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EDITORIAL

The False Promise of Presidential Regulation No. 125 of 2016?

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Abstract

In this Introduction, Indonesia's approach towards refugee protection is contextualized historically and regionally in light of the enactment of Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees (PR). In particular, we describe the legal and policy framework for refugee protection in Indonesia and analyze its underlying norms and values, including the constitutional right to asylum. We explain how the legal framework competes with Law No. 6 of 2011 on Immigration, which facilitates a discretionary, securitized, and 'humanitarian' approach to refugee policy, which is inconsistent with Indonesia's legal responsibilities. In conclusion, we assess both the challenges and opportunities provided by the PR.

Keywords: Indonesia; refugee law and policy; refugee protection; immigration law and humanitarianism

1. Introduction

The focus of this Special Issue is Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees adopted on 31 December 2016 ("the PR"). The PR, which implements Law No. 37 of 1999 on Foreign Relations,[1] is an important development in Indonesia's distinctive response to refugee issues at both a national and a regional (Southeast Asian—"SEA") level. Many advocates for refugee rights hoped for enactment of a regulation that would progress the rights of refugees and build on the perceived promise of Indonesia's laws, by implementing the constitutional right to asylum in Indonesia's Constitution.[2] However, as Enny Soeprapto (former Indonesian Human Rights Commissioner—"Komnas HAM"—2002–07) explains in his Foreword, in 2013, policy-makers decided to enact a Presidential Regulation[3] rather than to provide a right to seek asylum through new laws and policies.

The articles in this Issue critically assess the contribution of the PR to the advancement of refugee rights and norms, and discuss the challenges and opportunities it creates for the care of refugees in Indonesia. This Issue arises from a workshop held in Jakarta on 20–21 March 2019.[4] It is an outcome of an Australia Research Council (ARC) project on

[1] Law No. 37 (1999) on Foreign Relations, Art. 27(2).
[2] The 1945 Constitution of the Republic of Indonesia, Art. 28G(2). See Dewansyah, Dramanda, & Mulyana (2017).
[3] See Table 2 in Suyatna et al.'s article in this Special Issue for the hierarchy of legislation in Indonesia's legal system.
[4] The workshop on "Presidential Regulation No. 125 of 2016 on the Treatment of Refugees and Asylum Seekers in Indonesia: Opportunities and Challenges" was sponsored by the Centre for Indonesian Law, Islam and Society,

"Indonesia's refugee policies: responsibility, security and regionalism."[5] It is unique, as it is the first known comprehensive publication to highlight perspectives from Indonesian scholars and policy-makers about Indonesian refugee law and the contribution of the PR. In this Introduction, we also include insights, comments, and contributions from other participants at the workshop, including administrators, policy-makers, and representatives of international organizations and civil society.

The purpose of this Introduction is to summarize some key debates, themes, and issues that concern Indonesia's role as a responsible state actor and leader on refugee issues in Indonesia and the SEA region,[6] to explain the background to and effect of the PR. These debates, themes, and issues can broadly grouped as follows:

- What norms or values underlie Indonesia's history of involvement with foreign refugee issues[7] from independence until the constitutional reform of 2000 that inserted Article 28G (2) into the 1945 Constitution of the Republic of Indonesia ("the constitutional right to asylum")?
- What is the status of the constitutional norm embodied in Article 28G(2)? Further, why has the constitutional right to asylum not become the guiding norm in Indonesian refugee law and policy?
- What is the basis of the "humanitarian-protection" rhetoric that is prevalent in Indonesia amongst policy-makers, administrators, and some Indonesian scholars?
  - Do the Pancasila principles in Indonesia's Constitution support an argument for "humanitarian protection" as a competing constitutional norm?[8]

In the last part of the Introduction, we canvass the challenges and opportunities the PR provides, in particular:

- What barriers to implementation have been experienced by local-government authorities and at provincial administrative levels in applying the PR?
- What human rights gaps in the PR have been exposed?

Whilst the PR was ultimately animated by the Rohingya boat-people crisis, which impacted Indonesia, Malaysia, and Thailand in 2015,[9] it applies broadly to refugees and asylum seekers who enter or are within Indonesian territory (approximately 13,626 "persons of concern" or refugees were in Indonesia as at January 2020). As the articles in this Issue demonstrate, the ramifications of the PR's application are much broader than a response to a proximate crisis and raise serious questions about the acceptance of responsibility for refugees by the Indonesian state. For example, although Indonesia is a party to key international instruments that guarantee international human rights to refugees

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[5] The workshop was an outcome of ARC DP180100685: the contribution of the ARC is gratefully acknowledged.

[6] E.g. Jakarta Declaration (2013); see Kneebone (2017).

[7] In Indonesia, the terms used for asylum seekers and refugees are "*pencari suaka*" (asylum seeker) and "*pengungsi dari luar negeri*" (foreign refugee); "*pengungsi*" is also used for internally displaced persons. The term "independent" or "autonomous refugees" is "*pengusi mandari*;" "illegal immigrants," a term that is frequently used in the media, are "*imigran gelap*," "*imigran haram*," or "*imigran ilegal*."

[8] The five principles (Pancasila) that are set out in the Preamble are: (1) Belief in Almighty God; (2) A Just and Civilized Humanity; (3) The Unity of Indonesia; (4) Democracy; and (5) Social Justice.

[9] Missbach et al. (2018), pp. 8, 14. For a description of the crisis and its significance, see Kneebone (2016); Kneebone (2014b).

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(see Tobing's and Dewansyah and Nafisah's articles in this Issue) and that are mirrored in its Constitution,[10] such rights are not extended by the government or the courts to refugees in Indonesian territory.[11] Article 28G(2) of the 1945 Constitution, the constitutional right to asylum, is embedded in the human rights Chapter XA of the Constitution.

We consider first Indonesia's response to refugees from independence in 1945 to 2000 (the year of the constitutional amendment). We situate 2000 as a turning point in Indonesian politics and briefly explain the significance of the developing Australia–Indonesia relationship on refugee policy to that point and beyond as refugee protection became increasingly "securitized" in Indonesia, especially with the introduction of Law No. 6 of 2011 on Immigration.

2. Indonesia's response to refugees from independence to 2000

Indonesia's response to refugees is rooted deeply in its history, laws, policies, and politics. Indonesia is not a signatory to the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention)—a feature it shares with its close SEA neighbours, Malaysia and Thailand. All three countries received refugees during the Indo-Chinese crisis and participated in the subsequent Comprehensive Plan of Action for Indo-Chinese Refugees from 1989 as described below. All are currently transit and/or host states for groups of refugees mainly from the Middle East, Africa, and South Asia, particularly Myanmar. However, whereas neither Malaysia nor Thailand has any special laws that focus on refugees, Indonesia has several, including the constitutional right to asylum.[12]

In Malaysia and Thailand, refugees without visas are automatically illegal immigrants, and thus become discretionary objects, as an excepted group, of the executive's immigration powers. Neither Thailand nor Malaysia has signed the 1951 Refugee Convention and neither has laws that recognize the status of a refugee.[13] By contrast, in Indonesia, laws and policies dating from 1956 recognize the existence of refugees within its borders and their need to claim asylum or protection in Indonesia from the state. Laws created subsequently in 1999 (see discussion below) recognize that the granting of asylum is a sovereign right of the Indonesian state and confer power on the Indonesian president to formulate refugee policy.

In 2000, the 1945 Constitution of the Republic of Indonesia was amended to insert Article 28G(2), which provides: "Every person shall have the right to be free from torture or inhumane and degrading treatment, and shall have the right to obtain political asylum from another country."

[10] Yonesta (2019).

[11] Afriansyah & Zulfa (2018).

[12] The Constitutions of Vietnam and Timor-Leste, nations also situated in SEA, contain a right to asylum. See discussion by Dewansyah and Nafisah in this Special Issue.

[13] Refugees and asylum seekers who are found without lawful documentation in Malaysia are subject to arrest, detention, prosecution, fines, or deportation: s. 6(1)(c) of the Malaysian Immigration Act 1959/63; see also Lego (2012), p. 88. In Thailand, s. 17 of the 1979 Immigration Act gives the Minister of the Interior the power to permit, under certain conditions and subject to Cabinet approval, any alien or any group of aliens to enter and stay in Thailand. In 1998, the Thai government established Provincial Admission Boards to screen asylum seekers in camps on the Myanmar–Thai border: Muntarbhorn (2004). However, refugee-status determination remains the responsibility of the UNHCR. On 10 January 2017, Thailand implemented Cabinet Resolution 10/01 and set up a commission to develop a screening mechanism for undocumented urban migrants and refugees, available at https://www.unhcr.or.th/en/about/Thailand (accessed 22 January 2021); see also Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562. Book No. 136 Special section 314, Royal Gazette, 25 December, B.E. 2562.

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This mirrors a 1956 Circular Letter issued by the president that recognized the right of "political" refugees or fugitives to claim the protection of the Indonesian state.[14] The context for this administrative (non-binding) circular was Indonesia's hosting and participation in the 1955 Bandung or Asian-African Conference—an important expression of post-colonial independence and pan Asian-African co-operation and its participation in the non-alignment movement.[15] However, only one Algerian "freedom fighter" is known to have been granted asylum in Indonesia under this circular.[16] Further, Indonesia became a member of the Asian-African Legal Consultative Organisation (AALCO) created in 1956. A primary task of AALCO was the formulation of the (non-binding) 1966 Bangkok Principles on the Status and Treatment of Refugees. In 2001, Indonesia also participated in AALCO's reformulation of its principles, which suggests a knowledge of the basic principles of refugee law.[17] The understanding in the region is that these principles "aimed to provide a common normative framework of refugee protection for the Afro-Asian region."[18]

Following this, Indonesia's next notable experience with refugees was during the Indochina refugee crisis from 1975 to 1995. As is well documented, this crisis was dealt with in two stages. First, an agreement of 1979 saw countries in the region, including Indonesia, agreeing to provide temporary asylum. Second, a more formal arrangement known as the Comprehensive Plan of Action (CPA) of June 1989 involved countries of first asylum in the region, including Indonesia, agreeing to host and process asylum seekers on their territory. A key objective of the CPA was the eventual resettlement of recognized refugees in "Western" countries.[19]

Under Presidential Decision No. 38 of 1979, asylum seekers from Vietnam and Cambodia[20] were housed on Galang Island in Indonesia and processed by the United Nations High Commissioner for Refugees (UNHCR) under the 1979 international agreement.[21] In the second (CPA) phase, refugee-status-determination processing was conducted by *Panitia Pengelolaan Pengungsi Vietnam* (P3V, the Management Committee for Vietnamese Refugees) consisting of the army, navy, immigration, and police personnel supported by the UNHCR. At the workshop, Soeprapto, who was a UNHCR Protection Officer in Geneva from 1975 to 1978, described the period from 1979 to 1995 as one in which "*de facto* asylum" was practised by Indonesia. Soeprapto[22] describes how the UNHCR started "awareness-raising" activities about the importance of refugee protection in Indonesia in 1981. He explains that, until 2000, the government was considering becoming a signatory to the Refugee Convention.[23] Notably, at this stage, refugees and asylum seekers were labelled as *orang asing*, or "foreigners," under Law No. 9 of 1992 on Immigration. This, then, was how refugees and asylum seekers were framed and tolerated at the time Indonesia's 2000 constitutional reform took place.

It is time now to put that reform into context. As described by Butt and Lindsey, the constitutional reforms in 2000 led to the fourth version of the Constitution following

[14] The Circular Letter of the President No. 11/R.I/1956 of 1956 on Political Refugees, 7 September 1956 states: "political fugitives who enter or find themselves in the Indonesian territory will be granted protection on the basis of human rights and fundamental freedoms in accordance with international customary law." See also Reza (2013).

[15] See Kneebone (2014a).

[16] Reza, *supra* note 14.

[17] Kneebone, *supra* note 15.

[18] Oberoi (1999), p. 195. See also UNHCR (2012), para. A, where the principles are described as recognition of "a region with a good record of providing asylum to a large number of refugees."

[19] Kneebone & Rawlings-Sanaei (2007), pp. 14–8.

[20] Presidential Decree No. 38 (1979) regarding Coordination of the Resolution of Issues Related to Vietnamese Refugees in Vietnam. See Taylor & Rafferty-Brown (2010), p. 144; see also Reza, *supra* note 14.

[21] Tan (2016).

[22] Soeprapto (2004).

[23] *Ibid.*, p. 64. Indeed, there was discussion about ratifying the Convention up until 2014, as detailed later in this Introduction.

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independence in 1945 and reflect "political transitions from authoritarianism to liberal democracy and back and then forward again to liberal democracy."[24] The first Constitution was proclaimed by Indonesia's first president, Soekarno, in August 1945; the second was in place from December 1949 to August 1950; and the third was the Temporary or Interim Constitution of 1950, which contained nationally and internationally recognized human rights.[25] The right to asylum in the 1956 Circular Letter reflected those rights.

In 1959, Soekarno reinstated the original 1945 Constitution, which remained in place throughout the period of military government known as "the New Order," when Soeharto was in power from 1966 to 1998. After the fall of Soeharto in 1998, the Constitution was amended every year from 1999 to 2002. This included the period in which Habibie was president (May 1998–October 1999) when major reforms began on the decentralization of political power, electoral processes, human rights, and anti-corruption.[26]

There were four sets of constitutional amendments in this period of reforms. The First Amendment was directed at reducing the powers of the president, which Soeharto had abused from 1966 to 1998.[27] Article 28G(2) ("the constitutional right to asylum"), added in 2000, was part of the Second Amendment, which adopted an array of internationally recognized human rights. Article 28G(2) must thus be seen in the spirit of those reforms, representing a desire to be governed by the rule of law and human rights.

The 2000 constitutional Amendment that inserted Article 28G(2) was preceded by two pieces of legislation, which impacted upon refugee rights. The first was the Law No. 37 of 1999 on Foreign Relations. Article 25(1) of this law describes the granting of asylum to *foreign nationals* as a state's right vested in the president; Article 25(2) stipulates that this authority is to be carried out through a Presidential Decree. Article 26 states that the "granting of asylum to foreign nationals shall be exercised in accordance with national legislation taking into account international law, custom, and practice." Article 27 deals with refugee policy, as distinct from claiming asylum, and vests the power to "determine policy with respect to *foreign refugees* (or '*pengungsi dari luar negeri*') taking into account the views of the Minister [for Foreign Affairs]" (emphasis added) in the president—Article 27(1). Article 27(2) provides a second power for the president to create policy for foreign refugees through a Presidential Decree and is the direct legislative source for the PR.

Soeprapto, one of the drafters of this Bill, suggested at the workshop that the three provisions on refugee protections in Law No. 37 of 1999 on Foreign Relations (Articles 25–27) were inserted as a "stop-gap measure" in the expectation that Indonesia would accede to the Refugee Convention in the near future.[28] Thus, to clarify, Law No. 37 of 1999 on Foreign Relations grants two powers to the president to create Presidential Decrees, as Soeprapto explains in his Foreword to this Issue: first, to implement the right to grant asylum to foreign nationals (which, as Dewansyah and Nafisah explain, is a sovereign right of the state); and, second, to create policy for foreign refugees.

At the same time as Law No. 37 of 1999 on Foreign Relations was being drafted, a separate group of legislators from the Ministry of Justice was drafting the Decree of the People's Consultative Assembly Number XVII/MPR/1998 on Human Rights, which included "a right to seek asylum for political protection" in Article 24.[29] The Government of the Republic of Indonesia subsequently issued Law No. 39 of 1999 on Human Rights, which,

[24] Butt & Lindsey (2018), p. 3.

[25] The third Indonesian Constitution of 1949 included a version of the Universal Declaration of Human Rights (UDHR). Indonesia became a member of the UN in September 1950 and the UDHR was thus automatically adopted from that date.

[26] Butt & Lindsey (2012), pp. 19–20.

[27] *Ibid.*, p. 8.

[28] Statement at workshop 20–21 March 2019. See also Foreword of this Issue.

[29] See Table 2 in Suyatna et al.'s article in this Special Issue regarding the hierarchy of legislation.

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in Article 28, recognizes that: "*Everyone* has the right to seek asylum to obtain *political protection* from other countries"[30] (emphasis added).

According to Soeprapto, the drafters of Law No. 37 of 1999 on Foreign Relations (from the Ministry of Foreign Affairs) were unaware of the imminence of Law No. 39 of 1999 on Human Rights,[31] which perhaps highlights the flurry of reform activity in this period.

In their article in this Issue, Dewansyah and Nafisah discuss the drafting process and debates on Law No. 39 of 1999 on Human Rights, suggesting that they reveal "a lack of understanding" about the nature of the constitutional right to asylum and a preference for a "humanitarian" response. Whilst Law No. 37 of 1999 on Foreign Relations focuses on *foreign* refugees, Dewansyah and Nafisah suggest that some of the drafters of Law No. 39 of 1999 on Human Rights were responding to the ill-treatment of Indonesian people under the Soeharto regime, concluding that "the drafters [tended] to place more emphasis on the rights of Indonesian citizens to seek political refuge abroad rather than on the issue of foreign nationals seeking asylum in Indonesia." This view illustrates the conflicted debates at that time.

In this period from independence to 2000, Indonesia's response to refugee issues was shaped by pragmatic and political factors ranging from post-colonial nationalism and the pan Asia-Africa non-alignment movement to regional solidarity and a national authoritarian regime. In the period after 2000, refugee issues became increasingly controversial and securitized, largely in response to Indonesia's position as a transit country for refugees en route to Australia. In this post-2000 period, the constitutional right to asylum was not implemented as the guiding norm in Indonesian refugee law and policy. To explain how this norm has not taken root, we summarize briefly the impact of the Australia–Indonesia relationship and post-2000 developments in refugee policy in Indonesia.

3. Response to refugee movements from Indonesia: development of the Australia–Indonesia relationship

One relevant factor in Indonesia's response to refugees is its position as a transit country for asylum seekers en route to Australia, which is interpreted to mean that Indonesia's responsibility to refugees is only temporary, as it is not the ultimate destination or provider of a long-term solution. For example, at the workshop, former Minister for Foreign Affairs Nur Hassan Wirajuda suggested that "Indonesia has become the victim of Australia's attractiveness."

As the number of asylum seekers attempting to reach Australian territory from boats launched in Indonesia increased in the mid-1990s, joint co-operation between the two countries began to prevent the departure of boats from Indonesia. In 1990, there were two boat arrivals on Australian shores, with 198 people seeking refugee from Asia and Southeast Asia who had transited in either or both Indonesia and Malaysia. A decade later, in 1999, the number of people (on 86 boats) seeking asylum in Australia from the Middle East reached almost 3,000 and included those from Syria, Kuwait, Palestine, Jordan, and Syria.[32]

Joint Indonesia–Australia policing and anti-smuggling activities were established from the late 1990s to prevent the onward movement of asylum seekers from Indonesia. In the period up to 2000, the relationship between the two countries evolved from joint agency operations to formal government-level agreements.[33] The language used to describe asylum seekers in this period shifted from asylum seekers to "illegal immigrants."[34]

[30] See also Malahayati et al. (2017).

[31] Statement at workshop, 20–21 March 2019.

[32] Phillips (2017).

[33] Kneebone & Missbach (2018), pp. 380–3; Connery, Sambhi, & McKenzie (2014a); Connery, Sambhi, & McKenzie (2014b).

[34] Pickering (2004).

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Ultimately, these arrangements culminated in the development of the Bali Process (the Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime) in 2002.[35] Indonesia and Australia are joint chairs of this process, which formally began in 2002. The Bali Process is based (in part)[36] on the earlier Regional Cooperation Arrangement (RCA), which arose from this period. The RCA was a bilateral agreement between the two states, which involved co-operation with a non-state actor (the UNHCR) and a (then) intergovernmental actor (the International Organization for Migration (IOM)). Under this agreement, the IOM and the UNHCR acted in place of the two states, Australia and Indonesia.

The RCA required the Indonesian government to intercept and detain "Australia bound" "irregular migrants," to notify the IOM, which was to provide advice and assistance (particularly about "voluntary return"), and *then* (if needed) assessment by the UNHCR was to take place. Under the RCA, it was envisaged that Indonesian officials would refer asylum seekers to the IOM for "case management and care," who would then refer them to the UNHCR to make asylum claims, if they expressed a wish to do so. The UNHCR performed refugee-status determinations (RSDs) because Indonesia is not a party to the Refugee Convention. The IOM, as an intergovernmental body, is funded by participating governments and, until 2018, was funded generously by the Australian government for its activities in Indonesia, especially in relation to arrest, detention, and (later) accommodation in non-custodial shelters (until 2018—see Missbach and Adiputera's article in this Issue).[37] In turn, between 2000 and 2014, Australia resettled 2,044 refugees from Indonesia,[38] which was deemed a sign of goodwill and a commitment to the RCA. However, unexpectedly and against established practice, in November 2014, Australia announced that it would stop resettling refugees from Indonesia.

The existing collaboration between Indonesia and Australia, although promoted as balanced and mutually beneficial, has often been dominated and led by Australia,[39] which has prioritized deterrence measures to combat the irregular movement of refugees and asylum seekers in a securitized approach.[40]

4. Post-2000 developments in Indonesian refugee policy

4.1 The role of the UNHCR in Indonesia

Two policies issued in 2002 and 2010, respectively, confirmed the role of the UNHCR under the RCA. In 2002, a directive entitled "Procedures regarding Aliens Expressing Their Desire to Seek Asylum or Refugee Status" was created. Subsequently, the 2010 Regulation of the Director General of Immigration was issued.[41] Its purpose was to provide for security of status if the UNHCR affirmed the status of an asylum seeker through RSD procedures. The 2010 Regulation ensures that refugees and asylum seekers have access to the UNHCR and allows them to stay temporarily in Indonesia until their refugee status can be confirmed and appropriate solutions can be found for them. It affirms the effect of the 2002 Circular and the

[35] Kneebone (2014b), *supra* note 9, pp. 602–4.

[36] *Ibid.*, pp. 599–601; a second source was the 1999 Bangkok Declaration on Irregular Migration.

[37] Missbach (2015), pp. 134–40; Hirsch & Doig (2018).

[38] Missbach, *supra* note 37, p. 131; see in particular Table 5.3.

[39] Kneebone, *supra* note 6.

[40] Missbach (2018); Missbach & Hoffstaedter (2020).

[41] Directive from the Director General of Immigration No. F-IL.01.10–1297, 30 September 2002, and Regulation of the Director General of Immigration of the Ministry of Law and Human Rights No. IMI.1489.UM.08.05 Year 2010 Regarding the Handling of Illegal Immigrants (*Peraturan Direktur Jenderal Imigrasi* No. IMI-1489.Um.08.05 Tahun 2010—*Tentang Penanganan Imigran Ilegal*), 17 September 2010, http://www.refworld.org/docid/3ed8eb5d4.html (accessed 30 April 2020).

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terms of the RCA described above. Although the 2010 Directive is an instrument entitled "Regarding the Handling of Illegal Immigrants," defined as persons who "subsequently declare themselves as asylum seekers and refugee(s)," it confirms the *non-refoulement* obligation that, as explained below, is the corollary of the right to seek asylum.[42]

4.2 The IOM's role in immigration detention centres and accommodation

In contradistinction to the UNHCR's protection role, the IOM's role in Indonesia under the RCA increasingly supported Australia's securitized approach to irregular migration, which includes preventing the movement of asylum seekers.[43] As Missbach and Adiputera explain in this Issue, the IOM's role under the RCA was enhanced by the Agreement on Reinforcing Management of Irregular Migration (RMIM) in 2007.[44] Both of these arrangements placed the management and accommodation of refugees and asylum seekers in Indonesia in the hands of the IOM, with generous financial assistance from the Australian government. By 2012, there were 13 immigration detention centres (or IDCs) in 13 provinces housing thousands of asylum seekers as well as in other alternative accommodation.[45]

Because of the limited capacity of the Indonesian immigration detention system, however, not all asylum seekers and refugees were detained. In late 2016, for example, there were 14,191 asylum seekers and refugees registered with the UNHCR in Jakarta. Roughly a third of them were incarcerated in IDCs financed by the IOM that were primarily funded by the Australian government. Another third were accommodated in the so-called "alternatives to detention"—that is, open but monitored community shelters supervised and financed by the IOM. Living in community shelters allowed refugees more freedom of movement, as well as a monthly living allowance. But immigration detention was a precondition to accessing this care, as direct referral to IOM accommodation was not possible.[46] The remaining third lived independently (as "independent" or "autonomous refugees") in self-funded accommodation, usually overpriced rentals in cities and peri-urban locations.

4.3 The overhaul of Law No. 9 of 1992 on Immigration: Law No. 6 of 2011 on Immigration

In Indonesia, the initial discussions on the need to overhaul Law No. 9 of 1992 on Immigration began in 2002, after the first wave of asylum seekers from the Middle East and Africa had transited through Indonesia. The 1992 law justified the regulation of the "traffic of people" as "one manifestation of sovereignty as an independent legal state based on the rule of law." It imposed a requirement on "foreign nationals" to possess a visa (Article 6) but made no specific provision for asylum seekers or refugees. After the introduction of the Pacific Solution I (2001–08) by Australia,[47] there was a substantial decline in the number of asylum seekers transiting in Indonesia[48] and, therefore, the pressure for Indonesia to draft new legislation diminished for at least a few years.

[42] The 2002 and 2010 instruments were later superseded by the Regulation of the Director General of Immigration No. IMI-0352.gr.02.07 on the Handling of Illegal Immigrants Claiming to be Asylum Seekers or Refugees [Indonesia]," 2016, https://www.refworld.org/docid/58aeef894.html (accessed 30 April 2020).

[43] McNevin, Missbach, & Mulyana (2016).

[44] Commonwealth of Australia (2007), p. 77.

[45] Missbach (2017).

[46] *Ibid.*

[47] Kneebone & Pickering (2007); Kneebone (2006). The purpose of the Pacific Solution was to prevent asylum seekers from reaching Australian shores by interdicting them and removing them to offshore processing sites.

[48] Kneebone (2014b), *supra* note 9, p. 601. The Pacific Solution involved the offshore processing of asylum seekers on Manus Island and Nauru.

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The first serious steps towards drafting a new law on immigration did not begin until 2005, when Susilo Bambang Yudhoyono became the president.[49] In 2009, in response to the expulsion of thousands of Rohingyas from Myanmar who, since December 2008, had been forcibly expelled and abandoned in international waters by Thai security forces,[50] the Bali Process was reactivated and the third meeting of the Process was held.[51] In this period, there was a steady focus on framing the increased movement of asylum seekers from Indonesia and other regions to Australia, under both the Australian policy and the Bali Process within a smuggling-trafficking discourse. As a consequence, Indonesia was encouraged to criminalize people smuggling, which was seen as the irregular movement of asylum seekers across maritime borders. Indonesia finally introduced a new Immigration Law in May 2011—seemingly assisted by Australia under the Bali Process in a "capacity-building" role.[52]

Indonesia's Law No. 6 of 2011 on Immigration, which governs the legal status of immigrants, has a strong focus on irregular migration and the creation of smuggling offences.[53] Although the preamble to the 2011 Law acknowledges that "today's global development drives greater mobility of people in the world ... protection and promotion of the human rights are required," Law No 6. of 2011 on Immigration is designed to make asylum seekers "irregular." Article 119(1) makes it an offence punishable with a maximum sentence of five years' imprisonment and a fine of IDR 500 million (USD 32,000) for a foreigner to stay in Indonesia without a valid travel document and visa. It is also an offence for a foreigner to knowingly use a false travel document. A report, authored by Graeme Hugo, found that 84% of asylum seekers entered Indonesia "illegally" following the enactment of this law because they could not comply with the legal-immigration requirements.[54]

During the discussion of the draft of the Immigration Law, asylum seekers and refugees were perceived as victims of human trafficking and/or human smuggling.[55] Article 86 of Law No 6. of 2011 on Immigration provides a limited concession for refugees and asylum seekers by creating an exception to its punitive provisions for victims of human trafficking and smuggling. Therefore, under the securitized framework of Law No 6. of 2011 on Immigration, asylum seekers are perceived either as victims of trafficking/smuggling or as illegal immigrants.[56] Discussion at the workshop indicated that, amongst many Indonesian policy-makers and scholars, Law No 6. of 2011 on Immigration is now seen as the main law governing refugees. The new Immigration Law has led to refugees being labelled as "illegal immigrants" (*imigran gelap*) (as in the *Qasemi* decision discussed below).

Whilst this can be partly explained by the securitized approach to refugee issues promoted under the bilateral and multilateral arrangements created since 2000 (including the Bali Process), this is not a complete explanation, as the Indonesian state (i.e. the president) has delegated the function of determining refugee status to the UNHCR.[57] Further, the 2010

[49] Kneebone and Missbach, *supra* note 33, p. 387, citing Pembahasan di DPR (2010), 'Pembahasan di DPR: Pembahasan RUU Tentang Keimigrasian di DPR-RI' (Discussion in the House of Representatives: Discussion on Immigration Bill in the House of Representatives).

[50] Kneebone (2014b), *supra* note 9, p. 602.

[51] *Ibid.*, pp. 601–4.

[52] Kneebone, *supra* note 6, pp. 32, 34. In 2009, Indonesia passed two national laws to address people smuggling: Law No.5 (2009), ratified the United Nations Convention Against Transnational Organised Crime 2000 (CTOC); Law No. 15 (2009), ratified the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Migrant Protocol): see Crouch & Missbach (2013), p. 6.

[53] Tan, *supra* note 21, p. 377.

[54] Hugo, Tan, & Napitupulu (2014), p. 10.

[55] See Dewansyah and Nafisah's article in this Special Issue. Law No. 6 (2011) on Immigration, Art. 88, requires the return of victims of trafficking, in potential breach of the *non-refoulement* principle.

[56] The framing of asylum seekers by Indonesia as smuggled persons is a central plank of Australia's deterrent policy: see Kneebone and Missbach, *supra* note 33.

[57] Law No. 37 (1999) on Foreign Relations, Art. 25(1), and the Constitution, Art. 28G(2).

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Regulation of the Director General of Immigration, which was replaced in 2016 (prior to the making of the PR), recognizes that "illegal immigrants" in Indonesia are subject to administrative action on immigration, but that asylum seekers and refugees will be dealt with by Indonesian authorities in co-operation with the UNHCR.[58] This remains the measure taken by the Indonesian state in lieu of fully implementing the constitutional right to asylum.

5. Failure to implement the constitutional right to asylum

The right to asylum in the Constitution is a sovereign right of the Indonesian state to grant asylum introduced, as explained above, in 2000 in the spirit of reform and a focus on the rule of law and human rights. The 2000 Constitution was considered to be progressive, inspiring hope and a promise of liberal democracy.[59] As Dewansyah and Nafisah in this Issue observe:

> The fact that the right to asylum is enshrined in the 1945 Constitution as the highest norm in the Indonesian legal system is a significant indication of its status as a constitutional right, which imposes legal obligations on the state.

Gil-Bazo argues that a long history of recognition of asylum in different theocracies, plus the prevalence of its inclusion in constitutions internationally, results in it having the status of an international-law norm.[60] This is the result of the combination of two sets of norms: a common norm of human behaviour (provision of asylum) in different religious traditions; and the "supreme" norm of constitutional recognition.

At the workshop, several participants, including Soeprapto and Febi Yonesta,[61] commented on the need for an Indonesian law on refugee rights to implement the powers and obligations in Article 28G(2) of the Constitution and Law No. 39 of 1999 on Human Rights. As Soeprapto argues in the Foreword to this Issue, it is necessary for the Indonesian government to legislate under its general powers to implement these provisions. The fact that the constitutional right to asylum has not subsequently been implemented as the guiding norm in Indonesian refugee law and policy can be explained as a lack of political will on the part of the state to "operationalize" the law.[62] Moreover, as a number of contributors to this Issue have noted (Sadjad, Tobing, and Dewansyah and Nafisah), although Indonesia has not ratified the Refugee Convention,[63] Indonesia is bound nevertheless by *non-refoulement* obligations under both international instruments to which it is a party and principles of customary international law. The principle of *non-refoulement* is also embodied in Article 28G(2) of the Constitution in the "right to freedom from torture or degrading treatment." As a consequence, the Indonesian state should introduce an appropriate determination procedure to protect the right to *non-refoulement* and thus to seek asylum.[64] Thus, Indonesia should fulfil its obligations under the constitutional right

[58] Regulation of the Director General of Immigration No. IMI-0352.gr.02.07 on the Handling of Illegal Immigrants Claiming to be Asylum Seekers or Refugees, *supra* note 42; Afriansyah & Zulfa, *supra* note 11, p. 220. It is recognized that this Regulation is consistent with *non-refoulement* obligations: Syahrin (2017).

[59] Chen (2010), p. 861.

[60] Gil-Bazo (2015).

[61] Then chairperson of SUAKA and co-chair of the Indonesia Legal Aid Foundation (YLBHI). See Yonesta, *supra* note 10.

[62] See also Dewansyah and Nafisah in this Special Issue.

[63] Missbach, *supra* note 37, p. 122. In May 2006, when Indonesia was elected as a member of the United Nations Human Rights Council, it pledged to ratify the 1951 Convention and its 1967 Protocol by 2009. Ratification was under active consideration in 2011, but ceased with the election of Joko Widodo as president in 2014.

[64] Gil-Bazo, *supra* note 60, p. 13.

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to asylum. However, in place of specific Indonesian legislation,[65] the operationalization of the right to seek asylum has been delegated to the UNHCR.

Some Indonesian scholars accept the normative value of Indonesia's constitutional right to asylum, especially as it is situated in the human rights Chapter XA of the Constitution, which is largely modelled on the Universal Declaration of Human Rights (UDHR).[66] As Butt and Lindsey comment, Chapter XA offers "broader constitutional protection of human rights than do many developed states."[67] However, it seems that the Indonesian state has not adopted the constitutional norm as it should by law, but favours the competing humanitarian approach, as explained below. This implied rejection of constitutional norms is troubling in a country that is struggling to establish the rule of law.[68]

The next question is why the focus of refugee protection shifted for many scholars and policy-makers following the making of Law No. 6 of 2011 on Immigration to the competing "humanitarian-protection" argument. As we now explain, the reliance on Law No. 6 of 2011 on Immigration illustrates a competition between a discretionary humanitarian and immigration-law approach and a rights-based rule-of-law approach, which is underpinned by different views about the nature and importance of human rights. It also reflects a debate about the relevance of the Pancasila principles[69] as competing national constitutional norms.

6. What is the basis of the "humanitarian-protection" argument?

In his article in this Issue, Tobing focuses on Indonesia's *non-refoulement* obligations under international law to counter the narrative projected by the government to the public, which consistently frames Indonesia's response in allowing refugees to temporarily reside in Indonesia on humanitarian grounds. He cites a report of a statement by Dicky Komar, the former Director of Human Rights and Humanitarian Affairs of the Indonesian Foreign Affairs Ministry in June 2018, that:

> Indonesia is actually not a signatory to the 1951 Convention and 1967 Protocol concerning refugees, so the Indonesian government is not obliged to fulfill the rights of refugees. Even so, ... the government has a humanitarian tradition of helping foreign refugees in Indonesia.

Tobing points out that some scholars argue that the right to asylum in Article 28G(2) of the Constitution is supported by the second of the five Pancasila principles set out in the Preamble to the Constitution, namely a "just and civilized humanity." The argument is that Article 28G(2) is another embodiment of the humanitarian argument rather than representing a superior constitutional norm. As we explain below, the "humanitarian approach" appeals to Pancasila principles for support.

Tobing illustrates the use of the term "humanitarian" in two main senses: first, its literal meaning of regarding the interests of humanity; and, second, as being associated with government (executive) largesse or discretion, and extra-legal remedies.[70] This latter sense is used by Komar in the above statement when he suggests (incorrectly) that

[65] Note that the obligation to enact such legislation arises even though Indonesia is not a party to the Refugee Convention. See the discussion of Thailand in *supra* note 13.

[66] Dewansyah and Nafisah in this Special Issue; Rosmawati (2015); Agustine (2016) argues additionally that it reflects a tradition of hospitality.

[67] Butt & Lindsey, *supra* note 26, p. 252.

[68] Chen, *supra* note 59, pp. 865–6.

[69] As set out above; see *supra* note 8.

[70] Kneebone (2010).

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Indonesia does not have legal obligations to refugees because it is not a party to the Refugee Convention, but confers (extra-legal) humanitarian protection at its discretion. This is a commonly held view amongst SEA countries that have "rejected" international refugee law.[71] For example, during the 2015 crisis involving Rohingya boat people, the Ministers of Foreign Affairs of Malaysia, Indonesia and Thailand in their joint statement of 20 May 2015 said that these three states had taken "necessary measures ... on *humanitarian* grounds, beyond their international obligations."[72] Discretionary or extra-legal measures are the basis of Thailand's and Malaysia's protection of refugees under their national legislation. In this second sense, humanitarian protection is contrasted with legal-rights-based protection.[73]

The first (literal) sense of humanitarianism was promoted by some participants at the workshop. The representative of the organization *Dompet Dhuafa* spoke of humanitarian assistance in its most basic sense as the provision of essential aid.[74] In a similar vein, in their joint statement of 20 May 2015, the three Ministers of Foreign Affairs pledged to uphold their "responsibilities and obligations under international law and in accordance with their respective domestic laws, including the provision of *humanitarian* assistance to ... those 7,000 irregular migrants still at sea."[75] They further agreed to offer refugees temporary shelter "provided that the resettlement and repatriation process will be done in one year by the international community."

The latter statement illustrates the association of humanitarianism with minimum and/or temporary protection, commonly made in Indonesia. Temporary protection is promoted because refugees are perceived by many as posing a threat to social harmony and as unsuitable for integration into Indonesia (see Sadjad's article in this Issue). For example, at the workshop, a participant who represented immigration and police focused on the potentially negative impacts of refugees in Indonesia, which he considered to be "ideological, political, economic, social" and involving "national security." This view was shared by another administrator at the workshop, who referred to the challenges in monitoring and handling migrants nationwide and the social problems they created.

These comments at the workshop illustrate how the humanitarian approach is contrasted with principles of law, including human rights. Whilst many Indonesian scholars (including participants at the workshop) recognize that Indonesia's protection of refugees stems from its respect for human rights and the legal framework described above,[76] a suspicion of human rights obligations (equally voiced by workshop participants) implies a return to the Asian-values debate, in which human rights are seen as a Western concept.[77] The denial of human rights to refugees is a further example of the failure to constitutionalize refugee rights.[78] The appeal to the Pancasila principles in Indonesia's Constitution, which are said to refer to "national values," to support the argument for

[71] Davies (2008), p. 5; Lego, *supra* note 13.

[72] See Government of Indonesia, Government of Malaysia, and Government of Thailand (2015) (emphasis added).

[73] Dewansyah, Dramanda, & Mulyana, *supra* note 2, p. 350.

[74] In a similar vein, a representative of the Ministry of Foreign Affairs at the workshop opined that Indonesia is acting "beyond our obligations" under the PR and stressed that the PR's first and foremost principle is the "humanitarian emergency aspect"—that is, providing assistance/protection to those in distressed situations.

[75] Government of Indonesia, Government of Malaysia, and Government of Thailand, *supra* note 72 (emphasis added).

[76] Rosmawati, *supra* note 66; Agustine, *supra* note 66.

[77] Butt & Lindsey, *supra* note 26, pp. 244–5; Kneebone (2019). This debate was promoted by the New Order regime (1966–98—when the original 1945 Constitution was restored).

[78] Dewansyah and Nafisah in this Special Issue.

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"humanitarian protection" is another manifestation of the rejection of constitutional norms and a return to the Asian-values debate.[79]

Thus, two approaches to refugee protection in Indonesia were manifested in the workshop: (1) a rights-based rule-of-law approach to refugee protection in accordance with Indonesia's constitutional and national legal obligations, including international law and human rights; and (2) a discretionary/exceptional humanitarian approach to immigration law.

7. Assessing the PR

It is now time to turn to the 2016 PR and to assess it in light of the above discussion. We ask three questions:

- How does the PR frame protection for asylum seekers and refugees? As bearers of rights or as humanitarian (or even illegal) entrants? Is the humanitarian label synonymous with a "securitized" approach?
- Does the PR support or undermine the pre-existing framework and architecture of refugee law and policies?
- What challenges and opportunities for protection of refugee rights in Indonesia remain after the PR?

7.1 How does the PR frame protection for asylum seekers and refugees?

The article by Sadjad in this Issue explains the structure and content of the PR, which consists of 40 articles divided amongst four chapters. Chapter I includes Article 1(1), which contains a definition of a refugee that mirrors that in the Refugee Convention:

> A refugee from abroad, hereinafter referred to as a refugee, is a foreigner who resides within the territory of the Republic of Indonesia due to a well-founded fear of persecution for reasons of race, ethnicity, religion, nationality, membership of a particular social group, and different political opinions, and does not wish to avail him/herself of protection from his/her country of origin and/or has obtained asylum seeker status or refugee status from the United Nations through the United Nations High Commission for Refugees in Indonesia.

Many commentators optimistically read much into this provision and saw it as a promise of refugee rights.[80] In this definition, both "refugees" and asylum seekers are described as "refugees."[81] As Sadjad observes, the terms "refugee" (*pengungsi*) and "asylum seeker" (*pencari suaka*) are used interchangeably throughout the PR (albeit somewhat inconsistently).[82] Prior to the PR, asylum seekers only had a status in international law; post the PR, asylum seekers

[79] Syahrin (2018) argues that the Pancasila supports the exclusion of "illegal immigrants" from Indonesian society; cf. Ulum & Hamida (2018), who point to the association between Asian values and Pancasila as a form of "cultural relativism." Dewansyah and Nafisah in this Issue conclude that it is an ambiguous norm.

[80] Chairah (2017), p. 28; Varagur (2017); Yonesta (2017).

[81] Art. 1(1) of the PR recognizes the "declaratory" status of asylum seekers. This theory recognizes the claim of an asylum seeker in international law to refugee status if they satisfy the elements of the refugee definition in Art. 1A(2) of the 1951 Refugee Convention. As a number of the contributors to this Special Issue explain, this means that certain basic rights such as non-penalization for method of entry (Art. 31 of the 1951 Refugee Convention) are owed to asylum seekers.

[82] Arts 29, 39, and 42(3)(d) of the PR conceptualize asylum seekers as persons whose applications for RSD have been rejected and are therefore amenable to "voluntary return or deportation."

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receive temporary protection from the UNHCR while their application is being processed and gain refugee status if their status-determination application is successful.

However, as Sadjad explains, by framing refugees passively as persons to be "discovered," "sheltered," and "safeguarded," the PR treats refugees as persons to be managed or as irregular migrants, disregarding their status in international law. Chapter II of the PR is headed "Detection," Chapters III and IV contain provisions for "Shelter" and "Safeguarding," respectively, but Chapter V tellingly deals with "Immigration Supervision." Sadjad analyses earlier drafts of the PR (at least six versions) dating from November 2011 and demonstrates that, during the drafting process, the promise of rights for refugees was whittled down. While earlier drafts had envisaged that refugees would be granted a permanent status in Indonesia, these provisions were omitted from later drafts.[83] Sadjad also notes the absence of references to or provision of human rights (which had been included in earlier drafts),[84] although Article 3 of the PR states: "The handling of refugees must duly observe generally applied international provisions and be in accordance with the provisions of laws and regulations."

In its final form, the PR only envisages two solutions: first, voluntary repatriation (or "return")[85] and, second, resettlement in a third country[86] or "country of destination,"[87] local integration having disappeared as an option before enactment. Voluntary repatriation is referred to in a number of articles in the PR as "voluntary return *or deportation* in accordance with the prevailing laws and regulations" (Article 29(1), emphasis added). A clear procedure for voluntary return is provided in Article 38. However, Article 43 of the PR specifies that a return can be involuntary for "refugees whose applications are ... finally rejected." This raises the question of whether the PR upholds the principle of *non-refoulement*, which applies to Indonesia (see Tobing in this Issue).[88]

The PR does not expressly prohibit *refoulement* (and does not provide any final process for determining whether *refoulement* might occur).[89] Malahayati et al. suggest that the search-and-rescue procedures in the PR prevent *refoulement*, although they admit (as do other commentators) that Indonesia's record on *non-refoulement* is mixed.[90] As the *Qasemi* case discussed below illustrates, there are instances post PR in which asylum seekers (*pencari suaka*) have been treated as "illegal immigrants" and their rights to RSD have been ignored, and so the possibility of *refoulement* is real.

Sadjad explains that the PR perpetuates a humanitarian approach towards asylum seekers, by framing refugees and asylum seekers as transitory migrants, passive recipients of assistance, and as persons of concern to national security who are not able to integrate into Indonesian society. In their final article in this Issue, Dewansyah and Nafisah point to the lack of conferment of basic human rights in the PR as an indication of a humanitarian approach. By contrast, Damaledo, in his article in this Issue, shows that, in Nusa Tenggara Timur Province, the definition in Article 1(1) of the PR has encouraged a shift in the framing of refugees from "illegal migrants" to refugees, in a region where refugee protection has long been politically controversial. Damaledo's discussion illustrates the opportunity that the PR definition provides to challenge past conceptions of refugees. This discussion illustrates the tension between the inclusive refugee definition in the PR and the securitized (immigration) framing of the refugee "problem." This tension epitomizes the Indonesian

[83] Missbach et al., *supra* note 9, also point out that earlier drafts had more rights.

[84] Yonesta, *supra* note 80; Chairah, *supra* note 80; see also Dewansyah and Nafisah in this Special Issue.

[85] Art. 38 of the PR.

[86] Art. 37(a) of the PR.

[87] Art. 33(2) of the PR.

[88] Syahrin, *supra* note 58.

[89] UNHCR (1979), para. 192, sets out procedural standards to satisfy the non-*refoulement* obligation, including appeal to a higher authority. Many states have implemented a specific pre-departure non-*refoulement* process

[90] Malahayati et al., *supra* note 30, pp. 76–7. See also Tan, *supra* note 21, pp. 382–3; Kneebone (2020).

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approach to refugee issues under which national state responsibility is deflected on the one hand to international organizations and local governments while, on the other hand, refugees are seen as the objects of state/administrative discretion.

7.2 Does the PR support or undermine the pre-existing framework and architecture of refugee law and policies?

As mentioned above, the PR is an exercise in the power vested in the president under Law No. 37 of 1999 on Foreign Relations, in particular Article 27(2)—the legislative power of the Ministry for Foreign Affairs to create refugee policy. However, the PR created the Coordinating Ministry for Political, Legal, and Security Affairs, and placed the treatment of refugees under its authority.[91] The Coordinating Minister (Article 1.5, "The Minister") is responsible for co-ordinating between the Ministry of Foreign Affairs and the Ministry of Law and Human Rights (Articles 1.3, 1.6, 42), the latter of which oversees the Directorate General for Immigration—the Immigration Office and Immigration Detention Centres. The involvement of these two ministries (requiring inter-ministry co-ordination) is a new feature of the PR, as is the specific authorization of the Directorate General for Immigration to handle refugee issues.[92]

As several commentators have pointed out, the Ministry of Foreign Affairs was involved in drafting the final version of the PR, along with the Directorate General for Immigration, the National Police, and the National Army.[93] Further, commentators have observed that, post PR, there is a "biased perspective and actions taken by officers on the ground when using a security approach rather than a human rights approach in managing refugee and asylum seeker issues in Indonesia."[94] That is, a securitized, "discretionary" culture continues to dominate the implementation of the PR in place of the rights-based approach that the broad definition in Article 1(1) of the PR appeared to promise.

This is unsurprising because the PR also supports the policy embodied in the RCA, whereby the Indonesian state delegated its power to determine refugee status to the UNHCR.[95] One change that followed from the terms of Article 1(1) of the PR is that it broadens the role of the UNHCR to cover both persons who meet the definition of asylum seeker as well as refugees who have obtained a positive RSD decision from the UNHCR. This has led to a new practice of the UNHCR issuing identity cards to both asylum seekers who have not yet undergone the RSD process and those who have a successful RSD outcome.

The PR also refers obliquely to the IOM's role to provide shelters and basic necessities in Chapter III (Articles 26–28) when it refers to "international organisations." As Suyatna et al., in their article in this Issue, explain, the PR has formalized the role that the IOM had prior to the enactment of the PR of providing alternative accommodation outside of detention centres.[96] But, simultaneously, the PR created a new role for local government. As of January 2020, out of 13,626 persons registered with the UNHCR in Jakarta, only ten persons remained in immigration detention. Of the approximately 4,000 people who had been formerly detained, almost all had been transferred to community shelters in

[91] More specifically, the government body in charge of implementing the PR is the Refugee, Trafficking and People Smuggling Desk, which is under the Coordinating Ministry.

[92] Kadarudin et al. (2018).

[93] Chairah, *supra* note 80, para. 23; cf. Sadjad, who cites Yonesta as saying that the Director General of Immigration had a strong influence on the drafting of the PR.

[94] *Ibid.*, paras 28–30.

[95] Dewansyah and Nafisah point to this continued role of the UNHCR as another example of an entrenched humanitarian approach in the PR.

[96] This is discussed further in Missbach and Adiputera's article in this Special Issue.

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accordance with the provisions of the PR.[97] As Suyatna et al. suggest, this is a significant departure from the previous practice of centralizing the responsibility for handling refugees to the national government in co-operation with the IOM, and only minimally involving local administrations.

In summary, the PR reinforces the old architecture but complicates it by requiring even more inter-ministry co-ordination; at the same time, it arguably further removes the Indonesian state from responsibility for refugees by shifting responsibilities on matters concerning foreign policy to the local-government level.

7.3 Challenges and opportunities for protection of refugee rights in Indonesia post the PR

As outlined above, the PR is focused on the management and securitization of refugees and asylum seekers rather than providing durable or long-term solutions. However, the definition in Article 1(1) of the PR is arguably a significant advancement in terms of the framing of asylum seekers and refugees. Overall, the PR marks a shift from a centralized to a decentralized system, which creates many challenges and ignores the realities of local politics as summarized.

There are many practical and logistical challenges for a proper implementation of the PR, ranging from providing adequate implementing laws, regulations, guidelines, and funding to local governments to ensuring effective inter-ministerial co-operation at both the national and the local levels (see Suyatna et al. in this Issue). Further, there is a need to clarify the role of provincial governments. Additionally, there is the issue of "autonomous" or independent refugees—those who were not previously provided with accommodation by the IOM and who are not eligible for community shelters. As Missbach and Adiputera explain in the third article in this Issue, this group (which amounts to about a third of the total refugee population) mainly live in urban areas such as the Greater Jakarta area. There is the challenge of providing adequate housing and rights to all refugees for health, education, and livelihood.[98]

The largest challenge that is highlighted in this Introduction is arguably a normative one: to ensure that refugees are seen primarily as a state responsibility, in accordance with its *non-refoulement* and constitutional obligations. The responsibility to protect and provide for refugees can be shared by the state across various departments and levels of government, although the implementation of the PR must be directed by clear state policies and guidelines on funding.

At the workshop, Elfansuri Chairah from Komnas HAM suggested that one of the biggest challenges is to change the "mindset" of immigration officers implementing the PR from law enforcement and security to "protectors." He pointed out that the PR is ambiguous as to its scope: it is not clearly limited to the provision of emergency measures, but neither does it prescribe a protection focus. As contributors to this Issue point out, since the enactment of the PR, in practice, Law No. 6 of 2011 on Immigration has consistently been used as the main regulatory framework to deal with refugees and asylum seekers rather than, for example, the spirit behind Article 1(1) of the PR.

This is evidenced by the *Qasemi* decision[99] to which the authors in this Issue refer and which was described and analyzed at the workshop by Avyanthi Azis. Bismellah and Shaqera Qasemi were Afghani nationals of Hazara ethnicity who travelled to Indonesia from Kabul in February via India and Malaysia, arriving in Surabaya in March 2018. Upon their arrival, their "agent" (smuggler) confiscated their passports. They

[97] In early 2020, after the abolition of immigration detention in accordance with the PR, approximately 8,000 refugees and asylum seekers were accommodated in community shelters.

[98] See also Dewansyah and Nafisah in this Special Issue.

[99] Court cases No. 1/Pid.S/2018/P.N. Tng; No. 02/Pid.S/2018/P.N. Tng (Tinggi Tangerang).

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subsequently made four attempts to claim asylum both to the UNHCR (twice) and to immigration officers (twice). They were, however, charged with offences relating to their lack of valid travel documents and convicted under Law No.6 of 2011 on Immigration Law.[100] This was despite the fact that they stated their intention to seek asylum in Indonesia and that they held letters issued by the UNHCR, which arguably met the requirements of the Law, and the fact that the immigration officers were required under Regulation No. IMI-0352.GR.02.07 of 2016 (which preceded the PR) to refer them to the UNHCR after they stated their intent to seek asylum.

This case was decided after the introduction of the PR, Article 1(1) of which, as explained, recognizes the status of an asylum seeker. As their defence, the Qasemis submitted that the effect of this article is that a person does not need to obtain the status of a refugee (i.e. be assessed by the UNHCR) to come within its terms. The defence argued that immigration officers had therefore made a procedural error. The majority of the court rejected that argument, ruling that the Immigration Law applied to them because they had not obtained refugee status, and convicted each of them with a prison term of one month.[101] The Court in the *Qasemi* case disregarded the PR due to it being a Presidential Regulation and not a law (*undang-undang*), highlighting the shortcomings of the PR in terms of legal hierarchy.[102]

In Azis's presentation at the workshop, she commented on the lack of knowledge of the judges of the PR and its effects, and of the situation and rights of refugees in general in Indonesia. The judges clearly applied an immigration-law approach—indeed the Presiding Judge inferred that the defendants had probably broken Malaysia's laws (by transiting through Malaysia) and that Indonesia was also entitled to regard them as illegal immigrants.[103] Further, although the defence raised the exception in Article 86 of the Immigration Law, which entitled them to protection as victims of human trafficking and smuggling, this was also disregarded. The *Qasemi* case highlights the issues with the implementation of the PR due to its lack of socialization amongst officials in the Indonesian bureaucracy within both immigration and legal institutions.[104]

Poor socialization also hinders the implementation of the PR at the local-government level. As mentioned above, the PR delegates responsibility for front-line management of refugees to local governments, namely the provision of shelter and housing. As outlined by Suyatna et al. in this Issue, the primary barriers to implementation of the PR at the local-government level are the lack of legal clarity regarding their jurisdiction to manage refugee issues and the lack of political will to implement their new responsibilities under the PR. The lack of political will is underpinned by a poor understanding of refugee issues within the local bureaucracy, a reluctance to allocate budget to refugees local issues, competition for limited resources, and a lack of economic support from the national government.

7.3.1 Opportunities

These same challenges also create opportunities that include the development of a detailed refugee law[105] and education around refugee issues at regional (SEA), national,

[100] Art. 116 juncto 71(b).

[101] There was one dissenting opinion.

[102] See Table 2 in Suyatna et al.'s article in this Special Issue.

[103] This illustrates awareness of the regional dynamics of asylum seeking in SEA and the framing of asylum seekers as objects of immigration discretion.

[104] It is well known that a lack of socialization of laws amongst state institutional stakeholders is an endemic issue in Indonesia, in particular with respect to the capacity of courts. See generally Pompe (2005); Butt & Lindsey, *supra* note 26, Chapter 4.

[105] Chairah, *supra* note 80, para. 23, who saw the PR as an "answer to the lack of [a] legal framework on refugee management in Indonesia;" para. 26: "the first legal framework."

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and local levels. As the *Qasemi* case illustrates, many key institutional stakeholders and decision-makers lack knowledge and understanding of refugee issues, and need training and education with respect to the application of the PR on refugee issues in general. Further, the ambiguity in the drafting and application of the PR (discussed above) highlights the need to develop further guidelines for implementation of the PR particularly with respect to *non-refoulement* through deportations and failure to conduct rescue at sea.[106] The gap between humanitarian and rights-based protection that underlies the PR provides many opportunities to advocate for adequate rights in relation to health, education, and livelihood.[107] For example, Yonesta has pointed out the inconsistency between the rights under Indonesia's Constitution and its international-law obligations, which apply to asylum seekers and refugees.[108]

As outlined by Suyatna et al., although there are compounding barriers to the implementation of the PR at the local-government level, the PR also presents a number of opportunities: "at legal and technical levels, Indonesian laws and regulations do, in fact, authorize local governments to allocate budget towards the management of refugees to fulfil new responsibilities under the PR."

However, the political will at the local level to implement the PR is largely contingent on the example set by the national government. The impetus for change, therefore, hinges on the national government's capacity or will to make refugee issues a budget priority and increase the flow of funding to local governments for the purposes of implementing the PR. As discussed by Suyatna et al., critical in setting such an example is the Coordinating Ministry and relevant ministers who have the authority to provide technical and financial support across key institutions. Beyond technical and financial issues, the Coordinating Ministry is positioned strategically to re-orientate the normative framing of refugee rights in Indonesia towards a rights-based narrative rather than humanitarianism or securitization.

The fall in resettlement places globally in the post-PR period also suggests another opportunity. It is now clear that Indonesia cannot dismiss its responsibilities by describing itself as a transit country, as it has in the past. With a lack of resettlement places globally—a trend that is likely to be exacerbated by the economic effects of COVID19—Indonesia has become a long-term hosting country, similar to Thailand and Malaysia. Indonesia needs to find positive ways to utilize the skills of refugees within its borders and to work co-operatively with other countries within the SEA region to share the hosting of refugees.

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[106] Kneebone, *supra* note 90.

[107] Yonesta, *supra* note 10.

[108] *Ibid*. The rights include engaging in "wage-earning employment" and "nondiscrimination." See also Dewansyah and Nafisah in this Special Issue, who explain the rights due to asylum seekers under the "declaratory theory" (*supra* note 82) and general human rights law.

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