

CHAPTER FOUR

FINDING AND ANALYSIS

A. Overview of the Issues of Asylum Seekers and Refugee in Indonesia

Indonesia is country which lies in a strategically geographical location, between two continents and two oceans. The cross position of Indonesia makes it as a strategic place for a mixed population movements. This is not only because of its strategic locations but also its harbours in the borderline with other countries. Sea port fiber bordering on another country especially a bordering in west Kalimantan with Malaysia Sabah, Australia in southern, and the Timur Leste. There are 79 the legal borders in Indonesia known as two routes namely the west and the east. The west routes are Medan, Jambi, Batam, and Lampung. While for the east routes can be accessed through Bau Bau, Southeast Sulawesi.¹

Now days, all countries are affected by International migration, whether as countries of origin, transit or destination, or as a combination of these.² Indonesia is categorized into a transit country of asylum seekers and refugees before they are arriving at the destination country. Among the destination countries of asylum seekers and refuge are Malaysia, Thailand, and Australia.

¹ Wagiman, 2012, *Hukum Pengungsi Internasional*, Jakarta, Sinar Grafika, p. 165.

²Ryszard Cholewinski, Paul De Guchteneire, Antoine Pecoud, 2009, *Migration and Human Rights*, New York, Cambridge, p. 2.

There are 3 reasons of the people when they migrate from their countries be it economic, social, or protection issues.

When asylum seeker and refugee leave the country of origin or residence earlier, they are motivated by the reason of protection. They left their homeland, house, possession and family. Asylum seekers and refugee are the people that could not be protected by the country of origin so that they have to leave the country. Therefore, their protection and assistance are the responsibility of the International community. Indonesia is one of the countries assigning responsibility of International community.

Indonesia meanwhile has its own problems related to migrant's problems, especially asylum seekers and refugee. Although only as transit country, Indonesia does not necessarily abdicate responsibility to prevent the migrants that come to Indonesia. The first case of asylum seekers and refugee in Indonesia is the case of asylum seekers and refugee from Vietnam that arrived on April 30th, 1975.³

A long conflict in the country under the government of Ho Chi Minh, had forced them out of their country to seek protection. By using boats, they sailed through the South China Sea and came to Southeast Asian countries illegally. In 1975 Indonesia, had become destination for Vietnamese

³*Ibid*, p. 166.

immigrants. They demanded the services from UNHCR for asylum and placed in a third country.⁴

Vietnam refugees or better known as "boat people", at first time, were accepted as the boat people without a help of UNHCR. The development of the growing number of boat people who had been pushed out of the country had encouraged United Nations through the UNHCR to organize the International Convention on Refugees Vietnam in Geneva in July 1979 that known as "International Conference on Indochinese Refugees (ICIR)".⁵The results of the conference stated that all boat people of Vietnam origin are recognized as refugees. Countries of first asylum are required to accept them temporarily before being placed in a third country. The conference was also attended by representatives of the Indonesian government. Again, although Indonesia is not the party of 1951 Refugee Convention, Indonesia willingly or unwillingly should accept them as Indonesia is member of United Nation.

In the conference, the Indonesian government offered someplaces as a processing center. The place chosen was Rempang or Galang Island in the Riau Islands. Galang Island is an island inhabited only around 250 people covering an area which covers about 80 hectares.⁶

⁴*Ibid.*

⁵*Ibid.*

⁶Moh. Fandik, 2013, "Penampungan Orang Vietnam di Pulau Galang 1975-1979", *EJournal Pendidikan Sejarah*, Volume 1, No. 1, Januari 2013, Surabaya, p. 167.

Not only participated in the conference but also provided Galang Island as a transit place was a sign for Indonesia seriousness in handling the boat people at the initial stage. Then those boat people were sent to their final destination, the United States, in 1975-1979. However, Indonesia's seriousness was turned to be abused by the communist government of Vietnam. Exodus was implemented by reason of economic, political, and strategic. As the result, in August 1979 the number of boat people who entered in Indonesia increased into 40,000 people landed into District Jemaja and Anambas.⁷ All those refugees were landed at various Indonesia islands; Letung, Karamon, and Kuku. Since the arrival of refugees from Vietnam at Galang Island, Indonesia had the negative impact of the flood of Vietnamese refugees. The coming had caused several problems, both domestic and regional problems.

The Indonesian government subsequently formed a Departmental Internal team in preparation for construction of the Refugee Processing Center on Galang Island. On June 18, 1979, the "Lay Out" Center of Processing was handed over to the Minister of Foreign Affairs, in conjunction with the ASEAN Foreign Ministers in Denpasar held on 28 June 1979.⁸

⁷Wagiman, *op. cit.*, p. 168.

⁸ Katerina Mayumi Simanulang, 2014, "Pelaksanaan Operasi Komando Tugas (Kogas) Kemanusiaan Galang 96 dalam Rangka Pemulangan Pencari Suaka Asal Vietnam Tahun 1996 Di Pulau Galang Ditinjau dari Surat Edaran Direktur Jenderal Imigrasi Nomor: F-II.01.10-1297 Perihal Penanganan Terhadap Orang Asing Yang Menyatakan Diri Sebagai Pencari Suaka atau Pengungsi", taken from <http://e-journal.uajy.ac.id/7285/2/HK110638.pdf> , accessed on Sunday, May 7th, 2017, 10.00 a.m.

After receiving the transfer of duties from the Minister of Foreign Affairs on July 1, 1979, the Minister / Armed Forces formed an organization called the Vietnam Refugee and Management Committee, abbreviated or P3V, consisting of two parts, namely Center (DEPHANKAM) and Regional (Riau Islands). The law as the basis for work in the handling of this Vietnam Refugee project is the Presidential Decree No. 38/79 Year 1979 dated 11 September 1979, on the coordination of the settlement of the problem of Vietnamese refugees in Indonesia.⁹

The P3V Center team comprises interdepartmental officials comprising the Department of Foreign Affairs, the Ministry of Home Affairs, the Department of Justice and the Department of Defense SecurityI. The task of P3V is to coordinate the security and resolution of the problem of Vietnamese refugees in the Riau Islands, and to coordinate the support or refugee activities and their distribution to third countries in cooperation with UNHCR.¹⁰

Accepting Vietnamese refugees not only became the first Indonesian experience dealing with refugee cases, the boat people also created history of the UNHCR in Indonesia. As the result of their coming, in 1979, the UNHCR office was established in Indonesia. There were two solutions offered to Vietnamese refugee at that time namely resettlement (shipment to third countries) and Repatriation (repatriation to the country of origin). In October

⁹ *Ibid.*

¹⁰ *Ibid.*

1996 repatriation was successfully implemented. For 20 years, Indonesian government had helped the Vietnamese refugees in the form of provision. Such costs paid by Indonesia should be solely the responsibility of UNHCR. Indonesia had not participated in the determination of their status and shipping destination country because Indonesia is not a State party of 1951 Refugee Conventions.

Vietnam refugees on the Galang Island was the first issues of refugees and asylum seekers in Indonesia since then a number of asylum seekers and refugees have always increased year by year. A total of 13,829 up to Feb 29, 2016 and it reaches a total of 18,829 refugee and asylum seekers in Indonesia.¹¹ Those people come from various countries but then they sailed to Australia as a state that will give a protection for them.

Table 1: The Number of Asylum Seeker and Refugee in Indonesia, February 2016.¹²

¹¹Dina Puspita Hapsari, 2016, The Role of UNHCR and Jesuit Refugee Services in Managing Global Refugee Crisis, Public Lecture in Universitas Gajah Mada, Thursday, November 24th, 2016, Yogyakarta

¹² Mitra Saliman, "UNHCR di Indonesia", 2016, taken from <http://www.unhcr.or.id/id/tentang-unhcr>, accessed on Friday, November 25th, 2016, 8:25 p.m.

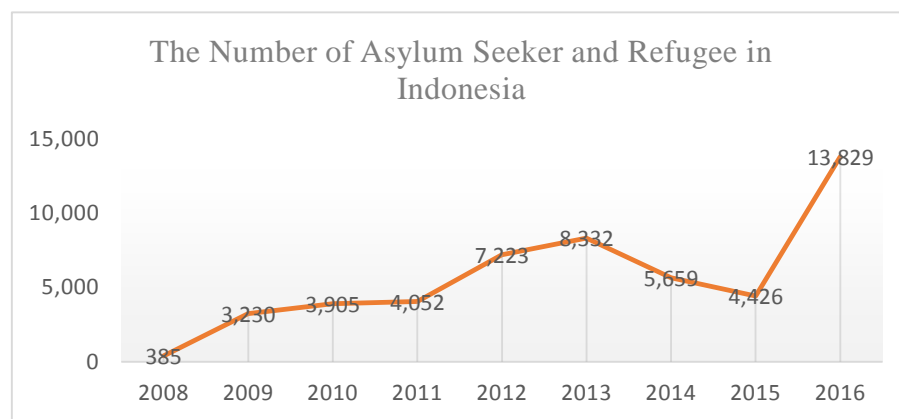
Country	Total Refugees	Total Asylum seekers
Afghanistan	3,056	3,859
Myanmar	795	244
Somalia	459	762
Sri Lanka	319	294
Iran	312	331
Palestine	375	157
Pakistan	348	140
Iraq	223	689
Others	382	1,084
Total	6,269	7,560

Source: Mitra Saliman, "UNHCR di Indonesia".

There were 13,829 number of refugee and asylum seekers in mid of 2016. The large number for a nonparty state of 1951 Refugee Convention. Indonesia experienced up and down in the number of asylum seekers and refugees entering Indonesia. After a decline number in the late 1990s, the number of arrival of asylum seekers and refugee to Indonesia increased again in 2000, 2001 and 2002. Although the number of arrivals declined in 2003-

2008, the trend increased in 2009 and the numbers become so large in early 2016.¹³

Table 2: The Number of Asylum Seekers in Indonesia from 2008 until 2016



Source: Mitra Saliman, “UNHCR di Indonesia”.

The fact shows that transit migration may apply for international protection. The UNHCR in Thailand and Malaysia raised the question, why many of them chosed to come to Indonesia while it makes them face the risk of being arrested and physical hazards, especially if the boat ride. The reason that appears on the head is unclear. UNHCR regional offices in Thailand and Malaysia have excessed the cases. In January 2013, the UNHCR office in Kuala Lumpur handled 90,185 refugees and 11,650 asylum seekers, then the UNHCR

¹³Mitra Saliman, “UNHCR di Indonesia”, taken from <http://www.unhcr.or.id/id/tentang-unhcr>, accessed on Friday, November 25th, 2016, 8:25 p.m.

office in Bangkok handled 84,479 refugees and 14,580 asylum seekers. In contrast, the accumulated number of cases in Jakarta is less than of one tenth of total cases managed by our neighboring countries.¹⁴

The existence of asylum seekers and refugees which tends to increase have demanded more efforts by the Indonesian government. This problem does not only affect themselves, but their coming influenced Indonesia economic condition as a whole.

Until now, however, Indonesia is still not able to solve the problem of asylum seekers and refugees. Indonesia is not a party of the 1951 Refugee Convention that makes Indonesia has no authority. Moreover, Indonesia does not have special laws or national legal regulations regarding the handling of refugees and asylum seekers. Indonesia does have a reference in the law No. 39 year of 1999 on Diplomatic Relations, but the implementation of the law is less effective because it is already out of date to address the refugee issues.

Indonesian's experience in dealing with refugees today is not as simple as handling those of Galang Island¹⁵. It is due to the condition of increasing refugees and unadopted legal instruments.

¹⁴ Antje Missbach, 2017, *Trouble Transit: Politik Indonesia bagi Pencari Suaka*, Jakarta, Yayasan Pustaka Obor Indonesia, p. 86.

¹⁵ There was a UNHCR administration office established in Galang to run the Galang Refugee Camp during the 1979-1996 period. Many Vietnamese Boat People and asylum seekers were temporarily accommodated in the Galang camp during the determination of their refugee status and their subsequent

The opening of the 1945 Constitution has declared Indonesia participation in the establishment of world order based on freedom, lasting peace and social justice. Its position in the International level should be a driving force in the International instruments on human rights. As a country that has been independent since 1945 and become the members of United Nations for 57 years ago, Indonesia should concern to ratify 1951 Refugee Convention.

B. UNHCR in Indonesia

By 1950, the International Community Recognized that the refugee problem sparked by the Second World War was not a temporary issue. So many years after the war had ended, 1,250,000 refugees were still left in Europe. The International organization which is competent in refugee affairs is the United Nations High Commissioner for Refugee (UNHCR). Commissioner UNHCR is specifically established for dealing with asylum seekers and refugee issues. This body was established on 14 December 1950 by an assembly of the United Nations and began to work one year later, on January 1st, 1951. UNHCR initially only provided security protection, food, and medical assistance in an emergency besides helping in finding solutions for refugees for long periods of time.

resettlement in the USA, Australia and some European Countries. Many Vietnamese from their new resettled countries have come back to visit Galang. And namely the former refugee area known as *Sinam Camp*

UNHCR is an International institution mandated to provide International protection for refugees and permanent solution to the refugees with the help of government, other actors or humanitarian organizations.¹⁶ UNHCR in Indonesia was established in 1979. Its regional office is located in Jakarta and has several chapters in Medan, Tanjung Pinang, Surabaya, Makassar, Kupang and Pontianak.

In its early stage, the activity of UNHCR were focused on handling the arrival of Vietnamese refugees, as stipulated in the Comprehensive Plan of Action (CPA). An action plan was launched on June 14, 1989 by the member countries that follow the International Conference on Indo-Chinese refugees. The specific responsibilities of UNHCR in addressing the Indo-Chinese refugees were defined in the CPA. In 1979, the Indonesian government was authorized to establish of a refugee camp on Galang Island, which accommodates more than 170,000 refugees until its closing in 1996.¹⁷

Since Indonesia has not ratified the 1951 Refugee Convention, UNHCR is the only institution that gives the right to determine refugee status in Indonesia. Among its mandate are to provide International protection for refugees, seek durable solutions for refugee's problems, promote the International Refugee Law, and protect stateless people and Internally

¹⁶Achmad Romson, 2003, *Pengantar Hukum Pengungsi Internasional: Hukum Internasional dan Prinsip Prinsip Perlindungan Internasional*, Bandung, Sanic Offset, p. 165.

¹⁷UNHCR, 2016, UNHCR di Indonesia, taken from <http://www.unhcr.or.id/id/unhcr-ambassador-id> accessed on Monday, October 28th, 2016, 6:53 p.m.

Displaced Persons (IDP). UNHCR regional office in Jakarta is in cooperated with the Indonesian government in processing asylum seekers and refugees in Indonesia. This is done in order not to be returned to their country of origin and in addition to obtain international protection. UNHCR is an institution that act on behalf of Indonesian government.

UNHCR works closely with government counterparts, particularly the Ministry of Foreign Affairs, the Coordinating Ministry for Political, Legal and Security Affairs, the Ministry of Law and Human Rights, including the Directorate-General of Immigration, and the Ministry of Home Affairs to provide protection and support to, and to identify comprehensive solutions for persons under UNHCR's mandate.¹⁸

UNHCR also engages with International, NGO and civil society partners, including UN agencies, Church World Service (CWS), UNHCR's implementing partner involves in assistance programs, as well as operational partners including the International Organization for Migration (IOM), Jesuit Refugee Service (JRS), the Indonesian Red Cross, and the National Human Rights Commission, it assists the Government of Indonesia to ensure the effective protection of refugees, asylum-seekers, and stateless persons.¹⁹

1. United Nations High Commission for Refugee and International Organization for Migration in Indonesia

¹⁸*Ibid.*

¹⁹*Ibid.*

Indonesia is not a country signatory to the refugee convention and protocol, so that Indonesia does not offer official rights on asylum-seekers and refugees in its territory, but tolerates their existence as long as they carry out the determination of refugee status under the UNHCR or they are directed to get the service to the International Organization for Migration (IOM).

One of the main non-governmental partners of UNHCR in Indonesia is the IOM, which specifically deal with the issue of detention, public housing programs and travel arrangements for the placement and repatriation of refugees and asylum seekers. IOM also facilitates voluntary repatriation of refugees and asylum seekers and other things that concern. Indonesia is not an IOM member state either, but Indonesia has official status at IOM council as observer since 1991. In order to operate in Indonesia, IOM should renew its contract with the Indonesian government every six months.

The relationships between the IOM and UNHCR have been recorded as a long history "marked by close cooperation and competition a bitter". Because those two organizations have many overlapping activities, they were noted in long history of rivalry from workplace performance and outlook between the two agencies. Although IOM has no mandate of refugees, but it has been involved in helping the management activities that have an impact on refugees and asylum seekers, as in Indonesia.

UNHCR in Indonesia is operated with limited funds and limited number of staff as well; the situation is very different from the IOM. In financial year 2009, IOM received twenty-two different donors and Australia's was the biggest donors while UNHCR has only two donors. Despite having considerable dependence on the performance of UNHCR Indonesia did not contribute any funds to the UNCR until 2012. This is the first-time contributes UNHCR funds.²⁰

By observing the performance of the IOM in handling the asylum seekers who enter Indonesia, its activities play major role compared to the UNHCR. This sometimes makes the asylum seekers more aligned to the IOM than to UNHCR. The IOM managed their rudeness or subsequent placement into another country. While UNHCR only take care of the determination of their status.

There are interesting things found from IOM itself. It is supported by Australian department of Immigration and Citizenship which contributed US \$ 21,407,194, followed by the European Commission (US \$ 17,631,483), and United States Agency for International Development (US \$ 10,602,042) and Australian Customs IOM (US \$ 668,869) and the Australian Federal Police (US \$ 183,887). Australia is a country that has a great interest in detaining asylum seekers to remain in Indonesia.²¹

²⁰ Antje Missbach, *op.cit*, p. 156.

²¹ Antje Missbach, *op.cit*, p. 172

As the largest donor in Indonesia, Australia indirectly controls of policy carried out by IOM Indonesia. The new Indonesian state authorities began to change mobilization transit of the migrants and be more proactive. Indonesia can not make a major contribution from its own budget take care of the transit migrants in detention. So, enormous funding from the Australia is needed, otherwise unlikely Indonesia will not able hold thousands of transits. In addition, Indonesia only began to combat human trafficking when Australia and other sources offer collaboration with the funding supports.

At first, the issue of transit migrants in the regard is not an important priority in Indonesia. Asylum seekers in Indonesia then serve as a bet that is very important in establishing diplomatic ties with Australia. Actually, the transit of asylum seekers or migrants who enter Indonesia is a very simple affair. When they entered, the government of Indonesia could send them directly to Australia as their destination country because Indonesia is only used as a transit country. However, it is difficult to implement, because there are political interests between Indonesia and Australia.

Every effort must be guided by an interest, as well as political domain. Politics, in the classical theory of Aristotle understood as the efforts taken by the citizens to realize the common good. Term common good is a keyword in the definition. In other words, interests pursued in politics refer to Aristotle's view that should lead to the interests that are intended for the

realization of the common good. The purpose, in another language is called national interest. Theoretically, in order to maintain the viability of a country, then the state must meet its national interests. So, the State can be stable and still survive. The national interest is to determine which way the politics will be formulated.²²

2. The Problems of UNHCR in Dealing with Issue of Asylum Seekers and Refugees in Indonesia

There were 24 people forced to flee every minute, 51% of them are children, and in every 113 people in the world there is refugees, asylum seekers or IDPs. It is a shocking fact which must be accepted. UNHCR has been working in Indonesia since 1975 and now it has 32 national staff, 8 International staff, and 27 affiliate workforce deployment staff under arrangements with IUNV, UNOPS, ICMC, and IRC. The country office is in Jakarta and UNHCR also its representatives in Kupang, Makassar, Medan, Surabaya, Pontianak and Tanjung Pinang. The problem is whether this is comparable to the number of asylum seekers and refugees who entered Indonesia in 2016; 40 staff are required to take care of 13,829

²² Kompasiana, “Kepentingan Politik Apa Politik Kepentingan?”, 2017, taken from http://www.kompasiana.com/the_udiezindonesia/kepentingan-politik-apa-politik-kepentingan_551a0be1813311cb7c9de130 accessed on Friday, March 17th, 2017, 10:51 a.m.

persons. Such number of staff, of course, is not proportional to the number of people who should get help from their power.²³

In the implementation of various programs of cooperation of the UNHCR and the government of Indonesia, UNHCR also faces several obstacles that hinder in the optimization of the performance. Factors extent of Indonesia's marine area is not comparable with Indonesian law enforcement officials to 34 provinces. Indonesia stretches 3,977 miles from the Indonesian Ocean to the Pacific Ocean. The makes Indonesia has vast oceans around 3,257,483 km².²⁴ Moreover, the asylum seekers entered Indonesian territory by sea. There are some areas that are less than optimal in the monitoring of marine areas of Indonesia, so it takes a long time to monitor and causes less efficient implementation of UNHCR programs.

Some policies made by Indonesia government have made UNHCR faced major problems in the handling of asylum seekers and refugees. One of the island severely affected widespread problem of Indonesia territory is Papua. The absence of representatives of the UNHCR office in the eastern part of Indonesia makes inhibition in reviews their mandate to run. The amount of the budget only for the cost of accommodation makes UNHCR

²³Dina Puspita Hapsari, 2016, The Role of UNHCR and Jesuit Refugee Services in Managing Global Refugee Crisis, Public Lecture in Universitas Gajah Mada, Thursday, November 24th, 2016, Yogyakarta

²⁴Anonymous, 2016, "Luas Wilayah Negara Indonesia", taken from <http://www.invonesia.com/luas-wilayah-negara-indonesia.html> accessed on Friday, December 2nd, 2016, 2:24 p.m.

prefers to use the budget to help asylum seekers and refugees outside the territory of Papua. It is an injustice that must be felt for the people of Papua especially for asylum seekers and refugees who entered the territory of Papua. UNHCR indirectly have failed as an institution of international protection for asylum seekers and refugees.

Generally speaking, UNHCR services get a lot of diverse evaluations of the recipients. A refugee who has been waiting for placement for more than five year, said "UNHCR as gentle killer". Instead a young Afghanistan who had recently been released from Rudenim after the intervention of UNHCR said, "from the bottom of my heart, I am very grateful to the UNHCR".²⁵

UNHCR had problems with the policy made by the Indonesian government. Indonesian government policy can also be said to be unclear or commonly said to be wishy-washy. On one hand, there is the will of the Indonesian government to implement the treatment of international standards on asylum seekers and refugees are particularly vulnerable to human rights violations, but, on the other hand and at the same time, Indonesia is not a country that ratified the 1951 Convention on the Status of Refugees and its 1967 Protocol, so no adequate national legal instruments to implement it in the field. The is no advantage for the UNHCR, as it

²⁵ Antje Missbach, *op.cit*, p. 154

becomes miscoordinations. UNHCR treatment given to of Asylum seekers and refugees were different from that given by government officers. Immigration detention centers or RUDENIM provided to be used as residence of Asylum seekers and refugees are also referred for the unfit category housed.

People move both 'regularly' and 'irregularly' to seek international protection. In their minds are the ways how to get safe place for living. So many people who come to the office of the UNHCR to obtain refugee status, but not necessarily all of them are refugees. Problems of Asylum seekers and refugees becomes a very serious because a lot of people abuse these issues for the benefit of others. That is why UNHCR becomes the only institution that has the authority to give refugee status and it should be more selective in the determination of refugee status.

The sustainability performance of UNHCR also indirectly shows the performance of Indonesia in dealing with cases of asylum seekers and refugees. Government participation in joint deal with asylum seekers and refugees will certainly have better impact in the future. When Indonesia becomes the parties of 1951 Refugee Convention, Indonesia may directly determine the status of refugee without waiting the decision of UNHCR. Indonesian Government may determine for themselves to the status of refugees and asylum seekers, so the government can directly be involved

and contributed to the management of refugee problems in accordance with Indonesia's national interest.

Indonesia can have their greatest impact on refugee protection by adopting legislation which is consistent with the Refugee Convention and Protocol and other International standards. National procedures for determining refugee status are a particularly important focus for parliamentarians because those procedures are essential to the protection and the Refugee Convention leaves the content of such procedures to the country of asylum.²⁶

C. The Reason Why Indonesia Not Ratify 1951 Refugee Convention Relating to the Status of Refugee.

One of the greatest challenges confronting the International community is to link the task of refugee protection and human security to the broader defense of human rights. During recent years, traditional notions of security and sovereignty have been challenged, placing refugee issues much higher on the International agenda and creating new opportunities for International action.²⁷

The refugee protection regime provides a good example of where state compliance may be motivated by self-interest. That is not to say that other

²⁶James C. Hathaway, *op.cit.*, p. 48.

²⁷Edward Newman, 2003, *Refugees and Forced Displacement International Security, Human Vulnerability, and the State*, Tokyo, New York, Paris, United Nations University Press, p. 31.

reason such congruence - do not operate here.²⁸ Indonesia has been dealing with the case of asylum seekers and refugees since 1975, starting with the refugees from Vietnam but after forty-one years it passed away Indonesia has not signed the Refugee convention.

In May 2006, when Indonesia was elected to the UN human rights council, Indonesia promised to ratify the 1951 Convention and 1967 Protocol in 2009. The action plan is to provide protection for refugees and migration, and offers assistance to develop a mechanism to overcome all the problems relating to refugee protection and mixed migration flows effectively with a view to oversee the country's transition towards signatories.²⁹

Indonesia reaffirmed its intention to sign the refugee convention, included in the national legislation program (Prolegnas) 2005-2009 all laws are planned to be approved or corrected by the Parliament within the period of five years, but so far nothing has been executed. Despite Indonesia repeated statement on the refugee convention, the 2010-2014 parlement had no longer any intention to ratify it.³⁰

A plan to ratify the Convention has actually been made. The plan or program ratification of the 1951 Refugee Convention and 1967 Protocol on the Status of Refugees has been included in two periods (2004-2009 and 2010-

²⁸David Armstrong, 2012, *International Law and International Relations*, New York, Cambridge University Press, p. 179.

²⁹ Antje Missbach, *op.cit*, p. 152.

³⁰ *Ibid*.

2014) of the National Action Plan on Human Rights or in Indonesia known as RANHAM. RANHAM in the period 2004-2009, the ratification of International Refugee Law is planned to be realized in 2009. However, the ratification was delayed until the second RANHAM period 2010-2014. It is planned to ratify the 1951 Convention in 2013 while the 1967 Protocol in 2014.³¹

RANHAM are realized in 2011 and intended to cover the next three years, the goal is to support the award, fulfillment, protection, and enforcement of human rights in Indonesia. The RANHAM clearly states the Refugee Convention and the need to ratify the Convention (The Presidential Decree No. 23 year 2011). However, this did not happen and the possibility of ratification of the new government under President Joko Widodo, remains small. The high cost is predicted that processing mechanisms of refugees in the country are the main obstacles.

1. External Factor

The 1951 Refugee Convention Relating to the Status of Refugees and the Additional Protocol in 1967 have set the rules and norms that must be fulfilled by the state party through with article contained therein.³² There are several articles in this convention considered it be quite heavy and difficult

³¹Ria Rosalianna Simbolon, 2014, "Penundaan Ratifikasi Konvensi 1951 dan Protocol 1967 tentang Status Pengungsi oleh Pemerintah Indonesia", *Ejurnal Ilmu Hubungan Internasional*, Vol. 2 No.2, Samarinda, p. 452.

³²Edward Newman, *op.cit.*

to be fulfilled by the Indonesian government. The 1951 Refugee Convention is considered important for ratification because the convention is the first international treaty that covers a wide range of the most important aspects of the life of a refugee.

The 1951 Refugee Convention also establishes minimum standards to be acquired rights for refugees, which is attainable standard of equal treatment of interest by other foreigners in certain countries, as well as equal treatment with nationals. For a minimum standard right acquired include: ³³

- a. The right not to be forcibly deported (refouled) to countries where these refugees have reason getting scared of persecution (Article 33);
- b. The right to not expulsion, except in certain circumstances very clear (Article 32);
- c. Exclusion of punishment for illegal intrusion into the State Party to this Convention (Article 31);
- d. The right to work (Article 17);
- e. The right to have a home (Article 21);
- f. The right to acquire an education (article 22);
- g. The right to obtain public assistance (article 23);
- h. The right to freedom of religion (Article 4);
- i. The right to obtain legal services (Article 16);

³³ 1951 Refugee Convention relating to the Status of Refugee

- j. Freedom of movement within the territory (Article 26);
- k. The right to get an identity card (Article 27);

When Indonesia became a party of the Refugee Convention, then directly Indonesia should run the provisions. Article to be considered of the government of Indonesia is Article 17 which contains the right to work for refugees and Article 21, namely the right to have a home. In article 17, which contains "The Contracting State shall accord to refugees lawfully ..., as regards the right to engage in wage-earning employment", the article requires the state parties of the Convention to provide jobs for the refugees was considered too heavy for the Indonesian government, considering that Indonesia is a developing country and has a fairly high unemployment rates, per capita income of the Indonesian population itself is also considered not quite feasible.

In addition to Article 21, which provides "As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens Generally in the same circumstances ", in that article Indonesia requires to provide homes for the refugees, this provision is considered very heavy for Indonesia. The poverty rate in Indonesia is still quite high, it is still a lot of lagging regions

in Indonesia that are still in need of infrastructure worthy from the central government, therefore if the government makes a policy in this regard it is better to provide facilities to the citizens who need rather than giving facility for asylum seekers and refugees who enter Indonesia.

Indonesia actually is able to run some standard provisions of the 1951 Refugee Convention. As article 22 the right to education for refugees, the government of Indonesia is able to achieve this goal. A policy to provide education for refugee until middle school level above is still possible to be implemented, but giving up college education is still heavy. Besides, there are still many Indonesian citizens who have not been able to go to college. High cost of going to college is also a problem. Again, Indonesia make this conditions as the reason not to ratify the 1951 Refugee Convention. The inability of Indonesia to provide facilities for the refugees is answered through Article 42 1951 of Refugee Convention:

“At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.”³⁴

³⁴Article 42 of 1951 Refugee Convention relating to the Status of Refugee

The policy in article 1951 Refugee Convention should not be a reason for not ratifying the 1951 Refugee Convention. The actual contents of the 1951 Refugee Convention are not at all burdensome to the state party's convention. In this context, the Indonesian government can make reservations to the provisions of Articles 13, 14, 17 etc. with article which requires states to provide equal treatment to refugees and its own citizens as well as others who live in their area of property rights on goods moving, not moving, housing, employment, etc. Providing facilities for its own citizens is still difficult to fulfill, so its impossible to provide such facilities to refugee.

Regardless of the policy issues contained in article 1951 Refugee Convention, Indonesia still has a reason not to ratify it. Indonesia is a country located in the geographical location which is very strategic; it is located between two continents and two oceans. Indonesian territory is in the cross position and it makes Indonesia as a strategic place for mixed population movements. It makes its own concerns for Indonesia when Indonesia became a state party convention refugee.

If the 1951 Refugee Convention is ratified, government is obliged to protect refugees in Indonesia. The government could no longer treat refugees as illegal immigrants but accommodate them in detention migrant centers. In this way, the refugees will feel very safe when entering the territory of

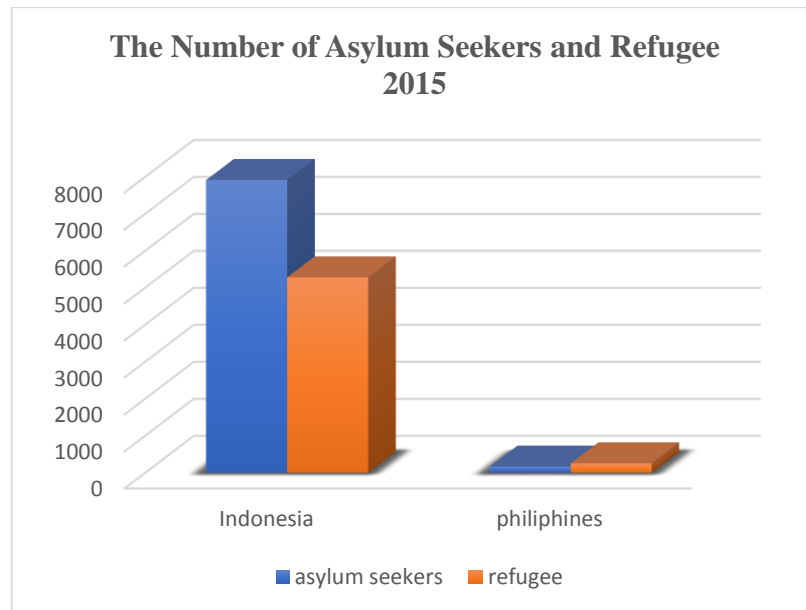
Indonesia, because the protection and rights that they will receive from the government of Indonesia. Thus indirectly, the number of refugees increases.³⁵

In fact, not all of the countries ratified 1951 Refugee Convention have increased the number of asylum seekers and refugees. One example is the Philippines, which have ratified the 1951 Refugee Convention on July 22nd, 1981.³⁶ Having ratified the Refugee Convention, instead of being a favorite country to be a country of destination, the number of asylum seeker and refugee actually decreased. If we compare the number of asylum seekers and refugees in Indonesia and the Philippines, the number of asylum seekers and refugees in Indonesia is higher than the number that exist in the Philippines.

Table 3: The Number of Asylum Seekers and Refugee in Indonesia and Philippines.

³⁵Ria Rosalianna Simbolon, *op.cit*, p. 456.

³⁶ UNHCR, 2016, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”, Taken from <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>, accessed on Monday, December 5th, 2016, 7:42 p.m.



Source: UNHCR Philippines, 2015, “Philippines Factsheet”.

In 2015, there were 163 asylum seekers and 253 refugees in Philippines while in Indonesia there were 7,911 asylum seekers and 5,277 refugee.³⁷ Philippines has a number of very significantly higher than the number of asylum seekers and refugees in Indonesia. This is because Philippines had no longer a transit country like Indonesia since 1981 but it has become a country of destination for asylum seekers and refugees.

³⁷UNHCR Philippines, 2015, “Philippines Factsheet”, taken from <http://unhcr.ph/>, accessed on Wednesday, December 7th, 2016, at 4:40 p.m.

2. Internal Factor

Indonesian territory extends along 3,977 miles between the Indian Ocean and the Pacific Ocean. Indonesia's land area is vast waters 1,922,570 km² and 3,257,483 km². The densely-populated Island in Indonesia is island of Java, where half the population of Indonesia live. Indonesia consists of five major islands, namely: Java with an area of 132,107 km², Sumatra with an area of 473,606 km², with an area of 539,460 km² Kalimantan, Sulawesi, with an area of 189,216 km², and Papua with an area of 421,981 km².³⁸If Indonesia decides to ratify the 1951 Refugee Convention and in 1967 Additional Protocol. Then the government directly should increase the strength of law in Indonesia. One of them is to improve the border control, defense and maritime security.

Indonesia government feels that before it becomes a party in 1951 Refugee Convention, Indonesia must strengthen the capacity of law first. Indonesia is famous for a country that has many islands that is rich in culture. Each area of Indonesia has different cultures, different races, until the language is different. When Indonesia becomes a party in the 1951 Refugee Convention, then Indonesia will treat the asylum seeker and refugee in the same treatment like its citizenship. Social conditions of Indonesian are also

³⁸Anonymous, 2016, "Luas Wilayah Negara Indonesia", taken from <http://www.invonesia.com/luas-wilayah-negara-indonesia.html> accessed on Friday, December 2nd, 2016, 2:24 p.m.

a reason of the Indonesian government not to ratify the 1951 refugee convention. One form of protection for asylum seekers and refugees is to provide long-term solutions for the handling of refugees that should be done by the Government of the Indonesia, which consists of integration of local, voluntary repatriation and placement in third countries.

If refugees and society cannot coexist as expected by the government, of course, it can cause internal conflicts and new problems that could disturb public order and safety in Indonesia. The treatment of refugees come from the government when Indonesia ratified the 1951 Refugee Convention then can cause negative perspective in society. Things that could trigger negative perceptions and the new problems are social jealousy between local people or society and refugees. Indonesian society that has not been able to feel the same treatment as obtained by the refugees, of course will feel less or not gate the attention of the Indonesian government in comparison with the refugee obvious that only migrants.³⁹

The existence of refugees in Indonesia which consists of various cultures would also be influential. This is especially true because of the refugees still choose to maintain a cultural identity that is not always fully harmonized with the values of local people. The entry of foreign culture that is not in accordance with the national identity, can indirectly affect even

³⁹Ria Rosalianna Simbolon, *op.cit*, p. 458.

change the nation's culture Indonesian society, as it was happened during the first-time Indonesian handling “boat people”, refugees from Vietnam in Galang Island. The arrival of Vietnamese refugees in Galang Island certainly had caused social change in indigenous communities on Galang Island. Social changes had occurred as a result of the construction of places of public facilities built by the government to accommodate the Vietnamese refugees in Galang Island.

Negative perception of the development of the construction of public facilities was affected by the impression of the government's program and also the fate of the local residents who do not receive the same treatment as refugees Vietnam this was due to UNHCR as persons with grants of Vietnamese refugees in Indonesia, it has not authority to fix the local people's life.⁴⁰Employment provided by government was very minimum for local residents on the Galang Island. The presence of public facilities for the development projects of Vietnamese refugees on Galang Island led to changes in the social order on Galang Island, especially in the case of mutual assistance systems and the development of different functions in society at that time tended to change the form of mutual cooperation. This is just one

⁴⁰Moh. Fandik, 2013, “Penampungan Orang Vietnam di Pulau Galang 1975-1979”, *Ejurnal Pendidikan Sejarah*, Vol. 1 No. 1, January 2013, Surabaya.

example of cases that experienced by Indonesia in dealing with asylum seekers and refugees.

So far Indonesian society cannot accept the arrival of asylum seekers and refugees because they still have a lack of understanding of asylum seekers and refugees. Indonesian society most did not know what should be done when they are experiencing the arrival of asylum seekers and refugees in the region. When the community was given the understanding, briefed told what action should be carried out to asylum seekers and refugees naturally Indonesian society will be familiar with the condition.

The problems of difference providing facilities between refugees and local residents in the area is actually a reasonable thing. It is said to be reasonable thing but in reality, it is not a reasonable thing. Indonesia government gives the same facilities to all asylum seekers and refugees who arrive in Indonesia as the one given to the UNHCR, but the UNHCR only has an obligation to provide protection for asylum seekers and refugees. If the facilities are provided to asylum seekers and refugees are given from the Indonesian government, and local society feels there is a difference between the treatments asylum seekers, refugees and the local communities then become a problem.

If Indonesia ratifies the 1951 Refugee Convention, it will be easier to carry out its obligations and take care of its citizens. If Indonesia takes care of asylum seekers and refugees due to responsibility as the state party,

Indonesia can also provide a treatment for their society simultaneously. So, there is no jealousy among its society.

D. The Importance of the Ratification of the 1951 Convention on the Status of Refugees

Nearly all countries are affected by International migration, whether as a country of origin, transit or destination, or as a combination of these. International migration has become an intrinsic feature of globalization.⁴¹ Asylum Seekers and Refugees flow and human displacement, infinitum, been a feature, and consequence, of conflicts within and between societies. As outsiders, asylum seekers and refugee may not master the language of the host state; they may be unfamiliar with its legal system and administration, or they can be in trouble by the exposure to alien cultural and social practices.⁴²

Many people have received some form of protections and assistances from governments and organization implementing policies that take the protection of the displaced beyond the protection of those determined to qualify for refugee status. Three types of refugee protection policy approach will be described:⁴³

- a. Distinct but linked refugee and immigration approaches,

⁴¹Ryszard Cholewinski, Paul De Guchteneire, Antoine Pecoud, 2009, *Migration and Human Rights*, New York, Cambridge, p. 3.

⁴² *Ibid.*

⁴³Edward Newman, 2003, *Refugees and Forced Displacement International Security, Human Vulnerability, and the State*, Tokyo, New York, Paris, United Nations University Press, p. 67.

- b. Refugee protection subsumed by immigration concern,
- c. Asylum processing as immigration control.

The factors that have contributed to International migration include many things. Among the people on the move today, many are seeking employments or educational opportunities while others want to reunite with family members and still more are fleeing persecution, conflict or violence in their countries. The migration has increased every year as proven by data released by the United Nations Department of Economic and Social Affairs which notes that there are 213,943,812 International migrants worldwide.⁴⁴ Basically, there are two forms of International migration: forced migration (especially refugee and asylum seeker movement but also that associated with disasters); and irregular migration.⁴⁵

Viewed from the substance, 1951 Refugee Convention is basically not to overburden an obligation to the state party of the conventions. Consideration from the humanitarian aspect of the suffering endured by refugees and their future dominates the provision of refugee protection. The legal protection of refugees can be classified as a protection of human rights because basically the refugees are free man who was forced to flee from conditions that threaten and depriving his or her rights as human beings.

⁴⁴*Ibid.*

⁴⁵Dita Liliansa and Anbar Jayadi, 2015, Should Indonesia Accede to the 1951 Refugee Convention and it's 1967 Protocol?, *Indonesia Law Review* 3: 324-346 ISSN 2088-8430, e ISSN: 2356-2129, p. 327.

In order to practice the Pancasila and the 1945 Constitution, Indonesia essentially defines various laws that directly regulate the protection and respect of the rights it guarantees enjoyment of economic, social and cultural. but it is realized that the legal regulations that exist are not appropriate and not fully ensured the fulfillment of legal protection.

Therefore, in short, the reasons of the ratification the Convention addressed in the paper are:

1. The Lack of National Law

People transiting through Indonesia is not a new phenomena. Indonesia has always been a fascinated migration place because local geographical configuration and location, an archipelago of more than 17,000 islands that connects Asia and Australia. The impact of foreigner in these Islands can be temporary, some permanent, that are still visible in language, culture, architecture and other aspects.

Based on the characteristic features and facilities owned by an International regime, Indonesia is considered necessary to ratify the 1951 Refugee Convention and in 1967 Additional Protocol. The existence of both the International refugee regime with the principles, norms, rules, procedures and facilities implementation through the development of standards, allocation and restrictions, influence Indonesia to make a

consideration to make ratification of refugee convention.⁴⁶ During this time, Indonesia uses article 26-27 on Law No. 37 years 1999 about Foreign Relations. Indonesia used this law as a reference in handling all about asylum seekers and refugees in Indonesia include about handling funds. The things that must be considered and unfortunate from Indonesia is, Indonesia has been using law that does not specifically regulate the process of granting asylum seekers and refugee that should be done by the Indonesian government.

As already described in the previous paragraph, Indonesia does not have any law on asylum seekers and refugee. Indonesia only has law regulating asylum seekers and refugees that enter into Indonesia but Indonesia does not have clear law in terms of handling asylum seekers and refugees. Here is an overview about the Indonesia law:⁴⁷

Table 4: Indonesia law related to the Issues of Refugee.

No.	The 1945 Constitution and Legislation	Formulation
1.	The 1945 Constitution article 28 (G)	Everyone has the right to freedom from torture or degrading treatment of human dignity and the right to obtain political asylum from another country.

⁴⁶Ria Rosalianna Simbolon, *op.cit*, p. 454.

⁴⁷Fitria, 2015, "Perlindungan Hukum Bagi Pengungsi di Negara Ketiga: Praktik Indonesia", *Padjajaran Jurnal Ilmu Hukum*, Vol. 2 No.1, 2015, ISSN 2460 1543, Pp. 114-116

2.	Decree of People Representative Assembly (Tap MPR) No. XVII/MPR/1998	MPR Decree is made up of three parts, one part admitted the existence of the Universal Declaration of Human Rights, which in article 24 provides that: "everyone has the right to seek asylum to obtain political protection from other countries."
3.	Law No. 12 of 2005 on the Ratification of the Convention Civil and Political Rights	Article 12 (2): everyone is free to leave any country and their own country. Article 7: each person should not be subjected to torture or inhuman punishment.
4.	Law No. 5 of 1998 on the Ratification of the Convention against Torture and other Cruel, Inhuman or Dehumanizes People	Article 13: there should not be a country that refuses, return or extradition of someone to a country where there is a belief or reasonable grounds that he would be dangerous because of being subjected to torture.
5.	Law No. 37 of 1999 on Diplomatic Relations	Article 25 (1): authority to grant asylum to foreigners in the hands of the president by taking into consideration the minister. Article 27 (1): The president sets the policy problem of refugees from abroad by taking into consideration the minister.

6.	Law No. 6 of 2011 on Immigration	<p>Article 86: provision of immigration administrative action does not apply to victims of human trafficking and human smuggling.</p> <p>Article 87</p> <p>Paragraph (1): victims of trafficking and smuggling are located in the region Indonesia placed in immigration detention or designated place.</p> <p>Paragraph (2): victims of trafficking and smuggling as referred to in paragraph (1) shall receive special treatment different from detention in general.</p> <p>Article 88: Ministers or immigration officer appointed to strive for victims of human trafficking are foreign nationals immediately returned to their home countries and given travel documents if they do not have it.</p>
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Source: Fitria, 2015, "Perlindungan Hukum Bagi Pengungsi di Negara Ketiga: Praktik Indonesia".

There are several things that can be assessed. First even though there are no regulations on asylum seekers and refugees in comprehensive, Indonesia regulation is still condusive for the presence of refugees and asylum seekers. Unfortunately looking at regulation, there are some words refugee contained in these provisions. Actually Law No. 37 Year 1999 on Diplomatic Relations already has mandated to establish a Presidential Regulation.⁴⁸ From 1999, the Presidential Regulation newly was created at the end of 2016, after such a long time that is 17 years old. It shows that

⁴⁸*Ibid.*

Indonesia is still not serious in dealing with asylum seekers and refugees in Indonesia.

Secondly, various rules above when in fact just set and also strengthened that principle of Non-refoulment become legally commitment recognized by Indonesian government. Although Indonesia does not enter the provisions in the national law, Indonesia still should follow the principle of non refoulment. Non-refoulement is a principle including as well as a peremptory norm or Jus Cogens that bind all country as well as countries not party to the 1951 Refugee Convention. The principle of non-refoulement reflecting is the minimum standard protection based on humanitarian reasons listed in Article 33 of the 1951 Convention relating to the Status of Refugees.

Third, the current legal instrument that is Law of Immigration, unfortunately, did not mention the about refugee explicitly in its provisions. Immigration Law is supposed to regulate refugees in material substance or in their regulations. The Immigration law is using the term victim smuggling and trafficking because most asylum seekers and refugees are at once most victims of smuggling and trafficking. Terms used in the Law are too broad, the explanation on article 88 should only be applied to victims of trafficking who are pure victims not means as well as

asylum seekers or refugees.⁴⁹ It should be noted that the implementation of the provisions of Article 88 requires coordination and understanding for officers on the implementation of the field, because if it is not properly understood the terms used by Indonesia, Indonesian commitment to international customs laws on non-refoulment cannot be executed well.

An initiative step has been shown by Indonesia at the end of 2016. Indonesia coined a Presidential Regulation No. 125 Year 2016 on Refugee Handling. After a long time, i.e within 17 years finally the president signed a Presidential Regulation on refugees. This regulation was signed with a view to implement the provisions of Article 27 paragraph (2) of Law No. 37 Year 1999 on Diplomatic Relations. According to the Regulation, the handling of refugees is based on cooperation between the central government and the United Nations through High Commissioner for Refugees in Indonesia and / or the international organization, which is an international organization in the field of migration issues or in the humanitarian field which has an agreement with the central government. Article 3 of the regulations:

“Refugees pay attention to generally accepted international regulations and in accordance with the provisions of the legislation”.⁵⁰

⁴⁹*Ibid.* p. 117.

⁵⁰ Presidential Decree No. 125 Years 2016 article 3 about Refugee Handling.

In the Presidential Regulation, indirectly Indonesia has been implementing the contents of the 1951 Refugee Convention which is an international provision on the issue of refugees. Indonesia is also necessary to ratify to further legalize the regulation, because it is not an obstacle anymore for Indonesia. If Indonesia is serious in addressing the problems of refugees, Indonesia should have long signed a 1951 Refugee Convention. Because during Indonesia as a transit country for asylum seekers and refugees Indonesia had poor record on human rights. Indonesia tends to be more concerned with the reputation and image of the International Human Rights. Indirectly by issuing the regulation and without Indonesia ratified the 1951 Refugee Convention once again want to build a good image of human rights in the International Community.

According to Article 2 of the Vienna Convention of 1969, is defined as the ratification of international acts whereby a State expressed its willingness or an agreement to be bound by an international treaty. Because of that ratification is not retroactive, but since the signing of the ratification of the new binding. According to the article 1 paragraph 2 of Law No. 24 Year 2000 on International Agreements ⁵¹explained, ratification is one of authentication, which is a legal action to attach

⁵¹Article 1 paragraph 2 of Law No. 24 Year 2000 on International Agreements

themselves to an international treaty. So, with the ratification of Indonesia binds itself to an international treaty.

According to article 9 of Law No. 24 Year 2000 regulates that the ratification an international agreement by the Government of Indonesia to do it is required by the treaty, and carried through the Act or Presidential Decree.⁵² However, after the enactment of Law No. 10 Year 2004 on the Enactment of Legislation, the ratification the agreement between the Republic of Indonesia and other countries or international bodies can no longer be done by Presidential Decree but by Presidential Regulation The is in accordance with the provisions of article 46 paragraph (1) letter c point 1 of Law No. 10 Year 2004.⁵³

When we look at the terms of the ratification of an international treaty, Indonesia secretly has been qualified with the release of Presidential Regulation No. 125 Year 2016. The new implementation makes us unable to see the direction and intent of the Establishment of the Presidential Regulation. Whether such an appointment would end only promise Indonesia as in the past about wanting to ratify 1951 Refugee Conventions. The regulation Indonesian political option currently is not used to ratify the Convention and the Protocol of Refugees and Asylum

⁵² Article 9 of Law No. 24 Year 2000 International Agreements

⁵³ Law No. 10 Year 2004 on the Enactment of legislation

Seekers, or maybe Presidential Decree rules that had just signed a fatherly run only as a means of political interests of Indonesia. Consequently, with the Presidential Regulation Indonesia should also be carried out in accordance with the 1951 Refugee Convention and its Protocol to fulfill and guarantee the rights of asylum seekers or refugees in Indonesia.

Universal Declaration of Human Right or UDHR is the root of all instrument that regulate the issues of refugee, especially in the Article 14 (1) UDHR which clearly states that everyone has the right to seek and enjoy in others countries asylum from prosecution.⁵⁴ In the case of asylum seekers and refugee, Indonesia should ensure the sustainability of human rights as guaranteed based on UDHR. The Article 14 of the Universal Declaration of Human Rights, states that:

- a. Everyone has right to seek and to enjoy in others countries asylum from prosecution;
- b. This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the United Nations.⁵⁵

The immigration officer has many problems in dealing with the case of asylum seekers and refugee in Indonesia. Lack of understanding

⁵⁴Yordan Gunawan and Gatot Priambodo, 2013, "Burma's Rohingya Case in International Law Perspective", *Jurnal Media Hukum*, Volume 19 No. 1, 2013, Yogyakarta, p. 166,

⁵⁵*Ibid.*

about asylum seekers and refugees make their own confusion for officers in the field. Whether their actions are correct or wrong in the handling in the field? What law they have to follow? In practice, immigration officers in Indonesia often refer to the Law No. 6 of 2011 on Immigration which states that asylum seekers or refugees are considered as "illegal immigrants". As a consequence, asylum seekers and refugees will be imprisoned for 10 years without trial. Unless they are the victims of human smuggling or trafficking.⁵⁶ When Indonesian made a new regulation, that is Presidential Regulation, Indonesia should also be supposed to amend some existing legislation such as the immigration rules. Where immigration rules are still contrary to the existing Presidential Regulation. And once again they contrast with the President Regulation.

Perhaps when Indonesia adopted a policy not to ratify the 1951 Convention on Refugee, Indonesia as a non-party state is having problems of asylum seekers and refugee, Indonesia should have their own National Law which discusses deeply about asylum seekers and refugees in Indonesia. The discussion of asylum seekers and refugee started from when they enter Indonesia, rights and obligations, its handling during in Indonesia, and until they leave Indonesia. Regulations made by the

⁵⁶Suaka, 2016, "Human Rights in Indonesia", take from <https://suaka.or.id/public-awareness/human-rights-framework/>, accessed on Wednesday, December 14th, 2016, 3:41 p.m.

Indonesian government today, basically are no longer able to answer the problems of refugees in Indonesia. The lack of national laws regarding the handling of asylum seekers and refugees making unclear tasks related institutions and agencies.

The lack of a National law on asylum seekers and refugee makes a big miscoordination among institutions involved in the handling asylum seekers and refugees that led to overlapping policies between agencies. Categorized as an illegal immigrant based on Law No. 6 of 2011 also make immigration officers to treat asylum seekers and refugees as like as criminal or as like as other illegal immigrants. Asylum seekers and refugees are not being able to be equated with illegal immigrants that is clearly defined in the terms of humanity. Refugees under the 1951 Refugee Convention and the 1967 Protocol have the same rights as other citizens of their country are.

When we could not handle, the refugee problems providing a good rule, so many problems will occur with so huge a threat. One example of prohibition of work given to asylum seekers which resulted in high poverty create frustration among them. Encourage asylum seekers from Iran and Afghanistan easily become involved in drug trafficking. It is due to their

hometowns position as the second opium-producing country in the world.⁵⁷

Asylum seekers from Myanmar, one of the synthetic drug producers in the world, has the same potential to earn income from the drug trade. Asylum seekers who have long lived and some times denied asylum, managed to build a network of people smugglers were quite strong throughout the territory of Indonesia.⁵⁸

Enny Suprpto, a former UNHCR protection staff and one of Indonesia's leading scholars of international refugee law, have long been advocating to Indonesia ratified in 1951 Refugee Convention and the additional protocol. She said that "by agreeing to the of Refugee convention will encourage the image of Indonesia as a nation committed to supporting human rights award, the said human rights are the most basic of the refugees". Indonesia is the most populous country and a potential member of ASEAN, and therefore believed to be a regional leader, so that Indonesia should be responsive to the criticism of human rights violations that occurred in its territory.⁵⁹

The responsibility has increased since 2011, when Indonesia became the chair of ASEAN and announced that Indonesia will put human

⁵⁷ Antje Missbach, *op.cit*, p. 129.

⁵⁸ *Ibid*, p. 130.

⁵⁹ *Ibid*, p. 194.

rights at the top priority for ASEAN. Issue of illegal immigrants has brought a negative impact to the relationship between Indonesia with other countries as well as the image of Indonesia in the international world. Under the pressure of tight supervisor of reports of recent reports, such as Human Rights Watch report on the handling of children in Indonesia RUDENIM. Political leaders and government officials of Indonesia is currently forced to deal with migrants in transit. Thus, Indonesia responsive to criticism of international criticism regarding Human Rights Record could be a useful focus for those who have lobbied for better protection for asylum seekers who crossed the border of Indonesia.⁶⁰

According to the second amendment of 1945 Constitution stipulates that "everyone is entitled to political asylum in other countries". The provision has never been translated into Indonesian national law. According to the article 1 paragraph 3 of 1945 Constitution, Indonesia as a country of law. Where all actions, liabilities, and all aspects are mostly regulated by law. There should have national legal instruments that clearly regulate the refugees, in it is very dangerous and harmful for Indonesia itself in the lack of national law. The lack of national law makes the condition of Indonesia in the categorized of urgency category. So, when

⁶⁰ *Ibid.*

Indonesia became a party of the 1951 Refugees Convention, Indonesia has to make a major change the Indonesian law on refugees.

2. The Unpreparedness of Indonesia in Dealing with Asylum Seekers and Refugee

In seeking to ensure human treatment for a particularly vulnerable group of people, International refugee law is closely related to International human right law, which focuses on preserving the dignity and well-being of every individual.⁶¹ States have played a central role in the evolution of International human rights law. In terms of the entitlements refugees and asylum seekers are under International human right law in the country of asylum.

Humanity reason is the precise reasons that can be used by the receiving country to be able to provide any protection to asylum seekers and refugee in the country or receiver, although the country was outside of the countries that ratified the Convention on Refugees. It is a legal order oriented towards humanity and respect for human dignity.⁶²In the Charter

⁶¹Yordan Gunawan and Gatot Priambodo, *op.cit*, p. 163.

⁶²Ademola Abass and Francesca Ippolito, 2014, *Regional Approaches to the Protection of Asylum Seekers*, King's College London, UK, p. 171.

of the United Nations, the human rights issue getting especial attention which is placed on the paragraph two of the Charter that said:

‘To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’.⁶³

Indonesia has been dealing with the case of asylum seekers and refugees since 1975 until today, but in the case of handling asylum seekers and refugee, Indonesia has not reason to be not ready in dealing with asylum seekers and refugees. Basic standards in the 1951 Refugee Convention and 1967 Protocol were burdensome for Indonesia as a developing country, it may be one of the considerations Indonesia who do not want to ratify the international instruments on refugees.

This is a dilemma for Indonesia in applying the principles that apply to the 1951 Refugee Convention on Article 1 A, that the section also applies to refugees who are in the country not party to the Convention / state parties. Indonesia however, is not as state parties to the Convention and not also as a destination country of refugees, (just as a transit country). However, the responsibilities executed Indonesia as well as the attitude of the government towards the refugees indicated purely for upholding the value of human rights.⁶⁴

⁶³United Nations Charter

⁶⁴Ajat Sudrajat Havid, 2004, “Pengungsi dalam Kerangka Kebijakan Keimigrasian Indonesia Kini dan Yang Akan Datang”, *Jurnal Hukum Internasional*, Vol.2 No.1, 2014, LPHI, p. 95.

a. Immigration Detention House (RUDENIM) in Indonesia

Immigration Detention House or RUDENIM is increasingly used as a place to accommodate the immigrants, which covers not only Refugees and asylum seekers but people without citizenship and the troubled people in immigration. Asia Pacific Refugee Rights Network or APRRN has reiterated concerns about the immigration detention center in the region as follows:⁶⁵

- a. The use of arbitrary detention is not needed as it does not meet international standards
- b. Neglect of fundamental rights
- c. Restrictions on asylum procedures and legal assistance, and
- d. Detention of vulnerable groups such as children, unaccompanied children, pregnant women, the elderly, and people with impaired physical and mental health.

RUDENIM is run by the government of Indonesia, but the system did not have adequate supervisory mechanism, neither transparent nor complaints procedures. The resulted violation of human rights that have become public consumption. Submission of asylum and / or request is part of the human rights of refugees. Article 28 of Law No. 39 of 1999 on

⁶⁵Suaka, 2016, “Rumah Detensi Imigrasi”, taken from <https://suaka.or.id/public-awareness/id-masalah-perlindungan/> accessed on Friday, December 16th, 2016, 2:15 p.m.

Human Rights affirms that everyone has the right to seek asylum to gain political protection from other countries.⁶⁶ With what is happening in the RUDENIM, obviously, Indonesia not only violate existing regulations on immigration law, Indonesia also violated human rights law.

Several cases of abuse and human rights violations in Indonesia immigration detention have been documented. The violations documented include a report about asylum seekers imprisoned in the cell for months without allowing them to go to the common room or outside the room, asylum seekers are better detained in the prison facility rather than in RUDENIM, they get many extortion and physical violence. Unfortunately, Indonesia does not have a system of independent monitoring and adequate complaints procedure. Treatments are arbitrary and extremely diverse from one RUDENIM to another RUDENIM. Corruption and bribery are common everywhere.⁶⁷ For some migrant transit, especially for those who have lived long in RUDENIM, transit conditions in Indonesia is very bad, sometimes even worse than they had experienced in their own country.

Indonesian legislation states that citizens of other countries can be detained if they enter and live in the country without the required documents. There are no criteria about who should (or should not) be detained and for how long. There are regulations that allow for specific

⁶⁶See article 29 Law No. 39 of 1999 on Human Rights

⁶⁷*Ibid.*

groups of people freed from immigration detention, as children, to be handled by international organizations (such as the International Organization for Migration or the other partner institutions from UNHCR).

Based on data released by the Directorate of Immigration, from total of 13 in RUDENIM spread in Indonesia at least four RUDENIM already over capacity. Namely, Semarang RUDENIM with capacity of 40 people filled by 117 immigrants, Jakarta RUDENIM with a capacity of 80 people filled out by 115 immigrants, Denpasar RUDENIM capacity of 80 people filled 96 immigrants and Kupang RUDENIM with a capacity of 90 people filled out by 116 immigrants.⁶⁸ It can be seen from some of the photos RUDENIM in Indonesia:

Picture 1: The Conditions of Asylum Seeker in Indonesia Immigration Detention House.

⁶⁸Direktorat Keimigrasian, 2015, "Rumah Detensi Indonesia", taken from <http://www.imigrasi.go.id/index.php/berita/berita-utama/947-rudenim-semarang-kelebihan-kapasitas> accessed on Friday, December 16th, 2016, 2:40 PM



Source: Tempo, 2016, "Pencari Suaka Membeludak, Indonesia Minta Bantuan Australia".

Putting the asylum seekers and refugees in RUDENIM is something that violates International law, because the principle of their existence in RUDENIM reducing rights, which in essence can be owned. As it is known to all, even though asylum seekers and refugees come into the territory of Indonesia with invalid documents or without documents they should get different treatment to those who are more illegal immigrants. Illegal immigrants other than refugees and asylum seekers do not have a strong base to leave the country but solely looking for a better life. Therefore, migrant illegal deportation to their country of origin or

even the placement of illegal immigrants can be accepted by international law. By contrast, asylum seekers and refugees is another category that should get international protection, so keep them in RUDENIM such in the form of reduced their dignity.⁶⁹

The arrests especially, provide an opportunity for the enforcement apparatus to bribery, blackmail and corruption, because they are in a position to exploit the weaknesses of transit migrants to seek personal gain. Registered asylum seekers reported that they were obliged to pay bribes between IDR. 2,5 million to IDR. 5 million in order not to be arrested, though they have an official document from the UNHCR. Rudenim for all asylum seekers in Indonesia is not a viable option. Although Indonesia is not a signatory to the 1951 Convention on Refugee, which states that the detention violated the right to freedom of movement of people seeking protection, Indonesia agree to international covenants of the International Covenant on Civil and Political Rights (ICCPR) which prohibits arbitrary detention.⁷⁰

Case in Jafar Badr, 24 years old showed how migrants transit experiencing hardship due to stuck in transit in Indonesia; he can not be left without a viable option. During the nine-month stay in Indonesia since the end of December 2012, Jafar in RUDENIM after failing to get a boat

⁶⁹Fitria, *op. cit*, p. 118.

⁷⁰*Ibid*, p. 94.

to the Christmas Island, he was robbed, beaten several times by local's street Cisarua time of release, his weight dropped by more than 20 kg Because of illness and less nutrition. Although he said that "there will be a problem for me if back to Iran", he prefers to go back to Iran and face the difficulties there than stay in Indonesia, because "the way we were treated here had made me hurt".⁷¹

If the asylum seekers and refugees are treated more humanely in Rudenim, rather many prisoners who might be persuaded to accept voluntary repatriation compared chooses to continue the migration. Because they know the risks of continued migration there are only two options, namely advance of life and death.

b. Violence and Negligence of Refugees and Asylum Seekers

Tariq is an 18-year-old boy who came from Afghanistan's Hazara. By mid-2010, after seeing a terrible incident that target the followers of Hazara near his home in Quetta, Tariq finally ventured to appeal to his father's permission to Australia due to "if I made it up, we'll all be a little safer".

⁷¹*Ibid*, p. 166.

Tariq did a very long journey to get his destination Australia. First of all, tariq go for twelve hours by car from Quetta to Karachi, later boarded the plane to Bangkok. Tariq stay in Bangkok for two weeks before heading Kuala Lumpur. After arriving in Kuala Lumpur Tariq go to Penang by bus and from there boarded the plane to Banda Aceh and finally to Jakarta. After arriving at Jakarta, Tariq and other friends were picked up by a member network of smuggler told them to "go to the UNHCR office and register themselves to be safed from the police."⁷²

When registering as asylum seekers, tariq has several times tried to leave Indonesia by boat to Australia, but each attempt failed for various reasons. Finally, he was arrested and detained several months in RUDENIM in Kupang, even though he was a minor (under 18 years) he should be released from prison. Tariq tells the story:⁷³

“[Four days after we arrested], they bring us home specialty - "Kupang immigration detention center". We were told that it was a camp, but what we see is a high wall, wire, san cell with twenty faces were sad to see us. We inserted one by one into the cell. We, twenty people in a small space just enough for five people. Cell locked and remain locked up for ten days. On the eleventh day, the head of immigration came in and threatened to send us to prison [where the Indonesian people on hold], if anyone dared to run away.”⁷⁴

⁷² *Ibid*, p. 78-79.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

For some migrant transit, especially those who have spent a long time in detention, conditions of transit in Indonesia is very bad, sometimes even worse than they experienced in their own country. So, there are limits to restrictions in their daily lives and lack of opportunity are often experienced as a punishment; as expressed by an Iraq refugees who has spent more than 10 year in Indonesia before the placement:

“Every country there is a method of torture. They use bullets in Iraq, in Indonesia they use discrimination by organizations and their regulations. Day and night, they told us criminal, illegal, this is more painful than a bullet in the head”.⁷⁵

The first death of asylum seekers in detention was Nekoyee Taqi, a male Afghan national who have to die on 28 February 2012 in Pontianak RUDENIM. Together with fellow friend’s prisoner, Taqi escaped from RUDENIM but was later captured by the police. A medical report prepared upon their arrival at RUDENIM mention that they are all in good health. During the next night, Taqi and two other prisoners were later rearrested and treated poorly by 10 officers. Taqi suffered serious injuries and Due guards call in the media failed to timely, Taqi died the next morning. Taqi autopsy revealed the presence of severe injuries and a cigarette burn scars indicating that he had been beaten and severely tortured.⁷⁶

⁷⁵ *Ibid*, p. 302.

⁷⁶ *Ibid*, p. 99-100.

The staffs were caught doing human rights violations against the detainee's prisoners in the ward they generally face a light sentence, as in the case of the 10 officers who beat Taqi Nekoyee to death and just sentence of ten months and then continued to work at the office of local immigration. This is certainly not commensurate with what they have done until claimed the lives of people.

Based on its investigations concerning the treatment of asylum seekers and refugee in immigration detention centers, the commissioner of National Human Rights Commission stated that: "The placement of refugee and asylum seekers in prison-like detention centers breeds negative consequences, both for mental health of refugee and asylum seekers as well as for respecting and upholding the rights of asylum seekers and refugee".⁷⁷ The National Human Rights Commission also made more far reaching political demands, urging the Indonesia government to sign the Refugee Convention, design a national strategy for the handling of asylum seekers and establish alternative shelters for asylum seekers.

Perhaps in running the contents of law, Indonesian government in this case becomes one of its providers of a home for asylum seekers and refugees. Indonesia must show preparedness law running any provision

⁷⁷ *Ibid*, p. 106.

from any kind, not even showed its inability to run law contents. Various kinds of facts above show Indonesia still not yet ready to handle the case of asylum seekers and refugees in Indonesia. Indonesia has been determining its seriousness in handling the case of asylum seekers and refugees with have a national legal instrument. The existence of refugees in RUDENIM obviously cause problems. Although RUDENIM is not a prison, but in practice RUDENIM similar is a prison.

Without new policy initiatives as well as repair, Indonesia as a transit country will soon face a stalemate. The issue of illegal imigram is a very sensitive issue, multidimensional, and easily politicized. Other observers have paved the way emergence sentiment xenophobic growing in Indonesia to issue the statement in line with the statement Meliala that "the problems surrounding the smuggling, sooner or later, it would interfere with national defense Indonesia" and illegal immigrants "will disrupt the unity and integrity of Indonesia".

Lastly, from the explanation above, an obligation that must be considered in Indonesia is about the obligation of refugees to comply with applicable law in which they took refugee. The unpreparedness problems of Indonesia in dealing with asylum seekers and refugee lies in the problem of law that is a problem in Indonesia. Indonesia is not a country that has ratified the convention and do not have a law that specifically regulates the

all about refugees. So, it is good time now for Indonesia to ratify 1951

Refugee Convention.