

## Pancasila and Pragmatism: Protection or *Pencitraan* for Refugees in Indonesia?

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### Abstract

Since the 1970s Indonesia has been a transit country for refugees searching for resettlement. While it has not signed the 1951 Refugee Convention, Indonesia does allow the UNHCR to operate within its borders. Furthermore, Indonesian President Joko Widodo recently pledged humanitarian assistance to Rohingya refugees in Bangladesh. This paper asks what motivates Indonesia to assist refugees, despite not being a signatory to the 1951 Refugee Convention. What principles underlie Indonesia's approach to refugees? Based on interviews conducted with government officials, practitioners, activists and academics in Indonesia, this paper finds that Indonesia is guided by *Pancasila* (Indonesia's state ideology) and the preamble to its constitution in playing a humanitarian role in international society. At the same time, however, this humanitarian imperative is in tension with pragmatism. This means that there are a number of problems for refugee protection in Indonesia. This paper argues that while Indonesia is driven by humanitarian ideals in assisting refugees, it must enact legal protections for refugees, for example, by ratifying the 1951 Refugee Convention, to endorse its commitment to *Pancasila* and the preamble to the constitution, otherwise it risks using these foundations as simply *pencitraan*, or 'window dressing.'

Keywords: *Indonesia, Refugees, Pancasila*

### I. INTRODUCTION

Indonesia has a mixed record in dealing with asylum seekers and refugees. It is not a signatory to the 1951 Refugee Convention and will not permanently resettle refugees, yet Indonesia has welcomed the work and an office of the United Nations High Commissioner for Refugees (UNHCR) since 1979. Since then, it has allowed asylum seekers and refugees registered with the UNHCR to stay in Indonesia temporarily. Furthermore, the Indonesian President, Joko Widodo, dispatched aid to Rohingya refugees seeking shelter in Bangladesh late last year.<sup>1</sup> In May of this year, the UNHCR thanked the Indonesian government for rescuing and disembarking two boats of Rohingya refugees.<sup>2</sup> At the same time, however,

<sup>1</sup> The Jakarta Post, "Jokowi dispatches aid to Rohingya refugees", online: *Jkt Post* <<http://www.thejakartapost.com/news/2017/09/13/jokowi-dispatches-aid-to-rohingya-refugees.html>>.

<sup>2</sup> United Nations High Commissioner for Refugees UNHCR, "UNHCR thanks Indonesia and Malaysia for rescue and disembarkation of Rohingya refugees, calls on countries in the region

refugees in Indonesia are protesting against the increased heavy policing and curfews they have been subjected to,<sup>3</sup> and yet another report has surfaced of a 22 year old Hazara refugee who has hanged himself after spending four years in a squalid Indonesian immigration detention centre.<sup>4</sup>

Why did Indonesia deliver aid to refugees in Bangladesh, yet provide so little for the refugees living in limbo within its own borders? What motivates Indonesia to assist refugees, despite not being a signatory to the 1951 Refugee Convention? Last year, presidential opponent Prabowo Subianto referred to Jokowi's donation of aid to Rohingya refugees in Bangladesh as *pencitraan*,<sup>5</sup> which can be roughly translated to 'window dressing' in English. According to the Oxford Dictionary, 'window dressing' means '[a skilful] but superficial or misleading presentation of something, designed to create a favourable impression.'<sup>6</sup> So, what principles do underlie Indonesia's approach to refugees? This paper seeks to answer this question through interviews with Indonesian government officials, practitioners, activists, academics, and observers of Indonesia's activity relating to asylum seekers and refugees. Based on these interviews, this paper finds that Indonesia is guided by the preamble to its constitution and the state ideology of *Pancasila* in playing a humanitarian role in international society. At the same time, however, this humanitarian imperative is offset by a keen pragmatism, which both motivates Indonesia to assist refugees for instrumental reasons such as bolstering its reputation, but also prevents the Indonesian government from fully engaging in meaningful protection of refugees. In this paper, I argue that to be truly committed to the preamble of its constitution and of *Pancasila*, Indonesia must enact legal protections for refugees or sign the 1951 Refugee Convention, otherwise it may risk undermining its apparent motivations of *Pancasila* as simply *pencitraan*, or 'window dressing.'

This paper will first explore the background of Indonesia's humanitarian traditions and its historical engagement with refugee policies. Then, it discusses

to comply with maritime search and rescue obligations", (1 May 2018), online: <<http://www.unhcr.org/news/press/2018/5/5ae81d624/unhcr-thanks-indonesia-malaysia-rescue-disembarkation-rohingya-refugees.html>>.

<sup>3</sup> Amy Pitonak, "Afghan refugees protest at Indonesian detention centre | Afghanistan Analysts Network", (3 April 2018), online: <<https://www.afghanistan-analysts.org/pressure-to-return-afghan-refugees-protest-at-indonesian-detention-centre/>>.

<sup>4</sup> Angela Jelita, "Refugees in Indonesia face bleak future with scant hope of a new life", (21 March 2018), online: *South China Morning Post* <<http://www.scmp.com/lifestyle/article/2137993/suicide-depression-and-poverty-indonesias-refugees-bleak-future-now-theres>>.

<sup>5</sup> Moh Nadlir, "Prabowo Sebut Bantuan Indonesia untuk Rohingya Hanya Pencitraan Jokowi", (16 September 2017), online: *KOMPAS.com* <<https://nasional.kompas.com/read/2017/09/16/14095231/prabowo-sebut-bantuan-indonesia-untuk-rohingya-hanya-pencitraan-jokowi>>.

<sup>6</sup> "Window Dressing", online: *Oxford Dictionaries* <[https://en.oxforddictionaries.com/definition/window\\_dressing](https://en.oxforddictionaries.com/definition/window_dressing)>.

what motivates Indonesia in working with refugees, based on fieldwork interviews. It will then conclude by discussing what this means for refugees seeking protection in Indonesia.

## II. INDONESIA'S HUMANITARIAN TRADITIONS

In order to understand Indonesia's commitment to assisting refugees, it is useful to first understand Indonesia's humanitarian traditions, as well as its legal engagement with refugee protection. This section will first briefly outline Indonesia's humanitarian traditions, before analysing its legal framework for dealing with refugees.

Indonesia's national values are embedded in the official state ideology of *Pancasila*. There are five pillars of *Pancasila*: (1) belief in the one and only God, (2) just and civilised humanity, (3) the unity of Indonesia, (4) democracy, and (5) social justice for all of the people of Indonesia. Of the *Pancasila* principles, it is perhaps the second that is most relevant to this article, as this is the principle that most interviewees pointed to as justifying their humanitarian motivations. This principle is often taken to mean 'humanitarian' or 'humanitarianism', which, according to the Oxford Dictionary, is defined as 'concerned with or seeking to promote human welfare.'<sup>7</sup>

These Pancasila principles were first articulated by Sukarno on June 1<sup>st</sup>, 1945 and were then included in Indonesia's constitution, which was adopted on August 18<sup>th</sup>, 1945. While they were first articulated by Sukarno, he argued that he did not create these principles, rather, he derived them from traditional Indonesian ways of life.<sup>8</sup>

Indeed there are many ways of life in Indonesia as the country is made up of many diverse cultures. Nevertheless, there are common humanitarian and charitable traditions that run through each. The practice of *gotong royong* (mutual assistance; Java), for example, is common throughout the country. *Gotong royong* involves all members of the community assisting their neighbours through a reciprocal exchange of labour. Assistance can be provided to neighbours in a variety of cases including ceremonies and construction of houses. *Gotong royong* can also be used to construct public facilities like roads, bridges and temples.<sup>9</sup> There are many similar philanthropic practices in other regions of Indonesia, such as *parelek* in West Java, which involves collecting and selling rice and donating the profits to the poor, elderly and orphaned; *arisan tenaga* in South Sulawesi,

<sup>7</sup> "Humanitarian", online: *Oxf Dictionaries Engl* <<https://en.oxforddictionaries.com/definition/humanitarian>>.

<sup>8</sup> Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society: A Cultural and Ethical Analysis* (BRILL, 1988) at 180.

<sup>9</sup> [PIRAC] Public Interest Research and Advocacy Center, ed, *Giving and fund raising in Indonesia: investing in ourselves* (Mandaluyong City, Metro Manila, Philippines: Asian Development Bank, 2002).

which involves cultivating the farmland of another, who donates to the group cash fund; *subak* in Bali, which ensures sustainability of water supplies in common resource pools; and *bareh sapacik* in West Sumatra, which involves donating rice to the mosque's keeper, as only a few examples.<sup>10</sup> While John R. Bowen argues that this has been manipulated by the state to become a cultural-ideological tool to mobilise labour and construct national tradition and identity,<sup>11</sup> it is generally thought that this 'mutual assistance' is an engrained cultural philosophy in Indonesia.<sup>12</sup>

### III. INDONESIA'S REFUGEE POLICIES

In relation to refugees, however, Indonesia has a mixed history both legally and in practice. There is a very limited legal framework that governs Indonesia's relationship with refugees. The first administrative acknowledgment of refugees was in a Circular Letter of the Prime Minister on Political Refugees of 1956 – an administrative and non-legally binding instrument. It defined 'political refugees' as foreigners who had committed a political crime, which is not contrary to Indonesia's interests, and afforded them protection on the grounds of 'human rights and fundamental freedom in accordance with international customary law.'<sup>13</sup>

Yet in the 1950s when the key foundations for the international refugee regime were laid, Indonesia took no part. The international refugee regime, as we know it today, was built with the establishment of the UNHCR, the 1951 Refugee Convention, and its 1967 Protocol. While Indonesia did not ratify the Convention or its Protocol, it allowed the UNHCR to open its first office in Indonesia in 1979 to assist with the ongoing flow of refugees from the Indochinese crisis. Between 1979 and 1996 Indonesia hosted a camp on Galang island for Indochinese refugees to have their claims processed before they were resettled in third countries. The camp accommodated more than 170,000 refugees from Indochina until it closed in 1996.<sup>14</sup> While many Indonesians look back on this period as

<sup>10</sup> *Ibid*, Ma Oliva Z Domingo, "Philanthropy in South East Asia" in Helmut K Anheier & Stefan Toepler, eds, *Int Encycl Civ Soc* (New York, NY: Springer US, 2010) 1220; Jamie Seth Davidson & David Henley, eds, "Custom and koperasi: The co-operative ideal in Indonesia" in *Revival Tradit Indones Polit Deploy Adat Colon Indig*, Routledge contemporary Southeast Asia series 14 (Abingdon, Oxon ; N.Y: Routledge, 2007) 87.

<sup>11</sup> John R Bowen, "On the Political Construction of Tradition: Gotong Royong in Indonesia" (1986) 45:3 *J Asian Stud* 545.

<sup>12</sup> Public Interest Research and Advocacy Center, *supra* note 9; Amelia Fauzia, *Brill's Southeast Asian Library, Volume 1: Faith and the State: A History of Islamic Philanthropy in Indonesia* (Leiden, NLD: BRILL, 2013) at 262.

<sup>13</sup> *Circular Letter of the Prime Minister No 11/R.I./1956 of 1956 on Political Refugees*, 7 September 1956 [*Circular Letter of the Prime Minister No 11/R.I./1956 of 1956 on Political Refugees*].

<sup>14</sup> United Nations High Commissioner for Refugees UNHCR, "UNHCR di Indonesia", online: *UNHCR* <<http://www.unhcr.org/id/unhcr-di-indonesia>>.

proof of Indonesia's humanitarian tradition, it is important to note that Indonesia opened the camp on the condition that all refugees would be resettled and the costs would be borne by the UNHCR.

In 1992 Indonesia passed law 9/1992 on Immigration,<sup>15</sup> which was the first law relating to the detention of foreigners. While the law allowed for detention, it rarely happened in practice.<sup>16</sup> During the decade of the 1990s Indonesia also engaged in international and regional processes related to migration. In 1991 Indonesia received formal observer status in the International Organisation for Migration (IOM).<sup>17</sup> As a core member of the Association of Southeast Asian Nations (ASEAN), Indonesia took an active part in developing the Bangkok Declaration, which put forward the Asian values perspective on human rights before the 1993 World Conference on Human Rights. Article 11 of the Bangkok Declaration emphasises 'the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons.'<sup>18</sup> Later in the decade, Indonesia participated in Regional Cooperation Processes.<sup>19</sup> These processes included the 1996 Regional Seminar on Irregular Migration (the Manila Process), in which the IOM lead a series of regional seminars; and the Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants, which was a regional meeting organised by the Australian Government and the UNHCR with a much broader focus than the Manila Process. These processes have been criticised for their lack of transparency and limited representation.<sup>20</sup>

After the fall of Suharto, Indonesia committed itself to a number of international conventions that tied it to certain human rights obligations, including the major principle relating to refugee protection: *non-refoulement*. The principle of *non-refoulement* prohibits states from returning a person to a place in which they face danger. Indonesia committed itself to this principle in 1998 when it ratified the Convention Against Torture (CAT), Article 3 of which states that 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of

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<sup>15</sup> Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia* (ISEAS - Yusof Ishak Institute, 2015) at 160.

<sup>16</sup> A Nethery, B Rafferty-Brown & S Taylor, "Exporting Detention: Australia-funded Immigration Detention in Indonesia" (2013) 26:1 J Refug Stud 88 at 94.

<sup>17</sup> Missbach, *supra* note 15 at 134.

<sup>18</sup> *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration)* (1993).

<sup>19</sup> Susan Kneebone, "The Bali Process and Global Refugee Policy in the Asia-Pacific Region" (2014) 27:4 J Refug Stud 596 at 599.

<sup>20</sup> Kneebone, *supra* note 19; Susan Kneebone, "The Governance of Labor Migration in Southeast Asia" (2010) 16:3 Glob Gov 383.

being subjected to torture.’<sup>21</sup> Furthermore, in 2005 Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR). The content of the ICCPR has been interpreted to ‘preclude return to torture, as well as inhuman or degrading treatment and places limits on State Parties’ detention of asylum seekers and refugees, among other things.’<sup>22</sup>

A number of domestic laws and instruments were also put in place. For example, the basis for *non-refoulement* was included in the 2002 Directive from the Director-General of Immigration, which also delegated responsibility for refugee status determination to the UNHCR.<sup>23</sup> This, however, is an administrative – not legal – instrument. In 1998 the ‘right to seek and receive political asylum from another country’ was included in the Parliamentary Decree on Human Rights of 1998 and Law No 39 of 1999 concerning Human Rights. This right was also included into Article 28G(2) of the Indonesian Constitution in amendments made in 1999.<sup>24</sup>

Despite ratifying these international conventions and adopting several domestic legal and administrative instruments, in practice, the situation in Indonesia appears less than compliant. For example, Indonesia has been accused of breaching the principle of *non-refoulement*<sup>25</sup> and has been repeatedly criticised for its decrepit detention facilities,<sup>26</sup> which may violate the right to liberty and security and amount to inhuman or degrading treatment or punishment, as well as potentially violating the right to liberty and security against the ICCPR.<sup>27</sup> Furthermore, there have been recent refugee protests against the increased heavy policing and curfews that refugees have found themselves subjected to,<sup>28</sup> and a recent report has surfaced of a 22 year old Hazara refugee who hanged himself after spending four years in a squalid Indonesian immigration detention centre.<sup>29</sup>

Around the time that Indonesia committed itself to these international instruments in the late 1990s, there was a rise in numbers of irregular migration flows through Indonesia onward to Australia. This led to an increasing concern

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<sup>21</sup> General Assembly UN, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).

<sup>22</sup> Nikolas Feith Tan, “The Status of Asylum Seekers and Refugees in Indonesia” (2016) 28:3 Int J Refug Law 365 at 5.

<sup>23</sup> *Ibid* at 4.

<sup>24</sup> *Ibid* at 5.

<sup>25</sup> Nikolas Feith Tan, “Australia, Indonesia and the Principle of Non-Refoulement”, online: *Asylum Insight* <<https://www.asyluminsight.com/c-nik-tan/>>; Amy Sawitta Lefevre & Kanupriya Kapoor, “Migrants land in Indonesia, but hundreds pushed back to sea”, *Reuters* (15 May 2015), online: <<https://www.reuters.com/article/us-asia-migrants-boat/migrants-land-in-indonesia-but-hundreds-pushed-back-to-sea-idUSKBN0008S20150515>>.

<sup>26</sup> Jessie Taylor, *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia* (2009); Tan, *supra* note 22 at 9.

<sup>27</sup> See Tan, *supra* note 22 at 7–12.

<sup>28</sup> Pitonak, *supra* note 3.

<sup>29</sup> Jelita, *supra* note 4.

and effort to control this flow on the part of Australia, and as a result, Australia and Indonesia agreed to co-chair the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process). This forum brings together 45 states from the region as well as the UNHCR, the IOM and the United Nations Office of Drugs and Crime to facilitate discussion and information sharing related to people-smuggling and transnational crime. The Bali Process aims to synchronise members' policies to avoid creating push and pull factors for each country in the region. While the Bali Process has been criticised as a talk-shop, the Bali Process did establish a Regional Cooperation Framework (RCF) in 2011 to provide a more comprehensive regional framework for cooperation in reducing people-smuggling. To this end, a Regional Support Office was established in 2012 to operationalise the RCF, which is primarily funded by Australia.<sup>30</sup> In recent years, the Bali Process has begun to further consider refugee protection in their meetings. Nevertheless, the Bali Process began as – and remains largely so – a forum with a heavily securitised focus on cross-border flows. Indeed, in practice the Bali Process aims to prevent the movement of people and essentially works to stop them reaching Refugee Convention signatory states (i.e., Australia) and accessing their rights.

The limitations of the Bali Process can be seen in the response, or lack thereof, to the 2015 Andaman Sea crisis when around 8,000 people fleeing Myanmar by boat were stranded at sea. Countries around the region, including Indonesia, reportedly intercepted these boats and pushed them back to sea.<sup>31</sup> Approximately 3,000 were saved by Indonesian and Malaysian locals or were able to swim to shore. At a meeting between the foreign ministers of Thailand, Indonesia and Malaysia, Indonesia and Malaysia agreed that they would not push boats back to sea but would instead offer temporary shelter, provided the refugees were resettled or returned within a year. While Thailand did not sign up to the deal, it did deploy navy vessels as assistance platforms while Indonesia, Malaysia, Thailand and Bangladesh conducted search and rescue operations.<sup>32</sup> Yet, there was no response or action taken by the Bali Process.

In addition to Indonesia temporarily receiving these Rohingya refugees, there are other indications that the Indonesian government is beginning to consider its own refugee response framework. At the end of 2016, Indonesian President Joko Widodo quietly issued the Presidential Decree Concerning the Handling of Foreign Refugees (hereafter: the Presidential Decree) on the handling of refugees, which outlines how relevant departments and organisations should administer refugees within Indonesia, including instructions for search and rescue, living

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<sup>30</sup> Amy Nethery & Carly Gordyn, "Australia-Indonesia cooperation on asylum-seekers: a case of 'incentivised policy transfer'" (2014) 68:2 *Aust J Int Aff* 177 at 189.

<sup>31</sup> Lefevre & Kapoor, *supra* note 25.

<sup>32</sup> Peter Hughes et al, "The Andaman Sea refugee crisis a year on: what happened and how did the region respond?", online: *The Conversation* <<http://theconversation.com/the-andaman-sea-refugee-crisis-a-year-on-what-happened-and-how-did-the-region-respond-59686>>.

arrangements, voluntary return and even funeral preparations for refugees found deceased.<sup>33</sup> The Presidential Decree defines a refugee using the same definition found in the Refugee Convention and states that the handling of refugees should be based on cooperation between the Indonesian government and the UNHCR, while taking into account generally accepted international conventions.<sup>34</sup>

Nevertheless, the Presidential Decree falls short of significant protections for refugees, such as protection from refoulement. While the decree requires the return of refugees to be voluntary and implemented in accordance with the law, it does not explicitly prohibit the return of a person to a place in which they face danger.<sup>35</sup> Although Indonesia is committed to the principle of *non-refoulement* under the Convention against Torture, the omission of this principle in the country's only refugee framework is a significant oversight.<sup>36</sup> Furthermore, the Presidential Decree focuses largely on search and rescue and does not grant refugees rights to work or education.

## 1. Indonesia and the Refugee Convention

As we can see from the above outline, Indonesia has a limited legal framework in dealing with refugees and only a shallow engagement with the international refugee regime. While it allows the office of the UNHCR to carry out its work within its borders, Indonesia has not yet ratified the Refugee Convention, despite expressing a willingness to do so on several occasions.<sup>37</sup> While the Indonesian government is generally accepting of refugees and allows them to take temporary shelter within its borders, significant problems remain for the refugees themselves. Without legal protections, such as those outlined in the Refugee Convention, refugees have no rights to work and limited access to education. Herein lies the problem of refugeehood: refugees cannot access their basic human rights on account of their humanity, rather, these human rights can only be guaranteed through law.<sup>38</sup>

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<sup>33</sup> *Peraturan Presiden tentang Penanganan Pengungsi dari Luar Negeri (Presidential Regulation on The Handling of Refugee from Overseas)*, Indonesia, 31 December 2016 [*Peraturan Presiden tentang Penanganan Pengungsi dari Luar Negeri (Presidential Regulation on The Handling of Refugee from Overseas)*]; Carly Gordyn, "Assessing Indonesia's new decree on refugees", (9 February 2017), online: *New Mandala* <<http://www.newmandala.org/assessing-indonesias-new-decree-refugees/>>.

<sup>34</sup> *Peraturan Presiden tentang Penanganan Pengungsi dari Luar Negeri (Presidential Regulation on The Handling of Refugee from Overseas)*, *supra* note 33; Gordyn, *supra* note 33.

<sup>35</sup> Gordyn, *supra* note 33.

<sup>36</sup> *Ibid.*

<sup>37</sup> Tan, *supra* note 22 at 6 n.32.

<sup>38</sup> For more on this conundrum, see Chapter Nine "The Decline of the Nation-State and the End of the Rights of Man" in Hannah Arendt, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt, 1973).



The common reasons that researchers cite for Indonesia's refusal to ratify the Refugee Convention include: Indonesia's fear of a 'pull factor,' concerns about economic burdens, fear of conflict with locals, and concerns about national security;<sup>39</sup> such concerns have been confirmed in some of my own interviews. Other reasons for non-ratification have also been put forward, such as commitment to the 'ASEAN way' tradition of not interfering in the business of neighbouring countries.<sup>40</sup> According to Sara Davies, however, these reasons are flawed in important ways. Davies instead argues that Asian states have not accepted refugee law because they have never felt obliged to do so.<sup>41</sup> This is because Asian states were excluded from the refugee law drafting process<sup>42</sup> and they perceive it to be irrelevant to the particular problems found in Southeast Asia. Against this argument, however, we can turn to Africa as an example, as the majority of African states have ratified the Convention. Furthermore, in 1969 the Organisation of African Unity adopted a Convention Governing the Specific Aspects of Refugee Problems in Africa, which complements the Refugee Convention within the specific African context.<sup>43</sup> Davies further argues that the Asian states have not signed on to international refugee law because the Indochinese crisis reinforced the idea that Western states would provide material assistance and resettle refugees from the region, which absolved Southeast Asian states from any responsibility. According to Davies, 'Southeast Asian states learnt to manipulate the refugee problem in order to secure this aid. The refusal to accede to the international instruments was a key tenet of the manipulation strategy.'<sup>44</sup>

Yet as we have seen, Indonesia does engage, albeit shallowly, with refugee issues. Despite not being a signatory to the Refugee Convention, Indonesia does, sometimes, help refugees through the donation of aid or by simply allowing refugees to take shelter on their shores while their claims for refugee status and resettlement are processed – something that many other non-signatory countries often do not allow.<sup>45</sup> What motivates the Indonesian government to do so? The rest of this article will investigate this question.

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<sup>39</sup> Penelope Mathew & Tristan Harley, *Refugee Protection and Regional Cooperation in Southeast Asia: A Fieldwork Report* (The Australian National University, 2014) at 15.

<sup>40</sup> Sara E Davies, "The Asian Rejection?: International Refugee Law in Asia" (2006) 52:4 Aust J Polit Hist 562.

<sup>41</sup> Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia*, Refugees and Human Rights (Leiden: Martinus Nijhoff Publishers, 2008) at 18.

<sup>42</sup> Davies, *supra* note 40.

<sup>43</sup> Organization for African Unity, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

<sup>44</sup> Davies, *supra* note 41 at 18.

<sup>45</sup> See for example Pei A Palmgren, "Irregular Networks: Bangkok Refugees in the City and Region" (2014) 27:1 J Refug Stud 21 at 25.

#### IV. METHODS

In order to understand what drives Indonesia's non-committal and sometimes contradictory stance towards refugees, I conducted interviews with Indonesian elites who are involved in this policy area. Interviews were conducted in a semi-structured format and the answers were then grouped and coded based on themes identified by the informants. This article will now present the most significant themes revealed during interviews in response to questions about why Indonesia behaves the way it does in relation to refugees.

#### V. FINDINGS: INDONESIA'S MOTIVATIONS

After conducting these interviews, it became apparent that there were two main underlying reasons affecting Indonesia's behaviour in relation to refugees: *Pancasila* and pragmatism. This section will first outline the reasons why Indonesia is motivated to assist refugees, before discussing the reasons why it is not willing to assist in further ways, such as through signing the Refugee Convention.

##### 1. Why does Indonesia assist refugees?

The key reasons that Indonesia assists refugees, according to my respondents, are the principles of *Pancasila* and Indonesia's constitution. First, *Pancasila* was seen as a motivating factor for assisting refugees through the interpretation of the second principle of *Pancasila* as 'humanitarianism.'<sup>46</sup> Wiryono Sastrohandoyo, a former Indonesian diplomat, stated: 'As a *Pancasila* country, we have to be humanitarian, to help people.'<sup>47</sup> He pointed to the Galang Island camp as evidence for Indonesia's ability and willingness to help, however, he also noted that this help was simply allowing refugees temporary shelter while they were processed. Furthermore, the costs of the processing centre were covered by the UNHCR, resulting in very little burden for Indonesia itself. Therefore, the appearance of humanitarianism was actually quite restricted, or offset, by pragmatism. The pragmatic limitations to actions motivated by *Pancasila* is a theme that became evident throughout these interviews.

Despite pragmatic limitations, many interviewees noted that Indonesia, as a country that is not a signatory to the Refugee Convention, often behaves 'in a way that sometimes is much more humane than many of the parties to the Convention ... Indonesia has never turned away a boat.'<sup>48</sup> Professor Dewi Anwar, formerly the Deputy Secretary for Political Affairs and advisor to the Vice President, recalls that at the time of the Andaman Sea crisis when local Indonesian authorities

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<sup>46</sup> Professor Sigit Riyanto, *Interview* (2017).

<sup>47</sup> Wiryono Sastrohandoyo, *Interview* (2017).

<sup>48</sup> Professor Dewi Fortuna Anwar, *Interview* (2017).

wanted to turn refugee boats away, the Vice President, Jusuf Kalla, reminded the Indonesian President that ‘the second principle [of] *Pancasila* is still humanitarianism ... we are still a *Pancasila* state, we don’t turn people away ... we take them in first, save them first, then figure out what to do with them later, but Indonesia is not supposed to act in such an inhumane way.’<sup>49</sup>

The second reason given as a motivating factor for assisting refugees was that humanitarian assistance was mandated in Indonesia’s constitution. Part of the preamble to the Constitution declares that the Indonesian government will ‘participate toward the establishment of a world order based on freedom, perpetual peace and social justice.’<sup>50</sup> Many interviewees used this as a motivating factor for Indonesia in assisting irregular migrants, even when the irregular migrants were not seen to be ‘Indonesia’s problem.’ For example, one interviewee responded that ‘it’s mandated for Indonesia to play that role [in international peace and order] and I think the foreign ministry is using that to look into the possibility of how Indonesia can play a role in the international affairs. I think the boat people, the asylum seekers, is not really our problem but we have a role to play in helping to find a solution.’<sup>51</sup> Adding further weight to this perspective are the comments from a current Indonesian senior government official, who wishes to remain anonymous: ‘as a mandate of our constitution, of course, Indonesia takes part in the world affairs including on the issue of humanitarian issues, so based on this mandate we deal with the issues of migration from a humanitarian perspective.’<sup>52</sup> Nevertheless, as we have seen in Indonesia’s delayed response to the Andaman Sea crisis, the desire to participate in world affairs based on ‘freedom, perpetual peace and social justice,’ does not necessarily equate to a proactive role, rather, a pragmatic, *ad hoc* response.

There are, however, other reasons why Indonesia is motivated to assist refugees that are not entirely based on humanitarian values, rather, in a sense of solidarity and in pragmatism. For example, Indonesia was partly motivated by a sense of solidarity in assisting during the Indochinese crisis where refugees were fleeing communism, at a time when Indonesia was staunchly anti-communist. In more recent years, this solidarity has been for fellow Muslims, especially the Rohingya. There are strong traditions of refuge and asylum in Islam, starting with the prophet Mohammad’s flight to Medina. According to Islamic law and tradition, Muslims and non-Muslims alike who are seeking protection have the right to ask for protection in an Islamic community and do not need to prove that

<sup>49</sup> *Ibid*; Very similar comments also made by Da’i Bachtiar, *Interview* (2017).

<sup>50</sup> *Certified english translation of the 1945 Constitution of the Republic of Indonesia.*, 2002 (First adopted August 18, 1945 - superseded 1949-1959 - restored 1959. Consolidated: as amended by the First Amendment (19 October 1999), the Second Amendment (18 August 2000), the Third Amendment (9 November 2001) and the Fourth Amendment (11 August 2002)) [*Certified english translation of the 1945 Constitution of the Republic of Indonesia.*].

<sup>51</sup> Endy Bayuni, *Interview* (2017).

<sup>52</sup> Anonymous Indonesian Government Official 1, *Interview* (2017).

they have been persecuted. Based on this tradition, seekers should be granted asylum upon their request and they should benefit from the rights accorded to all nationals, including rights to work, education, free movement and family reunification.<sup>53</sup>

Pragmatically, Indonesia is also motivated to assist refugees as a means of bolstering its reputation. According to Indonesian Professor of International Law, Sigit Riyanto, ‘Indonesia needs recognition from the world as a peace-loving nation and peace loving. By dealing with the refugee and asylum seekers treating them well, it seems that Indonesia would like to have a deep appreciation from the world.’<sup>54</sup> One example of this intricate relationship between pragmatism, humanitarian motivations and drive to bolster national reputation can be seen in Indonesia’s response to the 2015 Andaman Sea crisis, as briefly mentioned above. In the early days of crisis, Indonesian authorities reportedly intercepted refugee boats and pushed them back to sea.<sup>55</sup> After Indonesian fishermen rescued people from sinking boats and brought them ashore, and amidst mounting pressures to respond – plus the intervention of the Indonesian Vice President – Indonesia changed tactic and allowed the asylum seekers to alight until their resettlement.

Indonesia’s desires to bolster its reputation and to ‘play an active role’ in international affairs was also described by some interviewees as a motivating factor for Indonesia’s involvement in the Bali Process. Yet, as the Bali Process was designed to control flows of irregular migrants rather than assist refugees, this was an effort to boost its reputation as a leader in the region. This was especially so, considering that at the time the Bali Process was established, Indonesia was recuperating from the aftermath of the Asian Financial Crisis, *reformasi*, and the East Timor crisis. According to a number of interviewees, cooperation in this area is ‘important in terms of Indonesia’s international profile. Now that Indonesia is no longer an authoritarian regime it gives the foreign ministry the space to take initiatives to open to new ideas of how Indonesia can play a bigger role in international affairs and this is actually mandated in our constitution.’<sup>56</sup> While this is again a reference to Indonesia’s national constitution, it is used pragmatically to encourage leadership in the region, however, in an area based on the *control* of migration, as opposed to refugee protection.

Nevertheless, there is potential here for Indonesia to promote refugee protection. Indonesia has already shown its willingness in 2013 when Indonesia initiated and hosted a Special Conference on Irregular Movements of Persons. This conference brought together 13 countries of origin, transit and destination to focus on four aspects of people smuggling and human trafficking: prevention, early detection, protection and legal action. The outcome of which was the Jakarta

<sup>53</sup> Khadija Elmadmad, “Asylum in Islam and in Modern Refugee Law” (2008) 27:2 Refug Surv Q 51 at 54.

<sup>54</sup> Riyanto, *supra* note 46.

<sup>55</sup> Lefevre & Kapoor, *supra* note 25.

<sup>56</sup> Bayuni, *supra* note 51.

Declaration, which, despite the primary focus being management of migration flows and control of borders, included a commitment to protection and to ‘ensuring that smuggled and trafficked people shall not be held liable for people smuggling and trafficking in persons offences’, and ‘enhancing communication and coordination to support search and rescue at sea, disembarkation, reception, processing, and outcomes.’<sup>57</sup> The Jakarta Declaration indicates a subtle movement towards a holistic approach to migrant smuggling and ensures the rights of smuggled migrants.

## 2. Why does Indonesia not assist refugees further?

As seen above, many Indonesian officials cite humanitarian reasons – underpinned by the preamble to the constitution and *Pancasila* – as motivating factors for assisting refugees. Yet these principles are referred to or stated on paper in its refugee policies. Furthermore, as we have also seen, there are pragmatic limitations to this humanitarian imperative. These limitations have consequences, evidenced by the refugees in Indonesia protesting against the increased heavy policing and curfews they have been subjected to, and another suicide of a refugee after spending four years in a squalid Indonesian immigration detention centre. There are a number of reasons that explain Indonesia’s inability and unwillingness to fully commit to the humanitarian notion of refugee protection, however, I argue that the overarching reason is pragmatism.

First, it must be noted that the issue of refugees is simply not a major concern in Indonesia.<sup>58</sup> During fieldwork interviews, I asked each interviewee about the major issues that they deal with in their roles – the issue of refugees or irregular migration was very rarely noted as a top concern, if it all. This seems to be the case with the Indonesian populace, who, besides a few civil society groups, do not regard the protection of refugees as important and therefore do not pressure the government into taking action.<sup>59</sup> This of course is a different story in cases of emergency, as seen in 2015 when local Indonesian fisherman rescued boats of Rohingya refugees.

Generally, however, this is not a major day-to-day concern. It therefore translates to a lack of political will in the government. The issue of refugees is not a politically expedient issue but an issue which needs to compete with other domestic issues, such as economic matters. It therefore has a low priority for parliamentarians, many of whom point out Indonesia’s own domestic problems with internally displaced persons in Maluku, Kalimantan and Aceh, as well as unemployment and poverty. In this complex domestic environment with such competing issues, it makes the pursuance of refugee protection a non-pragmatic

<sup>57</sup> *Jakarta Declaration on Addressing Irregular Movement of Persons* (Jakarta, 2013).

<sup>58</sup> Riyanto, *supra* note 46.

<sup>59</sup> *Ibid.*

option for politicians. Furthermore, politicians lack a basic conceptual understanding of asylum and refugee matters. According to Professor Sigit Riyanto, who formerly worked for the UNHCR and conducted training workshops for government officials and immigration, politicians ‘do not know precisely what is a refugee and what are asylum seekers and what illegal immigrants is [sic].’<sup>60</sup> This lack of interest in refugee issues not only means a lack of interest in protecting refugees, but a relative lack of interest in controlling and limiting their entry and movement. In other words, as assisting refugees is not an important political issue and cannot compete with Indonesia’s resources, the reverse may also be true: allowing refugees to stay may be more pragmatic than curbing their movement, which would also have to compete for significant amounts of Indonesian resources.

Not only is the refugee issue not seen as important or as a benefit to Indonesians and their parliamentary representatives, assisting refugees is also seen as a cost. For example, Indonesian politicians are concerned about disruptions to national stability and the social economic impact should Indonesia begin to resettle refugees, despite Davies showing that there is no evidence to support such fears.<sup>61</sup> They are further worried that ratification of the Refugee Convention would create a pull factor for refugees to come to Indonesia.<sup>62</sup> This is concerning for Indonesians, as a country of 250 million people, with 11% of its population below the poverty line.<sup>63</sup> Some respondents not only cited the economic burden, but the direct responsibility in managing refugees as a cause for concern. For the moment, however, most refugees living in Indonesia are taken care of by the IOM, therefore costing Indonesia very little to allow refugees to wait in Indonesia while pursuing their refugee status determination and resettlement. Therefore, it is likely that taking action to combat refugees or irregular migrants would cost Indonesia more time, effort, and resources than it would to allow them to stay.

Doing as much as possible with minimal cost is one pragmatic theme that was common throughout most interviews. One respondent cited this as another reason for Indonesia’s hesitation in ratifying the Refugee Convention, with particular reference to the costs this could have on the bilateral relationship between Indonesia and Australia: ‘once Indonesia ratifies the Convention and then Australia has a kind of strong position to push Indonesia [with the responsibility to manage refugees] ... Now we [are] just doing what we can do.’<sup>64</sup> The two countries work together bilaterally and through the Bali Process to combat irregular migration. By not ratifying the Refugee Convention, Indonesia feels it is able to

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<sup>60</sup> *Ibid.*

<sup>61</sup> Davies, *supra* note 40 at 566.

<sup>62</sup> Sigit Riyanto, “Urgensi Legislasi Hukum Pengungsi dan Kendalanya di Indonesia” (2004) 2 *Indones J Int Law* 67 at 78.

<sup>63</sup> The World Bank, “Indonesia: Overview”, (2018), online: *World Bank* <<http://www.worldbank.org/en/country/indonesia/overview>>.

<sup>64</sup> Dr Dafri Agussalim, *Interview* (2017).

resist pressure from Australia to take more responsibility for refugees who would otherwise move onwards to Australia.

Such pragmatic calculations are often the reason that Indonesia is limited in its humanitarian approach to refugees and asylum seekers. The tensions between humanitarian and pragmatic considerations can be seen today in the Indonesian government's debates about refugee policy. For example, one anonymous government official stated that Indonesia 'need[s] to strike a balance between the fact that we are not party to the Convention but we have a mandate on humanity and humanitarian approach,' which, according to the official, often becomes a cause for heated debate within the government.<sup>65</sup>

Whether or not Indonesia should ratify the Convention is also a matter of debate within Indonesian policy circles, with some officials arguing that Indonesia needs to ratify the Convention in order to be seen no longer as a developing country but as a middle-income rising power and a role model for Southeast Asia. Nevertheless, this is not a view that is widely accepted within the government, and demonstrates how different bureaucratic departments have different ideas about refugee policy.<sup>66</sup> Another anonymous government official of high standing in the Ministry of Foreign Affairs argues that there is limited purpose for Indonesia to ratify the Convention because Indonesia already follows the key tenets of the Refugee Convention: *non-refoulement*, non-discrimination and non-penalisation, while countries that have ratified the Convention do not.<sup>67</sup> Furthermore, this interviewee noted that Indonesia was not involved in drafting the Convention, therefore, believes there are some elements of the Convention that Indonesia cannot adhere to.<sup>68</sup> The debate within the Indonesian government and the differing views between its departments would be a fruitful avenue for further investigation and study.

## VI. CONCLUSION: PROTECTION OR PRAGMATISM?

Indonesia assists refugees. It has done so by hosting a refugee processing centre on its Galang island during the Indochinese crisis, by allowing the UNHCR to carry out its work within Indonesia's borders, by donating aid to Rohingya refugees in Bangladesh and hosting refugees on its shores. These actions are, according to the Indonesian officials interviewed for this study, guided by humanitarian principles underpinned in *Pancasila*, and the mandate for Indonesia to play an international role as outlined in the preamble to the constitution. Nevertheless, these guiding principles are in tension with pragmatism, where Indonesia's concerns for its own reputation, economic concerns and domestic

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<sup>65</sup> Anonymous Indonesian Government Official 1, *supra* note 52.

<sup>66</sup> *Ibid.*

<sup>67</sup> Anonymous Indonesian Government Official 2, *Interview* (2018).

<sup>68</sup> *Ibid.*

politics prevent Indonesia from fully committing to a humanitarian approach to refugee flows.

This has a number of consequences for Indonesia's policies and the protection of refugees in Indonesia. First, Indonesia's desire to bolster its reputation and fulfil its constitutional mandate of playing an active role in world affairs has led the government to take an active part in regional forums such as the Bali Process, however, the focus of the Bali Process is on the *control* of migration flows, rather than the *protection* of refugees. There is potential here for Indonesia, as a co-chair of the Bali Process, to steer the discussion towards refugee protection. For this to be fruitful and truly beneficial to Indonesia's reputation, Indonesia must commit to legal protections for refugees, for example, through ratifying the Refugee Convention. This would be more in line with Indonesia's mandate of playing a role in world affairs based on 'freedom, perpetual peace and social justice.'

As mentioned, the major reasons often given for Asian states not committing themselves to refugee law are 'good neighbourliness,' fear of economic burden and fear of national security threats. While the concept of 'good neighbourliness' was not one of the reasons given in any of my interviews, the fears of economic burdens and national security threats still persist among Indonesian officials, despite Davies' evidence and argument that refugees do not burden the economy or threaten social cohesion.<sup>69</sup> Furthermore, those who argue the Refugee Convention is Eurocentric and irrelevant to the developing world can look to Africa as an example, where African states have not only ratified the Convention but developed a Convention specific to the refugee problems in Africa.<sup>70</sup> There is an opportunity here for the Southeast Asian region to follow this example and for Indonesia to take the lead. This would help fulfil Indonesia's desire to boost its reputation as well as fulfil its constitutional mandate to play a role in world affairs, which brings us to the next point.

Second, while Indonesia plays an active role in controlling migration, for example through co-chairing the Bali Process discussed above, the mandate of the Indonesian constitution is to play a role in building a world order based on 'freedom, perpetual peace and social justice.' Yet currently, pragmatic concerns often result in Indonesia taking an *ad hoc* response to refugee issues as they arise, rather than playing a proactive role. Again, there is room here for Indonesia to leverage its leadership and proactively play a part in promoting protection for refugees in the region, for example, by initiating a protection framework under the ASEAN umbrella.

Third, the refugee issue is not a salient issue – especially in times not considered to be crisis – and therefore competes with other domestic issues considered more important by Indonesian policy makers. This also means that

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<sup>69</sup> Davies, *supra* note 40 at 565–566.

<sup>70</sup> Organization for African Unity, *supra* note 43.



controlling refugees is not a major concern for Indonesia and letting them stay temporarily may be the most pragmatic option. While controlling refugee movement may require the commitment of more resources, currently, refugees are largely looked after by the IOM. The general policy disinterest has also meant that Indonesia, up until the Presidential Decree was released at the end of 2016, had no framework for dealing with refugees. Even now, Indonesia is well known for its bureaucratic inconsistencies and the effective implementation of the decree remains to be seen.

Ultimately, this means that refugee policies in Indonesia, while motivated by the *Pancasila* ideology, are largely based on pragmatism, which falls short of true protection for refugees. This means that pragmatism overrides Indonesia's ability to appear truly humanitarian or fully committed to the principles of *Pancasila*. Indonesia must enact legal protections for refugees to prove its commitment. Without legal protections, refugees have no rights to work and limited access to education. As mentioned, the problem of refugeehood means that refugees cannot access their basic human rights without legal provisions. As outlined earlier in this paper, to be 'humanitarian' is to promote human welfare. Therefore, by enacting legal rights for refugees Indonesia can demonstrate its commitment to protecting refugees based on its humanitarian *Pancasila* values and show that it takes a proactive role in establishing a 'world order based on freedom, perpetual peace and social justice.'

As mentioned in the section above, ratification of the Refugee Convention remains debated within the Indonesian government. Yet if Indonesia does not want to ratify the Refugee Convention there are other ways that it can demonstrate its commitment to true refugee protection and show that *Pancasila* overrides pragmatism, such as through strengthening its domestic legal protections and granting refugees the rights to work and an education. In addition, as this paper has shown, Indonesia's approach to refugees is also driven in part by reputational benefits. One avenue where Indonesia can bolster its reputation for regional leadership is in refugee protection, which it can promote through an ASEAN regional framework and by steering the Bali Process towards refugee protection.

It is indeed appreciated that Indonesia allows refugees temporary shelter on its shores, something many other non-signatories do not allow. Yet without legal protection, Indonesian officials using *Pancasila* to justify their hosting of refugees temporarily may be at risk of using *Pancasila* as '*pencitraan*', as opposed to a true *Pancasila* humanitarian commitment where the promotion of human welfare is truly the priority.

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