

EDITORIAL

Foreword

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Indonesia is situated geographically between countries of origin and the intended destination of asylum seekers. Those who are in transit in Indonesia may well stay for a long period of time pending their resettlement in a third country or voluntary repatriation. Some of them may have to stay permanently in Indonesia because no third country is willing to accept them for durable resettlement or because those unfortunate and vulnerable human beings could not return to their country of origin. Legislation setting forth Indonesia's policy on asylum seekers, asylees, and refugees and their rights is therefore needed to address this humanitarian problem, which is of concern to the international community. However, in place of such legislation, in 2016, Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees (the "PR") was adopted.

In this brief Foreword, I explain why such legislation is needed, some background to the PR, and I commend this Special Issue to its readers.

The Bill that eventually became Law No. 37 of 1999 on Foreign Relations was drafted by a team established by the Ministry of Foreign Affairs. I was involved in the drafting of the Bill, which took place from 1996 to 1998. Articles 25, 26, and 27 of Law No. 37 of 1999 on Foreign Relations were intended to be used as a legal basis for the drawing-up of a national policy on asylum and refugee questions in anticipation of the possibility of Indonesia's ratification of the 1951 Convention relating to the Status of the Refugees (and its 1967 Protocol) or Indonesia's enactment of a national law on the questions of asylum and refugees in the absence of national policy on the subjects. Accordingly, immediately following the enactment of Law No. 37 of 1999 on 14 September 1999, I drafted two Presidential Decisions (now called "Presidential Regulations"), the first on asylum to follow up on Article 26 and the second on refugee policy as required by Article 27(2). The suggested drafts were, however, not acted on by the competent authorities.

In the meantime, only nine days after the enactment of Law No. 37 of 1999 on Foreign Relations on 14 September 1999, Law No. 39 of 1999 on Human Rights, which recognizes the right to asylum as a human right (Article 28), was enacted on 23 September 1999. Subsequently, less than one year later, on 18 August 2000, the Constitution was amended for the second time. The amended instrument recognizes, *inter alia*, the right to asylum as a human right (Article 28G(2)), thus reaffirming and strengthening the provisions of Article 28 of Law No. 39 of 1999 on Human Rights.

The provisions of Article 28 of Law No. 39 of 1999 on Human Rights and of Article 28G(2) of the Constitution supersede the provisions of Articles 25, 26, and 27 of Law No. 37 of 1999 on Foreign Relations (*lex posterior derogat legi priori; lex superior derogat legi inferiori*). Accordingly, any implementing legislation that should be issued should no longer be legislation required by Law No. 37 of 1999 on Foreign Relations, but legislation that implements the provisions of Article 28G(2) of the Constitution and Article 28 of Law No. 39 of 1999 on Human Rights. Such legislation could be issued in two possible alternatives. The first could be in the form of legislation ratifying the 1951 Refugee Convention and its 1967

Protocol, while the second could be legislation whose *ratione materiae* would be the questions of asylum and refugees. A law on this issue is urgently required.

Accordingly, in 2013, upon my own initiative, I drafted a suggested Bill on the ratification of the 1951 Refugee Convention and its 1967 Protocol, together with the “Academic Paper” as required by the Law on the Drafting of Legislation, for possible reference by whoever is concerned or interested in the subject in advocating and promoting a better protection of asylum seekers, asylees, and refugees. Further, with a view to ensuring that the national legislation concerned deals with national policy on asylum and refugee matters and which constitutes an implementation of the provisions of the Constitution and Law No. 39 of 1999 on Human Rights recognizing the right to asylum as human right, in 2019, on my own initiative, I drafted a suggested text of a Bill on the protection of asylum seekers, asylees, and refugees together with the corresponding “Academic Paper,” to substitute the present Presidential Regulation No. 125 of 2016. I submitted the documents to SUARA, an Indonesian non-governmental organization that deals with the protection of refugees, for consideration and further actions in their advocacy activities.

The articles in this Special Issue explain why Presidential Regulation No. 125 of 2016 was adopted and canvass the challenges and opportunities that it presents. They highlight that it represents a missed moment in history for Indonesia to enact legislation to implement the right to asylum in Article 28G(2) of the Constitution and Article 28 of Law No. 39 of 1999 on Human Rights.

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