

## ASYLUM SEEKERS IN A NON-IMMIGRANT STATE AND THE ABSENCE OF REGIONAL ASYLUM SEEKERS MECHANISM: A CASE STUDY OF ROHINGYA ASYLUM SEEKERS IN ACEH-INDONESIA AND ASEAN RESPONSE

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### Abstract

*The problem of asylum seekers has become a global humanitarian issue. Demands regarding the handling mechanisms based on the values of human rights is getting stronger voiced by the international community. In the Southeast Asian region, the number of ethnic Rohingya asylum seekers has increased and has started to demand settlement in non-immigrant countries like Indonesia. Although Indonesia does not have international obligations in handling asylum seekers, constitutionally, Indonesia has an obligation to guarantee the right of everyone to obtain asylum which has been included in the Constitution. In a global perspective, humanitarian issues in the handling of asylum seekers has begun to be driven towards the handling model based on regionalism. Therefore, ASEAN's response to the issue of asylum seekers should start a discourse given the number of asylum seekers in Southeast Asia began to rise. This paper deals with the immigration policy on asylum seekers of Rohingya people in Aceh province of Indonesia who plight in 2015 "boat people crisis" with regionalism approach.*

**Keywords:** *asylum seekers, regional, ASEAN, legal framework, rohingya.*

### Abstrak

*Masalah pencari suaka telah menjadi isu kemanusiaan global. Tuntutan mengenai mekanisme penanganan yang didasarkan pada nilai-nilai hak asasi manusia semakin kuat disuarakan oleh masyarakat internasional. Di kawasan Asia Tenggara, jumlah pencari suaka dari etnis Rohingya telah meningkat dan telah mulai meminta untuk dapat menetap di negara-negara non-imigran seperti Indonesia. Meskipun Indonesia tidak memiliki kewajiban internasional dalam menangani pencari suaka, secara konstitusional, Indonesia memiliki kewajiban untuk menjamin hak setiap orang untuk memperoleh suaka sebagaimana tercantum di dalam konstitusi. Dalam perspektif global, isu-isu kemanusiaan mengenai penanganan pencari suaka mulai didorong ke arah model penanganan yang bersifat regional. Oleh karena itu, ASEAN harus segera menanggapi wacana ini mengingat jumlah pencari suaka di Asia Tenggara yang semakin meningkat. Makalah ini membahas tentang kebijakan imigrasi bagi pencari suaka dari etnis Rohingya di Provinsi Aceh, Indonesia yang mengalami keadaan buruk pada "krisis manusia perahu" 2015 dengan pendekatan regionalisme.*

**Kata kunci:** *pencari suaka, regional, ASEAN, kerangka hukum, rohingya.*

## I. INTRODUCTION

The number of asylum seekers arriving in Indonesia in recent years continues to increase. Most of the asylum seekers originally intended to seek asylum in Australia, so in this case, Indonesia has been considered as a transit country. However, not long ago, many asylum seekers from Southeast Asia grew niche to request asylum in Indonesia, such as ethnic Rohingya and other asylum seekers from Myanmar and Bangladesh.<sup>1</sup> Up to the present time Indonesia is not a party to the 1951 United Nations (UN) Convention relating to the status of Refugees and/or the 1967 Protocol Relating to the status of refugees (hereinafter Refugee Convention).. It means that there is no legal obligation for Indonesia to accept asylum seekers identified as refugees.

On one hand, this is in line with Indonesian policy of immigration law. As a non - immigrant state, Indonesia's territory is not intended to be immigrants destination country to settle permanently, let alone for the asylum seekers.<sup>2</sup> On the other hand, the Second Amendment of the 1945 Constitution guarantees everyone's right for political asylum.<sup>3</sup> Owing to that, it becomes increasingly important to examine: how the practices of handling asylum seekers in Indonesia are based on immigration law, and whether such practices are in line with the principles of human rights, especially the right to asylum according to the 1945 Constitution. For the case of Rohingya asylum seekers, the situation becomes very complicated because ASEAN as a regional organization in South-east Asia is slow to react, and does not have a regional mechanism to deal with asylum seekers in the member countries of ASEAN. Meanwhile, many ASEAN countries has already known as countries which have problem on serious violations of human rights caused by the cross-border movement of individuals across the region, including refugees, and asylum seekers who are moving in search of protection from persecution.<sup>4</sup>

This paper deals with practices in handling asylum seekers in Indonesia as a non - immigrant state from immigration law perspective, particularly for the treatment of Rohingya asylum seekers in Aceh province of Indonesia, well known as 2015 "boat people" crisis. This paper also aims to find the handling practices suitability of asylum seekers according to the norms of human rights law, specifically those which guarantees the right to asylum, including examining the possibility of developing a regional regime of asylum seekers mechanism at the level of ASEAN.

## II. ASYLUM SEEKERS, IMMIGRATION POLICY AND REGIONAL APPROACH

Asylum seekers can be interpreted in the generic sense and in the context of law. In its generic meaning, asylum seekers are a type of forced migrants. These migrants are

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<sup>1</sup> In our interview with a Rohingya asylum seeker, Muhammad Husen, who speaks Malay language (25 years old), in North Aceh Regent Aceh Province, he stated that "although at first he intended to go to Malaysia to work, but after staying in Aceh, there is a desire to settle there". Interview with Muhammad Husen, Rohingya asylum seeker (Blang Adoe, North Aceh Regent, October 9, 2015).

<sup>2</sup> Penelope Mathew and Tristan Harley, *Refugee Protection and Regional Cooperation in Southeast Asia A Fieldwork Report* (Canberra: The Australian National University, 2014), p.15, [http://www.mrcrg.ac.in/WC\\_2015/Reading/D\\_RefugeeProtection.pdf](http://www.mrcrg.ac.in/WC_2015/Reading/D_RefugeeProtection.pdf).

<sup>3</sup> See Article 28E (2) of Indonesia. *Undang-Undang Dasar 1945 Perubahan (Amended 1945 Constitution)*, 1999 - 2002.

<sup>4</sup> See Arie Afriansyah, "ASEAN's Human Rights Body: New Breakthrough for Human Rights Protection in South East Asian Region Some Preliminary Notes from Indonesia's Perspective." *Indonesia Law Review, Year 1 Vol. 2*, (May - August, 2011) : 19, accessed 18 October 2016, doi : <http://dx.doi.org/10.15742/ilrev.v1n2.80>.

forced to migrate (*forced/involuntary migration*) to seek asylum in another country or through the international protection mechanism. In such sense, asylum seekers are synonymous to refugees, although in historical and conceptual perspectives, asylum institution and refugee status came from different development.<sup>5</sup>

Asylum seekers and refugees are people who have left their home countries to escape actual or feared political, religious or social persecution; or other threats to their safety and well-being.<sup>6</sup> Meanwhile, in the context of the law, “an asylum seeker is someone who has made a claim to be considered for refugee status under the Refugee Convention and/or the Universal Declaration of Human Rights (UDHR).”<sup>7</sup> While a refugee itself is defined as someone who “owing to a well-founded fear of being persecuted for Reasons of race, religion, nationality, membership of a particular social group or political opinion is being located outside the country of his nationality”.<sup>8</sup> In this sense, international law distinguishes asylum seeker as someone claiming to be a refugee, while a refugee is an asylum seeker whose status has been confirmed as a refugee, not including those who are internally displaced.

In general, the action of asylum seekers leaving the country of origin to the destination country is a fundamental human right, namely the “right to seek and enjoy asylum.”<sup>9</sup> In a broader sense, the right to seek asylum is part of the right to leave, but in a condition that they are forced to. Such right means “the claim” of someone (including asylum seekers) to the state she/he left, in which sense the country must not restrict the person traveling abroad.<sup>10</sup> Nevertheless, these rights are not synonymous with the right to enter and settle legally in other countries.<sup>11</sup> This is due to the fact that reception of foreigners in other countries highly depends on the decision of immigration authorities nationwide.<sup>12</sup> However, because the issue of asylum seekers is a matter of human rights, the principle of non-refoulement set on the ban for the destination state to return the refugees to their country of origin where there is a threat of persecution. The destination country however, does not have the obligation to ensure a stable, long-term residence of the refugee, unless the country is one of the parties to the Refugee Convention.<sup>13</sup> Thus, the obligation to accept refugees (asylum

<sup>5</sup> Asylum as an expression of state sovereignty constitutes the protection that a state grants to an individual, while refugee status as the international legal regime for the protection of refugees was established in the early twentieth century to find a solution to the refugee problem. See María-Teresa Gil-Bazo, “Asylum as a General Principle of International Law”, *International Journal of Refugee Law*, Year 27, No. 1, (2015): 7-8, accessed 20 October 2016, doi: <https://doi.org/10.1093/ijrl/eeu062>.

<sup>6</sup> Orn B. Bodvarsson and Hendrik Van Den Berg, *The Economics of Immigration: Theory and Policy The Economic Migration and Policy* (Heidelberg: Springer, 2009), p.276.

<sup>7</sup> Maggie O’Neill, *Asylum, Migration and Community* (Bristol: The Policy Press, 2010), p.6.

<sup>8</sup> Convention relating to the status of refugees, Geneva, 28 July 1951, United Nation Treaties Series, Vol. 189, No. 2545, Art. IA (2), as amended by Protocol relating to the status of refugees of the 1967, Art. I (2).

<sup>9</sup> United Nations, General Assembly, Article 14 of the Universal Declaration of Human Rights (UDHR), A/III/217 (December 10, 1948).

<sup>10</sup> Author, *Pencegahan dan Penangkalan Dalam Perspektif Hak Atas Kebebasan Bergerak Setelah Perubahan UUD 1945 [Prohibition to Leave and to Entry in Freedom of Movement Perspective after Amended 1945 Constitution]* (unpublished master thesis. Bandung: Faculty of Law Universitas Padjadjaran, .....), p.65.

<sup>11</sup> Guy S. Goodwin-Gill, *International Law and Movement of Persons Between States* (Oxford: Clarendon Press, 1978), p.139.

<sup>12</sup> Manfred Nowak, “Civil and Political Rights” In *Human Rights: Concepts and Standard*, Edited by Janusz Symonides, (England: UNESCO Publishing, 2000), p.86.

<sup>13</sup> Fitria, “Perlindungan Hukum Bagi Pengungsi di Negara Ketiga: Praktik Indonesia”, *Padjadjaran Ilmu Hukum Year 1 Vol 2* (May-August 2015): 110.

seekers who have determined status) is only attached to states which are parties to the Refugee Convention. In any event, the obligation not to return asylum seekers to their country of origin applies to all countries, including countries that have not ratified the Refugee Convention<sup>14</sup>, as a general principle of international law.<sup>15</sup>

A long-term solution for refugees in third countries that may be considered is voluntary repatriation to the country of origin or resettlement in the territory of a state which is party to the 1951 Refugee Convention and its protocols. Meanwhile, the option of local integration can only be implemented in the countries of the convention—although as of now UNHCR prefers voluntary repatriation solutions unless such solution cannot be implemented.<sup>16</sup>

Although international law provides regulations for asylum seekers and refugees (including those living in third countries), the treatment and reception of asylum seekers is largely determined by the immigration policy of the country concerned. On the basis of sovereignty, the state has the authority to grant permission for its citizens to travel abroad and the conditions which follow, as well as to grant entry into and the establishment of foreigners in the country.<sup>17</sup> In such context, immigration policies touch only on the internal interest of the state and in general it is expressed with the view that immigration is only within the scope of domestic jurisdiction.<sup>18</sup> At the very extreme, the characteristics of legal provisions in the field of immigration, as Goodwin-Gill states, reflect “absolute and uncontrolled discretion” or “sovereign power” of state.<sup>19</sup> In the course of its development, the concept of sovereignty is no longer absolute, and must accommodate respect for human rights and justice. However, the policies and immigration laws of each country still affect international migration issues, including the issue of asylum seekers and refugees. While immigration policies have an enormous impact on asylum seekers and refugee settings, Satvinder Juss Singh states that: “currently, the human rights elements of refugee law are misunderstood because it is separated from the broader considerations of immigration policy.”<sup>20</sup>

In general, there are two models of immigration policy widely applied by international societies, namely policy applied by immigrant states/nations, and the model applied by nonimmigrant states/nations. As affirmed by Lynch and Simon, immigrant states/nations such as the United States (U.S.), Canada, and Australia are countries that accept, even encourage, immigration to the point where immigrants figure packs prominently in the population, the culture, and the mythology of that nation.<sup>21</sup> In contrast, “nonimmigrant nations” that do not accept immigrants, are

<sup>14</sup> *Ibid.*

<sup>15</sup> Guy S. Goodwin-Gill, , *op.cit.*, p.141.

<sup>16</sup> In UNHCR Executive Commission Conclusion 58 (XL)-1989 on ‘The problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection’ it is stated that governments should, ‘in close co-operation with the UNHCR’: ....promotes appropriate durable solutions with particular **emphasis firstly on voluntary repatriation** and, where this is not possible, local integration and the provision of adequate resettlement opportunities (emphasis added). Susan Kneebone “Introduction: Refugees and Asylum Seekers in the International Context – Rights and Realities”, in *Refugees, Asylum Seekers and The Rule of Law Comparative Perspectives*, edited by Susan Kneebone, (Cambridge: Cambridge University Press, 2009), pp.18–19.

<sup>17</sup> Guy S. Goodwin-Gill, *op.cit.*, p.3.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Satvinder Singh Juss, *International Migration and Social Justice* (Hampshire–Burlington: Ashgate, 2006), p.249.

<sup>21</sup> James P. Lynch and Rita J. Simon, *Immigration The World Over Statutes, Policies, And Practices* (Lanham: Rowman & Littlefield Publishers.Inc, 2003), p.209.

nations where relatively small proportions of the population are immigrants or are of immigrant stock and where immigrants have not had much impact on the culture and the mythology of the nation.<sup>22</sup> Countries characterized as non-immigrant nations include Japan and pre-2000 Germany. Some countries reflect immigrant nation's policies in certain aspects as well as national nonimmigrant policies in some others. Such type of countries, including Britain and France, are referred to as "ambivalent nations" by Lynch and Simon.<sup>23</sup>

Immigration policies of immigrant nations are described as "an unrestrictive immigration policy". This differs from countries of non-immigrant communities which reflect "restrictive immigration policy".<sup>24</sup> The countries of immigrants generally allow foreigners to enter the country with the purpose of settling or even for obtaining citizenship. As the general public can see the number of the aforementioned immigrants is considerably higher than its permanent population.<sup>25</sup> This is contrary to the countries that prohibit immigrant foreigners to come to the country with the aim of settling, let alone to become a citizen.

In addition to the main characteristics above, Lynch and Simon identify some other differences in immigration policies of immigrant and non-immigrant countries. First, admission policy in the immigration countries is less burdensome for foreigners who intend to get in<sup>26</sup>, in comparison with the requirements set forth by non-immigrant countries. Even language facility, employment, or other conditions would not be a prerequisite for entry to immigrant nations.<sup>27</sup> Second, the naturalization policy in immigrant countries is relatively less strict as compared to non-immigrant countries because generally, such states recognize the right of the immigrants to become citizens.<sup>28</sup> In the United States, for example, having the status as a permanent resident (a resident alien) is the ultimate step towards acquiring US citizenship status.<sup>29</sup> While in non-immigrant countries the status as a resident and the length of time to settle do not confer the right of immigrants to become citizens.<sup>30</sup>

Third, a country of immigrants would impose fewer restrictions on the actions of resident aliens that are not required of citizens, *in casu* there is no obligation to register periodically or approval for changes in residence or employment.<sup>31</sup> It stands in contrast to non-immigrant nation policy which applies strict immigration control to all types of foreigners. Some countries show characteristics of non-immigrant nations, such as Germany (pre 2000), and Japan, which have strict entry requirements, especially to settle.<sup>32</sup> Fourth, immigrant nations would administer the policy in an

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<sup>22</sup> *Ibid.*

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

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

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, pp.209-210.

<sup>27</sup> *Ibid.*, p.212.

<sup>28</sup> *Ibid.*, p.209.

<sup>29</sup> As stated by Allport and Ferguson Jr, "For some immigrants, being a **resident alien** in the United States is a satisfactory condition that allows them to live without any major problems, and they retain their foreign nationality for life, even if they never return to their home countries. For others, however, the ultimate goal is to **acquire American citizenship** (emphasis added)." Alan Allport and John E. Ferguson JR, *Immigration Policy 2nd Edition* (New York: Chelsea House Publishers, 2009), p.22.

<sup>30</sup> Bagir Manan, "Ensuring The Role of Immigration in Services, Application and Enforcement Immigration Law in Globalization Era", Paper presented in Working Meeting of Directorate General of Immigration, Department of Justice, Jakarta, August 21, 1996, p.2.

<sup>31</sup> James P. Lynch and Rita J. Simon, *op.cit.*, p.210.

<sup>32</sup> *Ibid.*, p. 216.

open and public manner, with a minimum of discretionary decisions.<sup>33</sup> Meanwhile, in non-immigrant countries the criteria for foreigners who are admitted is set by immigration officials with little legislative oversight. Moreover, there is no extensive opportunity for judicial review of the decisions made by immigration authorities.<sup>34</sup> Fifth, immigrant nations' population tolerate illegal immigrants to a greater extent than in non-immigrant nations.<sup>35</sup>

Based on these characteristics, countries of immigrants appear to be more receptive to asylum-seekers and refugees to settle, especially if the country is a party to the Convention. Meanwhile, the policy in non-immigrant countries would make it more difficult for immigrants to receive asylum or refugee status required for settling. Even in non-immigrant countries which have ratified the Refugee Convention, such as Germany until 2000, the reception of refugees is largely determined by government policy.

There are non-immigrant countries which have changed the policy into immigrant country, such as post millenium Germany by adopting the principle of *jus soli* in its laws of nationality.<sup>36</sup> However, due to the fact that Germany has been historically designed as a non-immigrant country, immigrants in Germany, although they have been naturalized as citizen, are considered as strangers by German society.<sup>37</sup> There is another non-immigrant country which maintains its policy, but campaigns multiculturalism to the public— namely, Japan.<sup>38</sup> Similarly, Germany has instituted a system of guest workers, (while in the case of Japan it has been around since the 1980s) which has received an influx of immigrant workers from less developed countries.<sup>39</sup> With the policy that allows immigrants to settle for a long period of time, the Japanese society has been transformed into a heterogeneous society, albeit the fact that the distinction between the Japanese and the immigrants still transpires. In view of the rough situation, a campaign for “multicultural coexistence” (*tabunka kyousei*) has been launched. The purpose of the campaign is to instill the perspective that people of different ethnicities and nationalities should be friendly and should trust each other in order to live together harmoniously.<sup>40</sup> In other words, the campaign's multiculturalism endeavors reflect the integration/assimilation problem among immigrant communities in Japan, including asylum seekers. It indicates that immigration policy, especially in non-immigrant countries, sets a specific context for the treatment and reception of asylum seekers.

Immigration policy and law themselves, although being regarded as “the last bastion of sovereignty”<sup>41</sup>, relate to the control of human traffic across countries. In

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<sup>33</sup> *Ibid.*, p.210.

<sup>34</sup> *Ibid.*, pp.216 -217.

<sup>35</sup> *Ibid.*, pp.211.

<sup>36</sup> See Holger Kolb, “Immigration into a Non-immigration Country: The German Experience”, *FES-Information Year 2008 Series 04*: 9, accessed on September 9, 2015. url: <<http://library.fes.de/pdf-files/bueros/seoul/06050.pdf>>.

<sup>37</sup> As Lynch & Simon pointed out, that immigrant population in German, “...is culturally integrated (through intermarriage and other processes) but socially marginal”. James P. Lynch and Rita J. Simon, *op.cit.*, p.263.

<sup>38</sup> Keiko Yamanaka, “Japan as a Country of Immigration: Two Decades after an Influx of Immigrant Workers”. In *Transnational Migration in East Asia: Japan in Comparative Focus*, edited by Shinji Yamashita *et al.* (Osaka: Japan National Museum of Ethnology, 2008), p.193.

<sup>39</sup> *Ibid.*, p.187.

<sup>40</sup> *Ibid.*, p.193.

<sup>41</sup> Stephen Legomsky, “The Last Bastions of State sovereignty Immigration and Nationality Go Global”

such respect, the success of these countries to implement their immigration policy does not merely rely on their own efforts; rather, it is also determined by international cooperation among countries. Krasner refers to the dimensions of sovereignty as the sovereignty of interdependence which refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, contaminants or capital across national borders.<sup>42</sup> In line with technological developments, in particular transportation technologies, the state has begun to lose sovereignty due to such interdependence. It includes cross-country migration control with regard to other countries, so that countries are encouraged to cooperate with other countries, or even to establish international institutions.<sup>43</sup>

The foregoing also applies in the context of the protection of asylum seekers and refugees. In this case, the regime of international refugee law also relies heavily on the role of cooperation and the existence of international organizations such as the United Nations High Commissioner for Refugees (UNHCR) or the International Organization for Migration (IOM). It is also supported by the existence of an asylum regional mechanism, for instance the Comprehensive Plan of Action (CPA) for Indochinese refugees (1989 - 1996) in the Southeast Asian region, the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, and the Common European Asylum System (CEAS) in European Union (EU) and some non-EU member states.<sup>44</sup> As affirmed by UNCHR (2000), a regional harmonized protection approach is an important means in strengthening the international refugee protection regime.<sup>45</sup> In this regard, a regional approach to the protection of asylum seekers and refugees is expected to provide durable solutions for them.<sup>46</sup>

There are two reasons why a regional approach is emerging and is being promoted. First, for the last two decades nation states have been implementing non-entry policies and other restrictive policies for asylum-seekers. Second, a regional approach is expected to provide a practical solution which is more suitable for the regional situation of the global problem.<sup>47</sup> On the other hand, the emergence of a regional approach in dealing with asylum seekers and refugees originates from the fact that the sovereignty of the state is not in a position to resolve these problems effectively. In this case, the paradigm of the New Regionalism in general, as being stated by Mario Telo, “can be seen as an attempt by states to react by **strengthening regional control when traditional centralized national sovereignty no longer functions** and to bargain collectively with extra-regional partners” (emphasis added).<sup>48</sup> The mass influxes of asylum seekers in the last two decades, however, has

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in *Challenges of Globalization Immigration, Social Welfare, Global Governance*, edited by Andrew C. Sobel, (London–New York: Routledge, 2009), p.44. Catherine Dauvergne, *Making People Illegal What Globalization Means for Migration and Law* (Cambridge–New York: Cambridge University Press, 2008), p.2.

<sup>42</sup> Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), p.4.

<sup>43</sup> *Ibid.*, pp.13-14.

<sup>44</sup> Penelope Mathew and Tristan Harley, *op. cit.*, pp.3- 4.

<sup>45</sup> United Nation, General Assembly, *Note in International Protection*, A/AC.96/930 (July 7, 2000), para 39, p.13. url: <<http://www.unhcr.org/3ae68d6c4.html>>, accessed on November 5, 2015.

<sup>46</sup> Susan Kneebone, “Introduction: Regionalism as A Response of Global Challenge” in *New Regionalism and Asylum Seekers*, edited by Susan Kneebone and Felicity Rawlings-Sanaei (eds), (New York–Oxford: Berghahn Book, 2007), p.1.

<sup>47</sup> *Ibid.*

<sup>48</sup> Mario Telo, “Introduction: Globalization, New Regionalism and the Role of the European Union” in *European Union and New Regionalism Regional Actors and Global Governance in a Post-Hegemonic Era, Second Edition*, edited by Mario Telo, (Hampshire–Burlington Ashgate, 2007), p.7.

been considered as a globalization of forced international migration, and could not be resolved by one national state alone. In this context, regionalism in asylum seekers protection can be viewed as a collective and communal response within a region to global issues where the parties share a common purpose or destiny.<sup>49</sup>

This regional approach in some ways also reflects the particular regional needs that are unable to be met by simply relying on the provisions of the 1951 Refugee Convention and its Protocol. CEAS under the Dublin regulation (Dublin III) for example, intended to Prevent 'asylum-shopping'—a perceived threat of multiple applications of asylum seekers in order to prolong reviews of their stay in the EU.<sup>50</sup> In addition to that, the regional approach is also an alternative protection for asylum seekers in a region where most of the countries are not party to the Refugee Convention and its Protocols, or are even largely composed of non-immigrant countries. The CPA for Indochinese refugees is an example of regional cooperation in the handling of asylum seekers in Southeast Asia, which has been considered quite successful since, as reflected in Robinson's statement, "it was the first-burden sharing arrangement among countries of origin, first asylum and resettlement, and attempted to address the whole problem with concrete solutions". However, some others think that the CPA has failed because, as Hathaway states, it is derived from "a tripartite collusion among Asian governments with little commitment to human rights law, superficially interested developed states, and a largely impotent international agency (UNHCR)."<sup>51</sup>

### III. THE PRINCIPLE OF NON-IMMIGRANT STATE AND CURRENT DEVELOPMENT OF INDONESIA'S LEGAL FRAMEWORK ON ASYLUM SEEKERS

The basic principles of Indonesia as a non-immigrant state have long been adopted by Law No. 62/1958 on Citizenship and Law No.9/1992 on Immigration. Both of the said laws were amended in 2006 (Law No. 12/2006 on Citizenship) and in 2011 (Law No. 6/2011 regarding Immigration) respectively. In legislation related to citizenship, the principle of non-immigrant state is reflected in the setting of *jus sanguinis* principle in acquiring Indonesian citizenship status, with a few exceptions based on the *jus soli* principle for aliens' children to avoid statelessness,<sup>52</sup> and limited dual citizenship for children from mixed marriages.<sup>53</sup> Even though it is possible to obtain citizenship through naturalization after a foreigner lives in Indonesia for 5-10 years, the final decision is subject to the discretion of the president and the minister of law and human rights. It is based on the "principle of substantive truth".<sup>54</sup> It is also proved that another character of the non-immigrant state, that the length of residence as immigrant – in Bagir Manan words - "does not confer to the right of immigrants to become citizens."<sup>55</sup>

<sup>49</sup> Susan Kneebone, *op.cit.*, p.2.

<sup>50</sup> Garunya Karunaharamoorthy, "Update 2.0: Common European Asylum System plus Dublin III," <<http://www.nouvelle-europe.eu/en/update-20-common-european-asylum-system-plus-dublin-iii>>, accessed on September 15, 2015.

<sup>51</sup> Susan Kneebone. *op. cit.*, p.17.

<sup>52</sup> Indonesia, *Undang-Undang tentang Kewarganegaraan (Law regarding Citizenship)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law Number 12 Year 2006, SG No. 63 Year 2006), Art. 4.

<sup>53</sup> Indonesia, *Undang-Undang tentang Kewarganegaraan (Law regarding Citizenship)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law Number 12 Year 2006, SG No. 63 Year 2006), Art. 5 (1).

<sup>54</sup> Indonesia, *Undang-Undang tentang Kewarganegaraan (Law regarding Citizenship)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law Number 12 Year 2006, SG No. 63 Year 2006), general elucidation.

<sup>55</sup> Bagir Manan, *loc.cit.*

In its immigration legislation, Indonesia does not recognize immigrant visas being issued to settle permanently. If a foreigner intends to stay longer in Indonesia, he must apply for "Limited Stay Visa" as a condition to obtain Limited Stay Permit for a period of 2 years. Such visa can be extended up to a maximum of 6 years<sup>56</sup> but only for some particular category of people such as clergy, experts, workers, researchers, students, investors, elders, and families.<sup>57</sup> Although the legislation on immigration has long regulated Permanent Residence Permit, in general such permission can only be granted as a form of conversion of Limited Stay Permit.<sup>58</sup> In principle, such provisions limit the presence of foreigners who settle in Indonesia.

However, the new Law on Immigration (Law No. 6/2011) and its implementing regulations introduce significant changes. Through the said law, the government may grant permanent residence directly without having to go through the conversion of Limited Stay Permit for 3 categories of foreigners, namely: (1) former child subject to dual nationals of the Republic of Indonesia who chose foreign citizenship, (2) a child born in Indonesia from foreigner holding Permanent Stay Permit, and (3) Indonesian citizen who her/his Indonesian citizenship in Indonesian territory.<sup>59</sup> In fact, Law No. 6/2011 provides that validity of Permanent Stay Permit is for 5 years and it can be extended for an indefinite period of time if the permit is not canceled,<sup>60</sup> albeit with the obligation to report to the immigration office periodically (once in 5 years), and subject to discretionary immigration control mechanism as commonly required in non-immigrant countries. The above described changes shift the principle of non-immigration state toward a more open position.<sup>61</sup>

Although the provisions encourage alien residents to settle in Indonesia over a long-term period, the legislation continues to reflect selective policy principle in receiving and treating foreigners, which means that "only foreigners who provide benefits and do not jeopardize the security and public order will be allowed to enter and remain in Indonesian territory."<sup>62</sup>

If the abovementioned fact is associated with the presence of asylum seekers in Indonesia, despite the fact that there has been a shift in the principle of non-immigrant

<sup>56</sup> Indonesia, *Peraturan Pemerintah tentang Peraturan Pelaksanaan Undang-Undang Nomor 6 Tahun 2011 tentang Keimigrasian (Government Regulation regarding Implementation of Law Number 6 year 2011 regarding Immigration)*, PP No. 31 Tahun 2013, LN No. 68 Tahun 2013 (Government Regulation Number 31 year 2013, SG No. 68 Year 2013), Art. 48 (1).

<sup>57</sup> Indonesia, *Undang-Undang tentang Kewarganegaraan (Law regarding Citizenship)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law Number 12 Year 2006, SG No. 63 Year 2006), Art. 39 (a).

<sup>58</sup> Indonesia, *Peraturan Pemerintah tentang Visa, Izin Masuk, dan Izin Keimigrasian (Government Regulation regarding Visa, Entry Permit and Immigration Permit)*, PP No. 32 Tahun 1994, LN No. 55 Tahun 1994 (Government Regulation Number 32 year 1994, SG No. 55 Year 1994), Art. 32, 49, and 50. Compare with Indonesia, *Undang-Undang tentang Kewarganegaraan (Law regarding Citizenship)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law Number 12 Year 2006, SG No. 63 Year 2006), Art. 156 (2).

<sup>59</sup> Indonesia, *Peraturan Pemerintah tentang Peraturan Pelaksanaan Undang-Undang Nomor 6 Tahun 2011 tentang Keimigrasian (Government Regulation regarding Implementation of Law Number 6 year 2011 regarding Immigration)*, PP No. 31 Tahun 2013, LN No. 68 Tahun 2013 (Government Regulation Number 31 Year 2013, SG No. 68 Year 2013), Art. 152 (2).

<sup>60</sup> Indonesia, *Undang-Undang tentang Kewarganegaraan (Law regarding Citizenship)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law Number 12 Year 2006, SG No. 63 Year 2006), Art. 59 (1).

<sup>61</sup> Author, "Perkembangan Politik Hukum dan Kebutuhan Hukum Keimigrasian Indonesia: Menjawab Sebagian, Melupakan Selebihnya," *Hassanuddin Law Review Year 1 Vol. 2 (May-August .....)*: 160.

<sup>62</sup> Indonesia, *Undang-Undang tentang Keimigrasian (Law Regarding Immigration)*, UU No. 6 Tahun 2011, LN No. 52 Tahun 2011 (Law Number 6 Year 2011, SG No. 52 Year 2011), Paragraf 9 General Elucidation.

state to become a more open measure, immigration laws still view asylum seekers as mere strangers, which at the very least is “less beneficial” to the national interest. It is difficult for asylum seekers to settle in Indonesia, especially those who enter Indonesia without possessing a valid travel documents and visa. They may be subject to immigration administrative action, particularly deportation, or at least placed temporarily in the isolation space or placed under detention waiting for the execution of deportation.<sup>63</sup> In general, as Fitria states, “current legal instruments, The Law on Immigration, unfortunately did not touch refugees explicitly in its clauses, even though the Law on Immigration can actually regulate on matters pertaining the refugees in the substance”.<sup>64</sup> Fitria’s argument refers to Fahri Hamzah’s statement in The Jakarta Post (2011), which as it is quoted stated that, “there is hope in the Immigration Law to regulate refugees; however, these expectations cannot be materialized directly. Thus just put refugees as victims of trafficking who should not be deported and punished and the government is then able to coordinate with UNHCR in handling them.”<sup>65</sup> On the other hand, the question arises as to what happens if asylum seekers who enter Indonesia are not victims of human trafficking or people smuggling? Thus, the provisions of the Law on Immigration which regulate the protection of victims of trafficking and people smuggling are not always able to protect the rights of asylum seekers from deportation. In fact, there is a possibility for them to be placed in a detention center.

The only provisions of the Immigration Law which allow asylum seekers to enter Indonesia without having to meet the requirements of immigration law, namely the provisions on emergency entry, are as follows:<sup>66</sup>

- 1) Immigration officials in an emergency situation can provide emergency entry stamp to Aliens.
- 2) Emergency entry stamp as referred in paragraph (1) shall apply as a stay/visit permit for a certain period of time.

The term “emergency” in the above provisions refers to:

“For **conveyance landed on Indonesian territory** in the framework of **humanitarian aid (humanitarian assistance)** in the area of natural disasters in Indonesia’s Territory (*national disaster*) or **in the event of a conveyance that brought the stranger anchored or land** somewhere in Indonesia because of **damage to the machine or bad weather** while the conveyance is **not intended to dock or land in the region of Indonesia.**” (Emphasis added)

The above provisions can be regarded as a legal basis which proves that the acceptance of the influx of “boat people” as “legitimate” to Indonesia is on a “humanitarian” basis, rather than on the basis of respecting the right to asylum or human rights in general.

As it has been well known by scholars, after the 1998 reform Indonesia has recognized the existence of asylum seekers and refugees in its legislation.<sup>67</sup> Law

<sup>63</sup> Indonesia. *Undang-Undang tentang Keimigrasian (Law Regarding Immigration)*, UU No.6 Tahun 2011, LN No. 52 Tahun 2011 (Law Number 6 Year 2011, SG No. 52 Year 2011), Art. 78 (2) f.

<sup>64</sup> Fitria, *op.cit.*, p.116.

<sup>65</sup> *Ibid.* Fahri Hamzah at the time, conducted as Chief of Special Committee on Bill of Immigration Law, Indonesian House of Representatives.

<sup>66</sup> Indonesia. *Undang-Undang tentang Keimigrasian (Law Regarding Immigration)*, UU No.6 Tahun 2011, LN No. 52 Tahun 2011 (Law Number 6 Year 2011, SG No. 52 Year 2011), Article 11 (1).

<sup>67</sup> Savitri Taylor and Brynna Rafferty-Brown, “Difficult Journeys: Accessing Refugee Protection In

No. 37/1999 on Foreign Relations (Foreign Relations Law) recognizes the existence of “foreign refugee” and “granting asylum to foreign nationals and orders the establishment of Presidential Decision (currently known as Presidential Regulation) to regulate further the implementation of the authority to grant asylum and the main points of the foreign refugee policy.<sup>68</sup> The Law on Human Rights (Law No. 39/1999) and Article 28E (2) Second Amendment (2000) of 1945 Constitution guaranteed the right to asylum in different wording, between “the right to seek political asylum for protection from another country”<sup>69</sup> and “the right to obtain political asylum from another country.” The wording in the Law on Human Rights is more precise than the wording in the Amended 1945 Constitution because - as stated earlier - the right to seek asylum is not identical with the right to enter another state<sup>70</sup> and while granting asylum is traditionally considered as a state authority, in the current conditions it must be granted under the human rights consideration. However, the phrase “from another country” in the legislation and the Constitution as stated above raises a question as to whether Indonesia only recognizes the right to asylum granted by other countries even though Indonesia alone is unable to grant asylum. Such doubts arise due to the term ‘the right to asylum’ used in the Amended 1945 Constitution is different from the constitutional rights of asylum clause guaranteed by many national constitutions such as France, Italy and Germany, among others.<sup>71</sup>

In practice, as affirmed by Mathew and Harley, the assurance of the right to asylum in Indonesia’s Constitution “clearly does not impact on the rights of the many persons seeking refugee status in Indonesia.”<sup>72</sup> In fact, implementing regulation on asylum seekers and refugees in the form of *Peraturan Presiden* (Presidential Regulation) as mandated by the 1999 Law on Foreign Relations lately enacted in very long time by the end of 2016 (Presidential Regulation No. 125/2016 on The Handling of Refugee from Overseas/ Presidential Regulation on Refugee).<sup>73</sup> Additionally it is expected to be a legal framework for Indonesia in the realization of the right to asylum as guaranteed

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Indonesia,” *Monash University Law Review Year 36 Vol.3 (2010)*: 144, accessed on September 23, 2015. url: <<http://www5.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/journals/MonashULawRw/2010/29.pdf>>. See Indonesia. *Undang-Undang Dasar 1945 Perubahan (Amended 1945 Constitution)*, Art. 28E (2). See also Indonesia, *Undang-Undang tentang Hubungan Internasional (Law Regarding Foreign Affair)*, UU No. 37 Tahun 1999, LN No. 156 Tahun 1999 (Law Number 37 Year 1999, SG No. 156 Year 1999), Art. 25–27.

<sup>68</sup> Indonesia, *Undang-Undang tentang Hubungan Internasional (Law Regarding Foreign Affair)*, UU No. 37 Tahun 1999, LN No. 156 Tahun 1999 (Law Number 37 Year 1999, SG No. 156 Year 1999), Art. 27.

<sup>69</sup> Indonesia, *Undang-Undang tentang Hak Asasi Manusia (Law on Human Rights)*. Undang-undang Nomor 39 Tahun 1999, LN No. 165 Tahun 1999 (Law Number 39 Year 1999, SG No. 156 Year 1999), Art. 28 (1).

<sup>70</sup> Guy S. Goodwin-Gill, *op.cit.*, p. 139.

<sup>71</sup> In France, the wording of this right is stipulated in the Preamble of the 1946 and 1958 Constitution: “Anyone persecuted because of his action for freedom has a **right of asylum in the territories of the Republic**.” Article 10(3) of the Italian Constitution of 1948 provides that: “An alien who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her own country **has the right of asylum in the territory of the Italian Republic** in accordance with the conditions established by law”. Article 16(II)(2) of the German Basic Law or constitution (now article 16a) provides: “Persons persecuted on political grounds shall have the right of asylum.” Helene Lambert, Francesco Messineo, and Paul Tiedmann, “Comparative Perspectives of Constitutional Asylum In France, Italy, And Germany: Requiescat In Pace?” *Refugee Survey Quarterly Year 27 Vol. 3 (2008)*:17.

<sup>72</sup> Penelope Mathew And Tristan Harley, *op. cit.*, p.16.

<sup>73</sup> Indonesia, *Peraturan Presiden tentang Penanganan Pengungsi dari Luar Negeri (Presidential Regulation on The Handling of Refugee from Overseas)*, Peraturan Presiden Nomor 125 Tahun 2016, LN No. 368 Tahun 2016 (Presidential Regulation Number 125 Year 2016, SG No. 368 Year 2016).

by the Law on Human Rights and the Amended 1945 Constitution. Consequently, in practice there is no legal framework that specifically regulates the handling of asylum seekers in Indonesia, except for administrative policy rules in the Directorate General of Immigration (DGI), the Department of Justice (currently the Ministry of Law and Human Rights) namely Circular in 2002<sup>74</sup> and Directive in 2010 respectively.<sup>75</sup> The objective of the above mentioned two policy rules is to provide protection for “illegal immigrants” who do not want to be deported to their country of origin. The said policies assert the responsibility for determining refugee status by UNHCR. It denotes that the policy of the rules does not specifically determine the government’s responsibility to implement active protection of asylum-seekers and refugees. Moreover, as both are “policy rules” rather than “the law” or “legislation”, there is no binding effect if the substance of the provisions is not implemented or is violated.

The increasing number of asylum seekers for entry into Indonesia has pushed the Government to establish an adequate legal framework for handling asylum seekers and refugees. The option to ratify the Refugee Convention remains unexercised, as the current Human Rights Action Plan of Indonesia does not include further planning to accede to the said Convention. Also, there has been no inclination to date to ratify the Convention due to the budgetary burden involved.<sup>76</sup> So the only national legal framework regulate refugee and asylum seekers directly is Presidential Regulation on Refugee.

However, the content of the Presidential Regulation on Refugee only set up the procedures for handling asylum seekers and refugees to enter Indonesia, particularly in an emergency situation, starts from the discovery to the surveillance.<sup>77</sup> Despite this regulation adopt refugee definition from Refugee Convention<sup>78</sup>, but it does not means that Indonesian Government granting asylum to refugee or handle refugee status determination (RSD) process. Once foreigner claim as asylum seekers or refugee, she will be referred to UNHCR for RSD process.<sup>79</sup> Only two durable options available for refugees which are regulated in this regulation, namely voluntary repatriation and resettlement to the third country.<sup>80</sup> There is no option of local integration for refugees in Indonesia. The only positive development in this regulation that the asylum seekers and refugees, should be placed in designated shelters<sup>81</sup> and they are distinguished form illegal immigrants in general. However, the detention center still functionalized as temporary shelter in emergency situation for the refugees rescued at sea.<sup>82</sup>

<sup>74</sup> Circular of Directorate General of Immigration, Department of Justice No: F-IL.01.10-1297, 30 September 2002 regarding Procedures Regarding Aliens Expressing Their Desire to Seek Asylum or Refugee Status], accessed on August 22, 2015, url: <<http://www.imigrasi.go.id/phocadownloadpap/DitjenImigrasi/surat%20edaran%20dirjen%202002%20f-il.01.10-1297.pdf>>.

<sup>75</sup> Directive of Directorate General of Immigration, Ministry of Law dan Human Rights No. IMI-1949.UM.08.05 Tahun 2010 regarding Handling of Illegal Immigrant, accessed on August 22, 2015, url: <<http://www.imigrasi.go.id/phocadownloadpap/PeraturanDirjen/Tahun2010/imi-1489.um.08.05%20tahun%202010%20ttg%20penanganan%20imigran%20ilegal.pdf>>.

<sup>76</sup> Interview with Yopie Insanwarhana, Head of Sub-Directorate of Humanity, Directorate of Human Rights, Multilateral, Ministry of Foreign Affairs, (Jakarta, October 23, 2015).

<sup>77</sup> See Article 4 (2) of Indonesia, *Peraturan Presiden tentang Penanganan Pengungsi dari Luar Negeri (Presidential Regulation on The Handling of Refugee from Overseas)*, Peraturan Presiden Nomor 125 Tahun 2016, LN No. 368 Tahun 2016 (Presidential Regulation Number 125 Year 2016, SG No. 368 Year 2016).

<sup>78</sup> Article 1 (1), *Ibid.*

<sup>79</sup> *Ibid.*, Article 20 (2).

<sup>80</sup> See Article 28 (1) and Article 29 (1), *ibid.*

<sup>81</sup> See Article 24, *ibid.*

<sup>82</sup> See Article 9 to Article 12, *ibid.*

In general, the Presidential Regulation on Refugee justifies the transplantation of immigration legal framework for emergency entry of asylum seekers and refugees, rather than the genuine legal framework to grant asylum as mandated by the Law on Foreign Relations. Even if this Presidential Regulation is perceived as providing asylum procedures, the asylum in question is a “temporary asylum” as is applied in the treatment of Indochinese refugees on Galang Island in the past. It shows the principle of non-immigrant state which is still the main characteristic in dealing with asylum seekers. However, because the substance regulated is in relation with and confined with the human rights provisions, in this case the right to asylum, it should not be regulated in the Presidential Regulation, but in legislative act.<sup>83</sup> Legislative act can also set penalties, including administrative law penalties and the penal law, as a compliance mechanism for the enforcement of the norms of asylum and refugees. In other words, if the rules concerning asylum is regulated in the legislative act / law, the protection of the asylum seekers and refugees can be safe assured. However that would be, this option has not appeared in the official forums in regards of asylum seekers and refugees in Indonesia.

#### IV. ROHINGYA IN ACEH, INDONESIA

In general, the number of asylum seekers and refugees in Indonesia is not as great as in some other Southeast Asian countries such as Thailand, Malaysia and Bangladesh. Similarly, the number of Rohingya asylum seekers in Indonesia is relatively small when compared for example with their presence in Thailand and Malaysia.

Nevertheless, the existence of Rohingya asylum seekers in Indonesia has several significant implications. First, Indonesia itself has almost never accepted consistent mass influxes of asylum seekers since the presence of “Boat People” from Indochina as a result of the Vietnam War dating back as far as the late 1980s. Indonesia experienced yet another new wave of asylum seekers in the 2000s due to the conflict in the Middle East and this condition continued up until the subsequent years with the number of refugees continuing to increase explosively.<sup>84</sup> Asylum seekers from Rohingya are among the new wave of asylum seekers who entered from 2009 to 2015 with a sizable amount concentrated in one specific region (Aceh). Secondly, in the case of Rohingya, particularly in Aceh, it has been the first time we see the handling of asylum seekers and refugees in Indonesia involving quite diverse actors. Such handling does not only involve the central government, but also the local government and civil society organizations. Even though it is not burdensome to them, the local government has a major role in the handling of shelter for asylum seekers.<sup>85</sup> At the same time, the role of civil society organizations has reemerged with the arrival of a wave of asylum seekers (e.g. SUAKA (which means “asylum”)), as the handling of Rohingya asylum seekers requires more civil society organizations to get involved.

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<sup>83</sup> See limitation clause in Indonesia, *Undang-Undang Dasar 1945 Perubahan (Amended 1945 Constitution)*, 1999 – 2002, Art. 28J (2).

<sup>84</sup> Mitra Salima, “UNHCR di Indonesia”, <<http://www.unhcr.or.id/id/unhcr-ambassador-id>>, Accessed on October 5, 2015; Australian Radio, “Turunnya Jumlah Pencari Suaka di Jakarta Berdampak ke Australia”, [“Decrease in the Number of Asylum Seekers in Jakarta Has An Impact On Australia”], <<http://www.radioaustralia.net.au/indonesian/2014-01-15/turunnya-jumlah-pencari-suaka-di-jakarta-berdampak-ke-australia/1248316>>, accessed on October 5, 2015.

<sup>85</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

They include, for example: ACT (*"Aksi Cepat Tanggap"* or Quick Response Action), Save the Children for the education of children, MSF (Medicins Sans Frontiers) for assisting the health of children, especially the psychological aspects, the local Red Cross, and RAPI (residents' radio network).<sup>86</sup> Third, as the Rohingyas come from Myanmar, which is also an ASEAN member state, the handling of Rohingyas in Aceh and in some other Southeast Asian countries has always been associated with the role of ASEAN.

Rohingya asylum seekers, who are predominantly Muslim, are ethnic people native to the northern island of Arakan (now known as Rakkinee state) in Myanmar (Burma).<sup>87</sup> Since the Junta military government came to power, especially after the Law on Citizenship of 1982 was enacted, the Rohingya people have not been considered as citizens of Myanmar. Subsequently they became stateless.<sup>88</sup> Ever since, they have been structurally and socially discriminated against, and have received some inhumane treatments, such as being made forced labor and land-grabbing. Further, the government subsequently reviewed restrictions to the freedom of movement and the freedom of religion to the Moslem Rohingnyas which was expressed through the closure of mosques and madrasas.<sup>89</sup> In contrast, some other ethnic minorities in Myanmar, such as the Karen, Shan, Chin, Kachin and Mon, are relatively well organized and possess the capacity to wage a war against the center and also link up some issues concerning their respective communities with the international community. Ultimately, the Rohingya are not organized and they lack international network.<sup>90</sup> The only way for them to fight against discrimination and inhumane treatment is to flee and seek asylum in neighboring countries such as Bangladesh, Cambodia, Thailand and Malaysia.

Rohingya people first arrived in groups by sea in 2009 in Sabang and Kuala Idi, East Aceh District, Aceh Province, while smaller groups had also entered other regions of Indonesia namely in Makassar, Medan, and Jakarta. This wave continues and it has been tallied that in February 2011 as many as 129 Rohingya boat people were also stranded in the waters of Pidie and were subsequently accommodated at the Port Kreung Raya. Similarly, in 2012, as many as 54 ethnic Rohingyas were stranded in North Aceh district.<sup>91</sup> The latest wave occurred in May 2015 when around 500 Rohingya people and Bangladeshi migrants were stranded in Aceh Province.<sup>92</sup> As of May 2015 the Rohingya people and Bangladeshi migrants were accommodated in temporary refugee camps in some areas of Aceh, to name some: in the Port of Kuala Langsa, Bireuen Bayeun East Aceh District, Aceh Tamiang and in North Aceh District

<sup>86</sup> Interview with Rauzi Harista, ACT activist (Blang Adoe, North Aceh, October 9, 2015).

<sup>87</sup> Penelope Mathew And Tristan Harley, *op. cit.*, p.8.

<sup>88</sup> Syeda Naushin Parnini, "The Rohingya Issue In Bangladesh-Myanmar Relations", *International Journal of Arts & Sciences* No. 4 Vol. 23 (2011). p.66.

<sup>89</sup> Viva News, "Manusia Perahu Myanmar Terdampar di Aceh", ["Boat People from Myanmar Stranded in Aceh"], <<http://nasional.news.viva.co.id/news/read/284801--manusia-perahu-myanmar-terdampar-di-aceh>>, accessed on June 30, 2015.

<sup>90</sup> BBC.com, "Ratusan orang Rohingya terdampar di Aceh", ["Hundreds of Rohingya people stranded in Aceh"], <[http://www.bbc.com/indonesia/berita\\_indonesia/2015/05/150510\\_aceh\\_rohingya\\_kapal](http://www.bbc.com/indonesia/berita_indonesia/2015/05/150510_aceh_rohingya_kapal)>, accessed on June 15, 2015.

<sup>91</sup> Antara News, "Mensos tinjau pengungsi Rohingya di Aceh Timur", ["Minister of Social Affairs inspects Rohingya refugees in East Aceh"], <<http://www.antaranews.com/berita/497810/mensos-tinjau-pengungsi-rohingya-di-aceh-timur>>, accessed on June 15, 2015.

<sup>92</sup> Interview with Ahmad Khumaidi, Liaison Officer for Processing Illegal Immigrant, Directorate of Investigation and Immigration Enforcement, Directorate General of Immigration, Ministry of Law dan Human Rights (Jakarta, October 23, 2015).

Immigration Office Puntuet Blang Mangat Sub-district, with a total of 1,759 persons.<sup>93</sup>

For handling asylum seekers, including the Rohingyas, the government uses two approaches, namely the legal approach and the human rights approach.<sup>94</sup> The first approach taken is the legal approach, in particular with reference to immigration laws; that is if immigrants enter without immigration documents, they will be processed in accordance with the Directive of DGI regarding illegal immigrants<sup>95</sup>. However, if illegal immigrants are admitted as asylum seekers or indicated as victims of human trafficking, there will be a distinction in handling as opposed to other illegal immigrants, and there will be further coordination with UNHCR for sending immigrants to be sheltered in Detention Centers or other places (with the human rights approach).<sup>96</sup> If indeed they are asylum seekers, the Government of Indonesia will handle it in accordance with the principles applicable in the international convention on refugees such as the principle of non-refoulement, non-discrimination and other principles.<sup>97</sup> In terms of funding, the Indonesian government collaborates with IOM in the handling of asylum seekers, especially in attending to the needs of daily life of refugees.<sup>98</sup> Thus the cost of handling asylum seekers and refugees is not charged to the budget of the government.

- a. In general, asylum seeker handling mechanisms currently include the following:<sup>99</sup>
- b. Rescue, if they were floating at sea or were found high on the coast, they will be carried into the territory of Indonesia.
- c. Health care service, for asylum seekers who need health care.
- d. Documentation, immigration officials will record the identity of asylum seekers.
- e. Placement, they will be placed in shelters until the RSD process by UNHCR is completed.
- f. Repatriation, after verification is completed, asylum seekers will be sent to immigrant countries or repatriated to their country of origin for those who failed to acquire refugee status (rejected persons).

The above government policies reflect the tendency to use the immigration approach as the main approach. Although the human rights approach is also used, it is a complementary one, thus reflecting the principle of “selective policy, upholding human rights” as one of the Indonesian immigration law principles.<sup>100</sup> Not everyone agrees with the policy and the approach taken by the Government. For example,

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Interview with Yopie Insanwarhana, Head of Sub-Directorate of Humanity, Directorate of Human Rights, Multilateral, Ministry of Foreign Affairs, (Jakarta, October 23, 2015).

<sup>96</sup> *Ibid.*

<sup>97</sup> Interview with Ahmad Khumaidi, Liaison Officer for Processing Illegal Immigrant, Directorate of Investigation and Immigration Enforcement, Directorate General of Immigration, Ministry of Law dan Human Rights (Jakarta, October 23, 2015).

<sup>98</sup> Indonesia. *Undang-Undang tentang Keimigrasian (Law Regarding Immigration)*, UU No.6 Tahun 2011, LN No. 52 Tahun 2011 (Law Number 6 Year 2011, SG No. 52 Year 2011), Paragraph 9 General Elucidation.

<sup>99</sup> Interview with Elfansuri Chairah, Head Section of Research and Study, Komnas HAM (Jakarta, August 10, 2015).

<sup>100</sup> *Ibid.*

Indonesia's National Human Rights Commission, Komnas HAM, considers that the handling of asylum seekers who are equated with perpetrators of illegal acts is not appropriate, since asylum seekers are not persons who commit crimes, nor are they offenders.<sup>101</sup> The Commission also considers that the frequently occurring placement of asylum seekers at Detention Center is not appropriate because the detention center is reserved for violators of immigration laws. Thus, it becomes a violation of the right to freedom of movement of a person.<sup>102</sup> However, according to the Directorate General of Immigration, the placement of asylum seekers at detention center is not an issue, because unlike in prison, all the needs of immigrants are fulfilled, including health care and basic needs.<sup>103</sup> According to the Directorate General of Immigration, the action does not deprive them of the freedom of movement, because detention center is only one alternative to asylum seekers, while others can be placed in homes shelters.<sup>104</sup> Moreover, asylum seekers are considered as vulnerable groups which have to be given special treatment rather than being placed in detention center.<sup>105</sup>

The Government has been involved in a debate with the Commission and other civil society groups on the matter of choice between the immigration and human rights approach. Each side fights for one of such approaches as being the main one - while none of them are taking a comprehensive approach. On the one hand, the domination of the immigration approach in dealing with asylum seekers should be included in the human rights framework, whereby the protection of asylum seekers is the Government's obligation rather than just voluntary humanitarian assistance. On the other hand, human rights approach needs to have a balanced purpose of anticipating the negative impacts of international migration, such as the handling of human trafficking and people smuggling as many practices of smuggling of asylum-seekers or illegal migrants continue to occur.<sup>106</sup> However, the conflict between the Government and the Commission is in fact understandable because the Commission is not directly involved in handling asylum seekers and refugees.

Based on the structure of handling asylum seekers in Indonesia, the primary responsibility lies with the Coordinating Minister of Politics, Law, Human Rights (CMoPLHR) in harmony with several other ministries under CMoPLHR. The partnering institutions are the Ministry of Law and Human Rights (MoLHR), particularly the Directorate General of Immigration, the Ministry of Foreign Affairs (MOFA), the Ministry of Internal Affairs (MOIA) as well as some NGOs such as IOM.<sup>107</sup> At the local level, the handling of Rohingya and Bangladeshi asylum seekers in North Aceh is carried out by the Political Asylum Processing Team, in coordination with the Secretary of the North Aceh Local Government. However, it remains the domain of the central government, in particular through the Office of Immigration as a leading

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<sup>101</sup> Interview with Ahmad Khumaidi, Liaison Officer for Processing Illegal Immigrant, Directorate of Investigation and Immigration Enforcement, Directorate General of Immigration, Ministry of Law dan Human Rights (Jakarta, October 23, 2015).

<sup>102</sup> *Ibid.*

<sup>103</sup> Interview with Ahmad Khumaidi, Liaison Officer for Processing Illegal Immigrant, Directorate of Investigation and Immigration Enforcement, Directorate General of Immigration, Ministry of Law dan Human Rights (Jakarta, October 23, 2015).

<sup>104</sup> *Ibid.*

<sup>105</sup> Interview with Yopie Insanwarhana, Head of Sub-Directorate of Humanity, Directorate of Human Rights Multilateral, Ministry of Foreign Affairs, (Jakarta, October 23, 2015).

<sup>106</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

<sup>107</sup> *Ibid.*

sector, and involves a variety of related local de-concentration units, such as the Indonesian National Police, the Indonesian National Army, the local government, and NGOs and local official working group that are at the shelter.<sup>108</sup> For immigrants from Bangladesh, as they are not asylum-seekers, the responsibility is assumed by the Immigration Office.<sup>109</sup> The said office then coordinates activities of handling asylum seekers. Regular meetings are conducted once a week for managing shelters, and once in a month a meeting is held of the entire team, all which has been going quite well so far.<sup>110</sup>

Since mid-June 2015, as many as 329 Rohingya people began to be placed in the shelter in the village of Blang Adoe, North Aceh district, which was built by ACT volunteers and with donations from Indonesian communities and companies.<sup>111</sup> As for Bangladeshi immigrants, after some had been separated from the Rohingnya to be placed in the former immigration office in Lhokseumawe, almost all of the rest were deported back to Bangladesh.<sup>112</sup> The status of Rohingya people in shelters is still in the process of RSD by UNHCR, however, they have already received Asylum Attestation Letter.<sup>113</sup> Currently, the shelter is managed jointly by a *Working Group* chaired by the Local Government Secretary of North Aceh Regent.<sup>114</sup>

The shelter is called *Integrated Community Shelter (ICS)* as it ensures the privacy of a normal life just as like in a regular home and it is equipped with a range of basic facilities such as public toilets, clean water, a mosque, a playground for children, a common kitchen and a clinic managed by the Government of North Aceh District.<sup>115</sup> In terms of facilities, the Rohingya people feel comfortable at the shelter.<sup>116</sup> They are grateful because they are able to stay safe after a long journey by boats in the ocean.<sup>117</sup> The good thing is that they have the freedom which is difficult for them to obtain in their home country— namely the freedom of religion, the freedom which is fundamental for human beings which cannot be reduced by the Refugee Convention.

One of the problems faced by asylum seekers at the shelter is that they have no permission to work.<sup>118</sup> Such condition has compelled some of them to leave the shelter to Malaysia, because in Malaysia they are able to work, although only as so-called laborers.<sup>119</sup> As stated previously, Malaysia has many Rohingyas who live and work in the informal sector. To bridge the problem of the saturation of Rohingya asylum seekers at the shelter, the manager of the shelter has prepared a community development scheme for asylum seekers, for example one carried out by ACT, such as land preparation and means of cattle breeding as well as farm training, albeit

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<sup>108</sup> *Ibid.*

<sup>109</sup> Interview with Rauzi Harista, ACT activist (Blang Adoe, North Aceh, October 9, 2015).

<sup>110</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

<sup>111</sup> *Ibid.*

<sup>112</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

<sup>113</sup> Interview with Rauzi Harista, ACT activist (Blang Adoe, North Aceh, October 9, 2015).

<sup>114</sup> *Ibid.*

<sup>115</sup> Interview with Muhammad Husen, Rohingya asylum seeker (Blang Adoe, North Aceh Regent, October 9, 2015).

<sup>116</sup> Interview with Rauzi Harista, ACT activist (Blang Adoe, North Aceh Regent, October 9, 2015).

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

with constraints of land.<sup>120</sup> In reality, the numbers of Rohingya asylum seekers at the shelter is on the wane. There only remains approximately 200 people due to the rest have departed or left the shelter to unknown places in October 2015.<sup>121</sup> The latest information states that the number continues to decrease and there is an attempt to smuggle them to Malaysia—although most had been caught in Medan (North Sumatra), and suspected smuggler has been accused by local police in Medan and North Aceh.<sup>122</sup> At the end, the government decided to relocate all of the remaining refugees in North Aceh shelter to Medan in December 2016.<sup>123</sup>

Besides the issue of lack of work or saturation, there are other problems faced by the Rohingya people, namely language and communication which can often cause misunderstandings with local residents.<sup>124</sup> Such issue between them is often not understood by the manager of the shelter concerned.<sup>125</sup> Interpreters are solely engaged by the UNHCR and the IOM for completing their purposes. They are not always available at the shelter.<sup>126</sup> The need for interpreters to be made available at the shelter has been proposed to the CMOPLHR, however, it has not been fulfilled ever since.<sup>127</sup> In addition to the above described problems, there are indications of social jealousy from communities around the shelter, with the potential of inciting a conflict with local residents.<sup>128</sup> As a matter of fact, people in locations around the shelters generally live in poverty.<sup>129</sup> However, no conflict has ever occurred between Rohingya asylum seekers and the locals thus far. Further, in addition to the communication issue with public state officials, the issue of the competence of interpreters is also often a problem in refugee status determination in general, and particularly in Indonesia.<sup>130</sup>

The conditions above reflect issues which cause predicaments to the Government of Indonesia in addressing the Rohingya people or asylum seekers in general. On the one hand, the option of local integration is not possible and so the Government does not have programs that encourage acculturation with local residents. It also further restricts their right to work. On the other hand, asylum seekers who live in rather good shelter facilities have made various attempts to leave the shelter, resulting in the asylum seekers' becoming victims of human trafficking and people smuggling crimes. It should be considered though on the basis of "temporary asylum" that the government and various stakeholders need to encourage **"temporary local**

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<sup>120</sup> Communication via SMS with Tengku Adien, RAPI volunteer in Rohingya Shelter (November 5, 2015).

<sup>121</sup> *Ibid.*

<sup>122</sup> *BBC.com*, "Fasilitas pengungsi Rohingya di Aceh Utara 'mubazir'" [The Facility of Rohingya Refugees in North Aceh 'useless']. [http://www.bbc.com/indonesia/berita\\_indonesia/2016/02/160224\\_indonesia\\_fasilitas\\_pengungsi](http://www.bbc.com/indonesia/berita_indonesia/2016/02/160224_indonesia_fasilitas_pengungsi). Accessed 14 October 2016.

<sup>123</sup> *Kompas.com*. "Desember 2016, Seluruh Warga Rohingya Selesai Dipindah ke Medan" [December 2016, All Rohingya People Completed Moved to Medan], <http://regional.kompas.com/read/2016/11/20/18385741/desember.2016.seluruh.warga.rohingya.selesai.dipindah.ke.medan>. Accessed 20 January 2017.

<sup>124</sup> *Ibid.*

<sup>125</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

<sup>126</sup> Interview with Rauzi Harista, ACT activist (Blang Adoe, North Aceh, October 9, 2015).

<sup>127</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

<sup>128</sup> Interview with Rauzi Harista, ACT activist (Blang Adoe, North Aceh, October 9, 2015).

<sup>129</sup> Interview with Jaelani Abdullah, Head of Office for Social, Workers and Resident Mobility Affairs, Government of North Aceh Regent (Lhokseumawe, October 8, 2015).

<sup>130</sup> Savitri Taylor and Brynna Rafferty-Brown, *op.cit.*, p.153.

**integration**”, so that asylum seekers’ relationship with the local community can be established and they can be potentially empowered—for example by granting them the right to work<sup>131</sup>, while waiting for the conditions that allow them to resettle in another country or repatriate voluntarily. Such measure is also expected to prevent, or at least reduce, people smuggling crimes committed against asylum seekers and refugees.

## V. ASEAN RESPONSE

In the regional context, the public has been raising questions about the attitude of ASEAN which is not taking concrete steps towards resolving the Rohingya crisis in Southeast Asia—although the ASEAN Declaration on Human Rights recognizes “the right to seek and receive asylum.”<sup>132</sup> However, it is quite understandable given that most ASEAN members have not ratified the Refugee Convention.<sup>133</sup> In fact, one of its own members, namely Myanmar, has actually contributed to this issue. The above conditions should encourage ASEAN to take certain steps, as up to this point it has not taken a specific attitude towards the Rohingya issue in tackling the problem.

Most people have expressed expectation that ASEAN play a greater role in resolving this crisis, especially to make ASEAN become a forum which is able to formulate a solution for the improvement of the situation of ethnic minorities in Myanmar.<sup>134</sup> Some others have also proposed to grant more authority to the ASEAN Intergovernmental Commission of Human Rights (AICHR) and to establish an ASEAN Refugee Institution.<sup>135</sup>

A suggestion that ASEAN become catalyst in improving the situation in Myanmar appears to be far from becoming a reality in the near future. It is due to two matters: first, ASEAN itself does not yet consider the issue of Rohingya as ASEAN’s institutional agenda. Hence the response to the Rohingya crisis is not the official stance of ASEAN as an organization, but rather only a response of individual member states and so it is considered as regional cooperation beyond ASEAN. Second, the response of the Government of Myanmar when asked about their cooperation in solving this problem, Myanmar requested the Indonesian government not to use the term “Rohingya” when referring to the asylum seekers, but rather to call them “Bengali”.<sup>136</sup> The said response was not surprising since such an attitude has been common throughout most of Myanmar public action, especially since the Rakhine State riots in 2012. As a matter of fact, most people in Myanmar demonstrated “stop blaming Myanmar” in reaction to the statement of the U.N. while other countries and the foreign media discredited Myanmar societies concerning Rohingya matters.<sup>137</sup>

<sup>131</sup> This is also suggested in Penelope Mathew and Tristan Harley, *op.cit.*, p.24.

<sup>132</sup> ASEAN Human Rights Declaration, Art. 16.

<sup>133</sup> Only 3 ASEAN countries have acceded to the Refugee Convention and 1967 Protocol: Philippines, Cambodia and Timor Leste.

<sup>134</sup> Penelope Mathew And Tristan Harley, *op.cit.*, p.21.

<sup>135</sup> Ahmad Rizky Mardhatillah Umar, “Making ASEAN Works in Rohingya: A Southeast Asian Perspective”, <<http://asc.fisipol.ugm.ac.id/news-making-asean-works/>>, accessed on July 14, 2015.

<sup>136</sup> The Irrawaddy, “Burma May Boycott Trafficking Summit over Use of Name ‘Rohingya’”, <<http://www.irrawaddy.org/burma/burma-may-boycott-trafficking-summit-over-use-of-name-rohingya.html>>, accessed on June 30, 2015.

<sup>137</sup> The Irrawaddy, “Stop Blaming Burma: Anti-Rohingya Rally Held in Rangoon”, Available on <<http://www.irrawaddy.org/burma/stop-blaming-burma-anti-rohingya-rally-held-in-rangoon.html>>, accessed on June 30, 2015.

Such responses reflect the ongoing disputed issues of Rohingya ethnic identity, with no clarity whether they will be recognized as citizens. Such being the case, the possibility of voluntary repatriation can occur, however it does not guarantee that the waves can be resumed at a later date.

Officially, ASEAN has responded to the Rohingya crises only indirectly with a general agenda, namely combating transnational crimes such as human trafficking and people smuggling<sup>138</sup>. It includes the problem of irregular migrants in the ASEAN forum or in other regional cooperation such as “The Bali Process”.<sup>139</sup> In reality, the initial response to tackle the Rohingya Crisis or “boat people” was initiated by ASEAN member states which are affected by the problem namely, Indonesia, Malaysia and Thailand in Putrajaya, Malaysia on May 20, 2015,<sup>140</sup> and in the Special Meeting of non-ASEAN on Irregular Migration in the Indian Ocean on May 29, 2015 in Bangkok.<sup>141</sup> ASEAN took a late start on taking a stance in the context of irregular movement of persons in the Emergency ASEAN Ministerial Meeting on Transnational Crime Concerning Irregular Movement of Persons on Southeast Asia on July 2, 2015. In the said meeting, ASEAN members agreed to explore the possibility of establishing a “trust fund” and a “Task Force” to respond to the crisis and emergency situation related to the irregular movement of persons in Southeast Asia.<sup>142</sup> Although it does not mention a word about asylum seekers, refugees or Rohingya, but the term “emergency situation arising from the irregular movement of persons” refers to the issue of asylum seekers and refugees in the ASEAN region. ASEAN’s stance has been welcomed in the context of addressing irregular migrants in general, and in the matter of safe and legal migration in coherence with international standards and human rights.<sup>143</sup>

The slow response from ASEAN, in addition to its tendency to avoid formal talks on Rohingya or refugees in general, reflects ASEAN’s well known principle of decision-making by consensus and the principle of non-intervention related to the domestic affairs of member states as defined by the ASEAN Charter. In particular, the principles that have been constructed since 1991 against Myanmar as a policy of “constructive engagement” to promote and accelerate the Democratization Process of Myanmar by means of such ASEAN-type engagement and ASEAN’s own influence.”<sup>144</sup> However, those regional policies and principles cannot guarantee the change of Myanmar’s domestic policy to make it more democratic and respectful of human rights. Myanmar’s national election which will be held in early November 2016, may provide new hope to speed up democratization in Myanmar, including the protection of ethnic minorities such as the Rohingya and others.

<sup>138</sup> Interview with Yopie Insanwarhana, Head of Sub-Directorate of Humanity, Directorate of Human Rights, Multilateral, Ministry of Foreign Affairs, (Jakarta, October 23, 2015).

<sup>139</sup> Penelope Mathew and Tristan Harley, *op. cit.*, p.5.

<sup>140</sup> Joint statement: Ministerial meeting on irregular movement of people in Southeast Asia. <<http://reliefweb.int/report/myanmar/joint-statement-ministerial-meeting-irregular-movement-people-south-east-asia>>. accessed on June 30, 2015.

<sup>141</sup> Channel News Asia. “Full concluding statement at migrant crisis talks”, <<http://www.channelnews-asia.com/news/asiapacific/full-concluding-statement/1880646.html>>, accessed on June 30, 2015.

<sup>142</sup> Chairman Statement Emergency ASEAN Ministerial Meeting on Transnational Crime Concerning Irregular Movement of Persons on Southeast Asia in Kuala Lumpur Malaysia (July 2, 2015), para. 6, (VII & VIII).

<sup>143</sup> Joint Statement by UNHCR, OHCHR, IOM, the SRSG for Migration and Development, and UNODC Press Releases, <<http://www.unhcr.org/5593dad46.html>>, accessed on July 1, 2015.

<sup>144</sup> Fan Hongwei, “ASEAN’s “Constructive Engagement” Policy toward Myanmar”, *March/April China International Studies*, 2012. pp.54-55. <<http://www.cssn.cn/upload/2013/02/d20130228094828662.pdf>>, accessed on July 1, 2015.

Meanwhile, the idea of reforming AICHR and establishing the ASEAN Refugee Institution, reminisce a proposal by Thai Prime Minister Surin Pitsuwan in the ASEAN Foreign Ministers Meeting in 1998 on a policy of ASEAN's "flexible engagement", especially when a dialectical approach cannot change the domestic policy of Myanmar.<sup>145</sup> Flexible engagement in Pitsuwan's proposal was basically an exception of the principle of non-intervention, where ASEAN is expected to be able to play a constructive role in preventing or resolving domestic issues with regional implications.<sup>146</sup> The proposal is supported by the Philippines, and was rejected by other ASEAN members, but since then agreement has been reached on "enhancing interaction" as a compromise plan, hence ASEAN countries can "openly criticize" and put pressure on Myanmar for its domestic problems as the stance of the individual countries but not that of ASEAN.<sup>147</sup> As for the regional asylum mechanism, such as the ASEAN Refugee Institution, it can be said that it is at the same table as reconsidering Surin's "flexible engagement" proposal.

Many people are pessimistic that these matters can be agreed upon in ASEAN institutionally. Elfansuri from the Human Rights Commission, for example, frowned upon the plan to establish a regional mechanism of ASEAN for asylum seekers that can be agreed by its members, since ASEAN countries generally do not have a tradition of human rights; thus, the most possible solution is to ratify the International Convention on Refugees.<sup>148</sup> If the regional asylum mechanism in question is in the form of a permanent body of ASEAN, it will be difficult to accept the proposal, and even if it is accepted, it may share the same fate as the AICHR. The proposal of "flexible engagement" should be reconsidered, particularly in forming the ASEAN regional mechanism for asylum-seekers on a case by case basis, as has been applied to Indochinese refugees by some member states of ASEAN. In this regard, ASEAN, institutionally, outside the cooperation between ASEAN and other countries, should be encouraged to establish the ASEAN Regional Comprehensive Plan for Regional Asylum Seekers and Refugees, by developing the idea of voluntary "trust fund" and "task force" which has been initiated by previous practices.

## VI. CONCLUSION

The presence of the Rohingya people in Aceh shows on the one hand the protection of asylum seekers and refugees in a non-immigrant state such as Indonesia, which does not allow for endeavors of "local integration", has remained one of the most durable solutions for refugees. On the other hand, the handling of Rohingnya asylum seekers and other refugees in general by the Government of Indonesia indicates that Indonesia is a country which is still very tolerant towards asylum-seekers and refugees. It is based on humanitarian assistance, rather than the framework of implementing human rights obligations.

Although the permanent option of local integration is not acceptable as yet, the presence of Rohingnya asylum seekers in Aceh reflects the need for "temporary local integration". No one knows for certain for how long the threat of persecution will

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<sup>145</sup> *Ibid.* p.58.

<sup>146</sup> Kenneth Christie and Denny Roy, *The Politics of Human Rights in East Asia* (London: Pluto Press, 2001), p.178.

<sup>147</sup> *Ibid.*, pp.178-179.

<sup>148</sup> Interview with Elfansuri Chairah, Head Section of Research and Study, Komnas HAM (Jakarta, August 10, 2015).

continue to occur in Myanmar. “Temporary local integration” can be implemented step by step, with the objective or their being accepted at least by the local community while waiting for voluntary repatriation.

As the discussion in this paper has shown, the ratification of the Refugee Convention is not an option which has been accepted by the Indonesian government. However, the government still views it as one of the constitutional rights, namely the “right to obtain asylum”. With such attitude, “the right to obtain political asylum” under the Amended 1945 Constitution should be interpreted as “temporary asylum”, as has been practiced in dealing with Indochinese refugees on Galang Island until the 1990s.

However, the endeavors to develop specific legal rules for asylum seekers and refugees in the form of Presidential Regulation should be appreciated as a step forward towards building a legal framework that will ensure the handling of asylum seekers in line with the constitutional guarantee of the right to asylum, albeit temporarily. Considering that the substance to be provided for relates to human rights, the regulation on handling asylum seekers and refugees would be more appropriately set out in the form of a Statute (Law). If this matter is regulated by a Statute (Law), the constitutional issues regarding central-local government relationship can be set forth explicitly.

The character of Rohingya asylum seekers, who are considered to be “regional refugees”, also needs to be seriously resolved within the ASEAN consultative mechanism. The idea of “flexible engagement” policy in ASEAN needs to be echoed back, not only on the issue of asylum seekers, but on all domestic issues that affect regional stability. However, if this idea is rejected again by the majority of ASEAN member countries, cooperation in processing and protecting Rohingya asylum seekers and other regional refugees should at least be advocated in a way to develop a case by case based resolution to the Rohingya problem and other asylum seekers in the current context items, namely: ASEAN Regional Comprehensive Regional Plan for Asylum Seekers and Refugees. As reflected by the success of the Refugee Convention in resolving the case of Second World War refugees—establishing the international refugee law regime, a comprehensive ASEAN Plan for Rohingya is expected to initiate the development of a regional refugee law regime.

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