

## THE DILEMMA OF HOSPITALITY: REVISITING INDONESIA'S POLICY ON HANDLING REFUGEES UNDER INTERNATIONAL LAW

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### ABSTRACT

*Presidential Regulation No. 125 of 2016 is the first regulation that provides a normative framework to manage refugees and asylum seekers in Indonesia. However, many scholars believe that this regulation is simply an institutionalization of several existing informal practices and it does not introduce any substantive changes to ensure refugee protection. This paper analyzes the content of the Presidential Regulation, including its background, structure, wording, and aims. In addition, this study identifies the limits of the regulation in fulfilling, protecting, and respecting human rights based on ICCPR and ICESCR. This article contends that the Presidential Regulation portrays the dilemma of hospitality. On the one hand, it reflects that the regulation welcomes the refugees by providing mandates to the authorities to rescue those stranded at sea and provide accommodation during their stay. On the other hand, the regulation implies a kind of distrust to the refugees—treating them as a threat, limiting their movement, and forbidding them from work. The dilemma by and large affects the effective fulfillment of the rights of the refugees. Finally, this study offers some policy recommendations regarding refugees.*

**Keywords:** *refugee; ICCPR; ICESCR; hospitality; Presidential Regulation 125/2016*

### ABSTRAK

Peraturan Presiden No 125 Tahun 2016 adalah peraturan pertama yang memberikan kerangka normatif terkait penanganan pengungsi dan pencari suaka di Indonesia. Regulasi ini sudah lama dinantikan oleh pemerhati hak asasi manusia karena diharapkan mampu menjamin hak-hak dasar pengungsi. Meski begitu, akademisi berargumen bahwa regulasi ini hanya melembagakan praktik penanganan yang sudah ada. Ia tidak menawarkan perubahan substansi yang dapat memastikan perlindungan pengungsi. Tulisan ini menganalisis muatan dari Peraturan Presiden termasuk latar belakang penyusunan, struktur, pemilihan kata, dan tujuan, serta mengidentifikasi batasan dalam pemenuhan, perlindungan dan penghargaan hak asasi manusia berdasarkan ICCPR dan ICESCR. Dalam analisis, tulisan ini menemukan bahwa Peraturan Presiden No 125/2016 menggambarkan dilema negara dalam memenuhi hak pengungsi berdasarkan ICCPR dan ICESCR. Di satu sisi, negara menyambut pengungsi yang terdampar di laut dan menyediakan akomodasi selama masa penampungan. Namun di sisi lain, peraturan ini memperlakukan pengungsi sebagai ancaman, membatasi pergerakan dan melarang pengungsi bekerja. Dilema negara dalam menawarkan 'keramahan' pada pengungsi kemudian berpengaruh pada terbatasnya pemenuhan hak pengungsi. Tulisan ini menjadi penting untuk melihat keterbatasan peraturan yang sudah ada dan mengidentifikasi hal-hal yang harus diperbaiki dalam penanganan pengungsi.

**Kata kunci:** *pengungsi; ICCPR; ICESCR; keramahtamahan; Peraturan Presiden No 125/2016*

## INTRODUCTION

Currently, Indonesia is hosting approximately 13,623 refugees and asylum seekers<sup>1</sup>. They largely come from Afghanistan, Iraq, and Myanmar. Most of them are stranded in Indonesian water on their way to seek asylum in main resettlement country such as Australia or New Zealand.<sup>2</sup> Most of the forced migrants are unable to directly move to their destination countries because they often get stranded in unknown water and rescued to the nearest coastline.<sup>3</sup> For decades, Indonesia has been a transit country due to its geographical position. It is located between the refugees' country of origin, mainly in the Middle East, and Australia as their destination country. Most refugees are now living in community shelters provided by the Indonesian government and the United Nations High Commissioner for Refugees (UNHCR). About one-third of the refugees live autonomously in urban areas, such as Jakarta and Bogor. Initially, they intended to temporarily stay in Indonesia, yet amid uncertainty, they ended up living in the country.

Informed by studies by Missbach<sup>4</sup>, Harvey<sup>5</sup> and McNevin<sup>6</sup> who comprehensively examine Indonesia's situation as a transit country, we may arrive to a view that transit country is "a country that refugees and migrants pass through along the way to their preferred country of asylum – it may be located anywhere between the country

of origin and the country of destination."<sup>7</sup> In this spatial context, Kunz showcases refugee condition in transit countries as a 'midway to nowhere' situation, emphasizing the precariousness, temporariness, and uncertainty suffered by the refugees.<sup>8</sup> In transit countries, governments cannot send refugees back to their country of origin because of the non-refoulement principle. However, at the same time, they provide limited solutions pertaining to refugee resettlement.

In the case of Indonesia, the state is yet to ratify the 1951 Refugees Convention. This situation enables the state to argue that they do not have obligation to accept and fulfill refugee rights. Consequently, it leads to an increasing number of refugees who are being trapped in the country, waiting for asylum or refugee status from the UNHCR. They are practically living in limbo. Without ratifying the convention, Indonesia is not bound to accept refugees, to provide accommodation, to fulfill their basic needs, or to allow them to work. This situation puts refugees in dependency, poverty, and vulnerability.

After a long process of negotiation, Indonesia finally issued Presidential Regulation No 125 of 2016 on Refugees and Asylum Seekers Handling in Indonesia as the first regulatory framework for protecting the refugees. Previously, the operative legal instrument to handle refugees only deals with immigration issue, that is, Directive of the Directorate General of Immigration of the Ministry of Law and Human Rights No IMI-1489.UM.08.05 on the Processing of Illegal Immigrants and Foreign Affairs Act No 37 of 1999. In this regulation, refugee is categorized as illegal migrants who are put into detention until they get resettlement. Triggered by overcapacity in detention centers and international pressure to protect refugees, the government finally issued the

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1 UNHCR, *UNHCR Monthly Statistical Report: Indonesia*, January 2020, 1.  
2 Ibid.  
3 Graeme Hugo, George Tan, and Jonathan Napitupulu, "Indonesia as a Transit Country in Irregular Migration to Australia," in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-Making*, ed. Marie McAuliffe and Khalid Koser (ANU Press, 2017), 169.  
4 Antje Missbach, "Substituting Immigration Detention Centres with 'Open Prisons' in Indonesia: Alternatives to Detention as the Continuum of Unfreedom," *Citizenship Studies* (2020).  
5 Gemima Harvey, *Beyond Limbo, Building Lives: Livelihood Strategies of Refugees and Asylum Seekers in Java, Indonesia*, 2019.  
6 Anne McNevin and Antje Missbach, "Luxury Limbo: Temporal Techniques of Border Control and the Humanitarianisation of Waiting," *Int. J. Migration and Border Studies* 4, no. 2 (2018): 12–34.

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7 Pavle Kilibarda, "Obligations of Transit Countries under Refugee Law: A Western Balkans Case Study," *International Review of Red Cross* 99, no. 1 (2017): 211.  
8 Hugo, Tan, and Jonathan Napitupulu, "Indonesia as a Transit Country in Irregular Migration to Australia," 169.

Presidential Regulation in December 2016. This regulation was eagerly awaited by refugees and human right activist and expected to guarantee refugee rights. However, as Missbach argues, this regulation only institutionalizes the previous informal practices and does not introduce any substantive changes that will ensure refugee protections.<sup>9</sup>

Although Indonesia does not ratify Refugee Convention, the country still has obligation to protect and fulfill refugee rights as stated in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The government already ratified both instruments in 1996 and issued ICCPR-ICESCR Ratification Acts in 2005. These two Acts encapsulate Indonesia's commitment to guarantee the rights of refugees under ICCPR and ICESCR. By doing so, although Indonesia has not ratified the Refugees Convention, it still has the legal obligation to guarantee the protection and fulfillment of refugee's rights.

This article applies these international human rights instruments to examine to what extent does the regulation protect, fulfill, and respect the rights of refugees. Several studies have praised Presidential Regulation No. 125 of 2016 as a big step for Indonesia in protecting refugees.<sup>10</sup> However, those studies depart from the idea that Indonesia is not a country that has ratified the refugee convention. These studies are inadequate to read that Indonesia also has obligations in fulfilling the refugee rights under the two main covenants for the protection of human rights. This article contends that ICCPR and ICESCR could provide effective criteria to evaluate Presidential Regulation No 125 of 2016. Thus, we can identify the urgent agenda that the government

should address in recent years related to refugee protection.

## RESEARCH METHODS

This article seeks to address the handling of refugees in Indonesia based on international law after the issuance of Presidential Regulation No 125 of 2016. This study adopts the hospitality concept by Jacques Derrida as its theoretical framework. Derrida argues that every hospitality offered by the state always contains a dilemma. The state will always perceive refugees as a guest and as a threat. State's decision related to refugees is always laid on the spectrum between those two polarizations. Therefore, the state will always face a dilemma between welcoming them and at the same time treating them as a stranger.

This article elaborates the state's position within this spectrum by examining the Presidential Regulation text. The discussion elaborates the way the term 'refugees' is defined throughout the text, and how this definition portrays state's dilemma in handling refugees—which in turn also affects the state treatment of refugees. To explain the effects, this article uses two sources. *First*, the primary source is collected from selected criminal cases involving refugees. The cases are the case-laws that occurred after the Presidential Regulation was ratified in 2016, in which there are three selected cases. Each of them describes the attitude of the judiciary in fulfilling three basic rights of refugees, namely freedom of movement, right to work, and equality before the law. *Second*, this paper uses secondary sources from journals and news to find any data related to the government actions that have been and/or have not been done in fulfilling the rights of refugees.

### Derrida's Concept on "The Otherness" and the Dilemma of Hospitality

Refugees are the most appropriate object to describe the concept of "otherness". The other or otherness was introduced by Derrida as anyone different from 'the self' or origin people. They must come precisely from without, from

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9 Antje Missbach, *Stalemate: Refugees in Indonesia Presidential Regulation No 125 of 2016*, 2018, 18.

10 Dio Herdiawan Tobing, "Indonesia Refugee Policy Is On Right Track," *The Jakarta Post*, last modified January 24, 2019, accessed April 17, 2021, <https://www.thejakartapost.com/academia/2019/01/24/indonesia-refugee-policy-is-on-right-track.html>.

someplace other than the home.<sup>11</sup> The other is aliens, radically different from us, Douzinas call them as a total threatening other<sup>12</sup>. The other is indicated by a different language or culture and the unfamiliarity with local law or norms. Douzinas states that refugees are the perfect representative of total otherness; their arrival is a sign that ego cannot find peace and security even in his own home. For Douzinas, this is the reason why refugee is seen as such a threat. The enjoyment of rights is predicated on the exclusion of others and vice versa. Law, according to Douzinas, translates this fear of threat into a policy that puts refugees as the object. The origin of the law is not coming from the refugee's experience but the host's interpretation of refugees. As an object, the refugees keep being 'alien', something apart from 'us' or 'the self.' They do not have entitlements to basic life needs such as food, shelter, and clothes. In short, they are not considered as human beings. Moreover, as non-subject, their life is based on private philanthropy or state benevolence.<sup>13</sup>

The acceptance of refugees into the state's border is an act of offering hospitality. Derrida defines hospitality as an attitude of letting 'the other' interrupt 'the self' or 'the host.' "It is invasive of the integrity of the self or the domain of the self."<sup>14</sup> The decision to accept the refugees does not come from the host, but the other himself. "This responsible response is surely yes, but a yes to preceded by the yes of the other"<sup>15</sup> The experience of meeting a stranger is the point at which the other, with all the nakedness of his face, is asking the host to take responsibility for him. That is when, according to Derrida, the hosts realize that they have a responsibility for the lives of the other, in the sense that, "[T]he death of the other is the first death. I am responsible for the

other in so far as he is mortal."<sup>16</sup> Acceptance of the other—in this context refugees—is understood as a responsible attitude towards the lives of the refugees.

Even so, hospitality is always limited (or defined) by legal and sovereign boundaries. Without this limit, a foreigner cannot be called as "the other" within a country. And the state cannot be called "the host" if it does not have control over its territory. We may call this limitation a gesture of mastery,<sup>17</sup> where there must be a tension to protect its authority while at the same time offering hospitality. Therefore, acceptance of the refugee will always on a spectrum between hospitality and hostility. Hospitality and hostility are contradictory concept but are closely related. As Derrida argues, hospitality is a troubling concept that always brings its contradiction within it.<sup>18</sup> In order to welcome the other, the country should be ready to delimit the space or place that is offered to the other.<sup>19</sup>

## DISCUSSION AND ANALYSIS

Our following discussion is divided into two parts. The *first* part elaborates Indonesia's Presidential Regulation on Refugees to understand the purpose, principle, and mechanism of handling refugees. The *second* part analyzes the regulation based on Derrida concept about the dilemma of hospitality. This paper argues that the Presidential Regulation portrays state's dilemma in offering hospitality. On the one hand, the state *welcomes* stranded refugees and provides them accommodation. But on the other hand, the regulation is *hostile* to them by limiting their movement and forbidding them from work.

### A. Indonesian Regulation on Refugee

Although Indonesia has not ratified the 1951 Refugees Convention, the country has been

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11 G Baker, *Policising Ethics in International Relations* (London: Routledge, 2011), 5.  
12 Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000), 365.  
13 Ibid., 357.  
14 Judith Still, *Derrida and Hospitality: Theory and Practice* (Edinburgh, 2010), 13.  
15 Jacques Derrida, *Adieu to Emmanuel Levinas* (California: Stanford University Press, 1999), 23.

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16 Ibid., 7.  
17 Still, *Derrida and Hospitality: Theory and Practice*, 13.  
18 Mette Louise Berg and Elena Fiddian-Qasmiyeh, "Introduction to the Issue," *Migration and Society* 1, no. 1 (December 1, 2018): 2.  
19 Ibid, 3.

hosting refugees and asylum seekers for a long period. Until 2016, the admission and handling of refugees were not regulated comprehensively in a single law. Presidential Regulation No 125 of 2016 has been through a lengthy debate among the executive and legislative for years. In May 2015, the Andaman Sea crisis happened where thousands of Rohingya people from Myanmar stranded at sea. This crisis raised public concern. As a response, the regulation regarding the handling of refugees became more urgent to be enacted.<sup>20</sup> The President accelerated this process and finally declared the regulation at the end of 2016, having considered that the regional cooperation with Australia does not solve the crisis.

Presidential Regulation No 125 of 2016 defines a refugee as:

A person who attends Indonesia territory owing to a well-founded fear of persecution for reason of race, tribe, religion, nationality, membership of particular social groups or different political opinion and unwilling to avail protection from their own country and/or has granted asylum seeker status/ refugees determination status from United Nation through UNHCR.

The government adopts the definition of refugees mainly from the Refugee Convention. The definition recognizes all status and identities defined under the Convention framework. For the first time in Indonesian regulation, refugees are separated from legal migrants and human trafficking groups. It is later stated clearer in Article 41 that, “the handling of refugees at all stages must be conducted separately with human trafficking groups.”

The Presidential Regulation consists of 45 provisions which are divided into eight chapters: 1) general provisions; 2) discovery and interception; 3) accommodation; 4) security; 5) supervision; 6) funding; 7) other provisions; and 8) closing provisions.

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20 Missbach, *Stalemate: Refugees in Indonesia Presidential Regulation No 125 of 2016*, 20.

The first chapter consists of the definition and actors responsible for the handling of refugees. This chapter indicates Indonesia’s half-hearted commitment to guarantee the rights of refugees. Article 2 in the first chapter states that Indonesian government along with UNHCR and other international organizations are responsible for the handling of refugees. The provision implies the government’s reluctance to act as the most responsible actor in handling refugees. Later in Article 26, the state guarantees refugees the right to have proper accommodation, healthcare, and sanitation. Yet, the government shifts the responsibility to provide facilities to an international organization, which most likely refers to UNHCR and the International Organization of Migration (IOM). IOM is an international organization that provides services and advice related to the migration issue to the government and migrants, including refugees and internally displaced persons.<sup>21</sup> There is only one article that states about the funding. Article 40 stipulates that,

Funding required for refugee treatment comes from: a.) state budget revenues and expenditures through related ministries/agencies; and/or b.) other sources that are legitimate and non-binding in accordance with the provisions of legislation

The idea of this provision is to show the government’s commitment to handling refugees beyond its capacity as a non-member state of the 1951 Refugee Convention. However, the government considers about extra domestic financial burden caused by the handling of refugees.<sup>22</sup> It implies a clear state’s budget limitation for refugees and puts the burden to UNHCR or IOM. Later in the next chapter, this statement becomes more evident as the basic need, health care, and sanity are mainly facilitated by UNHCR or IOM.

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21 Ibid., 7.

22 Raden Ajeng Rizka Fiani Prabaningtyas, “Indonesia and The International Refugee Crisis: The Politics of Refugee Protection,” *Journal of Indonesian Social Sciences and Humanities* 9, no. 2 (December 31, 2019): 140.

Chapter II until chapter V of the Presidential Regulation are the core provisions of this regulation. The two chapters consist of four scopes of regulation: admission, shelter and accommodation, security procedure, and immigration supervision. In the admission chapter, this regulation shows a significant improvement as it prioritizes refugee safety, especially when they are stranded in Indonesian waters. Article 6 states that Search and Rescue Team (SAR) has a duty to do emergency rescue once they find suspicious refugee's boat. This is the first regulation in Indonesia that provides a coordinated mechanism which involves several actors in finding and rescuing refugees. These actors are the Indonesia National Army, Police, Ministry of Transportation, Marine Security Agency, and other related stakeholders. Previously, Indonesia did not have any clear regulations on who should rescue refugees once they were found. This provision guarantees refugee safety to not be left stranded or being sent back overseas.

After being found and rescued, refugees will be transported to the closest detention center to be registered and examined, as stated in Articles 9-13 of the Regulation. Neither the police nor immigration officer has the authority to decide the status of refugees. They have to contact UNHCR officers and let them decide the status. While refugees waiting for their asylum to be granted, detention centers have to coordinate with the UNHCR to provide temporary shelter for refugees. It is important to note that Article 24 recognizes various alternatives for refugee accommodation, including temporary and permanent shelter provided by the local government. It means that the state, represented by the local governments, has goodwill to receive and take care of the refugees. However, although the local government provides shelters, the responsibility to fulfill refugee basic needs is still in the hand of UNHCR or any international organization concerned about migrant issues. Article 26 (3) and (4) state that international organizations have to provide clean water, food, drinks and cloth, health care,

sanitation, and worship facilities. Moreover, the Regulation does not mention any limitations on how long the refugees must stay in a detention center before transferred to permanent shelter. In practice, it will be problematic if the local government cannot provide more shelters, which means that they will send the refugees back to the detention center.

The regulation guarantees refugees access to healthcare, sanitation, food, and shelter. However, none of the articles explicitly mentions refugee rights. By contrast, Chapter five of the regulation implicitly perceives refugees as a threat that must be monitored and supervised, instead of as vulnerable groups that should be protected. It is stated clearly in Article 32 that police and local governments have a duty to 'secure' the refugees to avoid criminal acts. The security force is mandated not to secure the refugees but to secure the citizens from refugees. Article 33 states that supervision must be conducted once refugees are found. The same treatment is also mandatory at the shelter until the departure to the refugee destination country or voluntary repatriation to the origin country or deportation. Refugees must also report their presence to the immigration officer once a month. Should they fail to report for three months in a row, they will be sent to a detention center. They have to comply with the code of conduct in each community shelter.

This provision will be harmful to refugees due to none of the provisions mentions how long they will be put in the detention center when they violate any of these rules. Missbach in her study mentions this policy as a self-regulation and self-discipline for the refugees. The potential of repeating detainment is used strategically by the government as a threat for refugees to obey the rule.<sup>23</sup> Even when they live outside the detention, refugees are still monitored and live under limitations. Living outside is not the opposite of the detention regimes, but rather a larger detention center with the same code of conduct.

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23 Missbach, "Substituting Immigration Detention Centres with 'Open Prisons' in Indonesia: Alternatives to Detention as the Continuum of Unfreedom," 3.

## **B. International Legal Framework: Refugee's Right Under ICCPR and ICESCR**

In its preamble, both ICCPR and ICESCR declare that human rights derive from the inherent dignity of humans. Article 6 General Comment No. 15 of 1986 on the Position of Aliens under the Covenant states that exceptions and restrictions on freedom of movement, residence, and employment can be made for aliens. However, Article 5 states that restrictions on this right cannot be carried out if there is a risk of inhuman treatment. In terms of handling refugees, leaving refugees trapped in transit countries, confining them resulting in the inability to work, and derogating their human dignity potentially lead to inhuman treatment. It is also worth noting that every state measurement must be referred to the ICCPR and ICESCR mandates, which is to preserve the inherent dignity of human being. Thus, refugees are also protected under ICCPR and ICESCR.

This article would focus on two rights under ICCPR and one right under ICESCR: freedom of movement, equality before the law, and the right to work. These three rights are considered to be essential for refugees. Several cases would be explained below to show how crucial these rights are and yet difficult to be guaranteed by the state. Moreover, these rights can clearly represent the state's dilemma in welcoming refugees.

### *a. Freedom of Movement and Its Practice in Indonesia*

ICCPR guarantees that 'everyone lawfully within the territory of a state shall have the rights to liberty of movement and freedom to choose his residence' as stated in Article 12 (1). This provision aims to guarantee refugee rights to flee from their country and to seek asylum in the destination country. It means that state parties are prohibited to prevent refugees from arriving in their territory including committing pushback policy. In addition, the article also guarantees refugee rights once they are within other states' territory. These rights are inherent with freedom from arbitrary detention which prevents the state from being hostile to refugees. However,

this section will focus on freedom of movement for refugees who are already within other state territories and waiting for asylum from a third country.

CCPR General Comment No. 27 on Freedom of Movement provides a comprehensive interpretation of this provision, specifically about aliens who enter the state illegally. It is stated that after their status has been regularized, they become lawful within the territory. This provision leads to a question of what conditions make an 'alien' can be considered a 'lawful' subject. In paragraph 4, the Committee states that the status of outliers who come to a country can only be judged by domestic law. The interpretation of lawful presence is also available in Grahl-Madsen's publication. He states that the term 'lawfully presence' must apply not only to those who intend to stay permanently but also to refugees who intend to stay temporarily.<sup>24</sup> It includes any refugees who transit or travel throughout several countries before they reach their destination country. Later, Grahl Madsen argues that this lawful presence status can be varied based on domestic law procedures.

This condition can be realized in various ways, varying along with the particular case at hand; formal admission to a refugee status determination procedure or regularization of status in the sense of Article 31 (2), provided the relevant domestic laws that govern the lawfulness of presence in the territory are constrained by the presence the 1951 Convention<sup>25</sup>.

In Indonesia, everyone who comes without a legitimate document or visa will be considered as an illegal migrant. In that sense, refugees will be considered illegal migrants since they do not have the appropriate documentations. However, based on Presidential Regulation No. 125 of 2016, refugees and asylum seekers must be differentiated from illegal migrants. They have

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24 Marjoleine Zieck, "Refugees and the Right to Freedom of Movement: From Flight to Refugees and the Right to Freedom of Movement: From Flight to Return Return," *Michigan Journal of International Law* 39 (2018): 81.

25 Ibid.

to be welcomed even if they are unequipped with legal documents. At this point, soon after refugees report their arrival to UNHCR, the agency will recognize their status as an asylum seeker.<sup>26</sup> By doing so, the refugees and asylum seekers fulfill the terms “regularized” from paragraph 4 of the CCPR General Comment No 27 on Freedom of Movement. The Indonesian government must consider them as lawfully entering the country. Consequently, Indonesia should guarantee their rights to move as guaranteed by Article 12.

Article 12 (3) of the Covenant allows states to restrict internal freedom of movement and the freedom to choose residency only when it is necessary. Restriction on these rights may be allowed in order to protect national security, public order, public health or morals or the rights and freedoms of others. Furthermore, the restriction may be applied only if it is consistent with the other rights recognized under the Covenant. In order to justify the restriction, state parties must mention the circumstances in which they treat aliens differently. Unfortunately, many countries often seek justification for their restriction under this provision. To address this issue, the HRC explicitly mentions the restriction below:

Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave may only be restricted in accordance with Article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3.<sup>27</sup>

It means that such restriction must be justified using provided domestic law. In addition, it must be included in state’s report for CCPR.

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26 Asylum seeker is different from refugee. To be called a refugee, one must get Refugee Status Determination from UNHCR. In Indonesia, people who come from abroad and wait for their RSD to be granted are usually called asylum seekers. However, in this paper, the term refugee is referred to as both asylum seekers and refugees themselves.

27 Zieck, “Refugees and the Right to Freedom of Movement: From Flight to Refugees and the Right to Freedom of Movement: From Flight to Return Return,” 86.

The restriction may also be applied under public emergency as stated under Article 4 ICCPR. It defines state emergency as a condition which is officially proclaimed as threatening the life of the nation. This provision will be examined in the case of Indonesia.

Two years after the President issued the regulation on handling refugees, the government started to cease using immigration detention centers for asylum seekers and refugees. A report from UNHCR in January 2020 shows a significant decrease in the number of refugees located in detention centers. Before the Regulation, about 4,200 refugees, including women and children, were put in detention centers. There are thirteen detention centers in Indonesia. Four of them have already exceeded their capacity. After the regulation is in force, less than one percent remained in detention: 120 people in 2018 and it keeps decreasing. In January 2020, only ten refugees still remained in detention. None of them were children and there was only one woman.<sup>28</sup>

Currently, there are as many as 13,623 persons registered with UNHCR in Indonesia. They are 10,276 refugees and 3,347 asylum-seekers. More than half of them come from Afghanistan or as many as 7,668 persons (56%). The rest come from Somalia (10%), Iraq (6%) and about 5% are Rohingya from Myanmar. UNHCR has registered the children by the end of January 2020. There are 3,794 children registered including 3,659 children who fled with their nuclear families, 89 children have their relatives as companions and there are still 46 children who are separated from their parents. The latter usually lived with other refugees as their adult caregivers.<sup>29</sup>

UNHCR in their latest report claims that more than 8,000 refugees and asylum seekers have stayed in community shelters. The financial cost for community shelter including electricity and guards is entirely covered by IOM. UNHCR

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28 Tobing, “Indonesia Refugee Policy Is On Right Track’.”

29 UNHCR, *UNHCR Monthly Statistical Report: Indonesia* .



and IOM have allocated monthly allowance for each household. However, this allowance is not sufficient compared to the average Indonesian household income to afford family basic needs. Neither UNHCR nor IOM can guarantee the sustainability of this allowance. Sometimes, it rises but most of the time it suffers a shortfall in funding.<sup>30</sup> The condition in each community shelter may vary according to the basic facilities provided by government. Most of them are repurposed hotels and student dormitories that have been renovated. Even after renovation, some of them are still crowded and in bad shape<sup>31</sup>. However, compared to detention centers, this accommodation has better access to health care, religious institution, and psychological support. A family with little children is placed in one room while a single person must share the room with others.<sup>32</sup> Although these accommodations are provided by the local government, the authority to allocate proper shelter remains with the IOM.<sup>33</sup> In some cases, IOM finds it difficult to allocate shelter since the local government is reluctant to host more refugees as they fear for potential religious tension, social envy, and cultural misunderstanding.<sup>34</sup>

Although refugees are now living in hostels or community shelters, their movements are still limited. Refugees who lived in Makassar told the Aljazeera that Indonesia is like an open prison.<sup>35</sup> Whenever they break the rules, they will be put into detention and will be stamped as illegal immigrants. The situation worsens because neither the Indonesian government nor IOM can guarantee how long they have to stay in shelters.

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30 Yunizar Adiputera and Atin Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia* (Yogyakarta, 2018).

31 Missbach, "Substituting Immigration Detention Centres with 'Open Prisons' in Indonesia: Alternatives to Detention as the Continuum of Unfreedom," 7.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ian Morse, "'Open Prison': The Growing Despair of Refugees Stuck in Indonesia," *Al Jazeera*, March 4, 2019.

Those who get rejected still can ask for judicial review<sup>36</sup>. However, if it is rejected for the second time, they will be asked to voluntarily return to their home country.<sup>37</sup>

Regardless of there have been more humane facilities provided in community shelters, scholars like Julia Morris still perceives this alternative to detention as a 'normative cover.'<sup>38</sup> It is nothing more than a moral veneer from the politics of forced immobility. Refugees may indeed enjoy more mobility compared to their stay in detention centers. They get a proper place to live compared to overcrowded cells. They are also treated differently from the illegal migrants. However, despite these situations, refugees cannot freely go from the community shelter. They must ask for permission to leave the shelter and must return in less than 48 hours. They are prohibited to come to airports or seaports. They have to sign a declaration letter stating that they will obey this code of conduct. The consequence of violating these rules is to lose all services and payments they have entitled to and are blocked from re-entering the shelter. Many cases ended in judicial trial for refugees who break the rules, i.e. Zakarea Fraud Case<sup>39</sup>.

Zakarea is a Rohingya refugee who lived in a community shelter located in Pelangi Hotel, Medan. The shelter is built by the local government and IOM. On November 1<sup>st</sup>, 2020, he was asked by his friend, Abdul Hamid to pick up Hamid's wife at another community shelter located at the BLK building in Lhokseumawe, 206 miles from Medan. If he succeeds to bring them back, Hamid would give him two million rupiahs as a reward. When Zakarea arrived in front of BLK building, a soldier from Indonesian National Army asked about his purpose. Zakarea answered that he was going to pick up a friend to meet her husband. The soldier, who was suspicious of the situation, took

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36 Ibid.

37 Ibid.

38 Missbach, "Substituting Immigration Detention Centres with 'Open Prisons' in Indonesia: Alternatives to Detention as the Continuum of Unfreedom," 7.

39 *Zakarea Fraud Case* (2021).

Zakarea and brought him to the police station to be investigated. The soldier argued that he had done the right thing as refugees are forbidden to leave the shelter without permission from the local government or UNHCR. Lhokseumawe District Court in case number 23/Pid.Sus/2021/PNLSM passed a verdict to Zakarea for violating *Act No 21 of 2007 on Eradication of People Smuggling Crime*. He was considered to commit an attempt of helping other to do human trafficking. In the reasoned judgment, the judges argued that Zakarea is found guilty because he received money for picking up a woman. Besides, he received the money from someone who ordered him to bring a person. The judges perceive it as a transaction where money is exchanged with people.

Based on the Anti-Human Trafficking Act No 21 of 2007, human trafficking is defined as

Act of recruitment, transport, holding, sending, transferring, or receiving a person with threats of violence, use of force, kidnapping, imprisonment, forgery, fraud, abuse of power or vulnerable position, bondage or payment or benefit, so as to obtain the consent of the person who has control over the other person, whether commit within the country or between countries, for the purpose of exploitation or resulting in exploitation of people.

In Zakarea's case, he did not kidnap or transfer the woman. He merely escorted the woman to her own husband with consent and acknowledgment from both parties. There is not any abuse of power or coercion in this case. The money that he received is not to obtain consent from anyone but as compensation for taking the woman to her husband. The most crucial point is that she was not escorted for the purpose of exploitation but to reunite with her family. Thus, this act does not fulfill the definition of human trafficking. As a result, this kind of criminalization has strengthened the idea within society that refugees are not allowed to move from their shelter. Although the proceeding did not cause any legal implications against the woman, the decision itself implies a threat for refugees who want to

leave the shelter. Law, which has the authority to set normality within society, has confirmed the norms that refugees must stay behind the shelter wall. It brings the consequence that everyone who knows their attempt to leave must report it to the police.

Article 31 and 32 of the Presidential Regulation No 125 of 2016 place refugees as an object of surveillance. Article 31 stipulates that everyone including local citizens who found refugees is obliged to comply with security procedure and report it to the police station. Later in Article 32, "security officer of the shelter under Indonesia police coordination must keep refugees remain in the shelter." Although the court did not mention this regulation during the trial, however, the soldier who arrested Zakarea justified his action based on this regulation. The soldier thought that no refugees may leave their shelter, including the woman whom Zakarea picked up. Meanwhile, if we look back at Article 12 *ICCPR*, the woman is considered as someone whose status is a 'lawful presence,' hence the state should protect her freedom of movement.

This case cannot be justified under the restriction provision. Article 12 (3) of the Covenant allows states to restrict internal freedom of movement and the freedom to choose residency only when necessary. Restriction on the above rights may be allowed in order to protect national security, public order, public health or morals or the rights and freedoms of others and is consistent with the other rights. In the above case, the judges' decision cannot be justified since Zakarea has not even escorted the women to leave the shelter. Even if the women leaves the shelter, the policy is still unjustifiable since there is nothing dangerous from meeting family.

The Presidential Regulation indeed has prohibited refugees from living in detention center. However, Zakarea's case portrayed the state's dilemma between protecting human dignity as mandated by *ICCPR* or dealing with the fear of a stranger's interruption. Even though the regulation has protected the refugee from

detention, in the end, the government reaffirmed its power by delimiting refugee movement. This is what Still called the gesture of mastery, to remind the refugees that they are still stranger<sup>40</sup>.

b. *Equality before the Law and Its Practice in Indonesia*

Article 4 ICCPR guarantees the rights of equality before the law. This provision has two scopes. The first guarantees equality before courts, tribunals, or any judicial trial. The second guarantees a fair and public hearing by a competent, independent, and impartial tribunal established by law. Article 14 also contains the prohibition of any form of discrimination regarding this right. State parties must guarantee that their domestic law will not treat people from other nationalities differently.

The right of access to courts and tribunals and equality before them are not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.

General Comment No 32 further explains that equality before the law consists of the availability of legal assistance for individuals. Article 14 paragraph 3 (d) also guarantees this availability; “States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it.” This provision should be applied in the case of refugees as they are not familiar with the applied domestic law. In addition, it is usually the case that refugees cannot speak local language. This will bring obstacles in defending their argument during the proceeding process. Article 14 paragraph 3 (a) guarantees this condition, that “all persons charged with a criminal offense have the right to be informed promptly and clearly in a language which they understand.” To ensure these rights, refugees

certainly need legal assistance. It is not merely for the purpose of translating language. Assistance also includes translating and explaining the local norms, legal consequences, and the procedures. General Comment No 32 has enhanced this concern as stated in paragraph 40, saying that “the right to have the free assistance of an interpreter applies to aliens as well as to nationals.”

This article identifies several cases in Indonesia in which refugees have to deal with the domestic trial without accompanied by legal assistance. In General Comment, the committee makes the provision clearer by stating that State is encouraged to provide free legal aid for individuals who do not have sufficient means to pay for it. This provision has been adopted into Indonesia Act No 16 of 2011 on Legal Aid. This act states that legal aid recipients are people or groups of poor people who are unable to fulfill their basic rights properly. They are the ones who cannot independently get the rights to afford food, clothing, health services, education, employment, and/or housing. In this case, foreign refugees should be classified as legal aid recipients because all their basic rights depend on international organizations.

In fact, not all refugees who fall into legal issues receive legal assistance. Throughout 2019-2020, this study found at least two trials involving refugees as a defendant without any legal assistance. The first case is an allegation of fraud against a refugee from Cameroon named Tehokeu. Tehokeu was accused of committing deception to a local citizen, claiming that he could double up the money.<sup>41</sup> Jakarta District Court, in its verdict No 328/Pid.B/2020/PN Jkt.Pst, sentenced him to two years of imprisonment for taking USD 1,000 or equal to IDR 15 million for having violated Article 378 of the Criminal Code. Compared to the same double-up-money fraud cases committed by Indonesian in 2020, the punishment for Tehokeu is more severe. An Indonesian man who was accompanied by legal assistance was punished for one year four months for taking IDR 700

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40 Still, *Derrida and Hospitality: Theory and Practice*, 13.

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41 *Tehokeu v Darma Susila* (2020).

million. He got remission because of his status as the only breadwinner in his family. Meanwhile, in Tehokeu case, the Judges do not address his status as a refugee who does not has an occupation to support his living. Tehokeu, along with the other three defendants, have financial problems too. However, they do not get remission the way the Indonesian defendant has. This case shows that without legal assistance, a refugee cannot defend himself and alleviate the charge. Despite that, different treatment between refugees and Indonesian people indicate discrimination based on their nationality resulting in judges' different verdict. The state, in this context represented by the judiciary system, does not treat refugees equally with the citizen as mandated by Article 14 ICCPR. The situation gets worse when refugees can hardly access legal assistance even if the right to get legal assistance has been guaranteed in Law on Legal Aid and Criminal Procedural Code.

Another example is a case involving a man named *Yousufi* who was accused of falsification of identity.<sup>42</sup> Yousufi was charged for ten months in prison and fine of five million IDR. During the trial, he was not accompanied either by a translator or legal assistance. Yousufi could not defend himself and explain his inability to enjoy the right to work and freedom of movement. This situation forced him to falsify his identity to be able to join a competition that was urgently needed to fix his financial situation. Instead of defending his situation, he admitted and confirmed all of the accusations. It made the judges find no rational reason to alleviate the charge. Like the previous cases, Yousufi case portrays the lack of legal apparatus sensibility toward refugees' vulnerability. In addition, these two cases represent how refugees live under uncertainty in Indonesia. They do not know how long they must stay in the shelters. They are not allowed to have any jobs to make their ends meet. Committing crime becomes their response to tackle uncertainty. Although this condition cannot justify their decision to commit a

crime, these cases clearly describe various burdens experienced by the refugees.

Article 30 (1) of the Presidential Regulation states that all refugees have liability to obey Indonesian law and adapt to Indonesian local norms. In Article 30 (4), all refugees who break the law will be processed according to prevailing regulations. The word 'process' in this article includes arrest, investigation, and legal assistance during the trial. However, two previous cases portray how the legal apparatus interpret Article 30 (4) only about the arrest, investigation, and punishment process. There is not enough knowledge even for the judges in processing refugee legal cases. In the midst of such conditions, it is important to have legal assistance that can articulate the conditions of refugees. Although the right of getting legal assistance has been provided in the Legal Aid Act and Indonesian Criminal Procedure Code, in practice the enjoyment of this right remains limited for the refugees. Only a few legal aids offer and have experience in refugees' cases, namely SUAKA and the Indonesian Legal Aid Foundation (YLBHI), and both of them operated mostly in Jakarta (Refugee Legal Aid Information, n.d.).

The only thing that allows refugees to enjoy their rights as guaranteed in ICCPR and ICESCR is having legal protection in the country in which they are living. Even in the situation where the state has provided and recognized refugees' rights, refugees are often unable to assert their claim when their rights are violated because they must face substantial barriers that obstruct their access to legal processes<sup>43</sup>. The barrier is not merely about the lack of legal aid personnel for refugees, but also the difficulty of law enforcers to stand on the refugees' feet. Refugees are still unknown to 'the host', and applying the host's law to them is like forcing a foreigner to use a language they don't know. Hence, there will always be a limitation on interpreting let alone fulfilling refugees' rights.

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42 *Yousufi Falsification Case* (2019).

43 Anna Lise Purkey, "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations," *Journal of Refugee Studies* 7, no. 2 (2013): 262.

c. *Right to Work and Its Practice in Indonesia*

Each right in the ICCPR and ICESCR is interdependent and inalienable. ICESCR guarantees the right of everyone “to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”. ICESCR recognizes that the right to work can “provide for oneself and one’s family financially through employment”. In addition, being able to work gives them the ability to “meet a crucial human need for the preservation of human dignity”. Fulfilling the right to work will give refugees access to adequate housing, food, and healthcare and hence would preserve their dignity as a human being.<sup>44</sup>

Presidential Regulation No 125 of 2016 enables the refugees to live physically, but without dignity. It addresses refugees’ basic rights which are sanitation, health care, and proper accommodation as regulated in Chapter III. However, none of the articles mentions state’s permission for refugees to have formal work. This situation makes refugees depend on NGO funding to fulfill their needs. Without working or vocational training, they lose their ability, hopes, and sense of purpose. It leaves them vulnerable to depression.<sup>45</sup> Currently, there are only 40% of refugees who get assistance from non-government organizations. The rest of them should live independently in informal or illegal work.<sup>46</sup> The previous fraudulence case committed by Tehokeu shows that refugees often get arrested for various crimes, such as fraud and prostitution. Without the right to work, they are forced to commit a crime or choose to live under dependency, vulnerability, and poverty.

Even though ICESCR does not force immediate action as ICCPR does, ICESCR urges the states to guarantee the rights to the

maximum available resource. Nonetheless, the lack of resources cannot justify discriminatory treatments, “unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority.”<sup>47</sup> Making this effort by giving refugees access to employment can solve the resource problems. The Committee in CESCR Statement<sup>48</sup> even argues that access to education and employment will reduce refugees’ dependency on state funding or private charity which in turn decreases the state’s financial burden.<sup>49</sup>

However, Article 2(3) of the Covenant establishes an exception for developing countries’ obligations. It states that, “[D]eveloping countries with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” The exception applied only to economic rights and particularly related to access to employment. This statement does not mean developing countries could deny this right entirely. On the contrary, the state may determine to what extent they would guarantee this right and how to guarantee this right without burdening domestic economy.

Based on the explanation above, Indonesia has a number of justifiable reasons for not fulfilling refugees’ economic rights. These are three government statements that imply their justification for not fulfilling refugees’ economic rights. *First*, the government argued that giving refugees access to work may trigger more refugees to come.<sup>50</sup> Meanwhile, Indonesia

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44 Sarah Bidinger, “Syrian Refugees and the Right To Work: Developing Temporary Protection in Turkey,” *Boston University Internatinal Law Journal* 33 (2015): 27.

45 Adiputera and Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia*.

46 Missbach, *Stalemate: Refugees in Indonesia Presidential Regulation No 125 of 2016*, 9.

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47 Committee on Economic Social Cultural Rights, *General Comment No. 20 (2009): Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para.2 of the International Covenant on Economic, Social and Cultural Rights)*, 2009, para. 13.

48 Committee on Economic Social Cultural Rights, *CESCR Statement: Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights*, 2017.

49 *Ibid.*, para. 6.

50 Hindra Liauw, “Menlu Tak Ingin Penampungan Rohingya Tarik Pengungsi Lain,” *Kompas*, June 10, 2015.

has its own problems with the lack of job vacancies. Restriction of the right to work is done purposively as a deterrence strategy to prevent more refugees to come and stay for a long time. Second, the government is afraid that refugees would compete with domestic labor.<sup>51</sup> Meanwhile in 2024, Indonesia will experience demographic bonus which causes tighter competition among the productive age population. If the problem is not managed well, refugees' right to work can provoke horizontal conflict between refugees and locals. Third, to be able to work means that refugee will blend in with the locals<sup>52</sup> It will be problematic, since in Indonesia refugees are often blamed for the social tension between local majority Sunni Islam and refugees Shia Islam. The government is afraid this polarization will provoke prolong conflict between Shia and Sunni.<sup>53</sup>

The conflict gets worsening by the fact that many host communities perceive refugees as a burden for the government due to their dependency. They are jobless but gaining access to enjoy facilities provided by government and international organizations. The government is afraid that allowing refugees to work will trigger existing social jealousy into open conflict.

The question emerges whether those three conditions are enough to justify refugee rights exception under article 2(3) of the ICESCR. Studies conducted by Harvey<sup>54</sup> and Adiputera<sup>55</sup> attempt to answer the question. Adiputera and Prabandari offer an interesting analysis of the opportunity and challenges for allowing refugees to work. Adiputera claims that employing refugees has a minimum and even negligible impact on Indonesia's macro-economic. To put it into

perspective, Indonesia has 5,33% unemployment or approximately 7.005.262 among 131,544,111 Indonesian labor force in 2016. Meanwhile, UNHCR claims that the total number of productive working-age refugees in Indonesia is 11,266. Compared to the whole Indonesian population and specifically to the entire national labor force, it is equal to 0,00008%. Adiputera argues that this number represents the very low risk of refugees affecting labor market access for Indonesians.<sup>56</sup>

In research conducted by Harvey in Bogor and Jakarta, he argues that besides the poverty problem, Indonesia's regulation that prohibits refugees to work has created another problem. He raises the issue of wasted skills and the fact that people are forced into listlessness. By allowing refugees to work, they will attain their dignity. Contrary to the government argument, allowing refugees to work will help them to be accepted by the locals. They will contribute to the host community with their skills. In addition, the host community will not see them as a burden or unemployed who enjoys international funding for living. Fulfillment of the right to work for refugees is possible to be done without harming the national interest.

As stated in CESCR General Comment 20, the exception of rights because of lacking resources can only be justified if all efforts have been done. The Indonesian government has multiple alternatives that can be done in an effort to fulfill refugee rights without violating national interest. For example, the entrepreneurial character of refugees may bring a new prospect for new economic opportunities driven by the refugees. Data from UNHCR Indonesia showed that around 10-11% of refugees previously work as a merchant or traders. It means they have experience and sufficient skill to open up small enterprises. Adiputera recommends this idea to create further benefit for local community. Government can facilitate joint enterprises between refugees and locals that could employ workers from both

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51 Vinsensius Shianto, "Employing Refugees in Indonesia: Is It Possible?," *Jakartapost*, June 11, 2018.  
52 Missbach, *Stalemate: Refugees in Indonesia Presidential Regulation No 125 of 2016*, 16.  
53 Ibid.  
54 Harvey, *Beyond Limbo, Building Lives: Livelihood Strategies of Refugees and Asylum Seekers in Java, Indonesia*.  
55 Adiputera and Prabandari, *Addressing Challenges and Identifying Opportunities for Refugee Access to Employment in Indonesia*.

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56 Ibid., 9.

groups.<sup>57</sup> Malaysia becomes a host for more than 170,000 refugees and has not ratified the 1951 Refugees Convention yet. Compared to this, Indonesia faces a smaller problem than Malaysia. Malaysia has issued temporary work permits in 1963 for some Moro people from Philippines, Acehese from Indonesia, and recently Syrian refugees.<sup>58</sup> In 2016, the Malaysian cabinet initiated a pilot project to facilitate 300 UNHCR-registered refugees from Rohingya ethnic group. They work in the plantation and manufacturing sectors legally.

Although the current research shows that it is possible and profitable for the government to allow refugees to work, in the end government prefers to delimit this right. The next part of this article will help us to understand why the state decided to limit refugees' right even when they can contribute to the host country.

### **C. Derrida's Theory of Hospitality and the State's Contradictory Approach to Refugees**

The existence of Presidential Regulation No 125 of 2016 strengthens the idea that refugees remain strangers or 'the other' and must be treated differently from ordinary citizens. Although the regulation aims to protect the refugees, some provisions implied that refugees' existence within Indonesia territory brings threat to security. The state insecurity must be traced back to what Indonesia experienced when welcoming refugees in Galang Island and providing shelter during Tampa Crisis.<sup>59</sup> Members of parliament at that moment criticized the decision on welcoming refugees given many domestic humanitarian problems left unsolved. They were afraid that the government will spend more budget on strangers

who enter Indonesia border without permission. After Tampa crisis which triggered thousands more refugees fled from Middle East, Indonesia become more precarious on its border security, fearing refugees may cause an extra burden for the nation. After the 9/11 tragedy, state's insecurity becomes more obvious.<sup>60</sup> The line between refugees, illegal migrants, and terrorists blurred, hence the government uses security language to prevent them from coming. Although the Presidential Regulation has made the border line between refugees and illegal migrants, the mindset that perceived refugee as a "threat" persists.

State's insecurity is inescapable and for this reason, the country will always encounter the dilemma between offering unconditional hospitality and limiting the hospitality to prevent refugees to infiltrate the host's space. As Derrida argued, "there would be no decision, in the strong sense of the word, in ethics, in politics, no decision, and thus no responsibility, without the experience of some undecidability."<sup>61</sup> The decision Indonesia finally made should be read as a result of this inevitable dilemma.

The dilemma is portrayed in Indonesia's attempt to fulfill refugees' rights mandated by ICCPR and ICESCR through the newly released Presidential Regulation No 125 of 2016. This law has brought refugees out from crowded detention centers and put them into more proper accommodation. However, the government still perceives them as a threat and assigns police and security to prevent them from leaving the shelter. It is most likely that the government must overcome the same dilemma regarding refugees' right to work. On the one side, the right to work will help refugees to fulfill their own basic needs but, on the other side, it will reduce job vacancies for local citizens. Indonesia overcomes the dilemma by cooperating with IOM and UNCHR to provide refugees with basic needs such as health care, food, sanitation, and conducting skill training for

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57 Ibid., 15.

58 Aslam Abd Jalil, "The Right to Work Can Empower Refugees in Malaysia", *The Conversation*, last modified July 5, 2019, accessed April 15, 2021, <https://theconversation.com/the-right-to-work-can-empower-refugees-in-malaysia-119666>.

59 Prabaningtyas, "Indonesia and The International Refugee Crisis: The Politics of Refugee Protection," 136.

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60 Ibid., 138.

61 Still, *Derrida and Hospitality: Theory and Practice*, 11.

refugees. However, up to now, the government is still reluctant to give them full right to work making refugees rely on public benevolence and private charity.

The dilemma also portrayed in refugees' access to legal process. As individuals living within the territory of Indonesia, refugees must comply with Indonesian law. In fact, refugees often hardly claim their rights because they cannot access legal assistance which can articulate their situation. Even if they got legal assistance, the nature of the law still puts refugees as an object who are dominated. As Douzinas argued, there is a great paradox in asking the law to protect the refugee.<sup>62</sup> Derived from English law and courts when encountering refugees, Douzinas argued that law was never necessarily meant to violate human rights. What law does is translating refugees' fear into knowledge, assuming that the judge can occupy the place of the refugee and share the pain. The pain, the suffering, and the death are radically singular and timely, it cannot be translated into shareable knowledge. For the law, translating fear into knowable realities is necessary, however the translation end up making refugees an object of domination. The refugees must surrender under regulation which never truly recognized their fear and situation. But in the end, the state does not have another choice than offering hospitality to refugees and at the same time delimit it through law.

Derrida's concept on the dilemma of hospitality is important to understand why Indonesia cannot completely guarantee refugee rights. The undecided situation forces the government to limit hospitality through the enforcement of Presidential Regulation No 125 of 2016. Indonesia prefers to maintain its status as 'the host' by creating a line between refugees as 'the other' and Indonesian people as 'the self.' This line is manifested in the right to work, freedom of movement, and equality before the law.

This regulation is the best tool so far that can

protect refugee rights, yet it still puts refugees as the object of the rights. In the end, Indonesia's attempt in providing accommodation, health care, and protecting refugees from arbitrary detention cannot manifest ICCPR and ICESCR ultimate aims to preserve human dignity. The state will always make the refugees rely on the state's benevolence so that the state can protect its national sovereignty.

## CONCLUSION

Indonesia's response to dealing with refugees should be seen as a dilemma of hospitality. Indonesia has to treat refugees as a guest and fulfill their basic rights. Even though at the same time, Indonesia still perceives them as a threat, refugees remain other than Indonesian so that when their rights are not delimited, the country fears they snatch local jobs employment and cause horizontal tension. This in-between situation is undoubtedly illustrated in the new Presidential Regulation No 125 of 2016. On the one hand, the regulation welcomes the refugees by rescuing those who are stranded at the sea and providing accommodation during their stay. On the other hand, the regulation treats them as intruders that jeopardize local community's security. The dilemma of hospitality is furthermore captured in Indonesia's attempt to protect and fulfill refugee rights under ICCPR and ICESCR. The Presidential Regulation on Handling Refugees has shown the country's willingness to protect refugees as a part of international responsibility. However, this mechanism is insufficient to fulfill the mandate of ICCPR and ICESCR on preserving human dignity.

## RECOMMENDATION

Indonesia is a state party for ICCPR and ICESCR. As the consequence, Indonesia is legally and morally bound to fulfill refugee rights provided in the convention. In doing so, Presidential Regulation No 125 of 2016 must be revised to fulfill refugee rights under ICCPR and ICESCR. The fulfillment of refugee rights can be done step by step. As the first move, Indonesia can give the right to work for refugees. Therefore,

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62 Douzinas, *The End of Human Rights*, 358.



they may gain their dignity as a human being. The government can adopt Malaysia's scheme of facilitating a joint enterprise between refugees and local employers and issue a temporary work permit. By allowing refugees to be outside the shelter and let them have a job, their potential to commit a crime will decrease. Thus, it prevents them from getting involved in criminal cases.

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