouring state. By revisiting the Bali Process arrangement, it is suggested that Australia needs to respect its commitment and take any means necessary to keep good relations with its neighbours, including Indonesia.</p>

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### INTRODUCTION

The legal protection for cross-border refugees has been conceived as a “global public good” where states are concerned to share the burden of such protection.<sup>1</sup> As discussed in detail later,

<sup>1</sup> Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009), 25-27.

the principle of burden-sharing or responsibility sharing has its roots in the 1951 Refugee Convention,<sup>2</sup> as embodied in its Preamble and Article 35, and assumes “an expectation of reciprocity” between states.<sup>3</sup> Unfortunately, in reality, such a burden in handling the issues of asylum seekers and refugees has been very uneven in parts of the world. This situation has been heavily influenced by the notoriously trending policies of the destination countries on “cooperative deterrence”<sup>4</sup> and “diverse non-entrée measures”.<sup>5</sup>

Europe, as the region that gave birth to the Convention on Refugees, Europe has been experiencing an influx of asylum seekers coming from the African and middle eastern region in the last decade, fleeing from life-threatening situations in their home countries.<sup>6</sup> As the region became associated by migrants as a life-saving place, countries in Europe interestingly took different positions towards this new influx.<sup>7</sup> Some states still embrace the influx of these asylum seekers. However, some also explicitly and strongly reject the asylum wave.<sup>8</sup> The rejecting countries have even securitised their boundaries to prevent the asylum seekers reach their border.<sup>9</sup> Despite the European Union's standard policy in managing the arrival of refugees, the rejection by some states creates a disruption to the burden-sharing in protecting the refugees, which is another challenge to international law.<sup>10</sup>

Such impact is no exception in Indonesia, a state struggling to manage asylum seekers and refugees with neighbouring southeast countries. Indonesia has always been a transit state for asylum seekers and refugees.<sup>11</sup> This can be first traced back to the refugees of Indochina.

<sup>2</sup> United Nations, “Convention Relating to the Status of Refugees,” *189 UNTS 137*, 1951.

<sup>3</sup> Amy Nethery and Carly Gordyn, “Australia-Indonesia Cooperation on Asylum-Seekers: A Case of ‘Incentivised Policy Transfer,’” *Australian Journal of International Affairs* 68, no. 2 (2014): 177–93, 181, <https://doi.org/10.1080/10357718.2013.841122>. The international community even confirmed the “...urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees.” Global Compact on Refugees, UN doc A/73/12 (part II) (2 August 2018).

<sup>4</sup> Susan Kneebone, “Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia,” *Refuge: Canada’s Journal on Refugees* 33, no. 1 (2017): 29–41, 30, <https://doi.org/10.25071/1920-7336.40446>.

<sup>5</sup> Thomas Gammeltoft-Hansen and James C. Hathaway, “Non-Refoulement in a World of Cooperative Deterrence,” *Columbia Journal of Transnational Law* 53, no. 2 (2015): 235–84.

<sup>6</sup> Claudia Morsut and Bjørn Ivar Kruke, “Crisis Governance of the Refugee and Migrant Influx into Europe in 2015: A Tale of Disintegration,” *Journal of European Integration* 40, no. 2 (2018): 145–59, <https://doi.org/10.1080/07036337.2017.1404055>.

<sup>7</sup> Hein de Haas, “The Myth of Invasion: The Inconvenient Realities of African Migration to Europe,” *Third World Quarterly* 29, no. 7 (2008): 1305–22, <https://doi.org/10.1080/01436590802386435>. Jose-Manuel Gimenez-Gomez, Yabibal M. Walle, and Yitagesu Zewdu Zergawu, “Trends in African Migration to Europe: Drivers Beyond Economic Motivations,” *Journal of Conflict Resolution* 63, no. 8 (2019): 1797–1831.

<sup>8</sup> Jean Claude Garcia-Zamor, “The Global Wave of Refugees and Migrants: Complex Challenges for European Policy Makers,” *Public Organization Review* 17, no. 4 (2017): 581–94, 585, <https://doi.org/10.1007/s11115-016-0371-1>.

<sup>9</sup> Monica Colombo, “The Representation of the ‘European Refugee Crisis’ in Italy: Domopolitics, Securitization, and Humanitarian Communication in Political and Media Discourses,” *Journal of Immigrant and Refugee Studies* 16, no. 1–2 (2018): 161–78, 175, <https://doi.org/10.1080/15562948.2017.1317896>.

<sup>10</sup> Rainer Bauböck, “Refugee Protection and Burden-Sharing in the European Union,” *Journal of Common Market Studies* 56, no. 1 (2018): 141–56, <https://doi.org/10.1111/jcms.12638>.

<sup>11</sup> Robyn C. Sampson, Sandra M. Gifford, and Savitri Taylor, “The Myth of Transit: The Making of a Life by Asylum Seekers and Refugees in Indonesia,” *Journal of Ethnic and Migration Studies* 42, no. 7 (2016): 1135–52, <https://doi.org/10.1080/1369183X.2015.1130611>.

Specifically, the asylum seekers, and refugees of Vietnam from the 1970's to the 1990s.<sup>12</sup> Recent cases have supported Indonesia's role as a transit state for the asylum seekers and refugees of the Rohingya. Indonesia also serves as a transit state for Afghanistan refugees and other countries.<sup>13</sup> In the case of Vietnam and the Rohingya, Indonesia has shown good faith in handling asylum seekers and refugees, separated from the reality that Indonesia is just a transit state. The good faith that Indonesia has shown is rooted in its international obligations not to reject or return all asylum seekers that go into Indonesia on their way to Australia or New Zealand. As of January 2018, 13,895 individuals seek protection to remain in Indonesia.<sup>14</sup>

The issue of asylum seekers does not end in granting access. Furthermore, Indonesia has additional responsibilities in handling asylum seekers<sup>15</sup> that have received refugee status until that refugee can receive certainty from other third safe countries of their acceptance. Not being a member of the 1951 Convention relating to the Status of Refugees (Refugee Convention),<sup>16</sup> Indonesia does not have a policy to integrate refugees into its society. However, at the same time, Indonesia should not return them to their original countries, as this would violate the international norms of non-refoulement.<sup>17</sup> These conditions lead to Indonesia's current situation as the transit-ing, processing, and waiting for a country seeking asylum.

Unfortunately, the world (especially those destination countries for asylum seekers) is trying to securitise borders and compromise their international obligations over domestic policy.<sup>18</sup> Thus, such development caused prolongation of the waiting period for asylum seekers and refugees in transit countries, such as Indonesia. Some scholars argue that these refugees are living in limbo as the waiting period for resettlement is uncertain (a long period is typical);<sup>19</sup> they are not eligible to work but are required to be self-reliant<sup>20</sup> and some of them are even living autonomously

<sup>12</sup> Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia* (Singapore: ISEAS–Yusof Ishak Institute, 2015), 30-42. ,

<sup>13</sup> Missbach. 42-44.

<sup>14</sup> According to the UNHCR, this number is included 10,168 refugees and 3,727 asylum-seekers, of whom 9,742 were male and 4,153 were female. Monthly report (January 2018) issued by UNHCR Jakarta Office (file on Author).

<sup>15</sup> Indonesia does not differentiate terms "asylum seekers" and "refugees" as legal meanings. It refers to "refugees" to all people who seek further protection with differentiation where they are coming from, internally (similar to Internally Displaced Persons/IDP – *Pengungsi Dalam Negeri*) or outside Indonesia (foreign refugees – *Pengungsi Luar Negeri*).

<sup>16</sup> United Nations, "Convention Relating to the Status of Refugees."

<sup>17</sup> Nils Coleman, "Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law," *European Journal of Migration and Law* 5, no. 1 (2003): 23–68, <https://doi.org/10.1163/157181603100405657>; Jean Allain, "The Jus Cogens Nature of Non-Refoulement," *International Journal of Refugee Law* 13, no. 4 (2001): 533–58, 538, <https://doi.org/https://dx.doi.org/10.1093/ijrl/13.4.533>.

<sup>18</sup> Daniel Ghezelbash et al., "Securitisation of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia," *International and Comparative Law Quarterly* 67, no. 2 (2018): 315–51, <https://doi.org/10.1017/S0020589317000562>; Volker Türk, "The Promise and Potential of the Global Compact on Refugees," *International Journal of Refugee Law* 30, no. 4 (2019): 575–83, 576, <https://doi.org/10.1093/ijrl/eeey068>.

<sup>19</sup> Joe Cochrane, "Refugees in Indonesia: Hoped for Brief Stay, Many May Be Stuck for Life," *The New York Times*, accessed 11 June 2020, <https://www.nytimes.com/2018/01/26/world/asia/indonesia-refugees-united-nations.html>.

<sup>20</sup> Yunizar Adiputera and Atin Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia* (Yogyakarta: Institute of International Studies, 2018), 3.

among local people. Indonesia, indeed, reiterated its commitment to rescue anyone in distress, including asylum seekers at sea and land.<sup>21</sup>

The process of refugee placement to third party states needs specific attention. This is due to Indonesia's role as a member of the international community, where one side is seen as reluctant to violate the rights of refugees while acknowledging the fact that Indonesia has limits for the handling and protection of refugees within its sovereign borders. Various results can emerge from the interaction between the refugees and Indonesian society. Legal and social problems that occur within Indonesian society involve asylum seekers and those who have obtained refugee status living independently outside the immigration detention centres and community houses.<sup>22</sup> The current situation is creating a "ticking time-bomb," where refugees (including asylum seekers) and the Indonesian community experience a negative impact on the waiting period due to a lack of support from the international community.

Most of the available literature focuses on protecting asylum seekers and refugees by highlighting Indonesia's non-comprehensive policies and its lack of infrastructure toward the issues without acknowledging Indonesia's right to seek assistance from the international community in handling these "transiting protected migrants".<sup>23</sup> This article seeks to fill that gap by providing an analysis of the opportunities for Indonesia in seeking further assistance from the international community in handling asylum seekers and refugees in Indonesia.<sup>24</sup> As an alternative solution, this paper observes that Indonesia needs to share its burden with the international community in general, especially by means of regional arrangement or cooperation.

Such cooperation in burden-sharing is focused on between Indonesia and Australia. This is because Indonesia is one of the last frontiers for Australia's border to manage the inflow of asylum seekers;<sup>25</sup> both countries are actively engaging in cooperation in the region despite no direct reference to asylum seekers or refugees, and both countries need each other equally to manage

<sup>21</sup> Indonesia, "Presidential Regulation No. 125 on Management of Foreign Refugees" (2016), Articles 5-23.

<sup>22</sup> Asylum seekers who live and stay independently are those who are coming to Indonesia legally (usually benefiting from Indonesia's free-visa countries or visa-on-arrival policies) but then declare themselves to the UNHCR and IOM in Indonesia as asylum seekers (*Pengungsi Mandiri*).

<sup>23</sup> Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*; Savitri Taylor and Brynna Rafferty-Brown, "Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesian Solution," *International Journal of Refugee Law* 22, no. 4 (2010): 558–92, <https://doi.org/10.1093/ijrl/eeq034>; Adiputera and Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia*; Nikolas Feith Tan, "The Status of Asylum Seekers and Refugees in Indonesia," *International Journal of Refugee Law* 28, no. 3 (2016): 365–83, <https://doi.org/10.1093/ijrl/ew045>; Antje Missbach, "Doors and Fences: Controlling Indonesia's Porous Borders and Policing Asylum Seekers," *Singapore Journal of Tropical Geography* 35, no. 2 (2014): 228–44, <https://doi.org/10.1111/sjtg.12059>.

<sup>24</sup> An example of regional burden-sharing previously was discussed in Richard Towle, "Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?," in *International Journal of Refugee Law*, vol. 18, 2006, 537–70, <https://doi.org/10.1093/ijrl/eel015>.

<sup>25</sup> Susan Kneebone, "Migration Control at Sea: The Australian Case," in *Extraterritorial Immigration Control: Legal Challenges*, ed. Bernard Ryan and Valsamis Mitsilegas (Leiden: Martinus Nijhoff, 2010), 347–60, 354. As a receiving refugee country, Australia has changed its policy in the wake of the 9/11 events. Jane McAdam, "Australia and Asylum Seekers," *International Journal of Refugee Law* 25, no. 3 (October 1, 2013): 435–48, 436, <https://doi.org/10.1093/ijrl/eet044>.

irregular migration<sup>26</sup>. Unfortunately, Australia had also securitised its border to prevent the incoming asylum seekers to its shore.<sup>27</sup> Intake for genuine refugees to Australia has also been further limited.<sup>28</sup> Lastly, Australia limits its support to only asylum seekers found at sea and not those who were arriving by other means.<sup>29</sup> Thus, in equal cooperation, both parties need to implement their commitments to achieve a balanced burden of managing asylum seekers and refugees. Thus, this paper argues that Australia should not lessen its commitment, especially since Indonesia has proven its higher commitment by enacting a particular national policy on the matter.

Based on the above background, this research discusses three main points. First, it analyses the Bali Process as a regional mechanism to tackle issues of asylum seekers and refugees. Second, the paper analyses Australia's legal policies throughout the period from the inception of the Bali Process in 2002 up to now. Third, it examines how Indonesia applies its national law when it comes to the management and treatment of asylum seekers and refugees. Finally, this is followed by a proposal for Australia not to violate its international obligations, such as the Refugee Convention, by fairly sharing the refugee burden with Indonesia. It will conclude with some highlights of some policy recommendations for Indonesia and Australia's governments to improve their policies for asylum seekers and refugee management.

## RESEARCH METHOD

This paper uses desk study research with a normative approach to analyse nationally and internationally relevant laws and policies. International law in force, both treaties and customary, such as the refugee convention and the principle of non-refoulment, become the primary legal basis for analysing Indonesia and Australia obligation in managing the common issues of asylum seekers and refugees. In addition, national laws and policies of both Australia and Indonesia are also examined to show how the commitments of both countries towards asylum seekers and refugees.

## ANALYSIS AND DISCUSSIONS

### Bali Process as Regional Arrangement to Share the Burden

As the movement of asylum seekers may end up in several countries from their original points of departure, the issues surrounding their protection logically involve all countries in such a geographical region. Nowadays, it can be seen that significant movements can be divided into north and south regions. Asylum seekers from Africa and the Middle East in the northern part are

<sup>26</sup> Kneebone argues that Indonesia and Australia have an asymmetric power relationship, whereby their actions are influenced in the interests of Australia through several monetary and non-monetary assistance to Indonesia. Kneebone, *ibid*.

<sup>27</sup> "Illegal Criminals Invading': Securitising Asylum-Seekers in Australia and the US," e-International Relations, accessed 10 December 2021, <https://www.e-ir.info/2020/09/12/illegal-criminals-invading-securitising-asylum-seekers-in-australia-and-the-us/>.

<sup>28</sup> "Recent Changes in Australian Refugee Policy," Refugee Council of Australia, accessed 10 December 2021, <https://www.refugeecouncil.org.au/recent-changes-australian-refugee-policy/#:~:text=All%20of%20those%20visas%20were,during%20the%20COVID-19%20pandemic.>

<sup>29</sup> M. Alvi Syahrin, "Haruskah Indonesia Menangani Pengungsi Dari Luar Negeri?," *Opinio Juris* 9, no. 3 (2019): 19–24, 21.

aiming to go to countries within Europe.<sup>30</sup> Whereas, in the southern part, asylum seekers from the Middle East and South Asia are trying to reach Australia and New Zealand. The latter region is commonly referred to as the Asia Pacific region, containing two sub-regions: South Asia (which includes Afghanistan, Sri Lanka, India, and Bangladesh) and Southeast Asia<sup>31</sup>.

In 2012, UNHCR acknowledged, “The Asia–Pacific region is home to the world’s largest and oldest refugee populations.” Stating that the movements of “asylum-seekers from Afghanistan, Myanmar and Sri Lanka representing the three largest groups moving irregularly”. Unfortunately, their environment for protection “continues to be fragile with very few countries having signed the 1951 Convention relating to the Status of Refugees”<sup>32</sup>. Within the region of Southeast Asia: Thailand, Malaysia, and Indonesia host most of the incoming asylum seekers, whereby Malaysia and Indonesia are also known as transit countries for those going to Australia or New Zealand. Given the fact that the issues related to “refugees” are inter-state domain, then countries in the region try to address the issue of refugees accordingly in the so-called Bali Process.

According to its official portal, the cooperation is called “the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime”. It is a states’ conference, a forum for policy dialogue, information sharing and practical cooperation to help the region address such challenges. It is a voluntary and non-binding process within the region of Asia-Pacific and consists of 48 members<sup>33</sup> including the United Nations High Commissioner for Refugees (UNHCR), United Nations Office on Drugs and Crime (UNODC) and the International Organization for Migration (IOM).<sup>34</sup> The involvement of UNHCR and IOM clearly resemble how the issues of asylum seekers and refugees are also substantially considered within this regional arrangement. It has also been claimed that the “Bali Process is a state-led policy-formation mechanism that works in parallel to the international refugee regime.”<sup>35</sup>

The Bali Process 'originated' at the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in February 2002. This ministerial meeting was the first formal meeting of the Bali Process. It was a follow up of the 1996 Regional Seminar on Irregular Migration and Migrant Trafficking in East and South Asia, which the IOM organised in Manila. This 1996 Regional Seminar then led to the 1999 Bangkok

<sup>30</sup> Hannes Weber, “Can Violent Conflicts Explain the Recent Increase in the Flow of Asylum Seekers From Africa Into Europe?,” *Journal of Immigrant and Refugee Studies* 17, no. 4 (2019): 405–24, <https://doi.org/10.1080/15562948.2018.1517424>. Marco Percoco and Ugo Fratesi, “The Geography of Asylum Seekers and Refugees in Europe,” in *New Frontiers in Interregional Migration Research*, ed. Bianca Biagi et al. (Springer International Publishing, 2018), 105–23.

<sup>31</sup> Susan Kneebone, “Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs,” *International Journal of Human Rights* 20, no. 2 (2016): 153–72, 158, <https://doi.org/10.1080/13642987.2016.1141499>.

<sup>32</sup> UNHCR as cited in Susan Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region,” *Journal of Refugee Studies* 27, no. 4 (2014): 596–618, 598, <https://doi.org/10.1093/jrs/feu015>.

<sup>33</sup> It includes countries in the region, source countries for refugees transiting to Australia (such as Afghanistan, Sri Lanka, Myanmar, Iran and Iraq) and ‘superpowers’ such as the United States of America and the Peoples’ Republic of China.

<sup>34</sup> “About the Bali Process,” Bali Process, accessed 12 December 2021, <https://www.baliprocess.net>. It is also stated that the website is funded by the governments of Japan, Australia and New Zealand. It shows to the public which countries have significant interests as well.

<sup>35</sup> Kneebone, “Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs”, 597.

Declaration on Irregular Migration, which refers to the Manila Process, and the Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC). These events were known as the Regional Cooperation Processes (RCPs) that IOM led in the region.<sup>36</sup>

It is essential to point out from the 1999 Declaration that it was made "to address the question of international migration, with particular attention to regional cooperation on irregular/undocumented migration".<sup>37</sup> However, there is no express reference to "refugees", but instead, international migration is conceived as irregular migration and as involving 'smuggling and trafficking in human beings. Some have argued that such an expression of the declaration is typical of the "securitised" concept of irregular migration and as the response to human trafficking regionally in the 1990s.<sup>38</sup>

The first formal meetings under the Bali Process were conducted in 2002 and 2003. The 2002 meeting was triggered by the arrival of asylum seekers mainly from Afghanistan and other Middle East countries. At that time, they were making their second journey to Australia between 2001 and 2002.<sup>39</sup> The meeting in 2002 resulted in a Co-Chairs Statement by Australia and Indonesia that recognises the necessity for international support and assistance to countries producing and hosting "large refugee populations"<sup>40</sup> and this seems in line with the global trend for international refugee protection. In a more direct reference, the statement linked issues of migration and asylum by stating that:

"Ministers, while acknowledging that the conference had not been convened to deal directly with the issue of refugees, affirmed that nothing in this statement was intended to prejudice the legitimate rights of genuine refugees to seek and enjoy asylum in accordance with relevant . . . Conventions and Protocols. They called for effective measures to be put in place to ensure that protection is provided, consistent with the international obligations of individual States, while preventing abuse by people smugglers of the relevant UN Conventions on refugee protection. Ministers noted that all countries, including origin, transit and potential destination, should play a part in finding solutions for refugees, while providing for return in a humane manner for those found not to be refugees. In certain circumstances, for return to be sustainable, the issue of return would require international support and cooperation."<sup>41</sup>

Up to 2008, the flows drastically decreased until 2009 when the numbers skyrocketed,<sup>42</sup> heightening the tension about refugees in the region.<sup>43</sup> In April 2009, Australia and Indonesia, together with other regions' governments, attended the Third Bali Regional Ministerial

<sup>36</sup> Susan Kneebone, "The Governance of Labor Migration in Southeast Asia," *Global Governance: A Review of Multilateralism and International Organizations* 16, no. 3 (2010): 383–96, 389–390, <https://doi.org/https://doi.org/10.1163/19426720-01603007>.

<sup>37</sup> Bangkok Declaration on Irregular Migration 1999.

<sup>38</sup> Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012), 91–98.

<sup>39</sup> Susan Kneebone, "The Pacific Plan: The Provision of 'Effective Protection'?" *International Journal of Refugee Law* 18, no. 3–4 (2006): 696–721, 696–698, <https://doi.org/10.1093/ijrl/eel022>.

<sup>40</sup> "Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime: Co-Chairs' Statement, 2002," accessed 30 November 2021, paragraph 21, [https://www.mofa.go.jp/policy/i\\_crime/people/conf0202.html](https://www.mofa.go.jp/policy/i_crime/people/conf0202.html).

<sup>41</sup> "Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, paragraph 26.

<sup>42</sup> The increased numbers were contributed by the conflicts that occurred in Sri Lanka and Pakistan, and the asylum seekers were trying to reach Australia via Indonesia. Kneebone, "Migration Control at Sea: The Australian Case", 355.

<sup>43</sup> Kneebone, "The Bali Process and Global Refugee Policy in the Asia-Pacific Region", 601.

Conference (BRMC) and re-confirmed their commitment to the Bali Process to tackle forced migration within the region.<sup>44</sup>

In addition to those who were coming from Sri Lanka and Pakistan, the Rohingya were also fleeing persecution from Myanmar.<sup>45</sup> Since December 2008, Rohingya people had been forcibly denied entrance and abandoned in international waters by the Thai security forces,<sup>46</sup> and about another two million asylum seekers sought shelter in surrounding countries such as Thailand, Malaysia, Indonesia, and India.<sup>47</sup>

ASEAN as a regional organisation remained relatively passive in responding to this new asylum seekers flow. However, the Bali Process was finally reconvened in March 2016 to formulate an "urgent and collective response" in the form of a new Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Declaration).<sup>48</sup> In the lead up to this meeting, several commentators urged the Bali Process to "step up" to the challenge of regional refugee protection.<sup>49</sup> However, the focus of the 2016 Declaration is upon "transnational organised crime." For example, it is ingeniously stated in paragraph 2, "The decline in irregular movement of persons in these waters in the second half of 2015, [is] attributable to the resolute actions by affected countries to disrupt smuggling networks, among other factors."<sup>50</sup>

Although the 2016 Declaration recognises the need "to identify and provide safety and protection" and to "address the root causes," the focus of the measures is on "irregular migrants" and "mixed migratory movements."<sup>51</sup> The concrete measures suggested are to "enhance safe and orderly migration pathways, including for migrant workers," but for refugees, the states are merely encouraged to "explore potential temporary protection and local stay arrangements for asylum seekers and refugees, subject to domestic laws and policies of member states."<sup>52</sup> In this respect, the declaration acknowledges "the need for adequate access to irregular migrants wherever they are, by humanitarian providers especially the UNHCR and the IOM, as appropriate"<sup>53</sup>

The declaration was badged as Australia's initiative "to counter this terrible trade in human

<sup>44</sup> Kneebone, "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia", 35.

<sup>45</sup> Nehginpao Kipgen, "The Rohingya Crisis: The Centrality of Identity and Citizenship," *Journal of Muslim Minority Affairs* 39, no. 1 (2019): 61–74, <https://doi.org/10.1080/13602004.2019.1575019>.

<sup>46</sup> Madeline Gleeson, "Unprecedented but Unfulfilled: Refugee Protection and Regional Responses to the Andaman Sea 'Crisis,'" *Antropologi Indonesia* 38, no. 1 (2017): 6–20, <https://doi.org/10.7454/ai.v38i1.8747>.

<sup>47</sup> Kneebone, "The Bali Process and Global Refugee Policy in the Asia-Pacific Region", 601.

<sup>48</sup> "Bali Declaration on People Smuggling Trafficking in Persons and Related Transnational Crime, 'The Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (23 March 2016)," accessed 10 November 2021, [https://www.baliprocess.net/UserFiles/baliprocess/File/Bali Declaration on People Smuggling Trafficking in Persons and Related Transnational Crime 2016 \(1\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/Bali%20Declaration%20on%20People%20Smuggling%20Trafficking%20in%20Persons%20and%20Related%20Transnational%20Crime%202016%20(1).pdf).

<sup>49</sup> Sriprapha Petcharamesree et al., "The Bali Process Can Do a Lot More to Respond to Forced Migration in Our Region," *The Conversation*, accessed 11 December 2020, <https://theconversation.com/the-bali-process-can-do-a-lot-more-to-respond-to-forced-migration-in-our-region-56213>.

<sup>50</sup> "Bali Declaration on People Smuggling Trafficking in Persons and Related Transnational Crime, 'The Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (23 March 2016).", paragraph 2.

<sup>51</sup> Bali Declaration on People Smuggling Trafficking in Persons and Related Transnational Crime. paragraph 5.

<sup>52</sup> Bali Declaration on People Smuggling Trafficking in Persons and Related Transnational Crime. paragraph 6.

<sup>53</sup> Bali Declaration on People Smuggling Trafficking in Persons and Related Transnational Crime.



beings.”<sup>54</sup> But Indonesia's reaction to it shows the gap between the two countries. One consequence of Australian policies is the increase in asylum seekers in Indonesia in need of resettlement in third countries. In commenting on the Declaration, Indonesian Foreign Minister Retno Marsudi called for countries to assist with the resettlement of the more than 13,000 refugees and asylum seekers registered with the UNHCR in Indonesia. She said, "Of course, there is hope from Indonesia not only to Australia but to every country to be more receptive to these migrants who have been waiting for resettlement".<sup>55</sup> But the declaration makes no reference to resettlement outcomes.

### **Australia's Policies in the Period of Bali Process: 2001-Present**

In preventing asylum seekers from arriving in Australian waters and further processing within Australian jurisdiction, Australia concluded several bilateral treaties with Pacific countries in the region. Such initiatives were called the "Pacific strategies". However, some scholars termed it as Australia's externalised border control via the positioning of airline liaison officers (ALOs)<sup>56</sup> in Southeast Asia and provision of Australian Federal Police (AFP) training on people smuggling.<sup>57</sup>

In the aftermath of the MV Tampa incident,<sup>58</sup> Australia operated the Pacific Solution I policy in 2001-2008, which was directed to asylum seekers who made "secondary movement" from transit countries such as Indonesia. In this context, Australia and Indonesia tried to establish a cooperation agreement that was then formalised as the Regional Cooperation Arrangement (RCA) at the Bali Process meeting. This agreement involved two non-state actors, the UNHCR and the IOM. Under this agreement, the UNHCR<sup>59</sup> and the IOM agreed to take the necessary steps to process asylum seekers applications within Indonesian jurisdictions and Australia's commitment to supporting IOM's work in Indonesia. As a transit state, Indonesia committed to intercepting and detaining all irregular migrants intending to go to Australia.<sup>60</sup>

Despite Indonesia's open policy for the incoming transiting asylum seekers, the placement of these irregular migrants was mostly detention in several facilities in Indonesia, funded by

<sup>54</sup> Jewel Topsfield, "Migrant Crisis: Australia to Launch Anti-Human Trafficking and Slavery Strategy," Sydney Morning Herald, accessed 11 November, 2020, <http://www.smh.com.au/world/migrant-crisis/migrant-crisis-australia-to-launch-antihumantrafficking-and-slavery-strategy-20160321-gnnm3i.html>.

<sup>55</sup> Topsfield.

<sup>56</sup> Kneebone, "Migration Control at Sea: The Australian Case", 349.

<sup>57</sup> Susan Kneebone and Sharon Pickering, "Australia, Indonesia and the Pacific Plan," in *New Regionalism and Asylum Seekers*, ed. Susan Kneebone and Felicity Rawlings-Sanaei (United States: Berghahn Books, 2007), 167-87, 178.

<sup>58</sup> The event was the arrival of a Norwegian registered container ship, the MV *Tampa*, in Australian waters with a cargo of 433 asylum seekers in transit from Indonesia. The Pacific Solution was arguably made to respond to the spike in arrivals of boat people from Indonesia. Far from being a spontaneous gesture, the creation of the Pacific Solution was a response to a spike in boat arrivals from Indonesia in the eighteen months leading up to early 2001. The majority of these arrivals were part of the "Afghan diaspora" of 2001, when an estimated 900,000 people fled Afghanistan. Kneebone, "Migration Control at Sea: The Australian Case", 356-360.

<sup>59</sup> The specific presence of the UNHCR in this arrangement was due to the fact that Indonesia is not a party to the 1951 Refugee Convention. Arie Afriansyah and Eva Achjani Zulfa, "Refugees Resettlement: A Review of Indonesian Laws and Practices," *Indonesia Law Review* 8, no. 2 (2018): 203-20, 212.

<sup>60</sup> Kneebone, "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia", 32.

Australia via the IOM.<sup>61</sup> In addition to this policy, Indonesia agreed to Australia via implementing the Enhanced Cekal System (ECS) – a system set up to help Indonesian border officers "detect the movement of terrorists and other transnational criminals".<sup>62</sup> Further, Australia committed itself to improve Indonesia's capacity<sup>63</sup> to enhance its border officials and legal system specifically, to "deal with illegal immigration in areas such as border management, visa systems and the verification of identity and nationality."<sup>64</sup>

In the period of 2008-2013, Australia's behaviour towards regional management of the incoming asylum seekers was even firmer.<sup>65</sup> With the creation of Operation Sovereign Borders (OSB), Australia implemented a unilateral response to further prevent incoming asylum seekers by "stopping the boats" outside its maritime zones with military forces.<sup>66</sup> Another example of this practice was that Australian officials paid Indonesian fishermen at sea to bring the asylum seekers back to the Indonesian shore.<sup>67</sup> This policy has been accused of violating international law and aroused anger from the international community, including Indonesia.<sup>68</sup>

Unfortunately, the Thai Government followed Australia's harmful practice in pushing back the asylum seekers from Myanmar.<sup>69</sup> This has triggered concern from the ASEAN community. Trying to find a solution to the Rohingya tension within ASEAN, Indonesia conducted a Special Conference on Addressing Irregular Movement of People outside the Bali Process with the UNHCR in 2013.<sup>70</sup> In this conference, the UNHCR was deeply troubled by the regional deterrence and pushback practices, which were modelled on Australian policies. The conference ended with adopting the Jakarta Declaration on Addressing Irregular Movement of Persons, pledging

<sup>61</sup> Amy Nethery, Brynna Rafferty-Brown, and Savitri Taylor, "Exporting Detention: Australia-Funded Immigration Detention in Indonesia," *Journal of Refugee Studies* 26, no. 1 (2013): 88–109, 95–97, <https://doi.org/10.1093/jrs/fes027>.

<sup>62</sup> Australian Government Department of Immigration and Citizenship, "Annual Report: 2006-7," accessed 11 October 2021, <http://www.border.gov.au/ReportsandPublications/Documents/annualreports/annual-report-2006-07-complete.pdf>.

<sup>63</sup> Kneebone, "The Bali Process and Global Refugee Policy in the Asia-Pacific Region", 596-618.

<sup>64</sup> Millar Caroline, "Bali Process': Building Regional Cooperation to Combat People Smuggling and Trafficking in Persons," Institute for the Study of Global Movements, Monash University (29 July 2004), accessed 11 August 2021, <http://dfat.gov.au/news/speeches/Pages/bali-process-buildingregional-cooperation-to-combat-people-smuggling-andtrafficking-in-persons.aspx>.

<sup>65</sup> Danuta Kozaki, "Abbott Says Australians 'sick of Being Lectured by UN' after Scathing Report on Asylum Policies," ABC News (9 March 2015), accessed 11 August 2021, <http://www.abc.net.au/news/2015-03-09/tony-abbott-hits-out-united-nationsasylum-report/6289892>.

<sup>66</sup> See Natalie Klein, "Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants," *Melbourne Journal of International Law* 15, no. 2 (2014): 414–43.

<sup>67</sup> Amnesty International, "By Hook or By Crook Australia's Abuse of Asylum-Seekers at Sea," Amnesty International (28 October 2015), accessed 12 August 2021, <https://www.amnesty.org/en/documents/ASA12/2576/2015/en/>. In November 2013, Indonesia suspended cooperation on migrant smuggling with Australia as a response to this event. Melissa Curley and Kahlia Vandyk, "The Securitisation of Migrant Smuggling in Australia and Its Consequences for the Bali Process," *Australian Journal of International Affairs* 71, no. 1 (2017): 42–69, 58.

<sup>68</sup> Klein, "Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants", 413-414.

<sup>69</sup> Kneebone, "Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs", 153-172.

<sup>70</sup> Kneebone, "The Bali Process and Global Refugee Policy in the Asia-Pacific Region", 601.

countries of origin, transit, and destination, to work together to address irregular migration.<sup>71</sup>

Because of the OSB policy, increased detention of asylum seekers occurred in Indonesia alongside the supporting work of the IOM, which was also increased. Nevertheless, Australia is still committed to funding the IOM and boosting its funding. However, the UNHCR needs to work harder since it is responsible for the increasing numbers of refugees that remain in Indonesia because of the 2014 Australian policy not to resettle asylum seekers who made their way via Indonesia. Thus, UNHCR struggles with the demand of processing claims and the waiting times of the resettlement.<sup>72</sup>

As the latest development, Australia responded with a mixed gesture on Indonesia's national policy in managing asylum seekers. As discussed further below, Australia seems to think that it does not have to share its commitment to Indonesia, which has shown significant implementation of the commitment to protect asylum seekers. Despite Indonesia's national policy, the burden was even more enormous when Australia changed its policy by only supporting rescued asylum seekers who have experienced trauma while travelling over land or at sea. Unfortunately, such a policy shift dismisses the spirit of burden-sharing in protecting that fleeing persecution.

## **Indonesian Legal Policies as Response to Asylum Seekers and Refugees**

### ***Indonesia's Efforts in Managing Asylum Seekers and Refugees***

As stated previously, approximately 13,840 individuals are waiting in Indonesia while seeking asylum and refugee settlement in other states. The total number consists of 4,045 asylum seekers and 9,795 refugees.<sup>73</sup> In Indonesia, they stay in different residences or shelters. According to the Indonesian Directorate General of Immigration, 1,446 people are living in immigration detention centres;<sup>74</sup> 4,941 people live in community houses; 1,853 people live in temporary shelters; 5,579 people live independently, and one person is under the custody of the directorate general of immigration.<sup>75</sup> The Government of Indonesia is only responsible for those who are living in the immigration detention centres and within its institution.<sup>76</sup> Those who are living in temporary shelters and community houses come under the support of IOM. Those who live independently do not get any support from any party as they came to Indonesia legally but thereafter declare themselves asylum seekers.

To support the life of these people, the Indonesian government cooperates with the UNHCR and IOM to process the refugee status determination (RSD) and provide assistance of logistical

<sup>71</sup> United Nations High Commissioner for Refugees (UNHCR), "Jakarta Declaration on Addressing Irregular Movement of Persons," UNHCR (20 August 2013), accessed 10 August 2021, <http://www.unhcr.org/5214ae709.pdf>.

<sup>72</sup> Kneebone, "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia", 34. Statistically speaking, only one per cent of the refugees around the world are able to be resettled in the third safe country. Jane McAdam and Fiona Chong, *Why Seeking Asylum Is Legal and Australia's Policies Are Not* (Sydney: UNSW Press, 2014), 153.

<sup>73</sup> UNHCR Jakarta Office, "Monthly Report (January 2018)" (Jakarta, 2018).

<sup>74</sup> As of January 2018, eight out of 13 Indonesian immigration detention centres are over-capacity. Directorate General of Immigration, "Report of the Directorate General of Immigration (January 2018)," 2018.

<sup>75</sup> Directorate General of Immigration.

<sup>76</sup> Despite living in Indonesian immigration detention centres, IOM and other international organisations fulfil logistical needs such as foods, health facilities, and other relevant procurement for asylum seekers and refugees. Article 15, Director General of Immigration Regulation No. 0352.GR.02.07/2016.

support. These logistical supports are essential as they are meant to stay in Indonesia temporarily, and they are subject to some limitations, such as a prohibition from legally engaging in employment. Therefore, since the refugee status determination and resettlement process follows a non-determinate period,<sup>77</sup> they may end up becoming self-reliant during their stay in Indonesia.<sup>78</sup> Under the current policy, there is no available right to work for asylum seekers and refugees. The Presidential Regulation only covers residential administration in Indonesia without addressing the wider issues of how immigrants can become self-reliant by gaining employment. It reaffirms the coordination and facilitation with the UNHCR and the IOM.<sup>79</sup> Asylum seekers and refugees are very much dependent on the assistance provided by UNHCR, IOM and other volunteering agencies. Moreover, those categorised as independent asylum seekers who live among Indonesian society may eventually run out of their savings as they cannot legally work. Notably, those who have already been granted refugees status receive a monthly stipend of approximately 1.3 million Indonesian Rupiah or around 100 US dollars.<sup>80</sup> Whereas asylum seekers receive no assistance except in particular circumstances, volunteer organisations, such as Jesuit Refugee Service Indonesia, may provide the funds.<sup>81</sup> Nevertheless, this financial assistance is not sustainable as it may not keep up with the growth of inflation and become dependent on the contributions of concerned states such as Australia.

Socially, the support offered to asylum seekers and refugees in Indonesia may create social jealousy from the Indonesian community. Based on the official report of the Indonesian Statistical Central Agency (*Badan Pusat Statistik/BPS*), as of September 2017, there are still around 26,5 million Indonesians living under the poverty line.<sup>82</sup> Knowing financial assistance is given to asylum seekers and refugees without a job has created damaging myths among the Indonesian population, especially the poor and those living in the surrounding areas where asylum seekers and refugees stay.<sup>83</sup> In addition, this “generous” financial aid coming from UNHCR and IOM has been criticised as a pull factor for those trying to make a journey to Australia and New Zealand through Indonesia.<sup>84</sup>

<sup>77</sup> Tom Brown and Antje Missbach, “The Boats May Have ‘Stopped’, but More Refugees Are Stuck in Limbo in Indonesia,” *The Conversation*, 2016, <https://theconversation.com/the-boats-may-have-stopped-but-more-refugees-are-stuck-in-limbo-in-indonesia-56152>.

<sup>78</sup> Adiputera and Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia*, 3.

<sup>79</sup> Indonesia, Presidential Regulation No. 125 on Management of Foreign Refugees, Article 26.

<sup>80</sup> It was acknowledged that this amount is enough to fulfil basic needs to live decently, but UNHCR does not have the capacity to increase it. Church World Service, *Accessing Services in the City: The Significance of Urban Refugee-Host Relations in Cameroon, Indonesia and Pakistan* (Church World Service, 2013), 20.

<sup>81</sup> Linda Ruth Briskman and Lucy Imogen Fiske, “Asylum Seekers and Refugees in Indonesia: Problems and Potentials,” *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 8, no. 2 (2016): 22–42, 27, <https://doi.org/10.5130/ccs.v8i2.4883>.

<sup>82</sup> Central Agency of Statistics (Badan Pusat Statistik/BPS), “Persentase Penduduk Miskin September 2017 Mencapai 10,12 Persen (Percentage of Poor People in September 2017 Amount to 10,12 Per Cent),” *Badan Pusat Statistik/Central Bureau of Statistics* (2 January 2018), accessed August 10, 2021, <https://www.bps.go.id/pressrelease/2018/01/02/1413/persentase-penduduk-miskin-september-2017-mencapai-10-12-persen.html>.

<sup>83</sup> Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 100.

<sup>84</sup> Japanton Sitohang, “Masalah Imigrasi Illegal: Dari Dan Melalui Indonesia’ (Illegal Immigration Issues: From and through Indonesia),” in *Indonesia Dalam Strategi Keamanan Australia: Persoalan Migrasi Illegal*

The day-to-day situation in Indonesia is not getting any better. This is because people from conflict-prone countries continue to come to Indonesia despite actually wishing to go to Australia or any other third, safe country. In addition, refugee-receiving countries tend to harshly limit or stop their quotas due to the populism promise campaign. The harsh Australian policy has impacted Indonesia towards asylum seekers for too long now. Since 2013, the policy of "Operation Sovereign Borders" (OSB) has had a significant result in stopping asylum seekers from going to Australia. With this military-led operation, boats that were bringing asylum seekers to Australia were intercepted and pushed back to the place from where they originated, such as Indonesia.<sup>85</sup> This interception was committed outside Australia's maritime jurisdictional zones, arguably avoiding a violation of non-refoulement. In addition, offshore detention centres in Nauru and Papua New Guinea were extended to ensure that more status determination is not conducted on Australia's soil.<sup>86</sup>

There was a significant recent development soon after the enactment of Presidential Regulation 125/2016. Australia saw the new policy adopted by Indonesia as a blessing in reducing its burden to support Indonesia in "offshore" processing before reaching Australia. Considering Indonesia has a better national policy for asylum seekers and refugees, including financial commitment, Australia reduced its contribution to support independent asylum seekers coming to Indonesia on 15 March 2018. Australia argued that these people were unnecessarily benefiting from Australia's commitment under Regional Cooperation Agreement to stay in Indonesia by waiting for the status processing. However, support is still available for those who are intercepted at sea by Indonesian authorities through UNHCR and IOM.<sup>87</sup> Australia focused instead on the program of "Assisted Voluntary Return" (AVR) and resettlement to other safe third states.<sup>88</sup>

As a response, Indonesia's Directorate General issued a Circular Letter to all regional immigration offices throughout Indonesia principally requesting: (1) to coordinate and disseminate further with the Indonesian police and local government about this new Australian policy; (2) to refuse new incoming independent asylum seekers who submit themselves to the immigration office by explaining the new Australia's policy; (3) to direct these new independent asylum seekers to go to UNHCR or IOM offices to be processed for AVR; and (4) to recollect data of asylum seekers and refugees from IOM and UNHCR to certify which ones are not eligible for support.<sup>89</sup>

It can be argued that refusing and directing to IOM and UNHCR will not reduce Indonesia's burden in handling asylum seekers, as they will eventually stay in Indonesia. Even though these

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(*Indonesia in Australia's Security Strategy: Illegal Migrants Issues*), ed. M. R. Muna (Jakarta: Pusat Penelitian Politik, 2002), 55.

<sup>85</sup> Michael Bachelard, "Vomitous and Terrifying: The Lifeboats Used to Turn Back Asylum Seekers," *Sydney Morning Herald* (2 March 2014), accessed 10 August 2021, <https://www.smh.com.au/national/vomitous-and-terrifying-the-lifeboats-used-to-turn-back-asylum-seekers-20140301-33t6s.html>.

<sup>86</sup> Briskman and Fiske, "Asylum Seekers and Refugees in Indonesia: Problems and Potentials", 28-29.

<sup>87</sup> Australian funds both UNHCR and IOM, but a significant portion is given to the latter. Kneebone, "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia", 34.

<sup>88</sup> Australia's Department of Home Affairs, "Letter to Indonesian Immigration Director-General", 7 March 2018. File on Author.

<sup>89</sup> Circular Letter of the Immigration Director General No. IMI-GR.02.03-1910, "Perubahan Kebijakan Penanganan Pencari Suaka dan Pengungsi oleh IOM" (Changes of Policy on the Handling of Asylum Seekers and Refugees by IOM), 30 April 2018. File on Author.

people agree to do AVR, such a process still requires some time in Indonesia. IOM itself will have so much difficulties in organising all the asylum seekers and refugees. Therefore, Australia's decision to remove some of its support will increase the burden upon Indonesia and its people.

### ***Indonesia's National Law and Policies***

Until the end of 2016, arguably, Indonesia did not have a comprehensive national regulation in managing asylum seekers and refugees who needed protection under international law. This can be seen from the fact that Indonesia was not a party to both the Refugee Convention 1951 and the Optional Protocol 1967. In addition, Indonesia realised that it is not a destination country for these asylum seekers and refugees. Starting in 2017, Indonesia enacted a national regulation at the level of Presidential Regulations to manage foreign refugees while residing in Indonesia temporarily. Unfortunately, this article highlights that such regulation is not solving the problem of how Indonesia shares its burden in managing the costs and efforts in handling asylum seekers and refugees in Indonesia.

### **National Law and Policy Prior 2016**

#### ***General Protection Under Human Rights***

The importance of the protection and fulfilment of human rights in Indonesia can be traced from the Constitution of the Republic of Indonesia Year 1945 (the "Constitution NRI 1945). The section on human rights in the Constitution NRI 1945 using the phrase "any person" which means NRI 1945 Constitution do not discriminate who is entitled to protection. Do not discriminate does not mean blind protection, but there are restrictions set forth in the 1945 Constitution.<sup>90</sup>

Related to the presence of refugees in Indonesia, new provisions in the 1945 Constitution protect their existence, including Article 28A of the 1945 Constitution that guarantees that every person has the right to life.<sup>91</sup> Furthermore, Article 28G (1) also guarantees the protection of private and family. Then, Article 28D states that every person has the right to security, protection and legal certainty. Furthermore, Article 28 paragraph (1) states that the rights mentioned above, the right to life and indirectly, the right to a guaranteed personal dignity and family before the law with recognised standing before the law are rights that cannot be restricted under any circumstances.

Another human rights provision is Law No. 39 the Year 1999 on Human Rights (Law 39/1999). Article 2 of the Law states that Indonesia recognises and upholds human rights and human freedoms. However, in view of this article, we also need to refer to the provisions of Article 67 of the Law, which states that anyone who is in the territory of the Republic of Indonesia must comply with the legislation, the unwritten laws, and international law on human rights that the Republic of Indonesia has accepted.

Aside from the regulations mentioned earlier, there is also the Decision of the Indonesian People's Consultative Assembly (*Ketetapan MPR*) No. XVIII/MPR/1998 on Human Rights ("TAP MPR No. XVIII/MPR/1998"). Article 2 of the TAP MPR No. XVIII/MPR contains

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<sup>90</sup> Indonesia Constitution (1945), Article 28-I.

<sup>91</sup> Indonesia Constitution. Article 28-A

provisions that emphasise the importance to ratify the various instruments of the United Nations on Human Rights, as long as such instruments are not contrary to Pancasila and the 1945 Constitution. Further, Article 5 of TAP MPR No. XVIII/MPR declare the Human Rights Charter as a reference in drafting the human rights bill. Thus, it can be seen that Indonesia had always paid attention to international legal instruments on human rights, not merely referring to the national desire to help asylum seekers.

Suppose Indonesia's commitment is associated with the presence of refugees in Indonesia. In that case, the refugees have rights guaranteed in international legal instruments and in national laws ranging from the 1945 Constitution and other legislation. Consequently, refugees residing in the Republic of Indonesia should have proper access to an enabling mechanism for turning those written rights into daily practice.

### *Specific Policies on Asylum Seekers and Refugees*

Initially, Indonesia regulated the management of asylum seekers and refugees as embodied in the Circular Letter of the Prime Minister (Ali Sastroamidjojo) No. 11/RI/1956 of 7 September 1956 on Protection of Political Fugitives (*Perlindungan Pelarian Politik*).<sup>92</sup> However, there was no mass influx of people escaping from persecution at that time. Instead, in that period, newly emerging states were not politically stable, and there are some occasions where someone escaping from his/her country is due to political views.<sup>93</sup> Being an administrative instrument, this Circular Letter has several essential protection principles. First, "political refugees" is protected on the grounds of "human rights and fundamental freedom in accordance with international customary law".<sup>94</sup> Second, it defines a political refugee as a non-Indonesian citizen who commits a political crime against his/her original country, and this crime may be committed outside or within Indonesian territory.<sup>95</sup> Third, The Letter excludes acts that do not have political motives.<sup>96</sup> Such a clause implies that ordinary criminals are not eligible for protection and may be categorised as an "Exclusion Clause" under the Statute of the Office of the United Nations High Commissioner for Refugees<sup>97</sup> and the Refugee Convention.<sup>98</sup> Finally, the letter eventually excludes political fugitives from protection if his/her action is contrary to Indonesia's national interests, such as crime against humanity, crime against the state's order, or the crime is directed against a religion that exists and is legally recognised in Indonesia.<sup>99</sup>

<sup>92</sup> Enny Soeprapto, "Promotion of Refugee Law in Indonesia," *Indonesian Journal of International Law* 2, no. 1 (2004): 57–66, 58, <https://doi.org/10.17304/ijil.vol2.1.3>.

<sup>93</sup> Bhatara Ibnu Reza, "Challenges and Opportunities in Respecting International Refugee Law in Indonesia," in *Protection of Refugees and Displaced Persons in the Asia Pacific Region*, ed. Angus Francis and Rowena Maguire (Ashgate, 2013), 117–39, 123.

<sup>94</sup> Indonesia, "Circular Letter of the Indonesian Prime Minister" (1956), Article 1.

<sup>95</sup> Circular Letter of the Indonesian Prime Minister. Article 2.

<sup>96</sup> Circular Letter of the Indonesian Prime Minister. Article 3.

<sup>97</sup> United Nations, "Statute of the Office of the United Nations High Commission for Refugees, 4 December 1950, A/RES/428(V)" (UN General Assembly, 1950), paragraph 7(d).

<sup>98</sup> United Nations, "Convention Relating to the Status of Refugees," Article 1(F)(b).

<sup>99</sup> Indonesia, Circular Letter of the Indonesian Prime Minister, Article 4.

Indonesia, then in 1975, faced the mass influx of asylum seekers from Indochina.<sup>100</sup> In responding to this situation, Indonesia issued Presidential Decision No. 38 the Year 1979 on Coordination of a Solution for the Problems on Vietnamese Refugees. This instrument was created to coordinate tasks among the relevant ministries in managing the arrival and management of "boat people" in Indonesia: Ministry of State Defence, the Ministry of Foreign Affairs and the Ministry of Internal Affairs. Under this policy, Indonesia would not grant the refugees settlement, as it is not a party to the Refugee Convention. However, Indonesia allowed entry for these asylum seekers for a temporary period until the international community, through the UNHCR, made final repatriation or resettlement.<sup>101</sup> Therefore, Indonesia also allowed UNHCR access, signing an agreement according to which the agency could conduct registration and refugee status determination.<sup>102</sup> The Indonesian government provided an island (*Galang* Island) as a temporary place for around 10,000 Indochina asylum seekers. Located in the Riau Archipelago, it allowed easy access for the local government while preventing interaction between the local population and the asylum seekers.<sup>103</sup>

Since asylum seekers come from outside Indonesia and are not Indonesian citizens initially, Indonesia considers such issues to fall under its immigration laws. Indonesia first enacted its immigration law in 1992, but it was later replaced by Law No. 6 Year 2011 on immigration. Those coming to Indonesia without proper or valid travel documents were confronted with immigration sanctions and subject to immigration detention.<sup>104</sup> Article 1 paragraph 1 of this law defines immigration as things or happenings regarding traffic of people entering or leaving Indonesian territory and its geographical overview to safeguard the enforcement of state sovereignty Indonesia. Referring to this definition, the influx of asylum seekers to Indonesia or discharge of refugees to be placed in a third country can be constructed as matters of immigration. It also includes supervision of asylum seekers and refugees awaiting placement in a third country.

Under Law 6/2011, the refugees<sup>105</sup> can be classified as Alien. According to Article 1 point 9 of Law No. 6 In 2011, an Alien is a person who is not a citizen of Indonesia. Since an Alien is not a citizen of Indonesia, when they get into the territory of Indonesia, they are required to have a valid visa and a valid or another travel document.<sup>106</sup> If these rules are violated, they will be placed in the detention centre.<sup>107</sup> However, the law does not mention a specific response specifically to refugees. It only regulates the handling of victims of human trafficking and human smuggling who are exempt from immigration administrative action.<sup>108</sup>

<sup>100</sup> Soeprapto, "Promotion of Refugee Law in Indonesia", 61.

<sup>101</sup> Reza, "Challenges and Opportunities in Respecting International Refugee Law in Indonesia", 125.

<sup>102</sup> "Agreement between the Government of the Republic of Indonesia and the United Nations High Commissioner for Refugees Regarding the Establishment of the Office of the UNHCR Representative for Indonesia (15 June 1979)." (n.d.).

<sup>103</sup> Antje Missbach, "Waiting on the Islands of 'Stuckedness'. Managing Asylum Seekers in Island Detention Camps in Indonesia from the Late 1970s to the Early 2000s.," *ASEAS - Austrian Journal of South-East Asian Studies* 6, no. 2 (2013): 281–306, 288.

<sup>104</sup> Indonesia, "Law No. 6 of 2011 on Immigration" (2011), Article 83(1)(b).

<sup>105</sup> Refugees do not include internally displaced persons.

<sup>106</sup> Indonesia, Law No. 6 of 2011 on Immigration, Article 8(2).

<sup>107</sup> Law No. 6 of 2011 on Immigration. Article 81.

<sup>108</sup> Law No. 6 of 2011 on Immigration. Article 75.



As the institution responsible for Immigration affairs under the Ministry of Legal Affairs and Human Rights, the Director-General of Immigration from the Ministry of Legal Affairs and Human Rights in 2010 issued an Internal Regulation (*Peraturan Direktur Jenderal Imigrasi* No. IMI-1489.UM.08.05/ *Perdirjen Imigrasi* 2010) that applied nationally on the Management of the Illegal Immigrant (*Penanganan Illegal Imigran*). Under this regulation, asylum seekers coming to Indonesia are categorised as "illegal immigrant", but once they get an "attestation letter" and are granted the status of refugee from the office of UNHCR, they are allowed to stay temporarily in Indonesia.<sup>109</sup> This instrument also ensures that the Government of Indonesia will not be responsible for supporting the logistical needs of asylum seekers and refugees who are under the UNHCR's protection.<sup>110</sup>

In April 2016, the Director-General of Immigration replaced its 2010 Regulation with a more specific policy in managing asylum seekers and refugees under Indonesian Immigration Law. In its Regulation No. 0352. GR.02.07/2016 on the Handling of Illegal Immigrants Declaring to be Asylum Seeker or Refugee, Indonesia tries to manage the presence of asylum seekers in Indonesia in a more intricate arrangement, including the division of responsibilities between the Directorate General of Immigration, UNHCR and IOM. With this regulation, the cooperation, which has been conducted between the three institutions, is formalised in a legal instrument. Again, it is essential to note that such an instrument only applies within the Ministry of Legal Affairs and Human Rights. Since the management of asylum seekers and refugees is crosscutting areas of responsibility, this regulation only works in segmented institutions.

In 1999, Indonesia introduced a national law that mentions specifically the handling of asylum seekers and refugees in Indonesia, Law No. 37 Year 1999 on Foreign Relations (Law 37/1999). Article 25 states that "the authority to grant asylum to foreigners vested in the President by considering the Minister". Then, Article 26 regulates that "granting asylum to foreigners carried out under national legislation and with due regard to the laws, customs and international practice". Then, in relation to refugees, Article 27 states, "the President sets policy for refugee management from abroad by taking into consideration the Minister's opinion". The minister referred to here is the Indonesian Minister of Foreign Affairs. From the last provision, Indonesia has a plan to make a national policy in managing asylum seekers and refugees in Indonesia. Unfortunately, it was not until 16 years later that such a policy was enacted. Such legal policy will be discussed in the following section.

### ***Presidential Regulation No. 125 Year 2016***

In December 2016, the Government of Indonesia finally enacted a national regulation specifically on the management of asylum seekers and refugees.<sup>111</sup> Under Presidential Regulation No. 125 Year 2016,<sup>112</sup> the coordinating minister nationally coordinates the handling management for

<sup>109</sup> Indonesia, "Director General on Immigration Regulation No. IMI-1489.UM.08.05" (2010), Articles 1-5.

<sup>110</sup> Director General on Immigration Regulation No. IMI-1489.UM.08.05. Article 6.

<sup>111</sup> The enactment of this regulation is argued to become the implementation of Indonesia's commitment to the Bali Declaration 2016.

<sup>112</sup> Indonesia, Presidential Regulation No. 125 on Management of Foreign Refugees. The unofficial translation of the law can be found on <http://www.refworld.org/pdfid/58aeee374.pdf>.

Political, Legal and Security. Such management will be implemented across government institutions and divided into some stages or events: the rescue/discovery, the placement/sheltering, the security, and the immigration monitoring/control.

In the event of discovering or rescuing asylum seekers at sea, the Indonesian Search and Rescue Agency (*Basarnas*) becomes the coordinator actor.<sup>113</sup> If the rescue is on land, the Indonesian Police (POLRI) will be the ones that have the primary responsibility. Soon after the rescue, those asylum seekers should be placed in the closest immigration detention centre for further process.<sup>114</sup> In terms of finding shelters for these asylum seekers, in the case of mass influx and limited space of immigration detention centres, the local government is mandated to provide such temporary shelter(s).<sup>115</sup> This is because the local government has the authority to assign public space(s) for a particular purpose. Those whose application is rejected by the UNHCR will be placed in the immigration detention centre and deported according to the current regulations.<sup>116</sup> The Indonesian Police is authorised to ensure the security of the asylum seekers and refugees during their stay in Indonesia. Such security will not only be for asylum seekers and refugees but also for the people of Indonesia.<sup>117</sup> In order to monitor all of the asylum seekers and refugees, the directorate general of immigration has the primary responsibility and coordination for all relevant institutions.<sup>118</sup> Finally, in this regulation, the Government of Indonesia is committed to providing a national budget for managing asylum seekers and refugees through those relevant institutions.<sup>119</sup>

This Presidential Regulation is arguably a breakthrough in handling asylum seekers and refugees in Indonesia. The critical point of this regulation is the state's recognition of asylum seekers and refugee status, which has only been done through circulars imposed by the Directorate General of Immigration previously. With this recognition, the status of asylum seekers and refugees is applicable across institutions under the Government of Indonesia. In other words, this policy is more comprehensive handling of asylum seekers and refugees. In contrast to refugee handling in earlier eras, this policy focuses on the smuggling aspect of human displacement and covers aspects of discovery, shelter, security, and immigration control.

It is critical to note that, despite positive development in formalising the government's recognition of asylum seekers and refugees in Indonesia, the real impact of the regulation may not be seen until at least two years of implementation.<sup>120</sup> During 2017 and 2018, the government has still been occupied with disseminating the regulation to relevant ministries, agencies, and local governments. In addition, relevant ministries seem to have difficulties designing a proposal of the national budget since some of them are new in the involvement of the issues of asylum seekers and refugees.

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<sup>113</sup> Ghezalbash et al., "Securitisation of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia", 315-351.

<sup>114</sup> Indonesia, Presidential Regulation No. 125 on Management of Foreign Refugees, Articles 10-20.

<sup>115</sup> Presidential Regulation No. 125 on Management of Foreign Refugees. Articles 24-28.

<sup>116</sup> Presidential Regulation No. 125 on Management of Foreign Refugees. Articles 29-30.

<sup>117</sup> Presidential Regulation No. 125 on Management of Foreign Refugees. Articles 31-32.

<sup>118</sup> Presidential Regulation No. 125 on Management of Foreign Refugees. Articles 33-39.

<sup>119</sup> Presidential Regulation No. 125 on Management of Foreign Refugees. Article 40.

<sup>120</sup> Adiputera and Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia*, 4.

Based on the description of Indonesian national law pertaining to the refugee issue, Indonesia has had national laws relating to the handling of asylum seekers and refugees in Indonesia and even set up rules that adjust to the social situation in Indonesia related to refugees. However, despite all legal efforts made by the Government of Indonesia in protecting asylum seekers and refugees, it seems that such avenues will not be effectively achieved unless Indonesia appeals to the international community for “shared-burden” in managing the issues.

## **Balancing the Burden Forward**

### ***Sharing the Handling of Asylum Seekers and Refugees for Indonesia***

The first experience in sharing the burden of handling asylum seekers and refugees was illustrated from the Comprehensive Plan of Action (CPA) for Indo-Chinese Refugees.<sup>121</sup> Despite being a non-member of the Refugee Convention, Indonesia, Malaysia, and Thailand participated in the CPA as they perceive refugee resettlement as an obligation of the “international community”. Overlapping with the issues of irregular migrant workers and stateless persons, these countries see “refugees” as more of a category of illegal migrants.<sup>122</sup> Indonesia participated in the CPA by allowing the entry of “boat-people” and the screening for status determination by UNHCR on Galang Island.<sup>123</sup>

Then, following the final closure of CPA,<sup>124</sup> a new wave of asylum seekers came from Afghanistan, Iraq and Iran at the end of 1990s. The methods of their arrival in Indonesia were so different to those from the Indochinese previously.<sup>125</sup> The peak arrivals of these asylum seekers were during 2000-2002.<sup>126</sup> This figure was likely influenced by the escalation of conflicts in the originating countries.

Most of these people were not intending to finalise their journey in Indonesia but Australia. Thus, most of them were trying to continue their journey to reach Australia's shore illegally, to be processed as asylum seekers in Australia. The MV Tampa incident in 2001,<sup>127</sup> has significantly shaped Australia's policy towards asylum seekers reception.<sup>128</sup> Australia's policy (operation Relex) was to stop and prevent these incoming people from arriving on Australia's soil.<sup>129</sup> If they

<sup>121</sup> United Nations, “International Conference on Indo-Chinese Refugees, Geneva, 13–14 June 1989: Declaration and Comprehensive Plan of Action,” UN Doc A/CONF, 148/2,” 1989.

<sup>122</sup> Sriprapha Petcharamesree, “ASEAN and Its Approach to Forced Migration Issues,” *International Journal of Human Rights* 20, no. 2 (2016): 173–90, 177, <https://doi.org/10.1080/13642987.2015.1079021>.

<sup>123</sup> Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 29-41.

<sup>124</sup> The CPA was celebrated as a success story in UNHCR-led international refugee cooperation. Alexander Betts, “Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA,” *New Issues in Refugee Research*, vol. 120, 2006.

<sup>125</sup> Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 42-43.

<sup>126</sup> Missbach. 44.

<sup>127</sup> In September 2001, the Norwegian freighter, MV *Tampa*, rescued 438 people from Afghanistan from a sinking Indonesian fishing vessel heading to Australia. The vessel was rejected to disembark at the nearest port, Christmas Island (Australia), but nor Indonesian authorities granted the access. The passenger also pleaded not to go back to Indonesia. Chantal M. J. Bostock, “The International Legal Obligations Owed to the Asylum Seekers on the MV Tampa,” *International Journal of Refugee Law* 14, no. 2–3 (2002): 279–92, 279-282; Ernst Willheim, “MV Tampa: The Australian Response,” *International Journal of Refugee Law* 15, no. 2 (2003): 159–91, 159-163.

<sup>128</sup> Kneebone, “The Pacific Plan: The Provision of ‘Effective Protection’?”, 696-721.

<sup>129</sup> Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 47.

finally reached Australia, they would be taken to other “safe” third countries for offshore processing: mainly in Nauru and Manus Island (Papua New Guinea).<sup>130</sup> Due to new waves of asylum seekers coming from Pakistan and Sri Lanka, the Australian government re-issued a new policy until the present day, which is quite similar to Operation Relex in 2013 with Operation Sovereign Border.<sup>131</sup>

These non-entrée policies by Australia have been increasing the numbers of asylum seekers who remain in Indonesia. Concerning this situation, Indonesia and Australia have entered into some cooperation mechanisms to handle this condition. Similar to the Pacific Solution, it is arguable that this cooperation was not implementing “burden-sharing” but “burden-shifting” from Australia to Indonesia. This situation is caused by the fact that Australia does not want any asylum seekers to reach its shore to avoid the obligation of non-refoulement. Rather than managing by itself, Australia gives Indonesia assistance to take care of all asylum seekers who wish to go to Australia.

Indonesia and Australia have agreed to jointly manage the issue through the Bali Process as the Regional Cooperation Arrangement (RCA) in 2009. The RCA acknowledges the roles of the IOM.<sup>132</sup> and the UNHCR. Under RCA, IOM and UNHCR play two roles in the two states. The RCA mandates the Indonesian authorities to intercept and detain “irregular migrants” that are heading towards Australia and notifying IOM of logistical issues (case management and care), and then (if needed) UNHCR will assess their claims (refugee status determination).<sup>133</sup>

The incoming escalation of Rohingya asylum seekers in 2008 from Myanmar and the pushbacks by the Thai authority,<sup>134</sup> also triggered states in the region to find solutions for these people. Indonesia has shown its deep concern for the situation. In 2013, it led a Special Conference on Addressing Irregular Movement of People outside the Bali Process.<sup>135</sup> The conference then resulted in the Jakarta Declaration on Addressing Irregular Movement of Persons. Countries of origin, transit, and destination pledged to work together to address irregular migration.<sup>136</sup> Following this event, three ministers of foreign affairs of Malaysia, Indonesia, and Thailand met on 20 May 2015 to discuss the issue of “irregular movement of people” into Indonesia, Malaysia, and Thailand. It was stated that the purpose of the meeting was “finding a solution to the crisis of influx of irregular migrants and its serious impact on the national security of the affected

<sup>130</sup> Martin Flynn and Rebecca LaForgia, “Australia’s Pacific Solution to Asylum Seekers,” *Lawasia Journal*, 2002, 31–43.

<sup>131</sup> Andreas Schloenhardt and Colin Craig, “Turning Back the Boats”: Australia’s Interdiction of Irregular Migrants at Sea,” *International Journal of Refugee Law* 27, no. 4 (2015): 536–72, <https://doi.org/10.1093/ijrl/eev045>.

<sup>132</sup> IOM is an intergovernmental body funded by interested governments but mainly by the Australian government in relation to its activities in Indonesia. Kneebone, “Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia”, 32.

<sup>133</sup> Nethery and Gordyn, “Australia-Indonesia Cooperation on Asylum-Seekers: A Case of ‘Incentivised Policy Transfer’”, 186-187.

<sup>134</sup> Kneebone, “Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs”, 160.

<sup>135</sup> Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region.”, 601.

<sup>136</sup> United Nations High Commissioner for Refugees (UNHCR), “Jakarta Declaration on Addressing Irregular Movement of Persons,” UNHCR, 2013.

countries".<sup>137</sup> Notably, the ministers agreed to offer them temporary shelter, "provided that the resettlement and repatriation process would be done in one year by the international community." Malaysia and Indonesia invited other countries in the region "to join in this endeavour".<sup>138</sup>

The question of how Indonesia views the principle of international cooperation, especially burden-sharing, can be determined by the Indonesian 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 Jusuf Kalla. The UN notes that:

"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, he said a comprehensive approach was needed to tackle irregular migration, 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, emphasising that commitments to ensuring safe migration, outlined in the 2030 Agenda, must be implemented."<sup>139</sup>

UNHCR subsequently supported this statement by confirming that Indonesia, seen from its international behaviour, had always acted in conformity with the idea of burden-sharing. Kalla's above statement has shown that Indonesia had given its contribution, and it was now other states' turn to chip in their contribution. This declaration was made a year after the Rohingya refugees massively arrived in Indonesia, and in it, Kalla conveyed an invitation to all countries as an international community to also participate in the burden-sharing process. Cited from the meeting minutes, Kalla held that "burden-sharing and taking collective action does not mean...we share equitable international obligation under the Convention".<sup>140</sup>

In the 2015 Kuala Lumpur Declaration, which was participated in by ASEAN states, the focus was not on the mechanism in facing the mass influx of refugees but on the tasks and actions that ASEAN states should do to counter the root of refugee movements such as human trafficking and smuggling.<sup>141</sup> In 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".<sup>142</sup> This implies the stance of ASEAN states that human trafficking and smuggling are one of the leading causes of refugee movements. The states also

<sup>137</sup> Malaysia Ministry of Foreign Affairs, "Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia," MoFA Malaysia, 2015.

<sup>138</sup> Kneebone, "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia", 37.

<sup>139</sup> United Nations, "General Assembly Adopts Declaration for Refugees and Migrants, as United Nations, International Organization for Migration Sign Key Agreement," United Nations, 2016.

<sup>140</sup> Jusuf Kalla, "Statement by H.E. Mr. Jusuf Kalla Vice-President of The Republic of Indonesia at The High-Level Plenary Meeting to Address Large Movements of Refugees and Migrants," Wasespri, 2016.

<sup>141</sup> ASEAN, "ASEAN Ministers Meet on Irregular Movement of Persons," ASEAN, 2 July 2015, accessed 11 August 2021, <http://asean.org/asean-ministers-meet-on-irregular-movement-of-persons/>.

<sup>142</sup> ASEAN, "Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia," ASEAN, 29 September 2015, accessed 2 July 2021, <https://asean.org/storage/2012/05/Adopted-Kuala-Lumpur-Declaration-on-Irregular-Movement-of-Persons-in-Southeast-Asia.pdf>.

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."<sup>143</sup> They viewed that the refugee problem around Asia "requires immediate regional response",<sup>144</sup> not only for ASEAN but also "members of the international community to support the humanitarian and relief effort involved in dealing with challenges resulting from irregular movement..." The form of cooperation concerned on that forum is sharing information and intelligence among countries in overcoming the refugee movement.

Seeing that burden-sharing might be viewed from two different perspectives (affected or assisting state), Indonesia has been in those two situations. Indonesia's situation 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 a political commitment to facilitate the refugees floating in the ocean. The foreign ministers of those three countries conducted a meeting in Malaysia to discuss the measure to save those people to handle this problem.<sup>145</sup> Accommodating 7000 refugees in a cooperative manner between Indonesia and Malaysia resulted from the meeting. The form of sharing that was done here is the cooperation in providing a temporary stay measure. In the minutes, it was stated that:

"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 endeavour."<sup>146</sup>

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. 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.<sup>147</sup>

Despite this arrangement between the three countries, the burden of handling asylum seekers and refugees will not be effectively shared due to the lack of involvement of destination countries such as Australia, New Zealand, Canada, or the United States. The latter countries were appreciative of the agreement made by Thailand, Malaysia, and Indonesia. They pledged to "take care"

<sup>143</sup> Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia.

<sup>144</sup> Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia.

<sup>145</sup> Kompas, "Jokowi Pastikan Malaysia Dan Thailand Siap Kerjasama Bantu Pengungsi Rohingya" (Jokowi Ensures Malaysia and Thailand Are Ready to Cooperate in Assisting Rohingya Refugees)," Kompas (23 May 2015), accessed July 2, 2021, <http://nasional.kompas.com/read/2015/05/23/13371261/Jokowi.Pastikan.Malaysia.dan.Thailand.Siap.Kerja.Sama.Bantu.Pengungsi.Rohingya>.

<sup>146</sup> "Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia," Reliefweb, 20 May 2015, accessed 2 July 2021, <https://reliefweb.int/report/myanmar/joint-statement-ministerial-meeting-irregular-movement-people-southeast-asia>.

<sup>147</sup> Interview with Dina Hapsari, Protection Officer UNHCR Indonesia, February 2018.

of asylum seekers and refugees without the commitment of the destination countries. In the end, such lack of involvement will eventually fail to produce durable solutions, not only for the asylum seekers and refugees but also for Indonesia, that carries the burden together with Malaysia and Thailand.

### **Australia and the Burden Sharing of Self-Interest**

As stated above, the Indonesian Presidential Regulation 2016 is arguably an essential gesture of policy or commitment implementation in managing and protecting asylum seekers and refugees in Indonesia and the region as part of burden-sharing. Despite imperfection in implementing the law, at least Indonesia is consistent in articulating its policy in managing and protecting irregular migrants within its territory. Unfortunately, Australia's response towards the Indonesian new law does not show a positive gesture and is possibly the opposite.

After roughly a one-year enactment of the Presidential Regulation, Australia decided to adjust its policy in supporting the work of IOM by giving protection discriminately towards asylum seekers. Despite appreciating the bilateral arrangement under the RCA as "an important cornerstone of Australia's commitment the burden of refugees and asylum seekers currently in Indonesia", Australia as of 15 March 2018, does not permit "independent asylum seekers" (*tinggal mandiri*) to receive incentives under the RCA mechanism. This group of asylum seekers and refugees are those who came to Indonesia legally and then presented themselves as asylum seekers to the Indonesian authority or the IOM. In addition, the Australian government prioritises offering the asylum seekers and refugees, including "*tinggal mandiri*" so-called Assisted Voluntary Returns and Reintegration (AVRR) packages by hoping to "encourage refugees and asylum seekers to return home if safe to do so or another country where they can legally reside".<sup>148</sup>

This policy does not improve the burden-sharing management of asylum seekers and refugees in the region. Differentiating treatment to the asylum seekers and refugees by way of their transportation mode cannot be accepted in a logical sense. The 1951 Convention has provided a system to assess whether someone is genuinely and legitimately a refugee.<sup>149</sup> Thus, it will not make much difference to legally discourage those people from presenting themselves as asylum seekers to Indonesia. Removing funding to this group will only shift the additional burden to Indonesia as these independent asylum seekers will remain while waiting for assessment as refugees. The policy is negatively impacting the development of a new refugee regime in Indonesia. As stated above, the implementation of the Presidential Regulation 2016 is far from ideal.

With its all-strict border control, Australia seems to underestimate the impact of the waiting period for asylum seekers and refugees within Indonesian territories. Cutting the funding as its share contribution to managing asylum seekers will be adding to the long list of Australia's notorious policy in the region. Since the policy heavily impacted Indonesia, she was unfortunately forced to politically respond to Australia's decision in its jurisdiction.

In responding to the policy changes from the Australian government and taking the Presidential Regulation 2016 into consideration, the Indonesian Director General of Immigration

<sup>148</sup> Letter from the Acting Deputy Secretary Policy, Department of Home Affairs, Australia to the Indonesian Director General of Immigration, dated 7 March 2018. file on Author.

<sup>149</sup> United Nations, "Convention Relating to the Status of Refugees.", Article 1.

circulated its letter to all heads of provincial immigration offices all around Indonesia on 30 April 2018 to do as follows:<sup>150</sup> 1) coordination with the Police and the Provincial Government and to explain to all the asylum seekers and the refugees about the position of the Immigration Detention Centres in relation to the removal of funding via the IOM; 2) strict coordination with the representatives of IOM and the UNHCR in each working area; 3) refuse all the new incoming asylum seekers who wish to be registered to the Indonesian authorities as legitimate asylum seekers; 4) explain the reason behind this refusal due to policy changes of Australian Government and Indonesia as non-member party to the 1951 Refugee Convention; 5) direct those independent asylum seekers to the UNHCR or the IOM in order to be returned home voluntarily (AVR); 6) re-collect data of all asylum seekers and refugees with differentiation of those independent asylum seekers.

As seen from this directive, the Indonesian immigration authority has also taken parallel policy changes to avoid the additional burden. However, this additional burden is placed on Indonesia as a state. The responsibility for these asylum seekers and refugees is indeed placed under the regional government (s). Unfortunately, there is always a case for saying that a few regions are not ready for such responsibility. The flow of incoming independent asylum seekers will continue, meaning that such a burden will only be weighted towards Indonesia in this mechanism. Finally, most importantly, both policy changes do not give a positive gesture to the implementation of burden-sharing in protecting those who are fleeing from persecution.

In this situation, delving back to the concept of burden-sharing, Australia and Indonesia need each other since the management of flow, sheltering, assessment and granting the refugee status to asylum seekers are crucially implemented not by a single country. Australia needs Indonesia as a "buffer-zone" for most incoming asylum seekers bound for its country. Looking at how Indonesia and Australia have had a series of cooperation projects to protect asylum seekers and refugees, such positive precedence should be maintained for the region's greater good. It is very likely that other countries, including Indonesia, will also take a unilateral policy response to benefit their national interests. This would create situations where fundamental human rights to receive sanctuary will become much less likely to be fulfilled as promised by the international community in the Global Compact for Refugees.<sup>151</sup>

## CONCLUSION

Every state in the world has its roles and duties in lights of asylum seekers and refugees protection. Some countries have become target destinations, and some just a transiting place to third, safe countries. Unfortunately, the protection for asylum seekers and refugees appears to be no longer conceived as a "global public good" where states have adopted self-interest policies. Securitising a state's border, stricter immigration rules, and state self-interest policies have weakened protections for those fleeing from persecution. However, the idea of burden-sharing as the cornerstone of international cooperation for asylum seekers and refugees may leave some hope to be maintained.

<sup>150</sup> Letter from the Director-General of Immigration dated 30 April 2018 (file on Author).

<sup>151</sup> Arie Afriansyah, "Indonesia and the Global Compacts on Refugees and Migration," *International Journal of Refugee Law* 30, no. 4 (2019): 684–86, <https://doi.org/10.1093/ijrl/eey066>.



Learning from the previous arrangement, starting from the Comprehensive Plan of Action (CPA) then followed by the Regional Cooperation Agreement (RCA) under the mechanism of the Bali Process, both Indonesia and Australia have become the main actors in managing the asylum seekers and refugees in the region. For its part, Indonesia has shown a positive gesture by enacting long-awaited national regulation for foreign refugees. This activity illustrates how Indonesia implemented its commitment to take the burden for those who are still in the assessment processes and the waiting period to be resettled in third, safe countries.

Of this development, it is lamented that Australia took a less positive response by removing its funding via IOM for those asylum seekers who make the journey by legal arrangement to Indonesia. Australia gains domestic political support by processing asylum seekers offshore. At the same time, Australia limits its financial assistance to Indonesia and reduces its intake of refugees whom UNHCR in Indonesia has determined. While the Indonesian government did its best to manage asylum seekers and refugees in its territory, Australia's policy changes have made asylum seekers and refugees face indefinite waiting times, poor living conditions and uncertainty. This policy should be evaluated since Indonesia felt that Australia shifted its burden to Indonesia, and it was not supporting the spirit of burden-sharing in this cycle of management.

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