under Article 292 should develop detailed rules in their jurisprudence, for reasonableness is challenging to apply without detailed criteria.

Based on Article 73 paragraph (2) in conjunction with Article 292 paragraph (1), a bond or other form of security is given as a precondition of prompt release for a foreign vessel arrested by a coastal state. However, UNCLOS 1982 does not further govern the details of bonds or security amounts for the prompt release of foreign vessels arrested by coastal states. Hence, the reasonable bond amount can be decided to refer to the practice in the ITLOS.[22] Considering the cases in ITLOS in the "prompt release process," there is always a tendency for the plaintiff to ask for a large amount of bond, so some problems often arise concerning the feasible compensation and prompt release.

The prompt release of a vessel can be requested on the ground of the violation by the coastal State of UNCLOS Article 73 paragraph (2), Article 220 paragraph (7) and paragraph (8), Article 226 paragraph (1) "b" and "c. The primary condition for implementing Article 292 of UNCLOS is that there must be an element of detention carried out by a coastal state that does not meet the provisions of UNCLOS. In other words, the Tribunal can only examine disputes where the vessel has been detained under UNCLOS, which expressly regulates the vessel's release after submitting a security deposit or other financial guarantee.[23] At the end of the tenth day of detention, if the parties agree to settle their dispute through the courts, under Article 292 paragraph (1) of UNCLOS, the flag State has two alternatives: whether to apply for release to the court or tribunal agreed by the detention State or submit an implementation to the ITLOS. This implies that after the expiry of the ten-day period, the Tribunal shall have exclusive and automatic jurisdiction, which the Responding State cannot contest. The procedure of prompt release of vessels and crews is regulated explicitly in ITLOS Rules from Article 110 to Article 114.

[22]Usmawadi Amir, "Penegakan Hukum IUU Fishing Menurut Unclos 1982 (Studi Kasus: Volga Case) 1," *Jurnal Opinio Juris* 12, (2013): 68–92.

[23]Seline Trevisanut, "Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends," *Ocean Development and International Law* 48, no. 3–4 (June 2017): 300–312.

III. THE IMPLEMENTATION OF PROMPT RELEASE AND REASONABLE BOND IN ILLEGAL FISHING CASES BEFORE THE ITLOS

Several cases were submitted to the ITLOS to determine the reasonableness of the bond. It is interesting to discuss precisely what factors must be paid attention to in determining the reasonableness of a security deposit. The financial security or other financial guarantee must be fair because that is one of the purposes of the prompt release. The UNCLOS and ITLOS Rules need an explanation of an appropriate amount. Therefore, the factors to be considered in assessing the security deposit and determining what constitutes an appropriate guarantee fluctuate from case to case.

After the Tribunal declares it has jurisdiction to examine the request for prompt release and determine that the implementation has been accepted, the Tribunal orders the release of the vessel with the obligation to provide an appropriate deposit or other financial guarantee. The security deposit to be determined by the Tribunal must be "reasonable." The reasonableness requirements for the security deposit are regulated in Article 292, paragraph (1) and Article 73, paragraph (2) of UNCLOS. The Tribunal determines "the amount, nature and form of the security deposit or other financial guarantee to be submitted."[24]

Up to 2022, nine cases have been submitted to ITLOS. Under Article 292, namely:[25] MV Saiga (Saint Vincent and Grenadines v. Guinea), Camouco (Panama v. Prancis), Monte Confurco (Seychelles v. Prancis), Grand Prince (Belize v. France), Chaisiri Reefer 2 (Panama v. Yaman), Volga (Russian Federation v. Australia), Juno Trader (Saint Vincent dan Grenadines v. Guinea-Bissau), Hoshinmaru dan Tomimaru (Jepang v. Federasi Rusia). Of the nine cases, six of them (Saiga, Camouco, Confurco, Volga, Hoshinmaru and Juno Trader) were ordered to be released on lower bond; the Tribunal declared it had no jurisdiction over the Grand Prince case, and the hearing was terminated, the parties settled the dispute on an ad hoc basis. Referendum on the Chaisiri Reefer case 2, and there is no object of dispute in the Tomimaru case.[26]

[24]"Prompt Release of Vessels and Crew," ITLOS, accessed 12 August 2022, https://www.itlos.org/en/main/jurisdiction/contentious-cases/prompt-release-of-vessels-and-crews/#:~:text=An%20application%20for%20the%20release,vessel%20or%20on%20its%20behalf.

[25]See "List of Cases."

[26]See Buntoro, Haridus, Sudardi, "Tinjauan Yuridis Prompt Release," 2.

The main issue of the dispute is the reasonable bond set by the coastal State. The ITLOS' approach to the reasonableness of the bond has proven to be a significant hurdle for effective and deterring enforcement measures. It considers that the bond must be financial, excluding non-financial securities, such as "good-behavior bonds," which are conditions to carry a Vessel Monitoring System [VMS]. Further concerns are the limitation on the amount that can reasonably be claimed as a bond and the vague criteria that ITLOS uses to determine the amount, which leads to legal uncertainty.[27]

In the Saiga case, the reasonableness criteria include the amount, nature and form of the security deposit or other financial guarantee" and "the existence of a balance of the amount, form and nature of the security deposit or other financial guarantee.[28] In the Camuoco case, the Tribunal underlined the relevant factors to the assessment of the reasonableness of the bond, including the severity of the alleged infringement, the type of punishment imposed, the value of the vessel and cargo seized, the form and amount of the security deposit determined by the detaining State.[29] These factors are the guiding criteria in assessing the reasonableness of the security deposit, which describes the balance of interests under Articles 73 and 292 of UNCLOS.[30] As in the case of the MV Volga, irrelevant factors are additional non-financial conditions, such as the obligation for a vessel to carry a monitoring and surveillance system as regulated by the Commission for the Conservation of Antarctic Marine Living Resource (CCAMLR.).[31]

In accordance with Article 111, paragraph (2) (b) of the ITLOS Rules, the implementation must include data relevant to determining the value of the vessel. Thus, the ITLOS Rules also determine the value of the vessel as an element for determining the reasonableness of the security deposit.

Based on an explanation of the factors that must be considered in evaluating security deposits, there are fluctuations from case to case. In the Monte Confurco

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[27]Schatz, "Combating Illegal Fishing".

[28]ITLOS , "The Saiga Case," Para 82.

[29]"The Camouco Case (Pan. v. Fr.)," accessed 12 August 2012, http://www.itlos.org/start2.

[30]Jianjun Gao, "Reasonableness of the Bond under Article 292 of the LOS Convention: Practice of the ITLOS," *Chinese Journal of International Law* 7, no. 1 (2008): 115-142.

[31]"The Volga Case," *Jusmundi*, accessed on 15 August 2022, https://jusmundi.com/en/document/decision/en-the-volga-case-russian-federation-v-australia-judgment-monday-23rd-december-2002.

case, the Tribunal decided that the value of the fish and fishing gear should be considered as a relevant factor in assessing the reasonableness of the bond.[32] The problem in the Monte Confurco case is that the fines determined by France should be smaller or in accordance with the reasonableness. The French side determined that to release the vessel, it must first pay 56,400,000 FF. The court was of the opinion that the number of fish and fishing gear seized was 56,400,000 FF, which the French Court decided did not meet the element of fairness in accordance with Article 73 paragraph (2) of UNCLOS. In his separate statement, Judge Ndiaye stated that the appropriateness or fair amount was determined based on the factual and relevant circumstances of the case. [33]

In the MV Volga case, the Tribunal stated that the sale of the catch has no relevance to the guarantee to be set for the prompt release of the vessel and its crew.[34] Similarly, in the case of the MV Camouco, the Tribunal decided that the value of the vessel may not be a determining factor in the assessment of the amount of the bond or other financial guarantee, whereas, in the Volga case, it was decided it was reasonable to arrange a security deposit equal to the price of the vessel, fuel, lubricants and fishing gear.[35]

There are two schools of thought to determine the reasonableness of a bond. First, the consideration must be based on the national law of detention State. The Tribunal is advised to respect the considerations used by domestic courts in determining bond for prompt release. Second, reasonable or unreasonable, a bond is determined based on the assessment of an independent body, and it does not necessarily have to comply with the criteria set by the detaining State through the decisions of judges or national legislators.[36]

The ITLOS, as an international tribunal, has implemented the provisions of Article 73, paragraphs (2) and (3), and Article 292 of UNCLOS regarding prompt release procedures and determining the reasonable bond, but until now, there have been problems determining the reasonable bond because there is no special regulation.

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[32]Fatiah Falhum Salim, "The Monte Corfuco Case: Judgment of International Tribunal for the Law of the Sea," *Indonesian Journal of. International Law* 2, no. 3 (2005): 617-619.

[33]"Declaration of Judge Ndiaye, Case No.6 International Tribunal for the Law of the Sea," accessed 12 August 2022, https://www.itlos.org/en/cases/list-of-cases/case-no-6/.

[34]See Trevisanut, "Twenty Years of Prompt," 1-13.

[35]ITLOS, "The Volga Case," Para 73.

[36]See Buntoro, Haridus, Sudardi, "Tinjauan Yuridis Prompt Release," 503.

IV. THE IMPLEMENTATION OF ARTICLE 73 PARAGRAPH (3) OF UNCLOS 1982 REGARDING NON-IMPRISONMENT PENALTY IN ILLEGAL FISHING CASES IN INDONESIA

Indonesia as an archipelagic State is internationally recognised based on UNCLOS 1982, ratified with Law No. 17 of 1985 concerning Ratification of the United Nations Convention on the Law of the Sea. Indonesia has strategic positions and great potential fisheries resources that attract the attention of foreign fishing vessels to commit illegal fishing. Illegal fishing has seriously threatened the Indonesian EEZ, generating social, economic, and environmental losses. Based on data from the Ministry of Marine and Fisheries Affairs, the number of fisheries crimes from 2017 to 2021 was 1130 cases. Indonesia has made many attempts to give the actors of illegal fishing a deterrent effect, one of which is to sink the vessel.[37]

Table 1. Criminal Data Case in Marine Affairs and Fisheries Dealt With by Fisheries Surveillance during 2016-2021[38]

Year	Number of Case	Preliminary examination	Administrative Sanction	Other Action	Legal Process
2021	213	-	36	10	167
2020	139	-	30	3	106
2019	151	-	32	5	111
2018	193	-	31	1	161
2017	197	-	27	7	163
2016	237	-	12	5	230
TOTAL	1130	0	168	31	931

Foreign fisheries vessel entering into IEEZ territory is arrested by the Fisheries Surveillance Vessel of the Directorate General of Marine and Fisheries Resources of the Ministry of Marine Affairs and Fisheries with modus operandi commonly used, such as having no permit (*SIUP, SIPI* and *SIKPI*), using harmful and prohibited catching tools, breaking incompatible fishing ground, transhipment and inactive Vessel Monitoring System (VMS).

[37]Yordan Gunawan and Hanna Nur Afifah Yogar, "Law Enforcement on Illegal Fishing of Illegal Foreign Vessels Within EEZ of Indonesia," *KnE Social Sciences* 3, no. 14 (2019): 656.

[38]"Recapitulation of data on fishery crimes (Rekapitulasi Data Tindak pidana perikanan)," kkp, accessed 12 August 2022, https://kkp.go.id/an-component/media/upload-gambar-pendukung/Ditjen%20PSDKP/Humas%20PSDKP/Data%20TPKP%2031%20Desember%202021.pdf.

In contrast to fisheries disputes before the ITLOS, most cases in Indonesia are due to the implementation of Article 73 paragraph (3), which prohibits imprisonment for EEZ violations. The Judge makes two arguments, the first prohibiting imprisonment and the second using imprisonment as a substitute for a fine. Indonesia has ratified UNCLOS 1982, so Article 73 paragraph (3) of UNCLOS has been adopted into Article 102 of the Fisheries Law that governs the invalidity of imprisonment in IEEZ unless there has been an agreement between the Indonesian government and the corresponding state. In other words, imprisonment or corporal punishment should not be imposed in Indonesia.

Based on the data of verdicts on the official website of the Supreme Court's verdict, [39] there are 192 verdicts related to fisheries crimes, of which 101 are related to crimes occurring in IEEZ territory. The interesting point is the difference in verdicts concerning fine sentences in IEEZ. Some verdicts sentence a fine, and others sentence imprisonment as a substitute for a fine. In 2015, the Supreme Court enacted Circular Letter (SEMA) Number 3 of 2015, which stated the invalidity of imprisonment as a substitute for a fine for illegal fishing. SEMA stipulates that "in cases of illegal fishing in the IEEZ, convicts can only be subject to fines without imprisonment as a substitute for the fines." It is hoped that by issuing this SEMA, the court's decision will only refer to the imposition of fines, with no alternative imprisonment as a substitute for a fine. It contradicts Article 30, paragraph (2) of the Criminal Code, which states, "If the fine is not paid, it is replaced by imprisonment."

For example, there were 19 verdicts at the appeal to the Supreme Court from 2013 to 2015, 12 sentencing a fine and seven sentencing imprisonment as a substitute for a fine. To reaffirm the preceding rules, Article 104 paragraph (1) of the Fisheries Law governs the implementation for the release of a foreign vessel and its attendants arrested if the flag state has made an attempt to provide a reasonable bond or guarantee, and the authority of fisheries justice makes the decision. This provision is adopted from Article 73, paragraph 2, of UNCLOS 1982, which states that "arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security."

[39] "The Supreme Court's verdicts," Mahkamah Agung, accessed 12 August 2022, https://putusan.mahkamahagung.go.id5.

Since the enactment of SEMA, the fine has been sentenced in 14 verdicts; there were three verdicts in 2016, in Medan Fisheries Court, Pontianak Fisheries Court, and Jayapura Provincial Court, and there were 11 verdicts in 2017, all of which were in Tanjung Pinang Fisheries Court. Meanwhile, imprisonment has been sentenced as a substitute for a fine in 28 verdicts: 13 verdicts in 2016, 1 verdict in Ternate District Court, eight verdicts in Ranai District Court, two verdicts in Pekanbaru Provincial Court, and 1verdict in Jayapura Provincial Court; and 15 verdicts in 2017, 1 verdict in Aceh District Court, three verdicts in Tanjung Pinang Fisheries Court, and 11 verdicts in Fisheries Court. Based on the data, it can be known that SEMA Number 3 of 2015 did not significantly influence the chamber of judges in applying Article 30 paragraph (2) of the Criminal Code to impose imprisonment as a substitute for a fine related to fishing crimes in the IEEZ.

The chamber of judges states that Article 73 paragraph (3) of UNCLOS prohibits the sentence of imprisonment or physical punishment as the primary punishment, as mentioned in Article 10 of the KUHAP (Code of Criminal Procedure), while imprisonment substituting for a fine is not basic punishment but a means of compelling the defendant to pay the fine sentenced. It is the solution used if the defendant is unable to pay the fine sentenced, and the imprisonment substitute for the fine is regarded as facilitating the verdict itself.

According to the judges who give imprisonment penalties or imprisonment as a substitute for a fine, UNCLOS only prohibits physical punishment or corporal punishment. The sentence of imprisonment as a substitute for the fine will be the solution or the way out for the defendants who are incapable of or unwilling to pay the fine. The UNCLOS does not explain the scope of imprisonment. Judge Lucky's opinion can be used as a reference related to the issue of imprisonment. According to Judge Lucky in his separate opinion in the M/V Virginia Case (Panama V. Guinea-Bissau), he said that the restraint of passport had been categorised as *imprisonment*, so Guinea-Bissau has breached Article 73 paragraph (3) UNCLOS:

The word "imprisonment" is not defined in Article 73, paragraph 3 of the Convention. Therefore, a meaning relevant to the circumstances is necessary; the word "imprisonment" in Article 73, paragraph 3, must be given a broad and generous meaning. The meaning should not be that the individual must be sent to a prison and confined in a cell. The term imprisonment means the restraint

of a person contrary to his will; in other words, it means a deprivation of one's liberty. As to what will amount to imprisonment, the most apparent modes are confinement in a prison or private house (in this case, a vessel). Thus, the crew were deprived of their right to liberty and freedom.[40]

Judge Lucky argued that the word "imprisonment" should be defined broadly, not only as an individual imprisoned or confined in a jail but it should be defined as the restriction of an individual's freedom so that the restraint of passport and the detention of vessel attendants inside the vessel with the guard is categorised into *imprisonment*. According to Judge Lucky's opinion, the word *imprisonment* in Article 73 paragraph (3) of UNCLOS can be defined broadly, not only as a jail sentence but any form of restriction to an individual's freedom. Considering this argument, imprisonment is not limited to a jail sentence. Any form of restriction on personal freedom qualifies as imprisonment. It means that imprisonment as a substitute for a fine should not be sentenced to foreign perpetrators who commit fisheries crimes in EEZ because it restricts personal freedom. The imprisonment as a substitute for a fine is categorised under the definition of imprisonment.[41] The authors argue that the judges should prohibit the sentence of imprisonment as a substitute for a fine because Indonesia has ratified UNCLOS. Therefore, the government should apply the provision based on the *pacta sunt servanda* principle.

V. PROBLEMS OF PROMPT RELEASE IMPLEMENTATION IN INDONESIA

In Indonesian law, prompt releases are generally regulated in Article 15 of Law Number 5 of 1983 concerning Indonesia's EEZ and in Article 104 paragraph (1) Law Number 31 of 2004 concerning Fisheries as already stated amended by Law Number 45 of 2009 concerning Amendment of Law Number 31 of 2004 on Fisheries. This article adopts the provisions of Article 73 paragraph (2) in conjunction with Article 292 paragraph (1) of UNCLOS 1982. The provision of security deposits is one of the conditions for the prompt release of a foreign vessel detained by the coastal state; however, UNCLOS 1982 did not provide further

[40]"Separate Opinion of Judge Lucky," ITLOS, accessed 5 August 2022, https://www.itlos.org/fileadmin/itlos /documents/cases/case_no.19/judgment_published/C19_Lucky.pdf.

[41]See Adiananda, Pratama, and Utama, "Problematika Penegakan Hukum,".

details. The amount of the security deposit or other financial guarantee must be "reasonable," so determining the appropriate security deposit amount can be based on practice in cases that ITLOS has decided. The Indonesian legislation regulates an implementation to release the vessel and/or people arrested for committing fisheries crime in the IEEZ, which can be done at any time before there is a decision from the fisheries court by submitting an appropriate amount of security deposit, the fisheries court makes the determination.

Article 104 of the Fisheries Law is a provision regarding the bond system (guarantee system) in the form of money, which the fisheries court determines. However, it has not clearly and definitively regulated the mechanism and factors that must be met in determining the reasonableness of the guarantee (amount, nature and form of the security deposit), the deadline for submitting the implementation, and the applicant's status as the flag State of the vessel.

Administratively, several implementing regulations, namely (1) the mechanism for requesting release, (2) the mechanism for determining the resealable bond, and (3) the institution for assessing the amount of the guarantee value, need to be identified. In international relations, clarification is needed regarding (1) the fairness if Indonesia offers an active prompt release through a notice, in accordance with Article 73 paragraph (4) UNCLOS and (2) the responsibility of the flag state for the impact of the prompt release if a court decision determines that the crew is subject to penalties of fines and evidence in the form of ships seized for the state or destroyed.

In practice, Indonesia has never implemented a prompt release mechanism because there are doubts and differences of interpretation regarding the implementation of the mechanism. Regarding differences in interpretation, there are two opinions, namely:[42]

1. The prompt release mechanism does not stop the criminal investigation and prosecution process that is being or will be carried out because the word used in Article 104 paragraph (1) is a guarantee that it means that the case process will continue or

[42]Rohmin Dahuri, "Penerapan Ketentuan Pelepasan Segera (Prompt Release) Kapal dan Awak Kapal Pelaku Illegal Fishing di Zona Ekonomi Eksklusif Indonesia," *Tokoh Kita,* 11 September 2020, https://www.tokohkita.co/read/20200911/1432/aturan-prompt-release-bisa-tekan-kerugian-akibat-iuu-fishing.

2. By implementing the prompt release mechanism, the criminal investigation and prosecution process that will be carried out must be stopped to create legal certainty.

The term "guarantee" is important in interpreting that the criminal law process continues. Based on several ITLOS decisions, the coastal state must release the vessel and its crew as soon as the "reasonable bond" stipulated by the ITLOS is paid. This has prompted some academics to translate the term "bond" in the context of a prompt release with the term compensation. They argue that ITLOS has changed the implementation of criminal liability to civil liability regarding the prompt release mechanism.[43]

The determination of reasonable bonds must be appropriate without (1) overestimating the price of the detained vessel, (2) the fine for the captain/vessel owner is too high, and (3) including non-financial components. The amount of reasonable bond determined must take into account (1) the selling value of fish resulting from IUU fishing, (2) the value of the vessel's price, (3) the value of fuel and lubricants, (4) the value of fishing equipment; and (5) fines for the captain/owner.[44] In practice, the fine for the captain/vessel owner is too high and includes non-financial components. The Tribunal stated, "the bond amount must be commensurate with the degree of guilt of the alleged infringement."

Substances need further regulation regarding the mechanism and factors that must be met in determining the reasonableness of the guarantee (amount, nature and form of the security deposit), the deadline for submitting the implementation, and the applicant's status as the vessel's flag State. The procedure has never been implemented and still requires implementing regulations.

The provision of the reasonable bond is an alternative settlement of the action fisheries crime by foreign vessels in IEEZ that can be used as a source of Non-Tax State Revenue (PNBP) by looking at the number of criminal acts that occurred in IEEZ, as well as the perpetrators' living expenses while undergoing treatment detention period or high cost of securing evidence if the settlement of foreign vessel cases in IEEZ is carried out through a judicial mechanism that

[43]Shams Al Din Al Hajjaji, "Criminal Liability for Environmental Damage: National Courts versus the International Tribunal for the Law of the Sea," *Groningen Journal of International Law* 5, no. 1 (2017): 96-114.

[44]See Dahuri, "Penerapan Ketentuan Pelepasan Segera,".

takes quite a while. Appropriate security deposit implementation can minimise Indonesia's losses due to fisheries crime.[45] The prompt release is implemented to balance the coastal and flag States in realising justice, benefit and sustainability in managing fisheries resources. The prompt release for illegal fishing in Indonesia has never been implemented, although it has been regulated in the Fisheries Law. Indonesia has the opportunity to obtain reasonable bonds to be a solution to handling violations of IUU fishing by foreign vessels in the IEEZ. It is crucial for Indonesia as a party to UNCLOS to have national regulations to implement the obligation for prompt release. That way, there will be certainty about the legal framework that currently does not exist.

VI. CONCLUSION

ITLOS has handled nine cases of prompt releases and reasonable bonds. The prompt release procedure aims to ensure the implementation of the immediate release of the ship and/or its crew who have been detained after providing an appropriate security deposit. The prompt release procedure is an instrument to balance interests between the coastal and flag States. The flag State is interested in obtaining the release of the vessel and/or crews. On the other hand, the detaining state is interested in ensuring the implementation of justice and the payment of a fine. The problems of prompt release cases regarding the reasonableness of the bond. The ITLOS made significant contributions to determining whether the bond's criteria were reasonable or unreasonable; however, the ITLOS does not yet have general provisions to determine it.

`In Indonesia, the main problem of law enforcement in EEZ related to the implementation of Article 73 paragraph 3 of UNCLOS regarding the prohibition of imprisonment to foreigners committing a crime in EEZ. There are two kinds of the Supreme Court's verdicts. First is the judge's verdict that only sentences a fine; second is that sentence imprisonment is a substitute for the fine. The prompt release procedure is regulated in Article 104, paragraph (1) of Fisheries Law, but this procedure has never been implemented in Indonesia. It requires regulations related to the mechanism for determining the reasonableness of the guarantee (amount, nature and form of the security deposit), the time limit for submitting the implementation, and the applicant's status as the vessel's flag State.

[45] *Ibid.*

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Main Articles

In Search of the Best Practice for Refugee Status Determination in Indonesia: The Asia-Pacific Perspective

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Abstract

At the end of 2021, United Nations High Commissioner for Refugees (UNHCR) roughly estimated that more than 100 million individuals were displaced worldwide from their country of origin. Indonesia's experience in global refugee flows is distinct, as it is one of the biggest transitory countries for displaced persons in Asia-Pacific. Being a transit point, Indonesia has struggled for years to host the ever-increasing influx of displaced persons seeking to resettle in destination countries. Asylum seekers in Indonesia are waiting for UNHCR Indonesia to contact them to undergo the Refugee Status Determination (RSD) process as a prerequisite before seeking to resettle elsewhere but also to validate one's claim as a refugee. This article presents a compelling case for why Indonesia should be reformed in the current RSD process.

Keywords: Refugee; RSD, UNHCR, Indonesia, Best Practice

I. INTRODUCTION

Political and armed turmoil in the last decade has significantly impacted the global rise of the refugee movement worldwide. As the United Nations High Commissioner for Refugees (UNHCR) Filippo Grandi put it, 'every year of the last decade, the numbers climbed'.[1] At the end of 2021, UNHCR roughly estimated that more than 100 million individuals were displaced worldwide

[1]Global Times, "UNHCR warns of acute migratory crisis," *Global Times,* 16 June 2022, https://www.globaltimes.cn/page/202206/1268285.shtml.

from their country of origin.[2] In order to avoid grave security concerns such as targeted persecution, gross human rights violence, or active armed violence, these individuals flee from their respective country of origin to gain permanent residence in countries willing to accept their refugee status. Indonesia's experience in global refugee flows is distinct, as it is one of the biggest transitory countries in Asia-Pacific.

Indonesia's experience in global refugee flows is distinct, as it is one of the biggest transitory countries for displaced persons in Asia-Pacific. A transitory country commonly refers to a country that offers a temporary settlement to displaced persons. At the same time, these individuals undergo the settlement procedure in their preferred third destination country or any safe third country. Indonesia's role as a transitory hub can traced back to the mass exodus of Indochinese refugees who fled their country of origin in the aftermath of the Vietnam War. In 1979, Indonesia, Malaysia, Thailand and the Philippines collectively agreed to designate part of their territories as interim process centres to shelter displaced Indochinese people who waited for their asylum applications to be approved by the United States or other third-destination countries.[3] The Indonesian government then further implemented the initiative under Presidential Decree No. 38 of 1978. The Decree instructs different national ministries to coordinate the management of temporary settlement (Article 2(2)), construction of temporary facilities (Article 4), and the establishment of a contact network of the government with the UNHCR and other third countries which expressed their commitment to accept resettlement of Indochinese refugee in their respective territories (Article 3).[4] Such concerted national effort was later followed by the formal designation of Galang Island –located in Southeast of the Batam region– as a refugee camp to host roughly 122,000 to 145,000 Indochinese refugees and asylum seekers from 1979 to its closure in 1996.[5]

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[2]"Refugee Data Finder: More than 100 million people are forcibly displaced," UNHCR, accessed on 28 December 2022, https://www.unhcr.org/refugee-statistics/insights/explainers/100-million-forcibly-displaced.html.

[3]Charles P. Wallace, "Update/Vietnamese Refugees: New challenge Raised to 'Boat People' Accord," *Los Angeles Times*, 30 June 1990, accessed on 28 December 2022, https://www.latimes.com/archives/la-xpm-1990-06-30-mn-613-story.html.

[4]see Indonesia, "Presidential Decree No. 38 of 1979 Concerning Coordination to Resolve Vietnamese Refugee Issue in Indonesia," 30 December 1979, accessed on 28 December 2022, https://www.refworld.org/docid/3ae6b4eb18.html.

[5]Bilal Dewansyah and Ratu Duroton Nafisah, "The Constitutional Right to Asylum and Humanitarianism in Indonesian Law: "Foreign Refugees" and PR 125/2016", *Asian Journal of Law and Society* 8, (August 2021): 545.

Nevertheless, being a transit point, Indonesia has struggled for years to host the ever-increasing influx of displaced persons seeking to resettle in destination countries, such as Australia, Malaysia, Canada, or the United States.[6] The implementation of Operation Sovereign Border (OSB) in 2013 by the Australian government was a significant turning point that spiked the refugee population in Indonesia, with thousands of asylum seekers effectively stranded in Indonesia.[7]It was done by denying any request of RSD submitted by asylum seekers who tried to enter Australia via Indonesia via boat or by illegally bypassing the Australian immigration clearance from July 2013 onwards. Fast forward to 2020, roughly 3,375 asylum seekers in Indonesia were waiting for UNHCR Indonesia to contact them to undergo the Refugee Status Determination (RSD) process.[8]

The accessibility of the RSD process matters for asylum seekers in Indonesia not only as a prerequisite before seeking to resettle elsewhere but also to validate one's claim as a refugee, hence qualifying them as a refugee under international law. This process is critical because a refugee certification could protect oneself from being forcibly deported, even though it does not warrant the possibility of resettlement.[9] It also opens the possibility of seeking special assistance to rebuild their lives in the country of transit while waiting for the resettlement process. However, the RSD conducted by UNHCR in Indonesia has needed to be more suboptimal. It must work on an immense backlog of RSD applications, as with many other UNHCR-mandated RSD systems.[10] Incoherence between national immigration laws and RSD in categorising asylum seekers, refugees, and migrants also poses a risk for asylum seekers to be forcefully detained and deported despite having pending RSD decisions. The Global Detention Project,

[6]Mixed Migration Centre, "Quarterly Mixed Migration Update: Asia, *Mixed Migration Centre,* Quarter 1" Online: Mixed Migration Centre, 7, accessed on 8 February 2022: https://mixedmigration.org/wp-content/uploads/2022/04/226_QMMU_Q1_2022_Asia.pdf .

[7]Tom Brown and Antje Missbach, "The Boats May Have 'Stopped', but More Refugees are Stuck in Limbo in Indonesia," *The Conversation*, 12 March 2016, accessed on 28 December 2022, https://theconversation.com/the-boats-may-have-stopped-but-more-refugees-are-stuck-in-limbo-in-indonesia-56152.

[8]"Refugee Status Determination," UNHCR Indonesia, accessed 28 December 2022, https://www.unhcr.org/id/en/refugee-status-determination.

[9]Maja Smrkolj, "International Institutions and Individualised Decision-Making: An Example of UNHCR's Refugee Status Determination," *German Law Journal* 9, no.11 special issue (2008): 1782.

[10]Hester Moore, "It is Time to Re-examine Refugee Status Determination as a Protection Tool," 42 Degrees, 2020, accessed 28 December 2022, https://www.42d.org/2020/08/04/its-time-to-re-examine-refugee-status-determination-rsd-as-a-protection-tool/.

for instance, has reported that throughout 2016 there were the Indonesian authorities detained at least 4,273 asylum seekers despite having been declared by UNHCR Indonesia as valid asylum seekers ('person of concern') under the RSD scheme.[11] Lastly, the intended outputs of RSD are flawed for merely allowing asylum seekers to choose one of two durable options once they have attained their refugee status. The first is to repatriate or return to their country of origin voluntarily, and the second is to wait for resettlement in a third country.

This article presents a compelling case for why Indonesia should be reformed in the current RSD process. In doing so, we simultaneously showcase some RSD practices collected from several Asia-Pacific countries, in this respect Malaysia, Thailand and Australia, and then reflect on the viability of those practices to be implemented in the existing Indonesia RSD process. In our attempt to discuss the problems of Indonesia's RSD and the possible best practices to counteract those flaws, this article first describes the context and theoretical underpinnings behind RSD. We then see RSD's implementation in Indonesia and determine its known shortfalls. Then, we make a case for why a comparative overview of different RSD practices outside Indonesia is imperative to improve the country's RSD system. As we proceed to the comparative discourse of RSD, general overviews and known issues will be discussed in each of the three nominated countries of comparison: Malaysia, Thailand, and Australia. Near the end, our theory building shall reflect if any of the practices showcased in the compared RSDs would improve the Indonesian system and if it is feasible to adopt such practices.

II. THE REFUGEE STATUS DETERMINATION IN CONTEXT

Before a settlement application to a destination country can be approved, displaced individuals must undergo the RSD screening process to verify their status as refugees -whether they would likely face persecution in the future.[12] In the overall scheme of the resettlement process, RSD is the starting step in

[11]UNHCR, "Indonesia Factsheet, February 2016," in Global Detention Project, *Global Detention Project Submission to the Universal Periodic Review 27 Session of the UPR Working Group, April-May 2017*, 22 September 2016, accessed 28 December 2022, https://www.globaldetentionproject.org/wp-content/uploads/2016/09/GDP-UPR-Submission-Indonesia-Sept-2016.pdf.

[12]Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination," *Georgetown Immigration Law Journal* 17, (2003): 367.

the long journey for asylum seekers –the individuals who claim themselves as refugees–to permanently settle in their destination country. Investigation of the asylum seekers' claim for RSD may be directly conducted by the country of destination or de facto handled by a specialised international agency such as UNHCR. The latter is particularly commonplace in countries with no RSD process, such as Indonesia and other Southeast Asian countries.

Works in RSD are vast, with a rooted history in public international law. Smrkolj describes that countries worldwide have historically recognised persons forced to flee their home countries as 'refugees'.[13] Determining who is entitled to refugee protection has been part of the international strategy for refugee protection set by the League of Nations that predates even the 1951 Refugee Convention.[14] Literature acknowledges the variety of RSD procedures from one state practice to another and, as mentioned previously, between a self-regulated RSD or RSD carried by an international agency.[15]

Despite the variety in designs, Arakaki believes the RSD should be directed to provide the highest standard of fairness for asylum seekers. Hence, the Author emphasises issues akin to a fair trial, such as 'the opportunity to be heard, timeframe to prepare RSD application, possibility to seek counsel, the opportunity to contest adverse evidence, transparency in RSD decision-making, and opportunity for repeal or review. In the comparison field of RSD, it is argued that specific components have been historically more prevalent than the others. For example, in his attempt to compare ten countries' decision-making processes of refugee determination, Avery comes across some shared or highly recurring components that make RSD. Those, among others, are access to the refugee determination procedure, efficient and expeditious procedures, the right to appeal, and the application of rules of evidence. [16]

The literature on RSD also reflects on the legality of certain RSD practices to the existing international legal frameworks. Jones and Houle claimed that while the 1951 Refugee Convention does not explicitly prescribe a specific process in how RSD should operate, it does enable such process through the

[13]See Smrkolj, "International Institutions," 1780.

[14]Gilbert Jaeger, "On the History of the International Protection of Refugees," *International Review of the Red Cross* 83, no.843 (2001): 729-731.

[15]Osamu Arakaki, *Refugee Law and Practice in Japan* (London: Routledge, 2016), 80.

[16]Christopher L. Avery, "Refugee Status Decision-Making: The Systems of Ten Countries," *Stanford Journal of International Law* 19, no.2 (1983): 10.

reference of 'provisional measures' in Article 9 and the standard-setting in Article 32 and 33 where it instructs provisional measures as a priority before proceeding to expulsion and refoulement.[17] The same authors also refer to certain RSD practices, such as the right to present evidence in Article 32, using different layers of proceedings or the 'right to appeal' in Articles 13 and 14 of the International Covenant on Civil and Political Rights (ICCPR).[18]

Meanwhile, others have criticised some practices that bring greater vulnerability to asylum seekers. Kagan is concerned with the subjectivity of refugee credibility assessment, citing the cultural misunderstanding of incoming asylum seekers, political rhetoric from the RSD host country, and even the unclear ' fact-finding' role distribution between the initial RSD process and its appellate process.[19] Regarding refugee profiling, Jaji highlights the reliance of RSD officials on precedence and common narratives associated with the country of origin to determine if someone's RSD application should be rejected.[20] This trend may be convenient for asylum seekers prima facie declared by UNHCR or the country issuing RSD as potential refugees based on their country of origin.[21] However, the same benefit could not be extended to asylum seekers groups yet to attain such recognition. These people do not control their group narrative and thus risk being negatively profiled by the RSD decision-making practices. This claim is further endorsed to a degree by Affolter, where the author discovered institutional habit (*institutional habitus*) of the RSD caseworkers in Swiss to retain 'on-file facts' for the so-called 'bogus refugee' and hence become their recurring basis for generating adverse RSD decisions.[22]

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[17]Martin Jones and France Houle, "Building a Better Refugee Status Determination System," *Refugee: Canada's Journal on Refugees* 25, no.2 (2008): 4.

[18]*Ibid*.

[19]See Kagan, "Is Truth in the Eye," 367-368.

[20]Rose Jaji, "Refugee Law, Agency and Credibility in Refugee Status Determination in Nairobi, Kenya," *Z'Flucht. Zeitschrift für Flucht- und Flüchtlingsforschung* 2, (2018): 35-37.

[21]One of the examples of the prima facie refugee effect on RSD could be seen in the Ugandan RSD process, where the government allow anyone fleeing from South Sudan to receive the status of a refugee. See Allyson Ryan, "Refugee Status Determination: A Study of the Process in Uganda," Norwegian Refugee Council, 2018: 9, accessed on 10 December 2023, https://www.nrc.no/resources/reports/refugee-status-determination/.

[22]Laura Affolter, "Regular Matters: Credibility Determination and the Institutional Habitus in a Swiss Asylum Office," *Comparative Migration Studies* 9, no.4 (2021): 13.

III. THE RSD PROCESS IN INDONESIA

The discourse of RSD in Indonesia is mainly derived from reports produced by international organisations or local advocacy groups, and it is then followed by a few reflective insights from relevant scholarly works. Few shared backgrounds could be come across in this body of work. Like many non-signatory countries to the 1951 Refugee Convention, the Indonesian government is frequently portrayed as a regulatory stakeholder subject to international criticism for not creating an adequate legal framework for refugees despite being fully aware of its long-standing role in sheltering refugees.[23] Nevertheless, some optimistically seek to explore the progressive state of refugee protection in Indonesia, which is directly affected by Presidential Decree No. 125 of 2016 as a legal alternative to ratifying the 1951 Refugee Convention.[24]

Another point of observation is that despite Article 28G(2) of the 1945 National Constitution creating a legal foundation to support refugee protection by affirming that '…everyone has the right for political asylum in other countries", the literature felt such a norm has yet to be fully reflected in the country's overall refugee regulatory landscape. Dewanshyah and Nafisah, for example, observe how the right based on 'asylum' conferred in the Constitution is overshadowed by the government's proclivity to frame national policy towards refugees as either humanitarian assistance or measures needed to enforce immigration control.[25] It is argued that the national management of refugees is primarily by (3) three 'immigration control' leaning legislative products: The Law No. 37 of 1999 on Foreign Relations, The Law No. 39 of 1999 on Human Rights, and the Presidential Decree No. 125 of 2016 concerning the Handling of Foreign Refugees. At the same time, the humanitarian aspect of Indonesia's

[23]Antje Missbach and Nikolas Feith Tan, *"No Durable Solutions"*, Inside Indonesia, 13 March 2017, accessed on 10 December 2023, https://www.insideindonesia.org/no-durable-solutions; Savitri Taylor and Brynna Rafferty-Brown, "Difficult Journeys: Accessing Refugee Protection in Indonesia," *Monash University Law Review* 36, no.3 (2010): 138; Dio Herdiawan Tobing, "Indonesia's Refugee Policy – Not ideal But A Step in the Right Direction," *The Conversation*, 7 September 2017, accessed on 15 November 2022, https://theconversation.com/indonesias-refugee-policy-not-ideal-but-a-step-in-the-right-direction-75395.

[24]Dyah Dwi Astuti and Suharto, "Komnas HAM, UNHCR Continue Protecting Refugees' Rights," *Antara News*, 5 July 2019, accessed on 15 November 2022, https://en.antaranews.com/news/128432/komnas-ham-unhcr-continue-protecting-refugees-rights; Novianti, "The Implementation of Presidential Regulation Number 125 of 2016 on the Handling of International Refugees," *Negara Hukum* 10, no.2 (2019): 292.

[25]See Dewansyah and Nafisah, "The Constitutional Right to Asylum," 537.

treatment of refugees is reflected by the ongoing joint initiative between the government and UNHCR to establish the RSD process in the country. Hence, the latter oversees the overall procedural and decision-making of refugee credibility assessment, whereas the former operates in tandem to intercept irregular migrants entering the country.[26]

The legislations referred to above are also commonly referred to when discussing the quality of RSD, even though neither of them offers any detailed accounts of the operationalisation of RSD. Law No. 39 of 1999 is considered a safeguard law for those applying RSD in Indonesia as it prevents forced deportation under its non-refoulement clause. Nevertheless, a separate reading of Law No. 37 of 1999 may need to clarify the legality of asylum seekers in Indonesia as it made no distinction between asylum seekers, refugees, or stateless persons. Hence, according to Tobing, asylum seekers are more prone to be detained by Indonesian immigration as the authorities directly treat them as irregular migrants.[27]

To some, the Indonesian Presidential Decree No. 125 of 2016 alleviates many of the concerns above. It introduces the formal meaning of refugee at the national level, closely resembling the refugee definition carried by UNHCR when conducting RSD screening.[28] The Decree also solidifies the role of UNHCR Indonesia as the facilitator of the RSD process in the country.[29] Others call for more excellent room for policy improvement beyond the Presidential Decree. Missbach and Tan criticise Article 29 of the Presidential Decree for putting greater emphasis on placing prospective asylum seekers with twice-rejected

[26]Bureau of Democracy, Human Rights, and Labor of United States, "The 2020 Country Reports on Human Rights Practices: Indonesia," U.S. Department of State, 2020, accessed on 15 November 2022, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/indonesia/.

[27]See Tobing, "Indonesia's Refugee Policy".

[28]Article 1(1) of Presidential Decree No. 125 of 2016 defines 'refugee' as "foreigner who resides within the territory of the Republic of Indonesia due to a well-founded fear of persecution due to race, ethnicity, religion, nationality, membership of a particular social group, and different political opinions, and does not wish to avail him/herself of protection from their country of origin and/or has been granted the status of asylum-seeker or refugee by the United Nations through the United Nations High Commissioner for Refugees". Cf. Article 1(2) of the 1951 Refugee Convention; See also Mahardhika S. Sadjad and Max Walden, "The Nexus of Human Rights and Security in Indonesia's Approach to Refugees," *Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 2 October 2019, accessed on 15 November 2022, https://rli.blogs.sas.ac.uk/2019/10/02/the-nexus-of-human-rights-and-security-in-indonesias-approach-to-refugees/.

[29]See Dewansyah and Nafisah, "The Constitutional Right to Asylum," 549.

RSD applications -one from the first instance and the second through appellate review- into detention facilities and ultimately impose resettlement outcomes of either being deported or voluntarily repatriated to their [asylum seeker] country of origins. Here, the authors view that the Presidential Decree did not expand into the alternative recourse to detention in favour of treating detention as a primary migration management tool.[30] Separately, Kneebone appraises the Presidential Decree as a step in the right direction to incorporate refugees and asylum seekers as part of a 'refugee group' within the refugee regulatory landscape.[31] However, this paper finds the Decree to backslide in terms of offering durable solutions for refugees by removing the possibility of integrating themselves locally in Indonesia.[32] In the context of RSD, gaining refugee status in Indonesia post-Presidential Decree 125 of 2016 would restrict the individual to decide only between seeking resettlement in a third country or voluntarily repatriating to their country of origin.

Like many UNHCR-mandated RSDs, Indonesia RSD also faces persisting backlog problems, with UNHCR's pending caseload being significantly higher than the local UNHCR can process. The International Council of Voluntary Agencies – a network of NGOs operated in Asia Pacific- expressed great concern to UNHCR Indonesia and other UNHCR representatives across Asia-Pacific in 2017 for their collective underperformance in facilitating a consistent, fair, accessible RSD process across the region to displaced Rohingya fleeing from the mass Rohingya persecution in Myanmar.[33]

At the internal management level, Missbach and Sinanu have called attention to the understaffing problem in UNHCR Indonesia, citing how it would take

[30]See Missbach and Tan, "No Durable Solutions," 23.

[31]Susan Kneebone, "Is the 2016 Indonesian Presidential Regulation a Potential 'game-changer' on the Rescue of Rohingya Boat Refugees?," Kaldor Centre for International Refugee Law, 14 July 2020.

[32]Susan Kneebone, Antje Missbach and Balawyn Jones, "The False Promise of Presidential Regulation No. 125 of 2016?" *Asian Journal of Law and Society* 8, no. 3 (2021): 448 (431-450); For context, local integration is one of three long-term or durable solutions endorsed by UNHCR to resolve refugee issues. See UNHCR, "The 10-Point Plan: Solution for Refugees," *UNHCR*, June 2006: 186, accessed on 10 November 2022, https://www.unhcr.org/en-us/50a4c17f9.pdf .

[33]International Council of Voluntary Agencies, "NGO Statement on ASIA and the Pacific Agenda Item 3(A)IV", *Progressive Voice Myanmar*, 16 March 2017, accessed on 20 November 2022, https://progressivevoicemyanmar.org/2017/03/16/ngo-statement-on-asia-and-the-pacific-agenda-item-3aiv/.

at least one year to complete the RSD process with the current staff size.[34] The Human Rights Watch (HRW) also echoed the same concern. The international human rights advocacy group asserted that UNHCR Indonesia in 2013 fell short of its expected works and under-registered the country's total refugee population. Hundreds of migrant children showcased it stuck for months in 2013 at the local immigration detention centres waiting for UNHCR visitation.[35] There has yet to be a public confirmation from UNHCR Indonesia if their staffing issue, particularly in handling RSD, has been resolved. However, SUAKA's Handbook of Refugees and Asylum Seekers in 2018 suggests that it may take between two and six months before a decision can be reached.[36] One of the recent articles implies that the overall waiting period will remain grim in 2022. Mohammadi and Askary observe that with the global restriction caused by the global pandemic, RSD applications would see significant delays and turnback due to travel restrictions imposed by many countries of refugee destinations.[37] The authors further described that with a period of global restriction in migrant flow, an asylum seeker could see himself waiting from 8 to 13 years until both RSD and request for resettlement to a third country can be completed.[38]

Alternatively, some authors have speculated on the extraneous factors contributing to Indonesia's current RSD application backlog. Timmerman claimed that the backlog is an indirect consequence of Australia's border policies to block all RSD applications for asylum seekers who have tried to enter Australia by boat through Indonesia since July 2014.[39] Another work,

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[34]Antje Missbach and Frieda Sinanu, "Life and Death in Immigration Detention, Inside Indonesia," *Inside Indonesia*, 23 July 2013, accessed on 20 November 2022, https://www.insideindonesia.org/editions/edition-113-jul-sep-2013/life-and-death-in-immigration-detention.

[35]Alice Farmer and Kyle Knight, "Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia,: Human Rights Watch, 23 June 2013, accessed on 20 November 2022, https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia.

[36]JRS, Sandya Institute, UNHCR, *Know Your Rights: A Handbook for Refugees and Asylum Seekers,* 1st Ed (Online: SUAKA, 2018), 13.

[37]Sitarah Mohammadi and Sajjad Askari, "Refugees Live in Destitution in Indonesia: Years of Limbo and Suffering Lead refugees to protests for many weeks now for resettlement," Refugee Council of Australia, 10 January 2020, accessed on 20 November 2022, https://www.refugeecouncil.org.au/refugees-live-in-destitution-in-indonesia/.

[38]*Ibid.*

[39]Antonia Timmerman, "In Indonesia, desperation grows for refugees trapped in limbo for years, New Humanitarian," *The New Humanitarian*, 22 March 2021, accessed on 20 November 2022, https://www.thenewhumanitarian.org/news-feature/2021/3/22/in-indonesia-desperation-grows-for-refugees-trapped-in-limbo-for-years.

such as from Hirsch and Doig, went even further by claiming that the refugee population boom in Indonesia perpetrates the current backlog. The significant rise in the refugee population is allegedly due to the offshore policy enacted by the Australian government that funnel funds to IOM's operation in Indonesia, where the organisation subsequently provide monthly subsistence allowance to the asylum seekers as a trade-off for staying within Indonesia.[40]

The claims above, however, deserve further empirical scrutiny as the Mixed Migration Centre, on a separate occasion, released a report suggesting a significant reduction in refugee influx resettling to Indonesia, particularly from July 2014 and onwards.[41] The same report also describes the firmly held belief of many refugees they interviewed in Indonesia who treat the country as a viable transit point to enter Australia even after years of the Australian government's stance to reject any refugee claim made by boat people coming from Indonesia.[42] If the claim holds, many individuals who undergo the RSD process in Indonesia and later request resettlement in Australia would only find that the prospect of their resettlement to the latter is highly unlikely -thus putting them in indefinite transit in the former.

IV. THE GAP AND CALL FOR COMPARATIVE OVERVIEW

Doctrinal literature suggests that Indonesia is still searching for its 'ideal' RSD, even if a third-party agency of UNHCR primarily manages the process in question. The descriptive literature suggests a strong interplay between the three relevant legislations (i.e., Law No. 37 of 1999, Law No. 39 of 1999, and the Presidential Decree No. 125 of 2016) with the quality and appeal of participating in the RSD process. Ascribing to this trend, it would only be logical to dedicate this article to investigating the best practices of RSD going forward for Indonesia.

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[40]Asher Hirsch and Cameron Doig, "Australia's other "Offshore policy" – containing refugees in Indonesia through the International Organization for Migration," The University of Melbourne, 27 November 2019, accessed on 20 November 2022, https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/australias-other-offshore-policy.

[41]Mixed Migration Centre, "A Transit Country No More: Refugees and Asylum Seekers in Indonesia", *MMC Research Report*, May 2021: 14, accessed on 20 November 2022, https://mixedmigration.org/wp-content/uploads/2021/05/170_Indonesia_Transit_Country_No_More_Research_Report.pdf.

[42]*Ibid.,* 16.

Thus far, the components or practices of RSD could vary country by country. It could also be distinct or depend on whether it was self-regulated by a country or conferred to a third-party agency such as UNHCR. We also know that the current iteration of the RSD process has remained the same, at least publicly, since the enactment of Presidential Decree No. 125 of 2016. The Decree has introduced a noticeable change regarding the erasure of RSD prospects to seek local integration in Indonesia. Such change means that gaining refugee status by UNHCR in Indonesia would carry lesser protective value than other countries still upholding the three commonly suggested durable solutions (i.e., voluntary repatriation, local integration, and resettlement) for refugees.

In our search for viable reform, this article argues that much is to be learned about the RSD process and its subsequent outputs outside of Indonesia, particularly among the countries in the Asia-Pacific region. UNHCR Indonesia should strive to amend their current RSD practices to correspond with the laws and the extraneous change caused by global pandemics. This article compares the RSD process of some Asia-Pacific countries, namely Malaysia, Thailand, and Australia. The nomination of the Asia-Pacific region is preferred due to the regional context of Southeast Asian Countries, and the selection of Australia is driven by the strong ties between Indonesia and Australia about their collective pursuit to restrict asylum seekers from entering Australia.

The RSD process in Malaysia, Thailand, and Australia are appealing cases for RSD regimes around Asia-Pacific. Thailand and Malaysia share similarities with Indonesia, which has not ratified the 1951 Refugee Convention and its 1967 Protocol. This similarity provides a shared identity where all three countries have no laws assigned to deal with refugee rights as required by the 1951 Refugee Convention. All three countries, including Indonesia, are also somewhat exposed to refugee population influx, with Thailand hosting the largest refugee population of 671,888 people, 186,640 from Malaysia, 38.513 filing RSD applications for Australia resettlement, and Indonesia with roughly 14,500 UNHCR-registered refugees.[43]

[43]For the Southeast Asian refugee population, See Regional Summary: Asia and the Pacific, UNHCR Global Report 2021, https://reporting.unhcr.org/asia-pacific; For Australian asylum seekers data, see Statistics on people seeking asylum in the community, https://www.refugeecouncil.org.au/asylum-community/.

From their political standing, Indonesia and Thailand self-identified as 'transit' countries despite hosting many stranded refugees. For this reason, Indonesia and Thailand do not entertain the possibility of certified refugees integrating themselves locally into their regions.[44]As for Malaysia and Australia, the two countries have a long history of integrating the refugee population into their respective territories.

V. COMPARATIVE STUDIES FROM OTHER JURISDICTIONS

V.1. Malaysia

Malaysia presents itself as a unique refugee environment where it has become one of the primary hosts of the largest stateless group in the world, the Rohingya people. Malaysia has been one of the popular destinations for Rohingyas and Muslim asylum seekers in their journey to seek refugee status. Malaysia is preferred as either a transitional point or a country of destination. Jeong hints that the appeal to enter Malaysia can be based on three assumptions. 1) Malaysia is close to Myanmar; 2) Malaysia offers better job prospects than Myanmar due to a stable government and relatively good national economy; and 3) Malaysia, with a predominantly Muslim population, shares a religious identity similar to that of Rohingyas.[45]

The influxes of displaced Rohingya in Malaysia represent the importance of attaining refugee certification. The persecuted ethnic group faced slightly different obstacles when seeking legal protection in other countries compared to other ethnic refugee groups from Myanmar, such as the Karen, Mon, and Chin. For starters, in their departure from Myanmar, most Rohingya individuals are mostly perceived as *de facto* stateless. For years, the Myanmar government has been known to systematically exclude Rohingya ethnic groups from the list of national races (*taingyintha*), ergo making it practically difficult for Rohingya descendants to prove their nationality ties with the Myanmar citizenship

[44]Committee for the Coordination of Services to Displaced Persons in Thailand, "Analysis of Gaps in Refugee Protection Capacity in Thailand," UNHCR, 2006: 6, https://www.unhcr.org/457ed0412.pdf.

[45]Yoojeong Jeong, "Diverging Response to the Rohingya Refugee Crisis since 2017 Military Crackdown: Comparative Analysis of Bangladesh and Malaysia," *The Korean Journal of International Studies* 19, no.1 (2021), 133-165.

system.[46] Hence, when stateless Rohingyas receive refugee status from RSD in Malaysia, it is not only a matter of seeking a durable refugee solution but also giving them rights as individuals, in this context, refugee rights.

Notwithstanding the asylum seekers' perception of the values of refugee certification in Malaysia, the country itself is not a party to the 1951 Refugee Convention. It has yet to formulate laws to protect refugee rights. Without legislation to regulate the refugee registration process, UNHCR thus becomes the de-facto nationwide facilitator of RSD in Malaysia.[47] Those seeking to undertake the RSD process must visit the UNHCR office in Kuala Lumpur. The process, in general, shared similarities to the UNHCR-mandated RSDs elsewhere. It started with asylum seekers being asked to fill out RSD application forms containing personal details and to provide supporting documents of their home origins. After completing the forms, an interview session will be arranged by UNHCR officials to determine further the validity of the prescribed information of the applicants.

The RSD process concluded with positive (approval) or negative (rejection) results on the RSD application. For a negative result, the asylum seekers will be informed of the reason(s) for their result, with the possibility of challenging the result via an appeal procedure 30 days after the result is disclosed. Ultimately, individuals passing the RSD would receive a UNHCR-issued identification card with the status hinting them as UNHCR's 'Person of Concern' (PoC). As of December 2021, UNCHR confirmed at least 103,380 documented Rohingyas; these Rohingyas inherently are those who have already been validated through the RSD process.[48] The refugee ID card issued by the UNHCR does not grant legal protection to its holder. However, in 2017, the cards were used to access cheaper healthcare in local hospitals and clinics in Malaysia under the Refugee Medical Insurance Scheme (REMEDI) insurance scheme. Unfortunately, the scheme was suspended due to mismanagement as of 16 June 2018.[49]

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[46]Natalie Brinham, "Looking Beyond Invisibility: Rohingyas' Dangerous Encounters with Papers and Cards," *Tilburg Law Review* 24, no.2 (2019): 158.

[47]Dina Iman Supaat, "The UNHCR in Malaysia: The Mandate and Challenges," *South East Asia Journal of Contemporary Business, Economics and Law* 5, no.4 (2014): 23-29.

[48]"Malaysia: Figure at Glance," UNHCR Malaysia, accessed 28 December 2022, https://www.unhcr.org/figures-at-a-glance-in-malaysia.html.

[49]Asia Pacific Refugee Rights Network, "Country Fact Sheet: Malaysia," Asia Pacific Refugee Rights Network, September 2018: 6.

It is also worth noting that from 2017 onwards, the Malaysian government will require any UNHCR PoC to register themselves on the government's online refugee database, the Tracking Refugees Information System (TRIS).[50] This registration scheme would record individuals' data and biometrics, which are then tied into a government-issued tracking card known as MRC (Malaysia Refugee Card). Registration to TRIS does not warrant individuals with refugee-specific rights. However, the proponent of this registration scheme believes that it may help the government independently monitor and track refugees currently residing in Malaysia, lowering the risk of them being arrested and detained by local authorities.[51]

The fundamental takeaway here is the distinct practice of Malaysian RSD to introduce two regimes of certification, one issued by UNHCR and the government issuing another to monitor refugee populations. The RSD system set by UNHCR Malaysia serves two purposes. One is to validate asylum seekers as refugees, and the other is to provide preliminary documentation, which can be further verified by the government's TRIS scheme, a built-in refugee tracking database set by the Malaysian government back in 2017. If seen from a personal safety standpoint, getting a UNHCR ID is essential for asylum seekers because if the arrest were made, the UNHCR staff would most likely have formal leeway to reach and intervene with its PoC in detention in comparison to those who are undocumented. At least, that was the assumption until Malaysian Home Minister Hamzah Zainuddin made remarks in September 2022 that he had planned to use government-issued MRC as the only valid ID card in the country.[52]

V.1.A. Legal Foundation

As stated previously, Malaysia is neither a state party to the 1951 Refugee Convention nor ratified the 1954 Convention relating to the Status of Stateless Persons. It means that Malaysia is not bound to distinguish different types of non-citizens, such as asylum seekers, refugees, stateless, or migrants. Any non-

[50]MalayMail, "UNHCR Cardholders given until 30 September to get MRC card," MalayMail, 2 August 2017, accessed 28 December 2022, https://www.malaymail.com/news/malaysia/2017/08/02/unhcr-cardholders-given-until-sept-30-to-get-MRC-card/1434479.

[51]"About Us," TRIS MRC, accessed 28 December 2022, https://myrc.my/about-us/.

[52]Dineskuma Ragu, "MRC for refugees? Other countries will not accept it, says MP," Free Malaysia Today, 8 September 2022, accessed 28 December 2022, https://www.freemalaysiatoday.com/category/nation/2022/09/08/MRC-for-refugees-other-countries-wont-accept-it-says-mp/.

citizen who enters the country without a valid passport and entry permit will indiscriminately receive the status of illegal immigrant under Section 6(3) of the 1956/63 Malaysian Immigration Act. This lack of a nuanced approach to defining non-citizens closely resembles the current Indonesian immigration Law (Law No. 6 of 2011) -at least until Indonesian Presidential Decree No.125 of 2016 clarifies the meaning of refugee at the national level. Like Indonesia, the absence of existing national refugee laws also means there is no prescription for the RSD process other than the mandate agreed upon through cooperation agreements between Malaysia and UNHCR. The UNHCR Malaysia, therefore, designed its RSD in accordance with the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

Interestingly, the Malaysian legal system recognises limited rights for the non-citizen residing in their country. The country's highest law source, the 1957 Federal Constitution of Malaysia, recalls nine fundamental liberties tied to any Individual, some of which could be extended to non-nationals. The rights are as follows:

1) Prohibition on arbitrary deprivation of life or personal liberty (Article 5)
2) Prohibition on slavery and forced labour (Article 6)
3) Protection from retrospective criminal laws and repeated trials (Article 7)
4) Equality before the law and non-discrimination on the grounds of religion, race, descent, place of birth or gender (Article 8(1) and (2))
5) Prohibition of banishment and right to freedom of movement (Article 9)
6) The right to freedom of speech and expression, freedom of association and peaceful assembly (Article 10)
7) Freedom of religion (Article 11)
8) Rights with respect to education (Article 12); and
9) Rights to private property (Article 13)

Some of the fundamental liberties referred to above, such as Articles 8(2), 9, 10, and 12 of the 1957 Federal Constitution, explicitly protect Malaysian citizens and are not directly applicable to foreigners. Other rights, such as the right of arrested or detained individuals to be immediately brought before a court

(*habeas corpus*), are extendable to non-citizens but offer different constitutional treatment from their Malaysian counterparts. For instance, Malaysian citizens should generally be brought before a magistrate no longer than 24 hours of arrest as opposed to non-citizens, who may be detained for up to 14 days before being tried by the local magistrate.

The landmark Taj Mahal in 2014 ruling also interprets that the principle of equal protection of laws set under Article 8(1) of the 1957 Federal Constitution would equally cover the non-citizens of Malaysia. The ruling acknowledges explicitly that all persons, including foreigners with or without work permits or passes, may legally contest their employer, who may unjustly dismiss them from their employment position.[53] Other non-citizen rights are also contained within the Immigration Act 1959/63. These rights mainly concern foreigners' ability to challenge immigration-related decisions made by immigration authorities or judiciaries, for instance, the decision on refusal of entry, cancellation of travel passes, or decision to deport non-citizens.

V.1.B. Related Issues

Despite the claim of a steady decline of asylum seekers entering Malaysia since 2013, UNHCR Malaysia, like Indonesia, still struggle to process the massive caseload of RSD applications it has received for years. The UNHCR suggests that asylum seekers in Malaysia should expect the RSD process to take up to two or three years.[54] Noting that all asylum seekers bear the status of illegal immigrant under the national immigration laws, this waiting period would inevitably put asylum seekers at risk of being arrested, detained, or, worse, forcefully deported to their respective countries of origin.[55] There were also reported instances from 2016 to 2018 where asylum seekers of Rohingya ethnicities or who came from Myanmar were denied access to RSD. According to the instruction set by the government to UNHCR, the organisation may offer RSD to people from Myanmar if it has received a referral from local NGOs, if it has, to a specific capacity, documented in the UNHCR database, and if the person has been acquitted from local immigration detention centre.[56]

[53]Ali Salih Khalaf v Taj Mahal Hotel, 4 ILJ 15, (2014): 9.

[54]UNHCR, "Malaysia: Progress Under the Global Strategy Beyond Detention 2014-2019, Mid-2016," UNHCR, 2016, https://www.unhcr.org/57b587617.pdf.

[55]*Ibid*.

[56]See Asia Pacific Refugee Rights Network, "Country Fact Sheet: Malaysia,".

Access to RSD in Malaysia may be quite challenging at times. The Malaysian government in 2020 had denied access to some asylum seekers to visit UNHCR Malaysia to process their RSD application by arresting them over the concern of the COVID outbreak. Under the same public health policy, the government had similarly restricted the UNHCR officials from directly assisting those asylum seekers in detention.[57].

The recent initiative to record refugees *en masse* under the TRIS scheme may also reduce the credibility of UNHCR-issued refugee certifications or ID cards. Malaysian Home Minister has endorsed its counterpart, the MRC card, as a single ID card to identify refugees in Malaysia, even though MRC has yet to be formally recognised by those countries that currently only accept refugee certification bestowed by the UNHCR offices. With the current approach, Asylum seekers would still be at risk of getting on the opposite ends of the national immigration policy regardless of whether they possess UNHCR certificates. It does not help that the Malaysian Immigration Department has had negative experiences verifying the UNHCR cards, where a handful were forged or illegally purchased through intermediaries.[58]

V.2. Thailand

Thailand has a long-standing history of dealing with refugees. The country lies at the centre of Southeast Asia's mainland region. It has become the preferred passing point for mass influxes of refugees, from hosting the most prominent Cambodian refugees in the 1975 Cambodia-Vietnamese War to becoming an escape route for Rohingya people fleeing persecution from the Myanmar military in 2013 and 2017, respectively.[59] Its relatively prosperous and stable economy makes Thailand a preferred economic destination for its

[57]Ananthalakshmi and Mei Mei Chu, "Malaysia Denying UN Access to Detained Asylum Seekers, the Agency Says," REUTERS, 11 November 2020, accessed on 10 November 2022, https://www.reuters.com/article/malaysia-migrants-idUSKBN27R13P.

[58]The Star, "Fake UNHCR and MRC cards selling for RM200", the Star, 25 October 2019, accessed on 10 November 2022, https://www.thestar.com.my/news/nation/2019/10/25/fake-unhcr-and-MRC-cards-selling-for-rm200; The Star, "Agents bringing in Rohingyas also helped obtain UNHCR cards, says Immigration DG," the Star, 17 September 2022, accessed on 10 November 2022, https://www.thestar.com.my/news/nation/2022/09/17/agents-bringing-in-rohingyas-also-helped-obtain-unhcr-cards-says-immigration-dg.

[59]Hassan Al Imran, "The Plight of Boat Refugees to Thailand", *International Journal on Minority and Group Rights* 29, no. 5 (2022): 6.

neighbouring migrants in Cambodia, Laos and Myanmar.[60] Because of this, the management of refugees in Thailand tends to blur the distinction between asylum seekers who actively flee from persecution and those entering the country for economic reasons.[61] Comparable to Malaysia, Thailand also faced a high influx of the Rohingya population coming directly from their land borders. However, in Thailand's case, asylum seekers coming from Myanmar are designated by the Royal Thai Government (RTG) in Government detention camps, as opposed to Malaysia, which settled those displaced persons in urban areas of the country. Thailand's core immigration law -the Immigration Act of 1979- is somewhat restrictive by imposing an indefinite detention duration for illegal immigrants.[62] Like its Indonesian and Malaysian[63] counterparts, The Immigration Act bears no distinction on either asylum seekers or refugees, with the two being indiscriminately perceived under Thailand immigration law as illegal immigrants.

UNHCR Thailand primarily manages Thailand RSD in Bangkok. However, to monitor the unprecedented refugee influx at the Thailand-Myanmar borders in 2013, the RTG also developed its refugee screening process to assess the credibility of asylum seekers confined in the nine camps spread across the borderlands. The officials from the Ministry of Interior manage the screening process in these camps. While not operating within the UNHCR code of conduct, these officials have undergone joint RTG-UNHCR verification exercises to pinpoint the validity of refugee claims of Myanmar asylum seekers.[64] Today, Thailand has two separate refugee screening regimes. One was conducted by UNHCR, subject to international refugee protection criteria, and another was conducted at the campsites, which have no bearing on UNHCR and focus solely on RTG efforts to monitor refugee presence at their borders.

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[60]"Migration Context," IOM Thailand, accessed on 10 November 2022, https://thailand.iom.int/migration-context#:~:text=Because%20of%20its%20relatively%20prosperous,on%20migrant%20workers%20for%20manpower.

[61]UNHCR, "Case Fact: Thailand," UNHCR, 2011, accessed on 10 November 2022, https://www.unhcr.org/4cd970109.pdf.

[62]See Thailand's Immigration Act of 1979, Section 20.

[63]For Indonesia, see the Law No. 6 of 2011 concerning Immigration, Articles 8 & 9; For Malaysia, see the 1956/63 Malaysian Immigration Act, Section 6(3).

[64]Jittawadee Chotinukul, "Thailand and the National Screening Mechanism: A Step Forward for Refugee Protection?," *Global Migration Research Paper* 25, (2020): 3, accessed on 10 November 2022, https://repository.graduateinstitute.ch/record/298475?_ga=2.265625734.82012771.1703972986-1922099589.1703972986.

V.2.A. Legal Foundation

Thailand is a non-signatory to the 1951 Convention. However, unlike Malaysia, Thailand's Constitution did not refer to the fundamental liberties ascribed to its non-nationals. Two legislative products set the country's legal treatment of foreigners: the Nationality Act 1965 and the Immigration Act 1979. Non-nationals or individuals who do not possess Thai nationality shall be treated as immigrants under the Nationality Act (Section 4), and these 'immigrants', provided they are entering the country without valid permission or residing in Thailand with an expired or revoked permit, shall be detained and may be repatriated under the Immigration Act (Section 54). Much like the baseline of immigration laws of Indonesia and Malaysia, there is no distinction between asylum seekers, refugees, stateless, and migrants. It means the status of refugee or possession of refugee certification from a UNHCR-mandated RSD bears no protective legal power before Thailand's legal system. Bear in mind that this might change with introducing a national screening mechanism.

In December 2019, the RTG passed the Office of the Prime Minister Regulation on the Screening of Aliens who Enter the Kingdom and cannot Return to the Country of Origin (BE 2562). This Regulation endorses the creation of a universal national screening mechanism to assess the credibility of a refugee claim. This renewed screening would later operate by the Protected Person Screening Committee, upon which the asylum seeker shall submit their asylum seeker form (Clause 16), Reviewed on the first instance by the Committee (Clause 20) with the possibility to appeal (Clause 17). What makes this different from UNHCR-led RSD is the assignment of the status 'protected person' instead of refugee. While threading in the same group of people –the people who are unable or unwilling to return to their home origin due to reasonable fear of persecution- the use of the term protected person seems to be a leeway to indirectly bind Thailand to the obligation to protect refugee as prescribed by the 1951 Refugee Convention.

V.2.B. Related Issues

Thailand's RSD problems can be grouped into two timeframes: pre-national and post-national screening mechanisms. Before introducing the pre-national screening mechanism, Thailand's RSD system was divided into two regimes,

which, to no surprise, caused an overlap of authority between the UNHCR caseworkers in Bangkok and RTG caseworkers operating in campsites. This issue was apparent when UNHCR Thailand was barred from investigating the RSD application of Rohingya people detained in campsites since 2017.[65] Accordingly, anti-Rohingya political rhetoric in Thailand during the 2017 Rohingya crisis deemed RTG to perceive Rohingya not as a population fleeing persecution but as economic migrants illegally trespassing the Kingdom.[66] From that point, RTG has clarified that its screening process, carried out by UNHCR Thailand, has no association with RSD. The underlying concern is that asylum seekers in these camps can be forcefully returned to their country of origin without even managing to access the UNHCR process in Bangkok, assuming they received a negative refugee credibility assessment set by the Myanmar authority.

The introduction of national screening mechanism regulation also elevates the issue of relevancy for the already-existing RSD decisions by UNHCR Thailand, be it for asylum seekers whose RSD decisions are still pending reviews or those who have already been granted refugee status but are still waiting for their resettlement. Clause 30 of the Regulation for National Screening Mechanism warrants the transition from UNHCR-led RSD to a national screening process by ensuring that previous determinations made by UNHCR shall be considered. However, it remains to be seen how RTG's recognition of a 'protected person' could gain the same international recognition as the refugee certification carried out by UNHCR. It would be undesirable for asylum seekers to undergo the same credibility assessment process because the claim of 'protected person' asserted by Thailand's national screening process holds no merit to international refugee protection.

The decision made by the Thai government to thoroughly reject Rohingya claims as a refugee in 2017 also set a harrowing precedent where RTG could limit the access of their new screening process to specific ethnic groups, races, or religious groups. The possibility of the Screening Committee revoking 'protective status' also raised concern for the longevity of such recognition. The HRW, back in 2012, recalls the policy imposed by the government to deter refugees from

[65]See UNHCR, "Case Fact: Thailand,".

[66]Bilal Dewansyah and Irawati Handayani, "Reconciling Refugee Protection and Sovereignty in the ASEAN Member States: Law and Policy Related to Refugee in Indonesia, Malaysia and Thailand," *Central European Journal of International and Security Studies* 12, no.4 (2018): 473-485.

leaving their camps by threatening to arrest and forfeit the refugee status of any escapees.[67] The concerns associated with the national screening mechanism are purely conjecture since the Thai government has yet to implement its national screening process.

V.3. Australia

Australia's RSD model is extensive. It managed to implement its own RSD self-sufficiently without relying on heavy involvement from UNHCR. The country generally offers two RSD processes: a regular track and a 'fast track. In a regular scheme, the RSD is conducted onshore or within Australia. This process is offered only to those individuals who enter Australia legitimately with a valid visa and subsequently request a protection visa from the Australian Department of Immigration and Citizenship (visa subclass 200). This process is separate from the request for resettlement to Australia. Refugee resettlement can only be taken outside of Australia with a referral from UNHCR (visa subclass 201 or visa subclass 200 if the person referred is in immediate danger). As such, refugee certification issued by UNHCR, which can be seen from UNHCR-mandated RSDs in Indonesia, Malaysia, and Thailand, is a prerequisite when asylum seekers in those countries seek to resettle in Australia.

What is interesting from an onshore process is the inclusion of a person, not a refugee, but objectively "under real risk of significant harm if he or she to be returned to its country of origin" to apply for the protection visa.[68] The latter protection was established to accommodate Australia's complementary protection obligations coming from other non-refugee human rights treaties such as the Convention against Torture and Other Cruel or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. As a final product of the RSD, a protection visa could be regarded as formal recognition by Australia of one's status as a

[67]Human Rights Watch, "Ad Hoc and Inadequate Thailand's Treatment of Refugees and Asylum Seekers," Human Rights Watch, 2012: 8, accessed on 10 November 2022 www.hrw.org/sites/default/files/reports/thailand0912.pdf.

[68]"Refugee and Humanitarian Program," Australia Government Department of Home Affairs, accessed 28 December 2022, https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/about-the-program/seek-protection-in-australia/australia-protection-obligations.

refugee or as a person Australia is obliged to protect under its complementary protection obligations.

Fast-track RSD, on the other hand, is a condensed RSD process conducted offshore for those asylum seekers who are detained in offshore detention centres for entering the country without a valid visa.[69] Fast-track RSD is the only available means to gain refugee status in Australia for those who violate Australian immigration laws unless the Minister, by discretion, allows them to undertake the regular track.[70] Despite being called fast-track, asylum seekers may take several years to initiate their refugee claims under this process. This excessive delay is because the Australian government would only grant access to such RSD once (4) four-year detention period in the offshore detention centres has been completed.

The accelerated RSD process also comes with a few limitations. First, asylum seekers with rejected refugee claims could not request a 'merits review' from the Migration and Refugee Division of the Administrative Appeals Tribunal. In exchange, their cases may be reviewed by the Immigration Assessment Authority, which offers a more expedient review but restricts specific defence processes such as interviews or presenting new circumstantial evidence. Second, a successful fast-track RSD would yield a temporary protection visa (TPV). The TPV comes with its shortcomings. It is only valid for staying in Australia for up to (3) three years, with no opportunity to reapply for a permanent protection visa and no possibility of returning to the home country or sponsoring family to visit the country. It is possible to receive a longer stay duration of up to (5) five years if asylum seekers instead apply for a Safe Haven Enterprise Visa (SHEV). However, this is only situationally possible when the applicants have worked or enrolled for full-time study in educational institutions within Australia's excised territories.[71]

V.3.A. Legal Foundation

Australia's refugee laws revolve around four instruments: the Migration Act 1958, the Migration Regulations 1994, the Minister for Immigration's policy

[69]Migration Act, Section 46A.

[70]Migration Act, Section 46A (3).

[71]Legal Aid ACT, "Temporary Protection Visas and Safe Haven Enterprise Visas," Legal Aid ACT, N/A, accessed on 10 November 2022, https://www.legalaidact.org.au/sites/default/files/files/publications/TPV_and_SHEV_Jan19_0.pdf.

guidelines, and the Procedures Advice Manual. The 1958 Migration Act have undergone several amendments that affect the treatment of asylum seekers. The 1989 amendment (Migration Legislative Amendment Act 1989) established a detention procedure for those asylum seekers or refugees who arrived unlawfully on a boat into Australia. In contrast, the amendment in 1992 would require mandatory detention for all persons entering the country without a valid visa, even those asylum seekers whose claim to remain in Australia is pending review. The 1994 Migrant Regulations separately describe the type of visas available for asylum seekers and other decisions related to refugee status, while the Procedural Advice Manual is intended to provide procedural and policy guidance to officers applying the Migration Act and the Migration regulations.[72]

Australia controls the entry of all persons seeking to enter the country through the visa regime set by the Migration Act 1958.[73] In the context of RSD, Australia's issuance of refugee status after the refugee determination process has been concluded creates a legal status that applies only to Australia in the form of special refugee visas. Currently, the Australian government offers six types of visas for refugee or non-national protected persons: 1) a refugee visa (subclass 200); 2) in-country Special Humanitarian (subclass 201); 3) emergency rescue (subclass 202); 4) Woman at Risk (subclass 204); and two others available from fast-track RSD: 5) Temporary Visa Protection (subclass 785) and Save Haven Enterprise Visa (subclass 790).

Furthermore, because Australia's RSD decision falls under the administrative decision category, asylum seekers can appeal their adverse decision through judicial reviews. Here, judicial reviews play a big part in shaping, for better or worse, the practice of RSD in Australia. For instance, the High Court ruling in *MIEA v. Guo & Anor* in 1997 outlines the application of four elements that determine a refugee as laid down under the 1958 Migration Act –a by-product of the 1951 Refugee Convention.[74] One key takeaway in the ruling was that

[72]Minister for Immigration & Multicultural Affairs v. Ndege, FCA 783, Australia: Federal Court, 11 June 1999: 45, https://www.refworld.org/cases,AUS_FC,3ae6b7630.html.

[73]Sergio Carrera, et al., "Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lesson Learned and Feasibility for the EU," *Open Society of European Policy Institute*, (2018): 11, accessed on 10 November 2022, https://cdn.ceps.eu/wp-content/uploads/2018/09/OSI%20009-18%20Offshoring%20asylum%20and%20migration.pdf.

[74]Cf. The 1951 Refugee Convention, Article 1A (2); Minister for Immigration and Multicultural Affairs v. Guo Wei Rong & Anor, HCA S151, 1996: 105, https://www.refworld.org/cases,AUS_HC,3ae6b703c.html.

caseworkers need to determine individual claims to fear persecution rationally, 'the fact that a person was dealt [harm] lightly in the past does not guarantee the same treatment in the future.[75] In the same year, *MIEA v. Singh* (1997) also weighed in on the relevant time an assessment of refugee claim can be made to which the High Court clarifies only at the time when a decision is made, not at the time the asylum seekers left the country or when the application is lodged.[76]

V.3.B. Related Issues

For a policy intended to manage incoming asylum seekers to Australia better. The implementation of fast-track RSD has been controversial for the well-being of asylum seekers. The fast-track RSD is part of the policy parcel from Australia OSB policies. Asylum seekers who were intercepted at sea by the Australian authorities would have no say if they can directly apply for the fast-track RSD process. Instead, they would be detained in detention facilities operated in the excised territories or directly forced to repatriate to their initial departure points. The latter option may infringe Australia's international obligation to respect the non-refoulment principle of the 1951 Refugee Convention since it was involuntary and may put asylum seekers' lives or freedom at risk as they were returned to their respective countries of origin. It is worth noting that this is not always the case, as the immigration authority, after case-by-case consideration, may offer the possibility to apply for fast-track RSD. However, the fact remains that RSD accessibility is highly dependent towards the authority's discretion.

Australia's offshore refugee management has been historically contentious. In 2013, Australia was blamed for transferring asylum seekers to detention facilities in Nauru and Papua New Guinea, even though such deployment was unsupported by a diplomatic assurance by both countries to indicate that the transferred individuals would not be forced to return to their countries.[77] Since then, UNHCR has also been openly concerned with the use of fast-track RSD as a means to deter asylum seekers offshore. This RSD process, in UNHCR's view, relinquished the ability of asylum seekers to receive free legal assistance,

[75]See Minister for Immigration and Ethnic Affairs v Guo Wei Rong and Anor.

[76]Singh v. Minister for Immigration and Multicultural Affairs v. Singh, HCA 1653, Australia: Federal Court, 27 November 2001: 7, accessed on 10 November 2022, https://www.refworld.org/cases,AUS_FC,47fdfb33d.html.

[77]Daniel Gezelbash and Mary Crock, "Asylum Seeker and Refugee Policy in Australia Under Abbott Government," *Global Policy,* (2013).

removed the prospect of permanent residency, and restricted asylum seekers from reuniting with their family members as a result of them being detained offshore in Australia excised territories.[78] In a study conducted by Momartin and Others (2006), it is suggested that the policy separating those who can access permanent protection visas and those who may only request a temporary one has created a discrepancy in stress levels. Individuals applying for temporary protection visas demonstrate higher scores of anxiety and post-traumatic stress disorder compared to those potentially eligible for a permanent visa.[79]

Finally, there are doubts about decision-makers ability in Australia's offshore RSD to produce a fair and partial refugee credibility assessment. Conceptually, the fast-track RSD needs to be better than the regular-track RSD without some procedural components. In the appeal process facilitated by the immigration Assessment Authority, most of the information the appellate decision-makers receive comes primarily from data collected from when the application was lodged. This appeal is without the possibility of an interview, and it is commonplace that the asylum seekers could present no new evidence. As a result, asylum seekers are burdened with gathering every piece of evidence to support their claim in the initial RSD review and hope that the subsequent appellate review would find the previously collected evidence sufficient to warrant the overturn of the previous RSD decision. This inquiry process does not favour refugee conditions since multiple conditions could affect asylum seekers' ability to present evidence.[80] Consider, for example, short-term memory loss, the emergence of past trauma, language barrier, or even fear of disclosing sensitive information such as sexual orientation. The high-stakes nature of fast-track RSD is feared to escalate these conditions further.

[78]"Monitoring Asylum in Australia," UNHCR, accessed 28 December 2022, https://www.unhcr.org/au/monitoring-asylum-australia#:~:text=Australia%20has%20a%20national%20asylum,human%20rights%20of%20asylum%2Dseekers.

[79]Shakeh Martin, et al, "A comparison of the mental health of refugees with temporary versus permanent protection visas," *Medical Journal of Australia* 185, no.7 (2006): 357-361.

[80]Jesuit Refugee Service, "A fair refugee status determination process for people seeking asylum in Australia," Jesuit Refugee Service, June 2021: 2, accessed on 10 November 2022, https://aus.jrs.net/wp-content/uploads/sites/20/2021/07/Fair-Process-Policy-Brief-June-2021_Updated-1.pdf.

VI. LESSONS FOR INDONESIA RSD

Exploring the most viable RSD for Indonesia is a challenging ordeal. Comparative oversights expose us to different styles of RSD along with potential issues that come along with it. This section reviews the state practices described above and their potential for the following themes. One is to improve refugee documentation in Indonesia better. Two, to further enhance close cooperation between the Indonesian government and non-state parties. Third, to better promote durable solutions for refugees. Moreover, lastly, to ensure the RSD process is just and efficient.

VI.1. Improving Refugees Documentation

One of the common concerns directed at RSD is related to transparency and the transmission of information between government authorities, as immigration control enforcers, and UNHCR, as the institution bestowing the status 'protected person' recognised under the 1951 Refugee Convention. For countries such as Indonesia, Malaysia, and Thailand, the sharing of refugee documentation is critical given that none of the countries was party to the said Convention, hence under no obligation to legitimise the UNHCR card and the status of 'protected person' linked to the card. On the government's end, the Indonesian refugee documentation process is organised by the Indonesian Immigration Authorities, which is extracted from a series of local Immigration Detention Houses spread across the nation. However, this is separate from UNHCR Indonesia's in-house documentation, which stems from the screening of RSD applications.

The Malaysian situation illustrates that even when distancing itself from the RSD process, the government could still take advantage of the RSD operated by UNHCR to empower the nation's refugee tracking scheme, TRIS. If the book follows the Malaysian TRIS procedure, one could assume that every refugee who received refugee certification from UNHCR could subsequently register themselves in TRIS. Malaysia's model of supporting two-layer registration between UNHCR's RSD Database and, later, the Government TRIS Database may be implemented in Indonesia.

From a legal standpoint, there has been distinct recognition of different refugee datasets hinted at by Presidential Decree No. 125 of 2016. First is the

personal information gathered by the Head of the local Immigration Detention Centre as a basis to issue identity cards endorsed by the Immigration authorities (Article 15), and then there are various types of data recorded by UNHCR Indonesia; this includes information on those participating in RSD process, those who received approval for resettlement in third party country, and those who opted for voluntary repatriation (Article 42). With this legal foundation in data collection, what is currently missing is the concerted effort between the Indonesian immigration authority and UNHCR Indonesia to develop a joint tracing system for refugees participating in RSD, those who passed, failed, or are currently undergoing the screening process.

However, the synergy between these registration procedures also presents cautionary tales if it is to be implemented in Indonesia. In positioning TRIS registration as the follow-up process to RSD, the government would rely heavily on the outputs of RSD-registered persons. Hence, for every single backlog application of RSD, there will be an equal amount of unregistered displaced individuals in TRIS. In contrast, RTG of Thailand tries to separate its refugee documentation from UNHCR by creating a government-run RSD throughout the refugee campsites in Thai Myanmar borderlands.

By asserting that anyone who is not registered to the government's refugee registration system is an "illegal immigrant", the Malaysian government indirectly puts asylum seekers who are about to or whose RSD application is pending under review by UNHCR to be at risk of arrest, detention, or deportation. Thus, it is affecting their prospect of attaining refugee status. The same goes for those already declared refugees by UNHCR Malaysia but had to wait until the organisation renewed their expired IDs. The interplay between UNHRC-mandated RSD, the TRIS registration, and Malaysia's draconian immigration laws has put forth an enigma where the government put greater focus on creating a highly reactionary immigration control towards unregistered refugees but fall short of creating an environment where asylum seekers could safely register themselves. The government has also expressed little interest in offering possible assistance or coordination to alleviate the UNHCR backlog of RSD application backlog. As a result, it promotes an unrealistic environment of high-rate refugee registration, where asylum seekers would be desperate to go as far as resorting to forgeries or illegal purchase of UNHCR IDs and MRC cards to avoid getting caught on the wrong sides of Malaysian immigration laws.

VI.2. Promoting Durable Solutions for Refugee

The appeal to undertake RSD would only be meaningful if it can help those entitled to refugee protection with ample short-term and long-term solutions to address their refugee needs. Currently, the regulatory scheme presented by Presidential Decree No. 125 of 2016 offers only two long-term durable solutions. These can be achieved through voluntary repatriation or, in the case of approved resettlement requests, through administrative support to assist refugees' departure into a third country. The possibility of local integration needs to be added to these options. By insisting on treating refugees as mere subjects of discretionary humanitarian assistance, both Indonesia and Thailand have rejected a somewhat proactive, durable solution for local integration.

It is difficult for both countries to maintain the claim as transitory countries if, in reality, the inhabitants must spend a few years to receive their RSD decision, not to mention another few years to resettle to their respective destination countries. In its current state, the UNHCR urged prospective asylum seekers in Indonesia to partake in the RSD process but with visible outcomes of either returning to their respective countries where they are at real risk of harm or waiting tirelessly until their resettlement applications have been approved. However, with significant destination countries such as Australia and Canada having gradually reduced their resettlement quota each year to Indonesia, the prospect of any asylum seekers resettling after completing the RSD process is likely to be a challenge.

The ideal approach is to rethink how the displaced communities could engage with local community economic and social infrastructure. Malaysia's foreign citizenship scheme technically opens the opportunity for non-nationals registered by the government MRC system to work as a regular migrant worker, provided he/she can bypass the high administrative requirements needed to procure migrant work permits. Another more feasible alternative is to grant the displaced population to work in specific shorthanded labour sectors designated by the Malaysian Ministries. Nomination of those entitled to these designated working opportunities should prioritise those registered under the RSD scheme.

VI.3. Ensuring Fair and Efficient RSD Process

The literature review highlights how the RSD process in Indonesia and other parts of Asia Pacific was opaque. In our comparison, we find the Australian model to be one that fosters more growth to seek the best practices for RSD decision-making. While all UHCHR-mandated RSDs would allow the possibility to challenge the initial decision, the judicial reviews offered by the High Court of Australia have the advantage of creating lines of publicly accountable interpretation that defines the acceptable means of reviewing the RSD application under Australian refugee laws. Accountability has been a common concern in UNHCR-led RSD. In Malaysia, advocacy groups often need more transparency in the changes of either registration or RSD procedures.[81] This lack of accountability is partly because legal oversights at the national level did not accompany the UNHCR implementation of RSD.[82] This issue is found equally across Indonesia and Thailand (before enacting the Regulation for National Screening Mechanisms), where no laws directly regulate the code of conduct for refugee credibility assessment.

The Australian model has its challenges. In contrast to the regular RSD track, the fast-track RSD, which is designed to administer an accelerated RSD process for detained asylum seekers in the excised territories, is now riddled with concern over its fairness. At the expense of efficiency, the process confiscates the possibility of requesting an interview and entertaining new evidence when the appeal is made. The certification bestowed through this fast process is also sub-par to the protection visas offered on the regular RSD track. Temporary visas may only grant a stay in the country for three (TVP) to five (SHEV) years with no possibility of permanent stay, leaving the country, or sponsoring relatives abroad to visit. Here, the lesson is to ensure that if a two-tiered RSD system is to be introduced in Indonesia to reduce the backlog of applications, then both RSDs should be on par with one another. The government should be cautious to keep principal manoeuvres that would consider the unique circumstances faced by asylum seekers -their mental state, their fear of discussing specific topics, the inability to access the RSD verification site, and more.

[81]See Asia Pacific Refugee Rights Network, "Country Fact Sheet: Malaysia," 3.
[82]See Supaat, "The UNHCR in Malaysia," 26.

VII. CONCLUSION

Our journey to compare the RSD process across three different Asian-Pacific countries has shown us multiple internal and extraneous factors that could affect the success of the RSD process. Nevertheless, what necessarily counts as success is up for debate. Malaysia's experience taught us that RSD success should lead to a higher rate of registered non-nationals, which is at least expected from the government standpoint. On the other hand, Thailand sees the RSD process as a policy dynamic to meet its political agenda. The national concern over mass influxes of refugees in Thai/Myanmar borders has pushed the RTG to introduce its refugee screening system, which the government has justified to take control of a particular segment of the refugee population. Australia prides itself on establishing the RSD process that is uniquely crafted to conform with their international obligation to conduct individual RSD procedures while also creating buffer zones to prevent the 'boat people from entering Australia.

With the enactment of Presidential Decree 125 of 2016, Indonesia is at a vantage point where it has the legal foundation to define further the technicalities behind RSD or the shared competence between the government and third-party facilitators such as UNHCR. The accountability in UHCR-mandated RSDs is often overlooked at the national level due to the unclear legal standing of the said process. While Australia's extensive judicial reviews could create a highly reflective environment of RSD practices, it may be long before Indonesia decides to incorporate refugee protection laws into their national legal system. However, the courage to constantly criticise and improve our national RSD system should always be there since the prospect of life or death for many displaced persons in Indonesia often hinges on this process.

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