



Routledge Contemporary Southeast Asia Series

THE PROTECTION OF REFUGEES IN SOUTHEAST ASIA A LEGAL FICTION?

Sébastien Moretti



The Protection of Refugees in Southeast Asia

This book offers a comprehensive and detailed analysis of refugee protection in Southeast Asia from an international law perspective. It examines both the legal and policy frameworks pertaining to the protection of refugees in the region as well as the countries' response to refugee movements from the Indochinese refugee crisis in the mid-1970s to the most recent developments. It covers important aspects of refugee protection, such as access to territory, *non-refoulement*, the treatment of refugees, the concept of refugee as applied in the region, burden-sharing and durable solutions to the plight of refugees.

The analysis focuses specifically on the main countries of asylum within the Association of Southeast Asian Nations that are not parties to the 1951 Refugee Convention, namely Thailand, Malaysia and Indonesia. Using an international law perspective based on the doctrine of the 'two elements' (practice and *opinio juris*), the author argues that these states have long recognized that people fleeing persecution, armed conflict and generalized violence, namely refugees, should be protected. This in turn demonstrates that they recognize the existence and relevance of the international refugee regime despite their refusal to accede to the Refugee Convention.

Offering a different perspective on the links between international refugee law and refugee protection in Southeast Asia, this book will be of interest to researchers and practitioners in the fields of international relations, international refugee law, international human rights law, migration governance and Southeast Asian Studies.

Sébastien Moretti is Senior Fellow at the Global Migration Centre of the Graduate Institute of International and Development Studies. He has also worked for various international organizations on issues related to refugees and migration, with a particular focus on the West African and Asia-Pacific contexts.

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The Protection of Refugees in Southeast Asia

A Legal Fiction?

Sébastien Moretti

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Foreword

It is a pleasure for me to warmly welcome this very well researched and well informed book on the issue of refugee protection in Southeast Asia. The author provides an important update on the relationship between International Law and the region, crafting an analysis of responses interplaying between law, policy and practice principally since the 1970s until 2020. Even though most countries in the region are not yet parties to the 1951 Refugee Convention and its 1967 Protocol, in practice, they do not reject key principles of International Law, especially *non-refoulement*, in their interface with the dilemma of persons who seek asylum. A key contribution from the region in recent decades has been the practice of temporary refuge, whereby temporary admission and shelter are offered to persons who seek asylum or refuge, pending more durable solutions. Of course, there are several areas where improvements are needed, and the study interlinks with the general human rights regime and other entry points to indicate the preferred options for implementation in a dynamic spectrum.

A resonant truism (in a modified version) is that ‘no country is an island’ and international cooperation remains an underlying challenge. This varies from tackling the root causes of displacements to sharing the responsibility between asylum countries and the rest of the international community in the global panorama of cause-cum-effect, while not forgetting the refugee or person who seeks refuge – as a key stakeholder. The study addresses both direct and indirect possibilities for protection and assistance of people on the move, as well as the form and substance of potential and actual engagements. Ultimately, with the ominous spread of COVID-19 looming when this book was being finalized, a sense of humanity is all-important in order to open windows of opportunities and to desist from closing pathways to humane responses. Humbly, this must be premised on the added value of International Law and its sustained interaction with the national and regional settings, bearing in mind local wisdom, offering hope through exemplary action.

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July 2021

Preface

It is commonplace to say that most of the Southeast Asian countries do not recognize the specific rights of refugees and that they ‘reject’ international refugee law. From a purely international law perspective, however, these statements deserve closer scrutiny.

The arguments made in this book trace their origins to a PhD thesis in international law conducted at the Graduate Institute of International and Development Studies in Geneva. When I started my research at the end of 2008, there were plenty of examples in the news where Southeast Asian states were accused of pushing back, returning, detaining or otherwise mistreating asylum seekers and refugees. Thailand and Malaysia, the two main countries of destination in the region, were regularly cited among the worst places for refugees. The fact that most of the states concerned, with the exception of the Philippines and Cambodia, were not parties to the 1951 Convention relating to the status of refugees and its 1967 Protocol came to encapsulate these criticisms; it was the most obvious and undeniable evidence of their aversion to international refugee law.

However, while fully recognizing the significant limitations in the way many asylum seekers and refugees have been treated and the multiple violations of their human rights in non-signatory countries such as Thailand, Malaysia and Indonesia, there is sometimes a striking difference between, on the one hand, the absence of laws and policies regarding refugees and the alleged inflexibility of the authorities when it comes to dealing with irregular migrants and, on the other, their actual relative tolerance of the presence of refugees on their territory. This gap between the law and the practice of states in terms of refugee protection, *and what this discrepancy means from an international law perspective*, thus became a central part of my PhD thesis. My work was subsequently published by Bruylants under the title *La protection des réfugiés en Asie du sud-est: du privilège aux droits* (2016).

Some of the ideas first articulated in my doctoral dissertation have since then been refined and elaborated further in various articles. Parts of the argument in Chapters 2, 4, 5 and 6 of this book have appeared in ‘Keeping Up Appearances: State Sovereignty and the Protection of Refugees in Southeast Asia’ (*European Journal of East Asian Studies*, Vol. 17, No. 1, 2018) and

in ‘Southeast Asia and the Refugee Convention: Substance without Form?’ (*International Journal of Refugee Law*, Vol. 33, No. 2, 2021). Some of the recent developments described in Chapter 3 are based on ‘UNHCR and the Migration Regime Complex in Asia-Pacific: Between Responsibility Shifting and Responsibility Sharing’ (*UNHCR New Issues in Refugee Research* No. 283, 2016) and in ‘Between Refugee Protection and Migration Management: The Quest for Coordination between UNHCR and IOM in the Asia-Pacific Region’ (*Third World Quarterly*, Vol. 42, No. 1, 2021). Aspects related to durable solutions have notably been discussed in ‘The Challenge of Durable Solutions for Refugees at the Thai Myanmar Border’ (*Refugee Survey Quarterly*, Vol. 34, No. 3, 2015) and ‘Protection in the Context of Mixed Migratory Movements by Sea: The Case of the Bay of Bengal and Andaman Sea Crisis’ (*The International Journal of Human Rights*, Vol. 22, No. 2, 2017).

The information contained in this book takes into account developments up to the end of 2020. It also builds upon my experience working with various international and non-international organizations on migration and refugee issues, including in the Asia-Pacific, over the past ten years. I am thus grateful for the many friends and colleagues who I have met along the way and who have contributed in one way or another to shaping my thinking; without their comments, observations and ideas, this book could never have been written. More specifically, I would like to thank Vincent Chetail, Antje Missbach, Vittit Muntarbhorn, Frances Nicholson as well as the anonymous reviewers who have critically helped improve this book through their valuable suggestions. Last but not least, I am particularly grateful to my partner for her infallible support, patience and understanding while I was working on this book on top of other commitments. This book is dedicated to our son Théo, who joined the family while I was still working on the manuscript.

Sébastien Moretti
Geneva, 30 June 2021

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Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Reports 3
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International, regional and national instruments

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International Covenant on Economic, Social and Cultural Rights (ICESCR) (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

International Covenant on Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Protocol relating to the Status of Refugees (taken note of by UNGA 16 December 1966, entered into force 4 October 1967) 606 UNTS 267

Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention on the Rights of the Child (CRC) (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (opened for signature 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3

Convention on the Rights of Persons with Disabilities (CRPD) (opened for signature 13 December 2006, entered into force 3 May 2008) 2515
UNTS 3

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xvi *Instruments*

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Conclusion no 62 (XLI) International Protection (1990)

General Conclusion no 77 (XLVI) International Protection (1995)

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Conclusion no 109 (LXI) Protracted Refugee Situations (2009)

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- ASEAN, ‘Declaration on the Elimination of Violence Against Women in the ASEAN Region’ (30 June 2004)
- ASEAN, ‘Declaration on the Protection and Promotion of the Rights of Migrant Workers’ (13 January 2007)
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- OAU, African Charter on Human and Peoples’ Rights (opened for signature 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217
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Abbreviations

AALCC	Asian-African Legal Consultative Committee
AALCO	Asian-African Legal Consultative Organization
AHRD	ASEAN Human Rights Declaration
AI	Amnesty International
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
APC	Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants
APRRN	Asia-Pacific Refugee Rights Network
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
AVRR	Assisted Voluntary Return and Reintegration
AYBIL	Australian Yearbook of International Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCSDPT	Committee for Coordination of Services to Displaced Persons in Thailand
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIREFCA	International Conference on Central American Refugees
CPA	Comprehensive Plan of Action
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRRF	Comprehensive Refugee Response Framework
CSO	Civil Society Organizations
CUP	Cambridge University Press
DISERO	Disembarkation Resettlement Offers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ERAT	Emergency Response and Assessment Team (ASEAN)
ETM	Emergency Transit Mechanism (pending resettlement)

xx *Abbreviations*

ExCom	Executive Committee
FMR	Forced Migration Review
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GFMD	Global Forum on Migration and Development
GRF	Global Refugee Forum
HPG	Humanitarian Policy Group
HRC	Human Rights Committee
HRC	Human Rights Council
HRW	Human Rights Watch
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDC	Immigration Detention Centre
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILO	International Labour Organization
IOM	International Organization for Migration
IRC	International Rescue Committee
IRIN	Integrated Regional Information Networks (subsequently renamed the New Humanitarian)
JRS	Jesuit Refugee Service
JRS	Journal of Refugee Studies
KNU	Karen National Union
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
OAU	Organization of African Unity (now known as the African Union)
OCHA	Office for the Coordination of Humanitarian Affairs
ODP	Orderly Departure Programme (from Vietnam)
ORP	Orderly Repatriation Programme (to Vietnam)
OUP	Oxford University Press
PAB	Provincial Admission Board (Thailand)
RASRO	Rescue at Sea Resettlement Offers
RCA	Regional Cooperation Agreement (Indonesia–Australia)

RCF	Regional Cooperation Framework
RCP	Regional Consultative Processes
RPU	Refugee Processing Unit (Philippines)
RSD	Refugee Status Determination
RSO	Regional Support Office
RSPPU	Refugees and Stateless Persons Protection Unit (Philippines)
RSQ	Refugee Survey Quarterly
SAR	Special Administrative Region
SAR	Search and Rescue
SNC	Supreme National Council (Cambodia)
TBBC	Thailand-Burma Border Consortium
TBC	The Border Consortium
TFPP	Task Force on Planning and Preparedness
TPSA	Temporary Protection or Stay Arrangements (UNHCR's Guidelines)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNBRO	United Nations Border Relief Organization
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
UNTAC	United Nations Transitional Authority in Cambodia
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
USCRI	United States Committee for Refugees and Immigrants



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1 Introduction

The Convention relating to the Status of Refugees,¹ adopted in 1951 and supplemented by the 1967 Protocol, is the most comprehensive and universal instrument adopted to date to safeguard the fundamental rights of refugees and regulate their status in countries of asylum. Yet many countries, about a quarter of the World's states, are still not willing to accede to it.² The main gap regarding these two instruments is to be found in the Asia-Pacific, where a majority of states – 24 out of 44 – remain outside the Convention's refugee regime.³ Moreover, unlike in other regions there is not even a regional refugee instrument in Asia or Asia-Pacific. This lack of a formal legal framework regulating the protection of refugees at the regional as well as at the national levels has generally been regarded as an evidence that countries concerned 'reject' even the most basic tenets of international refugee law.

While refugee movements have always been first and foremost a regional issue, the question of how different regions of the world respond to refugee movements remains 'grossly understudied'.⁴ This book contributes to filling this gap by analysing more specifically the issue of refugee protection in Southeast Asia. Among the ten members of the Association of Southeast

1 Convention relating to the Status of Refugees (opened for signature 25 July 1951, entered into force 22 April 1954) 189 UNTS 150 and Protocol relating to the Status of Refugees (taken note of by UNGA 16 December 1966, entered into force 4 October 1967) 606 UNTS 267.

2 For ratification of treaties, see <<https://treaties.un.org/Pages/ParticipationStatus.aspx>> accessed 22 September 2020.

3 There is no universally agreed definition of the 'Asia-Pacific' region. The United Nations Economic and Social Commission for Asia and the Pacific counts 53 member states, including France, the Federation of Russia, the Netherlands, the United Kingdom and the United States, which are arguably not part of the Asia-Pacific but are members for other reasons. See *ESCAP Member States and Associate Members*, <www.unescap.org/about/member-states> accessed 17 January 2021. The Office of the United Nations High Commissioner for Refugees (UNHCR) also excludes Armenia, Azerbaijan, Georgia and Turkey from the region.

4 Ademola Abass and Francesca Ippolito, 'Introduction – Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 2.

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Asian Nations (ASEAN), namely Brunei Darussalam, Cambodia,⁵ Indonesia, Laos, Malaysia, Myanmar,⁶ the Philippines, Singapore, Thailand and Vietnam, only two have acceded to those instruments. The Philippines did so in 1981 and Cambodia in 1992.⁷ The analysis in this book focuses specifically on the ASEAN countries that are not parties to the Refugee Convention (the ‘non-signatory’ states’), in particular Thailand, Malaysia and Indonesia. These three countries are those that have been most affected by refugee movements in Southeast Asia over the past decades and those among the non-signatory states in the region whose practice in the field of refugee protection is most relevant from the point of view of the development of regional and international refugee law. By comparison, Laos, Myanmar and Vietnam have traditionally been refugee-producing countries, while Singapore and Brunei Darussalam have received (and accepted) very few refugees.⁸

Due to the lack of a specific legal framework, refugees in the main countries of asylum in the region are generally considered as ‘irregular migrants’ and as such they may be the object of measures such as arrest, detention and deportation. Against this backdrop, one can wonder how to ensure the protection of refugees in a context where there is no specific legal and/or policy framework for this purpose. What national and regional mechanisms or initiatives – if any – are in place to ensure the protection of refugees in those states, including in the context of large-scale movements? While more research is certainly needed to better understand the difference between the level of legal entitlements and the treatment of people who need international protection in non-signatory countries, it would be wrong to assume that the treatment of refugees in such countries is necessarily worse than in countries that are parties to the Refugee Convention.

Using an approach based on international law and centred around the practice of states and the notion of *opinio juris*, which refers to the conviction of a state that it is bound by a rule of international law, this analysis reveals

5 The country took the name ‘Kingdom of Cambodia’ in 1993 and still retains this name.

When the Khmer Rouge came to power in 1975, they named the country ‘Democratic Kampuchea’, a name that was used until they were ousted following a Vietnamese invasion, which proclaimed the ‘People’s Republic of Kampuchea’ in 1979. This book uses the term ‘Cambodia’ to refer to the country.

6 In 1989, the regime officially changed the name of the country in English to Myanmar or ‘Republic of the Union of Myanmar’ in full. It was previously known as Burma and continues to be referred to as such by some authors and organizations. This book uses the official name.

7 Timor-Leste is also part of Southeast Asia. However, we do not consider Timor-Leste in this book since it is not a member of the ASEAN (although its membership application is being considered) and since it is a party to the Refugee Convention and its Protocol (to which it acceded in 2002). Moreover, Timor-Leste is essentially a country of origin of refugees, while this book focuses on the practice of the main countries of asylum in Southeast Asia.

8 UNHCR recorded an average of three refugees and asylum seekers in Singapore for the period from 2000 to 2021, with no refugees and asylum seekers recorded in Brunei Darussalam during the same period. See UNHCR, Population Data <www.unhcr.org/data.html> accessed 19 January 2021.

that Southeast Asian states, despite their refusal to accede to the Refugee Convention, do recognize international refugee law. This is evidenced by the fact that they often provide a form of protection to those who have found refuge in their territories, in spite of their irregular status, and that this corresponds to a certain extent to the standards provided for under the Refugee Convention to people who are ‘lawfully’ present on the territory of a state.⁹ Yet these countries have sought to respond to the protection needs of refugees without giving the impression that they were compromising with issues of national sovereignty or the principle of non-interference in the internal affairs of other states. In maintaining these seemingly contradictory policies, it is argued, these states seek to maintain a ‘legal fiction’ according to which they preserve full sovereignty over their borders while in reality they largely accept the constraints and limits imposed by international refugee law.

1.1. An historical overview of refugee movements within Southeast Asia

While regional specificities of international refugee law in Africa and Latin America have been embedded in regional frameworks, no similar initiative has yet been taken in Asia, despite the fact that the continent has experienced several large-scale influxes of refugees since the middle of the past century. In 1947, the partition of India led to the displacement of some 14 million people. Two years later, the victory of the Chinese Communist Party drove nearly 1.5 million soldiers, civil servants and civilians associated with the Kuomintang to the island of Taiwan, with many more making their way to Southeast Asia. In March 1971, some 10 million people were forced into exile in India, fleeing the violence that led to the partition of Pakistan and the creation of Bangladesh. In 1978, more than 200,000 Rohingya – a predominantly Muslim ethnic group from Rakhine State, Myanmar – sought refuge in Bangladesh, claiming persecution at the hands of the Burmese Government. The following year, some 6 million Afghan refugees moved to Pakistan and Iran following the invasion of their country by the Soviet Union.

During the same period, the situation in Southeast Asia was taking a dramatic turn with a significant increase in the number of refugees from Indochina looking for asylum in other countries across the region. The context at the time was exceptional, with the Indochinese refugees fleeing the newly communist governments established in Vietnam, Laos and Cambodia in the midst of the Cold War. The ASEAN states, at the time Indonesia, Malaysia,

⁹ Research along the same lines has also been conducted in the Middle East, another sub-region of Asia characterized by a low level of ratification of the Refugee Convention and/or its Protocol. See for instance, Maja Jammy, ‘No Country of Asylum: “Legitimizing” Lebanon’s Rejection of the 1951 Refugee Convention’ (2017) 29:3 IJRL 438–465; Martin Jones, ‘Expanding the Frontiers of Refugee Law: Developing a Broader Law of Asylum in the Middle East and Europe’ (July 2017) 9:2 Journal of Human Rights Practice 212–215.

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Thailand, the Philippines and Singapore, found themselves at the forefront of the crisis, bearing the consequences of proxy wars led by other more powerful states outside the region. It was feared in particular that Thailand, which was exposed to the arrival of a large number of asylum seekers from Laos and Cambodia, would be the next ‘domino’ to fall. However, it is the situation of the Vietnamese asylum seekers – the so-called “boat people” – that attracted the most international attention. This was due in particular to the regional ambit of the crisis, as they landed in great numbers on the shores of most countries in the region.

With an estimated 3 million people fleeing Indochina, the so-called Indochinese refugee crisis represented a ‘mammoth refugee crisis’ which spanned for more than 20 years.¹⁰ According to the United Nations High Commissioner for Refugees (UNHCR), the crisis marked ‘a turning point in the contemporary history of refugee situations’,¹¹ due to both the significant number of displaced persons and its particularly long duration. The Indochinese crisis proved exceptionally problematic because of the difficulties identifying durable solutions for the refugees. Local integration had been ruled out by the countries concerned on account of various social, economic and security considerations, while repatriation to communist countries, in particular Vietnam, was not deemed acceptable for political reasons. Against this backdrop, resettlement thus became the main durable solution, but the number of refugees soon outpaced the (nevertheless large) quota offered by the United States and other Western countries, leaving many people stranded in refugee camps across Southeast Asia. At times, the states of first asylum in the region did not hesitate to push back asylum seekers to the sea, despite an obvious need for protection. They argued that they had already fulfilled their ‘humanitarian duty’ beyond what could reasonably be expected from them, given their situation. These tragedies highlighted a particularly significant gap in the international regime for the protection of refugees: could hundreds of thousands of people in a refugee-like situation be left unprotected on the grounds that the states concerned were not parties to the Refugee Convention? This was hardly conceivable in a context where they were fleeing communist governments in the midst of the Cold War.

Several international initiatives were taken to convince the countries of first asylum in the region to keep their borders open. As the situation worsened in 1978–1979, the Secretary-General of the United Nations (UN) convened an international Meeting on Refugees and Displaced Persons in Southeast Asia, which included Vietnam – although the country had been

¹⁰ UNHCR, ‘Role of the Office of the United Nations High Commissioner for Refugees in South-East Asia (1979–1983)’, Joint Inspection Unit, JIU/REP/84/15 (1984), para. 95.

¹¹ UNHCR, ‘Summary Record of the 391st Meeting, Thirty-sixth Session of the Executive Committee of the High Commissioner’s Programme’ (15 October 1985), para. 15.

invited in its capacity as an asylum country for thousands of Cambodian refugees. In the words of Robinson, the conference led to ‘a set of commitments that would dramatically reshape the refugee regime’.¹² In a nutshell, the countries of first asylum agreed to respect the principle of *non-refoulement* and continue to provide provisional asylum in exchange for the resettlement of the Vietnamese refugees, which were henceforth recognized as *prima facie* refugees; the Philippines and Indonesia proposed to host transit centres for refugees; and Vietnam agreed to implement a programme for the ‘orderly departure’ of ‘family reunion and other humanitarian cases’ – the so-called Orderly Departure Programme (ODP) – that would allow people to be directly resettled from Vietnam to the United States, thereby relieving some pressure on the first countries of asylum in the region.

The 1979 meeting led to a significant decrease in the number of arrivals by sea and contributed to safeguarding asylum in the region. The situation deteriorated, however, in the late 1980s due to a resurgence of arrivals, coupled with a decrease in the number of Vietnamese resettled under the auspices of the ODP. In the meantime, doubts had been cast regarding the motivations behind the continuous flow of asylum seekers more than a decade after the events that spurred the flight of Vietnamese people in the first place. As the ASEAN states resumed their pushbacks, the UN Secretary-General convened a second International Conference on Indochinese Refugees in Geneva in June 1989, which led to the adoption of the Comprehensive Plan of Action for Indochinese refugees (CPA).¹³ Ten years after the 1979 meeting, its approach was deemed ‘outdated and insufficient’.¹⁴ Instead, the International Conference aimed to develop ‘a new, comprehensive and solutions-oriented’ approach to put a definitive end to the problem posed by the continued presence and exodus of asylum seekers from Vietnam and Laos.¹⁵

The CPA marked a radical shift compared to the approach that had prevailed in the region for over a decade based on the quasi-automatic resettlement of the Vietnamese ‘boat people’. It provided for the establishment of a new individual ‘refugee status determination’ procedure (RSD) in all the countries in the region where Vietnamese people were arriving. While those who were recognized as refugees under the RSD procedure would still be resettled, those found not to be in need of international protection were to return to their home country. The CPA also endorsed the ODP, which was to be complemented by a mass information campaign carried out directly

12 W Courtland Robinson, ‘The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck’ (2004) 17:3 *Journal of Refugee Studies* 319–333.

13 UNGA, ‘Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General’, A/44/523 (22 September 1989).

14 *Ibid.*, para. 19.

15 *Ibid.*, para. 2.

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in Vietnam to sensitize prospective migrants and refugees about the risks related to irregular migration by sea and to inform them of the existence of a legal and safe alternative.

At the time of its adoption, the CPA appeared as a decisive step towards the establishment of a regional refugee protection regime in Southeast Asia. Some authors considered that the CPA represented ‘a significant development toward the strengthening of refugee protection in the region’.¹⁶ Others predicted that

in the long run perhaps one important achievement of the CPA will be that it may have been a step toward bringing several East and Southeast Asian countries into the existing international refugee regime, and that a basis may also have been laid for the beginning of a regional migration regime.¹⁷

Yet, while the CPA contributed to putting an end to the influx of Vietnamese ‘boat people’, its legacy and its influence over countries in the region has been much debated.

With some exceptions, refugee issues in Southeast Asia have received much less attention since the end of the Indochinese crisis. This is partly because they do not have the same scale and partly because of their lower media exposure. Myanmar represents the main source of refugees in South and Southeast Asia, as conflicts within the country have forced people to flee across borders for more than 30 years. The situation of Myanmar refugees remains protracted at the border between Thailand and Myanmar, where tens of thousands of refugees have been living in camps in Thailand, some of them for more than 30 years. As of December 2020, these asylum seekers and refugees accounted for some 91,800 people in nine camps along the border.¹⁸ Malaysia also hosts a significant number of asylum seekers and refugees, with some 180,000 people registered by UNHCR as of December 2020, a majority of them from Myanmar.¹⁹ However, in the absence of effective mechanisms to identify people in need of international protection, the exact number of Burmese asylum seekers and refugees in both countries is difficult to calculate. As of today, the issue of the Rohingya – one of the most persecuted ethnic groups in the world – represents the main challenge in terms of refugee protection in the region. Since 2005–2006, many of them

16 Fernando Chang-Muy, ‘International Refugee Law in Asia’ (1992) 24 *New York University Journal of International Law and Politics* 1178–1179.

17 Rosemarie Rogers and Emily Copeland, *Forced Migration: Policy Issues in the Post-Cold War World* (Fletcher School of Law and Diplomacy, Tufts University 1993) 116.

18 Royal Thai Government/Ministry of the Interior-UNHCR, ‘RTG/MOI-UNHCR Verified Refugee Population’ (31 December 2020) <<https://data2.unhcr.org/en/documents/download/84233>> accessed 16 January 2021.

19 UNHCR, *Population Data* <www.unhcr.org/data.html> accessed 20 July 2021.

have travelled by boat in extremely precarious conditions to reach Malaysia (via Thailand) or Australia (via Indonesia).²⁰ Numerous cases of pushbacks of Rohingya ‘boat people’ by the authorities of several countries have been reported over the past years, resulting in a high number of incidents at sea.

Against this backdrop, the Thai authorities cracked down on smuggling and trafficking rings in May 2015, following the discovery of mass graves in the south of the country and on the Malaysian side of the border. This led in turn to a new crisis in the Bay of Bengal and Andaman Sea, as the agents and facilitators became increasingly reluctant to disembark their passengers – a mix of Rohingya from Myanmar and Bangladeshi migrants – in Thailand, the traditional transit point to move onwards by land to Malaysia. Instead, they left the boats and their passengers stranded alone in the middle of the sea. The testimonies of those who made it to shore described horrific conditions endured at sea for weeks, or even months – people dying from thirst and starvation, with no access to medical care; threatened and beaten when begging for food and water, if not killed.

The situation took a turn for the worse when the maritime agencies of the concerned countries, in particular Thailand and Malaysia, initiated a pushback policy – or a ‘help-on’ policy as it is sometimes called – with regard to vessels intercepted in their territorial waters. At this point, between 7,000 and 8,000 individuals were estimated to be stranded at sea, with no country in the region willing to take them. The plight of the migrants and refugees in the Bay of Bengal and Andaman Sea attracted considerable attention, with international organizations, non-governmental organizations (NGOs) and journalists condemning the response of Southeast Asian states. Under considerable pressure, a meeting was organized in Kuala Lumpur on 20 May 2015 where Indonesia and Malaysia agreed to intensify search and rescue (SAR) operations and provide ‘temporary shelter’ to up to 7,000 people, provided that they would be resettled within one year.²¹ Another meeting on the ‘situation of irregular migrants in the Indian Ocean’ took place in Bangkok on 29 May, involving 17 states, including Bangladesh and Myanmar, the two main countries of origin of the movements in the region, and led to the adoption of a set of recommendations.²² The movements across

20 According to some estimates, some 160,000 people from Myanmar or Bangladesh moved by sea towards Thailand and Malaysia between 2012 and 2015. See Sébastien Moretti, ‘Protection in the Context of Mixed Migratory Movements by Sea: The Case of the Bay of Bengal and Andaman Sea Crisis’ (2018) 22:2 *The International Journal of Human Rights* 237–261.

21 Ministers of Foreign Affairs of Malaysia, Indonesia and Thailand, ‘Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia’ (20 May 2015) <<https://reliefweb.int/report/myanmar/joint-statement-ministerial-meeting-irregular-movement-people-southeast-asia>> accessed 16 January 2021.

22 See ‘Summary’, Special Meeting on Irregular Migration in the Indian Ocean, Bangkok, Thailand (29 May 2015) <<https://reliefweb.int/sites/reliefweb.int/files/resources/media-center-20150529-175942-231858.pdf>> accessed 16 January 2021.

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the Andaman Sea have significantly decreased since these events, although there were some concerns that they would resume following the large influx of Rohingya refugees to Bangladesh in 2017.

The displacement of some 740,000 people from Myanmar, a large majority of whom were Rohingya, was prompted by what a UN-mandated Independent International Fact-Finding Mission on Myanmar characterized as ‘a widespread and systematic attack’ on civilians conducted by the Myanmar military armed forces (known as the *Tatmadaw*) in retaliation for the attacks on police stations and a military base by a group called the Arakan Rohingya Salvation Army (ARSA).²³ As the situation becomes increasingly protracted in Bangladesh, with little prospect for the repatriation of the Rohingya to Myanmar, there has been a new increase in the number of people attempting to move by boat to Malaysia, where there is already a large community of Rohingya.²⁴

Apart from the situation of people from Myanmar, the number of refugees in Southeast Asia remains relatively limited. As of December 2020, there were some 5,200 so-called urban refugees in Thailand who came from some 40 different countries and territories, including Pakistan, Vietnam, Syria, the Occupied Palestinian Territory and Somalia.²⁵ For its part, Malaysia counted some 26,000 asylum seekers and refugees from countries other than Myanmar, mostly from Pakistan, Somalia, Yemen, Syria and Afghanistan.²⁶ Indonesia, as the third-largest country of asylum in the region after Thailand and Malaysia – even if it is more a country of transit to Australia – was host to some 13,700 asylum seekers and refugees in December 2020, most of them coming from Afghanistan, Somalia or Sudan.²⁷ As for the Philippines, despite the fact that the country is a party to the 1951 Convention, it is not an important destination for asylum seekers and refugees due mainly to the lack of work opportunities. As of December 2020, UNHCR reported ‘only’ 750 refugees and 400 asylum seekers in the country.²⁸

²³ Human Rights Council, ‘Report of the Independent International Fact-finding Mission on Myanmar’, A/HRC/39/64 (12 September 2018). The movements of the Rohingya to Bangladesh are also discussed in Section 7.4.2. While there are clear similarities between the way Southeast Asian states and Bangladesh have responded to the arrivals of refugees, a detailed consideration of the Rohingya refugee influx to Bangladesh is outside the scope of this book.

²⁴ According to UNHCR, some 2,400 people, essentially Rohingya refugees, attempted the sea journey between January and September 2020. See UNHCR, ‘Protection at Sea in South-East Asia. Flash Update’ (September 2020) <https://rohingyaconference.org/doc/UNHCR_Flash_Update_on_Protection_at_Sea_in_South-East_Asia_September_2020.pdf> accessed 16 July 2021.

²⁵ UNHCR, ‘Population Data’ <www.unhcr.org/data.html> accessed 20 July 2021.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

In the current setting in Southeast Asia, and the Pacific region more broadly, the issue of refugee protection must be considered in the context of larger migratory flows. This is a much more significant phenomenon in the eyes of the states concerned, as there are high numbers of irregular migrants living and working in countries such as Thailand and Malaysia – between 2 and 4 million in each country. Given the lack of opportunities to claim asylum, refugees are often intertwined with other migrants, making it difficult to distinguish among the different categories of people on the move.

1.2. Existing analysis of refugee protection in Southeast Asia

Much has been written about refugees in Southeast Asia, though most books and articles focus specifically on the Indochinese refugee crisis, when the issue of refugees and displaced persons in the region was at the forefront of the international agenda.²⁹ Interestingly, the literature on refugees in Southeast Asia produced during that period was quite divided. On the one hand, many heavily criticized the stance and response of the countries of first asylum in the region, with an emphasis on their avoidance of the use of the term refugee, the confusion between refugees and irregular migrants, the pushbacks of “boat people”, the encampment policy or their insistence on their right to return people deemed not to be in need of international protection. The response of the Southeast Asian states has been described by some commentators as ‘ranging from begrudging acceptance to hostile rejection, sometimes with tragic consequences’,³⁰ while others considered that the Asian ‘consensus’ on the Indochinese refugees revolved around the two concepts of ‘humane deterrence and restrictionism’.³¹

On the other hand, some highlighted the records of generosity of the same states and commended their efforts in hosting millions of refugees in a very sensitive political context, and despite their own economic and social problems. According to Chang-Muy, for instance, the overall response of Southeast Asian states to the influx of Indochinese refugees in the region ‘[was] one of generosity despite the huge and often complex problems involved’.³² Despite the absence of specific rules regarding the protection of refugees in the asylum countries across the region, the analysis of their

29 For the main books, see in particular Barry Wain, *The Refused: The Agony of the Indochina Refugees* (Kow Jones (Asia) Company Ltd 1981); Vtit Muntarbhorn, *The Status of Refugees in Asia* (OUP 1992); W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998).

30 Ann C Barcher, ‘First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?’ (1991–1992) 24 *New York University Journal of International Law and Politics* 1254.

31 Chan Kwok Bun, ‘Getting Through Suffering: Indochinese Refugees in Limbo 15 Years Later’ (1990) 18:1 *Asian Journal of Social Science* 1–18.

32 Chang-Muy, ‘International Refugee Law in Asia’ (n 16) 1176.

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practice suggested, according to Muntarbhorn, that ‘certain basic rights pertaining to refugees [were] upheld by them’.³³ As developing countries, Southeast Asian states had indeed contributed substantially to the response to the crisis; yet they also considered the efforts in terms of burden-sharing by other states – in particular Western states, that is, France and the United States, which were deemed responsible for the crisis – to be insufficient. At times this led to the adoption of more restrictive – and sometimes extreme – measures.

In comparison, the issue of the international protection of refugees in Southeast Asia since the resolution of the Indochinese refugee crisis has long been the object of less academic and scholarly attention. Published in 2008, the book written by Sara E Davies entitled *Legitimising Rejection: International Law of Refugees in Southeast Asia*³⁴ is also a study of the response of Southeast Asian states and the international community to the massive influx of asylum seekers and refugees from Vietnam, Laos and Cambodia during the Indochinese crisis. While the first part of the book discussed the ‘Eurocentric’ character of the Refugee Convention, the second part sought to explain the so-called rejection of international refugee law by Southeast Asian states during the crisis. She argued that their refusal to accede to the Refugee Convention and its Protocol, as well as the extremely harsh measures taken against the Indochinese refugees at the time, were part of a ‘manipulation strategy’ aimed at obtaining more contributions from the international community.

Most of the articles that have been written on refugee protection in Southeast Asia after the Indochinese crisis focus on the situation of refugees in specific countries, in particular in Thailand, Malaysia and Indonesia, or on specific groups of refugees, such as the Burmese ‘displaced persons’ in Thailand, and increasingly the Rohingya. All in all, there are very few attempts to conceptualize the protection of refugees at the regional level in Southeast Asia or more broadly in the Asia-Pacific region, and the picture that emerges from the literature remains rather fragmented.³⁵

What is more, most of these writings share a common understanding of the general situation of refugees in Southeast Asia. This revolves around the thesis of the ‘persistent rejection’ of international refugee law by the concerned countries. While Sara E Davies has provided the most systematic presentation of this argument in her book, critics along the same line have been numerous since then, with the ‘rejection of refugee law’ by Southeast

33 Vitt Muntarbhorn, *Current Challenges of Human Rights in Asia*, Conference on ‘Human Rights and Foreign Policy’ (University of Southampton 1986) 9.

34 Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff 2008).

35 See in particular Angus, Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate 2013).

Asian states theory becoming ‘a touchstone of refugee law scholarship’.³⁶ Indeed, the existing literature almost unanimously points out an ‘antipathy’ or an ‘outright hostility’ of states in the Asia-Pacific region, and more particularly in Southeast Asia, vis-à-vis international refugee law.³⁷ Commentators have also highlighted the ‘low-level commitment to legal refugee protection among states’,³⁸ the fact that the region stands ‘outside the global refugee regime’³⁹ and more generally the ‘persistence’ of ‘most states in the region in “rejecting” norms on refugee protection in spite of the institutionalization and implementation of these norms in most parts of the world’.⁴⁰ In what seems to be simply considered as a necessary corollary of the lack of legal framework, most of the existing studies provide a very bleak picture of the protection of refugees in the region. According to one commentator:

Asylum seekers and refugees are often left with no option but to live in fear in countries that do not recognize their basic rights. Being able to find somewhere to live, earn a livelihood, take a child to school, see a doctor when sick: these are the fundamental tenets of protection space that are lacking in the Southeast Asian region.⁴¹

In the same vein, it is often said that asylum seekers and refugees in Southeast Asia are living ‘in an assistance limbo, a political vacuum and a no-man’s land of human and legal rights’,⁴² or ‘mid-way to nowhere’,⁴³ thus giving the impression that they are deprived of all rights and abandoned to the complete arbitrariness of the authorities. According to Davies, for instance, the region’s perspective is that ‘asylum seekers should be treated as a transient group with little recourse for demanding rights and protection from the

36 Martin Jones, ‘Moving beyond Protection Space: Developing a Law of Asylum in South-East Asia’ in Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 251.

37 Sara E Davies, ‘Saving Refugees or Saving Borders: Southeast Asian States and the Indochinese Refugee Crisis’ (2006) 18:1 Global Change, Peace and Security 6.

38 Peter Billings and Anthony Cassimatis with Marissa Dooris, ‘Irregular Migration, Refugee Protection and the ‘Malaysian Solution’ in Francis and Maguire (eds), *Protection of Refugees in the Asia Pacific* (Ashgate 2013) 140.

39 Kirsten McConnahie, ‘Forced Migration in South-East Asia and East Asia’ in Elena Fiddian-Qasmiyah, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 627.

40 Alice M Nah, ‘Networks and Norm Entrepreneurship amongst Local Civil Society Actors: Advancing Refugee Protection in the Asia Pacific Region’ (2016) 22:2 The International Journal of Human Rights 224.

41 Taya Hunt and Nikola Errington, ‘The Search for Protection in Southeast Asia’ in Francis and Maguire (eds), *Protection of Refugees in the Asia Pacific Region* (n 38) 66.

42 International Rescue Committee (IRC) and Jesuit Refugee Service (JRS), *Nowhere to Turn: A Report on Conditions of Burmese Asylum Seekers in Thailand and the Impacts of Refugee Status Determination Suspension and the Absence of Mechanisms to Screen Asylum Seekers* (July 2005) 1.

43 Bun, ‘Getting through Suffering’ (n 31) 6.

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states in which they “illegally” reside'.⁴⁴ More compassionate policies have only been implemented on an exceptional and *ad-hoc* basis. The absence of an official recognition of their status, the lack of rights provided to asylum seekers and refugees, as well as different mechanisms and practices to which Southeast Asian states often resort – such as encampment and detention, resettlement or (mandatory) repatriation – constitute, for many, evidence of their aversion for the presence of refugees on their territory.

This idea of the hostile reception and treatment of refugees in the region has become widely accepted by academics and more generally by the public. Many today associate the refugee issue in Southeast Asia with images of unfortunate Vietnamese crammed into makeshift boats, overcrowded and filthy refugee camps such as those along the border between Thailand and Cambodia in the 1970s and 1980s or irregular migrants held in abominable conditions in immigration detention centres (IDCs). This perception has been reinforced following some incidents that have been the subject of extensive media coverage – the forced deportation of nearly 5,000 Hmong from Thailand at the end of December 2009, the acts of brutality by the Thai authorities towards the Rohingya who arrived by boat between 2008 and 2009 or the so-called maritime ping-pong⁴⁵ played by some Southeast Asian states with boats full of people in a desperate situation during the events in the Bay of Bengal and Andaman Sea in 2015, among others. Numerous reports by NGOs, including Human Rights Watch (HRW) and Amnesty International (AI), have denounced such acts. Looking at the protection of refugees from Myanmar in Thailand, for instance, HRW considered that ‘in almost no way can Thai policy be said to comply with international refugee norms and standards’.⁴⁶ According to AI, the Malaysian Government ‘effectively maintains that asylum seekers and refugees do not exist in the country’.⁴⁷ The US Committee for Refugees and Immigrants (USCRI) once described Malaysia and Thailand, alongside China, India and Bangladesh, as among the ten worst countries in the world in which to be a refugee.⁴⁸

It is only recently that some scholars have offered a different perspective focusing more on the measures that Asian states have taken in favour of refugees despite not being parties to the main refugee instruments. In many

44 Sara E Davies, ‘The 1989 Comprehensive Plan of Action (CPA) and Refugee Policy in Southeast Asia: Twenty Years Forward What Has Changed’ in Abass and Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers* (n 4) 338–339.

45 See e.g. Aubrey Belford and Reza Munawir, ‘Migrants in “Maritime Ping-Pong” as Asian Nations Turn Them Back’, *Reuters* (16 May 2015) <www.reuters.com/article/us-asia-migrants-idUSKBN0O105H20150516> accessed 16 January 2021.

46 HRW, ‘Unwanted and Unprotected: Burmese Refugees in Thailand’, C1006 (1 September 1998).

47 AI, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia’, ASA 28/010/2010 (June 2010) 7.

48 US Committee for Refugees and Immigrants, ‘World Refugee Survey 2008’ (2008).

cases, these may correspond to the international standards for the protection of refugees. After revisiting the proposition that Southeast Asian states rejected refugee law, Martin Jones, for instance, concluded that ‘the underlying proposition that refugee law has been rejected is in need of re-examination’.⁴⁹

1.3. Southeast Asia and international refugee law: a new perspective

This book provides an analysis of the legal and policy framework as well as of the practices of Southeast Asian states in relation to refugees. As Alexander Aleinikoff once put it with regard to the international migration framework, ‘[T]here is both more and less international law than might be supposed’.⁵⁰ This is true also in Southeast Asia.

On the one hand, there is far less international law than what activists and human rights organizations critical of Southeast Asian states’ policies towards refugees may claim. After all, the role of those organizations is precisely to denounce alleged violations of international law by these very same states, while calling on them to respect their ‘obligations’. Yet reports published by NGOs often question or criticize the practice of states based on the highest standards for the protection of refugees or for the protection of human rights more generally. It must be made clear, however, that international standards and binding international law are two different things. As expressed by the International Court of Justice (ICJ) in the *South-West Africa* cases, ‘[R]ights cannot be presumed to exist merely because it might seem desirable that they should’.⁵¹ What needs to be considered first and foremost are the *de lege lata* obligations, that is, the law as it *is*, rather than the *de lege ferenda* rules, that is, the law as it *should be*, regarding refugee protection.

On the other hand, the analysis in this book shows that there is more international law relating to the protection of refugees than what the states concerned in Southeast Asia would admit. In the face of criticism, most first asylum states in the region generally respond that they do not have obligations with regard to refugees, since they are not parties to the 1951 Convention or to its Protocol. Whatever they do in favour of refugees would therefore be a ‘privilege’ granted by them on a humanitarian basis only to a category of people they acknowledge to be in need of some sort of protection.

49 Jones, ‘Moving Beyond Protection Space’ (n 37) 253. See also Kelley Loper, ‘Prospects for Refugee Rights in Hong Kong: Towards the Legalization and Expansion of Protection from *Refoulement*’ in Francis and Maguire (eds), *Protection of Refugees in the Asia Pacific* (n 38) 75–93.

50 Alexander T Aleinikoff, ‘International Legal Norms and Migration: A Report’ in Alexander T Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 2.

51 South-West Africa Cases (*Ethiopia v South Africa; Liberia v South Africa*), second phase (Judgment) [1966] ICJ Reports 6, para. 91.

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It is clear, however, that they have certain obligations under customary international law, irrespective of their accession to international instruments, as well as obligations under international human rights law. Indeed, many rules of international human rights law have become part of customary international law – and also apply to refugees. As will be shown throughout this book, the human rights framework, which has considerably developed in past decades, has to a certain extent replaced the 1951 Convention and 1967 Protocol as the main framework in the region for the protection of refugees. In these circumstances, it cannot be concluded from the mere fact that states are not parties to the 1951 Convention that there is a ‘legal limbo’ regarding the protection of refugees in the region.

It is widely assumed that the treatment of refugees in countries that are not parties to the 1951 Convention is necessarily worse than in other states. Nevertheless, Southeast Asian states have provided asylum to hundreds of thousands of people in need of international protection over the past decades, although those concerned have continued to be considered as ‘irregular migrants’ under domestic laws. Close examination of state practice in the region reveals that the criteria they have considered in deciding to provide asylum broadly correspond to the traditional criteria associated with the refugee definition in international law. It also appears from the practice of states that these categories of persons recognized as being in need of international protection do benefit from particular protective measures. In Thailand, Malaysia and Indonesia, there is *de facto* a significant difference of treatment between asylum seekers and refugees, on the one hand, and other irregular migrants, on the other. While formalized protection of asylum seekers or refugees is more common outside the Asia-Pacific region, ‘informal’ protection in the form of a more or less significant degree of tolerance vis-à-vis specific groups of people seeking refuge on their territory is an essential characteristic of practice in Southeast Asia.

This is precisely where the real ‘paradox’ of refugee protection in Southeast Asia lies. The notion of sovereignty remains extremely important in the region, in part because all Southeast Asian countries, with the exception of Thailand, gained their independence after World War II. The importance of national sovereignty for those countries is reflected in the Treaty of Amity and Cooperation in Southeast Asia (also known as the Bali Treaty) adopted by ASEAN member states in 1976.⁵² This instrument emphasizes the importance of independence, sovereignty and territorial integrity, the right of every state to lead its national existence free from external interference and the principle of non-interference in one another’s internal affairs. Against this backdrop, international refugee law can be seen as a challenge to what Southeast Asian states perceive as an essential aspect of their sovereignty,

⁵² ASEAN, Treaty of Amity and Cooperation in Southeast Asia (Bali Treaty) (opened for signature 24 February 1976, entered into force 15 July 1976) 1025 UNTS 297.

that is, their sovereign power to decide upon the admission and expulsion of aliens. While the right to decide who can enter and remain in the territory of states is indeed often considered as the last bastion of sovereignty, the principle of *non-refoulement* does limit states' scope for action when it comes to accepting people on their territory. Interestingly, many other states, essentially Western states, that exhibited their commitment to refugee protection by acceding to the 1951 Convention and other international human rights instruments, have attempted to regain sovereignty through other means, such as the implementation of so-called *non-entrée* policies and the externalization of migration controls.⁵³

This issue has been approached differently in Southeast Asia. Most countries in the region have refused to accede to the 1951 Convention and, more generally, to accept binding obligations when it comes to migration. Yet several commentators have noted the 'tacit acknowledgment' by the authorities with regard to the presence of refugees on their territory and the fact that they were 'turning a blind eye' when it came to enforcing immigration laws.⁵⁴ They have also described these states as 'tacitly compromising to informal practices' regarding the treatment of migrants and refugees⁵⁵ or noted the 'apparently contradictory behavior'⁵⁶ of some states which allow UNHCR to operate despite the lack of formal recognition of the status of refugees. For the states concerned, such policies have arguably been a way for them to preserve the fiction of national sovereignty through an appearance of tight control over immigration issues, while at the same time responding to the needs of refugees in a way that is largely consistent with international refugee law.

Considered from an international law perspective, the practices of Southeast Asian states and some of the measures they have taken vis-à-vis people in need of international protection reveal that Southeast Asian states *do* recognize international refugee law. Somewhat ironically, and despite the fact that they refuse binding convention obligations in this regard, the practice of Southeast Asian states with regard to refugees arguably contributes to the strengthening of the international refugee regime through a number of processes. These will be introduced more in detail in subsequent chapters and concern primarily the development of international customary law.

⁵³ See e.g. Virginie Guiraudon and Gallya Lahave, 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control' (2000) 33:2 Comparative Political Studies 163–195; James C Hathaway and Thomas Gammeltoft-Hansen, 'Non-refoulement in a World of Cooperative Deterrence' (2015) 53:1 Columbia Journal of Transnational Law 235–285.

⁵⁴ Caitlin Wake, 'Turning a Blind Eye: The Policy Response to Rohingya Refugees in Malaysia', Humanitarian Policy Group Working Paper (November 2016).

⁵⁵ Nicola Piper, Stefan Rother and Jürgen Rüland, 'Challenging State Sovereignty in the Age of Migration' (2018) 17:1 European Journal of East Asian Studies, concluding remarks 130.

⁵⁶ J Lego, 'Making Refugees (Dis)appear: Identifying Refugees and Asylum Seekers in Thailand and Malaysia' (January 2018) 11:2 Austrian Journal of South-East Asian Studies 196.

1.3.1. The importance of the practice and opinio juris of states in international law

While most of the existing literature on refugees in Southeast Asia supports the ‘rejection of international refugee law’ approach, this book offers a more nuanced perspective. It demonstrates, on the contrary, that the states concerned do recognize the importance of rules pertaining to the protection of specific categories of people on the move, that is, refugees, even though they are not parties to the main international instruments relating to the protection of refugees.

Yet how can one determine whether states ‘recognize’ rules of international law if they are not parties to the relevant treaties? One possibility is to refer to the concept of custom in international law, the other major source of public international law together with convention law, and to use some of the tools and methods used by international lawyers to determine the existence of a rule of international customary law. Custom as a source of international law is mentioned in art. 38 of the Statute of the ICJ. This provides that the court, when it comes to settling disputes submitted to it in accordance with international law, must apply ‘international custom, as evidence of a general practice accepted as law’ alongside international conventions establishing rules expressly recognized by the states concerned.⁵⁷

In the *North Sea Continental Shelf Cases*, the ICJ developed the theory of the ‘two elements’, which provides that custom is the result of a combination of two processes, that is, the ‘practice’ of states and *opinio juris*.⁵⁸ Today the two elements are still regarded as ‘the essential conditions for the existence of a rule of customary international law’.⁵⁹ On the one hand, the practice of states, which must be ‘constant’ and ‘uniform’, in the words of the ICJ,⁶⁰ emanates mainly from the conduct of states. It may be found in a variety of forms, such as in constitutions, laws, administrative regulations, court judgments, treaties and in the conduct of states in connection with treaties, resolutions of international organizations, official statements made by governmental bodies at international conferences and, most importantly, in

⁵⁷ Statute of the ICJ (opened for signature 26 June 1945 and entered into force 24 October 1945), art. 38.

⁵⁸ North Sea Continental Shelf Cases (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Reports 3), para. 77. See also, Asylum Case (*Colombia v Peru*) (Judgment) [1950] ICJ Reports 266 at 276–277; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits) [1986] ICJ Reports 14, para. 207.

⁵⁹ International Law Commission (ILC), ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’, Yearbook of the International Law Commission, A/73/10, Vol II, Part Two (2018) 125.

⁶⁰ ICJ, Asylum Case (n 59) 276–277.

policies implemented by states.⁶¹ On the other hand, *opinio juris* refers to a belief by those observing the practice that it is mandatory. In the *North Sea Continental Shelf Cases*, the ICJ stated:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.⁶²

In other words, while state practice represents an ‘objective’ element, *opinio juris* is a ‘subjective belief’ on the part of states, that is, the state’s ‘conviction’ that it is bound by a rule of international law and that it must act in a certain way as a result. While this construction seems to imply that a rule becomes binding because it is already recognized as such, the important point here is to identify a sense of ‘legal duty’ behind the conduct of a state compared with a mere social usage.

There has been much debate on the respective importance of practice or *opinio juris* in the development of customary international law. Some authors consider that *opinio juris* represents ‘the most decisive constitutive element’ in the development process of international customary law.⁶³ Others consider that it is first and foremost the practice of states that has to be taken into consideration to determine whether a given rule has developed into customary law.⁶⁴ Yet the difference between practice and *opinio juris* is somewhat superficial, as the distinction seems to be more of a ‘methodological’ character. Indeed, it is often difficult to distinguish between the two constitutive elements of international customary law, which appear in fact to be ‘two faces of the same coin’.⁶⁵ The confusion between the two elements is particularly evident when one considers the elements used as indications that an *opinio juris* exists, as they are essentially the same as those used to establish

61 See Vincent Chetail, ‘Sources of International Migration Law’ in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press November 2012) 74–75; Michael Akehurst, ‘Custom as a Source of International Law’ (1976) 47:1 British Yearbook of International Law 1–11; ILC, ‘Identification of Customary International Law’ (n 60) 133.

62 ICJ, *North Sea Continental Shelf Cases* (n 58), para. 77.

63 Chetail, ‘Sources of International Migration Law’ (n 61) 75–76.

64 See e.g. Karol Wolfke, *Custom in Present International Law* (2nd edn, Nijhoff 1993) 40–51; Maurice H Mendelson, ‘The Formation of Customary International Law’ (1998) Collected Courses of the Hague Academy of International Law. See also International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law. Final Report of the Committee*, 2000.

65 Chetail, ‘Sources of International Migration Law’ (n 61) 77.

the practice of states. According to Akehurst, for instance, '[S]tate practice means any act or statement by a state from which views about customary law can be inferred'.⁶⁶ While emphasizing the importance of *opinio juris*, Chetail also acknowledges that it 'can only be deduced from material acts' and that 'the conviction to be bound is revealed through and by state practice'.⁶⁷

In situations where clear and univocal indications of an *opinio juris* are difficult to find, as is the case with Southeast Asian states in relation to refugee protection, a close examination of their practice can help determine that the practice in question has been undertaken with a sense of legal right or obligation. Based on a detailed analysis of the response of the main non-signatory states in Southeast Asia to refugee movements, this book argues that their long-standing practice does indeed reveal a conviction that certain categories of people, that is, asylum seekers and refugees, must benefit from some form of protection. What remains to be seen is the extent to which the protection those states offer to asylum seekers and refugees corresponds to the standards set out in the Refugee Convention. Indeed, as noted by the International Law Commission (ILC) in its 2018 'Draft Conclusions on Identification of Customary International Law', the fact that states 'act in conformity with a treaty provision by which they are not bound' may 'evidence the existence of acceptance as law'.⁶⁸

To be clear, there have been cases where Southeast Asian states have disregarded the specific protection needs of refugees and this analysis in no way intends to underestimate the protection challenges faced by asylum seekers and refugees in Southeast Asia and the responsibilities of the governments concerned. Yet, from an international law perspective, it must be noted that, for a rule to be established as customary, the practice of a state does not need to be 'in absolutely rigorous conformity' with the rule. The ICJ considers that the conduct of states should 'in general' be consistent with such rules.⁶⁹ In other words, inconsistency in the practice of a state, when this takes the form of breaches of a rule, does not mean that the state concerned 'rejects' this rule, particularly when it denies the violation or expresses support for the rule.

1.3.2. *The practice of Southeast Asian states as a law-making factor*

This book also argues that the practice of Southeast Asian states in relation to refugees has influenced the development of international refugee law. As noted by Wolfke, the practice of states represents in itself 'a law-making factor' that can either reinforce or lead to a change in the existing law.⁷⁰

⁶⁶ Akehurst, 'Custom as a Source of International Law' (n 61) 10.

⁶⁷ Chetail, 'Sources of International Migration Law' (n 61) 77.

⁶⁸ ILC, 'Identification of Customary International Law' (n 59) 139.

⁶⁹ ICJ, *Nicaragua v USA* (n 58), para. 186.

⁷⁰ Wolfke, *Custom in Present International Law* (n 65) 47.

Through their practice, states that are not parties to the 1951 Convention and/or the 1967 Protocol may be able to influence the development of the international refugee protection regime in a variety of ways. For example, the practice of a state or a group of states may constitute the point of departure for the development of a new rule of international law. Indeed, according to the ICJ in the *Nicaragua* case, ‘reliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law’.⁷¹ It would be sufficient for this practice to be followed by other states and to become widespread enough to potentially give rise to an *opinio juris* and ultimately become customary law. The same logic applies to a text of soft law adopted by a group of states. While the document in question will not have any binding value *per se*, it may mark the beginning of a normative process that could potentially lead to the adoption of a new treaty or to the development of new customary rule.

The practice of a state or a group of states may likewise play a decisive role in this process, in particular if among them are states ‘whose interests [are] specifically affected’.⁷² If, for example, states that are not parties to specific treaties nevertheless accept and abide by rules of international law that are also set out in conventions, then their attitude may reinforce the rules concerned and may even accelerate the crystallization of those rules into customary law. In the opposite scenario, the practice of a group of states that contravenes a rule of international convention law could delay or impede the development of such rule under customary international law. The practice of those states may also represent an ‘interpretation’ of the rule, in which case it may contribute to influencing the content of the rule under customary law. This influence could be felt at two levels, that is, either on the core content of a rule or on the existence and content of an exception.

Finally, while the practice of a group of states that runs contrary to a norm of customary international law should in principle be considered a *breach* of this rule, unless it falls under one of its exceptions, this practice may also lead to the development of a new customary rule. The reactions of other states play a decisive role in this regard.⁷³ On the one hand, they may condemn this practice and treat it as it is, that is, a breach of international law, in which case their reactions might confirm the existence of the rule and

⁷¹ ICJ, *Nicaragua v USA* (n 58), para. 207.

⁷² There has been a long debate regarding the greater weight that should be given to the practice of states that are especially affected by a specific issue – in the present case the large-scale influx of refugees. See in particular ICJ, *North Sea Continental Shelf Cases* (n 58), para. 73, as well as the Dissenting Opinion of Judge Lachs in the same case. See also ILC, ‘Identification of Customary International Law’ (n 60) 136–137.

⁷³ Akehurst, ‘Custom as a Source of International Law’ (n 61) 38–42.

even contribute to its strengthening.⁷⁴ On the other hand, if they remain silent, their absence of reaction could be interpreted as tacit acceptance of this behaviour and potentially as ‘indications of the recognition of a new rule’.⁷⁵ A practice that is contrary to a rule but is followed by other states might thus contribute to the erosion of that rule. In some cases, it could lead to the development of a new rule or to the emergence of a new exception.⁷⁶

This approach grounded in international law offers a new perspective on the linkages between Southeast Asian practice in terms of refugee protection and international refugee law. As Davies notes, even though the majority of Southeast Asian states have not formally acceded to the international refugee law instruments, ‘they have a consistent history of justifying their position by reference to the international refugee legal framework’.⁷⁷ Where some will be quick to denounce violations of international law and the hypocrisy of states, considering such actions as evidence of a broader rejection of international refugee law, this new approach goes beyond this assessment and argues that references to the legal framework have in fact a significant legal value. It provides evidence that the states concerned *recognize* and *accept* the existence of a legal regime pertaining to the protection of refugees and that they navigate between the rules and exceptions provided for by this regime to justify their actions to the rest of the international community.

1.4. Structure of the book

This book starts from the premise that there is a regional approach to refugee issues which is somewhat specific to Southeast Asian states while largely grounded on international refugee law. It is divided into six chapters in addition to the introduction and conclusion that seek to highlight those specificities.

Following the introduction, Chapter 2 explores one of the most nagging questions when dealing with refugee issues in Southeast Asia, that is, why most states in the region persistently refuse to accede to the Refugee Convention and Protocol. At least six arguments have been put forward in the literature or by states themselves to explain this situation. While all those arguments are valid to a certain extent, they do not fundamentally support the idea that Southeast Asian states ‘reject’ the idea that there should be some rules regarding the protection of specific groups of people fleeing persecution, armed conflict and generalized violence, namely refugees. They do, however, point out some of the limitations of the current global refugee regime.

⁷⁴ Wolfke, *Custom in Present International Law* (n 65) 65–66.

⁷⁵ ICJ, *Nicaragua v USA* (n 58), para. 185.

⁷⁶ Akehurst, ‘Custom as a Source of International Law’ (n 62) 38–42.

⁷⁷ Davies, *Legitimising Rejection* (n 34) 17.

Against this backdrop, Chapter 3 nuances one of the main criticisms regarding the protection of refugees in Southeast Asia, namely the fact that refugees find themselves in a ‘legal limbo’ in many of those states. On the one hand, international human rights law offers a significant level of protection to asylum seekers and refugees, while customary international law represents a source of particularly important obligations that bind all states, irrespective of their accession to the Refugee Convention. At the regional level, the development between 1996 and 2001 of the Bangkok Principles on Status and Treatment of Refugees by the Asian-African Legal Consultative Organization (AALCO)⁷⁸ as well as the adoption of a certain number of non-binding regional instruments that touch upon the issue of refugees in one way or another demonstrate that Southeast Asian states do not reject international refugee law *per se*. Yet it makes clear – and this is a key characteristic of the ASEAN more generally – that they prefer the development of soft law instruments rather than being bound by formal legal obligations.

Chapter 4 examines how Southeast Asian states have responded to the arrival of asylum seekers and refugees. Although many of these states are not parties to the 1951 Convention, there is arguably a ‘long-standing tradition of hospitality towards refugees’ in the region,⁷⁹ as illustrated by the large number of refugees those countries have hosted over the past decades. What might be different from other regions, however, and what drew much criticism, is the fact that they conceive asylum primarily as a ‘temporary’ form of protection. Indeed, the concept of ‘temporary refuge’ is, arguably, one of the main legacies of the Indochinese refugee crisis. While there have been cases of *refoulement*, as documented by numerous reports published by human rights NGOs, the general practice of Southeast Asian states when it comes to the prohibition of *refoulement* as well as their efforts to justify their actions in such cases clearly demonstrate their commitment to this fundamental principle of international refugee law.

It has been said that the 1951 Convention’s definition of a refugee ‘is not recognised by the majority of Southeast Asian states’.⁸⁰ Chapter 5 argues, on the contrary, that these states have traditionally accepted a large number of people fleeing various situations, including people fleeing armed conflict and violence as well as people fleeing persecution. They have remained rather discreet when dealing with people fleeing persecution, especially when they came from neighbouring countries, because of the repercussions they fear the grant of asylum could have on bilateral relationships.

⁷⁸ AALCO, ‘Bangkok Principles on the Status and Treatment of Refugees’ (31 December 1966); Asian-African Legal Consultative Organization (AALCO), ‘Final Text of the AALCO’s 1966 Bangkok Principles on Status and Treatment of Refugees’ (adopted 24 June 2001). The AALCO was formerly known as the Asian-African Legal Consultative Committee (AALCC) until 2001.

⁷⁹ UNHCR, ‘Update on UNHCR’s Operations in Asia and the Pacific’ (12 February 2019).

⁸⁰ Davies, *Legitimising Rejection* (n 34) 7.

Nevertheless, in their practice, Southeast Asian states have *de facto*, and increasingly *de jure*, recognized that certain categories of people, namely refugees, must be protected under international law.

Once refugees have been admitted into the territory of a state, the question arising is that of their treatment. Chapter 6 discusses the international standards for the protection of refugees, which are established by the 1951 Convention and complemented by international human rights law. Even though most Southeast Asian states are not parties to the 1951 Convention and/or 1967 Protocol, this chapter illustrates how asylum seekers and refugees, despite their irregular status, are *de facto* treated differently from other irregular migrants. This is in particular so when it comes to arrest, detention, return and, increasingly, when it comes to economic and social rights.

Chapter 7 of this book deals with durable and non-durable solutions to refugee situations in Southeast Asia, an issue that has proved particularly problematic in the region. Compared to other regions, Southeast Asian states have been extremely reluctant to consider local integration as an option. This explains not only the strong focus on resettlement, but also these states' insistence on the need to address the root causes of refugee movements – a dimension of the problem that had been largely neglected until recently. Now, however, with no realistic prospect for the return of the refugees from Myanmar, who constitute the bulk of the refugees in the region, 'non-durable' solutions such as the grant of a temporary permit to refugees seems to be the only realistic option, even though it remains difficult also to achieve.

Finally, the conclusion completes the book by wrapping up the analysis.

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2 Explaining Southeast Asian resistance to the ratification of the 1951 Convention

In 1949, in a context of massive cross-border displacement in the aftermath of World War II, the United Nations began developing a new international regime for the protection of refugees, which led to the establishment of UNHCR and the adoption of the Convention relating to the Status of Refugees. While the scope of application *ratione loci* and *ratione temporis* of the Convention were initially limited to events that took place in Europe prior to 1951, this was subsequently extended in 1967 with the adoption of the Protocol relating to the Status of Refugees. The Convention is considered the most important instrument of international refugee law: the ‘cornerstone’ of international refugee protection. As of 31 December 2020, 146 states were parties to the 1951 Convention (plus 19 signatories), while 147 were parties to the 1967 Protocol.¹

It has often been said that accession to the Refugee Convention entails significant benefits for the countries that ratify it. For instance, it can show other states that the country is committed to human rights; it can offer a basis for dialogue and solutions to refugee problems; and it could contribute to diffusing tensions between countries of origin and countries of asylum by transforming what could be viewed as a political decision, namely the grant of the refugee status, into a legal obligation. Yet, despite significant efforts by the United Nations High Commissioner for Refugees (UNHCR) to convince them otherwise, Asian states, and *a fortiori* the main destination countries, have remained far more cautious than other regions when it comes to international refugee law.

A majority of states in the Asia region and half of the states in the Asia-Pacific region remain outside the 1951 Convention and its Protocol. In Southeast Asia more specifically, only two out of the ten ASEAN states have acceded to those instruments, namely the Philippines and Cambodia. The

¹ For ratifications of treaties, see <<https://treaties.un.org/Pages/ParticipationStatus.aspx>> accessed 16 January 2021. Madagascar and Saint Kitts and Nevis are only parties to the Refugee Convention, whereas Cape Verde, the United States and Venezuela are only parties to the Protocol. In all, 148 states are parties to one or both of these instruments.

Philippines acceded to the 1951 Convention and its Protocol in July 1981 under pressure from the United States. In the case of Cambodia, the decision to accede to the 1951 Convention was made in October 1992 when the country was administered by the United Nations Transitional Authority in Cambodia (UNTAC).

The question why most Southeast Asian states have not yet acceded and, for some of them, have never expressed any intention to accede to the Refugee Convention is not only an ‘important political puzzle’,² but it is also the point of departure for any reflection on international refugee law in Southeast Asia. Before concluding that Southeast Asian states ‘reject’ international refugee law, it is worth considering in the first place the reasons why those states still refuse to accede to the main instruments pertaining to the protection of refugees. As will be shown more in detail later, the position of Southeast Asian states vis-à-vis the international refugee protection regime has arguably been determined to a large extent by the massive influx of people seeking asylum during the Indochinese crisis. Considering the number of people concerned, the political situation in the region and the ethnic issues in the main countries of first asylum, the crisis had fuelled fears, suspicions and resentment against refugees and given rise to arguments against possible accession to the 1951 Convention. Yet there are also various reasons for states avoiding going through the formal process of ratifying a particular convention that are not necessarily related to the content of the instrument itself.

Several arguments have been put forward in the scholarly literature or invoked by Asian states themselves. There are, broadly speaking, six main explanations for this situation: the primacy of national security (Section 2.1); the argument that refugees could pose a threat to social cohesion (Section 2.2); the economic costs associated to the presence and care of refugees (Section 2.3); the importance of the principle of non-interference in the internal affairs of other states (Section 2.4); and the ‘Asian’ versus ‘Western’ values debate (Section 2.5). Another argument has been developed more recently by Sara Davies to explain what she calls a ‘non-commitment to international refugee law’.³ According to her, the rejection of international refugee law by Southeast Asian states represents an essential part of a ‘manipulation strategy’ aimed at gaining more financial support from the international community (Section 2.6). While all these arguments contribute to a certain extent to explaining the position of Southeast Asian states with regard to the Refugee Convention and its Protocol, it is argued that they do not clearly support the proposition that Southeast Asian states fundamentally *reject* international refugee law.

² Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Nijhoff 2008) 5–6.

³ Ibid., 9.

2.1. Refugees as a threat to national security

One reason often put forward to explain Southeast Asian states' reluctance thus far to accede to the 1951 Convention or its Protocol relates to security concerns associated with the reception of refugees,⁴ especially in the context of a 'large-scale' or mass influx. States parties to these instruments have an obligation under these instruments not to return refugees to places where 'their life or freedom would be threatened' (the so-called principle of *non-refoulement*).⁵ In practice this means that they would generally have to accept refugees on their territory, at least on a temporary basis. It is clear, however, that for Asian states in general, national and regional security, which is considered to be in the 'collective interest', has long been a far more important concern than the promotion and protection of individual rights.⁶

Although the provision of asylum should be seen as a 'peaceful and humanitarian act',⁷ accepting refugees could indeed become a source of tension between states, potentially leading to violent reactions. In Southeast Asia, the case of the Vietnamese refugees after the fall of Saigon in 1975 was particularly sensitive. By the end of the 1970s, the ASEAN states were under the impression that the influx of people – who were mainly of Chinese ethnic descent – was in fact deliberately organized by the Socialist Republic of Vietnam in an attempt to destabilize its neighbours.⁸ It was feared in particular that the refugees, especially those of Chinese ethnicity, could potentially reinforce the communist movements within each country. The particularly strong language used by the Malaysian authorities on occasion reflected these concerns. On 15 June 1979, the Malaysian minister of interior, Ghazali Shafie, referring to the "boat people" who had arrived in the various countries of Southeast Asia, urged Vietnam to 'stop casting its human "rubbish" on their shores', while at the same time announcing a further tightening of Malaysian policy.⁹ The former Malaysian prime minister Mahatir Mohamad, then deputy prime minister, is also alleged to have threatened to order the authorities to 'shoot on sight' Vietnamese refugees trying to enter Malaysian territorial waters.¹⁰

⁴ See e.g. Astri Suhrke, 'Indochinese Refugees: The Law and Politics of First Asylum' (1983) 467:1 Annals of the American Academy of Political and Social Science 109; Vitit Muntarbhorn, *The Status of Refugees in Asia* (OUP 1992) 33.

⁵ The principle of *non-refoulement* is in any case a legal obligation under international law generally, including customary international law, as set out in more detail in Section 4.3.

⁶ Vitit Muntarbhorn, 'Current Challenges of Human Rights in Asia', Conference on 'Human Rights and Foreign Policy' (University of Southampton 1986) 12–15.

⁷ UNGA, 'Declaration on Territorial Asylum', A/RES/2312(XXII) (14 December 1967) Preamble.

⁸ Astri Suhrke, 'Migration, State and Civil Society in Southeast Asia', Working Paper (Chr. Michelsen Institute 1992) 14.

⁹ SC Wee, 'Malaysia Threatens to Shoot Landing Vietnamese Refugees', *Sarasota Herald Tribune* (16 June 1979).

¹⁰ Ibid.

In other circumstances, the countries of origin could consider that the states of asylum are providing sanctuary to rebel groups. Throughout the 1980s, for instance, the Vietnamese army conducted regular incursions into Thai territory to fight members of the Khmer Rouge, who had sought refuge in Thailand alongside civilians following the invasion of Cambodia and continued to operate from there. In the mid-1990s, the Government of Thailand was accused by the authorities in Myanmar of ' harbouring dissidents and members of . . . ethnic groups' in conflict with the government.¹¹ Many of the people who had sought refuge in Thailand were indeed close to the Karen National Union and used the refugee camps on one side of the border to support their fight on the other. Against this backdrop, Thailand became the object of numerous attacks and incursions by the Burmese military.¹²

Concerns for national security are not specific to Southeast Asian states, however, and the provision of asylum to refugees has never been solely an issue of compassion. As noted by one commentator, '[W]hen interests of State are fundamentally at odds with other values, as is increasingly the case with asylum, then it is unlikely that compassion, solidarity or human rights will prevail'.¹³ The challenge is thus to find the right balance between the security concerns of states and the obligation to protect refugees.¹⁴ In this regard, it should be noted that the 1951 Convention contains specific provisions that provide a system of checks and balances to ensure that the rights of refugees are protected in a way that takes full account of the security and law enforcement interests of states. Countries of asylum, for instance, may restrict the movements of refugees if the situation requires it.¹⁵ The Refugee Convention permits states of asylum to derogate from certain rules 'in time of war or other grave and exceptional circumstances'¹⁶ and to expel refugees for reasons of national security or public order.¹⁷ It even provides for an exception to the principle of *non-refoulement* in the case of refugees who may represent a danger to the security of the country or to the community of that country.¹⁸ All in all, under the Convention, states retain a large margin of manoeuvre to deny or limit the rights of refugees for security-related reasons.

¹¹ HRW, 'Unwanted and Unprotected: Burmese Refugees in Thailand', C1006 (1 September 1998).

¹² Hazel Lang, 'The Repatriation Predicament of Burmese Refugees in Thailand: A Preliminary Analysis', UNHCR New Issues in Refugee Research 46 (July 2001) 5.

¹³ Andrew Shacknove, 'From Asylum to Containment' (1993) 5:4 IJRL 517–518.

¹⁴ See UNHCR, 'Addressing Security Concerns without Undermining Refugee Protection – UNHCR's Perspective' (17 December 2015).

¹⁵ Convention relating to the Status of Refugees (opened for signature 25 July 1951, entered into force 22 April 1954) 189 UNTS 150 and Protocol relating to the Status of Refugees (taken note of by UNGA 16 December 1966, entered into force 4 October 1967) 606 UNTS 267 arts. 28.1 and 31.2.

¹⁶ Ibid., art. 9.

¹⁷ Ibid., art. 32.

¹⁸ Ibid., art. 33(2).

2.2. Refugees as a threat to social cohesion

This argument is somewhat related to the security argument, but the focus is more on the dynamics in terms of social cohesion within a country than on external threats. The 1951 Convention sets out specific obligations of states as regards refugees, with some provisions paving the way for the integration of refugees on the territories in which they have found asylum. Article 34, which provides that the states parties ‘shall as far as possible facilitate the assimilation and naturalization of refugees’, is particularly contentious in this regard. As explained by Muntarbhorn, ‘dominant in the minds of Asian states is the national security factor and the fear that accession to these instruments would oblige them to accept an unlimited number of refugees for long-term settlement’.¹⁹ Many commentators have thus highlighted the concerns of Southeast Asian states when it comes to integrating new people into their societies.

Indeed, states in the region remain fragile in terms of cohesion between different ethnic and religious groups and some of the governments concerned have expressed fear that the presence of refugees could disrupt the already fragile ethnic balance and lead to increased social tensions. For instance, the large numbers of people of Chinese ethnic origin among the Vietnamese boat people who landed on the shores of Southeast Asian countries in 1978 were viewed with hostility by these countries, as they were already dealing with strong Chinese minorities. Malaysia argued that the country was already struggling to integrate different ethnic groups into a single ‘Malaysian nation’ with the same system of values and that the arrival of people of Chinese ethnicity might exacerbate the tensions between communities.²⁰ The same concerns were visible in Singapore, where the arrival of a large number of ethnic Chinese people was seen as ‘a threat to national survival’.²¹ The authorities feared that their reception in Singapore would undermine the specificities of a country that was already trying to change its image as a ‘third China’.²² This approach led to the encampment of various groups of refugees throughout Southeast Asia.

There have also been concerns regarding the fact that the standards provided for in the Refugee Convention were higher than the living conditions of the population. For instance, the Thai Government argued at the time that the use of substantial economic resources for the care of Indochinese refugees rather than for the country’s development provoked the anger of the local population, often itself living in extreme poverty.²³ In Malaysia,

19 Vitt Muntarbhorn, *The Status of Refugees in Asia* (n 4) 33.

20 See Suhrke, ‘Indochinese Refugees: The Law and Politics of First Asylum’ (n 4) 109.

21 Suhrke, ‘Migration, State and Civil Society’ (n 8) 15.

22 Mary Yuen, ‘Vietnamese Refugees and Singapore’s Policy’ (1990) 18:1 *Asian Journal of Social Science* 83.

23 Operations Centre for Displaced Persons in Thailand, ‘The Unfair Burden – Our House Is Full’, REC/THA/8 D (September 1979) 15–17.

the minister of foreign affairs explained in November 2012 that his country had no intention of acceding to the Refugee Convention because it would oblige the Malaysian Government ‘to treat [the refugees] better than [its] own people’, insofar as the Convention provides, among other things, for the right to work and the right to education.²⁴ This demonstrates that Malaysia’s reluctance to sign the 1951 Convention is partly due ‘to the perceived disparity between the socio-economic rights accorded to refugees under the Convention and the rights afforded to its own citizens, particularly in relation to the minimum wage’.²⁵ A broad range of other arguments related to societal security have been put forward by authorities, with refugees and irregular migrants being portrayed as threats to social order or to public health, or even to the environment.²⁶

Despite its obvious importance, however, this line of argument does not explain a number of cases where Southeast Asian states have accepted the integration of groups of people of different ethnic origins. Malaysia integrated thousands of people in the 1970s and 1980s who had fled what was then the Democratic Kampuchea, now Cambodia, as well as a large number of people from Myanmar or the Philippines, regardless of their ethnic origins, simply because they were Muslims. The security argument is also at odds with the reality that millions of irregular migrants of different origins are living and working in countries such as Thailand and Malaysia. As Greig suggested, the fact that countries may refrain from becoming parties to refugee agreements may thus have more to do with the fear of arousing ‘public disquiet about the possible entry of large numbers of “foreigners” into the national territory’ rather than with the content of those instruments.²⁷

2.3. The ‘burden’ of hosting refugees

Another important argument often put forward by Southeast Asian states for their resistance to ratifying the 1951 Convention relates to the responsibilities and costs they fear they would have to bear should they accede to the Convention, in particular in the context of a massive influx of people.²⁸ The hosting of refugees indeed involves heavy financial burdens that

24 Naido Sumisha, ‘Malaysia Finds “Conflict” in UN Refugee Convention’, *ABC Radio Australia* (12 November 2012) <www.abc.net.au/news/2012-11-12/an-malaysia-speaks-on-refugee-treatment/4367642> accessed 16 January 2021.

25 Francis Angus and Rowena Maguire, ‘Shifting Powers: Protection of Refugees and Displaced Persons in the Asia Pacific Region’ in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate 2013) 5.

26 See e.g. W Courtland Robinson, ‘Thailand: Background Paper on Human Rights, Refugees and Asylum Seekers’, Writenet (July 2004) 31.

27 Donald W Greig, ‘The Protection of Refugees and Customary International Law’ (1978) 8:4 Australian Year Book of International Law 112–113.

28 Davies, *Legitimising Rejection* (n 2) 10–12.

neighbouring states, which are mostly developing countries, may be unable to bear. Yet, although it is clear that the hosting of refugees has significant financial implications, the 1951 Convention does not establish a proper mechanism to share the burden and long-term responsibility with regard to refugees; it only acknowledges – in its Preamble, that is, in a non-obligatory form – that ‘the grant of asylum may place unduly heavy burdens on certain countries’ and that a ‘satisfactory solution’ to the refugee problem could not ‘be achieved without international co-operation’.²⁹ The absence of clear parameters for what is sometimes referred to as ‘burden-sharing’ is arguably one of the main weaknesses of the Convention.

Southeast Asian states, like other developing states, privilege their own economic development and are not necessarily able and willing to assume responsibility for the costs associated with the hosting of refugees. For instance, at a Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South-East Asia organized in Geneva in December 1978, the main countries of first asylum in the region, namely Thailand, Malaysia, Indonesia and the Philippines, all emphasized the economic problems that the influx of refugees raised for their already fragile economies. Malaysia declared that it was a developing country with limited resources and that the influx of Indochinese ran the risk of compromising its economic and social development.³⁰ Indonesia, for its part, did not accept Indochinese refugees for permanent resettlement ‘because of its heavy burden in caring for its own people’.³¹ Thailand also raised the fact that the presence of thousands of refugees from Laos, Cambodia and Vietnam during the Indochinese refugee crisis put significant pressure on economic resources as well as on other resources such as land, water, wood or energy. It did so again in relation to the refugees from Myanmar who sought refuge in the Kingdom from the mid-1980s onwards, many of whom still live in several refugee camps along the border between the two countries.

The recognition of the responsibility of other states, and hence their moral obligation to contribute to the effort, has always been a significant issue for Southeast Asian states. During the Indochinese refugee crisis, they repeatedly recalled that Western states – in particular France and the United States – were largely responsible for the situation that had compelled people to move in the first place through their involvement in the Indochina and Vietnam wars. As such, Southeast Asian states argued that those states should also be responsible for assisting and protecting the Indochinese refugees.

29 1951 Convention, Preamble.

30 UNHCR, ‘Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South-East Asia, Geneva’ (11 December 1978).

31 Rooslan Soeroso, ‘Indonesia: Refugees and Displaced Persons – the Asian Practice’, in ‘Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons’, Manila, Philippines, HCR/120/25/80 (14–18 April 1980).

The responsibility, according to Southeast Asian states, also extended to the countries of origin, with Vietnam being singled out following the invasion of Cambodia, which led to a new influx of refugees.³² It is the Indochinese crisis that arguably brought this issue at the forefront of the refugee agenda, with the term ‘burden sharing’ itself emerging only in 1970s in the context of the situation in Southeast Asia.³³ Since then, Southeast Asian states have repeatedly voiced their concerns regarding the costs associated with refugee protection and the lack of support in this regard, calling on other states, including the countries of origin, to contribute to the response through financial assistance and resettlement places, or by addressing the ‘root causes’ of refugee movements.³⁴

Thailand perhaps best summarized what Southeast Asian states consider to be the main weakness of the Refugee Convention in a statement made during a meeting of UNHCR’s Executive Committee (ExCom) in 2001:

The 1951 Convention was widely acknowledged as the framework within which refugees should be protected, yet it was inadequate to deal with the magnitude and complexity of contemporary refugee problems. The Convention focused on international protection at the expense of preventing and addressing the root causes of refugee problems. Moreover, in line with the principle of non-refoulement, asylum countries were under an obligation to allow all refugees and displaced persons to enter their territory notwithstanding their limited resources and underdeveloped infrastructure. The existing framework placed the primary burden of refugee problems on asylum countries.³⁵

Another related issue is the fear that accession to the Refugee Convention ‘could result in more asylum seekers’.³⁶ In other words, accession might also create a pull factor, or have a ‘magnet effect’, and incite more people to come to their territory looking for asylum. Southeast Asian officials have regularly voiced such concerns. In April 2007, a representative of the Malaysian authorities said that the government was of the opinion that ‘if Malaysia becomes party to the Convention, considering its strategic geographical

³² ASEAN, ‘Statement by the Philippine Foreign Minister as Chairman of the ASEAN Standing Committee’, Manila (August 1980).

³³ Claire Inder, ‘The Origins of “Burden Sharing” in the Contemporary Refugee Protection Regime’ (2017) 29:4 IJRL 529. There have been several attempts since then to replace the term ‘burden-sharing’ with more euphemistic notions of ‘solidarity-sharing’ or ‘responsibility-sharing’.

³⁴ On the need to address the ‘root causes’ of refugee movements, see also Section 7.4.

³⁵ ExCom, ‘Summary Record of the 554th Meeting, Held at the Palais des Nations, Geneva’ A/AC.96/SR.554 (8 October 2001), para. 60.

³⁶ Fernando Chang-Muy, ‘International Refugee Law in Asia’ (1992) 24 New York University Journal of International Law and Politics 1177.

location in the region, it would be a drawing factor for refugees to come to Malaysia'.³⁷ In 2013, the Thai authorities also expressed fear that the development of 'a formal regional policy' would 'encourage more arrivals'.³⁸ By contrast, the fact that countries are not parties to the Refugee Convention is thought to have a deterring effect.

It is true that other states, outside the Asian region, have chosen to accede to the Refugee Convention and its Protocol, despite being developing countries themselves. A majority of African and Latin American states have indeed acceded to these two instruments, despite the fact that large parts of their societies are living in poverty. Yet, if the costs related to accession are not necessarily the main obstacle, the lack of burden-sharing mechanisms remains a strong argument for developing countries.

2.4. The principle of non-interference in the internal affairs of other states

As stated earlier, the grant of asylum by a state should in principle be considered a 'peaceful and humanitarian' act that should not be regarded as an 'unfriendly' act by any other state. In certain circumstances, however, hosting refugees can effectively create tensions between states. This is because the recognition of refugee status under the 1951 Convention does represent 'an implicit acknowledgment by the State of refuge of the existence of a least reasonable fear – if not the actual occurrence of "political" persecution in the refugee's country of origin'.³⁹ As such, the grant of asylum could be viewed by the country of origin 'as an implied criticism of its domestic policies and might, therefore, be a politically embarrassing decision for the country of refugee to take'.⁴⁰ Indeed, accepting refugees may bind states into positions that could lead to a deterioration of relations among states that want to maintain good relations.

The recognition of the principle of sovereignty and its corollary, namely the principle of non-interference in the internal affairs of other states, as reaffirmed in the Bali Treaty,⁴¹ are so important for Southeast Asian states that they have come to define the 'ASEAN way'. This is

37 Quoted in Amarjit Kaur, 'Refugees and Refugee Policy in Malaysia' (2007) 18 UNEAC Asia Papers 84.

38 Quoted in Integrated Regional Information Networks News, 'In Search of a Regional Rohingya Solution', *The New Humanitarian* (26 July 2013) <www.irinnews.org/report/98477-analysis-search-regional-rohingya-solution> accessed 16 January 2021.

39 See Jean-Pierre L Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1978) 8 Australian Year Book of International Law 164.

40 Ibid., 164–165.

41 Treaty of Amity and Cooperation in Southeast Asia (opened for signature 24 February 1976, entered into force 15 July 1976) 1025 UNTS 297, art. 2.

characterized, *inter alia*, by a non-conflictual and, indeed, consensual approach to intergovernmental relations. The principle of non-interference explains the fact that the nature of the political regime of the member states has never been an obstacle to becoming a member of the organization. It also explains the fact that they have remained largely silent regarding serious human rights violations committed by some member states, for instance in Indonesia during the conflict in Aceh (Indonesia), in Timor, in the south of the Philippines, in the south of Thailand and even in Myanmar regarding the Rohingya and other minorities.

On many occasions Southeast Asian countries have expressed concern regarding the consequences that the grant of asylum could have on their relations with the other countries in the region. As refugees, the Hmong, for instance, had long received preferential treatment in Thailand due to their collaboration with the US Government during the Vietnam war and the serious fear of persecution following the change of government in Laos. Their situation deteriorated, however, as relations between the governments of Thailand and Laos improved. The Hmong increasingly became a problem for the Thai authorities, who were caught between their national interests and the pressure exerted by the United States. One could also mention the 'Montagnard refugees' from Vietnam who were granted temporary refuge in Cambodia in the early 2000s. This decision provoked the ire of the Vietnamese authorities, which exerted significant pressure on Cambodia to return them.⁴²

Another example concerns the people displaced from Myanmar to Thailand following the repression of the prodemocracy protests in 1988. This issue became particularly problematic as diplomatic relations between the two governments improved throughout the 1990s.⁴³ While Thailand initially offered asylum to many people fleeing those events, the political activities conducted openly by the refugees in Thailand against the government in Yangon became less acceptable. As stated by the deputy prime minister of Thailand in January 1995, 'Burma and Thailand are neighbouring countries and Rangoon could become suspicious of any Thai support for the dissident group'.⁴⁴ By 2003, the Thai Government had decided to relocate all of the Burmese urban refugees to the camps at the border to address the concerns of the authorities in Yangon by curtailing the activities led openly

42 See e.g. HRW, 'Vietnam/Cambodia: UN Should Halt Repatriation of Montagnards until Safeguards Are in Place' (19 February 2002) <www.hrw.org/news/2002/02/19/vietnam-cambodia-un-should-halt-repatriation-montagnards-until-safeguards-are-place> accessed 16 January 2021.

43 David BH Denoon and Evelyn Colbert, 'Challenges for the Association of Southeast Asian Nations (ASEAN)' (winter 1998–99) 71:4 Pacific Affairs 509–511.

44 Quoted in HRW, 'Unwanted and Unprotected' (n 11).

by the political refugees from Myanmar in Thailand.⁴⁵ As a commentator once noted,

[T]o classify Burmese as refugees means to acknowledge that there are significant categories of Burmese nationals who have a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.’ Such a recognition is detrimental to intra-ASEAN solidarity and would violate the golden rule of ASEAN, namely the non-interference in the domestic affairs of a member state. The political implications of granting refugee status to refugees from other South-East Asian nations cannot be overlooked.⁴⁶

It could be argued, however, that acceding to the Convention would turn a political choice into a legal obligation; asylum states would then be in a position to invoke their obligations under the 1951 Convention to justify the grant of asylum or, alternatively, to refuse refugee status on legal grounds. Muntarbhorn noted in this regard that many of the ‘displaced persons’ in Thailand during the Indochinese refugee crisis, especially those arriving by boat towards the end of the 1980s, were ‘merely looking for a brighter future as economic migrants’; as such, Thailand would have been in position not to treat them as refugees.⁴⁷

The principle of non-interference is an important argument in the context of Southeast Asia. Specifically, respect for this principle means, among other things, that ASEAN states avoid supporting rebels or people who are in conflict with other ASEAN governments. There are few examples of groups of people from ASEAN states that have been officially granted asylum within the ASEAN. Apart from the Burmese refugees in the camps in Thailand, the most obvious case is that of the Muslim refugees from Mindanao, in the south of the Philippines, who were pretty much welcomed by Malaysia throughout the 1960s and 1970s. Some interpreted their admission as an implicit endorsement by Malaysia of the struggle of Muslim populations in

45 HRW, ‘Out of Sight, Out of Mind: Thai Policy towards Burmese Refugees and Migrants’, 16:2 (C) (February 2004).

46 The Malaysian Bar, ‘Malaysian Government Must Re-Think Their Overall Position with Respect to Refugees’, Statement presented by Andrew Khoo, Chairperson of the Bar Council’s Human Rights Committee, at the session entitled ‘New Challenges and Stronger Partnerships in the Asia-Pacific’ of the 2010 UNHCR Annual Consultations with NGOs in Geneva, Switzerland (30 June 2010) <www.malaysianbar.org.my/article/about-us/committees/human-rights/malaysian-government-must-re-think-their-overall-position-with-respect-to-refugees> accessed 20 January 2021.

47 Vittit Muntarbhorn, ‘International Protection of Refugees and Displaced Persons: The Thai Perspective’, Law Association for Asia and the Western Pacific (1981) 33–34.

the Philippines.⁴⁸ Yet the decision of the Malaysian authorities seemed to have more to do with internal considerations, that is, changing the ethnic balance in the (Malaysian) state of Sabah in favour of Muslims, than with foreign policy considerations. Another example is that of the Muslim Thai who sought refuge in Malaysia in 1981 and who were ‘officially claimed to be receiving “humanitarian aid” as recognized refugees until their voluntary repatriation was possible’.⁴⁹ The same situation arose in 2005 with regard to some 130 Muslim Thai to whom Malaysia offered a temporary shelter as the situation in southern Thailand deteriorated.⁵⁰ Those concerned have since returned to Thailand, but the situation in the south of the country and the role that Malaysia continues to play in harbouring Thai ‘insurgents’ on its territory remain sensitive issues between the two countries. Finally, there is the case of the more than 30,000 people from Aceh fleeing fighting between the Indonesian army forces and the Acehnese separatist movement in the early 2000s, who were given temporary visas in Malaysia in 2005 following the late 2004 Tsunami.⁵¹

2.5. The ‘Eurocentric’ nature of the Refugee Convention and the ‘Asian values’

Another common argument in the literature seeking to explain Southeast Asian states’ reluctance to ratify the Refugee Convention rests on the idea that they are not interested in signing up to a legal regime that does not correspond to their understanding and perception of what the international regime for the protection of refugees should be. Several commentators have pointed out in particular the ‘Eurocentric’ nature of the 1951 Convention, which may be viewed as not adapted to the culture and specificities of the Asian context.⁵²

It must be recalled in this respect that the convention was adopted in the aftermath of World War II and that it was primarily conceived ‘as a

48 Davies, *Legitimising Rejection* (n 2) 142–150. In 2017, an estimated 80,000 Moro Muslims who had fled the violence in Mindanao were still living in Sabah. See Gerhard Hoffstaedter, ‘Refugees, Islam, and the State: The Role of Religion in Providing Sanctuary in Malaysia’ (2017) 15:3 *Journal of Immigrant and Refugee Studies* 301.

49 Jera Beah H Lugo, ‘Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the “Humanitarian Exception”’ (2012) 17 *Journal of Political Science and Sociology* 80.

50 R Camilleri, ‘Muslim Insurgency in Thailand and The Philippines: Implications for Malaysia’s Cross-Border Diplomacy’ (Higher Education Research Data Collection publications 2008) 72–73.

51 Hoffstaedter, ‘The Role of Religion in Providing Sanctuary in Malaysia’ (n 48) 291–292; HRW, ‘Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia’ 16:5 (C) (April 2004).

52 See e.g. Vittit Muntarbhorn, *The Status of Refugees in Asia* (n 4) 30–36; Davies, *Legitimising Rejection* (n 2) 23–56.

response to refugees in Europe displaced during the course of the Second World War and those fleeing Communist countries after the war'.⁵³ The roots of this Eurocentrism are manifold, starting with the geographical and temporal limitations of the 1951 Convention. Article 1(A)(2) of the Convention restricts the definition of a refugee to people fleeing 'events occurring before 1 January 1951', thus precluding refugee situations arising after 1951. The Convention might also be limited in its geographical scope insofar as it gave States Parties the option of limiting their obligations under the Convention to persons who had become refugees as a result of events occurring 'in Europe' exclusively.⁵⁴ The refugee definition adopted for the purposes of the 1951 Convention was also consistent with the Western emphasis, in a pivotal period between the end of World War II and the beginning of the Cold War, on refugees as persons fleeing persecution.

UNHCR attempted to address the criticism of eurocentrism through the development of the Protocol on the Status of Refugees in 1967, which aimed at lifting the temporal and geographical limitations of the Convention so as to make it 'universal'. The Preamble to the Protocol noted that 'new refugee situations ha[d] arisen since the Convention was adopted and that the refugees concerned m[ight] therefore not fall within the scope of the Convention'. Yet the adoption of a new instrument did not fundamentally change the situation. The definition of a refugee remained the same as in the Convention with a focus on individuals demonstrating a 'well-founded fear' of persecution. As a result, many commentators consider that the Protocol was 'not well suited to deal with large-scale influx situations' such as in Africa and in Asia, where people typically flee generalized situations of conflict and widespread violence.⁵⁵ Against this backdrop, Sara Davies argues that 'the Protocol did not persuade the majority of Southeast Asian states that international refugee law was relevant to solving the irregular migrant problems they confronted'.⁵⁶ This has been contrasted with 'the willingness of African countries to develop regional instruments and institutions, implementing and in fact extending the base protection found in international law, both in the areas of refugee protection'.⁵⁷

Those who reject the accusation of Eurocentrism of the Refugee Convention would argue that nearly 150 states representing all regions of the world have acceded to the Convention and/or its Protocol, including many Asian

⁵³ Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar Publishing 2016) 28.

⁵⁴ 1951 Convention, arts. 1(A)(2) and 1(B)(1).

⁵⁵ Gervase Coles, 'Temporary Refuge and the Large Scale Influx of Refugees' (1980) 8 *The Australian Year Book of International Law* 202.

⁵⁶ Davies, *Legitimising Rejection* (n 2) 74.

⁵⁷ Francis and Maguire, 'Shifting Powers: Protection of Refugees and Displaced Persons in the Asia Pacific Region' in Francis and Maguire (eds), *Protection of Refugees in the Asia Pacific* (n 25) 4.

states. The ‘Eurocentric’ argument may thus not be a sufficient explanation to the reluctance of other states to join the international refugee regime. Nevertheless, it is interesting to note that Asian states have long asserted their specificities when it comes to international human rights law through a discourse centred on ‘Asian values’. It has been said, for instance, that international human rights law was developed without the contribution of developing countries, which resulted in a significant disconnect between international standards and the culture and values in Asia. The difference has often been described in opposite terms, for example, as ‘particularism’ versus ‘universalism’, ‘communitarianism’ versus ‘individualism’, ‘Asian values’ versus a Western and liberal vision of human rights, or the prominence of economic and social rights over civil and political rights. It has been argued that international human rights law, in particular civil and political rights, represent obstacles to the economic development of developing countries, or that they do not correspond to Asian societies, which tend to emphasize the importance of strong government, respect, submission to the authorities, the predominance of the community over the individual and/or the primacy of responsibilities over rights.⁵⁸

This kind of discourse has not yet completely disappeared in the region. For instance, the Malaysian Government stated in the report it submitted in 2009 in the context of the Universal Periodic Review (UPR) that ‘while upholding the universal principles of human rights, Malaysia would like to accentuate its human rights values which take into account the history of the country as well as the religious, social and cultural diversities of its communities’. The report added that ‘the practices of human rights in Malaysia are reflections of a wider Asian value system where welfare and collective well-being of the community are more significant compared to individual rights’.⁵⁹

2.6. The ‘manipulation’ argument

In her book on international refugee law in Southeast Asia, Sara Davies offers a detailed analysis of the Eurocentric nature of the Refugee Convention. However, when it came to explaining why most Southeast Asian states remained outside the formal refugee regime, she resorts to a new extra-legal argument. According to her, the states concerned learned during the Indochinese refugee crisis to take advantage of their position *outside* the

58 See e.g. Muntarbhorn, ‘Current Challenges of Human Rights in Asia’ (n 6). See also Vittit Muntarbhorn, *Challenges of International Law in the Asian Region* (Springer 2021) 88–91.

59 Human Rights Council, ‘National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to the Human Rights Council Resolution 5/1. Malaysia’, A/HRC/WG.6/4/MYS/1/Rev.1 (19 November 2008), para. 114 <https://digitallibrary.un.org/record/643202/files/A_HRC_WG.6_4_MYS_1_Rev.1-EN.pdf> accessed 16 January 2021.

international refugee regime so as to put pressure on the international community to impose much better burden-sharing arrangements. By threatening to refuse or expel refugees if financial contributions or resettlement guarantees were not sufficient and by putting their threats into effect from time to time, whatever the human cost, states in the region perhaps succeeded in obtaining much larger contributions from the international community than they would have received if they had been more accommodating.⁶⁰

While there is no doubt that Southeast Asian states quickly understood that they needed to remain firm if they wanted more support from the international community, it is not, however, certain that this calculation alone explains their persistent refusal to accede to the 1951 Convention and/or the 1967 Protocol. There are indeed no reasons to conclude that these very same states would not have been able to obtain the same arrangements if they had been parties to these instruments. In the face of a massive influx of refugees of an exceptional magnitude, which arguably represented a security issue, Southeast Asian states could have taken exactly the same measures, even if it meant violating the provisions of the 1951 Convention. The Philippines, which has been a party to the Refugee Convention since 1981, did not act differently from other states in the region. Even the United States intercepted Haitian boat people in the 1980s and 1990s and returned them after a summary procedure, in what seemed to be a contradiction compared with their official stance at the time requiring Southeast Asian states to offer temporary refuge to the Vietnamese asylum seekers.⁶¹

Interestingly, this argument does not clearly support the view that Southeast Asian states fundamentally *reject* international refugee law, or the content of the Refugee Convention, or the idea that refugees should benefit from international protection. The rejection of formal obligations, that is, the fact that the states concerned do not wish to accede to the Refugee Convention, is rather seen as a *means* to obtain more contributions and support from the international community. Moreover, it cannot be concluded that the entire refugee policy of Southeast Asian states was conditioned solely by the level of contributions they received. Several generous proposals were made by the international community – and in particular by the United States – during the Indochinese refugee crisis to facilitate the local integration of certain groups of refugees, but these offers were nonetheless rejected. In September 1979, for instance, the response of the Thai authorities to new proposals to facilitate the local integration of Indochinese asylum seekers in exchange for financial support was straightforward: ‘Thailand neither asks for nor wants money – we want the displaced persons out of our country’.⁶² In 1988, Thailand again refused funding from the United States

60 Davies, *Legitimising Rejection* (n 2) 16–21.

61 Shacknove, ‘From Asylum to Containment’ (n 13) 530.

62 Operations Centre for Displaced Persons in Thailand, ‘The Unfair Burden’ (n 23).

to construct and maintain new refugee camps for the Indochinese, insisting instead on their rapid resettlement. Building on this example, UNHCR concluded that it is ‘political interest’ rather than the lack of financial support ‘that has often motivated states to close their borders to mass refugee flows – namely, to assert state sovereignty over national membership and entry into national territory’.⁶³

2.7. Conclusion

With regard to refugees, Southeast Asia differs from other regions of the world (apart from the Middle East), in that most states are not parties to the 1951 Convention and/or its Protocol. At the same time, these states have been affected by some of the largest refugee movements in recent decades. It is this regional context, characterized as it is both by the significance of the refugee issue and by the resistance of most of the states concerned to accession to the main refugee protection instruments, that represents the main specificities of the refugee situation in Southeast Asia.

Although there have been positive signs from time to time that the position of the main non-signatory countries in Southeast Asia might change, UNHCR efforts to persuade them to accede to the international refugee law instruments have thus far proved unsuccessful. When asked about accession to the Convention and/or its Protocol, Indonesia, Malaysia and Thailand have made very vague commitments. Indonesia pledged to accede to the two instruments in 2006, in the context of its election to the Human Rights Council; however, the country has not taken any concrete step in this direction. In October 2017, the representative of Thailand to the ExCom declared that the government had just set up a committee ‘to explore a possibility to join the 1951 Refugee Convention’, while noting that it remained to be seen whether Thailand would ‘eventually join the Convention or not’.⁶⁴ In Malaysia, the political coalition that won the elections in May 2018 – the Pakatan Harapan of Mahathir Mohamad – had committed to ratify the Refugee Convention as part of its electoral campaign, but nothing was done until the breakdown of the coalition in February 2020.

Yet, if the position of many Southeast Asian states vis-à-vis the 1951 Convention and 1967 Protocol rests on a complex set of considerations, it remains unclear why they have *persistently* refused to join the international refugee protection regime while many states in Latin America or Africa certainly had the same reservations, but nevertheless acceded to those instruments. The

⁶³ UNHCR, ‘NO Entry! A Review of UNHCR’s Response to Border Closure in Situations of Mass Refugee Influx’, PDES/2010/07 (June 2010), para. 80.

⁶⁴ Thailand, ‘Statement by Delegation of Thailand, Mr Sing Visespochanakit, Acting Deputy Secretary-General, Office of the National Security Council, General Debate, 68th UNHCR Executive Committee’ (3 October 2017).

question would be even more puzzling in the case of states that refuse to become parties to a convention but nevertheless abide by some of its provisions. There are many examples, including in Asia – most notably Pakistan which has sheltered millions of Afghan refugees since the 1980s – where states not parties to the Refugee Convention have provided a form of protection to those who had found refuge in their territory that in some respects go beyond the standards provided for in the Convention.

To better grasp this apparent paradox in the context of Southeast Asia, it may be useful to refer to a distinction which is often overlooked between the *instrumentum* and the *negotium*, or in other words, between the form and the substance of an instrument (in the present case, the Refugee Convention).⁶⁵ Compared to other regions where states may be more inclined to adopt or accede to international refugee or human rights treaties without necessarily abiding by the obligations stemming from these instruments, Southeast Asian states have generally shown an aversion with regard to legally binding instruments.⁶⁶ Yet this does not prejudge the importance they give to the rules themselves. As a matter of fact, refusing to accede to the Refugee Convention (considering some of its limitations) does not necessarily imply that the concerned countries in Southeast Asia disregard all the principles enshrined in such treaty, including respect for the principle of *non-refoulement*. It merely means that approaches to refugee issues have not been mediated by formal legal obligations.⁶⁷

Singapore, which is party to very few human rights instruments, perfectly summarized this distinction between the law and the practice when it stated in the context of the UPR that, while the country '[might] not be a party to a particular treaty yet, it does not mean that in practice, its policies are not already fully or largely in compliance with its provisions'.⁶⁸ Thailand and Malaysia have also explained on various occasions during the UPR that, while they were not parties to the Refugee Convention, they had nonetheless 'established administrative arrangements'⁶⁹ or 'implemented policy

65 See e.g. Vincent Chetail, *International Migration Law* (OUP 2019) 284–286.

66 Sébastien Moretti, 'Southeast Asia and the 1951 Refugee Convention: Substance without Form?' (2021) 33:2 International Journal of Refugee Law.

67 Ibid.

68 Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Singapore, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review' A/HRC/18/11/Add.1 (11 July 2011), para. 3 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/144/50/PDF/G1114450.pdf?OpenElement>> accessed 16 January 2021.

69 Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Malaysia, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies presented by the State under Review', A/HRC/11/30/Add.1 (3 June 2009), para. 18 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/137/38/PDF/G0913738.pdf?OpenElement>> accessed 16 January 2021.

measures⁷⁰ to provide assistance and protection to asylum seekers and refugees, in cooperation with the relevant international organizations, that is, UNHCR and International Organization for Migration (IOM). Similarly, the Indonesian Government often claims that Indonesia already complies ‘with the principle and spirit of the 1951 Convention’.⁷¹ In this context, it would be more appropriate to speak about the ‘Asian resistance to the ratification of the 1951 Convention’⁷² rather than about Asian ‘rejection’ of international refugee law. In any case, even in the absence of a specific legal framework, asylum seekers and refugees are still protected under international human rights law, as will be explained in the next chapter.

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70 Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review. Thailand. Addendum. Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies by the State under Review’, A/HRC/19/8/Add.1 (6 March 2012), para. 18 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/114/65/PDF/G1211465.pdf?OpenElement>> accessed 16 January 2021.

71 See Antje Missbach, ‘Accommodating Asylum Seekers and Refugees in Indonesia: From Immigration Detention to Containment in “Alternatives to Detention”’ (2017) 33:2 Refuge 35.

72 Sam Blay, ‘Regional Developments: Asia’ in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2010) 148.

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- UNHCR, 'NO Entry! A Review of UNHCR's Response to Border Closure in Situations of Mass Refugee Influx', PDES/2010/07 (June 2010).
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3 A ‘legal limbo’? Overhauling the normative framework for the protection of refugees in Southeast Asia

Protection is a core concept of international human rights and refugee law, but there is no agreed definition of the term as such, even in the Refugee Convention. The definition most commonly used by humanitarian organizations is that adopted by the Inter-Agency Standing Committee (IASC). The IASC defines protection as

all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. International Human Rights Law, International Humanitarian Law, International Refugee law).¹

The concept of protection has a legal and a practical dimension, as it is primarily about ensuring that the rights enshrined in international instruments are respected. In Southeast Asia, however, it is often said that refugees are deprived of any rights and that they live in a ‘legal limbo’² or ‘in a no man’s land of human and legal rights’³ due to the fact that most of the countries concerned are not parties to the Refugee Convention or its Protocol. This chapter argues, on the contrary, that there is ‘more international law’ than proponents of the so-called Asian rejection of international refugee law theory claim and that the gap in refugee law in Asia can largely be filled by an assemblage of existing legal obligations.

The two main sources of international legal obligations, according to art. 38 of the Statute of the International Court of Justice (ICJ), are treaty law

1 This definition is set out in Inter-Agency Standing Committee (IASC), ‘Inter-Agency Standing Committee Policy on Protection in Humanitarian Action’ (2016).

2 See eg AI, ‘Between a Rock and a Hard Place’ (28 September 2017) <www.amnestyusa.org/reports/between-a-rock-and-a-hard-place/> accessed 16 January 2021.

3 IRC and JRS, ‘Nowhere to Turn: A Report on Conditions of Burmese Asylum Seekers in Thailand and the Impacts of Refugee Status Determination Suspension and the Absence of Mechanisms to Screen Asylum Seekers’ (July 2005) 1.

and customary law.⁴ The international refugee regime is based primarily on treaty law, with the 1951 Convention and its 1967 Protocol being the main ‘universal’ instruments regarding the protection of refugees. Some regions have also adopted specific instruments that apply to their own respective contexts. Moreover, international human rights law has come to play an increasingly important role in the protection of refugees, as it applies to every person on the territory or under the jurisdiction of a state. Although its content and scope are sometimes difficult to define with certainty, international customary law remains the main source of international law binding all states. As such, it also plays an important role in countries that are not parties to the Refugee Convention or Protocol.

Besides international law based on legal instruments and custom, another important phenomenon is the development of ‘soft law’. This refers to non-binding instruments adopted by states and international organizations. While it is not a source of international law *per se*, soft law has become ‘the privileged avenue for facilitating inter-state cooperation and international dialogue’, in particular in the context of migration.⁵ In the Asia-Pacific region, and more specifically in Southeast Asia, the reluctance of states to adopt formal instruments or to establish more formal settings to discuss issues related to migrants and refugees has resulted in the adoption of a myriad of statements, roadmaps or ‘declarations’ on such issues.

At the international level, the Convention relating to the Status of Refugees, the 1967 Protocol and the UNHCR are the key pillars of the international refugee regime (Section 3.1). However, considering only the Refugee Convention and UNHCR would provide a very incomplete picture of the current international refugee protection regime. Indeed, at the universal level, refugees also benefit from the protection afforded to individuals under human rights treaties (Section 3.2), as well as under international customary law (Section 3.3). Although it is not binding, soft law is another phenomenon that needs to be taken into account, considering the aversion of Southeast Asian states to binding international law and their preference for non-binding instruments (Section 3.4).

At the regional level, the main soft law instrument related specifically to the protection of refugees is the Bangkok Principles on Status and Treatment of Refugees adopted by the Asian-African Legal Consultative Committee (AALCC) in 1966 and revised in 2001 by what had become in the meantime the Asian-African Legal Consultative Organization (AALCO) (Section 3.5). Various other non-binding instruments have also been adopted in the

⁴ Statute of the International Court of Justice (opened for signature 26 June 1945 and entered into force 24 October 1945), art. 38.

⁵ See Vincent Chetail, ‘Sources of International Migration Law’ in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law* (CUP 2012) 88.

context of the Association of Southeast Asian Nations (Section 3.6) or by the Regional Consultative Processes (RCPs) that have been established in the region, including, in particular, the Bali Process (Section 3.7).

3.1. The international refugee regime

The Convention relating to the Status of Refugees, supplemented by its 1967 Protocol, is the only convention of 'universal' value concerning refugees.⁶ Some 70 years after its adoption, the Convention remains the primary reference in terms of standards and norms for the treatment of refugees (Section 3.1.1). Although it is widely considered the 'guardian' of the Refugee Convention, the UNHCR is in fact a distinct intergovernmental institution with its own Statute and mandate. As such, UNHCR can play a significant role in the protection of refugees in Southeast Asia (yet with the express agreement of, and within the limitations set by, the governments concerned), as its presence and its activities do not depend on the accession of the concerned states to the 1951 Convention or its Protocol (Section 3.1.2).

3.1.1. The 1951 Convention and its 1967 Protocol

Adopted by a Conference of Plenipotentiaries held in Geneva in July 1951, the Refugee Convention is the most comprehensive international instrument that has been adopted to date to safeguard the fundamental rights of refugees and to regulate their status in countries of asylum. It included for the first time a general definition of the term 'refugee' which, apart from the 1951 dateline, was of universal applicability.⁷ It also provides for a broad range of entitlements for refugees and establishes certain minimum standards for their treatment in the state of asylum. While the Convention has been described as one of the first instruments in the field of international human rights law, adopted just a few years after the Universal Declaration of Human Rights (UDHR), it technically differs from human rights instruments insofar as it establishes obligations for states rather than 'rights' for individuals. It results from this that international refugee law 'is more State-centric than human rights law'.⁸ This being said, it is against the standards set forth in the Convention that the protection offered by a state to those who have sought refuge on its territory is assessed.

⁶ Convention relating to the Status of Refugees (opened for signature 25 July 1951, entered into force 22 April 1954) 189 UNTS 150 and Protocol relating to the Status of Refugees (taken note of by UNGA 16 December 1966, entered into force 4 October 1967) 606 UNTS 267.

⁷ Ivor C Jackson, 'The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection' (1991) 3 IJRL 406–407.

⁸ Vincent Chetail, 'Moving Towards and Integrated Approach of Refugee Law and Human Rights Law' in Cathryn Costello, Michelle Foster and Jane, McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 205.

The Convention was adopted in the particular context of post-war Europe to provide solutions to the refugee problems in Europe at that time. It soon became clear, however, that it needed to be amended or supplemented by another text if it was to continue to provide a legal framework for the protection of refugees in other parts of the world.⁹ The idea of an additional protocol rather than a new treaty presented several advantages: the procedure was quicker; it avoided opening new and potentially arduous negotiations, in particular on the question of the definition of a 'refugee', and it avoided the need for states already parties to the 1951 Convention to accede to a new instrument. The Protocol was also envisaged as an instrument to which other states could accede without prior accession to the Convention.

The Protocol relating to the Status of Refugees was adopted by the United Nations General Assembly on 16 December 1966,¹⁰ without any Southeast Asian states being represented at the vote, and entered into force on 4 October 1967. The primary benefit of this instrument lies in the fact that it extends the scope of the 1951 Convention by removing its temporal and geographical limits. In terms of substance, however, the Protocol did not add anything new: it merely referred to the definition provided in art. 1 of the Convention, which is based on the concept of a 'well-founded fear' of persecution, and specified that states parties undertake to apply the provisions of the Convention to persons recognized as refugees.¹¹

The importance of the 1951 Convention and 1967 Protocol and the desirability of states acceding to these instruments have been reaffirmed on many occasions. At a meeting celebrating the 60th anniversary of its adoption in December 2011, UN member states reasserted that the Convention, as well as its Protocol, represented 'the foundation of the international refugee protection regime' and that they had 'enduring value and relevance'.¹² Yet 45 UN member states still remain outside the international refugee regime, with a majority of them in regions that are particularly affected by refugee movements, namely the Middle East and South/Southeast Asia.

3.1.2. *The role of UNHCR in Southeast Asia*

UNHCR was created in 1950 as a subsidiary organ of the UNGA to provide international protection and durable solutions for refugees.¹³ In Resolution 428(V), the UNGA called upon governments 'to co-operate with the United

⁹ For more details on regional approaches to refugee protection, see Section 3.5.

¹⁰ UNGA, Resolution 2198 (XXI), A/RES/2198 (16 December 1966).

¹¹ James C Hathaway, 'The Architecture of the UN Refugee Convention and Protocol' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 172–173.

¹² UNHCR, 'Ministerial Communiqué', HCR/MINCOMMS/2011/6 (8 December 2011).

¹³ UNGA, 'Statute of the Office of the United Nations High Commissioner for Refugees', A/RES/428(V) (14 December 1950), para. 1.

Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office’.¹⁴ UNHCR’s competence is thus independent from the Refugee Convention, as its Statute, annexed to this resolution, represents an independent legal basis for granting refugee status and providing international protection, regardless of any other instrument.

Moreover, unlike in the case of the Convention, UNHCR’s competence based on its Statute is not limited to events that occurred before 1951 or events that took place in Europe. The organization is thus able to assist other groups of refugees beyond those who fall within the strict framework of the Convention, including those who are in countries that are not parties to the text with prior authorization of the General Assembly. In practice, the General Assembly has on many occasions extended the mandate of UNHCR to cover other categories of persons, starting in 1957 when it authorized the organization to provide all possible assistance on the basis of its ‘good offices’ to Chinese refugees in Hong Kong. The persons concerned did not, strictly speaking, fall within UNHCR’s mandate, but the General Assembly had found that the problem was ‘such as to be of concern to the international community’.¹⁵ It has since then adopted several resolutions regarding the possibility for UNHCR to offer its ‘good offices’, thus extending its mandate.¹⁶ In 1977, the Executive Committee (ExCom) reaffirmed ‘the fundamental importance’ of UNHCR’s Statute ‘as a basis for the international protection function of the High Commissioner, particularly in respect of States which had not yet acceded to the 1951 Convention or the 1967 Protocol’.¹⁷

UNHCR also has a normative role to play. It is a subject of international law and an important actor in the refugee field whose practice and opinions must be taken into account in the development of international refugee law. The UNHCR Executive Committee, established by the United Nations Economic and Social Council (ECOSOC) in 1958 at the request of the General Assembly,¹⁸ represents a forum in which all refugee issues are discussed. It includes states from all parts of the world that are selected by ECOSOC ‘on the basis of their demonstrated interest in and devotion to the solution of the refugee problem’,¹⁹ including Southeast Asian countries such as Thailand and the Philippines. The Committee publishes an

14 UNGA, Resolution 428 (V) (14 December 1950).

15 UNGA, Resolution 1167 (XII) (26 November 1957).

16 UNHCR, ‘Note on the Mandate of the High Commissioner for Refugees and his Office’ (October 2013).

17 ExCom, Conclusion no 4 (XXVIII) International Instruments (1977).

18 ECOSOC, ‘Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees’, resolution 672 (XXV), E/RES/672 (XXV) (30 April 1958).

19 UNHCR Statute (n 13), para. 4.

annual ‘Note on International Protection’ setting out developments and challenges relating to refugees. It also adopts Conclusions that contribute to clarifying or developing international refugee law.²⁰ The Conclusions are adopted on the basis of consensus, which means that all countries, including the Philippines and Thailand, must not have raised objections. Although they are not binding, ExCom Conclusions are ‘persuasive and even authoritative sources’ on matters of policy, legal practice or interpretation of various aspects of refugee protection.²¹ They also provide an unparalleled overview of the evolution of the international refugee protection regime through time.

In Southeast Asia more specifically, UNHCR’s presence dates back to 1972 when the first regional representative was appointed in Bangkok to strengthen contacts with governments in the region and assess the needs of the various groups of refugees. It is, however, in the context of the Indochinese refugee crisis that UNHCR took a more important role. A first agreement was signed with Thailand in July 1975, with UNHCR providing material assistance and support in identifying durable solutions – either voluntary repatriation or resettlement – for refugees in exchange for temporary asylum.²² On 9 December 1975, the General Assembly adopted Resolution 3455 in which it ‘urg[ed] the international community further to strengthen its support of the efforts of the United Nations High Commissioner for refugees’ regarding the ‘Indo-Chinese displaced persons’.²³ The organization emerged transformed from this experience, with the ‘sustained exodus of Indochinese refugees and the massive international response thrust[ing] UNHCR into a leading role in a complex, expensive and high-profile humanitarian operation’.²⁴ By way of illustration, between 1975 and 1980, UNHCR’s budget rose from nearly US\$80 million to over US\$500 million, while its staff more than doubled. In 1979, UNHCR’s operations in Southeast Asia accounted for no less than 56.2 per cent of its total expenditure.²⁵

UNHCR is not limited only to invoking and supervising compliance with the 1951 Convention. Indeed, it ‘stands for, and is entitled to invoke, the full array of rights, freedoms and principles related to refugee protection developed by the international community under the auspices of the UN or

²⁰ As of 2021, ExCom comprised 107 Members.

²¹ UNHCR, ‘Review of the Use of UNHCR Executive Committee Conclusions on International Protection’, PDES/2008/03 (April 2008), para. 18.

²² W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998) 20–21.

²³ UNGA, Resolution 3455 (XXX) (9 December 1975).

²⁴ UNHCR, *The State of The World’s Refugees 2000: Fifty Years of Humanitarian Action* (OUP January 2000) 79.

²⁵ UNHCR, ‘Role of the Office of the United Nations High Commissioner for Refugees in South-East Asia (1979–1983)’, JIU/REP/84/15 (1984) 22.

of regional organizations'.²⁶ It can also 'base its arguments on constitutional and other domestic legal provisions reiterating or elaborating international human rights standards'.²⁷ Yet the fact that most Southeast Asian states are not parties to the 1951 Convention makes UNHCR's task in the region more complicated, as it is not in a position to perform its 'duty of supervising the application of the provisions' of the Convention in those states.²⁸ In practice, UNHCR has to make significant compromises because it lacks a more solid basis on which to maintain a dialogue with the authorities. In Thailand, for example, the authorities substantially limit the scope of UNHCR's mandate, preventing it from accessing asylum seekers from countries such as Myanmar and North Korea and limiting its role in the refugee camps at the border between Thailand and Myanmar. Access to immigration detention centres (IDCs) in Thailand and Malaysia and the release of asylum seekers and refugees registered with UNHCR is not always guaranteed. UNHCR's interventions with regard to *non-refoulement* are also not always heard. In general, it seems fair to say that UNHCR's presence in the region is not sufficiently institutionalized and seems to depend too much on the goodwill of the authorities.

3.2. International human rights law as the main vector of refugee protection in the region

While technically speaking the Refugee Convention differs from international human rights law instruments insofar as it establishes obligations for states rather than rights for individuals, it is often considered one of the first universal conventions to have been adopted in the field of human rights after the adoption of the UN Charter in 1945. Yet, international refugee law and international human rights law have in fact long been considered as distinct and separate regimes. It is only recently that their complementarity has been recognized, with an increasing number of studies highlighting the convergences between the two fields of international law, not only in terms of substance and entitlements (Section 3.2.1) but also in terms of enforcement and implementation (Section 3.2.2).

3.2.1. International human rights law as an alternative framework in non-signatory states

The first international instrument to give substance to the concept of 'human rights', left undefined in the UN Charter, was the Universal Declaration of Human Rights adopted by the General Assembly on 10 December

²⁶ UNHCR, 'UNHCR and Human Rights – A Policy Paper Resulting from Deliberation in the Policy Committee on the Basis of a Paper Prepared by the Division of International Protection' (1997).

²⁷ Ibid.

²⁸ 1951 Convention, art. 35(1).

1948.²⁹ The Asian states represented that day, that is, China, India, Pakistan, Myanmar (then Burma), the Philippines and Thailand, all voted in favour of adopting the Declaration. The text contained two provisions of particular interest for refugee protection: art. 13.2 which provides: 'Everyone has the right to leave any country, including his own, and to return to his country' and art. 14.1, which provides: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'.

While the UDHR is a resolution of the General Assembly without legally binding force, two binding instruments were adopted in 1966 (and entered into force in 1976) under the auspices of the UN: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).³⁰ Both have been ratified by many countries.³¹ As of today, seven other international human rights treaties have been adopted, plus several Optional Protocols.³² Some of these instruments, including in particular the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1989 Convention on the Rights of the Child (CRC) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), contain provisions that are important for the protection of refugees. Thus, it is primarily through human rights, rather than on the basis of the international refugee protection regime, that the protection of refugees may be advanced in states that are not parties to the Refugee Convention.

The points of contact between international refugee law and international human rights law are numerous and complex. The relevance of international human rights law with regard to refugees stems primarily from its territorial application: human rights apply to all those present on the territory of a state on the basis simply of their presence, with very few distinctions between nationals and foreigners. Thus, those present on the territory of states not parties to the 1951 Convention or its Protocol benefit at least from the protection afforded by human rights law. The main issue in this context has more to do with the difference in treatment between foreigners who are 'lawfully staying' and those who are irregularly present in a given country.

Several of the most important provisions contained in the Refugee Convention, such as the principle of *non-refoulement*, the right to work or the

29 UNGA, Universal Declaration of Human Rights (10 December 1948) UNGA res 217 A.

30 International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

31 For ratification of treaties, see <<https://treaties.un.org/Pages/ParticipationStatus.aspx>> accessed 16 January 2021.

32 The core international human rights instruments are listed at <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 16 January 2021.

right to freedom of movement, can also be found in international human rights law. In some cases, international human rights law even goes *beyond* the standards for the protection of refugees under the Refugee Convention, most notably in the context of economic and social rights, which are 'described in far greater detail in other international [human rights law] instruments than in the Refugee Convention'.³³ As one commentator noted, in these circumstances human rights instruments may 'eclipse whole sections of the U.N. Refugee Convention concerning the treatment of refugees, even in areas of equal levels of treatment'.³⁴

At the same time, international human rights law provides refugees with a much broader range of rights than those provided for in international refugee instruments. By including some important aspects of protection that are not covered by the Refugee Convention, international human rights law contributes to filling several 'critical gaps in the Refugee Convention's rights regime'.³⁵ These may relate, for instance, to the right to life, the right to family unity, the right to a fair trial, the right to freedom of opinion and expression or the prohibition of slavery, among other rights. In other words, human rights law has the potential to provide greater protection than the 1951 Convention, including in areas that are expressly covered by the Convention.³⁶ Chetal thus considered that:

[B]esides granting additional rights to refugees and asylum-seekers, general human rights instruments prove to be more adequate and more protective even when the rights in question are already covered by the Geneva Convention. The minimum standards prescribed by the refugee status have been increased and – in some instances superseded – by human rights law.³⁷

In December 2020, six ASEAN states (Cambodia, Indonesia, Laos, the Philippines, Thailand and Vietnam) were parties to the ICESCR and ICCPR, while Myanmar was a party only to the ICESCR. The same six states had also acceded to the CAT, an instrument of particular importance for the

³³ Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (December 1999) 17:4 Netherlands Quarterly of Human Rights 400.

³⁴ Margaret G Wachenfeld and Hanne Christensen, 'Note: An Introduction to Refugees and Human Rights' (1990) 59:178 Nordic Journal of International Law 183.

³⁵ James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 110.

³⁶ For more details on the links between international refugee law and international human rights law, see Section 6.1.

³⁷ Vincent Chetal, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 48. See also Chetal, 'Moving towards an Integrated Approach' (n 8) 212–219.

protection of asylum seekers and refugees because of the provision against *refoulement* it contains. All Southeast Asian states had acceded to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), to the CRC and to the Convention on the Rights of Persons with Disabilities (CRPD). International human rights law thus represents ‘a vital source of protection’ for asylum seekers and refugees who are living in those states.³⁸

3.2.2. Human rights monitoring mechanisms and the protection of refugees

Numerous commentators have also noted the significant role that international human rights law can play in terms of the implementation of human rights, specifically with regard to asylum seekers and refugees.³⁹ Indeed, some of the human rights instruments, including the ICESCR and the ICCPR, along with the CAT, the CRC, the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), and the ICRMW include the establishment of monitoring mechanisms to ensure the effective implementation of their provisions, usually in the form of treaty monitoring bodies. These have three broad functions. First, they contribute to the development of international standards, in particular through the publication of General Comments or General Recommendations. Second, they follow the implementation of the provisions of the various instruments by examining reports that must be submitted by the states concerned to indicate the steps they have taken to implement the provisions of the Convention. Third, under certain conditions, if this competence has been expressly accepted by states, they may also consider ‘communications’ from states or individuals concerning alleged violations of the treaty rights. By their mere presence on the territory of a state subject to this kind of scrutiny, asylum seekers and refugees can also resort to these treaty bodies. Through these functions, particularly the first two, the treaty bodies ‘have played a critical role in ensuring protection of refugees and asylum seekers through a contextual interpretation of general human rights treaties’.⁴⁰

Other mechanisms exist that are not specific to certain treaties. Of particular interest are the ‘special procedures’ of the Human Rights Council, which allow for the appointment of Special Rapporteurs as independent experts tasked with investigating, advising and reporting on human rights, either in a specific

38 Vincent Chetail, *International Migration Law* (OUP 2019) 186.

39 See Brian Gorlick, ‘Human Rights and Refugees: Enhancing Protection through International Human Rights Law’, *UNHCR New Issues in Refugee Research* 30 (October 2000); Clark and Crépeau, ‘Mainstreaming Refugee Rights’ (n 33) 389–410.

40 Chetail, ‘Are Refugee Rights Human Rights?’ (n 37) 65.

country⁴¹ or on a thematic basis.⁴² The Special Rapporteur on the human rights of migrants, for instance, is mandated to 'examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights' of migrants, including refugees, asylum seekers or victims of trafficking.⁴³ The Working Group on Arbitrary Detention; the Special Rapporteur on the right to education and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance are some other special procedures that also address the issue of migrants and refugees.⁴⁴

Since 2006, there has been also the Universal Periodic Review (UPR) mechanism, which aims every four years to review 'the fulfilment by each State of its human rights obligations and commitments'.⁴⁵ Unlike the treaty bodies, the UPR reviews the obligations under international human rights law of all members of the UN; in this context, states that are not parties to the Refugee Convention are nonetheless also obliged to report on their record in terms of refugee protection. While the UPR has great potential in terms of monitoring compliance with the international refugee protection regime, its main limitation comes from the fact that the scope of the review largely depends on the instruments to which states are parties. In the case of Malaysia and Myanmar, for example, the review will focus mainly on the implementation of the CEDAW and CRC. UNHCR increasingly contributes to the work of the UPR and other human rights treaty bodies, including through written submissions.

The treaty bodies represent a 'soft enforcement' system, based essentially on reports submitted by states on a regular basis, and as such they have significant limitations. The recommendations made by the treaty bodies, as well as the recommendations made in the context of the UPR, are not binding, and thus states remain free to implement them or not. Many Southeast Asian states, and in particular Thailand and Malaysia, have failed to submit their reports, or have done so with significant delay, while very few states in the region have accepted the provisions that allow some of the treaty bodies to consider individual 'communications'.⁴⁶ It appears also that the work

41 For the list of Country Mandates, see <https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx> accessed 16 January 2021. As of December 2020, they included one Special Rapporteur on the situation of human rights in Cambodia and one Special Rapporteur on the situation of human rights in Myanmar.

42 For the list of Thematic Mandates, see <https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM> accessed 16 January 2021.

43 Commission on Human Rights, 'Human Rights of Migrants', res 1999/44 (27 April 1999), para. 3.

44 Taryn Lesser, 'The Role of United Nations Special Procedures in Protection the Human Rights of Migrants' (2010) 28:4 RSQ 154–160.

45 UNGA, 'Human Rights Council', Resolution 60/251, A/RES/60/251 (3 April 2006), para. 5(e).

46 To date, in Southeast Asia, only the Philippines has ratified the Optional Protocol to the ICCPR, which allows the Human Rights Committee to receive such communications, while only three states – the Philippines, Thailand and Cambodia – have ratified the Optional Protocol to the CEDAW.

of the special procedures of the Human Rights Council has often been constrained by the lack of access to some of the countries in Southeast Asia. The Special Rapporteur on the situation of human rights in Myanmar, in particular, has rarely been given access to the country, while Malaysia and Thailand have opposed the visit of the Special Rapporteur on the human rights of migrants.⁴⁷ In spite of these limitations, human rights monitoring mechanisms are likely to play an increasing role in the enforcement and implementation of human rights law in favour of refugees in Southeast Asia.

3.3. The protection of refugees under customary international law

Thailand and Indonesia are not parties to the Refugee Convention, while Malaysia, Brunei Darussalam and Singapore and have not even acceded to many instruments related to the protection of human rights (apart from the CEDAW, CRC and CRPD). While this illustrates their reluctance to be bound by formal legal obligations in the field of refugee protection, and for some of them more generally human rights, these states, like any other state, are nonetheless bound by customary international law. In the case of non-signatory states, customary international law, as one commentator noted, ‘can be “critically important” in the identification of key principles of refugee protection and as an indication of what is permitted (or not)’.⁴⁸

While the identification of customary rules of international law is more complex than in the context of treaty law, there is a broad agreement that many provisions of the UDHR have become part of customary international law. With regard to migrants more specifically, customary international law provides for a broad range of rights that covers non-nationals at various stages of their journey. According to Chetail, these include departure from their countries of origin, as well as admission and stay in another territory.⁴⁹

When it comes to departure and admission, the right to leave any country is particularly important for refugees escaping life-threatening situations such as persecution and armed conflicts and has been described as a rule of customary international law by some scholars.⁵⁰ Asylum seekers and refugees should have the right to leave their country, yet there is no concomitant right under international law to enter another country, not even for the purpose of seeking asylum. The right to decide who enters a country remains the sovereign decision of a state. This being said, customary international law ‘remains essential in laying down basic tenets that all states have to respect

47 For more details on the countries and other visits of special procedures, see <www.ohchr.org/EN/HRBodies/SP/Pages/CountryandothervisitsSP.aspx> accessed 16 January 2021.

48 Hélène Lambert, ‘Customary Refugee Law’ in Costello, Foster and McAdam, *The Oxford Handbook of International Refugee Law* (n 11) 240–257.

49 See in particular Chetail, *International Migration Law* (n 38) 76–164.

50 *Ibid.*, 85–92.

when deciding upon the (non-)admission of migrants'.⁵¹ On the one hand, the principle of *non-refoulement*, which prohibits the return of people to a territory where their lives or liberty would be at risk, is largely considered a rule of customary international law, both under international refugee law and under international human rights law.⁵² On the other hand, customary international law provides a set of procedural guarantees in the context of the implementation of immigration control. These include in particular the prohibition of arbitrary detention, including the right to challenge the lawfulness of detention before a court and the right of non-national detainees to consular access,⁵³ as well as the prohibition of collective expulsion.⁵⁴

However, customary international law has a stronger impact when it covers the presence of asylum seekers and refugees in host states.⁵⁵ The Human Rights Committee has, for instance, asserted the customary law nature of the prohibition of torture, cruel, inhuman or degrading treatment or punishment; the prohibition of slavery; the right to life; the prohibition of arbitrary arrest and detention; the right to freedom of thought, conscience and religion; the prohibition of national, racial or religious hatred; the right to marry and the rights belonging to minorities to enjoy their own culture, profess their own religion or use their own language.⁵⁶ When it comes to economic, social and cultural rights, there is also a growing consensus that irregular migrants should have access to a minimum core set of rights. In that regard, the Committee on Economic, Social and Cultural Rights (CESCR) holds that 'basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law'.⁵⁷

Some rights are so important that they are even considered to be peremptory norms of international law or *jus cogens*. This means that they are norms from which no derogation is permitted, and which would result in the nullity of any treaty that was in conflict with them.⁵⁸ This includes in particular the prohibition of torture and arbitrary deprivation of life; the principle

⁵¹ Ibid., 93.

⁵² See Section 4.3, for more on the customary nature of the principle of *non-refoulement*.

⁵³ Chetall, *International Migration Law* (n 38) 132–138.

⁵⁴ Ibid., 132–142.

⁵⁵ Ibid., 144.

⁵⁶ See Human Rights Committee (HRC), 'CCPR General Comment no 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant', CCPR/C/21/Rev.1/Add.6 (4 November 1994), para. 8. See also HRC, 'CCPR General Comment no 15: The Position of Aliens Under the Covenant' (11 April 1986), para. 7.

⁵⁷ CESCR, 'UN Committee on Economic, Social and Cultural Rights: Report on the Twenty-fifth, Twenty-sixth and Twenty-seventh Sessions (23 April–11 May 2001, 13–31 August 2001, 12–30 November 2001)', E/2002/22; E/C.12/2001/17 (6 June 2002), para. 703.

⁵⁸ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 53.

of non-discrimination – at least when it comes to racial discrimination; the prohibition of slavery and servitude and the principle of non-retroactivity of criminal law. One may add to this list other rules such as the prohibition of genocide; the prohibition of extrajudicial execution; the prohibition of prolonged arbitrary detention; the right to leave any country; the right to family reunification and some procedural rights considered necessary for the effective guarantee of other rights.⁵⁹ Interestingly, none of these rights are provided for in the 1951 Convention.

3.4. The role of soft law

Besides treaty law and customary international law, soft law, that is, non-binding instruments adopted by states and international organizations, also has a role to play. Soft law is not listed in art. 38 of the ICJ Statute; it is not a formal source of obligations, and the importance of soft law instruments has often been underestimated due to the fact that they are formally non-binding. It is clear indeed that the adoption of soft law instruments has been favoured by states when they do not want their scope for manoeuvre to be constrained by binding rules.⁶⁰ At the same time, it is also true that many binding instruments contain very vague provisions, while some may be only ‘aspirational’ in nature, which also reflects the reluctance of states to be bound by international law in specific policy areas.

In fact, the role and function of soft law in the international legal order is complex and goes beyond the binding/non-binding dichotomy. Although soft law instruments are not binding, they do have a certain normative value, since they interact with treaty law and customary international law in many respects, thus impacting, and indeed influencing, the content of hard international law.⁶¹ With regard to treaty law, for instance, the adoption of soft law instruments often aims to clarify and provide an ‘authoritative interpretation’ of some of the provisions of a given treaty.⁶² This is the case for the Conclusions on the international protection of refugees adopted annually by UNHCR’s ExCom, with regard more specifically to the Refugee Convention, as well for the General Comments adopted by the human rights treaty bodies with regard to the relevant international human rights instruments. In addition, the adoption of soft law instruments could also be the first step towards the negotiation and adoption of a multilateral treaty. This was the

59 See, for instance, Lambert, ‘Customary Refugee Law’ in Costello, Foster and McAdam, *The Oxford Handbook of International Refugee Law* (n 48) 241–243.

60 Chetail, *International Migration Law* (n 38) 293.

61 For more details on the links between soft law and hard law, see Chetail, ‘Sources of International Migration Law’ (n 5) 84–90.

62 Chetail, *International Migration Law* (n 38) 286–290; Chetail, ‘Sources of International Migration Law’ (n 5) 87–88.

case, for instance, with the adoption in 1966 of the ICESCR and the ICCPR, which followed the adoption of the UDHR in 1948. In the case of migration more specifically, a field long considered as part of the *domaine réservé* of states and which is characterized precisely by many soft law instruments, the adoption of a Global Compact for Safe, Orderly and Regular Migration (GCM) in December 2018 may further lay the ground for the adoption of a multilateral treaty.⁶³

Soft law can also interact with customary international law in various ways. For instance, a soft law instrument can codify customary international law in written form, thus clarifying the content of customary rules.⁶⁴ It can also consolidate a customary law process by providing evidence of the two constitutive elements of customary international law, that is, practice and *opinio juris*. The ICJ noted in this regard that interstate declarations and resolutions of intergovernmental organizations, depending on their content and the conditions of their adoption, could 'provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'.⁶⁵ Finally, soft law can influence the development of customary international law, including by constituting 'the starting point' of a customary law process that might eventually lead to new customary norms.⁶⁶ This was most notably the case for several provisions of the UDHR, which have now become part of customary international law.⁶⁷

In sum, despite a clear increase in the number of soft law instruments adopted by states globally, the importance of soft law has been largely overlooked due to its lack of binding force. Yet, soft law is a complex phenomenon that fulfils various functions, and the decision to adopt soft law instruments does not necessarily prejudge of the importance of the norms embedded in such instruments. In Southeast Asia more specifically, resort to soft law has historically been the rule rather than the exception, even for the most important subjects. Indeed, ASEAN states have a less legalistic approach to international relations than many other parts of the world. The aversion to binding legal obligation and thus the resort to soft law in the

⁶³ UNGA, 'Global Compact for Safe, Orderly and Regular Migration', A/RES/73/195 (19 December 2018), para. 4.

⁶⁴ Chetail, *International Migration Law* (n 38) 286–287; Chetail, 'Sources of International Migration Law' (n 5) 85–86.

⁶⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Reports 226 (8 July 1996), para. 70. See also Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits) [1986] ICJ Reports 14, para. 188.

⁶⁶ Chetail, *International Migration Law* (n 38) 286–287; Chetail, 'Sources of International Migration Law' (n 5) 85–86.

⁶⁷ Maria-Teresa Gil-Bazo and Elspeth Guild, 'The Right to Asylum' in Costello, Foster and McAdam, *The Oxford Handbook of International Refugee Law* (n 11) 877–878.

region is also, as a former Secretary-General of the ASEAN once put it, a ‘matter of culture’. He stated:

Southeast Asian’s way of dealing with one another has been through manifestations of goodwill and the slow winning and giving of trust. And the way to arrive at agreements has been through consultation and consensus . . . rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law.⁶⁸

In fact, this way of doing things is part of the ‘ASEAN way’. ASEAN’s founding document, the Bangkok Declaration of August 1967, was a mere declaration and it took nine years for the ASEAN states to conclude a legally binding treaty, namely the Bali Treaty, to formalize the agreement between them. Similarly, the ASEAN Charter, which establishes the legal and institutional framework for ASEAN, was only adopted in 2007. A plethora of soft law instruments have been adopted by the ASEAN in the field of human rights since the early 2000s.⁶⁹ As will be shown in the following sections, many soft law instruments adopted by ASEAN states or to which Southeast Asian state are parties are relevant in one way or another to the protection of refugees. To comprehend the normative framework related to the protection of refugees in the region and to better gauge the position of those states with regard to this issue, it is thus necessary to go beyond the analysis of binding international law and consider also soft law.

3.5. Regional approaches to refugee protection

While the Refugee Convention and its Protocol remain at the core of the international refugee regime, initiatives have been taken at the regional level to complement this regime and make it more relevant to the circumstances that have led to the displacement of people in specific contexts. In Asia, however, there is no such regional instrument (Section 3.5.1). Nevertheless, many of the states in the region are members of the Asian-African Legal Consultative Organization (AALCO), a regional entity comprising African and Asian states, including some from Southeast Asia, that is, Brunei Darussalam, Indonesia, Malaysia, Myanmar, Singapore and Thailand. AALCO first adopted the Bangkok Principles on the Status and Treatment

⁶⁸ ASEAN, ‘The ASEAN Way and the Rule of Law’, address by Rodolfo C Severino, ASEAN Secretary-General at the International Law Conference on ASEAN Legal Systems and Regional Integration sponsored by the Asia-Europe Institute and the Faculty of Law, University of Malaysia, Kuala Lumpur (3 September 2001) <https://asean.org/?static_post=the-asean-way-and-the-rule-of-law> accessed 20 January 2021.

⁶⁹ For an overview of the vast number of soft law instruments adopted by ASEAN in the field of human rights, see Chapter 3, Section 3.6.2.

of Refugees in 1966,⁷⁰ with a 'final' version of the text being adopted in 2001.⁷¹ While the Bangkok Principles are not binding, their importance should not be underestimated, in particular in the context of Asia where states are traditionally reluctant to accept formal obligations by way of treaty (Section 3.5.2).

3.5.1. The development of regional approaches to refugee protection

While the beginning of the Cold War had led to the exodus of refugees fleeing communist regimes to Western Europe and beyond, the process of decolonization and the struggles for independence, especially in Africa, but also in Asia, led to significant refugee movements in the 1960s and 1970s. For UNHCR, the adoption of the 1967 Protocol was essentially an attempt to prevent the adoption of regional instruments that could potentially dilute the 'universal' principles for the protection of refugees that UNHCR sought to promote through the Refugee Convention. Yet, the Protocol only expanded the scope of the Refugee Convention. It did not provide any additional rights for refugees beyond what was already included in the 1951 Convention nor did it cover forms of displacement that were not caused by a 'well-founded fear' of persecution.

Against this backdrop, in September 1969, the Organization of African Unity (OAU) adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.⁷² Compared to the 1951 Convention, the OAU Convention expanded the scope of the refugee definition to people fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order',⁷³ such as armed conflicts and situations of generalized violence. In Latin America, where many countries had been facing refugee influxes since the 1960s, a group of experts from several Latin American countries adopted the Cartagena Declaration in November 1984.⁷⁴ This Declaration essentially adopted the same standards as the OAU Convention, yet with an even more expanded definition of a refugee, covering also people fleeing situations of massive violations of human rights. Although the Cartagena Declaration is not a legally binding text, Latin and Central American states have reiterated its importance on many occasions and its provisions have been incorporated into the national legislation of

70 AALCO, Bangkok Principles on the Status and Treatment of Refugees (31 December 1966).

71 AALCO, 'Final Text of the AALCO's 1966 Bangkok Principles on the Status and Treatment of Refugees' (adopted 24 June 2001).

72 Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (opened for signature 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

73 OAU Convention, art. I.

74 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984).

many countries in the region.⁷⁵ Both the OAU Convention and the Cartagena Declaration were adopted to establish standards for the protection of refugees at the regional level, taking due account of the specificities of the region concerned. In doing so, in some regards they went even further than the Refugee Convention. The OAU Convention not only extended the definition of refugees to people fleeing armed conflict and generalized violence, it also broadened the principle of *non-refoulement* to include non-rejection at the frontier,⁷⁶ emphasized the importance of burden-sharing,⁷⁷ and elaborated further on voluntary repatriation as a durable solution.⁷⁸ For its part, the influence of Latin America has been decisive in particular in the development of law and practices in relation to diplomatic asylum.⁷⁹ In their own way, both regions have contributed to the development of international refugee law.

Yet, no similar initiative has been taken in Asia, where the absence of a specific regional refugee instrument may be partly explained by the sheer geographical size of the continent, which extends from the Middle East to Japan, as well as by its political, cultural and ethnic diversity and complexity. There have been discussions regarding the development of a regional refugee framework, however. In April 1980, for instance, in the midst of the Indochinese refugee crisis, UNHCR invited a group of Asian experts to participate in a roundtable discussion on the issue of international protection of refugees and displaced persons in the region. In his opening speech, Moussalli, the then director of International Protection, introduced this idea as follows:

The possibility of adopting a regional approach to the protection of refugees in Asia is indeed a matter to which this meeting might devote some attention. The various humanitarian principles for the treatment of refugees on the international level did not, of course, develop in a vacuum. On the contrary, these principles were formulated on the basis of an historical heritage of humanitarian ideas and concepts, many of which were long established. These concepts not only facilitated the development of internationally recognized principles, but also made it possible for these principles subsequently to be applied in the day-to-day practice of States. I am fully convinced that the most fruitful

⁷⁵ See in particular the San José Declaration on Refugees and Displaced Persons (7 December 1994); Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (16 November 2004).

⁷⁶ OAU Convention, art. II.3.

⁷⁷ Ibid., art. II.4.

⁷⁸ Ibid., art. V.

⁷⁹ See Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3:2 IJRL 197–200.

and constructive approach to the protection of refugees in Asia is to have regard in the first instance to the humanitarian ideas and concepts which have been historically developed within Asia. I am sure that these ideas and concepts are the most useful basis for solutions which may be needed in Asia, and that they could also contribute to further progressive development of the international standards for the treatment of refugees. UNHCR's role in this respect should be to draw from established principles and practice in the region with a view to establishing regionally acceptable norms which are also in line with universally accepted criteria.⁸⁰

The discourse around the regionalization of refugee protection gained increased prominence a few years later, in a context of compassion fatigue as a result of the large numbers of refugees arriving in Western countries. Two major international conferences on refugees with a regional focus were organized at the end of the 1980s, both leading to the adoption of ambitious regional plans of action to end long-standing situations of displacement: the International Conference on Central American Refugees (CIREFCA) in May 1989 and the International Conference on Indo-Chinese Refugees in June the same year. Referring to the organization of the latter before the ExCom in November 1988, ahead of the International Conference, the Representative of Thailand highlighted the added value of specific regional approaches as follows:

[W]hile there were certain universal principles that should be applicable to all refugees, it was nevertheless essential to take account of prevailing realities, since it was realities with which refugees found themselves confronted and it was in a world of realities that solutions to their problems must be found. At the same time, it was becoming increasingly apparent that the norms and principles formulated at an earlier time in one part of the world and under a particular set of circumstances could not always be applied automatically to other regions or situations. It was therefore useful to convene international conferences in an effort to solve the specific problems raised by refugees in a particular region.⁸¹

Many states during this period supported a new approach to refugee issues emphasizing the importance of ensuring protection first and foremost

80 UNHCR, 'Fundamental Principles in the International Protection of Refugees and Displaced Persons, The Role of UNHCR' in 'Proceeding of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, Manila, Philippines', HCR/120/25/80 (14–18 April 1980).

81 ExCom, 'Summary Record of the 427th Meeting, Held at the Palais des Nations in Geneva', A/AC.96/SR.427 (9 November 1988).

within the region of origin. The rationale behind this shift was largely restrictive, insofar as it aimed primarily at keeping refugees closer to their countries of origin. It was nevertheless argued that it was better for refugees to remain close to their country of origin because of cultural proximity, that they would necessarily prefer returning back 'home' – and that staying closer to their country would facilitate this process; and that states within the same region were more willing and more capable of coordinating to solve an issue that was directly of concern to them. Apart from the 1989 Comprehensive Plan of Action (CPA), which was limited to the Indochinese crisis, this suggestion has, however, never been followed by concrete steps to develop a regional instrument concerning refugees in the Asia.

3.5.2. The Bangkok principles: 'a breakthrough in refugee law at the regional level'

To date, the only 'regional' refugee instrument relevant in Asia is the Bangkok Principles on the Status and Treatment of Refugees adopted in 1966 and revised in 2001 by the AALCO. Contrary to the OAU Convention and the Cartagena Declaration, the Bangkok Principles have not attracted much attention. It is true that they are not binding – the 2001 version of the Principles expressly states that they are 'declaratory and non-binding in character'.⁸² It is a soft law instrument and thus states are not legally bound to comply with its provisions. Moreover, the Bangkok Principles, unlike the Cartagena Declaration, have never been incorporated into the national legal order of countries in Asia; they have rarely been invoked as a reference text by Southeast Asian states and their implementation has not been the subject of any monitoring.

Yet, the normative value of the Bangkok Principles should not be underestimated. While they have often been neglected, they fill a normative gap in a context where very few Asian states are parties to the Refugee Convention and its 1967 Protocol, and also 'expand the reach beyond those treaties with new principles from the Asian and African regions'.⁸³ The first version of the Bangkok Principles was the first 'regional' instrument in the field of refugee protection. While relatively brief, the Bangkok Principles were nevertheless considered 'a breakthrough in refugee law at the regional level',⁸⁴ as they included some innovations compared to the Refugee Convention. For instance, the text mentioned for the first time the principle of provisional asylum, the right of return, the principle of *non-refoulement* at the frontier

⁸² AALCO, '2001 Bangkok Principles', notes, comments and reservations made by the member states of the AALCO.

⁸³ Vittit Muntarbhorn, *Challenges of International Law in the Asian Region* (Springer 2021) 21.

⁸⁴ AALCO, 'Report of the AALCC/UNHCR Seminar to Commemorate the 30th Anniversary of the Bangkok Principles Concerning the Treatment of Refugees, Manila, Philippines, December 1996', New Delhi, AALCC Secretariat (1998).

and the right to compensation. At the time of their adoption, some felt that the Bangkok Principles represented an innovative and forward-looking declaration and that they 'may be considered an important step towards the development of the rights of refugees in Asia and in Africa'.⁸⁵

As noted earlier,⁸⁶ remaining outside the formal refugee regime may mean two very different things. Either the states concerned reject the *content* of the Refugee Convention or they oppose the *form* of this instrument, preferring to adopt non-binding principles on refugee issues rather than contracting formal obligations by way of treaties. It is clear in this regard that the *instrumentum*, that is, a binding treaty, has played a significant role in the decision of Southeast Asian states to remain outside the convention-based refugee regime. At the same time, the mere existence of the Bangkok Principles is in itself a significant indication that Southeast Asian states are not opposed to the idea that there should be a set of international rules regarding the protection of refugees. Indonesia, Myanmar (then Burma) and Thailand were already members of the AALCC when the first version of the Bangkok Principles was adopted; Malaysia and Singapore became members in 1970. The analysis of the various revisions of the Bangkok Principles over a period of 35 years, until the adoption of the final version, reveals that Southeast Asian states have significantly contributed to the development of this instrument.

A first revision of the Bangkok Principles was proposed as early as 1969 by Pakistan, in the context of tensions in the Middle East. A first addendum on the 'right of return' was adopted at the 11th session of the AALCC in 1970, followed by a second addendum on the principle of burden-sharing in 1987. Several studies were also prepared in collaboration with UNHCR throughout the 1980s and 1990s concerning, in particular, the establishment of 'safety zones' for displaced persons in countries of origin, the international responsibility of states in relation to refugee issues, the principle of *non-refoulement* and the development of 'model legislation' on the status and treatment of refugees envisaged as a way to overcome the hostility of many Asian states towards formal binding international law obligations. These initiatives were undertaken, with the support of some Southeast Asian states, because the AALCC considered that the existing legal framework, which had been elaborated 'in a specific socio-political climate to deal mainly with refugee situation in post-war Europe, [had become] inadequate to meet contemporary needs'.⁸⁷

⁸⁵ Eberhard Jahn, 'The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees' (July 1967) 27:1–2 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 123–124.

⁸⁶ See Section 2.7.

⁸⁷ AALCO, 'Report and Selected Documents of the Thirty-Second Session, Kampala, Uganda (1–6 February 1993)', New Delhi, The AALCC Secretariat (1993) 60.

A seminar was subsequently organized in Manila in 1996 to celebrate the 30th anniversary of the adoption of the Bangkok Principles. One of the objectives of the seminar was precisely to adapt the Bangkok Principles 'in line with contemporary standards, principles and norms, so that they reflect the positive state practice that [had] developed in Asia and Africa since 1966'.⁸⁸ The organization of the seminar coincided with the end of the Indochinese refugee crisis, which made it possible to take into account the experience of Southeast Asian states during this period. A background note prepared jointly by UNHCR and the AALCC for a preparatory meeting noted:

In the absence of a regional convention on refugees and in spite of a low level of accession to the universal refugee instruments, a positive State practice has developed in Asia over the past three decades. States in the region have generously arranged for receiving, processing, sheltering and otherwise assisting millions of asylum-seekers. Individual refugee status determination has been carried out under the [CPA] in close cooperation with UNHCR. . . . Temporary refuge or indefinite asylum has been granted to millions of refugees. Countless refugees have been resettled from the region and some to countries of the region as well. Large-scale repatriation movements have been successfully carried out. Most importantly, the involvement and responsibilities of countries of origin of refugees have been engaged to an unprecedented degree. It is fitting that the AALCC should draw on this tradition and this record of achievements and revisit the Bangkok Principles in this light with a view to providing guidelines for future action.⁸⁹

The recommendations made at the end of the seminar determined to a large extent the changes and additions to the Bangkok Principles. The final version of the Principles adopted in 2001 incorporated the same elements as those enunciated in 1966 but in a much more developed way. They also added a plethora of new articles on topics such as voluntary repatriation,⁹⁰ the principle of international cooperation⁹¹ and the principle of burden-sharing.⁹² Some of these modifications find their origins in the practice of Southeast Asian states during the Indochinese refugee crisis. While aligned to the international refugee regime, the Bangkok Principles may be said to offer an African-Asian regional perspective on refugee law that may also be

⁸⁸ AALCO, 'Report of the Seminar Commemorating the 30th Anniversary of the Bangkok Principles' (n 84).

⁸⁹ Ibid.

⁹⁰ AALCO, '2001 Bangkok Principles' (n 71), art. VII.

⁹¹ Ibid., art. VIII.

⁹² Ibid., art. X.

more in line with the 'ideas' and 'traditions' of developing countries, including Southeast Asian states, in the field of refugee protection.

3.6. ASEAN and the protection of refugees

As the case of the OAU demonstrates, regional organizations can play a decisive role in the adoption of regional instruments on refugee protection. The most important regional organization in Asia is ASEAN, established in 1967 by Malaysia, Indonesia, the Philippines, Singapore and Thailand, and later expanded to include ten nations (with the addition of Brunei Darussalam, Cambodia, Laos, Myanmar and Vietnam). As set out in the 1976 Treaty of Amity and Cooperation in Southeast Asia, the fundamental principles of ASEAN include 'mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations', as well as 'non-interference in the internal affairs of one another'.⁹³ ASEAN is a regional integration framework that includes an internal mobility component, with a focus on the movement of high-skilled migrants and, to a lesser extent, on trafficking. Refugee movements represented a significant aspect of ASEAN's work throughout the 1980s and 1990s, but the organization has been much less involved in this issue since the end of the Indochinese refugee crisis and commentators have deplored 'the limitations of ASEAN as a forum through which to advance refugee protection' (Section 3.4.1).⁹⁴ Yet significant progress has been made in the field of human rights over the past decade that could also benefit asylum seekers and refugees (Section 3.4.2).

3.6.1. Reluctance to address refugee issues within ASEAN

ASEAN, as one commentator noted, 'started life at the height of the Vietnam War as a united front Cold War political association, fighting the communist threat'.⁹⁵ Against this backdrop, ASEAN, which then comprised five non-communist countries, played a significant role in the context of the Indochinese refugee crisis, with refugees coming – precisely – from three communist countries, that is, Cambodia, Laos and Vietnam. During this period, ASEAN became an umbrella organization allowing its members to

⁹³ ASEAN, Treaty of Amity and Cooperation in Southeast Asia (opened for signature 24 February 1976, entered into force 15 July 1976) 1025 UNTS 297, arts. 2.a and 2.c.

⁹⁴ University of New South Wales, 'Where to from here? Report from the Expert Round-table on regional cooperation and refugee protection in the Asia-Pacific (12–13 September 2016)', Kaldor Centre for International Refugee Law (December 2016) 34 <www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Where_to_from_here.pdf> accessed 20 January 2021.

⁹⁵ Eugène KB Tan, 'The ASEAN Charter as Legs to Go Places: Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia' (2008) 12 Singapore Year Book of International Law 197.

speak with one voice about the crisis and to put forward their security concerns as well as their claims for more support and contributions from the international community to deal with the refugees.

ASEAN member states considered that they were not responsible for the crisis and thus that they should not be left to 'bear the burden' of the refugee presence in their territories alone. This explains the resistance of the ASEAN states to any attempt to 'regionalize' the response to the refugee movements in a way that would give them primary responsibility of caring for the refugees. They thus systematically insisted on the need to discuss responses to the crisis in a much broader framework, involving the Western countries as well as the countries of origin. At the time, this was a rather unusual practice.⁹⁶ The Meeting on Refugees and Displaced Persons in South-East Asia organized in Geneva in July 1979, the International Conference on Kampuchea organized in New York in 1981⁹⁷ and the International Conference on Indo-Chinese Refugees in 1989 were all organized at the insistence, or with the support, of ASEAN.

Yet, refugee issues have become a more sensitive topic since the end of the Cold War and the subsequent expansion of ASEAN to include traditionally refugee-producing countries. ASEAN's role, as envisaged in the Bali Treaty, was mainly to reassert individual state sovereignty and mutual protection from foreign influence and to ensure that each member state would be equally protected from another member state's influence. Discussions around refugee protection have thus largely been avoided. As a result, ASEAN has been widely criticized for remaining silent on issues related to refugee movements and more generally on human rights violations. This has also been the case with regard to the situation in Myanmar. The accession of Myanmar to ASEAN in 1997 was surrounded by controversy⁹⁸ and it is now the country of origin of the largest numbers of refugees in the region. This silence is generally attributed to the importance attached to maintaining constructive relationships among neighbouring

96 See e.g. ASEAN, 'Joint Press Statement. The Special ASEAN Foreign Ministers Meeting on IndoChinese Refugees, Bangkok' (13 January 1979).

97 ASEAN was calling for the organization of a Conference to deal with what they considered to be the direct cause of the Cambodian displacement at the border with Thailand, namely, the invasion of Cambodia by Vietnam in 1979. While some states wanted this new conference to take place within the ASEAN framework, the ASEAN member states refused, arguing that 'the Kampuchean conflict has international dimensions' and that the proposed conference, at the ASEAN level, was 'not the appropriate forum to resolve this issue'. See ASEAN, 'Press Statement of the Philippine Foreign Minister on Mr Essaifi's visit' (April 1981), paras 2 and 3.

98 The admission of Myanmar into ASEAN was opposed by Western countries due to the violent repression of protests in 1988 that eventually led to democratic elections in 1990, during which Aung San Suu Kyi's National League for Democracy party was victorious, but the election results were not recognized.

countries and to the principle of non-interference in the internal affairs of other states, which underpins the organization.⁹⁹

Only rarely have ASEAN countries made public statements critical of the actions of another ASEAN state, such as in the context of the repression during the Saffron Revolution in Myanmar in 2007 or to ensure access for international relief agencies in the aftermath of Cyclone Nargis in 2008, also in Myanmar. The seriousness of the plight of the Rohingya has also resulted in breaches of the principle of non-interference in other states' domestic affairs. In 2012, calls for greater ASEAN engagement in this regard even came from within ASEAN, with Surin Pitsuwan, the then Secretary-General of the organization, urging ASEAN to act collectively in response to the situation of the Rohingya in Rakhine State.¹⁰⁰ Malaysia and Indonesia – two Muslim countries – have also at times spoken out against the treatment of the Rohingya by Myanmar.¹⁰¹

In spite of many calls for ASEAN to become more involved in the Rohingya situation, the position of the organization has remained largely unchanged. It is rather unlikely that ASEAN will formally address refugee issues in the future, in particular when it comes to refugees from within the subregion. In line with the principle of non-interference in the internal affairs of other members, it might be argued that ASEAN countries appear somehow as 'safe countries' for their counterparts, with the premise that there can be no 'ASEAN refugees' within the ASEAN Community. This fiction is likely to become more prominent as the organization moves towards greater integration.

3.6.2. The development of a human rights framework within ASEAN

While it is clear that Southeast Asian states have no interest in developing a regional refugee regime, the development of a human rights framework within ASEAN could contribute to the protection of refugees. Unlike other regions, Asia does not have a specific regional human rights framework; yet some significant progress has been made over the past decades in the context of ASEAN. In 2001, Southeast Asian states adopted a Declaration on the Commitments for Children in ASEAN, followed in 2004 by a Declaration on the Elimination of Violence against Women in the ASEAN region. Various other non-binding human rights instruments concerning specific categories of migrants have subsequently been adopted. They include the Declaration

99 See in particular, Srirapha Petcharamesree, 'ASEAN and its Approach to Forced Migration Issues' (2016) 20:2 *The International Journal of Human Rights* 179–181.

100 See e.g. Yang Razali Kassim, 'Plight of the Rohingya: ASEAN Credibility Again at Stake', S Rajaratnam School of International Studies (RSIS) Commentaries, no 207/2012 (6 November 2012) <www.rsis.edu.sg/wp-content/uploads/2014/07/CO12207.pdf> accessed 16 January 2021.

101 Antje Missbach and Gunnar Stange, 'Muslim Solidarity and the Lack of Effective Protection for Rohingya Refugees in Southeast Asia' (2021) 10:5 *Social Sciences* 166–182.

on the Protection and Promotion of the Rights of Migrant Workers in 2007, the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers in 2017 and the ASEAN Declaration on the Rights of Children in the Context of Migration in 2019.

Another important milestone was the adoption in 2007 of the ASEAN Charter, which explicitly provided for the establishment of a human rights body within the organization.¹⁰² Despite some reservations about a mechanism that some states feared would ‘interfere in [their] internal affairs’,¹⁰³ in October 2009, ASEAN announced the establishment of an ASEAN Intergovernmental Commission on Human Rights (AICHR), which paved the way for the adoption of a regional instrument on human rights. The ASEAN Human Rights Declaration (AHRD) was adopted on 28 November 2012 at the 21st ASEAN Summit in Phnom Penh, Cambodia,¹⁰⁴ amidst concerns regarding the particularly opaque drafting process.¹⁰⁵ Various aspects of the declaration have also given rise to criticism.¹⁰⁶ These include the fact that the text balances the enjoyment of human rights and fundamental freedoms with ‘the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives’.¹⁰⁷ In addition, the AHRD declares that the realization of human rights ‘must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds’.¹⁰⁸ The declaration also provides for a ‘limitation clause’ that seems to apply to all provisions in a broad range of situations, that is, for issues related to ‘national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society’.¹⁰⁹ Last but not least, the declaration seems to condition several rights to their conformity with national law.¹¹⁰

¹⁰² The Charter of the Association of Southeast Asian Nations was adopted at the 13th ASEAN summit organized in Singapore in November 2007 and entered into force in December 2008.

¹⁰³ Jim Gomez, ‘Myanmar Opposes Investigative Powers of ASEAN’, *USA Today* (22 July 2008) <http://usatoday30.usatoday.com/news/world/2008-07-22-3880736717_x.htm> accessed 16 January 2021.

¹⁰⁴ ASEAN, ‘Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD)’ (2012).

¹⁰⁵ Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33:3 *Journal of Current Southeast Asian Affairs* 108.

¹⁰⁶ For an overview of the main issues, see Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration 2012’ (2013) 13:3 *Human Rights Law Review* 557–579.

¹⁰⁷ AHRD, art. 6.

¹⁰⁸ Ibid., art. 7.

¹⁰⁹ Ibid., art. 8.

¹¹⁰ Ibid., arts. 16, 19, 25 and 27(2).

Clearly, ASEAN still lacks a human rights treaty, entrenching the rights provided for in the AHRD. As evidenced by the fact that all the regional instruments related to the protection of human rights are non-binding, ASEAN favours a soft law approach rather than a more legalistic one in international cooperation. Despite this, the establishment of the AICHR and the adoption of the AHRD have been seen by many as significant developments in the field of human rights in the ASEAN region. The existence of the declaration means that human rights in Southeast Asia can no longer be viewed as a strict matter of national sovereignty.¹¹¹ The declaration not only contains commitments to economic, social and cultural rights, which have traditionally been the object of much interest in the region, it also includes commitments 'to far more contentious civil and political rights' that go 'far beyond the domestic positions of some member states'.¹¹² This includes entitlements that are important for refugees, such as the right to seek and receive asylum in another state, the prohibition of discrimination and the prohibition of cruel, inhuman or degrading treatment or punishment, which implicitly prohibits the *refoulement* of refugees. As such, the declaration offers a human rights framework against which states' refugee policies may be assessed.

3.7. The proliferation of non-binding intergovernmental frameworks on migration in the Asia-Pacific

Several Regional Consultative Processes, that is, informal and non-binding platforms to facilitate discussions on migration issues, have been established in the Asia-Pacific since the mid-1990s with a view to fostering cooperation between states on related issues across the region. These have included the Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC) and the Manila Process, both established in 1996 and now defunct. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) was also launched in 2002. Yet, despite UNHCR's efforts to strengthen dialogue around issues related to refugees and displaced persons, there has been little progress towards the development of a human rights-based and protection-sensitive approach to population movements in the region.

Indeed, the period following the end of the Indochinese refugee crisis was marked by a shift towards an approach to border control and law enforcement that focused on the fight against smuggling, trafficking and more generally irregular migration, as evidenced by the adoption of the Bangkok Declaration on Irregular Migration in 1999 (Section 3.5.1). The

¹¹¹ Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights* (Nijhoff 2012) 4.

¹¹² Davies, 'An Agreement to Disagree' (n 105).

Bali Process, which superseded the APC and the Manila Process, brought the cooperation around those issues to another level, with very few considerations concerning refugees or more generally for the human rights and protection needs of migrants (Section 3.5.2). There have been other initiatives with an even lesser degree of institutionalization than the RCPs. These include the Jakarta Declaration in 2013 and the Special Meetings on Irregular Migration in the Indian Ocean in 2015 and 2016, which resulted in the adoption of a variety of statements, roadmaps or more formal (albeit non-binding) ‘declarations’, which only marginally address protection and human rights issues (Section 3.5.3).

3.7.1. An increasing focus on the fight against irregular migration: the Bangkok declaration

In November 1996, as the CPA for Indochinese refugees came to an end, UNHCR and the Australian Government organized a regional meeting on refugees and displaced persons in the Asia-Pacific, with the participation of 24 governments, including those of ASEAN.¹¹³ The conference was the first meeting of what would become the APC, an informal forum to discuss issues of migration and displacement within the region, including with states that were not parties to the 1951 Convention. The consultations aimed primarily to facilitate the exchange of information and explore opportunities for better regional cooperation on these issues. A month later, IOM organized a Regional Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia in Manila, this time to discuss issues pertaining to irregular migration and trafficking in the presence of representatives of countries from East and Southeast Asia. This meeting and those that followed became known as the Manila Process, which comprised 16 states (17 with Hong Kong).¹¹⁴ With IOM acting as the secretariat, the agenda focused primarily on issues related to human trafficking and smuggling, migration management, border control and return.¹¹⁵

The Manila Process led to an increase in awareness about the issue of trafficking and other forms of irregular migration, and about the need to

¹¹³ The APC later expanded to 35 members: Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Fiji, Hong Kong SAR, India, Indonesia, Japan, Kiribati, Laos, Macau SAR, Malaysia, Micronesia, Mongolia, Myanmar, Nauru, Nepal, New Caledonia (France), New Zealand (until 2003), Pakistan, Papua New Guinea, the Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Vanuatu and Vietnam. IOM joined in 1997 and became part of the secretariat together with UNHCR.

¹¹⁴ This included the ten ASEAN member states plus Australia, China, Japan, New Zealand, Papua New Guinea and the Republic of Korea.

¹¹⁵ Sébastien Moretti ‘UNHCR and the Migration Regime Complex in Asia-Pacific. Between Responsibility Shifting and Responsibility Sharing’, *UNHCR New Issues in Refugee Research* 283 (November 2016) 14–22.

address them through some form of regional cooperation. It thus paved the way for the adoption of the Bangkok Declaration on Irregular Migration by the 18 countries invited to an International Symposium on Migration in Bangkok in April 1999.¹¹⁶ The Bangkok Declaration encouraged countries of origin, transit and destination 'to reinforce their efforts to prevent and combat irregular migration' and to take a number of measures to combat smuggling and trafficking. There is no mention of refugees and no mention of human rights in the declaration; the participants of the symposium merely recognized in the preamble 'the obligation of the countries of transit and destination to provide protection and assistance where appropriate, in accordance with their national laws'.¹¹⁷ Yet some commentators considered the Bangkok Declaration to be 'a breakthrough in the quest for Asian collective efforts in migration arrangements' insofar as it represented the first instrument recognizing the importance of regional cooperation among Asian countries in the field of migration.¹¹⁸

The Manila Process subsequently merged with the APC, with the latter's agenda being extended further to also cover issues related to human trafficking and migrant smuggling. Yet, the importance of the APC diminished significantly with the establishment of the Bali Process in 2002. The first Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime organized in Bali in February 2002 gathered more or less the same states as those that were already members of the Manila Process and the APC.

3.7.2. The Bali Process and the Regional Cooperation Framework

It was initially envisaged that the work of the Bali Process would be absorbed into the other regional institutional arrangements, that is, ASEAN and the APC. Yet, despite the fact that its importance over the first years of its existence was uneven, with no meetings at the ministerial level taking place between 2003 and 2009, the Bali Process has become the main RCP in the region, thus consigning the APC, which is now no longer active, to irrelevance. As evidence of its growing importance, the process now brings together 49 members, including UNHCR, IOM, the UN Office on Drugs and Crime (UNODC) and the International Labour Organization (ILO), as well as 29 observer countries and international organizations (including

¹¹⁶ This included the ten ASEAN member states plus Australia, Bangladesh, China, Japan, New Zealand, Papua New Guinea, the Republic of Korea and Sri Lanka.

¹¹⁷ The Bangkok Declaration on Irregular Migration, International Symposium on Migration, Bangkok, Thailand (21–23 April 1999).

¹¹⁸ Patcharawalai Wongboonsin, 'Asian Labour Migration and Regional Arrangements' in Kristof Tamas and Joakim Palme (eds), *Globalizing Migration Regimes: New Challenges to Transnational Cooperation* (Ashgate 2006) 207.

ASEAN itself).¹¹⁹ The Bali Process is co-chaired by Australia and Indonesia and led by a Steering Group made up of Australia, Indonesia, New Zealand and Thailand, as well as UNHCR and IOM.

The Bali Process has been widely criticized for its excessively security-driven agenda, its seeming reluctance to include protection and human rights considerations alongside migration management policies and the overly significant influence of Australia.¹²⁰ Its focus has essentially been on the development of measures that concretely make it more difficult for irregular migrants – including asylum seekers and refugees – to move within the region. These include intelligence and information sharing, strengthened cooperation between law enforcement agencies, cooperation on border and visa systems, and the conduct of public awareness initiatives to discourage trafficking and smuggling activities. As noted by Kneebone, under the Bali Process, refugees are essentially ‘constructed within a securitized discourse on “irregular migration”’.¹²¹ Ensuring that states take into consideration the protection needs and specific vulnerabilities of migrants and refugees in such circumstances has been a particularly challenging task for international organizations and NGOs, and in particular UNHCR.

A renewed interest for regional cooperation on migration issues in 2009, in the context of an increase in asylum seeker boat arrivals in Australia, offered a new opportunity for UNHCR to bring the subject of the protection of refugees into a process that had been largely dominated by a discourse around security and law enforcement issues. This led to the adoption of the Regional Cooperation Framework (RCF), a non-binding agreement largely inspired by UNHCR’s 10-Point Plan of Action on Refugee Protection and Mixed Migration,¹²² at the Fourth Regional Ministerial Conference of the Bali Process two years later. Introducing this initiative at the beginning of the Ministerial Conference in 2011, UNHCR noted that asylum-related issues had been ‘somewhat on the periphery of the discussions’ until then but that there had been ‘an evolution of thinking in this regard’ stemming from the recognition that the ‘failure to address the humanitarian and protection needs of refugees only destabilizes refugee groups, contributes to their onward movement and feeds the growth of a now flourishing

119 Bali Process, Membership <www.baliprocess.net/membership> accessed 16 January 2021.

120 Moretti ‘UNHCR and the Migration Regime Complex in Asia-Pacific’ (n 115).

121 See Susan Kneebone, ‘The Bali Process and Global Refugee Policy in the Asia-Pacific Region’ (2014) 27:4 JRS 598.

122 UNHCR, ‘Refugee Protection and Mixed Migration: A 10-Point Plan of Action’ (January 2007). The 10-Point Plan of Action was developed in 2006 ‘to assist governments and other stakeholders to incorporate refugee protection considerations into migration policies’. It is a key document when it comes to UNHCR engagement in the context of mixed movements.

people-smuggling industry in the region'.¹²³ The RCF was praised at the time as a significant step towards the inclusion of refugee issues in the agenda of the Bali Process.¹²⁴ The operationalization of the RCF was to be supported by the establishment of a Regional Support Office (RSO) based in Bangkok and placed under the joint management of Australia and Indonesia, with two representatives from IOM and UNHCR initially seconded to the secretariat.

According to UNHCR, the approach envisaged under the RCF would be 'comprehensive' and would take into account the humanitarian dimension of population movements and the refugee situation alongside security and law enforcement measures. It would be 'collaborative', including all the states concerned, whether or not they were parties to the 1951 Convention. It was also intended to make it possible to differentiate among several categories of persons on the move, including asylum seekers and refugees, and take into account various protection needs.¹²⁵ Yet, the arrangement agreed upon by the ministers was in fact a rather vague and ambiguous set of principles underpinning all kinds of arrangements that states may choose to conclude on various issues related to irregular migration.¹²⁶ In practice, the focus of the RCF has been on border control and migration management,¹²⁷ with few projects being initiated through the RSO to strengthen refugee protection within the region.¹²⁸ As Kneebone noted, UNHCR's efforts to inject protection considerations into the work of the Bali Process soon 'appear[ed] to have been overwhelmed by a strong focus on irregular migration'.¹²⁹ As a matter of fact, most of the projects undertaken by the RSO have been funded by the Australian Government and implemented by IOM with a focus on border control, migration and management and the fight against smuggling and trafficking.¹³⁰

123 UNHCR, 'Statement by Erika Feller, Assistant High Commissioner (Protection)', Fourth Bali Regional Ministerial Conference, Bali, Indonesia (30 March 2011) <www.unhcr.org/admin/dipstatements/4dd51b6d9/statement-ms-erika-feller-assistant-high-commissioner-protection-unhcr.html> accessed 16 January 2021.

124 Savitri Taylor, 'Regional Cooperation and the Malaysian Solution', *Inside Story* (9 May 2011) <<https://insidestory.org.au/regional-cooperation-and-the-malaysian-solution/>> accessed 16 January 2021.

125 UNHCR and the Philippines, 'Co-Hosts' Summary', Regional Cooperation on Refugees and Irregular Movements, Workshop, Manila, Philippines (22–23 November 2010).

126 Moretti, 'UNHCR and the Migration Regime Complex in Asia-Pacific' (n 115) 34–37.

127 Petcharamesree, 'ASEAN and Its Approach to Forced Migration Issues' (n 99) 185–186.

128 See Bali Process, *Regional Support Office Activities* <www.baliprocess.net/regional-support-office/activities/> accessed 16 January 2021.

129 Kneebone, 'The Bali Process and Global Refugee Policy in the Asia-Pacific' (n 121) 609.

130 See e.g. Bali Process, 'Intervention by RSO Co-manager during the Plenary Session of the Seventh Ministerial Meeting of the Bali Process', Bali, Indonesia (6–7 August 2018).

3.7.3. From the Jakarta Declaration back to the Bali Process

The weight of Australia's influence over the Bali Process and its government's excessive emphasis on the imperative to 'stop the boats' travelling towards Australia during this period eventually led to the Bali Process being challenged as the main forum for the governance of migration in the Asia-Pacific region. A series of regional meetings focusing also on irregular migration but with a lower level of institutionalization have thus been organized outside the framework of the Bali Process. This has led to the adoption of a plethora of non-binding intergovernmental frameworks on the issue of migration, with a focus on 'irregular maritime movements' across the region.

In August 2013, the Indonesian Government and UNHCR convened a Special Conference on Irregular Movement of Persons in Jakarta to discuss issues related to irregular migration. The conference, held at ministerial level, gathered the main countries of origin of migrants and refugees trying to reach Australia by boat, that is, Afghanistan, Pakistan and Sri Lanka, with Iran declining the invitation, as well as the main countries of transit and the other countries of destination in the region.¹³¹ The Jakarta Declaration on Addressing Irregular Movement of Persons adopted at the end of the conference¹³² marked an attempt by Indonesia and UNHCR to influence the migration agenda and priorities in the region, which had been largely imposed by Australia. The Jakarta Declaration promoted a 'four-pillar' approach that revolves around prevention, early detection, protection and prosecution. Although the Jakarta Declaration essentially incorporated measures already discussed in the Bali Process, the specific inclusion of protection alongside other issues was a new development, with the participants to the conference recognizing that 'the issue of irregular movement of persons also covers asylum seekers and refugees' and underlining the importance of addressing such movements through 'the development of a protection-sensitive regional approach'.¹³³

In May 2015, as the Bay of Bengal and Andaman Sea crisis unfolded, Thailand, Indonesia and Malaysia participated in a ministerial meeting on the irregular movement of people in Southeast Asia in Kuala Lumpur, with a view to 'finding a solution to the crisis of influx of irregular migrants'.¹³⁴

¹³¹ The participants included Afghanistan, Australia, Bangladesh, Cambodia, Indonesia, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guinea, the Philippines, Sri Lanka and Thailand. Iran participated in the subsequent meetings.

¹³² Jakarta Declaration on Addressing Irregular Movement of Persons (20 August 2013) <www.refworld.org/docid/530db94f4.html> accessed 16 January 2021.

¹³³ Ibid.

¹³⁴ Ministers of Foreign Affairs of Malaysia, Indonesia, and Thailand, 'Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia' (20 May 2015) <<https://reliefweb.int/report/myanmar/joint-statement-ministerial-meeting-irregular-movement-people-southeast-asia>> accessed 16 January 2021.

In the document issued at the end of the meeting, known as the 'Putrajaya Statement', the three governments stated that they had taken measures 'on humanitarian grounds, beyond their international obligations' in responding to the crisis and that they would 'continue to uphold their responsibilities and obligations under international law and in accordance with their respective domestic laws, including the provision of humanitarian assistance to the irregular migrants'. This also included respect for the principle of *non-refoulement*. As a matter of fact, Thailand, Indonesia and Malaysia committed to intensify SAR operations, while Indonesia and Malaysia also agreed to grant 'temporary shelter' to up to 7,000 people, provided that they would be resettled or repatriated within one year.¹³⁵ They also called on ASEAN to 'play an active role in addressing the issue' and recommended the convening of an emergency meeting by the ASEAN Ministerial Meeting on Transnational Crime to address the crisis.

A Special Meeting on the situation of irregular migrants in the Indian Ocean convened by the Thai Government then took place in Bangkok on 29 May 2015.¹³⁶ The 17 states attending the meeting adopted a set of recommendations that represented a 'roadmap' for the definitive resolution of the Bay of Bengal and Andaman Sea crisis.¹³⁷ The recommendations had three main parts, which related to the immediate responses needed to provide protection to people stranded at sea; the measures to be taken to prevent irregular migration, smuggling of migrants and trafficking in persons in the region; and the need to address the 'root causes' of such movements. Protection featured prominently in the first part of the document, with proposals to intensify SAR operations at sea and work towards the identification of disembarkation options, to ensure that UNHCR and IOM would have access to the people concerned, and to identify people with specific protection needs through effective screening processes. The document also included a section highlighting the need to address the 'root causes' of displacement through a broad range of economic, political and social measures. The need to address the root causes of displacement in the region had been strongly emphasized by Thailand, Indonesia and Malaysia in the Putrajaya

¹³⁵ Thailand, for its part, only committed not to pushback any more people stranded in Thai territorial waters and to send the persons concerned to Indonesia or Malaysia. 'Thailand Won't Push Back Migrants Stranded in Waters: Thai MFA', *Channel News Asia* (20 May 2015).

¹³⁶ With 17 states present, participation extended far beyond the five countries affected by the Bay of Bengal and Andaman Sea crisis. Besides Thailand, Malaysia, Indonesia, Bangladesh and Myanmar, other participants included Afghanistan, Australia, Cambodia, India, Iran, Lao PDR, New Zealand, Pakistan, Papua New Guinea, the Philippines, Sri Lanka and Vietnam. Representatives from UNHCR, IOM and UNODC were also invited.

¹³⁷ See 'Summary', Special Meeting on Irregular Migration in the Indian Ocean, Bangkok, Thailand (29 May 2015) <<https://reliefweb.int/sites/reliefweb.int/files/resources/media-center-20150529-175942-231858.pdf>> accessed 16 January 2021.

Statement. It is an aspect of any 'comprehensive response' to population movement that has been largely neglected in the context of the Bali Process but is seen as important by Southeast Asian countries.¹³⁸ The participants of the meeting agreed to pursue discussions in the context of other relevant regional frameworks, including ASEAN and the Bali Process.

Finally, the Emergency ASEAN Ministerial Meeting on Transnational Crime Concerning the Irregular Movement of Persons in the Southeast Asia Region was convened in Kuala Lumpur on 2 July 2015. The meeting focused on the law enforcement aspects of the response to the crisis and led to the adoption of a new document known as the 'Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia' which emphasized law enforcement measures. Particularly noteworthy were the proposals to 'endorse the establishment of a trust fund . . . to support the humanitarian and relief efforts involved in dealing with challenges resulting from the irregular movement of persons in Southeast Asia' and the suggestion to establish an ASEAN 'Task Force to respond to crisis and emergency situation arising from irregular movement of persons in Southeast Asia'.¹³⁹

The Bali Process expressly acknowledged the legacy of the various initiatives taken across the region during its Sixth Bali Process Ministerial Conference, which was held in March 2016 in the wake of the Bay of Bengal and Andaman Sea crisis. The ministers adopted the 'Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime' – the first Declaration ever adopted in the context of the Bali Process.¹⁴⁰ The Declaration referred to refugees several times; it acknowledged 'the importance of a comprehensive approach to managing irregular migration by land, air and sea, including victim-centred and protection-sensitive strategies' and highlighted the need to 'identify and provide safety and protection' to all categories of people on the move, that is, migrants, victims of human trafficking, smuggled persons, asylum seekers and refugees. With regard to refugees, the ministers recognized 'the need to grant protection for those entitled to it', while reaffirming that in all cases 'the principle of *non-refoulement* should be strictly respected'. Such references to refugees in what had been the most solemn document ever adopted in the context of the Bali

¹³⁸ See Section 7.4, for more details regarding the need to address the 'root causes' of refugee movements.

¹³⁹ ASEAN, 'Chairman's Statement, Emergency ASEAN Ministerial Meeting on Transnational Crime Concerning Irregular Movement of Persons in Southeast Asia', Kuala Lumpur, Malaysia (2 July 2015) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Chairman-Statement-Emergency-ASEAN-Ministers-Meeting-on-Transnational-Crime-2-July-2015-1.pdf>> accessed 16 January 2021.

¹⁴⁰ Bali Process, 'Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime. The Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime', Bali (23 March 2016).

Process would have been hardly conceivable in other circumstances.¹⁴¹ The ministers also recommended that the Bali Process undertake a review of the region's response to the crisis and develop a mechanism to facilitate timely and proactive consultations to respond to emergency situations.

The Ministerial Declaration was welcomed by UNHCR,¹⁴² while the Asia-Pacific Refugee Rights Network (APRRN) noted that 'there [was] increasing evidence to suggest that the forum is playing an important norm-setting role, particularly for states that have been unwilling historically to recognize refugees as a group of persons who have particular protection concerns'.¹⁴³ Yet, it remains to be seen if these were mere words or if the Bali Process can really play a more constructive role when it comes to dealing with refugees. By contrast, the declaration adopted at the end of the Seventh Ministerial Conference in August 2018 did not contain any reference to refugees.¹⁴⁴ Doubts have also been cast regarding the new Coordination Mechanism, supported by a Task Force on Planning and Preparedness and led by the co-chairs of the Bali Process, which was subsequently created in order to ensure a more rapid and coordinated response to sudden movements of people in the region. This new initiative's lack of effectiveness was already apparent in late 2017 with the Bali Process failing to play any meaningful role in one of the most significant humanitarian crises that has affected the region in decades: the influx of some 740,000 Rohingya seeking refuge in Bangladesh.¹⁴⁵

3.8. Conclusion

While most Southeast Asian states stand apart from the 1951 Convention and its Protocol, the development of international human rights law and the growing recognition of its complementarity with refugee law represent a significant development for the protection of refugees in those countries.

¹⁴¹ Moretti, 'UNHCR and the Migration Regime Complex in Asia-Pacific' (n 115) 43–46.

¹⁴² UNHCR, 'UNHCR Welcomes Ministerial Declaration in Bali, Calls for New Compact to Absorb Refugees in the Region' (23 March 2016) <www.unhcr.org/news/press/2016/3/56f259336/unhcr-welcomes-ministerial-declaration-bali-calls-new-compact-absorb-refugees.html> accessed 16 January 2021.

¹⁴³ APRRN, 'Summary of the Asia Pacific Refugee Rights Network's Submissions to the 2017 Consultations on the Global Compact on Refugees: Annex to Submission of the Asia Pacific Refugee Rights Network to the Tenth Annual High Commissioner's Dialogue on Protection Challenges on the Theme of 'Towards a Global Compact on Refugees' (12 and 13 December 2017) <www.unhcr.org/5a3bbe4c7.pdf> accessed 16 January 2021.

¹⁴⁴ Bali Process, 'Declaration of the Seventh Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime', Bali (7 August 2018) <www.baliprocess.net/UserFiles/baliprocess/File/BPMC%207%20Ministerial%20Declaration-Final.pdf> accessed 16 January 2021.

¹⁴⁵ Sébastien Moretti, 'Between Refugee Protection and Migration Management: The Quest for Coordination between UNHCR and IOM in the Asia-Pacific Region' (2020) 42:1 Third World Quarterly 44–46.

International human rights law not only fills some of the gaps of the 1951 Convention, but it also represents a comprehensive framework for the protection of refugees in many countries where the Convention does not apply. In the same vein, international customary law, which binds all states irrespective of their accession to any particular convention, guarantees a set of core rights that are extremely important, starting with the principle of *non-refoulement*. The first people to benefit from these developments are those who, for various reasons, are excluded from refugee protection, including those in states that remain outside the international refugee protection regime.

Moreover, it could be argued that the existence of the Bangkok Principles is a clear indication that Asian states both acknowledge the category of 'refugees', if not in law at least in principle, and the importance of guidance on how refugee issues should be dealt with. The adoption of the Bangkok Principles, like the adoption of several non-binding human rights instruments within ASEAN, also illustrates that Southeast Asian states prefer to develop soft law instruments rather than undertake new obligations. This is in line with the approach generally preferred by ASEAN, which seems to reject any legalism in favour of a more diplomatic and consensual approach that generally takes the form of non-binding agreements such as statements or declarations. As recognized by the ICJ with reference in particular to General Assembly resolutions, the belief that states are bound by customary law rules can also be derived, depending on their content and the conditions of their adoption, from their participation in non-binding instruments. Thus, the court has ruled: 'General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'.¹⁴⁶ The symbolic importance of a soft law instrument such as the Bangkok Principles is arguably far greater in Asia than in other regions where states are more likely to adopt binding instruments and where the adoption of mere non-binding standards would indeed be a clear sign of their reluctance to develop new rules in certain areas.

Two additional soft law instruments may present opportunities to advance refugee protection in the region. These are the Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM), both adopted in 2018. The GCR does not restate and reinforce international legal norms; rather, it reaffirms 'the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries'.¹⁴⁷ The Refugee Compact was indeed specifically developed to address the issue of more equitable and predictable burden-sharing arrangements in situations of large-scale

¹⁴⁶ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Reports 66, para. 70.

¹⁴⁷ GCR, A/73/12 (2 August 2018), para. 4.

movements of refugees. Its main ambition is 'to provide a basis for predictable and equitable burden- and responsibility-sharing' in the context of large-scale refugee movements, involving all UN member states and other relevant stakeholders.¹⁴⁸ The GCR also fills a gap in the institutional framework by establishing coordination structures focusing on refugees at the global level. In particular, the Compact provides for the convening of a meeting, at ministerial level, of a Global Refugee Forum (GRF), which will provide the opportunity for states and other relevant stakeholders to announce concrete pledges and contributions (e.g. resettlement places, financial, material and technical assistance) towards the objectives of the Global Compact and to take stock of their implementation. Many Southeast Asian states, including non-signatory states, participated actively to the various thematic consultations organized by UNHCR in 2017 and 2018 and the adoption of the Global Compact was welcomed by many of them that also highlighted the importance of burden-sharing.¹⁴⁹ Several states also participated to the first GRF held in Geneva in December 2019, with Thailand, Indonesia, the Philippines and Myanmar announcing various pledges (with varying levels of abstraction).¹⁵⁰

For its part, the Global Compact for Safe, Orderly and Regular Migration is the first comprehensive (non-binding) instrument on migration ever adopted by the international community. It represents 'a cooperative framework addressing migration in all its dimensions'.¹⁵¹ The GCM comprises 23 objectives and related commitments, many of them also important from a refugee protection perspective. These objectives include ensuring that all migrants have proof of legal identity and adequate documentation (objective 4); addressing and reducing vulnerabilities in migration (objective 7); saving lives and establishing coordinated international efforts on missing migrants (objective 8); strengthening the transnational response to smuggling of migrants (objective 9); preventing, combatting and eradicating trafficking in persons in the context of transnational migration (objective 10); providing access to basic services for migrants (objective 15); and eliminating all forms of discrimination and promoting evidence-based public discourse to shape perceptions of migration (objective 17). The GCM also provides for the establishment of an International Migration Review Forum (the first one scheduled for 2022) to discuss and share progress on the implementation of

¹⁴⁸ GCR, para. 3.

¹⁴⁹ UNGA, 'Third Committee Approves 11 Drafts amid Heated Debate over Death Penalty Moratorium, Use of Mercenaries, Efforts to End Cybercrime', GA/SHC/4252 (13 November 2018) <www.un.org/press/en/2018/gashc4252.doc.htm> accessed 16 January 2021.

¹⁵⁰ See UNHCR, 'Global Compact on Refugees, Pledges and Contributions', listed and updated on an ongoing basis at: <<https://globalcompactrefugees.org/index.php/channel/pledges-contributions>> accessed 16 January 2021.

¹⁵¹ UNGA, 'Global Compact for Safe, Orderly and Regular Migration', A/RES/73/195 (19 December 2018), para. 4.

all aspects of the Global Compact.¹⁵² The GCM was adopted by the UNGA in December 2018, with the support of all Southeast Asian states.¹⁵³

The decision to adopt two separate Global Compacts was primarily for institutional reasons, with UNHCR leading the development of the GCR, but efforts were made to ensure some 'complementarity' between the two instruments. While such concerns were not entirely addressed, the GCM may be instrumental in advancing the protection of asylum seekers and refugees in situations where they are not recognized as such, including in the case of states not party to the Refugee Convention that officially consider them as 'illegal migrants'. In particular, some provisions of the GCM related to the protection of irregular migrants, such as the principle of *non-refoulement*,¹⁵⁴ the veiled reference to the so-called firewalls¹⁵⁵ or the commitments made to 'promote, implement and expand alternatives to detention' in the case of migrants, especially in the case of families and children,¹⁵⁶ could also contribute to the protection of asylum seekers and refugees in non-signatory states in southeast Asia.

In sum, this chapter demonstrates that there is 'more international law' relevant to refugee protection in Southeast Asia than is often said, even though the individuals concerned may not officially be recognized as refugees. There are also an increasing number of venues and opportunities for engagement with states on issues related to the protection of migrants and refugees at both the global and regional levels. To further advance refugee protection, it is essential to consider the legal and policy framework related to refugee protection and human rights more broadly, including soft law, and to use all available international and regional channels for advocacy.

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¹⁵² Global Compact for Migration, para. 49.

¹⁵³ UNGA, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants', GA/12113 (19 December 2018) <www.un.org/press/en/2018/ga12113.doc.htm> accessed 16 January 2021.

¹⁵⁴ Global Compact for Migration, para 37.

¹⁵⁵ Global Compact for Migration, para. 31(b). The notion of 'firewalls' refers to measures taken to ensure that migrants, irrespective of their legal status, can access to basic services without being reported to immigration authorities.

¹⁵⁶ Global Compact for Migration, para. 29. See in this regard Vittit Muntarbhorn, 'The Global Compacts and the Dilemma of Children in Immigration Detention' (2018) 30:4 IJRL 668–773.

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4 Access to protection

While the right to leave one's own country is widely recognized in international law, there is no concomitant right to enter another country nor even a 'right to asylum'. The Universal Declaration on Human Rights recognized a 'right to seek and to enjoy . . . asylum from persecution', but it fell short of recognizing a right to obtain or to be granted asylum.¹ The International Covenant on Civil and Political Rights does not even include any reference to asylum. Adopted in November 2012, the ASEAN Human Rights Declaration provides, for instance, that every person has the right to seek and receive asylum in another state 'in accordance with the law of such State and applicable international agreements'.²

As a matter of fact, asylum remains largely conceived as a discretionary prerogative of states. It is first and foremost 'a right of States to grant it if they so wish in the exercise of their sovereignty'.³ The Declaration on Territorial Asylum adopted by the UNGA in 1967 provides, for instance, that 'asylum granted by a State, in the exercise of its sovereignty . . . shall be respected by all other States'.⁴ The OAU Convention, which includes a specific provision in this regard, also makes it clear that the grant of asylum is a right of the state.⁵ In other words, there is a right for people to seek asylum but no obligation for states to provide asylum to people seeking refuge.

The 1951 Convention nevertheless represents to some extent an exception to the exercise of territorial sovereignty. The Convention does not include a specific provision on asylum, but it has been drafted in such a way

¹ UNGA, Universal Declaration of Human Rights (10 December 1948) UNGA res 217 A, art. 14.1.

² ASEAN Human Rights Declaration (adopted 28 November 2012), art. 16.

³ M-T Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27:1 IJRL 3–28 (emphasis in the original) 7.

⁴ UNGA, Declaration on Territorial Asylum, A/RES/2312(XXII) (14 December 1967), art. 1.1.

⁵ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (opened for signature 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art. II.2.

that states, while having the impression of retaining their prerogatives, may in fact find themselves obliged to accept refugees on their territory. Indeed, art. 33.1 of the 1951 Convention reads:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Technically, respect for the principle of *non-refoulement* does not necessarily mean that states are required to accept asylum seekers on their territory, as they can send them to a third state where there is no risk of persecution. Yet, in most cases, the people concerned should be given access to the territory, at least temporarily, for such an inquiry to take place. In that sense, due respect for the principle of *non-refoulement* often involves 'a de facto a duty' to admit the person seeking protection.⁶ As the UNHCR noted in 2010, however, in the context of mass influx, 'the reality of border-crossing – both in principle and in practice – is far more complex'. In the previous two decades, states 'ha[d] repeatedly closed their borders to refugee influxes, usually with the aim of preserving security and relieving pressure on national capacity'.⁷ Since then, this tendency has only been accentuated, including in the Western world. As UNHCR observed in June 2016, with regard more specifically to the response of the European countries to the arrival of a large number of refugees and migrants in Europe in 2015:

It is clear that the institution of asylum needs more than ever to be respected, preserved, and reinforced. Yet a number of countries have taken measures to close their doors, restrict protection space, and even prevent people from reaching safety. We have seen this with the institution of barriers to entry, including transfer arrangements involving asylum-seekers and refugees, quotas on the number admitted to asylum procedures, unwarranted detention of asylum-seekers, confiscation of assets, increased visa requirements, and interdiction practices.⁸

Such a statement would sound profoundly familiar to those who are interested in refugee issues in Southeast Asia. Southeast Asian states have indeed regularly been criticized – often with good reason – for their lack of respect of international refugee law, for their pushback policies, for

⁶ James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 301.

⁷ UNHCR, 'NO Entry! A Review of UNHCR's Response to Border Closure in Situations of Mass Refugee Influx', UNHCR, PDES/2010/07 (June 2010), para. 5.

⁸ UNHCR, '66th Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme (ExCom), Geneva, 21–24 June 2016, Agenda item 2: International Protection, Statement by Volker Türk, Assistant High Commissioner (Protection)' (21 June 2016) <www.refworld.org/docid/57c823314.html> accessed 17 January 2021.

their numerous violations of the principle of *non-refoulement* and for their reluctance to accept asylum seekers and refugees on their territory. Looking back on the Indochinese refugee crisis, Suhrke referred, for instance, to the ‘vehemence of the ASEAN rejectionist stand, and the ruthlessness with which it was pursued’.⁹

This chapter takes a different view and argues, based on the detailed examination of the practice in the region since the Indochinese refugee crisis, that Southeast Asian states have a long tradition of offering asylum – or, more specifically, ‘temporary asylum’ or ‘temporary refuge’ – to people in need of international protection (Section 4.1). Temporary refuge has thus become a key tenet of the approach to refugee protection in Southeast Asia, although the specificities and content of this form of protection remain rather unclear (Section 4.2). While there is no obligation under international law to provide asylum, not even a temporary asylum, there is at least an obligation, known as the principle of *non-refoulement*, not to send asylum seekers and refugees back to places where their lives and security would be in danger (Section 4.3). While Southeast Asian states have generally been reluctant to formally acknowledge the principle of *non-refoulement*, it is also argued here that their practice, no matter the lack of explicit statement in this regard, demonstrates that they actually recognize the existence and applicability of the principle of *non-refoulement* in relation to asylum seekers and refugees (Section 4.4).

4.1. A long-standing practice of offering a temporary refuge to refugees

In its 2017 update on its operations in the Asia-Pacific, UNHCR stated that there ‘ha[d] been a long-standing tradition of hospitality towards displaced people across the region’.¹⁰ In practice, Southeast Asian states have indeed welcomed large groups of refugees on various occasions, most notably during the Indochinese refugee crisis (Section 4.1.1). As will be shown later, the practice of granting temporary refuge, or temporary asylum, emerges as one of the main characteristics of refugee protection in Southeast Asia, as well as one of its main contributions to the development of the international refugee regime (Section 4.1.2).

4.1.1. *Temporary asylum as a response to mass influxes of refugees*

When the UNHCR Director of Assistance noted in 1983 that ‘the phenomenon of mass exoduses and the concept of temporary asylum’ were ‘the two

⁹ Astrid Suhrke, ‘Migration, State and Civil Society in Southeast Asia’, Working Paper (Chr Michelsen Institute 1992) 14.

¹⁰ UNHCR, ‘Update on UNHCR’s Operations in Asia and the Pacific’ (2 March 2017).

factors which had contributed to shaping UNHCR's programmes in the late 1970s',¹¹ he had in mind the hundreds of thousands of refugees from Indochina looking for asylum in other countries throughout the region. Indeed, during the Indochinese refugee crisis, Southeast Asian states accepted an estimated 3 million asylum seekers and refugees in total from Cambodia, Laos and Vietnam. Thailand received the bulk of the influx, with some 2 million so-called displaced persons staying at the border with Cambodia, as well as a large number of Laotians in the north of the country.

While practices have varied over time, depending on the governments and the political context, Thailand, as a 'front line state bordering on Indochina' has generally provided asylum seekers with temporary asylum while reaffirming its right to take measure to protect its territory.¹² On 3 June 1975, for instance, the Thai Government adopted a cabinet decision stating that 'should any displaced persons attempt to enter the Kingdom, measures will be taken to drive them out of the Kingdom as fast as possible', adding that 'if it is impossible to repel them, such persons will be detained in camps'.¹³ This policy, according to Robinson, 'captured the fundamental ambivalence towards asylum seekers that has been reflected in much of Thailand's subsequent policies and practices',¹⁴ since those who were seeking refuge in Thailand, who arrived in rather small numbers in the first years of the crisis, were in practice relatively well accepted and granted temporary refuge in the country. As noted by Bronée, 'there was sufficient understanding of – and sympathy for – their situation' in Thailand and in other receiving countries at this stage. Thus, the issue of the burden they presented and the risk of any residual caseloads staying in the first countries of asylum 'did not seriously arise at this stage'.¹⁵

The situation changed in 1978, following an increase in the number of 'boat people' arriving in the region. As noted by one commentator, '[B]y May 1978 Thailand, which originally had been perhaps the most tolerant, already had a total of 160,000 "displaced persons" on its territory'.¹⁶ The

11 UNHCR, 'Addendum to the Report of the United Nations High Commissioner for Refugees', A/38/12/Add.1 (8 November 1983), para. 113.

12 Supang Chantavanich and Paul Rabe, 'Thailand and the Indochinese Refugees: Fifteen Years of Compromise and Uncertainty' (1990) 18:1 *Asian Journal of Social Science* 67–71.

13 Vittit Muntarbhorn, 'Displaced Persons in Thailand: Legal and National Policy Issues in Perspective' in 'Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, Manila, Philippines', HCR/120/25/80 (14–18 April 1980).

14 W Courtland Robinson, 'Thailand: Background Paper on Human Rights, Refugees and Asylum Seekers', Writenet (July 2004) 22.

15 Sten A Bronée, 'The History of the Comprehensive Plan of Action' (1993) 5:4 *IJRL* 534.

16 Justus M van der Kroef, 'The Vietnamese Refugee Problem' (Summer 1979) 142:1 *World Affairs* 8.

number rose dramatically with the influx of Cambodian in search of protection, who arrived at the border following the invasion of Cambodia by Vietnam in December 1978. Having announced a much more restrictive policy to respond to this increase, the Thai Government nevertheless resumed its practice of providing temporary asylum to the Indochinese following a meeting organized in Geneva on 20–21 July 1979, after it received further guarantees from the international community concerning the resettlement of the refugees. In October 1979, Thailand even announced an ‘open-door’ policy where temporary asylum would be granted to all displaced persons pending another solution. The government had made it clear that the country was not ‘bound by legal obligations to accept or give temporary refuge to any refugee’, but that it nevertheless accepted hundreds of thousands of people out of ‘a deep sense of moral obligation’.¹⁷ Yet, as Vitit Muntarbhorn observed, Thailand’s ‘open door’ policy

in many ways . . . finds its parallel in the principles of non-expulsion and non-refoulement embodied in Articles 32 and 33 of the 1951 Convention respectively, even though Thailand has not specifically assumed obligations arising from the latter. Therefore, in practice, Thailand has shown its readiness to abide by certain principles enshrined in international instruments, albeit within a limited sphere.¹⁸

In retrospect, Muntarbhorn estimated, Thailand’s ‘open-door’ policy at that time was in fact indicative of how the government abided by its ‘moral’ obligation at an international level, thereby enhancing respect for the principle of *non-refoulement*.¹⁹ Chantavanich and Rabe also emphasized the fact that the government was acting ‘in conformity with what it [saw] as its “moral” obligation to the refugees at the international level’.²⁰ It is in this context that UNHCR’s ExCom adopted a series of Conclusions on temporary asylum, noting in particular that in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge.²¹

Other countries in the region kept their borders open to hundreds of thousands of Vietnamese “boat people” who fled Vietnam in frail boats. Singapore represented the exception, as it enacted a strict no entry policy unless it

¹⁷ Quoted in Donald W Greig, ‘The Protection of Refugees and Customary International Law’ (1978) 8:4 Australian Year Book of International Law 126.

¹⁸ Muntarbhorn, ‘Displaced Persons in Thailand’ (n 13) 169.

¹⁹ Vitit Muntarbhorn, ‘International Protection of Refugees and Displaced Persons: The Thai Perspective’, Law Association for Asia and the Western Pacific (1981) 31.

²⁰ Chantavanich and Rabe, ‘Thailand and the Indochinese Refugees’ (n 12) 68.

²¹ ExCom, Conclusions no 5 (XXVIII) Asylum (1977), para. (d); no 15 (XXX) Refugees without an Asylum Country (1979), para. (c); no 19 (XXXI) Temporary Refuge (1980); no 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981), para. II.A.1.

received guarantees of their speedy resettlement. Otherwise, asylum seekers and refugees were 'generally granted temporary refuge' throughout South-east Asia, subject to resettlement to third countries, whereas the principle of *non-refoulement* was 'respected for the most part'.²² While Malaysia had started turning back boat people alleging security issues related mostly to the high number of Vietnamese from ethnic Chinese descent in 1978, it reopened its border after the July 1979 meeting. As Courtland Robinson observed, '[F]or fully a decade after it had stopped turning boat people back to sea in 1979 . . . , Malaysia had maintained a creditable record of generosity, granting temporary asylum to more than 250,000 Vietnamese'.²³ In the Philippines, as noted by Filipino commentators, the authorities 'interpreted the principle of non-refoulement very liberally'. Until the end of the Indochinese refugee crisis, the country indeed 'received all asylum-seekers, whether direct arrivals as boat people or people rescued at sea by passing vessels, without screening the asylum-seekers'.²⁴ In Indonesia, the government issued a Presidential Decision on Coordination of the Resolution of Issues Related to Vietnamese Refugees in Vietnam on 11 September 1979, which set out the conditions of temporary asylum.²⁵ The government's position was that refugees would be allowed to enter the territory provided that they agreed to be accommodated in camps pending their resettlement to a third country, as local integration was not an option. Although she was rather critical of the practices of South-east Asian states during the crisis, Anne Barcher noted that Indonesia had 'a surprisingly good record in admitting asylum seekers despite its other human rights problems'.²⁶ In sum, there was arguably, as recognized by UNHCR, 'a well-defined and well-established structure of temporary asylum within neighbouring countries, which allowed for the transit of asylum seekers but so far had excluded local integration'.²⁷ By 1987, approximately 1.1 million Indochinese had transited through Thailand, Malaysia, Indonesia, the Philippines, Hong Kong or Singapore.

In the meantime, like Thailand, these countries made repeated assertions that they had no legal obligations towards the refugees; the provision of a temporary asylum, in their words, was granted as a 'humanitarian gesture'

22 Vitt Muntarbhorn, *The Status of Refugees in Asia* (OUP 1992) 104.

23 W Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17:3 JRS 322.

24 Florentino B Feliciano and Marissa P Dela Cerna, 'Refugees in South-East Asia: A Note on Philippine Practice and Recent Developments', paper presented at the Conference on International Law and Refugees in the Asia Pacific Region, Melbourne (1990) 3, quoted in Muntarbhorn, *The Status of Refugees in Asia* (n 22) 82.

25 Indonesia, 'Presidential Decree No. 38/1979 regarding Coordination of the Resolution of Issues Related to Vietnamese Refugees in Vietnam' (1979).

26 Ann C Barcher, 'First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?' (1991–1992) 24 New York University Journal of International Law and Politics 1263.

27 ExCom, 'Summary Record of the 421st Meeting, Held at the Palais des Nations, Geneva, on Friday, 9 October 1987', A/AC.96/SR.421 (15 October 1987), para. 23.

only and not as a result of ‘any duty’ owed under international law.²⁸ During a roundtable of Asian experts in 1980, Ricardo Puno, the minister of justice of the Philippines, explained that ‘Asians prefer[ed] to base the legal protection of refugees, not on treaty obligations, but on elementary considerations of humanity’.²⁹ At the same meeting, the representative of Indonesia noted that Indonesia had ‘no legal obligation to accept the Indochinese refugees for temporary stay’, but that the country was willing to grant temporary stay to refugees from Indochina on the basis of ‘the humanitarian principles accepted by civilized nations’.³⁰ Arguably, this kind of discourse reflected their concern to avoid incurring obligations towards the Indochinese under developing rules of customary international law.³¹ Their practice, however, revealed that they recognized the need to provide protection to the Indochinese refugees.

Analysing the practice of Southeast Asian states to determine if the principle of *non-refoulement* had become a norm of international customary law in the early 1980s, Hyndman found:

Although states are still resisting binding obligations to grant asylum in the sense of granting a right of permanent settlement, state practice, including the practice of countries within South-East Asia, does indicate an acceptance of humanitarian obligations – an acceptance that refugees who arrive at foreign borders seeking admission should not be rejected, whether such rejection would mean a return across the border to the country fled, or the sending of the refugees upon a further dangerous journey to seek admission at another frontier, and that they should be given temporary refuge at least, provided that this is laced within a wider context of international cooperation.³²

The 1979 Meeting on Refugees and Displaced Persons in South-East Asia and the International Conference on Indo-Chinese Refugees organized in 1989 were specially organized to ensure that the main countries of asylum in Southeast Asia would continue to provide temporary refuge to the

28 Patricia Hyndman ‘Asylum and Non-refoulement – Are These Obligations Owed to Refugees under International Law’ (March 1982) 57 *Philippine Law Journal* 70; Greig, ‘Refugees and Customary International Law’ (n 17) 125–126.

29 Ricardo C Puno, ‘Basis and Rationale of International Refugee Law’ in ‘Proceeding of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons’, Manila, Philippines, HCR/120/25/80 (14–18 April 1980).

30 Rooslan Soeroso, ‘Indonesia: Refugees and Displaced Persons – The Asian Practice’, in ‘Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons’, Manila, Philippines, HCR/120/25/80 (14–18 April 1980).

31 Greig, ‘Refugees and Customary International Law’ (n 17) 125.

32 Hyndman, ‘Asylum and Non-refoulement’ (n 28) 77.

Indochinese asylum seekers and refugees pending more durable solutions, and this is what they did.

4.1.2. A defining feature of refugee protection in Southeast Asia

Southeast Asian states have also offered asylum to a large number of people outside the context of the Indochinese refugee crisis.³³ Andreas Schloenhardt noted, in 2002 that, although Thailand had not signed most of the international human rights and refugee treaties, ‘in practice the country [had] been very liberal and hosted millions of refugees from neighbouring countries’, including tens of thousands of refugees from Myanmar, and that it also ‘generally complie[d] with the non-refoulement obligation’.³⁴ Bowles noted that there was ‘considerable tolerance at the local levels in Thailand’ when these displaced persons arrived, even though the Thai authorities were already dealing with the presence of a large number of refugees on Thailand’s north, east and south borders. Those arriving from Myanmar were allowed to stay temporarily in the country and the Thai Government even articulated a policy granting them temporary refuge in November 1989.³⁵ Despite some incidents of people being returned to Myanmar, some of which arguably amounted to *refoulement*, many of those concerned have been living since then in the refugee camps – called ‘temporary shelters’ by the authorities – along the border with Myanmar. In December 2020, there were still around 92,000 people living in those camps.³⁶

Since the mid-1990s, Thailand has also accepted tens of thousands of Shan asylum seekers in Chiang Mai and Chiang Rai provinces in northern Thailand. Yet, although they were fleeing a succession of ‘opium wars’ and related fighting with the Myanmar Government, the Shan were not sheltered in camps as has been the case for the other refugees from Myanmar, arguably because of their ethnic proximity to the local population and the fact they could more easily *de facto* integrate into the society than other ethnic groups from Myanmar.³⁷ While it remains difficult to provide precise figures regarding the number of Shan asylum seekers and refugees in Thailand, it was estimated that there were at least 200,000 of them in Thailand in the early 2000s.³⁸

33 See Sébastien Moretti, ‘Keeping Up Appearances. State Sovereignty and the Protection of Refugees in Southeast Asia’ (2018) 17:1 European Journal of East Asian Studies 12–16.

34 Andreas Schloenhardt, ‘Immigration and Refugee Law in the Asia Pacific Region’ (2002) 32:1 Hong Kong Law Journal 543.

35 Muntarbhorn, *The Status of Refugees in Asia* (n 22) 131.

36 Royal Thai Government/Ministry of the Interior-UNHCR, ‘RTG/MOI-UNHCR Verified Refugee Population’ (31 December 2020) <<https://data2.unhcr.org/en/documents/download/84233>> accessed 17 January 2021.

37 Edith Bowles, ‘Assistance, Protection and Policy in Refugee Camps on the Thailand-Burma Border: An Overview’ (Refugee Studies Programme, University of Oxford 1997); HRW, ‘Unwanted and Unprotected: Burmese Refugees in Thailand’, C1006 (1 September 1998).

38 Robinson, ‘Thailand: Background Paper’ (n 14) 24.

With regard to Malaysia, UNHCR noted in its contribution to the UPR in 2013 that:

Malaysia has a long-standing tradition of humanitarian commitment and generously providing temporary asylum on humanitarian grounds to groups of asylum-seekers and refugees. In the past, this has included Filipino refugees from Mindanao arriving during the late 1970s and early 1980s, Cambodian and Vietnamese refugees and asylum-seekers during the 1980s and 1990s, a small number of Bosnian refugees in the early 1990s, and Indonesians from the Province of Aceh in the early 2000s. Malaysia has ensured protection and assistance to these groups, even though it is not a party to the 1951 Convention or its 1967 Protocol. It continues to ensure some level of protection and assistance to the current refugee population, comprised largely of Myanmar nationals, although not at the levels provided to the groups mentioned above.³⁹

Indeed, Malaysia accepted a large number of Filipinos fleeing unrest in the south of the country and who came to the eastern Malaysia state of Sabah in the 1970s. They were given an official permit to remain – an ‘HF7 permit’, precursor to the ‘IMM13 permit’ – which allowed them to stay and work in the area pending an improvement of the situation in their country.⁴⁰ Between 2003 and 2005, Malaysia accepted more than 30,000 Indonesians who were fleeing the violence in Aceh. Following the Tsunami in December 2004, they were given limited-term visas (IMM13) valid for two years, which legalized their stay in the country and gave them access to the labour market as well as to education. This arrangement was in place until 2010, after which many of them returned or were deported back to Aceh.⁴¹ In 2018, Malaysia noted in its National Report in the context of the UPR that:

[W]hile not being a State Party to the United Nations Convention relating to the Status of Refugees 1951, the Government provided temporary refuge to asylum seekers and refugees and continues to cooperate with the United Nations High Commissioner for Refugees to manage these issues on humanitarian grounds.⁴²

39 UNHCR, ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: Malaysia’ (March 2013).

40 Jera Beah H Lugo, ‘Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the “Humanitarian Exception”’ (2012) 17 *Journal of Political Science and Sociology* 78–79.

41 See Gerhard Hoffstaedter, ‘Refugees, Islam, and the State: The Role of Religion in Providing Sanctuary in Malaysia’ (2017) 15:3 *Journal of Immigrant and Refugee Studies* 291–292.

42 Human Rights Council, ‘National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Malaysia’, A/HRC/WG.6/31/MYS/1 (23 August 2018), para. 145 <<https://undocs.org/A/HRC/WG.6/31/MYS/1>> accessed 17 January 2021.

As of December 2020, there were some 180,000 asylum seekers and refugees registered with UNHCR⁴³ and tolerated on the Malaysian territory on a temporary basis pending resettlement or return to their country of origin.

Although the number of arrivals is less significant, Indonesia has ‘a surprisingly good record in admitting asylum seekers’,⁴⁴ with a policy of temporary asylum pending RSD by UNHCR and resettlement for those found to be in need of international protection. The 2016 Regulation concerning the handling of foreign refugees expressly refers to temporary shelters, while local integration is not an option and refugees are expected to leave the country at some point. As of December 2020, there were some 13,700 asylum seekers and refugees registered by UNHCR in Indonesia.⁴⁵

The Philippines, for its part, has ‘traditionally been very liberal towards the admission of asylum seekers’⁴⁶ – something the government is particularly proud of. As the representative of the Philippines Government noted in 2017 at the 68th session of ExCom, the country has ‘a strong humanitarian tradition, including opening [its] doors to refugees seeking asylum’ and it remains ‘strongly committed to provide humanitarian assistance and protection for the purpose of alleviating the plight of refugees’.⁴⁷ Yet, while the Philippines has been party to the Refugee Convention since 1981, it has continued to provide only temporary asylum for a very long time, insisting on resettlement over local integration, like all other countries in the region. As of end of June 2020, there were some 750 refugees and 400 asylum seekers in the Philippines.⁴⁸

In May and June 2015, when more than 5,000 Rohingya refugees and Bangladeshi migrants were stranded in the Bay of Bengal and the Andaman Sea, the Philippines was the first country to offer them temporary shelter ‘pursuant to [Philippines] commitments under the [Refugee] Convention’.⁴⁹ While it was unlikely that those concerned would make their way to the Philippines, the statement made by the authorities raised hopes that the other countries in the region might follow. A few days later, on 20 May, Malaysia and Indonesia agreed to provide ‘temporary shelter’ to the Rohingya.⁵⁰ In July 2017, the Director of Human Rights at the Indonesian

43 UNHCR, ‘Population Data’ <www.unhcr.org/data.html> accessed 20 July 2021.

44 Schloenhardt, ‘Refugee Law in the Asia Pacific Region’ (n 41) 544.

45 UNHCR, ‘Population Data’ <www.unhcr.org/data.html> accessed 20 July 2021.

46 Schloenhardt, ‘Refugee Law in the Asia Pacific Region’ (n 41) 539.

47 Philippines, ‘Statement, 68th Session of the Executive Committee of the High Commissioner’s Programme’ (4 October 2017) <www.unhcr.org/en-au/59d4d00c7> accessed 17 January 2021.

48 UNHCR, ‘Population Data’ <www.unhcr.org/refugee-statistics/download/?url=9WIY> accessed 20 July 2021.

49 Beh Lih Yi, ‘Philippines Offers Refuge to Desperate Migrants Trapped on Boats’, *The Guardian* (19 May 2015) <www.theguardian.com/world/2015/may/19/philippines-offers-refugee-to-desperate-asylum-seekers-trapped-on-boats> accessed 17 January 2021.

50 Ministers of Foreign Affairs of Malaysia, Indonesia, and Thailand, ‘Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia’ (20 May 2015).

Ministry of Foreign Affairs stated that ‘although [Indonesia] had not ratified the convention on refugees and asylum-seekers, [the country] behave[d] as if [it] had ratified it’.⁵¹ Amnesty International also commended the reaction of the Indonesian authorities alongside the hospitality of the local population in Aceh who were among the first to provide support to the Rohingya and Bangladeshi ‘boat people’ upon arrival.⁵² Although Thailand refused to announce that it would provide a temporary shelter, UNHCR noted a few months later that the Rohingya in the country were nonetheless ‘at least informally, subject to an as yet unwritten “temporary protection” regime, which tolerates their stay while UNHCR seeks solutions’.⁵³

As a party to the Refugee Convention, Cambodia also provided a temporary asylum to hundreds of Montagnards from the central highlands of Vietnam who arrived in Cambodia from 2001 onwards, following the repression of peaceful manifestations calling for independence, the return of ancestral lands and religious freedom.⁵⁴ Many were resettled to the United States, and it is only after coming under significant pressure from Vietnam that Cambodia started to prevent them from entering the country or to return some of those who had made their way into the country.⁵⁵

While there have been reported cases of pushbacks of asylum seekers in some countries in Asia, the ‘good news’, as Sam Blay observed, is that ‘the non-1951 Convention states in the region tend to accept and respect temporary refuge for asylum seekers’.⁵⁶ Indeed, the numerous examples mentioned earlier demonstrate that Southeast Asian countries have long recognized the importance of providing some form of protection to refugees, although in their case the grant of asylum is a provisional measure only, as (officially at least) the concerned persons would not be allowed to settle permanently on their territory. Yet, while the practice of temporary protection is generally accepted in response to a mass influx of refugees, in Southeast Asia it has become an important aspect of the response to all refugee situations, whether those fleeing arrive individually or in the context of

51 Sheany, ‘Indonesia Will Help Refugees, But “Won’t Host Them Forever”, says Immigration Office’, *Jakarta Globe* (26 July 2017) <<https://jakartaglobe.id/news/indonesia-will-help-refugees-wont-host-forever-says-immigration-office/>> accessed 17 January 2021.

52 AI, ‘Abandoned at Sea: The Refugee and Trafficking Crisis in Southeast Asia’, ASA 21/2574/2015 (October 2015) 31.

53 UNHCR, ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: 2nd Cycle, 25th Session, Thailand’ (September 2015).

54 See e.g. UNHCR, ‘Cambodia Agrees to Temporary Stay of Vietnamese’ (17 May 2001) <www.unhcr.org/news/press/2001/5/3b03d5781/cambodia-agrees-temporary-stay-vietnamese.html> accessed 17 January 2021.

55 HRW, ‘Repression of Montagnards: Conflicts over Land and Religion in Vietnam’s Central Highlands’ (2002), section XIII.

56 Sam Blay, ‘Regional Developments: Asia’ in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2010) 184.

a mass exodus. In other words, Southeast Asian states consider themselves as ‘first countries of asylum’ only. They only tolerate the presence of refugees on their territories under the assumption that those concerned would leave the country in the more or less short term. Nevertheless, the temporary nature of their presence, which tends to extend, is probably one of the greatest obstacles to refugee protection in Southeast Asia.

4.2. Defining temporary refuge in Southeast Asia

While Southeast Asian states in the context of the Indochinese refugee crisis were not the first states to provide ‘temporary asylum’ to people seeking protection, it is arguably the ‘plight of Southeast Asians’ which ‘br[ought] the norm of temporary refuge to the attention of the world community’.⁵⁷ At the time, such measures used to be considered an ‘exceptional’ practice in the case of a mass influx to ensure the initial admission and protection of refugees pending further discussions on burden-sharing and durable solutions – the so-called protection first approach. Yet, the provision of temporary asylum on an unprecedented scale in Southeast Asia raised new questions. These include whether or not the grant of temporary asylum could be conditioned upon burden-sharing arrangements (Section 4.2.1) and if it represented an ‘erosion’ of the institution of asylum (Section 4.2.2).

4.2.1. Conditioning temporary asylum on burden-sharing arrangements

According to some, the most innovative part of the temporary refuge approach resides ‘in the normative nexus between the responsibilities of frontline States – those immediately impacted by a mass influx of refugees – and those of the international community at a large’, that is, in the link between the provision of asylum and the principle of burden-sharing.⁵⁸ As noted earlier, the absence of any provision regarding burden-sharing in the Refugee Convention and the fact that countries of asylum were responsible for the assistance and protection of refugees on their territory are arguably key reasons why many Asian states remain outside the international refugee protection regime.⁵⁹ Given the large numbers of arrivals at the time, the provision of temporary asylum by Southeast Asian states was not unconditional. While they opened their doors to refugees at the beginning of the crisis, as the numbers of Vietnamese ‘boat people’ arriving on the shores of Southeast Asian countries increased, they soon made the provision of

⁵⁷ Deborah Perluss and Joan Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Virginia Journal of International Law 562.

⁵⁸ Jean-François Durieux, ‘The Duty to Rescue Refugees’ (2016) 28:4 IJRL 639.

⁵⁹ See Section 2.3, on the ‘burden’ of hosting refugees.

temporary asylum dependent upon commitments from Western states to resettle the new arrivals within a short time frame. This conditionality of asylum raised questions as to whether resettlement guarantees could be required as a precondition for the disembarkation of refugees and the provision of temporary asylum by Southeast Asian states.⁶⁰

On several occasions, Southeast Asian states voiced their concerns, whether individually or through the ASEAN, regarding the lack of burden-sharing by the international community. They threatened to push back refugees if the support provided was insufficient.⁶¹ Between November 1978 and June 1979, all ASEAN countries announced that they would no longer accept any more boat people, much to the dismay of UNHCR. At times, Thailand, Malaysia and Singapore pushed boats back to sea or refused to let the refugees disembark on their territory, no matter the humanitarian consequences. Yet, it can be argued that the adoption by Southeast Asian states of more restrictive measures, including the closure of borders and the interception and pushbacks of boat people, was not so much due to any form of hostility against refugees as ‘due to a gradual build-up of frustration that the international community ha[d] failed to adequately share the burden’.⁶² Sara Davies acknowledged that the hardened position of Southeast Asian states ‘was less a response to the refugees themselves and more a response to the lack of international assistance and the increasing gap between resettlement places being offered and the number of refugees arriving’.⁶³ It must be noted that these policies were also a reaction to increasingly stringent measures put in place by the resettlement states. Thailand, for instance, shifted from an ‘open door’ policy in 1979 to a more restrictive policy the following year in response to the decision by the United States, as reflected in the adoption of the Refugee Act, to limit the resettlement of Indochinese refugees to those recognized as refugees under the 1951 Convention, that is, on the basis of a well-founded fear of persecution only.⁶⁴

Securing continuing support for Southeast Asian states so as to ensure the provision of temporary asylum over such a long period of time thus became one of the main challenges. The ‘firm re-establishment of the observance of the practice of asylum and non-refoulement’ was a key aspect of the Meeting on Refugees and Displaced Persons in South-East Asia organized by the UN Secretary-General in July 1979. On this occasion, Western states committed to providing 260,000 resettlement places, instead of 125,000 offered initially, leading the Secretary-General to conclude, at the end of the meeting, that

60 UNHCR, ‘Problems Related to the Rescue of Asylum-Seekers in Distress at Sea’, EC/SCP/18 (26 August 1981), para. 22.

61 See in particular ASEAN, ‘Joint Communiqué of the Twelfth ASEAN Ministerial Meeting, Bali, 28–30 June 1979’ (30 June 1979).

62 UNHCR, ‘NO Entry!’ (n 7), para. 343.

63 Sara E Davies, *Legitimising Rejection. International Refugee Law in Southeast Asia* (Nijhoff 2008) 97.

64 Muntarbhorn, *The Status of Refugees in Asia* (n 22) 53–54.

'the general principles of asylum and non-refoulement were endorsed'.⁶⁵ Subsequent initiatives to guarantee access to temporary asylum included the Disembarkation Resettlement Offers (DISERO) and the Rescue at Sea Resettlement Offers (RASRO). These offers provided a pool of resettlement guarantees by flag states and a few non-flag states to ensure that the vessels passing near vessels loaded with refugees in distress in the region would come to their rescue with the assurance that they would be able to disembark their passengers within a short time.⁶⁶

Adopted at another international conference on the Indochinese refugees held in 1989, the Comprehensive Plan of Action for Indochinese Refugees (CPA) was also intended to protect the first asylum countries in the region by making it clear that it was the responsibility of the international community – and not just that of the countries in which the refugees happened to arrive – to provide for their future. As part of the CPA, all Vietnamese asylum seekers determined to be refugees under a regional RSD procedure would be resettled. By bringing together countries of first asylum, resettlement countries, and countries of origin, all of them contributing in one way or another to the response, the CPA appeared as 'a remarkable and ultimately effective instrument of multi-state cooperation and burden sharing'.⁶⁷

Yet, it is generally recognized that the grant of temporary asylum in situations of mass influx should in principle not be made conditional upon burden-sharing.⁶⁸ The importance of burden-sharing in the context of large-scale influx has been recognized by many scholars as an essential element of the international refugee protection regime, but essentially as a way of 'keeping borders open and preventing *refoulement*'.⁶⁹ It is to be noted in this regard that the states among the most affected by the arrival of Indochinese refugees in the region, including Thailand and Malaysia, initially accepted the asylum seekers and refugees on their territory; it is only *at a later stage*, when the phenomenon became too significant and when they felt they had not received adequate support from the international community that they came to condition their respect for the principle of *non-refoulement* and the provision of temporary asylum on international aid.

65 UNGA, 'Meeting on Refugees and Displaced Persons in South-East Asia, Convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and Subsequent Developments: Report of the Secretary-General', A/34/627 (7 November 1979), para. 15.

66 See in this regard UNHCR, 'Problems Related to the Rescue of Asylum-Seekers at Sea' (n 60).

67 Richard Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?' (2006) 18:3–4 IJRL 562.

68 See in particular, ExCom, Conclusions no 85 (XLIX) International Protection (1998), para. (p) and no 100 (LV) International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations (2004).

69 UNHCR, 'NO Entry!' (n 7), para. 360. See also Gervase Coles, 'Temporary Refuge and the Large Scale Influx of Refugees' (1980) 8 The Australian Year Book of International Law 210–212; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 335–345; Durieux, 'The Duty to Rescue' (n 58) 639–641.

In 2015, in the context of the Bay of Bengal and Andaman Sea Crisis, Malaysia and Indonesia agreed to provide a temporary shelter to the Rohingya who were stranded at sea, but on condition that the resettlement and repatriation processes will be completed by the international community within a one-year time frame.⁷⁰ This appeared more as a wishful thinking and as a way to reaffirm a principle that is important to them rather than as an absolute precondition, however, since it was unlikely that the concerned persons would be resettled in this time frame. Thus, their practice does not support the existence of an exception to the principle of *non-refoulement* in the absence of contributions deemed sufficient by the international community; rather, it demonstrates the importance of the principle of burden-sharing to ensure and maintain temporary asylum beyond a certain stage.

4.2.2. *An erosion of the institution of asylum?*

Temporary asylum became one of the pillars of the response to the arrival of refugees in Southeast Asia, despite some reservations by UNHCR. Although the 1951 Convention remains largely silent on this practice, UNHCR considered that the provision of temporary asylum represented an erosion of the principle of the right to asylum compared with the provision of a long-term asylum,⁷¹ which until then had been the usual practice in Europe and in Africa. From UNHCR's point of view, there was 'a danger that the practice of granting asylum on a purely temporary basis may become generalized'.⁷²

In spite of these concerns, a group of experts set up by UNHCR in 1981 to examine the practice of 'temporary refuge' in situations of large-scale influx, precisely as a response to the practice of Southeast Asian states with regard to the Indochinese refugees, acknowledged the serious problems that such movements could pose to host countries, and which could lead some states to actually deny entry to people seeking asylum.⁷³ Against this backdrop, the group of experts considered that it had become 'essential to avoid the automatic equation of admission under the principle of non-refoulement with the provision of a durable solution' and that 'if admission [was] to be related to the principle of non-refoulement it must be regarded as providing either a temporary or a durable solution', as there could be no reasonable expectations that a local solution would necessarily be possible.⁷⁴ The notion of 'temporary refuge' was also deemed more adequate

⁷⁰ See Ministers of Foreign Affairs of Malaysia, Indonesia, and Thailand, 'Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia' (n 50).

⁷¹ UNHCR, 'Addendum to the Report of the United Nations High Commissioner for Refugees', A/36/12/Add.1 (21 October 1981), para. 43.

⁷² UNHCR, 'Note on International Protection', A/AC.96.643 (9 August 1984), para. 14.

⁷³ UNHCR, 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Geneva, 21–24 April 1981', EC/SCP/16/Add.1 (17 July 1981), section C.

⁷⁴ Ibid., section D.

than the term ‘temporary asylum’ to avoid the confusion with the institution of a long-term asylum. Temporary refuge was defined in this context as the ‘protection characterized by the principle of *non-refoulement* which is accorded a person and which is temporary pending the obtaining of a durable solution’.⁷⁵

The concept of temporary refuge has since then been recognized as an essential element of the international refugee protection regime.⁷⁶ Although it does not explicitly refer to temporary refuge, the Refugee Convention states, in the context of the expulsion of a refugee, that the state concerned ‘shall allow such a refugee a reasonable period within which to seek legal admission into another country’.⁷⁷ The Bangkok Principles developed in 1966 was the first regional instrument to articulate the concept of ‘provisional asylum’ in lieu of permanent asylum. Indeed, it specified that if a state decided not to provide asylum to a refugee, it should nevertheless ‘grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country’.⁷⁸ A similar provision was included in the Declaration on Territorial Asylum adopted in 1967⁷⁹ and later in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.⁸⁰ In 1981, ExCom Conclusion no 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx included for the first time a set of standards related to the treatment of asylum seekers accepted under a temporary scheme.⁸¹ In Europe, where the criteria for the recognition of refugee status are generally limited to those set out in the Refugee Convention and are centred around the concept of an individual fear of persecution, a system of so-called temporary protection has been put in place to respond to mass influxes of people fleeing conflict and violence.⁸²

The international community has embarked on consultations aimed at clarifying the meaning and content of temporary refuge/protection on various

⁷⁵ Ibid, section F.

⁷⁶ See e.g. Alice Edwards, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13:2 Melbourne Journal of International Law 595–635.

⁷⁷ Convention relating to the Status of Refugees (opened for signature 25 July 1951, entered into force 22 April 1954) 189 UNTS 150 and Protocol relating to the Status of Refugees (taken note of by UNGA 16 December 1966, entered into force 4 October 1967) 606 UNTS 267, art. 32(3).

⁷⁸ AALCO, ‘Bangkok Principles on the Status and Treatment of Refugees’ (31 December 1966), art. 3.4.

⁷⁹ UNGA, ‘Declaration on Territorial Asylum’ A/RES/2312(XXII) (14 December 1967), art. 3.3.

⁸⁰ OAU Convention (n 5), art. II(5).

⁸¹ ExCom, Conclusion no 22 (XXXII) on the Protection of Asylum-seekers in Situations of Large-scale Influx (1981).

⁸² Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof [2001] OJ L212/12.

occasions since 1981. Yet, despite these initiatives, the ‘content, boundaries and legal foundation’ of temporary protection ‘remain largely undefined or unsettled’.⁸³ The main concern with these kinds of mechanism is related to the standards of treatment offered to refugees or displaced persons, which are generally lower than those provided for refugees. Indeed, as J-F Durieux and Jane McAdam observed, respect for the norm of *non-refoulement* in mass influx situations entails significant consequences: the price for accepting the obligation to admit large numbers is often ‘a de facto suspension of all but the most immediate and compelling protections provided by the Convention’.⁸⁴ As noted by Edwards, another characteristic of temporary protection compared with the protection afforded by the Refugee Convention is the fact that the cessation clauses set out in the Refugee Convention are considered not to be applicable. This means that people could be returned ‘as soon as the triggering event has been resolved, regardless of whether more durable and fundamental changes in the country of origin have taken place’.⁸⁵ Under these circumstances, the fact that there were no guidelines regarding the treatment of people accepted under temporary schemes for a very long time was also an indication of the reluctance of UNHCR to further endorse this practice.

It is only in 2014, and more specifically in relation to Southeast Asia, that an attempt has been made to better frame this practice through the development by UNHCR of the Guidelines on Temporary Protection or Stay Arrangements (TPSAs). These Guidelines state that TPSAs ‘are especially relevant in regions where there are few States parties’ to the 1951 Refugee Convention and other protection instruments, but also, more generally, in situations where the existing instruments ‘are difficult to or do not apply because of the character of the movement’.⁸⁶ Such situations include mass influxes or complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios.⁸⁷ TPSAs are described in the document as ‘pragmatic “tools” of international protection, reflected in States’ commitment and practice of offering sanctuary to those fleeing humanitarian crises’.⁸⁸ They are not limited to persons recognized as refugees under the 1951 Convention and as such can be applied in different scenarios, allowing in theory for a flexible and immediate response to a crisis.⁸⁹

⁸³ UNHCR, ‘UNHCR Roundtable on Temporary Protection, International Institute of Humanitarian Law, San Remo, Italy, 19–20 July 2012’ (2013) 25:1 IJRL para. 1.

⁸⁴ Jean-François Durieux and Jane McAdam, ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16:1 IJRL 13.

⁸⁵ See also Edwards, ‘Temporary Protection’ (n 76) 602–603.

⁸⁶ UNHCR, ‘Guidelines on Temporary Protection or Stay Arrangements’ (February 2014), para. 7.

⁸⁷ Ibid., para. 9.

⁸⁸ Ibid., para. 3.

⁸⁹ Ibid., para. 11.

These remain non-binding guidelines, however, and there is no evidence that they were used in the context of the Bay of Bengal and Andaman Sea crisis, which erupted just one year after their adoption.

4.3. The principle of *non-refoulement* in international law

In May 2015, in the context of the Bay of Bengal and Andaman Sea crisis, Thailand, unlike Malaysia and Indonesia, refused to commit to offering temporary shelter to the Rohingya stranded at sea. Instead, the Thai authorities announced that they would deploy two navy vessels as ‘floating platforms’ with medical teams on board off the coast of Thailand to provide necessary assistance and medical help to the people rescued at sea before facilitating their passage to Malaysia and Indonesia.⁹⁰ Thailand thereby complied with the principle of *non-refoulement*. Indeed, while the provision of temporary asylum is not an obligation *per se* under international law, national authorities – in this case Thailand – have at least an obligation to respect the principle of *non-refoulement*, which is considered as the cornerstone of the international refugee regime (Section 4.3.1). There are, however, some exceptions to the prohibition of *refoulement* under international refugee law (Section 4.3.2).

4.3.1. A rule of international law binding all states

Article 33(1) of the Refugee Convention sets out the principle of *non-refoulement* as follows:

No Contracting State shall expel or return (refoulé) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁹¹

At the regional level, the principle of *non-refoulement* has been included in many regional instruments relating to the protection of refugees, such as the Bangkok Principles,⁹² the OAU Convention⁹³ and the Cartagena Declaration.⁹⁴ Compared with the 1951 Convention, these instruments provide for a broader principle of *non-refoulement*, encompassing rejection at the border (as opposed to asylum seekers and refugees who are already present on the

⁹⁰ See ‘Thailand Won’t Push Back Migrants Stranded in Waters: Thai MFA’, *Channel NewsAsia* (25 May 2015).

⁹¹ 1951 Convention, art. 33(1).

⁹² AALCO, ‘1966 Bangkok Principles’ (n 78), art. 3.3.

⁹³ OAU Convention (n 5), art. II(3).

⁹⁴ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984), section III.

territory of a state).⁹⁵ UNHCR considers that the principle of *non-refoulement* also applies to persons seeking asylum pending a decision on their refugee status, failing which there would be a significant gap in protection. That the principle of *non-refoulement* applies to refugees irrespective of whether they have been formally recognized as such has been acknowledged by the ExCom in various Conclusions.⁹⁶

As UNHCR's ExCom noted in 1994, 'Other international instruments . . . could be invoked in certain circumstances against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would in jeopardy'.⁹⁷ In particular, art. 3.1 of the CAT provides: 'No State Party shall expel, return ("refoulé") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.⁹⁸ Article 7 of the ICCPR, which provides, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . .',⁹⁹ represents another vector of the principle of *non-refoulement* in human rights. Indeed, states not only have a negative obligation not to perform certain acts which would constitute a violation of the provisions of the Covenant, but they are also obliged to take the necessary measures to ensure effective respect of the rights provided for in the Covenant. As such, they cannot send someone back to a country where he or she risks being subjected to torture, inhuman or degrading treatment or punishment.¹⁰⁰ The principle of *non-refoulement* under international human

95 Subsequent interpretation of the 1951 Convention seems to support this broader understanding of the principle of *non-refoulement* as encompassing rejection at the border. See e.g. ExCom, Conclusions no 6 (XXVIII) Non-refoulement (1977), para. (c); no 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981), para. II.A.2; no 81 (XLVII) (1997), para. (h); no 82 (XLVIII) Safeguarding Asylum (1997), para. (d)(iii); no 85 (XLIX) International Protection (1998), para. (q); no 99 (LV) (2004), para. (l).

96 See e.g. UNHCR, ExCom Conclusions no 6 (XXVIII) Non-refoulement (1977), para. (c); no 79 (XLVII) International Protection (1996), para. (j); no 81 (XLVII) International Protection (1997), para. (i); no 82 (XLVIII) Safeguarding Asylum (1997), para. (d)(i). See also UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' (January 2007), para. 20.

97 UNHCR, 'Note on International Protection', A/AC.96/830 (7 September 1993), para. 40.

98 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art. 3.1.

99 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 7.

100 Human Rights Committee, 'General Comment no 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992), para. 9. See also HRC, 'General Comment no 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 12.

rights law offers broader protection than the principle of *non-refoulement* under international refugee law, since it is not limited to one of the five grounds for persecution under art. 1 of the Geneva Convention and since it includes all those present on the territory of a state or placed under the jurisdiction of the authorities and not only asylum seekers and refugees.¹⁰¹

All states, irrespective of whether or not they are party to the Refugee Convention, its Protocol or any international human rights instruments, are also bound by the principle of *non-refoulement* under customary international law. In 1977, the principle of *non-refoulement* in its broad sense, including *non-refoulement* at the border, was described by the ExCom as a 'fundamental humanitarian principle'.¹⁰² Five years later, the Committee noted that the principle of *non-refoulement* 'was progressively acquiring the character of a peremptory norm of international law'.¹⁰³ In 1985, UNHCR went even further and described the principle of *non-refoulement* as a 'peremptory norm of international law' and referred to the Cartagena Declaration, which considers the principle of *non-refoulement* to be *jus cogens*, that is, a rule that cannot be derogated from under any circumstance.¹⁰⁴ The customary nature of the principle of *non-refoulement*, including non-rejection at the border, has been widely recognized by the doctrine. It covers both people defined as refugees according to the Refugee Convention and people fleeing armed conflict and violence, who may not fall within the Convention definition.¹⁰⁵

Under international human rights law, the principle of *non-refoulement* in customary law is to a large extent related to the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which is also a rule of customary international law. According to Lauterpacht and Bethlehem, the principle of *non-refoulement* under international human rights law could be formulated as follows:

[N]o person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that

¹⁰¹ See for instance Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para 1 (Prohibition of Expulsion or Return ("Refoulement")/Défense d'Expulsion et de Refoulement)' in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees* (n 56) 1350–1357.

¹⁰² ExCom, Conclusion no 6 (XXVIII) Non-refoulement (1977), para. (a).

¹⁰³ ExCom, General Conclusion no 25 (XXXIII) (1982), para. (b).

¹⁰⁴ UNHCR, 'Report of the United Nations High Commissioner for Refugees', A/40/12 (13 September 1985), para. 23.

¹⁰⁵ See in particular Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 87–177; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 69) 345–354.

he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows for no limitation or exception.¹⁰⁶

In this context, states are bound not to transfer any individual to another country if this would result in him or her being exposed to serious human rights violations, notably torture or other cruel, inhuman or degrading treatment or punishment, as well as arbitrary deprivation of life.¹⁰⁷

4.3.2. *Exceptions to the principle of non-refoulement under international law*

Despite its importance, there are also some exceptions to the principle of *non-refoulement*, under both treaty-based and customary laws. In particular, the Refugee Convention foresees exceptions to the principle of *non-refoulement* for reasons of national security, that is, when there are ‘reasonable grounds for regarding’ an asylum seeker or a refugee ‘as a danger to a security of the country in which he is’ and when the person concerned has been ‘convicted by a final judgment of a particularly serious crime’ and as such ‘constitutes a danger to the community of that country’.¹⁰⁸ Through these exceptions, the Convention recognizes the right of states to take exceptional measures with regard to refugees when national security is at stake or in the event of the person representing a ‘danger to the community’, the latter exception focusing on the protection of the host society against criminality. It is to be noted, however, that such measures must be taken individually and not against groups of persons.

Like the 1951 Convention, the first version of the Bangkok Principles provided for an exception to the principle of *non-refoulement* for security reasons, although the provision was formulated somewhat differently. Article 3.3 of the 1966 Bangkok Principles stated that ‘no one seeking asylum in accordance with these Principles should, *except for overriding reasons of national security or safeguarding the population*, be subjected to measures such as rejection at the frontier, return or expulsion’ if such measures would entail a risk for the concerned person.¹⁰⁹ Article 8 on expulsion and deportation also provided that a state shall not expel a refugee, ‘save in the national or public interest’.¹¹⁰ The focus was thus no longer on the threat posed by an individual; the determining factor in the 1966 Bangkok Principles is the

¹⁰⁶ Lauterpacht and Bethlehem, ‘The Scope and Content of the Principle of *Non-refoulement*’ (n 107) 163.

¹⁰⁷ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement Obligations*’ (n 98), paras 19–20.

¹⁰⁸ 1951 Convention, art. 33.2.

¹⁰⁹ AALCO, ‘1966 Bangkok Principles’ (n 78), art. 3.3 (emphasis added).

¹¹⁰ Ibid., art. 8.1.

public interest, the national interest or the need to safeguard the population. Arguably this may reflect the ‘collective interest’ so important to Asian states. Adopted unanimously by the General Assembly in 1967, the Declaration on Territorial Asylum provides that exceptions must be made to the principle of *non-refoulement* ‘only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons’.¹¹¹ The explicit reference to a situation of a ‘mass influx of persons’ is arguably the main specificity of the regime of exceptions to the principle of *non-refoulement* in the Declaration on Territorial Asylum; yet, such a reference has not been included in subsequent instruments.

Indeed, the OAU Convention and the Cartagena Declaration do not include any exceptions to the principle of *non-refoulement*. The Cartagena Declaration goes as far as to say that the principle of *non-refoulement* is ‘imperative’ with regard to refugees and that it should be ‘acknowledged and observed as a rule of *jus cogens*’.¹¹² The Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America adopted in 2004 reaffirmed ‘the *jus cogens* nature of the principle of *non-refoulement*, including non-rejection at the border’.¹¹³ A different approach was nevertheless taken by the members of the AALCC when they revised the Bangkok Principles to bring them into line with the developments under international refugee law. The 2001 ‘final’ version of the Bangkok Principles includes exceptions to the principle of *non-refoulement* that are similar to those under the Refugee Convention and which revolve around issues of ‘national security’, ‘public order’ and ‘danger to the community’ of a country.¹¹⁴

Under international human rights law, the CAT does not include any exception to the principle of *non-refoulement* enshrined in its art. 3(1), while no derogation to art. 7 of the ICCPR regarding the prohibition of torture or cruel, inhuman or degrading treatment is allowed.¹¹⁵ In other words, unlike the principle of *non-refoulement* under international refugee law, the prohibition of *refoulement* under international human rights law, which mostly refers to the prohibition of torture, inhumane and degrading treatment, cannot be derogated from under any circumstances.¹¹⁶ This applies to everyone, even to those who fall within the exceptions provided for in the Refugee Convention. As such, international human rights law fills a crucial gap in the Refugee Convention.

¹¹¹ UNGA, ‘Declaration on Territorial Asylum’ (n 79), art. 3.2.

¹¹² Cartagena Declaration (n 94), section III.5.

¹¹³ Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (16 November 2004).

¹¹⁴ AALCO, ‘Final Text of the AALCO’s 1966 Bangkok Principles on the Status and Treatment of Refugees’ (adopted 24 June 2001), art. III.1.

¹¹⁵ ICCPR, art. 4.2.

¹¹⁶ Kälin and others, ‘Article 33, para 1 (Prohibition of Expulsion or Return (“*Refoulement*”))’ (n 101) 1350–1357.

The issue of the exceptions to the principle of *non-refoulement* under customary international law is more controversial. As noted by Perluss and Hartman, in the process of norm creation, ‘the core of the norm crystallizes first, while possible exceptions and limitations may emerge only gradually as practice accumulates’.¹¹⁷ There have indeed been long debates regarding the exact scope and content of the principle of *non-refoulement* under customary law, and while exceptions for reasons of national security exist, one of the main issues has been the applicability of the principle of *non-refoulement* under customary law in mass influx situations. Yet, there is an increasing recognition that the principle of *non-refoulement* applies also in the context of massive influx of refugees.¹¹⁸ As Edwards observes, ‘It is precisely in mass influx situations in which the duty of *non-refoulement*, in particular the prohibition on rejection at the frontier, takes on its most important dimension’.¹¹⁹ In any case, the customary principle of *non-refoulement* under international human rights law is absolute; no exceptions or derogations are allowed to the prohibition of *refoulement* even in case of a danger to national security arising from a massive influx of refugees.¹²⁰

4.4. Acknowledgement of the principle of *non-refoulement* by Southeast Asian states

As the preceding analysis shows, there is a broad agreement within the doctrine that the principle of *non-refoulement* is part of customary international law. According to the ICJ, the development of a rule of customary international law on the basis of a convention rule requires that ‘State practice, including that of States whose interests are specifically affected’ be ‘both extensive and virtually uniform in the sense of the provision invoked’.¹²¹ Since the main countries of asylum in Southeast Asia arguably count among the main ‘affected’ states by refugee movements, then their practice must have contributed to this process.

While Southeast Asian states do have a long-standing practice of granting temporary refuge to asylum seekers and refugees and of respecting the principle of *non-refoulement*,¹²² they have also been heavily criticized on a number of occasions. These include cases where they have indeed pushed back

¹¹⁷ Perluss and Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (n 57) 557.

¹¹⁸ See in particular Durieux and McAdam, ‘Non-Refoulement Through Time’ (n 84) 9–13; Lauterpacht and Bethlehem, ‘Non-refoulement’ (n 107) 119–121; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 69) 335–345; Kälin and others, ‘Article 33, para 1 (Prohibition of Expulsion or Return (“Refoulement”))’ (n 101) 1377–1380; Hathaway, *The Rights of Refugees* (n 6) 355–363.

¹¹⁹ Edwards, ‘Temporary Protection’ (n 76) 633.

¹²⁰ See HRC, ‘General Comment no 20’ (n 100), para. 3.

¹²¹ ICJ, North Sea Continental Shelf Cases (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Reports 3, para. 74.

¹²² See Section 4.1.

‘boat people’ onto the high seas or returned refugees, with some cases being arguably tantamount to violations of the prohibition of *refoulement*. From an international law perspective, however, and for the purpose of determining if Southeast Asian states acknowledge the principle of *refoulement* and its applicability towards them, what is important is to look at the exceptions and justifications the states concerned have resorted to when sending back asylum seekers and refugees (Section 4.4.1). While Thailand is the country that has been most criticized for such pushbacks, the Kingdom has explicitly reaffirmed its support for the principle of *non-refoulement* on various occasions and has generally complied with it in practice while keeping up the appearance of enforcing immigration laws towards irregular migrants (Section 4.4.2).

4.4.1. Violations of the prohibition of refoulement and the Nicaragua case

In certain cases, the return of asylum seekers and refugees by Southeast Asian states led to serious tragedies. In 1979, for instance, the Government of Thailand forcefully returned some 42,000 Cambodians at gunpoint to their country, despite security issues and the presence of landmines. Several thousand people may have died as a consequence of such actions. Fearing an adverse reaction by the Thai authorities, UNHCR remained silent despite the fact that this was arguably ‘the single largest instance of forced return (*refoulement*) the organization had encountered since it was established’.¹²³

On several occasions in the context of the Vietnamese refugee arrivals, in 1979 and 1980, and again in 1987 and 1988, Thailand and Malaysia implemented their so-called no-entry policy and intercepted and pushed back Vietnamese ‘boat people’ onto the high seas, leading to numerous deaths. The redirection of boats of Vietnamese asylum seekers by the Malaysian authorities right after the adoption of the CPA was an obvious violation of the principle of *non-refoulement*, as well as a violation of the commitments made by Malaysia in the context of the CPA, even though the vast majority of the “boat people” eventually reached Indonesia.¹²⁴

Thailand has been criticized on many occasions by NGOs for having forcefully returned Burmese asylum seekers to Myanmar.¹²⁵ The Thai

123 UNHCR, *The State of The World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP January 2000) 92.

124 Arthur C Helton, ‘The Malaysian Policy to Redirect Vietnamese Boat People: Non-refoulement as a Human Rights Remedy’ (1992) 24 New York University Journal of International Law and Politics 1203–1217.

125 HRW, ‘Unwanted and Unprotected: Burmese Refugees in Thailand’ (n 37); AI, ‘Kingdom of Thailand. Erosion of Refugee Rights’, ASA 39/03/97 (September 1997); HRW, ‘Out of Sight, Out of Mind: Thai Policy towards Burmese Refugees and Migrants’ 16:2 (C) (February 2004); HRW, ‘Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers’ (September 2012); AI, ‘Thailand: Between a Rock and a Hard Place: Thailand’s Refugee Policies and Violations of the Principle of Non-refoulement’ (September 2017).

authorities have been accused of pushing boats of Rohingya asylum seekers back to the high sea on various occasions since 2008. In one particularly tragic instance, in February 2013, the Thai authorities reportedly pushed back two boats from Myanmar/Bangladesh, which were rescued several weeks later by the Sri Lankan authorities. In the meantime, an estimated 98 people had died from hunger and dehydration on the boats.¹²⁶ Malaysia has also been accused of *refoulement* on various occasions. In 2011 and 2013, for instance, the Malaysian authorities were accused of returning members of the Muslim Uighur community to China, including some who were registered by UNHCR.¹²⁷ Similar cases have regularly been reported in the media.

It could be said that such incidents are outweighed by the innumerable occasions on which those states have scrupulously respected the principle of *non-refoulement*. It would be equally easy to say that countries that are parties to the Refugee Convention in other regions have also violated the prohibition of *refoulement* on many occasions to the point that some commentators have cast doubts on the customary nature of the principle of *non-refoulement*.¹²⁸ Yet, those states have not been accused of *rejecting* international refugee law, even if they do not always respect their obligations under that Convention. As UNHCR has noted, it is generally ‘weak and poor states that tend to resort to formal, physical border closure’ that lead to outright criticism, while wealthier states such as the United States, Australia and an increasing number of European states have been implementing a broad range of measures to prevent, deter and restrict the arrival of people in need of international protection.¹²⁹

As a matter of fact, instances of *refoulement* of asylum seekers and refugees by Southeast Asian countries are generally the result of a combination of factors; they are not in themselves evidence that those countries *reject* international refugee law. While there have been occasions where the principle of *non-refoulement* has been violated, what is interesting from an international law perspective is to look at the strategies and justifications states have employed to explain their conduct. Examining the content of the customary

126 See Alan Morison and Chutima Sidasathian, ‘Horror at Sea: 98 Bodies Thrown Overboard as Boat People Perish from Thirst, Starvation’, *PhuketWan* (19 February 2013) <<http://phuketwan.com/tourism/horror-sea-bodies-thrown-overboard-boatpeople-perish-thirst-starvation-17607/>> accessed 17 January 2021.

127 HRW, ‘Malaysia: Stop Forced Returns to China. More Uighur Asylum Seekers Denied Basic Protections’ (2013); ‘Bar Takes Govt to Task for Deportation’, *The Star Online* (27 August 2011) <www.thestar.com.my/news/nation/2011/08/27/bar-takes-govt-to-task-for-deportation/> accessed 17 January 2021.

128 See in particular Hathaway, *The Rights of Refugees* (n 6) 363–370.

129 UNHCR, ‘NO Entry!’ (n 7), para. 17. See also James C Hathaway and Thomas Gammeltoft-Hansen, ‘Non-refoulement in a World of Cooperative Deterrence’ (2015) 53:1 *Columbia Journal of Transnational Law* 235–285.

international law relating to the non-use of force and non-intervention, the ICJ considered in the *Nicaragua Case* that:

If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.¹³⁰

Put differently, this means that when states seek to justify the return of asylum seekers and refugees by using pretexts and justifications, by invoking exceptions to the prohibition of *refoulement*, or by justifying that the rule does not apply in these particular circumstances, instead of contesting the existence of the prohibition of *refoulement per se*, then their behaviour may be interpreted as an implicit recognition of the existence of the rule, which in turn contributes to strengthening the rule itself.

Whatever the reasons for returning people, Southeast Asian countries have never defended their actions by contesting the existence of the principle of *non-refoulement* or by claiming an unconditional right to return refugees to their countries of origin. In the same vein, there is no evidence that Southeast Asian states have ever argued that they were so-called persistent objectors to the prohibition of *refoulement* and therefore not bound by this customary international legal prohibition.¹³¹ Rather, the states concerned have either refuted the idea that the principle of *non-refoulement* applied and that its triggering criteria were met, or they have placed these measures within the regime of exceptions to the principle of *non-refoulement*.¹³² The efforts of Southeast Asian states to mask breaches of the norm through evasive strategies and references to exceptions to the rule itself suggest their recognition of the existence and obligatory character of the norm.

Indeed, what prompted the harsh measures implemented by countries such as Thailand and Malaysia during the Indochinese refugee crisis and beyond was neither the denial of the plight of the asylum seekers and refugees nor the rejection of the requirement that they should be offered some kind of protection. In many cases, the returns and pushbacks were rather an extreme reaction against what these states perceived as a clear lack of

¹³⁰ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits) [1986] ICJ Reports 14, para. 186.

¹³¹ The principle of the persistent objector, which has been the object of significant debate in the doctrine, provides that a state would not be bound by a rule of customary international law if it has consistently objected to it while the rule was in process of becoming part of customary international law.

¹³² See Sébastien Moretti, 'Keeping Up Appearances' (n 33) 16–20; Sébastien Moretti, 'Southeast Asia and the 1951 Refugee Convention: Substance without Form?' (2021) 33:2 International Journal of Refugee Law.

support from the international community in the context of a massive influx of refugees and the fear of being left alone to deal with the refugees. Faced with criticism following the forced return of tens of thousands of Cambodians in 1979, the former prime minister of Thailand responded afterwards that his decisions ‘was a correct one because it focused world attention on the plight of the refugees in Southeast Asia. It demonstrated to the world that countries such as Thailand [were] over-burdened by the refugees’.¹³³

There have also been cases where Southeast Asian governments simply denied having returned asylum seekers and refugees. For instance, when Malaysia was accused by UNHCR and the United States of returning boatloads of asylum seekers to the high seas, even though the government had just agreed to the CPA, the authorities initially denied they had resorted to such practices, before arguing that the persons concerned did not wish to remain in Malaysia.¹³⁴ Clearly, as noted by Guy Goodwin-Gill and Jane McAdam, ‘A State that did not consider itself bound by the customary principle of *non-refoulement* would have no reason to do this, since it would not regard the *refoulement* of refugees as a breach of international law’.¹³⁵

Another common evasive strategy is to claim that the persons concerned are outside the scope of those protected *ratione personae*. Indeed, the authorities also often resort to this ‘legal fiction’ by arguing that asylum seekers and refugees are in fact ‘illegal migrants’, meaning economic migrants, which in their view excludes the application of the principle of *non-refoulement*.¹³⁶ Among other pretexts, as mentioned earlier, Malaysia also argued that the Vietnamese whom they intercepted and pushed back in the early 1990s were merely economic migrants.¹³⁷ The same line of argument has been used on several occasions by the Thai authorities. This has been the case, for instance, for the Hmong – some of whom were recognized as refugees by UNHCR – who were deported by Thailand between 2006 and 2008.¹³⁸ It was the case also in December 2009, on Christmas night, when Thailand deported more than 4,000 Hmong asylum seekers, amidst an outcry from the international community, on the grounds that they were in fact irregular ‘economic migrants’

¹³³ Quoted in Phuwadol Songprasert and Noppawan Chongwatana, ‘Thailand: A First Asylum Country for Indochinese Refugees’ (Institute of Asian Studies, Chulalongkorn University, Bangkok 1988) 47.

¹³⁴ See Steven Erlanger, ‘Malaysia Accused on Boat People’, *New York Times* (17 April 1990) <www.nytimes.com/1990/04/17/world/malaysia-accused-on-boat-people.html> accessed 17 January 2021.

¹³⁵ Goodwin-Gill and McAdam, *The Refugee in International Law* (n 69) 352.

¹³⁶ Sébastien Moretti, ‘Keeping Up Appearances’ (n 33) 19–20.

¹³⁷ Yen Tran, ‘The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws’ (1995) 17:3 *Houston Journal of International Law* 481–483.

¹³⁸ USCRI, *World Refugee Survey 2009 – Malaysia* (17 June 2009).

from Laos.¹³⁹ In 2011, when asked about the pushbacks of boats carrying Rohingya people that had taken place a couple of years before, the then Thai Prime Minister Abhisit Vejjajiva responded that there was a need ‘to take the right view of these people’, and that while they were ‘often portrayed as refugees’ they were in fact ‘very much like economic migrants’.¹⁴⁰

In such cases, states deny the fact that the individuals concerned are in need of, and entitled to, international protection. However, as noted by Hyndman, ‘this, in itself, is not an argument against the existence of customary refugee law, in fact, it can be an argument for its existence’.¹⁴¹ Indeed, attempts to deny the existence of a triggering event, and thus to avoid the norm, may also be seen as an indication that states recognize that they are bound by an obligation once the norm is applicable. In the context of South-east Asia, this implies that the states concerned do recognize that ‘real’ refugees should be treated differently:

It is an indication that ‘refugees’ may be entitled to a definite standard of treatment under customary international law, even from nations under no treaty commitments, that the nations which are often careful to avoid use of the term ‘refugee’ do recognise this, and that they are endeavouring to avoid incurring these obligations by refusing to categorise the persons in their vicinity as ‘refugees’.¹⁴²

Finally, in other cases the states concerned have put forward some of the exceptions to the application of the principle of *non-refoulement* under international refugee law, in particular the ‘security’ argument. During the Indo-chinese refugee crisis, Malaysia justified its pushbacks of Vietnamese asylum seekers on national security grounds. As explained by Perluss and Hartman, ‘[i]t is nevertheless noteworthy that Malaysia cited national security rather than absolute principles of sovereignty entitling it to plenary powers of border control’.¹⁴³ The arrival of groups of Rohingya in Thailand at the end of 2008 was highly publicized, due to allegations that the Kingdom had resumed its practice of sending asylum seekers’ boats back to the sea, resulting in loss of life. Here also, the Thai authorities justified their actions on the basis of security considerations, arguing (without evidence) that the Rohingya were seeking to join the Muslim rebellion in the south of the

¹³⁹ See Ben Doherty, ‘Thailand Begins Deportation of More Than 4,000 Hmong Asylum Seekers’, *The Guardian* (28 December 2009) <www.theguardian.com/world/2009/dec/28/thailand-deportation-hmong-laos> accessed 17 January 2021.

¹⁴⁰ Quoted in HRW, ‘Ad Hoc and Inadequate’ (n 125) 78–79.

¹⁴¹ Patricia Hyndman, ‘Developing International Refugee Law in the Asian Pacific Region; Some Issues and Prognoses’ (1991) 1 Asian Yearbook of International Law 33.

¹⁴² Hyndman, ‘Asylum and Non-refoulement’ (n 28) 71.

¹⁴³ Perluss and Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (n 57) 621.

country.¹⁴⁴ In 2014–2015, some authorities in Thailand allegedly referred to the Uighurs who returned to China as potential ‘terrorists’ going to Turkey for military training or to fight in Syria.¹⁴⁵ Malaysia, for its part, justified the return of a group of Uighurs in 2011 on the grounds of their alleged involvement in human trafficking.¹⁴⁶ Accused of returning a Turkish asylum seeker to Turkey in August 2019, despite the fact that the person was registered by UNHCR, the Malaysian Government justified its actions by arguing that the man ‘was involved’ in terrorism.¹⁴⁷ In 2020, Malaysia mentioned the need to prevent the spread of the COVID-19 to justify the pushback of Rohingya ‘boat people’.¹⁴⁸

Other types of security-related considerations have also been put forward by Southeast Asian states, such as fears that their presence would disrupt an already fragile ethnic balance, that it would cause tensions with the local population, that they would bring diseases into the country, that they might commit all kinds of criminal acts or even that they might corrupt public morals.¹⁴⁹ Some would say that many of the aforementioned arguments should not be taken at face value; yet, from an international law perspective the interest is elsewhere – these justifications demonstrate that the governments concerned accept the existence of certain norms and thus feel the need to defend their actions with legal arguments.

4.4.2. Thailand’s ambivalence with regard to the principle of non-refoulement

Unlike in Africa or Latin America where the importance of the principle of *non-refoulement* has been reaffirmed on many occasions, direct and explicit expressions of this principle as a legal obligation are quite rare in Southeast Asia. Indeed, the states concerned have often argued that they were taking measures to protect refugees, including respecting the prohibition of *refoulement* and granting them temporary refuge, on a ‘humanitarian’ basis only,

144 ‘Govt “Being Pressured” on Rohingya’, *The Bangkok Post* (13 February 2009).

145 See e.g. Alan Morison and Chutima Sidasathian, ‘Terrorists or Terrified: Unproven Claims About Mystery Families Alarm Rights Group’, *The Phuket Wan* (24 March 2014) <www.iuhrdf.org/content/terrorists-or-terrified-unproven-claims-about-mystery-families-alarm-rights-group> accessed 17 January 2021.

146 ‘Bar Takes Govt to Task for Deportation’, *Star Online* (n 129).

147 ‘Malaysia Says Turkish Asylum Seeker Deported on Police Advice’, *Reuters* (30 August 2019) <www.reuters.com/article/us-malaysia-turkey/malaysia-says-turkish-asylum-seeker-deported-on-police-advice-idUSKCN1VK1L5> accessed 17 January 2021.

148 See Rebecca Ratcliffe, ‘Hundreds of Rohingya Refugees Stuck at Sea, Say Rights Groups’, *The Guardian* (17 April 2020) <www.theguardian.com/global/2020/apr/17/malaysia-and-thailand-urged-to-help-stranded-rohingya-refugees> accessed 22 September 2020.

149 Robinson, ‘Thailand: Background Paper’ (n 14) 31. See also with regard to Malaysia: ‘Influx of Immigrants Must Be Controlled to Curb Diseases, Says Deputy Minister’, *The Malay Mail* (13 November 2013) <www.malaymail.com/s/561769/influx-of-immigrants-must-be-controlled-to-curb-diseases-says-deputy-minister> accessed 17 January 2021.

meaning not out of any legal obligation. Thailand, in particular, has often been criticized for violating the principle of *non-refoulement*, casting doubt on the fact that the country recognizes that the requirement to respect the principle of *non-refoulement* applies to its actions.¹⁵⁰

Yet, there are cases where Thailand has expressly acknowledged this principle, most notably in the context of the UNHCR's ExCom annual meeting¹⁵¹ and in the context of the Human Rights Council. In a November 2016 submission to the Human Rights Committee, Thailand even stated that the Kingdom 'adhere[d] to the principle of *non-refoulement*, one of the international customary laws'.¹⁵² In the same report, Thailand noted that, while it was not party to the 1951 Refugee Convention, it nevertheless 'recognize[d] the possible needs of asylum seekers and refugees for international protection, and therefore ha[d] refrained from deporting them'.¹⁵³

Beside the positive statements confirming the importance of the principle of *non-refoulement*, domestic legislation and policy consistent with the substance of a norm provided for in a treaty to which the states concerned are not parties may also support the proposition that they nevertheless recognize this specific rule as being part of customary international law. In that regard, it must be noted that, in December 2019, the Thai Government adopted a new Regulation which includes a reference to the principle of *non-refoulement*. Indeed, the 'Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin' specifies that:

[W]hile enforcing the Immigration Law or this Regulation, if the competent official or government official finds an alien claiming to have a reasonable ground to be a Person under Protection, the deportation of the alien shall be delayed, with the exception of where national security is threatened.¹⁵⁴

¹⁵⁰ See AI, 'Thailand: Between a Rock and a Hard Place: Thailand's Refugee Policies and Violations of the Principle of Non-refoulement' (n 125).

¹⁵¹ See in particular ExCom, 'Summary Record of the 554th Meeting, Held at the Palais des Nations, Geneva, on Tuesday, 2 October 2001', A/AC.96/SR.554 (8 October 2001), para. 60; ExCom, 'Summary Record of the 599th Meeting, Held at the Palais des Nations, Geneva, on Monday, 2 October 2006', A/AC.96/SR.599 (25 November 2006), para. 84; ExCom, 'Summary Record of the 653rd Meeting, Held at the Palais des Nations, Geneva, on Wednesday, 5 October 2011', A/AC.96/SR.653 (2012), para. 65.

¹⁵² ICCPR, 'List of Issues in Relation to the Second Periodic Report of Thailand, Addendum, Replies of Thailand to the List of Issues', CCPR/C/THA/Q/2/Add.1 (15 November 2016), para. 121.

¹⁵³ Ibid., para. 128.

¹⁵⁴ Thailand, Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin BE 2562 (25 December 2019), cl. 15.

The Regulation further states that the authorities should ‘refrain from deporting the Person under Protection to the country of origin’, unless the concerned person ‘wishes to leave the Kingdom’ or ‘where national security is threatened’.¹⁵⁵

This being said, Thailand offers a particularly good example of the gap between the lack of specific legislation on refugees and the authorities’ practice in terms of prohibition of *refoulement*. Indeed, the country has on various occasions resorted to a practice of escorting asylum seekers and refugees to the border without handing them over to the authorities – a practice known as ‘soft deportation’.¹⁵⁶ This gave the persons concerned the possibility of returning immediately to the country or of moving onwards to other countries. For instance, in 2011, a group of Rohingya arrested a couple of years before and detained in the meantime was escorted back to the Myanmar border. Several returned immediately to Thailand, while others moved on to Malaysia, their initial intended destination. In 2012–2013, the Rohingya who had been arrested and detained in Thailand following the outbreak of violence in Rakhine state in June and October 2012 mysteriously ‘escaped’ from the IDCs and shelters where they were detained, with some of them reported to have reached Malaysia.¹⁵⁷ While these practices remain dubious in many respects, they illustrate how pragmatic the Thai authorities can be when it comes to reconciling the enforcement of immigration law with respect for the principle of *non-refoulement*.

In the same vein, the Thai authorities found ways to avoid accusations of *refoulement*, while at the same time claiming their right to take action against people intercepted at sea. As explained by Prime Minister Vejjajiva in 2009, instead of intercepting and returning the boats, the Thai Government had put in place its so-called “help-on” policy, which consisted of providing food, water and petrol, fixing the engines and towing out the boats towards Malaysia to allegedly assist the persons concerned to reach their ‘intended destination’.¹⁵⁸ In some cases where boats in distress have been rescued by the Thai Navy, the persons concerned were brought ashore for the time needed for the authorities to fix their boat or to provide them with a new boat to allow them to continue their journey.¹⁵⁹ There is also evidence to suggest that, in the context of an interception at sea, the authorities investigate cases requiring urgent medical care and that if there are any, they would be taken care of by the authorities, while the others would be obliged to

¹⁵⁵ Thailand, 2019 Regulation, cl. 25.

¹⁵⁶ See e.g. HRW, ‘Out of Sight, Out of Mind: Thai Policy towards Burmese Refugees and Migrants’ (February 2004); HRW, ‘Thailand: Don’t Deport Rohingya “Boat People”’ (2 January 2013) <www.hrw.org/news/2013/01/02/thailand-dont-deport-rohingya-boat-people> accessed 17 January 2021; HRW, ‘Ad Hoc and Inadequate’ (n 127) 121–125.

¹⁵⁷ See e.g. UNHCR, ‘Submission by the UNHCR: Thailand’ (n 53).

¹⁵⁸ HRW, ‘Ad Hoc and Inadequate’ (n 125) 78–79.

¹⁵⁹ HRW, ‘Thailand: Don’t Deport Rohingya “Boat People”’ (n 156).

continue their journey. This policy was reaffirmed by the Thai authorities in September 2017 in the wake of the events in the Rakhine State that led to the displacement of 740,000 people to Bangladesh, as they feared a resumption of movements by sea.¹⁶⁰

Such practices, however, cannot entirely exempt Thailand from its responsibilities with regard to the principle of *non-refoulement*. Under international human rights law, the responsibility of the state vis-à-vis intercepted persons is engaged as soon as the authorities exert an effective authority and control over them – even though the interceptions and pushbacks may take place in international waters.¹⁶¹ There have been debates regarding the circumstances under which the authorities may be deemed to exercise an ‘effective’ control during interception operations and whether ‘simply’ pushing back boats out to the high sea amounts to *refoulement*. While the effective control criterion is obviously fulfilled when the authorities arrest people, take them on board their own vessel or even detain them before sending them back to sea,¹⁶² many authors also consider that the responsibility of a state would be engaged in the case of ‘any interdiction measure, even if not amounting to effective control over individuals or a geographical area, through the act itself would entail jurisdiction and thus an obligation on behalf of the acting state to respect basic rights under international refugee and human rights law’.¹⁶³ Another way to look at this issue is to consider the consequences of the pushbacks, in which cases a state ‘[would] be legally responsible for *refoulement* that its own actions made possible’.¹⁶⁴ Against this backdrop, Thailand must be held responsible, *inter alia*, for the deaths of the 98 people who died in 2013 as a direct consequence of the pushback carried out by the Thai authorities.

4.5. Conclusion

As has been noted, temporary asylum has been an important feature of the humanitarian response in the context of the Indochinese crisis. The governments of the main states of first asylum had done their utmost in

¹⁶⁰ HRW, ‘Thailand Needs to Stop Inhumane Navy “Push-Backs”’ (22 September 2017) <www.hrw.org/news/2017/09/22/thailand-needs-stop-inhumane-navy-push-backs> accessed 17 January 2021.

¹⁶¹ See *Hirsi Jamaa and Others v Italy*, App no 27765/09 (ECtHR, 23 February 2012), paras 72–75. See also UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement Obligations*’ (n 98), para. 35; Kälin and others, ‘Article 33, para 1 (Prohibition of Expulsion or Return (“*Refoulement*”))’ (n 103) 1361–1363; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 46.

¹⁶² *Hirsi Jamaa and Others v Italy*, ibid., para. 81.

¹⁶³ Thomas Gammeltoft-Hansen, *Access to Asylum* (n 161) 125. See also Roland Bank, ‘Introduction to Article 11: Refugees at Sea’ in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees* (n 56) 846–847.

¹⁶⁴ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 690.

this context to provide temporary asylum to the Indochinese refugees in difficult conditions, considering the scale and circumstances of the crisis. It was essentially when the support of the international community became insufficient in their eyes that they took further action and began to push back people despite their obvious need for protection. Against this backdrop, burden-sharing has proved to be one of the foundations of refugee protection in Southeast Asia, as reflected in particular in the 1979 Meeting on Refugees and Displaced Persons in South-East Asia and in the 1989 CPA. It still determines to a great extent the ambit of the protection space in the region today.

The principle of burden-sharing has since then been recognized as an essential principle for the effective functioning of the international refugee protection system, as evidenced by the numerous Conclusions adopted by the ExCom over the past 30 years.¹⁶⁵ It is precisely to address what is arguably the most significant weakness of the Refugee Convention, that is, the lack of binding provisions on burden-sharing, that UNHCR worked with states to develop the Global Compact on Refugees between 2016 and 2018. The central focus of the GCR was supposed to be the Comprehensive Refugee Response Framework (CRRF), the main elements of which were set out in the 2016 New York Declaration for Refugees and Migrants.¹⁶⁶ These included four main areas of focus where burden-sharing arrangements were much needed, namely refugee reception and admission, support for immediate and ongoing needs, support for host countries and communities, and the promotion of durable solutions.¹⁶⁷ The GCR evolved significantly over the two years of consultation, with UNHCR adding a programme of action to the CRRF. Yet, the fact that it remains up to states to decide to what extent they want to contribute in terms of burden-sharing has raised doubts as to whether the GCR can be a real game changer.¹⁶⁸

While burden-sharing is key to convincing states to offer at least temporary refuge to asylum seekers and refugees, they have at least an obligation to respect the principle of *non-refoulement*. There are few direct and

¹⁶⁵ ExCom, Conclusions no 52 (XXXIX) International Solidarity and Refugee Protection (1988); no 77 (XLVI) International Protection (1995), para. (o); no 80 (XLVII) Comprehensive and Regional Approaches within a Protection Framework (1996), para. (e)(iv); no 85 (XLIX) International Protection (1998), para. (o); no 87 (L) (1999), para. (c); no 100 (LV) International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations (2004).

¹⁶⁶ UNGA, ‘New York Declaration for Refugees and Migrants’, resolution adopted 19 September 2016, A/RES/71/1 (3 October 2016).

¹⁶⁷ Ibid., Annex I.

¹⁶⁸ See e.g. James C Hathaway, ‘The Global Cop-Out on Refugees’ (2019) 30:4 IJRL 591–604; Bupinder S Chimni, ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2019) 30:4 IJRL 630–634; Alexander T Aleinikoff, ‘The Unfinished Work of the Global Compact on Refugees’ (2019) 30:4 IJRL 611–617.

explicit expressions of legal obligations related to the prohibition of *refoulement* among Southeast Asian states. Yet, despite their claims that they have offered asylum to refugees on ‘humanitarian’ grounds only, their practice regarding the provision of a temporary refuge and respect for the principle of *non-refoulement* has been extensive and consistent. This, in combination with their efforts to mask breaches of the prohibition of *refoulement* with a broad range of justifications and the invocation of exceptions, demonstrates that they do recognize the importance of this specific rule of international law. Under these circumstances, one could argue that the practice of Southeast Asian states with regard to the prohibition of *refoulement* has been carried out in such a way ‘as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.¹⁶⁹ In other words, these states in general uphold the principle of *non-refoulement* because they recognize it as a norm of international law.¹⁷⁰

Against this backdrop, cases where asylum seekers and refugees are pushed back or denied admission without legitimate grounds should be treated for what they are, that is, as violations of the principle of *non-refoulement* rather than as evidence that the states concerned do not consider themselves bound by this rule. Such cases remain frequent globally, as recalled annually in UNHCR’s Note on International Protection,¹⁷¹ including in countries that are parties to the 1951 Convention. This being said, another relevant question, which will be addressed in more detail in the next chapters, is whether the states concerned go beyond mere compliance with the principle of *non-refoulement*, or whether they are among those states that respect the principle of *non-refoulement* but otherwise take little responsibility for identifying refugees on their territory or for according them relevant rights.

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¹⁶⁹ Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands (n 121), para. 77.

¹⁷⁰ Some scholars consider that the obligation to provide a temporary refuge has also become a rule of customary international law, in which case the practice of Southeast Asian states would have played a significant role in the development of this norm. See for instance Hélène Lambert, ‘Customary Refugee Law’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 251–252.

¹⁷¹ See e.g. UNHCR, ‘Note on International Protection’, A/AC.96/1189 (1 July 2019), para. 8.

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5 The refugee concept in Southeast Asia

To ensure the principle of *non-refoulement* is respected, states have a ‘duty of independent enquiry’ before they remove or expel foreigners, that is, a duty to establish whether their removal would result in a breach of that principle.¹ The Refugee Convention does not, however, provide any indication as to how to differentiate between refugees and people who do not need international protection. In practice, many states parties to the Convention have established national RSD procedures. When countries do not have specific national RSD mechanisms in place, which is the case in most countries that are not parties to the Convention, the UNHCR may step in and conduct the RSD on the basis of its own Statute rather than on the basis of the Convention.

It has been said that ‘refugees do not exist’ in many countries in Southeast Asia, since most states do not have mechanisms in place to identify refugees² and because the 1951 Convention’s refugee definition ‘is not recognized by the majority of Southeast Asian states’.³ The lack of RSD procedures might thus result in people ‘automatically being labelled as “illegal migrants” without consideration for the fact that they may have been forced to *flee* their homeland’.⁴ It is true that Southeast Asian states have generally refused to use the term ‘refugees’ when referring to the various groups of people who have sought asylum on their territory, including with regard to those who have been given a temporary asylum. Rather, they prefer to refer to them as ‘illegal migrants’ or, on some occasions, as ‘displaced persons’.

While most states in the region are not parties to the Refugee Convention or its Protocol, this chapter nevertheless argues that these states do recognize the existence of a specific category of people who deserve international

1 UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ (26 January 2007), para. 22.

2 See e.g. AI, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia’, ASA 28/010/2010 (June 2010) 7.

3 Sara E Davies, *Legitimising Rejection. International Refugee Law in Southeast Asia* (Nijhoff 2008) 7.

4 Ibid., 7 (emphasis in original).

protection and that the criteria they apply correspond to the broader refugee definition under the OAU Convention or under UNHCR's broader mandate. That means that they consider people fleeing persecution as well as armed conflict and violence to be refugees. Looking at the practice of states in the region since the Indochinese refugee crisis, it appears that various mechanisms have been put in place to distinguish between refugees and other irregular migrants and to treat the former differently.

This chapter starts by examining the refugee definition under international law. The definition is key insofar as it serves to identify those who are entitled to refugee status and those who are excluded from protection, with the consequences that may result. There is no one single universal definition of a refugee, however, and the concept has expanded over time to cover people fleeing various situations (Section 5.1). Looking more specifically at the situation in Southeast Asia, the chapter discusses how the Indochinese asylum seekers and refugees were considered by the countries of first asylum and the international community during the Indochinese refugee crisis (Section 5.2). It is precisely to stem the continuous flow of asylum seekers from Indochina that mechanisms were put in place in Thailand and later on across the region in order to distinguish between the so-called economic migrants and *bona fide* refugees (Section 5.3). An examination of both the legal and policy framework and the practice of Thailand, Malaysia and Indonesia since then reveals that, even though they are not parties to the Convention, they also recognize the fact that people fleeing persecution, armed conflict and violence should benefit from some form of international protection (Section 5.5).

5.1. The refugee concept in international law

Few terms evoke at the same time as much empathy and hostility as the term 'refugee'. In its common understanding, the term refers to anyone who flees his or her country to seek refuge, understood as shelter or asylum, in another country, regardless of the reasons for that flight. Under the Refugee Convention, however, the term refugee has a precise legal definition. This has been extended subsequently with the adoption of several regional instruments, including the Bangkok Principles (Section 5.1.1). Moreover, the UNHCR Statute represents an independent basis for the determination of the refugee status based on a definition that has also expanded over time (Section 5.1.2).

5.1.1. Towards a broader refugee definition

The 1951 Convention defines the term 'refugee' as applying to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political

opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.⁵

This definition has generally been interpreted as emphasizing the ‘individual’ character of the persecution feared, that is, the fact that the person concerned must be personally in danger for one or more of the reasons set out in the Convention.⁶ The Refugee Convention is silent as to how the refugee status of an individual should be determined. In practice, refugee recognition usually requires the establishment of appropriate RSD procedures to determine the claims of those seeking asylum. As UNHCR has noted, it is ‘left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure’.⁷

However, it soon became apparent that the definition elaborated in the post–World War II context would not be relevant in the context of refugee movements in the developing world, which were rather characterized by large flows caused by conflict or political instability and that often spilled over into neighbouring countries. The 1967 Protocol removed the effects of the temporal and geographical limitations of the Refugee Convention so as to make the treaty-based protection of refugees universal, but it arguably failed to take into account phenomena other than persecution.⁸ Against this backdrop, broader refugee definitions have been adopted at the regional level, in Africa and Latin America most notably, to include people fleeing armed conflict and generalized violence.

The Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the OAU in 1969 not only reiterated the 1951 Convention refugee definition, but it also provided for a broader definition of a refugee as also including someone

who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁹

5 Convention relating to the Status of Refugees (opened for signature 25 July 1951, entered into force 22 April 1954) 189 UNTS 150, art. 1A(2).

6 See e.g. Guy S Goodwin-Gill, ‘*Non-Refoulement* and the New Asylum Seekers’ (December 2016) 26 Virginia Journal of International Law 899.

7 UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, HCR/1P/4/ENG/Rev.4 (February 2019), para. 189.

8 For a different view, see Terje Einarsen, ‘Drafting History of the 1951 Convention and the 1967 Protocol’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2010) 37–73.

9 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (opened for signature 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art. I(2).

The OAU Convention therefore considers not only the ‘subjective’ element, namely the well-founded fear of persecution, but it also includes an ‘objective’ element, that is, the general situation in the country of origin that spurs people to leave their country. Under such circumstances, refugee status should be recognized for the whole group of people, and not only on an individual basis as a result of an assessment of their personal situation. In Latin America, the definition of a refugee provided in the Cartagena Declaration is even broader. It includes ‘massive violations of human rights’ as a ground for granting refugee status. According to the Cartagena Declaration:

The definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.¹⁰

The text is arguably the most ambitious instrument pertaining to the protection of refugees to date. While the Declaration itself is non-binding, it is of fundamental importance in the region; the countries concerned have largely adhered to the principles enshrined in the Declaration and most of them have incorporated those principles into their national legislation.

There is no such specific regional refugee definition in the Asia-Pacific region, but it is worth looking at the definition provided in the Bangkok Principles and at its evolution over time. Article 1 of the 1966 version of the Bangkok Principles provided a similar definition to that provided for in the 1951 Convention, although without any geographical and temporal limitation.¹¹ Yet, the Principles somewhat anticipated the broadening of the refugee definition with a note attached to its art. 1, which stated that for the delegations of Iraq, Pakistan and Egypt the term ‘refugee’ also covered ‘a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State’.¹²

The refugee definition under the Bangkok Principles has subsequently been broadened to bring them into line with the development of international refugee law. This extension of the refugee definition was proposed in 1996 in the context of consultations aimed at revising and updating the text.

¹⁰ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984), section III.3.

¹¹ AALCO, ‘Bangkok Principles on the Status and Treatment of Refugees’ (31 December 1966), art. 1.

¹² AALCO, ‘1966 Bangkok Principles’, art. 1, note (ii).

UNHCR then argued that the decision to broaden the refugee definition in the Bangkok Principles would in fact reflect the practice of states, including Southeast Asian states. According to the UNHCR representative:

[I]n the years since the adoption of the Bangkok Principles, the Asian countries generously granted admission to large numbers of refugees. They were thus able to tackle the large flows of population seeking asylum, which Asia has been faced with since the early seventies. This record . . . underlines the relevance of a refugee definition which encompasses both persons with a well-founded fear of persecution and the victims of large-scale international or civil violence. . . . The expanded definition would contribute to strengthening the international regime of refugee protection by matching principles with the practices of States in Asia and, by extending to that region, even if on a non-binding basis, the agreed principles already adopted in Africa and in Latin America, and endorsed by the UNGA.¹³

Most importantly, it was noted during the seminar that while a number of states that responded to a refugee influx were not parties to legal instruments, which was the case of most Asian states, there was nevertheless 'a certain understanding even in this context as to what precisely the definition of a refugee is'.¹⁴ Against this backdrop, the final version of the Bangkok Principles adopted in 2001 includes a broader definition of a refugee as follows:

1. A refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group: (a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or (b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.
2. The term 'refugee' shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

¹³ AALCO, 'Report of the AALCC/UNHCR Seminar to Commemorate the 30th Anniversary of the Bangkok Principles Concerning the Treatment of Refugees, Manila, Philippines, December 1996', New Delhi, AALCC Secretariat (1998).

¹⁴ Ibid.

3. A person who was outside of the State of which he is a national or the Country of his nationality, or if he has no nationality, the State of which he is a habitual resident, at the time of the events mentioned earlier and is unable or unwilling due to well founded fear thereof to return or to avail himself of its protection shall be considered a refugee.
4. The lawful dependents of a refugee shall be deemed to be refugees.¹⁵

While it was agreed to broaden the refugee definition to include armed conflicts and situations of violence, as in the OAU Convention, the Bangkok Principles does not cover situations of ‘massive human rights violations’. This was most notably because of the fact that ‘the violation of the human rights as stated in the Cartagena Declaration can be very vague, or can be interpreted subjectively’.¹⁶ During the consultations leading to the revision of the Principles, the delegate of Thailand had also requested that the phrase ‘events seriously disturbing public order’ in para. 2 be deleted because it was considered too vague.¹⁷ Yet, the Bangkok Principles demonstrates that the international community, in all regions, has recognized that certain people, namely those fleeing conflict and persecution, constitute a specific category in need of international protection.

5.1.2. The evolution of the refugee definition for UNHCR

Adopted shortly before the 1951 Convention, UNHCR’s Statute contains a definition similar to that contained in the 1951 Convention, except that UNHCR’s competence is not constrained in its temporal or geographical scope. Accordingly, the mandate of the High Commissioner extends to:

Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.¹⁸

¹⁵ AALCO, ‘Final Text of the AALCO’s 1966 Bangkok Principles on the Status and Treatment of Refugees’ (adopted 24 June 2001), art. I.

¹⁶ AALCO, ‘Report of the Seminar Commemorating the 30th Anniversary of the Bangkok Principles’ (n 13).

¹⁷ AALCO, ‘Status and Treatment of Refugees’ in ‘Selected documents of 39th session of AALCC Held in Cairo (19–23 February 2000)’ (2000) Annex II.

¹⁸ UNGA, ‘Statute of the Office of the United Nations High Commissioner for Refugees’, A/RES/428(V) (14 December 1950), art. 6B.

This definition nevertheless gives a limited picture of the persons who have in practice been assisted and protected by UNHCR. While the well-founded fear of persecution is also the main criterion for refugee status, over the years, UNHCR's mandate has been broadened by various General Assembly resolutions to include other groups of people who did not fit into the strict refugee definition.¹⁹ In its 1994 Note on International Protection, which elaborated further on what 'international protection' means, UNHCR noted:

The Office has in recent years adopted the usage of regional instruments such as the OAU Refugee Convention and the Cartagena Declaration, using the term 'refugee' in the broader sense, to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of persons in their country of origin as a result of persecution or armed conflict, or serious public disorder.²⁰

Against this backdrop, UNHCR considers a broader description of refugees as including 'all persons outside their countries of origin who are in need of international protection because of a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder'.²¹ From UNHCR's standpoint, all such persons should be equally protected, in particular from *refoulement*. Those who are considered as refugees under UNHCR's mandate only are also referred to as 'mandate refugees', as opposed to those recognized as refugees under the Refugee Convention ('Convention refugees'). In non-signatory countries, mandate refugees have generally more limited rights since the Convention does not apply.

5.2. The refugee concept in Southeast Asia during the Indochinese refugee crisis

Countries such as Thailand, Malaysia, Indonesia and the Philippines accepted a large number of people who had fled the regime changes that took place across Indochina in 1975. Yet, using the term 'Indochinese refugees' in a general manner to refer to people from Cambodia, Laos and Vietnam obscures both the fact that their situation varied very much from one group to another and that the motivation behind the departures changed considerably during the crisis, depending on the period and the political

19 See also UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and His Office' (October 2013).

20 UNHCR, 'Note on International Protection', A/AC.96/830 (7 September 1994), para. 32.

21 UNHCR, 'Persons in Need of International Protection' (June 2017) <www.refworld.org/docid/596787734.html> accessed 17 January 2021.

and economic environment in the region (Section 5.2.1). With the countries of asylum remaining outside the international refugee framework, the qualification of those fleeing Indochina became a particularly sensitive issue throughout the crisis (Section 5.2.2).

5.2.1. Reasons for the flight of the Indochinese refugees

The so-called Indochinese refugees were moving for a large variety of reasons, including armed conflict and persecution. In addition to these push factors, it is also clear that growing numbers of people were later motivated by economic prospects.²² The expectation for a better life, in particular, became an important pull factor, as increasing numbers of refugees resettled in Western countries. Each group of people posed a different set of problems for host countries.

In the case of Laos, the proclamation of the People's Democratic Republic of Laos in December 1974 had initially led many soldiers, politicians and members of the administration of the previous regime to flee the country, followed by others of a lower rank who were worried about their status under the new political and economic system.²³ While at this stage those concerned were mainly lowland Lao, other groups followed, many from the hill tribes – such as the Hmong – who had collaborated with the United States during the Vietnam War. Several thousand of them crossed the Thai border, either to seek refuge or to establish a sanctuary.²⁴ While the exodus continued in the following years, by 1978, the reasons that prompted Laotians to flee and seek asylum seemed to have evolved and to be more related to the restructuring of the country's economy than to the conflict or the measures taken by the Pathet Lao against their enemies. Some of them could well have been threatened because of their political, economic or religious activities. Yet, those who left at that time, a majority of them lowland Lao, were in all likelihood fleeing poverty, the lack of economic opportunities, the collectivization of agriculture or all kinds of administrative obstacles.²⁵

In Vietnam, the reasons that prompted the departure of tens of thousands of Vietnamese in the mid-1970s were mainly related to the conquest of the south of the country by the Viet Minh. Following the fall of Saigon in April 1975, those who were associated in some way with the previous regime could indeed have some fears of retaliation by the communist regime that

22 Martin B Tsamenyi, 'The "Boat People": Are They Refugees?' (1983) 5:3 *Human Rights Quarterly* 348–373.

23 Milton Osborne, 'The Indochinese Refugees: Cause and Effects' (1980) 56:1 *International Affairs* 45–46.

24 W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998) 14.

25 Ibid., 103–106; Barry Wain, *The Refused: The Agony of the Indochina Refugees* (Kow Jones (Asia) Company Ltd 1981) 55–61.

had come to power. The measures taken by the new authorities to rebuild the country, the establishment of new economic zones in the countryside or the prospect to end up in one of the rehabilitation centres also led to a significant outflow of Vietnamese people.²⁶ Between 1975 and March 1978, an estimated 30,000 people sought refuge in other countries, in addition to the 130,000 Vietnamese evacuated from Guam in the wake of the US departure.²⁷

Yet, the number of people seeking refuge increased considerably with the new government's announcement in March 1978 of measures aimed at abolishing the bourgeoisie, including a ban on private trade and the nationalization of companies. These measures particularly affected people of Chinese ethnicity, who had traditionally played an important role in the economy of the country.²⁸ The influx of people in these circumstances could seem to be less related to the events of 1975 than to economic restructuring. Many may have considered that it would be better for them to leave than to remain in Vietnam in more precarious economic and social conditions.²⁹ In addition, increasing tensions between Vietnam and China also played an important role in the crisis. The situation of Chinese people who had a dominant influence on the country's economy in North Vietnam became problematic, as they were now accused of constituting a separate community within Vietnam. Their position became increasingly precarious as relations between the two countries deteriorated.³⁰

Besides the repression in Laos and Vietnam, Cambodia was also the scene of particularly tragic events. Two periods must be considered when discussing the influx of Cambodians to other countries in the region, more particularly to Thailand. These concern the period when the country was known as 'Democratic Kampuchea', on the one hand, which extended from the takeover of Phnom Penh by the Khmer Rouge in April 1975 to the invasion of the country by Vietnam in December 1978 and, on the other hand, the period of civil war between the central authorities supported by Vietnam and the Khmer Rouge guerrillas, which continued until the withdrawal of the Vietnamese forces in 1989.

The rule of the Khmer Rouge was characterized by an unprecedented level of violence against its own population. Some of the acts committed by the Khmer Rouge during this period have been characterized as a 'genocide'

26 Yen Tran, 'The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws' (1995) 17:3 *Houston Journal of International Law* 466–469.

27 Robinson, *Terms of Refuge* (n 24) 127.

28 Tsamenyi, 'The "Boat People": Are They Refugees?' (n 22) 349–352; Osborne, 'The Indo-chinese Refugees' (n 23) 38–44.

29 Frank Frost, 'Vietnam, ASEAN and the Indochina Refugee Crisis' (1980) 7 *Southeast Asian Affairs* 348–353.

30 Wain, *The Refused* (n 25) 76–80.

by the Extraordinary Chambers in the Courts of Cambodia (ECCC), which were established in 1997 to try the perpetrators of serious crimes committed under the Khmer rouge regime.³¹ All in all, it is estimated that nearly 2 million people were killed in just under four years, that is, approximately a quarter of the country's population.³² This was not yet known at that time, however, since during their period in power the Khmer Rouge were able to considerably limit departures from Cambodia. It is only at a later stage, following Vietnam's invasion and a short war between Vietnam and China, that a higher number of people from Cambodia sought refuge in the neighbouring countries, especially in Thailand and China. While the causes of these movements were generally considered to be multiple,³³ a large proportion of those who fled to the Thai border were fleeing the conflict between the Khmer Rouge and the Vietnamese forces. It is estimated that half a million people fled Cambodia between 1979 and early 1980.³⁴

5.2.2. ‘Labelling’ the Indochinese refugees

The qualification of those generally referred to as ‘Indochinese refugees’ became a particularly sensitive issue in this context. The United States, for example, considered the Indochinese as victims of the communist regimes in the region and thus as refugees in the legal sense of the term, which meant that they deserved international protection and, considering the lack of local integration opportunities, needed to be resettled abroad.³⁵ By fleeing their countries, they were, after all, ‘voting with their feet’. For their part, Southeast Asian states insisted on the fact that they were granting a temporary asylum to the Indochinese refugees on a ‘humanitarian’ basis only, that is, not out of any legal obligation. The use of the term ‘refugees’ to refer to the Indochinese was to be carefully avoided under these circumstances, as it might give the impression that the states concerned had international legal obligations to protect them.³⁶

Considering these different standpoints, it meant, in the words of James Hathaway, that ‘the legal status of Vietnamese asylum-seekers [was] not defined in a consistently principled way’.³⁷ The same could be said of the

31 See Extraordinary Chambers in the Courts of Cambodia, *Nuon Chea and Khieu Samphan* (Case 002/02), E465, Trial Chamber (TC) (16 November 2018) <www.eccc.gov.kh/en/document/court/case-00202-judgement> accessed 17 January 2021, paras 4331–4333.

32 Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Nijhoff 1997) 134.

33 Ibid., 131–169; Robinson, *Terms of Refuge* (n 24) 70–71.

34 Zieck, *UNHCR and Voluntary Repatriation* (n 32) 138.

35 Robinson, *Terms of Refuge* (n 24) 22.

36 Vittit Muntarbhorn, ‘International Protection of Refugees and Displaced Persons: The Thai Perspective’ (1981) Law Association for Asia and the Western Pacific 9–11.

37 James C Hathaway, ‘Labelling the “Boat People”: The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees’ (1993) 15:4 *Human Rights Quarterly* 686.

other groups of Indochinese asylum seekers, as the terminology used varied according to the periods and groups of people concerned, without any real consistency. ASEAN states used all kinds of expressions to refer to Indochinese people, including especially ‘illegal migrants’, which shifted the discourse in the field of immigration law rather than refugee or human rights law. Moreover, the states of first asylum were able to secure UNHCR’s acceptance that it would refrain from using the term ‘refugee’. The term ‘boat people’, which was used to refer to asylum seekers from Vietnam, was also convenient insofar as it does not have any legal meaning.

Yet, the way UNHCR referred to the Indochinese changed in November 1978 following discussions regarding the disembarkation of the 2,318 passengers on the *Hai Hong*. The Malaysian authorities did not object when UNHCR informed them that the Vietnamese ‘boat people’ should be considered *prima facie* as ‘people of concern to UNHCR’, even though it appeared that they had not been rescued at sea while fleeing Vietnam but that their journey had rather been deliberately organized with the support of the Vietnamese Government.³⁸ While the Refugee Convention puts the emphasis on a well-founded fear of persecution, which has largely been interpreted as requiring that each case be assessed individually, the *prima facie* approach is based on an ‘objective’ assessment of the situation in the country of origin, when it is practically difficult to carry out individual examinations due to the large number of people on the move or in relation to groups of individuals whose arrival is not on a large-scale, but ‘who share a readily apparent common risk of harm’.³⁹ The July 1979 Meeting on Refugees and Displaced Persons in South-East Asia tacitly endorsed this approach, at least when it came to the Vietnamese ‘boat people’, with UNHCR using more systematically the expression ‘refugees and displaced persons’ in its subsequent reports.

The situation was rather different in the case of the refugees from Cambodia. Following a short ‘open door’ period where people fleeing Cambodia were given temporary refuge and were not sent back across the border, in 1980, Thailand announced a new so-called human deterrence policy by trying to contain the newcomers in camps at the border. This decision led to a change in the way those concerned were referred to. Whereas many Cambodian asylum seekers arriving after 1978 were considered *prima facie* refugees by UNHCR and resettled, from 1980 onwards Thailand insisted that the newcomers were ‘illegal migrants’.⁴⁰ Officially, this change was justified

38 Robinson, *Terms of Refuge* (n 24) 28–29; B Wain, *The Refused* (n 25) 32–33.

39 UNHCR, ‘Guidelines on International Protection no 11: *Prima Facie* Recognition of Refugee Status’, HCR/GIP/15/11 (24 June 2015), para. 10.

40 Vitit Muntarbhorn, ‘Displaced Persons in Thailand: Legal and National Policy Issues in Perspective’ in ‘Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons’, Manila, Philippines, HCR/120/25/80 (14–18 April 1980).

by the reduction of the risk of famine in Cambodia. The Thai authorities stated that

the reason why the Thai government will not accept any more Kampuchceans is that the famine situation in Kampuchea has now improved to a certain extent. . . . There is no longer the dire need for the Kampuchceans to seek refuge now in Thailand.⁴¹

It has to be noted, however, that this policy was adopted right after the 1979 Meeting on Refugees and Displaced Persons in South-East Asia, which ignored the situation of the Cambodian refugees, and in a context of increasing arrivals in Thailand. The objective may well have been to put pressure on the international community to do more to solve the situation. Nevertheless, the government generally continued to refer to the Cambodians as ‘displaced persons’, which suggested that the authorities recognized that they had been compelled to move and thus deserved protection.⁴²

Unlike the Vietnamese refugees, however, the Cambodian ‘displaced persons’ were not eligible for resettlement and UNHCR did not have access to them – officially because as of 1982 onwards they were placed under the mandate of another organization that had been specifically created to assist them, namely the United Nations Border Relief Organization (UNBRO). Interestingly, this line of argument was reminiscent of one of the exclusion clauses of the Refugee Convention – art. 1D – which stipulates that the Convention does not apply to persons who are receiving protection or assistance from organs or agencies of the UN other than UNHCR. Seen from another angle, this means that the Thai Government implicitly recognized the fact that the Cambodians were in fact refugees.

5.3. The rise of screening procedures in Southeast Asia

Initially, the ‘root causes’ of refugee movements, which are particularly important in the determination of the refugee status, seemed to be only a secondary consideration for the first countries of asylum in Southeast Asia, since they accepted a large number of people moving for various reasons. This situation changed, however, as international aid started to shrink. Against this backdrop, the establishment of criteria and procedures to identify people more vulnerable than others became a way to limit the number of people who would receive protection.

41 Sub-committee on Public Relations and Coordination Concerning Relief Assistance to Kampuchean Illegal Immigrants, ‘Questions and Answers Concerning the Problem of Displaced Persons from Indochina’ (June 1981).

42 Donald W Greig, ‘The Protection of Refugees and Customary International Law’ (1978) 8:4 Australian Year Book of International Law 127.

It has been said that screening procedures were introduced in Southeast Asia at the initiative of first countries of asylum eager to reduce the number of people on their territory.⁴³ It would be more accurate, however, to say that the shift towards more control in fact came primarily from the countries of resettlement and then trickled down to the countries of first asylum. Indeed, developments in the region throughout the 1980s demonstrate that Southeast Asian states came to adopt more restrictive criteria, that is, the criteria set out in the 1951 Convention referring to a well-founded fear of persecution, in reaction to the changes in the resettlement policies of Western states, in particular the United States. This led to Thailand establishing a screening mechanism for asylum seekers and refugees from Laos (Section 5.3.1). In 1989, the CPA expanded the idea of a screening mechanism to the Vietnamese ‘boat people’ by establishing a region-wide RSD procedure aimed at limiting the number of people recognized as refugees and thus eligible for resettlement (Section 5.3.2).

5.3.1. *The determination of the refugee status of Laotian asylum seekers*

A general hardening of policy towards refugees, as Linda Hitchox observed, was ‘the almost inevitable outcome of the increasing reluctance of the donor countries to continue with resettlement’.⁴⁴ As the number of resettlement places failed to keep pace with the number of arrivals, the countries of first asylum in Southeast Asia feared that they would be left alone to deal with large numbers of refugees on their territory. Thailand was particularly concerned since it had been admitting a large number of asylum seekers and refugees from Laos and Cambodia, as well as the Vietnamese ‘boat people’.

The Thai Government and UNHCR had agreed as early as 1977 to screen arrivals from Laos to determine who should be offered protection, but at that time the major Western countries objected to the idea that those being screened out would be forcibly returned to Laos. What is more, to the great dismay of Thailand, no clear solutions were proposed during the 1979 Meeting on Refugees and Displaced Persons in South-East Asia with regard to those arriving from Laos. As it became clear that an increasing number of Laotians were crossing into Thailand in the hope of being resettled, the Thai authorities and UNHCR came back to the idea of a screening procedure, this time with ‘the implicit and sometimes explicit endorsement of major resettlement countries’, in particular the United States.⁴⁵ The objective of this initiative was

43 See e.g. Ann C Barcher, ‘First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?’ (1991–1992) 24 *New York University Journal of International Law and Politics* 1255.

44 Linda Hitchox, ‘Repatriation: Solution or Expedient? The Vietnamese Asylum Seekers in Hong Kong’ (1990) 18:1 *Asian Journal of Social Science* 117.

45 Dennis McNamara, ‘The Origins and Effects of “Humane Deterrence” Policies in Southeast Asia’ in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (OUP 1989) 126–128.

clearly to dissuade Laotians without a valid claim to asylum from coming to Thailand. Yet, this time again the process was delayed due to disagreements regarding the fate of those found not to be in need of international protection, and it was only in 1985 that a screening mechanism was eventually put in place.

Once implemented, this initiative marked a turning point compared with the *prima facie* approach for the Vietnamese and Laotian asylum seekers that had prevailed until then. The new procedure was also one of the first explicit forms of recognition by Thailand of persecution as a criterion for granting special protection. The procedure provided that refugee status would be granted to four categories of persons, that is:

- 1 soldiers and civil servants of previous regimes;
- 2 former employees of foreign embassies and international organizations;
- 3 those who participated in activities which were deemed to be antagonistic to the Communist government in Laos; or
- 4 persons with direct relatives in third countries.⁴⁶

The first three categories corresponded to the persons whom the United States was prepared to accept for resettlement. They were based on the risk of persecution they faced, either because of their links with the previous regime or because of their subversive activities vis-à-vis the new authorities. The new screening mechanism thus reflected the refugee definition provided for in the 1951 Convention. The importance of the element of persecution in the case of the Laotians was further reinforced by the fact that the Hmong were excluded from this procedure, precisely because of the risks they faced due to their links with the United States. In total, between 1985 and 1989, some 31,000 people were subjected to this procedure, at the end of which nearly 90 per cent of the people interviewed were considered refugees.⁴⁷

5.3.2. *The CPA and the quest for greater regional consistency*

As in the case of the Laotians, it was argued that the reasons the Vietnamese were fleeing changed over time, with an increasing number of people among those leaving Vietnam in the late 1980s pursuing economic objectives. It was precisely to put an end to this phenomenon that the International Conference on Indo-Chinese Refugees was organized and the CPA was adopted in 1989.

The International Conference and the CPA were not, as has been said, an initiative of the ASEAN states only nor had the international community 'largely capitulated to the demands of the countries of first asylum' with regard to the introduction of a screening procedure.⁴⁸ The CPA

46 Vittit Muntarbhorn, *The Status of Refugees in Asia* (OUP 1992) 130.

47 UNHCR, *The State of The World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP January 2000) 101.

48 Barcher, 'First Asylum in Southeast Asia' (n 43) 1267.

arguably evolved, as James Hathaway noted, ‘in response to a failure of first asylum, particularly in Thailand and Hong Kong, which in turn resulted from inadequate resettlement efforts by Western states’.⁴⁹ Interestingly, it is Hong Kong, with the support of the United Kingdom, that actually took the lead ‘in adopting the long-debated and much-criticized refugee screening procedure and in promoting in the region active talks about voluntary as well as forced repatriation’.⁵⁰ The first discussions to change the approach that had prevailed since the beginning of the influx of Vietnamese “boat people” started between the United Kingdom and Vietnam in 1988, with a screening policy being introduced in Hong Kong in June 1988 and the first forced repatriation of refugees back to Vietnam taking place in December 1989.⁵¹

Based on this experience in Hong Kong, the CPA proposed the introduction, at the regional level, of a uniform RSD procedure based on the criteria set out in the 1951 Convention. This RSD procedure ‘marked the first time an internationally agreed upon screening mechanism was introduced on a region-wide basis, involving the active participation of governments of first asylum, countries which had no previous experience in this regard’.⁵² The objective was to distinguish between ‘genuine refugees’, on the one hand, and those who, while having used the same channels, should be considered as economic migrants. The CPA therefore marked a 180-degree shift from the policy of granting *prima facie* refugee status to the Vietnamese: unless proven otherwise, they were now primarily considered as economic migrants.

The introduction of a regional RSD procedure raised hopes that the Southeast Asian states might apply the criteria under the Refugee Convention in other contexts beyond that of Vietnamese refugees for whom the CPA had been specifically formulated. According to Vtit Muntarbhorm, ‘The key criterion for status determination was the notion of “well-founded fear of persecution”, thus importing the influence of the 1951 Refugee Convention into the region, even for countries which had not acceded thereto’.⁵³ The procedure was seen at this stage as a further step towards the harmonization of the refugee criteria throughout the world. For others, however, the introduction of procedures based essentially on the persecution criterion was a way to narrow down the approach compared to what had been the practice in the region since the beginning of the Indochinese

49 Hathaway, ‘Labelling the “Boat People”’ (n 37) 688.

50 Chan Kwok Bun, ‘Hong Kong’s Response to the Vietnamese Refugees: A Study in Humanitarianism, Ambivalence and Hostility’ (1990) 18:1 *Asian Journal of Social Science* 96.

51 Hitchcox, ‘Repatriation: Solution or Expedient?’ (n 44) 113.

52 Shamsul Bari, ‘Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment’ (1992) 4:4 *IJRL* 488.

53 Muntarbhorm, *The Status of Refugees in Asia* (n 46) 35.

crisis.⁵⁴ In other words, a key implicit objective of the CPA was also to minimize the number of people who would be resettled. The response of the first countries of asylum, as Betts noted, was thus ‘contingent upon that of . . . the resettlement states’.⁵⁵

One of the main difficulties related to the implementation of the CPA was precisely related to the criteria for recognition of refugee status. The CPA specified in this regard that a ‘coherent’ procedure should be established ‘in accordance with national legislation and internationally recognized practices’. The text then specified that the criteria to be taken into account would be those of the Geneva Convention:

The criteria will be those recognized in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, bearing in mind, to the extent appropriate, the 1948 Universal Declaration of Human Rights and other relevant international instruments concerning refugees, and will be applied in a humanitarian spirit taking into account the special situation of the asylum seekers concerned and the need to respect the family unit.⁵⁶

This sentence was a compromise between different positions. The countries of first asylum and resettlement wanted a strict interpretation of the refugee definition focusing on the well-founded fear of persecution. For them, the introduction of an RSD procedure should operate as a deterrent and put an end to the continuing arrivals of people from Vietnam. Others, such as UNHCR, hoped that the reference to ‘other relevant international instruments’ would open the door to a broader interpretation of the refugee definition. At the other end of the spectrum, some actors, particularly NGOs, had hoped that a broader refugee definition would be considered, taking into account the specificities of the situation of the Vietnamese asylum seekers.⁵⁷ While emphasizing the ‘strict’ definition of the refugee concept, the final text left room for other interpretations.

54 See e.g. Sara E Davies, ‘The 1989 Comprehensive Plan of Action (CPA) and Refugee Policy in Southeast Asia: Twenty Years Forward What has Changed?’ in Ademola Abass and Francesca Ippolito (eds), *Law and Migration: Regional Approaches to the Protection of Asylum Seekers: an International Legal Perspective* (Ashgate 2014) 325–346; Arthur C Helton, ‘Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment’ (1993) 5:4 *IJRL* 556–557.

55 Alexander Betts, ‘Comprehensive Plans of Action: Insight from CIREFCA and the Indochinese CPA’, *UNHCR New Issues in Refugee Research* 120 (2006) 37.

56 UNGA, ‘Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary General’, A/44/523 (22 September 1989) Annex, para. 6(b).

57 Bari, ‘RSD under the CPA’ (n 52) 492–493.

The next step was to establish RSD procedures at the regional level. In the words of Richard Towle:

[T]he challenge was to create a coherent and consistent approach between states that did not share common legal or even cultural traditions, often did not see themselves bound by the same set of international legal standards, and whose national legislation was not properly adapted/tailored to the unique function of RSD.⁵⁸

According to art. 6(c) of the CPA, the procedures were to be based on the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, which was first published in 1979. The procedures were supposed to include, among other things, the provision of information to asylum seekers about the procedures themselves and the criteria; written notification of the decision within a prescribed period; and a right of appeal against negative decisions, with the asylum seekers entitled to advice from UNHCR if required.⁵⁹

For asylum seekers coming from Laos, the CPA also provided that measures should be taken to maintain ‘safe arrival and access to the Lao screening process’ established in 1985.⁶⁰ Some 10,000 Laotians were subject to the RSD procedure during the entire period of implementation of the CPA. Nearly 50 per cent of them were eventually considered to be refugees at the end of the examination of their case – a much lower proportion than the 90 per cent recognition rate that had prevailed between 1985 and 1989.⁶¹

The CPA was quite successful in its objective of curbing the influx of Vietnamese asylum seekers. In just a few years, departures from Vietnam ceased; temporary asylum was granted to asylum seekers and all those who had arrived before March 1989 or who had arrived afterwards and been considered refugees had been resettled, while the others had been repatriated. In this sense, the CPA has often been hailed as one of the most salient success stories of multilateral cooperation on refugee issues.⁶² The implementation of the regional screening procedure was nevertheless the object of many criticisms. These included the excessive waiting times; the lack of advice to asylum seekers throughout the process; the limits of interpretation that hindered the assessment of individual situations; the profile of some of the people in charge of conducting interviews; the lack of clarity of first

⁵⁸ Richard Towle, ‘Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?’ (2006) 18:3–4 IJRL 548.

⁵⁹ UNGA, ‘Declaration and CPA’ (n 56) Annex, para. 6(d).

⁶⁰ Ibid., para. 16.

⁶¹ Robinson, *Terms of Refuge* (n 24) 223–226.

⁶² See in particular Towle, ‘Processes and Critiques of the CPA’ (n 58) 537–550; Bari, ‘RSD under the CPA’ (n 52) 487–513; Sten A Bronée, ‘The History of the Comprehensive Plan of Action’ (1993) 5:4 JRL 534–543. It is to be noted that Towle, Bari, and Bronée all worked for UNHCR at the time of the CPA.

instance decisions; the waiting times for the appeal procedure; the risk of excessive pressure on asylum seekers to return to their country of origin; the level of corruption which, according to some, determined who was to be considered as a refugee; and the significant differences between countries in the implementation of the procedure.⁶³

While a minority of requests could be handled easily, the vast majority of the applicants presented more complex situations, the assessment of which was subject to interpretation.⁶⁴ Almost ten years after the main events that had justified the granting of a *prima facie* refugee status to the Vietnamese, and while Vietnam had in the meantime undertaken a series of reforms, it was becoming increasingly difficult for asylum seekers to assert a well-founded fear of persecution successfully.⁶⁵ In particular, it was often difficult to assess the motivation of people, since issues that might *a priori* seem economic in nature could in fact have political origins, particularly when measures were taken in a discriminatory manner towards certain specific groups.⁶⁶

While the refugee recognition rate was estimated at 27.9 per cent for the region as a whole,⁶⁷ a closer look reveals clear differences from one country to another. According to Robinson, the Philippines (which had the smallest number of boat people) proved to be more liberal than other countries, with 53.4 per cent of people recognized as refugees out of 7,272 applications. Next came Indonesia, with 43.3 per cent of people accepted out of 18,131 requests, and Malaysia, with 39 per cent of positive responses out of 15,488 requests. Among the ASEAN countries, Thailand seemed particularly restrictive, with only 22.5 per cent of arrivals recognized as refugees out of 13,504 applications.⁶⁸

Yet, it would be wrong to draw from these figures the conclusion that the ASEAN states were the only ones supporting the use of a relatively strict approach to the definition of refugee which limited the number of people screened-in. Indeed, there were indications that the procedure was closely aligned to the interests of the Western states, which were ultimately responsible for the resettlement of those found to be refugees. It was understood that the overall resettlement quota was limited, as illustrated by the fact that the United Kingdom had refused to play any role in the resettlement of the refugees.⁶⁹ According to Hitchox, ‘it [was] in the interests of all the parties

63 Muntarbhorn, *The Status of Refugees in Asia* (n 46) 152–154; Helton, ‘Refugee Determination under the CPA’ (n 54) 544–558; Robinson, *Terms of Refuge* (n 24) 198–209; Davies, *Legitimising Rejection* (n 3) 204–215.

64 Robinson, *Terms of Refuge* (n 24) 202–205.

65 Muntarbhorn, *The Status of Refugees in Asia* (n 46) 152–154.

66 Hathaway, ‘Labelling the “Boat People”’ (n 37) 686–702.

67 Robinson, *Terms of Refuge* (n 24) 206.

68 Ibid., 206.

69 Hathaway, ‘Labelling the “Boat People”’ (n 37) 700.

concerned, other than refugees, to develop the notion that the movements from Vietnam [was] an economic migration which the West [was] not prepared to support'.⁷⁰ Towle, despite being a strong proponent of the CPA, noted that resettlement states did not want 'an overly generous application of the criteria because this would have defeated the basic purpose of the CPA'.⁷¹ Some people reported that Malaysia, for instance, was 'diplomatically cautioned about its high acceptance rate'.⁷²

5.4. The refugee definition in Southeast Asia: which criteria apply in non-signatory countries?

The Philippines and Cambodia are the only two countries out of the ten ASEAN states that are parties to the Refugee Convention. Both have enacted specific legislations on asylum and refugee protection and put in place national RSD procedures.⁷³ Yet, while the refugee definition in both countries reflect the criteria set out in the 1951 Convention, with a focus on a well-founded fear of persecution, what is particularly noteworthy in these cases is the absence of provisions granting refugee status to persons fleeing armed conflict and generalized violence, in line with the broader definition of a refugee provided for in the OAU Convention, the Cartagena Declaration and the Bangkok Principles.⁷⁴ In other words, the refugee definition in those countries seems to be limited to a much narrower category of persons than those that have traditionally been provided with a temporary asylum in the region when there was no clear definition.

Unlike the Philippines and Cambodia, Malaysia, Thailand and Indonesia are not parties to the Refugee Convention. Indonesia has adopted various regulations concerning asylum seekers and refugees, with the latest adopted in 2016, including a refugee definition (Section 5.4.1). While Thailand and Malaysia have provided temporary asylum to many people over the past decades, what remains to be seen is which criteria they consider

70 Hitchox, 'Repatriation: Solution or Expedient?' (n 44) 118.

71 Towle, 'Processes and Critiques of the CPA' (n 58) 543.

72 Lam Lawrence, 'The Comprehensive Plan of Action (CPA) for Vietnamese Asylum Seekers: Some Reflections' (September 1993) 13:5 *Refugee* 13.

73 The Philippines adopted the Department Order no 94/1998, Establishing a Procedure for Processing Applications for the Grant of Refugee Status in 1998. A Department Circular no 058 Establishing the Refugees and Stateless Status Determination Procedure was adopted in November 2012. The Circular provided for the creation of a new office called the Refugees and Stateless Persons Protection Unit responsible, *inter alia*, for determining the status of refugees and stateless persons. In Cambodia, the government adopted the Sub-Decree no 224 on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia in December 2009. The decision-making power in terms of RSD was therefore transferred from UNHCR to a Refugee Office created the year before within the Immigration Department.

74 See Section 5.1.

when distinguishing between people in need of international protection and other ‘illegal migrants’. In the absence of a legal refugee definition in those two countries, an examination of their practice may shed light on the kind of situations they consider would justify the grant of temporary asylum or – at least – respect for the prohibition of *refoulement*. Thailand has announced in recent years the establishment of a mechanism to specifically screen people from Myanmar who could be accepted in the country under a temporary refuge scheme. It has also announced the establishment of a broader screening mechanism to distinguish people who need international protection from migrants (Section 5.4.2). As for Malaysia, it has given UNHCR a large margin of manoeuvre to undertake RSD under its mandate (Section 5.4.3).

5.4.1. *The refugee definition in Indonesia*

Refugees are mentioned in Indonesia’s legislation as far back as 1956, in the early years of independence, with a Circular Letter of the Prime Minister on Political Refugees. Article 2 of this (non-binding) document defined a ‘political refugee’ as ‘a foreigner who entered into or is in the Indonesian territory for having committed a political crime’, that is, a ‘crime committed for political reasons or purposes’.⁷⁵ As noted by Tan, this Circular Letter and the protection of ‘political refugees’ must be seen in the context of self-determination movements that Indonesia supported.⁷⁶

Adopted in 2002, the Directive of the Director General of Immigration on Procedures Regarding Aliens Expressing Their Desire To Seek Asylum and Refugee Status did not provide any refugee definition that would apply at national level. Instead, it specified that ‘aliens who seek asylum or refugee status in Indonesia will be referred to the United Nations High Commissioner for Refugees (UNHCR) for refugee status determination’.⁷⁷ The directive was addressed to ‘aliens’ and used the terms ‘asylum seekers’ or ‘refugees’ only to refer to persons who are recognized as such by the UNHCR. It also stated that identification documents provided by UNHCR to asylum seekers or refugees must be respected. Like the 2002 Directive, the Directive on the Handling of Irregular Migrants adopted in 2010 did not set out a refugee definition. In fact, the document was carefully crafted to make it clear that, from a domestic point of view, asylum seekers and refugees were to be considered irregular migrants. It referred, for instance,

75 Indonesia, Circular Letter of the Prime Minister no 11/R.I./1956 of 1956 on Political Refugees (7 September 1956), arts. 2–3.

76 Nikolas Feith Tan, ‘The Status of Asylum Seekers and Refugees in Indonesia’ (2016) 28:3 IJRL 368.

77 Indonesia, Directive from the Director General of Immigration no F-IL.01.10-1297 on Procedures Regarding Aliens Expressing Their Desire to Seek Asylum or Refugee Status (30 September 2002).

to irregular migrants declaring ‘[their] intention to seek asylum and/or [who] due to certain reasons cannot be subjected to deportation’, while specifying that the status of anyone registered or granted refugee status by UNHCR as an ‘irregular migrant’ within the country ‘shall not be in question’.⁷⁸ Despite the existence of this directive, the Immigration Law issued in May 2011 did not even mention ‘refugees’. As soon as asylum seekers enter Indonesia without valid documents, or if their documents are no longer valid, they are to be considered as ‘illegal migrants’ under Indonesian law.

Finally, the 2016 Regulation of the President of the Republic of Indonesia Concerning the Handling of Foreign Refugees defines a ‘foreign refugee’ as

[a] 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 [who] 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.⁷⁹

This new definition is inspired from the definition contained in the Refugee Convention with the focus on persecution, yet with a few changes such as the introduction of ‘ethnicity’ as a ground for persecution – like in the Bangkok Principles – and the absence of a reference to the fact that a refugee may be ‘unable’ to avail himself or herself of the protection of his or her country of origin. UNHCR’s role is emphasized, since a ‘refugee’ is also someone UNHCR has registered and to whom it has granted some form of status.

It is not clear from the language of this presidential regulation whether someone recognized by UNHCR as a refugee based on the broader refugee definition, that is, someone fleeing armed conflict and generalized violence, would be recognized as a refugee under this definition considering that the focus of the first part of the sentence is on the fear of persecution. This is arguably so, however, since in practice the Indonesian Government leaves UNHCR to deal with the registration and the determination of the refugee status of all persons claiming asylum in the country based on its mandate, and thus on the basis of the broader definition including both people fleeing persecution and people fleeing armed conflict and generalized violence.

⁷⁸ Indonesia, Immigration Regulations no IMI-1489.UM.08.05 entitled Handling of Irregular Migrants (17 September 2010), art. 3(1).

⁷⁹ Indonesia, Regulation of the President of the Republic of Indonesia Number 125 Year 2016 Concerning the Handling of Foreign Refugees (31 December 2016), art. 1.1.

5.4.2. Distinguishing persons in need of international protection from migrants in Thailand

During the Indochinese refugee crisis, Thailand accepted a large number of Indochinese refugees, whatever the causes of their flight, provided they would be taken care of by the international community and resettled in the shortest possible time. In 1982, the Thai delegate to the ExCom emphasized that his country '[had] not applied strict criteria' when it had 'opened its doors to these unfortunate people'.⁸⁰ Thailand had indeed granted temporary asylum to persons fleeing different types of situations, not only persecution, in the case of both Laotians and Vietnamese, but also armed conflict and violence, in the case of Cambodians who, although maintained on the Thai–Cambodian border after January 1980, had been able to return to Thailand several times during the fighting.

Thailand has also provided asylum to hundreds of thousands of people from different ethnic groups from Myanmar. This has included people fleeing armed conflicts between the Tatmadaw and insurgent groups at the border, such as the Karen, the Shan or the Mon, as well as people fleeing persecution at the hands of the authorities. For instance, Thailand accepted several thousand activists from Myanmar who were fleeing repression by the military junta following the crackdown of the 1988 uprising and had made their way to Bangkok, where they were recognized as 'persons of concern' by UNHCR.⁸¹ While Thailand refused to recognize these people as 'refugees', the expression used to describe them, that is, 'students and political dissidents', revealed clearly enough the political dimension behind their flight.

The relative tolerance they enjoyed in Thailand depended in large part on the nature of the relations with the Myanmar Government. The Thai authorities had welcomed opponents of the regime when relations between the two countries were strained, but their tolerance shrank as the two governments moved closer in the 1990s. While all 'students' and 'political dissidents' in Thailand had initially been recognized as refugees by UNHCR, those who arrived in the mid-1990s with a fear of persecution were then required to prove that they had played a major role in the events of 1988, failing which they would be denied protection.⁸² In 2007, Thailand accepted hundreds of people who had fled repression in the context of the so-called Saffron Revolution – a reference to the colour of the robes worn by Buddhist monks in Myanmar who had taken the lead in the movement – despite its concern that this would upset the Myanmar Government. They were

80 UNHCR ExCom, 'Summary Record of the 345th meeting, Held at the Palais des Nations, Geneva', A/AC.96/SR.345 (1 November 1982).

81 HRW, 'Unwanted and Unprotected: Burmese Refugees in Thailand', C1006 (1 September 1998).

82 Refugees International and Open Society Institute, *Pushing Past the Definitions: Migration from Burma to Thailand* (December 2002) 10–11.

however asked to keep a very low profile during their stay in Thailand, pending their resettlement to the United States. The Rohingya who arrived in 2015 were considered *prima facie* refugees by UNHCR and thus were allowed to remain in Thailand – albeit often in detention – pending another solution, while the Bangladeshis were returned to their country.

In theory, however, asylum seekers from Myanmar should be referred to the Provincial Admission Boards (PABs) set up by Thailand in 1999 in the provinces along the border with Myanmar to determine which of the tens of thousands of people who had poured into the country would have access to the so-called temporary shelters. When the PABs were first set up, the Thai Government decided that only ‘people fleeing fighting’ would be admitted at the end of a process over which the authorities retained control.⁸³ By defining the category of persons it considered *de facto* as ‘displaced persons fleeing fighting’,⁸⁴ the Thai Government refused to take the persecution criterion into account for members of ethnic minorities. Thus, those with a well-founded fear of persecution by the Myanmar authorities because of their ethnic minority status were denied protection in the camps as long as their flight had no direct connection with the fighting. It was the same for persons fleeing serious human rights violations – for example, forced labour, rape, destruction and displacement of villages, forced recruitment of child soldiers or abuses commonly committed by the Myanmar army in its fight against rebel movements. In June 1997, in response to a letter from HRW to the Thai Prime Minister denouncing violations of the principle of *non-refoulement* by the army, the Thai Ambassador to the United Kingdom justified the actions of its government as follows: ‘It is not our policy to give shelter to those who flee Myanmar due to human rights violations. Thailand only provides temporary shelter to Burmese displaced persons who have fled from fighting’.⁸⁵ It was clear in fact that Thailand no longer seemed willing to interfere in the internal affairs of Myanmar, which had in the meantime become a member of ASEAN.

The appointment of Thaksin Shinawatra, a strong supporter of a ‘constructive engagement’ with Myanmar, as Prime Minister in 2001 marked another hardening of policy towards asylum seekers and refugees from Myanmar. Among other measures that were taken against those known to have links with the opposition to the authorities in Yangon, it was

⁸³ Sébastien Moretti, ‘The Challenge of Durable Solutions for Refugees at the Thai-Myanmar Border’ (2015) 34:3 RSQ 72–75.

⁸⁴ To be noted that an official definition of the term ‘displaced persons’ was provided in the Regulations Concerning Displaced Persons from Neighbouring Countries issued by the Thai Ministry of Interior in 1954. This read as follows: ‘He who escapes from dangers due to an uprising, fighting or war, and enters the Kingdom in breach of the Immigration Act’. See W Courtland Robinson, ‘Thailand: Background Paper on Human Rights, Refugees and Asylum Seekers’, Writenet (July 2004) 22.

⁸⁵ Quoted in HRW, ‘Unwanted and Unprotected’ (n 81).

decided between 2003 and 2004, as part of a ‘harmonization’ process, to transfer all urban refugees from Myanmar, who had been recognized by UNHCR on the basis of a well-founded fear of persecution and who were mostly living in Bangkok, to the camps at the border.⁸⁶ Following the decision to regroup all of them in the camps, the eligibility criteria used by the PABs were broadened to include not only persons ‘fleeing fighting’ but also persons fleeing persecution, thus meeting also the criteria set out in the 1951 Convention. As a corollary, UNHCR was no longer allowed to conduct RSD vis-à-vis people coming from Myanmar. What is particularly noteworthy in this regard is that the Thai Government – on paper at least – was willing to offer protection to refugees from Myanmar on the basis of criteria that correspond to a broader definition of a refugee, thus encompassing both those in flight from persecution and from armed conflict.⁸⁷ Those who were screened in by the PABs were allowed to reside in the camps and to access food, healthcare, education and other humanitarian services. The main problem, however, is that the PABs have only been functioning intermittently, most specifically in the context of family reunification or for extremely vulnerable people such as those suffering from medical conditions. This means that there is in fact no effective way to determine whether asylum seekers from Myanmar are in need of protection.

UNHCR has traditionally been in charge of the registration and RSD of asylum seekers and refugees from other countries apart from Myanmar (with the exception also of North Korean defectors who are handed over to the South Korean authorities).⁸⁸ Yet, the situation may change following the announcement by the Thai Government that it would establish a screening mechanism to distinguish people with ‘genuine’ protection needs from economic migrants. This commitment was first made by Thailand in the context of the New York Summit on Refugees and Migrants in September 2016. It was followed in January 2017 by a cabinet resolution creating a ‘Committee for the Management of Undocumented Migrants and Refugees’.⁸⁹ A Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin was promulgated in December 2019, with its entry into

86 HRW, ‘Out of Sight, Out of Mind: Thai Policy toward Burmese Refugees and Migrants’ (February 2004).

87 Moretti ‘The Challenge of Durable Solutions’ (n 83) 72–75.

88 See e.g. Wassayos Ngamkham, ‘North Korea Defectors a “Dilemma”, *Bangkok Post* (26 January 2016) <www.bangkokpost.com/thailand/general/838792/north-korea-defectors-a-dilemma>; ‘Surge in Number of North Korean Defectors Slipping into Thailand’, *The Straits Times* (2 August 2017) <www.straitstimes.com/asia/se-asia/surge-in-number-of-north-korean-defectors-slipping-into-thailand> both accessed 17 January 2021.

89 UNHCR, ‘Update on UNHCR’s Operations in Asia and the Pacific’ (2 March 2017).

force scheduled for 180 days later, that is, 22 June 2020.⁹⁰ When the regulation was adopted, there were some 5,100 urban asylum seekers and refugees from countries such as Pakistan, Vietnam, Syria, the Occupied Palestinian Territories, Somalia, Iraq and China registered as asylum seekers or refugees by UNHCR in Thailand based on its broader mandate.⁹¹

As usual with Thailand, the new regulation carefully avoids the use of the term ‘refugee’, and instead uses the expression ‘Person under Protection’. According to the unofficial English translation of the Regulation, ‘Person under Protection’ refers to

an alien who enters into or resides in the Kingdom and is unable or unwilling to return to his/her country of origin since they have a reasonable ground to believe that they would face harm from persecution as determined by the Committee, and is granted status as a Person under Protection under this Regulation.⁹²

A ‘Committee on the Screening of Persons under Protection’ is still to be established, which will examine the request

according to the principles, procedures and conditions laid down by the Committee with the approval of the cabinet, taking into consideration the family unity principles, the right to receive assistance in determining the request, international obligations, and policies in accordance with the cabinet resolution.⁹³

While further guidance is still to be developed by the Committee, the definition provided for in the regulation suggests that the ground for protection under the regulation is limited to persecution. In other words, the situation of people fleeing armed conflict and violence – that is, refugees under the broader definition – may have to be dealt with separately.

5.4.3. Malaysia and the role of UNHCR

Like Thailand, Malaysia has also provided refuge to hundreds of thousands of people fleeing conflict and violence. As discussed earlier,⁹⁴ since the 1970s, Malaysia has offered asylum to some 60,000–70,000 refugees from the southern Philippines who fled the conflict between the Philippine

⁹⁰ Thailand, Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and Are Unable to Return to the Country of Origin BE 2562 (25 December 2019). The entry into force of the new Regulation has been delayed.

⁹¹ UNHCR, ‘Population Data’ <www.unhcr.org/data.html> accessed 17 January 2021.

⁹² Thailand, 2019 Regulation, cl. 3.

⁹³ *Ibid.*, cl. 19.

⁹⁴ See Section 4.1.

Government and the Moro insurgency and moved to Sabah. In 2003–2005, Malaysia accepted nearly 30,000 refugees from the Aceh region, at the western end of Sumatra Island, who were fleeing the renewed conflict between Indonesian forces and the separatist group Free Aceh Movement.

As of December 2020, Malaysia hosted some 180,000 asylum seekers and refugees, including both people fleeing persecution and people fleeing conflict and violence, making it the largest country of asylum in Southeast Asia.⁹⁵ Asked about the possibility of acceding to the 1951 Convention in the context of the UPR, Malaysia responded in 2009 that the country '[had] established administrative arrangements to provide assistance and protection to such persons on humanitarian grounds on a case-by-case basis, which effectively distinguishes persons claiming such status from the irregular migrants'.⁹⁶ In practice, the distinction is made by UNHCR, which registers and proceeds with the RSD of all asylum seekers in the country on the basis of its mandate. Pending the examination of their claim, asylum seekers are provided with a registration card that to a certain extent protects the holder against law enforcement measures. As noted by Mary Crock, 'The strength of the Malaysian system is in the sophistication and dedication of operations established by UNHCR and associated NGOs in that country – a fact that reflects at least the tacit support being offered by the Malaysian government'.⁹⁷

Against this backdrop, it can be argued that the fact that Malaysia, like Indonesia and to a certain extent Thailand, has allowed UNHCR to establish and run RSD and that it has largely refrained from expelling asylum seekers and refugees registered by UNHCR demonstrates that the country does accept the idea that people fleeing persecution as well as armed conflict and violence deserve protection. What Malaysia perhaps does not accept is rather 'the notion that refugees might be the bearers of other human rights'.⁹⁸

5.5. Conclusion

The refugee definition in the 1951 Convention is based first and foremost on a well-founded fear of persecution on one or more of the five grounds (race, religion, nationality, membership of a particular social group or political opinion). This definition has been broadened in Africa and in Latin America to include people fleeing armed conflict and violence (and in the

95 UNHCR, 'Population Data' <www.unhcr.org/data.html> accessed 20 July 2021.

96 Human Rights Council, 'Report of the Working Group on the Universal Periodic Review. Malaysia. Addendum. Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review', A/HRC/11/30/Add.1 (3 June 2009), para. 18 <<https://daccess-ods.un.org/TMP/1160550.86255074.html>> accessed 17 January 2021.

97 Mary Crock, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific' (2014) 63:2 ICLQ 258.

98 Ibid., 253.

latter case people fleeing situations of massive violations of human rights). While people fleeing such situations are not necessarily recognized as refugees under the Refugee Convention in Europe, in principle they would be protected under a temporary protection scheme, if they are moving as part of a mass influx, or alternatively they may qualify for subsidiary protection on the basis of states' international human rights law obligations. Despite the lack of a formal regional approach to refugee protection in Southeast Asia, this chapter argued that the practice of states confirms, and indeed reinforces, the idea that there is a truly 'universal' agreement on the categories of people in need of international protection covering both people with a well-founded fear of persecution and people fleeing armed conflict and violence.

The broader definition was adopted to respond more specifically to situations that developing countries were facing, that is, large-scale influxes of people caused by 'external aggression, occupation, foreign domination or events seriously disturbing public order' as stated in both the OAU Convention and the Bangkok Principles.⁹⁹ A close examination of the practice of the main countries of asylum in the region, namely Malaysia, Thailand, Indonesia and the Philippines, demonstrates that they have traditionally offered protection to people fleeing armed conflict and violence. Apart from the obvious humanitarian needs, the granting of temporary refuge has arguably been facilitated by the fact that, on the one hand, admission under these circumstances is not necessarily perceived as an affront by the state of origin and, on the other, that those concerned were expected to return to their countries of origin or be resettled to third countries as soon as conditions permitted.

Yet, some countries in Southeast Asia have been more cautious when it comes to explicitly recognizing the core dimension of the refugee definition based on the 1951 Convention, that is, the well-founded fear of persecution.¹⁰⁰ As UNHCR once noted, the granting of asylum, in particular on the basis of a fear of persecution, could indeed 'act as an irritant' between the countries of origin and the countries of asylum,¹⁰¹ whereas Southeast Asian states are particularly eager to maintain good relations with their neighbours, especially in the context of ASEAN. The so-called reluctance of some states in the region to accede to the 1951 Convention and/or the 1967 Protocol, in particular Thailand and Malaysia, may partly be explained by the fact that these states do not want to be legally bound by a refugee definition that is based on the concept of persecution. Rather, they prefer to maintain – in

⁹⁹ OAU Convention, art. I(2); AALCO, '2001 Bangkok Principles', art. I.3.

¹⁰⁰ Sébastien Moretti, 'Southeast Asia and the 1951 Refugee Convention: Substance without Form?' (2021) 33:2 International Journal of Refugee Law.

¹⁰¹ UNHCR, *The State of the World's Refugees 1997: A Humanitarian Agenda* (OUP January 1997) chapter 2.

appearance at least – full control over the admission of asylum seekers as part of the exercise of their ‘sovereignty’.

Nevertheless, the examination of both the domestic legislation and the practice of states in Southeast Asia, including non-signatory states, demonstrates that this criterion has increasingly been accepted. In Indonesia and the Philippines, the importance of providing protection to people fleeing persecution has long been recognized in domestic law. The refugee definition in the 1951 Convention was also a key aspect of the 1989 CPA, even if the procedures put in place in this context were intended to address a specific situation. Since the CPA, new domestic instruments recognizing persecution as qualifying for refugee status have been adopted in the Philippines and in Cambodia, as well as in Indonesia and in Thailand, the two latter remaining outside the Refugee Convention. In the case of Thailand, the adoption of a new policy suggests that the government is willing to take the RSD procedure into its own hands.

In the meantime, UNHCR continues to play a significant role when it comes to conducting RSD for asylum seekers on the territory of non-signatory states, based on its own Statute covering both people fleeing persecution and armed conflict. The margin of manoeuvre given to UNHCR and the fact that ‘persons of concern’ to UNHCR are generally protected against *refoulement*, at the very least, also implies that the countries concerned recognize the specific protection needs of people fleeing such situations.

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6 The treatment of refugees in Southeast Asia

Admission to a new territory and protection against *refoulement* are fundamental aspects of asylum, but this is not enough. Asylum ‘must offer refugees not just protection from life-threatening harm, but the possibility to lead a dignified life’.¹ Yet, Erika Feller, then Director of the Division of International Protection at the UNHCR, explained at the 62nd meeting of the ExCom in 2012, that the organization

ha[d] been concerned over recent times by a tendency in some States to choose to reconcile their interests and their responsibilities through what some have termed a policy of ‘benign neglect’. This means in practice that some Governments approach refugee protection in a minimalist manner, through policies resting on non-deportation, but doing nothing else.²

According to UNHCR, the large majority of refugees – around 84 per cent in 2018 – remains in developing or middle-income countries, with around one-third of the global refugee population in the Least Developed Countries.³ These countries often face considerable challenges when confronted with the arrival of refugees, ranging from a lack of resources and technical capacity to potential frictions between refugees and host communities. While access to protection and respect for the principle of *non-refoulement* are first priorities, it would be unrealistic to expect that they would offer the full range of rights provided for in the Refugee Convention without significant support. The 2018 Global Compact on Refugees was precisely developed to respond to these kinds of situations.

1 UNHCR, *The State of the World’s Refugees 2012: In Search of Solidarity* (OUP 2012) 89.

2 UNHCR, ‘Doing Protection Better’, statement by Ms Erika Feller, Assistant High Commissioner (Protection), 62nd session of the Executive Committee of the High-Commissioner’s Programme (2011) <www.unhcr.org/admin/dipstatements/4e8d5ea39/sixty-second-session-executive-committee-high-commissioners-programme-agenda.html> accessed 20 January 2021.

3 UNHCR, ‘Global Trends, Forced Displacement in 2018’ (2019) 17–18.

Southeast Asian states have long been criticized for their treatment of refugees, but the basis for comparison has traditionally been the highest standards as embedded in the Refugee Convention and under international human rights law. Yet, despite the fact that most Southeast Asian states are not parties to the Convention, those states *de facto* guarantee a certain level of protection to refugees, and in particular to those registered by UNHCR. Muntarbhorn considered in this regard that ‘the protection of the group internationally known as “refugees” is largely respected in Thailand, even though the country is not a party to the refugee instruments’.⁴ Lego noted the ‘apparently contradictory policies’ of Malaysia concerning its harsh immigration rules, on the one hand, and its relative tolerance or the exceptions it makes when it comes to applying those rules to asylum seekers and refugees on the other.⁵ This difference of treatment, it is argued, demonstrates that the concerned states do recognize that refugees have specific needs and that they should have a higher level of protection.

What remains to be seen is the extent to which the higher level of treatment provided by Southeast Asian states vis-à-vis refugees corresponds to the international standards as set out in particular in the 1951 Refugee Convention. As noted by the International Law Commission in its Draft Conclusions on Identification of Customary International Law, the fact that states ‘act in conformity with a treaty provision by which they are not bound’ may ‘evidence the existence of acceptance [of this rule] as law’.⁶ However, there is no set of standards for the treatment of refugees that apply to all refugees, wherever they may be. Even the 1951 Convention provides for different rules, depending on the degree of a person’s connection to the country of asylum, and most of these rules are defined according to the treatment accorded to nationals or foreigners. As a result, there are, in a way, as many refugee statuses and as many different forms of treatment of refugees as there are parties to the Convention.

Under international law, the ambit of refugee entitlements depends essentially on the instruments to which host states are parties, taking into consideration any reservations they may have made. The Refugee Convention as well as relevant international human rights instruments lay down obligations which states are bound to respect with regard to asylum seekers and refugees (Section 6.1). A specific issue is related to the standards of treatment of asylum seekers and refugees accepted under temporary

⁴ Vittit Muntarbhorn, *Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study* (2004).

⁵ Jera BH Lego, ‘Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the “Humanitarian Exception”’ (2010) 17 *Journal of Political Science and Sociology* 77.

⁶ ILC, ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’ (2018) Yearbook of the International Law Commission, A/73/10, vol II, Part Two, 139.

schemes in the context of large-scale influx, which is the case for many asylum seekers and refugees in Southeast Asia (Section 6.2). Apart from the case of the refugees living in the so-called temporary shelters at the border between Thailand and Myanmar, most asylum seekers and refugees in the region live in urban and rural areas. Although they are legally considered to be irregular migrants, it is argued here that they are treated differently when it comes to arrest, detention and freedom of movement (Section 6.3). Moreover, the main non-signatory states in Southeast Asia have often shown more tolerance when it comes to giving asylum seekers and refugees access to some services, including education and health, or when it comes to access to work, than would generally be the case with regard to other irregular migrants (Section 6.4).

6.1. International legal standards for the treatment of refugees

The treatment of refugees should in principle be assessed in the light of the standards set out in the Refugee Convention. These standards concern the treatment of people who have been recognized as refugees, but they also apply to a certain extent to asylum seekers awaiting a decision. They take into account not only their situation as aliens but also the specific problems of persons who cannot avail themselves of the protection of their state. Nevertheless, the system of entitlements under the Convention is particularly complex and results in varying degrees of protection. In particular, the minimum standards of treatment under the Convention are largely similar to the treatment accorded to aliens in general (Section 6.1.1). While international human rights law tends to blur the differences of treatment between foreigners and nationals, there is evidence that this distinction remains particularly important for Asian states (Section 6.1.2).

6.1.1. Standards of treatment under the refugee convention

The 1951 Convention has been described as an ‘extraordinary “Bill of Rights” for refugees.⁷ The Convention sets minimum standards, and it is left up to states to go beyond these if they wish. Some particularly important entitlements are civil and political rights, such as the prohibition of discrimination,⁸ freedom of religion,⁹ freedom of association,¹⁰ the right of

⁷ Brian Gorlick, ‘Human Rights and Refugees: Enhancing Protection through International Human Rights Law’, UNHCR New Issues in Refugee Research 30 (October 2000) 7.

⁸ Convention relating to the Status of Refugees (opened for signature 25 July 1951, entered into force 22 April 1954) 189 UNTS 150, art. 3.

⁹ 1951 Convention, art. 4.

¹⁰ Ibid., art. 15.

access to the courts¹¹ and freedom of movement within the country.¹² The other entitlements are economic and social in nature and ultimately aim to facilitate the integration of refugees into their host society. The right to work¹³ and the right to education¹⁴ are considered particularly important for refugees.

The 1951 Convention contains many provisions relating to the treatment of refugees. Yet not all rules apply in all situations and it is necessary to consider the nature of the attachment to the host state in the particular case to determine whether a specific right can be claimed. Indeed, the Convention establishes a complex system of subtle distinctions based on the degree of attachment of a person in the host country to determine entitlements, that is, the *applicability* of the norm. There are entitlements available to all refugees by virtue of the fact that they are refugees, regardless of their presence on the territory of a state of asylum. This is the case in particular for the principle of *non-refoulement*,¹⁵ the prohibition of discrimination¹⁶ and access to primary education.¹⁷ Additional entitlements require mere physical presence on the territory without legal recognition, as is the case for the prohibition of penalties on account of irregular entry.¹⁸ Others require lawful presence in the territory, that is, presence authorized by law, as is the case in particular for the right to engage in a self-employed professional activity,¹⁹ for the right to freedom of movement²⁰ and for the guarantees relating to expulsion on grounds of national security or public order that would not constitute *refoulement*.²¹

Finally, other entitlements are associated with the fact that the persons concerned have 'physical residence' in the territory of the host state²²; 'lawful stay', which is necessary to have access to wage-earning employment²³ or 'habitual residence'.²⁴ The difference between the two latter categories remains quite vague, although it is commonly argued that the 'lawful stay' refers to a 'right

11 Ibid., art. 16.

12 Ibid., art. 26.

13 Ibid., arts. 17, 18 and 19.

14 Ibid., art. 22.

15 Ibid., art. 33(1).

16 Ibid., art. 3.

17 Ibid., art. 22(1). See also arts. 13 (acquisition of movable and immovable property and other rights pertaining thereto); 16(1) (free access to domestic courts); 20 (rationing); 29 (fiscal charges), and 30 (transfer of assets).

18 Ibid., art. 31(1). See also arts. 4 (freedom of religion) and 27 (delivery of identity papers).

19 Ibid., art. 18.

20 Ibid., art. 26.

21 Ibid., art. 32.

22 Ibid., art. 25 (administrative assistance for civil status documents).

23 Ibid., art. 17. See also arts. 15 (right of association and to form trade unions); 19 (liberal professions); 21 (housing); 23 (public relief); 24 (protection of labour legislation and social security) and 28 (issuance of travel documents).

24 Ibid., arts. 16(2) (access to legal assistance) and 14 (protection of artistic rights and industrial property).

to remain in the country', while 'habitual residence' refers to a presence over a long period of time.²⁵ The drafters of the Convention do not seem to have sought to build a coherent and systematic system of entitlements with regard to the degree of connection between the refugee and the host state.²⁶ Nevertheless, the increasing protection the Convention provides seems to accompany a process of gradual integration of refugees into their new host community, which culminates with art. 34 on the assimilation and naturalization of refugees. In sum, as noted by Chetail, 'the longer the refugee remains in the territory of the state party, the broader the range of entitlements becomes'.²⁷

Once these entitlement criteria are fulfilled, the *content* of the norm is determined through another system of equivalence with the standards of treatment afforded either to aliens or to nationals. Some Convention provisions require the state to accord refugees, with regard to some specific rights, a 'treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'.²⁸ Other provisions provide that the treatment granted to refugees should be 'the most favourable treatment accorded to nationals of a foreign country, in the same circumstances'.²⁹ Finally, a number of provisions provide for treatment of refugees that is 'at least as favourable as that accorded to their citizens'.³⁰ The reference to the treatment of foreigners, which depends to a large extent on domestic law, means that the standards of treatment may vary considerably from one country to another.

This rather complex system of the Convention thus requires consideration of the link a refugee has with his or her state of asylum before the level of rights to which he or she is entitled can be determined. The principle that emerges seems to be that of assimilating the refugee to 'foreigners in general', which represents the minimum level of equality. In this regard, art. 7.1 reads as follows: 'Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally'.³¹

25 See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 524–528; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 156–160.

26 Vincent Chetail, *International Migration Law* (OUP 2019) 181–184.

27 Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 41.

28 1951 Convention, arts. 7(1) (exemption from reciprocity); 13 (acquisition of movable and immovable property); 18 (right to engage in self-employment); 19 (liberal professions); 21 (right and access to housing); 22(2) (education other than elementary education); and 26 (freedom of movement).

29 Ibid., arts. 15 (rights of association and to form trade unions) and 17 (access to wage-earning employment).

30 Ibid., arts. 4 (freedom of religion); 14 (protection of artistic and industrial property); 20 (rationing); 22(1) (primary education); 23 (public relief); 24 (labour legislation and social security) and 29 (fiscal charges).

31 Ibid., art. 7.

The same approach was reflected in the 1966 Bangkok Principles. A few states argued at the time that the standards of treatment should be equivalent to those of nationals of the host country – refugees, they claimed, were not in the same situation as other foreigners and thus deserved better treatment.³² By contrast, the majority of the delegates involved in the preparation of the Bangkok Principles considered that the standards of treatment for refugees should be the same as those accorded more generally to foreigners in the same circumstances. Accordingly, art. 6.1 of the Bangkok Principles provided that ‘a state shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances’.³³ Unlike in the case of the 1951 Convention, it was also decided not to list any specific rights for refugees beyond the rights accorded more generally to non-nationals.

6.1.2. International human rights law and the principle of non-discrimination

In the case of countries that are not parties to the 1951 Convention or to any other regional instrument on refugee protection, international human rights law provides minimum standards guaranteed under international law to all persons, regardless of their nationality. By virtue of the principle of non-discrimination, it also tends to abolish differences in treatment between foreigners and nationals, except in a very limited number of areas.³⁴

As Chetail notes, the principle of non-discrimination arguably represents ‘the most promising avenue for enhancing refugee protection through human rights’.³⁵ Whereas art. 3 of the 1951 Convention only prohibits discrimination *among* refugees ‘as to race, religion or country of origin’, the principle of non-discrimination in human rights covers also the difference of treatment between nationals and non-nationals, requiring states parties to respect and ensure that the rights of a particular convention are granted equally to all persons without discrimination of any kind.³⁶ Regarding more specifically civil and political rights, the Human Rights

32 AALCO, ‘Report of the Eleventh Session Held in Accra, Ghana, 1970’, New Delhi, AALCC Secretariat (1970) 153.

33 AALCO, ‘Bangkok Principles on the Status and Treatment of Refugees’ (31 December 1966), art. 6.1.

34 See e.g. David Weissbrodt and Stephen Meili, ‘Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?’ (August 2010) 28:4 RSQ 34–58.

35 Chetail, ‘Are Refugee Rights Human Rights?’ (n 27) 48.

36 See in particular International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art. 2.2; International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 2.1.

Committee explained in its General Comment no 15 on the position of aliens under the Covenant:

[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens.³⁷

The Committee on Economic, Social and Cultural Rights also considers that the rights under the ICESCR ‘apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation’.³⁸

Many of the entitlements provided for in the 1951 Convention are also found in human rights law. This is the case, as far as civil and political rights are concerned, for the prohibition of discrimination,³⁹ freedom of religion,⁴⁰ freedom of association,⁴¹ the right of access to courts⁴² and the right to freedom of movement within the country,⁴³ which are provided for in the ICCPR. With regard more specifically to economic and social rights, the right to education⁴⁴ and the right to work⁴⁵ are also provided for in the ICESCR (with certain limitations regarding the right to work).⁴⁶

In addition, international human rights law provides a set of important guarantees that go beyond those under the 1951 Convention, such as, in

37 Human Rights Committee, ‘General Comment no 15: The Position of Aliens under the Covenant’, HRI/GEN/1/Rev.1 (1984), para. 2. Article 13 provides some judicial guarantees against removal, while art. 25 concerns the right for an individual to take part in the conduct of public affairs, to vote and to be elected, and to have access, on general terms of equality, to public services in his country.

38 CESCR, ‘General Comment no 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2)’, E/C.12/GC/20 (2009), para. 30.

39 UNGA, Universal Declaration of Human Rights (10 December 1948) UNGA res 217 A, art. 2; ICCPR, art. 2.1; ASEAN Human Rights Declaration (adopted 28 November 2012), art. 9.

40 UDHR, art. 18; ICCPR, art. 18; AHRD, art. 22.

41 UDHR, art. 20; ICCPR, art. 22; AHRD, art. 32.

42 UDHR, art. 7; ICCPR, art. 14; AHRD, art. 5.

43 UDHR, art. 13.1; ICCPR, art. 12; AHRD, art. 15.

44 UDHR, art. 26; ICESCR, art. 13; AHRD, art. 31.

45 UDHR, art. 23; ICESCR, art. 6; AHRD, art. 27(1).

46 ICESCR, art. 2.3, provides that ‘developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’.

particular, the right to life⁴⁷; the prohibition of torture and cruel, inhuman and degrading treatment⁴⁸; the prohibition of slavery and servitude⁴⁹; the right to liberty and security of the person,⁵⁰ including the prohibition of arbitrary arrest or detention⁵¹; the right to privacy⁵²; the right to freedom of thought⁵³ and the right to freedom of opinion.⁵⁴ It also provides for procedural guarantees if a person is charged with a criminal offence, arrested or detained. These procedural rights are important for the implementation of the other rights, including in the context of immigration detention.⁵⁵ As for the additional rights deriving from the ICESCR, they include the right to just and favourable conditions of work,⁵⁶ the right to social security,⁵⁷ the protection of the family,⁵⁸ the right to an adequate standard of living⁵⁹ and the right to health.⁶⁰

It is to be noted, however, that some of the rights under the ICCPR are guaranteed only to people who are ‘lawfully’ staying on the territory of a state, including the right to liberty of movement (art. 12) and the guarantees against expulsion (art. 13). As such, they do not apply to irregular migrants. Moreover, international human rights law can be restricted or derogated from under certain circumstances, including in situations where a state may be facing a mass influx of refugees. Some of the most important civil and political rights, including the right to leave any country, including one’s own; freedom of religion; freedom of expression; the right of peaceful assembly; the right to freedom of association and the right to liberty of movement, may be subject to restrictions. In addition, art. 4.1 of the ICCPR permits derogations from certain, non-fundamental rights ‘in times of public emergency which threaten the life of the nation’, provided that such measures are strictly required by the exigencies of the situation, that they are not inconsistent with other obligations under international law and that they do not amount to discrimination ‘solely on the ground of race, colour, sex, language, religion or social origin’.⁶¹ Some rights are non-derogable, however, such as the right to life; the prohibition of torture, cruel, inhuman or degrading treatment; the prohibition of slavery, slave trade and

47 UDHR, art. 3; ICCPR, art. 6; AHRD, art. 11.

48 UDHR, art. 5; ICCPR, art. 7; AHRD, art. 14.

49 UDHR, art. 4; ICCPR, art. 8; AHRD, art. 13.

50 UDHR, art. 3; ICCPR, art. 9; AHRD, art. 12.

51 UDHR, art. 9; ICCPR, art. 9; AHRD, art. 12.

52 UDHR, art. 12; ICCPR, art. 17; AHRD, art. 21.

53 UDHR, art. 18; ICCPR, art. 18; AHRD, art. 22.

54 UDHR, art. 19; ICCPR, art. 19; AHRD, art. 23.

55 ICCPR, art. 9.

56 ICESCR, art. 7.

57 Ibid., art. 9.

58 Ibid., art. 10.

59 Ibid., art. 11.

60 Ibid., art. 12.

61 ICCPR, art. 4.1.

servitude; the recognition everywhere as a person before the law and freedom of thought, conscience and religion.⁶² As noted in Chapter 2, most of these rights exist under international customary law, and as such they apply to all states, irrespective of their accession to specific instruments.

Yet, these developments under international human rights law are not necessarily well accepted by Asian states and *a fortiori* in Southeast Asia. The difference between nationals and non-nationals, including refugees, remains a key aspect of their policies. For instance, one of the main questions during the revision of the Bangkok Principles was whether to maintain the reference to minimum standards for foreigners, or whether it was appropriate, in view of developments in the field of human rights since the adoption of the Principles, to align them with the ‘national treatment’.⁶³ Several Asian states argued in that regard that their legislation provided for preferential treatment for nationals and that certain rights were expressly denied to foreigners. As the Japanese delegate explained, ‘unlike in Africa, in Asia the standard of treatment provided was aliens standard of treatment and [that] was because the national standard of treatment in the field of labour, employment, social security, etc . . . entailed heavy burden on the receiving State’.⁶⁴ This is still the case today. In Thailand and Cambodia, for instance, the constitution contains specific provisions on the rights and obligations specific to Thai and Cambodian nationals respectively. As a result, only a minor change was eventually made in the revised version of the Bangkok Principles adopted in 2001, with article IV.1 specifying that the treatment of refugees must be ‘no less favourable than that generally accorded to aliens in similar circumstances, with due regard to basic human rights as recognised in generally accepted international instruments’. As will be seen more in detail later, Asian states accept the idea that asylum seekers and refugees deserve some form of protection, yet the level of treatment accorded to them will most likely be similar to that accorded to aliens rather than nationals in the country.

6.2. The treatment of people given temporary refuge in the context of a large-scale refugee influx in Southeast Asia

The treatment of refugees depends in part on the conditions of their admission. In the context of a mass influx, for example, states may authorize people to enter their territory but require them to stay in refugee camps. Such measures may be intended to protect the country from the presence

62 Ibid., art. 4.2.

63 AALCO, ‘Report of the AALCC/UNHCR Seminar to Commemorate the 30th Anniversary of the Bangkok Principles Concerning the Treatment of Refugees, Manila, Philippines, December 1996’, New Delhi, AALCC Secretariat (1997), para. 50.

64 AALCO, ‘Report of the tenth session of the Asian-African Legal Consultative Committee, Karachi, Pakistan, 1969’, New Delhi, AALCC Secretariat (1969) 47.

of refugees if they represent a ‘threat’ to national security, or if the authorities fear that their presence could cause problems with the local population. It may also be a way of preventing any progress towards the refugees’ integration, with a view to facilitating their possible departure to another country of asylum or return to their country of origin. Refugee camps were established in several countries across Southeast Asia to shelter Vietnamese refugees pending their resettlement. Thailand also hosted hundreds of thousands of asylum seekers and refugees from Laos and Cambodia during the Indochinese refugee crisis. Since the mid-1980s, Thailand has provided temporary shelter to hundreds of thousands of refugees from Myanmar in camps along the border between the two countries. As for Bangladesh, as of December 2020, it hosted some 860,000 Rohingya from Myanmar, including some 600,000 of them in the biggest refugee camp in the world.⁶⁵

Apart from the fact that refugees may be accommodated in camps, one of the main issues in the context of large-scale movement concerns the standards of treatment of people who have been granted a temporary refuge. The 1951 Convention is silent on the issue of temporary asylum, except in the context of expulsion, and instead favours a durable solution by integration. The treatment of refugees during the Indochinese refugee crisis was subject of much criticism at the time, although it varied significantly over time (Section 6.2.1). It is the practice of temporary asylum during the Indochinese crisis that highlighted the lack of clarity regarding the standards of treatment applicable to refugees admitted on a temporary basis and led to the development of related standards (Section 6.2.2). While in legal terms refugees remain considered as irregular migrants in Thailand, the example of the Burmese refugees at the border with Myanmar illustrates how the rigour of the law may be attenuated in practice, leading to a certain level of *de facto* integration (Section 6.2.3).

6.2.1. Towards a ‘Humane Deterrence Policy’ vis-à-vis Indochinese refugees

The issue of the standards of treatment accorded to refugees received significant attention during the Indochinese crisis, when hundreds of thousands of refugees were lingering in camps pending their resettlement or return. The images of refugee camps across Southeast Asia, particularly those on the Cambodia/Thai border, have at the time left their mark on public consciousness as much as the images of Vietnamese ‘boat people’ crammed into fishing boats. Although conditions in the camps varied over time, depending on the political context and the groups of people concerned, they were

⁶⁵ Inter Sector Coordination Group, ‘Situation Report Rohingya Refugee Crisis’ (December 2020) <www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/final_sitrep_-_december_2020_en.pdf> accessed 17 January 2021.

often described as extremely poor. According to Robinson, for instance, temporary refuge under those circumstances ‘amounted to little more than detention pending departure’.⁶⁶ Anne Barcher described the conditions in the camps throughout Southeast Asia as ‘ranging from bad to abysmal, including lack of security, a high incidence of violent crimes such as rape, murder and robbery, an inadequate supply of nutritious food, overcrowding, unsanitary conditions, poor quality or non-existent health care, and a general lack of employment, educational opportunities, and recreational activities’.⁶⁷ Others, however, have provided a more nuanced picture of the situation considering the overall context.⁶⁸ It was clear indeed that the conditions in many of the camps, considering the massive injection of international aid for refugees in the region, were better than those available in the countries of origin and perhaps also better than the living conditions of many nationals in the countries of asylum.

The countries of first asylum made some efforts to improve the conditions in the camps as the length of the refugees’ stay extended, while making sure that such initiatives would not contribute to fixing in any way the refugee population on their territory. Projects to ensure the self-sufficiency of the refugees were initiated by UNHCR and other organizations. Education was also made available in the camps, although this was generally limited to primary and secondary levels.⁶⁹ Other vocational and language training was subsequently put in place to address and alleviate the problems arising from the prolonged presence of refugees in the camps. According to Muntarbhorn, these initiatives revealed a certain recognition on the part of the Thai authorities of a right to education for refugees, similar to that provided for in art. 22 of the 1951 Convention but deriving from a moral rather than a legal obligation.⁷⁰ Most of the services in the camps during this period were provided by international organizations and NGOs. In the early 1980s, there were nearly 100 NGOs working with the Indochinese refugees, about 60 of them in Thailand alone.⁷¹

66 W Courtland Robinson, ‘The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck’ (2004) 17:3 JRS 323.

67 Ann C Barcher, ‘First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?’ (1991–1992) 24 New York University Journal of International Law and Politics 1264.

68 Dennis McNamara, ‘The Origins and Effects of “Humane Deterrence” Policies in Southeast Asia’ in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (OUP 1989) 131–132; Supang Chantavanich and Paul Rabe, ‘Thailand and the Indochinese Refugees: Fifteen Years of Compromise and Uncertainty’ (1990) 18:1 Asian Journal of Social Science 75–77.

69 Vitt Muntarbhorn, *The Status of Refugees in Asia* (OUP 1992) 119.

70 Vitt Muntarbhorn, ‘Displaced persons in Thailand: Legal and national policy issues in perspective’ in ‘Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, Manila, Philippines’, HCR/120/25/80 (14–18 April 1980) 168; Muntarbhorn, *The Status of Refugees in Asia* (n 69) 133.

71 UNHCR, ‘Role of the Office of the United Nations High Commissioner for Refugees in South-East Asia (1979–1983)’, JIU/REP/84/15 (1984), para. 91.

The situation of the Cambodian refugees at the border between Thailand and Cambodia was of particular concern. While Cambodians had been accepted into Thai territory, in January 1980, Thailand adopted a new policy, known as the ‘closed-door policy’, according to which they would not be allowed to access the Thai territory anymore. Instead, the Cambodians would be kept in the border area between the two countries – the term ‘border’ in this context referred to a ‘grey area’ where it was not clear whether the territory belonged to Thailand or Cambodia – in extremely precarious conditions, with no access to UNHCR or to resettlement opportunities. At the same time, the situation had become extremely explosive at the border and the new location of the camps was also a way for Thailand to create a buffer zone against the Vietnamese forces. The camps thus sheltered a large number of Khmer Rouge fighters who were supported by Thailand as well as by the United States and China, making any international presence in the camps difficult.⁷² This obviously led to many problems inside the camps, including security problems, high levels of violence, forced recruitment by armed groups and the diversion of food or medicine distributions. Even though they were in principle not allowed access to Thai territory, those displaced from Cambodia were generally able to enter Thailand when the situation deteriorated. As noted by Perluss and Hartman, the policy of considering the Cambodians as ‘irregular migrants’ while keeping them at the border represented an ‘ambiguous example’ of Thailand ‘conforming to the norm of temporary refuge with respect to Cambodians, but technically assert[ing] that its border is closed’.⁷³

Another aspect of the Southeast Asian response to the Indochinese refugee crisis that has drawn much criticism is the so-called humane deterrence policy. The term was indeed first coined by Thailand in 1981 to refer to a new policy vis-à-vis Laotian asylum seekers, later expanded to the Vietnamese, aimed at controlling the seemingly unending influx of asylum seekers into the country. Under this new policy, conditions in the camps would be made more difficult and resettlement would no longer be available. Looking at it more closely, however, this policy was not a reflection of the Thai Government’s lack of compassion and concern for the plight of the Indochinese nor was it evidence that Southeast Asian countries rejected international refugee law. The humane deterrence policy was developed in response to the lack of interest in the Laotian refugees at the 1979 Meeting on Refugees and Displaced Persons in South-East Asia. As with the Cambodian refugees, these were considered to be only issues for Thailand, not the rest of the region. In the meantime, it had become obvious that a large proportion

72 Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Nijhoff 1997) 137–138.

73 Deborah Perluss and Joan Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 *Virginia Journal of International Law* 571.

of Laotian asylum seekers had in fact been attracted by the prospect of resettlement.

Against this backdrop, the ‘humane deterrence’ policy aimed primarily to dissuade people without a valid claim to asylum, who were mostly lowland Lao, from leaving their country. This policy was carried out with the official endorsement of Western states in the context of an extremely complex political, geopolitical and humanitarian situation. The United States, indeed, was ‘particularly supportive’ of this policy, while UNHCR approved the efforts of the Thai Government to reduce the Indochinese ‘caseload’. The result was a clear deterioration of the conditions in the camps, which led to further international criticism.⁷⁴

6.2.2. Defining the standards of treatment under temporary refuge

At the normative level, UNHCR had deplored that refugees admitted to a country on a temporary basis were ‘generally accorded very few of [the] rights’ provided for in the Refugee Convention.⁷⁵ The Group of Experts convened by UNHCR in 1981 to examine the question of temporary asylum in situations of large-scale refugee influx noted that ‘existing international instruments on the status of refugees and asylum provide for admission on a temporary basis, but, from the point of view of the status and protection of persons granted temporary refuge, they do not deal with this aspect very satisfactorily’.⁷⁶ Access to asylum had been the priority, but once it was obtained, other issues arose regarding the treatment of persons in need of international protection.

In order to address a situation that could be regarded as being ‘in a twilight zone between law and fact’, the Group of Experts came up with a list of 17 standards based on the 1951 Convention as well as on the main human rights instruments that are applicable in situations where temporary asylum is granted in response to situations of mass arrival of refugees, regardless of the treaties to which states are parties. The ExCom subsequently adopted Conclusion no 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, which contained a list of ‘minimum basic human standards’ largely inspired by the report of the Group of Experts.⁷⁷ The Conclusion stated that these standards should apply both to persons who are refugees within the meaning of the 1951 Convention and to those who meet broader criteria such as those established by the OAU Convention.

⁷⁴ McNamara, ‘Humane Deterrence’ (n 68) 128–133.

⁷⁵ UNHCR, ‘Report of the United Nations High Commissioner for Refugees’, A/36/12 (28 August 1981), para. 34.

⁷⁶ UNHCR, ‘Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Geneva, 21–24 April 1981’, EC/SCP/16/Add.1 (17 July 1981), section H.

⁷⁷ ExCom, Conclusion no 22 (XXXII) on the Protection of Asylum-seekers in Situations of Large-scale Influx (1981).

These initiatives aimed primarily at providing a framework for the practice of temporary refuge in Southeast Asia.⁷⁸

Besides the principle of *non-refoulement*, other standards as provided for in Conclusion no 22 include the fact that refugees should not be subject to sanctions solely because of their illegal entry or presence in the country; the principle of freedom of movement; respect for human rights as provided for in the UDHR; the principle of non-discrimination; the prohibition of cruel, inhuman and degrading treatment; the prohibition of discriminatory measures based on race, religion, political opinion, nationality or country of origin and the principle of equality before the law.⁷⁹ According to UNHCR, the adoption of these standards ‘marked a turning point in the history of the international protection of refugees, since they set forth basic principles and minimum standards of treatment for asylum-seekers in large-scale influx situations’,⁸⁰ including in states not bound by the Convention or Protocol. Their importance was reaffirmed in the context of the 2001 Global Consultations on International Protection, with states referring to the Conclusion no 22 as an ‘important yardstick’.⁸¹

Another issue was related to the level of entitlements afforded to refugees in situations that become increasingly protracted. Indeed, it has often been argued that persons admitted on a temporary basis should not have access to the full range of entitlements set forth in the 1951 Convention precisely because of the ‘temporary’ nature of their stay.⁸² In particular, temporary refuge would not include rights oriented towards the integration of refugees in the country of asylum. Although Conclusion no 22 states that the persons concerned ‘should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights’,⁸³ it did not specifically mention several rights that are nevertheless important for refugees, such as the right to education and the right to work. Since then, it has been largely recognized that the standards of treatment of refugees in such situations should be increased over time beyond the minimum in Conclusion no 22 when the period of exile is prolonged.⁸⁴

The question of who is to be considered ‘lawfully present’ in a country is critical in this regard. Under international refugee and human rights law, people whose presence is ‘lawful’ have access to a few additional

78 See e.g. Alice Edwards, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13:2 Melbourne Journal of International Law 625.

79 ExCom, Conclusion no 22 (n 77), para. II.B.2.

80 UNHCR, ‘Addendum to the Report of the United Nations High Commissioner for Refugees’, A/37/12/Add.1 (10 November 1982), para. 45.

81 UNHCR, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’, EC/GC/01/4 (19 February 2001), para. 8.

82 UNHCR, ‘Note on International Protection’, A/AC.96/830 (7 September 1994), para. 46.

83 ExCom, Conclusion no 22 (n 77), para. II.B.2(b).

84 UNHCR, ‘1994 Note on International Protection’ (n 82), para. 49.

entitlements, including freedom of movement⁸⁵ and additional guarantees against arbitrary expulsion.⁸⁶ There is no obligation for a state, not even under the Refugee Convention, to regularize the presence of asylum seekers and refugees.⁸⁷ Some commentators have nevertheless argued in favour of a more liberal interpretation of what constitutes ‘lawful’ presence, maintaining for example that presence that has been ‘authorized’ or even ‘tolerated’ by the authorities should be considered as ‘lawful’. For instance, Hathaway argued that asylum seekers should be considered as ‘lawfully’ present in the territory of a state ‘once they have been admitted to a status verification procedure, temporary protection regime, or authorized *de facto* to remain without investigation of their need for protection’.⁸⁸ In the same vein, Durieux and McAdam argued that ‘once refugees have been admitted and treated as refugees over a number of years (albeit on a *prima facie* basis), and no other State will assume responsibility for them, asylum States cannot hide behind the semantic ambiguity of “lawfully in” or “lawfully staying” clauses’ to deny them access to some rights.⁸⁹ This line of argument could be made in the case of asylum seekers and refugees who have been allowed to stay under a temporary refuge policy in Southeast Asian countries for a potentially indefinite period of time while waiting for the prospect of return or resettlement.

In 2014, UNHCR developed the Guidelines on Temporary Protection or Stay Arrangements with the aim of ‘bringing [Conclusion no 22] in line with subsequent developments in international human rights law’. Some of the entitlements provided for in the TPSAs Guidelines include ‘protection against arbitrary or prolonged detention’; ‘non-discriminatory, humane and dignified treatment, including guarantees of shelter/housing, access to health and other basic services’; ‘freedom of movement’ and ‘physical security’. The minimum standards of treatment also refer to the need to have ‘recognized and documented permission to stay’ in the country for the designated period as well as access to education and to ‘self-sufficiency or work opportunities’.⁹⁰ Further, the Guidelines specify that in cases of extended stay, or where transition to

⁸⁵ 1951 Convention, art. 26; ICCPR, art. 12.

⁸⁶ 1951 Convention, art. 32; ICCPR, art. 13.

⁸⁷ The Human Rights Committee noted in 1999 that

the question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations.

See Human Rights Committee, ‘General Comment no 27: Article 12 (Freedom of movement)’, CCPR/C/21/Rev.1/Add.9 (1999), para. 4.

⁸⁸ Hathaway, *The Rights of Refugees* (n 25) 228–229. See also Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 673–677.

⁸⁹ Jean-François Durieux and Jane McAdam, ‘Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16:1 IJRL 15.

⁹⁰ UNHCR, ‘Guidelines on Temporary Protection or Stay Arrangements’ (February 2014), para. 23.

solutions is delayed, then ‘the standards of treatment would need to be gradually improved’.⁹¹ This discussion regarding the necessity of increasing the standards of treatment of refugees after a certain period of time should be placed in the context of the development in the field of international human rights. International human rights law applies when people are on the territory or under the jurisdiction of a state, regardless of the number of persons involved and regardless of the time they spend in the country.

6.2.3. The case of ‘displaced persons’ from Myanmar in camps at the Thai border: the difference between law and practice

More concerned at the time by the situation on the country’s other borders, Thailand had temporarily allowed the first people who arrived from the Karen State in Myanmar in the late 1970s to settle on its territory. They were followed by tens of thousands more throughout the 1980s. UNHCR was only allowed to carry out protection activities in camps at the border with Myanmar in 1998, as the relations between Myanmar and Thailand improved, and mainly with a view to finding durable solutions for the ‘displaced persons’ living in those camps, some of whom had been there for nearly 20 years.

As Lang has noted, the Burmese were ‘recognized as *de facto* “refugees” and as a group with genuine claims to asylum in the border camps’.⁹² Yet, Thailand has always said that those living in the camps at the border should and would return to Myanmar, and sooner rather than later. The temporary nature of the refuge granted by the Thai Government justified certain restrictive policies towards them and, during the nearly 40 years that these camps have existed, the Thai authorities have been reluctant to extend the rights of these ‘displaced persons’. Their freedom of movement is in principle limited as they are formally not allowed to leave the camps without official permission; they do not have formal access to the labour market and they have limited educational opportunities. No attempt has been made by the authorities to facilitate their integration in Thailand. They remain largely dependent on external assistance, which is mainly provided through a consortium of NGOs known today as The Border Consortium (TBC).⁹³ The Thai Government has also refused any improvement of the constructions and infrastructure inside the camps that could give the impression that the facilities were being built for a long period of time. In other words, the government continues to assert that the tens of thousands of people in the camps are expected to return to Myanmar in a near future.

91 Ibid., para. 17.

92 Hazel Lang, ‘The Repatriation Predicament of Burmese Refugees in Thailand: A Preliminary Analysis’, UNHCR New Issues in Refugee Research 46 (July 2001).

93 This group of NGOs was initially known as the Burmese Border Consortium, then as the Thailand–Burma Border Consortium (TBBC) and since 2012 as The Border Consortium (TBC). It has been providing assistance in the camps since the early 1980s.

In practice, however, the situation has been much more fluid. Thousands of people have settled down in the camps without being registered by the PABs and movements in and out the camps have been frequent in broad day light, with the authorities turning a blind eye. The displaced persons are indeed dependent on the assistance of TBC but there is also an informal trading system within the camps and with external traders.⁹⁴ In principle, those controlled and arrested outside the camps should be put in detention pending their removal as ‘illegal migrants’. In practice, however, they are generally released as soon as they can produce evidence that they are residing in one of the ‘temporary shelters’.

The authorities show the same tolerance with regard to access to employment: while working remains formally prohibited, in reality a large proportion of the camp population has found work outside the camps, for example in the agriculture or manufacturing sectors.⁹⁵ In 2007, this proportion was estimated at 40 per cent.⁹⁶ It is certainly higher today. Many people work for international NGOs that have activities inside the camps;⁹⁷ others are registered in the camps but work in Bangkok or have an official work permit in one of the provincial capitals. As explained in a joint UNHCR/ILO report, the ‘unwritten rule’ is that ‘if there is no criminality involved within the community at large, this mainly informal survival system will be allowed to continue’.⁹⁸ The informal fluidity that has developed between the categories of ‘displaced people’/refugees and ‘migrants’ over the decades of encampment has been a way to ensure a more dignified life for people while maintaining restrictive policies.

Progress has also been made in the field of education. The Committee for Coordination of Services to Displaced Persons in Thailand (CCSDPT), which coordinates humanitarian activities in the ‘temporary shelters’, authorized external organizations to develop educational activities in the camps in 1996. All camps have an education system at the nursery and primary level and even at secondary level. Problems remain, of course, such as the fact that the education provided is not certified by the Thai education system.⁹⁹

94 UNHCR and ILO, ‘Report on the Potential for Increasing Opportunities for Self Reliance and Income Earning/Generation on the Thai-Myanmar Border’ (2007) 11. See also Edith Bowles, ‘Assistance, Protection and Policy in Refugee Camps on the Thailand-Burma Border: An Overview’ (Refugee Studies Programme, University of Oxford 1997).

95 UNHCR and ILO, ‘Potential for Increasing Self Reliance’ (n 94) 22. See also Inge Brees, ‘Refugee Business: Strategies of Work on the Thai-Burma Border’ (2008) 21:3 JRS 387–388.

96 USCRI, *World Refugee Survey 2008 – Thailand* (19 June 2008) 164.

97 UNHCR and ILO, ‘Potential for Increasing Self Reliance’ (n 94) 24.

98 *Ibid.*, 11.

99 Human Rights Council, ‘National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: Thailand’, A/HRC/WG.6/12/THA/1, 19 July 2011, para. 104 <https://digitallibrary.un.org/record/707400/files/A_HRC_WG.6_12_THA_1-EN.pdf> accessed 20 January 2021.

In terms of access to education, the main challenge arises beyond secondary level,¹⁰⁰ as Thailand does not seem willing to provide access to local education systems, and therefore to university, for camp residents.

In sum, in spite of the tight restrictions, there is in fact some protection space for people admitted into the camps. Those concerned receive assistance from international organizations and NGOs; they have access to education and healthcare; people leave and enter the camps easily and without the authorities seeking to prevent them; thousands of people work around the camps or in provincial towns and those who are controlled and arrested outside are not deported. While all this continues to be allowed informally, it can indeed be argued that ‘de facto, and even structural, local integration is happening’.¹⁰¹

6.3. Freedom of movement and non-penalization for irregular entry into the territory of a state

The question of the protection of refugees is different for those who are not living in camp settings. With the exception of the camps at the border between Thailand and Myanmar, all asylum seekers and refugees in Southeast Asia live in semi-rural and urban areas. Refugees are thus no longer concentrated in one place but are dispersed in cities. They are not only more difficult to reach to provide assistance but also more likely to be in contact with government officials. As the authorities in many countries across the region continue to consider them to be ‘illegal migrants’, they may also be subject to law enforcement measures provided for such persons under immigration laws, in particular when it comes to arrest, detention and deportation.

Although Thailand and Malaysia host a considerable number of irregular migrants and to a large extent benefit from what is essentially a cheaper workforce, they have often clamped down on irregular migration, raiding workplaces and areas known to be hosting migrants and arresting and detaining people based on violations of national immigration laws. Immigration laws in those countries are often harsh in an effort to dissuade irregular migration – in Malaysia, for instance, irregular migrants may be subject to whipping if they return after having been deported.¹⁰² In the absence of domestic laws and procedures aimed at distinguishing between refugees and other irregular migrants, one of the main issues is the risk that people in need of international protection may be subject to the same treatment

100 Marc van der Stouwe and Su-Ann Oh, ‘Educational Change in a Protracted Refugee Context’ (June 2008) 30 *Forced Migration Review* 47.

101 Brees, ‘Refugee Business’ (n 96) 392.

102 Malaysia, Immigration Act 1959/63, Incorporating all Amendments up to 1 January 2006, section 36.

and sent back to their country of origin in violation of the principle of *non-refoulement*. Commentators and NGOs have on many occasions denounced the fact that those countries treat asylum seekers, refugees and irregular migrants in the same way. According to Amnesty International, for instance, ‘all are considered to be illegal and are subject to the same penalties’.¹⁰³

The detention of asylum seekers and refugees, as UNHCR has noted, represents ‘one of the most consistently troubling’ areas in the practice of asylum, both in non-signatory states and in states that are parties to the Refugee Convention.¹⁰⁴ While immigration detention also remains an issue in Southeast Asia and while Southeast Asian states have been clearly reluctant to grant ‘rights’ to refugees in the region, close examination of their practice reveals that refugees are increasingly treated differently from other irregular migrants in terms of their freedom of movement (Section 6.3.1). In some cases, Southeast Asian states also respect *de facto* the duty of non-penalization of refugees for irregular entry into their territory, thus going beyond their legal obligations in such cases (Section 6.3.2). Yet, in discussing these issues, the attempts of other states – in particular Australia – to enlist Southeast Asians states in their efforts to fight irregular migration must also be mentioned. In the case of Indonesia, the increase in the number of detained asylum seekers and refugees was a direct consequence of Australia outsourcing its restrictive immigration policies (Section 6.3.3).

6.3.1. Freedom of movement under international law

While freedom of movement is considered an important right for refugees, it is subject to many restrictions. Under international law, the right to freedom of movement is generally limited to people who are ‘lawfully’ in the territory of a state. Article 26 of the 1951 Convention provides that a state party shall grant refugees who are ‘lawfully in its territory’ the ‘right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances’.¹⁰⁵ Besides the requirement of lawful presence in the territory of a state, it should be noted that this provision is one of the most widely reserved provisions in the Refugee Convention.¹⁰⁶ Article 12.1 of the ICCPR also specifies: ‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’. Although it is non-binding, art. 15 of the AHRD is more generous, as it provides that ‘every person’ has the right to freedom of movement and residence within the borders of each state.

103 AI, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia’, ASA 28/010/2010 (June 2010) 7.

104 UNHCR, *The State of the World’s Refugees 2012* (n 1) 50.

105 1951 Convention, art. 26.

106 For an overview of the reservations and declarations to the 1951 Convention, see <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 17 January 2021.

Particularly important for refugees is art. 31(1) of the Refugee Convention, which provides that states ‘shall not impose penalties, on account of their illegal entry or presence, on refugees’, provided they have come directly¹⁰⁷ and ‘present themselves without delay to the authorities and show good cause for their irregular entry or presence’. This provision, also known as the ‘non-penalization’ clause, was specifically included to take into consideration the circumstances under which refugees may be compelled to leave, and the fact that they cannot be expected to comply with administrative formalities in order to seek asylum in a new country. Once in another country, however, they are expected to actively make themselves known to the authorities within a reasonable period of time. This provision is one of the few in the Refugee Convention, along with, notably, art. 33(1) prohibiting *refoulement*, that applies also to asylum seekers, whatever their legal status. The term ‘penalty’ in the context of art. 31(1) does not, however, preclude the administrative detention of asylum seekers as such. What is prohibited is rather detention as a ‘punitive’ measure.¹⁰⁸ It is to be noted also that this provision does not apply to individuals who claim refugee status only once they have been apprehended by the authorities, unless they have not had the chance to approach the authorities and to seek regularization of their status. This could, for example, be the case for people who have been intercepted at sea or while crossing a border.¹⁰⁹ As Hathaway rightly observed, ‘Because refugees are only required to present themselves “without delay” in order to benefit from Art. 31, it would make no sense to deny that protection simply because apprehension by authorities was nearly immediate’.¹¹⁰

The Refugee Convention also protects asylum seekers and refugees who are exempted from penalties in virtue of art. 31(1) against restrictions on

¹⁰⁷ As Goodwin-Gill notes:

Refugees are not required to have come ‘directly’ from their country of origin. The intention, reflected in the practice of some States, appears to be that, for Article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of ‘good cause’ for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.

Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection’ in Feller et al. (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP June 2003) 194.

¹⁰⁸ See in particular Gregor Noll, ‘Article 31 (Refugees Unlawfully in the Country of Refuge/ Réfugiés en situation irrégulière dans le pays d’accueil)’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2010) 1243–1276.

¹⁰⁹ Gallagher and David, *The International Law of Migrant Smuggling* (n 88) 166.

¹¹⁰ Hathaway, *The Rights of Refugees* (n 25) 390–391.

their freedom of movement other than those which are necessary, and then only until their status in the country is regularized or they obtain admission into another country.¹¹¹ Yet, in the absence of a specific purpose, the state enjoys broad discretion when it comes to deciding the objectives that render restrictions on refugees' movement 'necessary'.¹¹² In the absence of any specific obligation for a state to regularize the presence of refugees, restrictions on freedom of movement may be linked to the possibility for a refugee to be accepted for resettlement in another country. Article 31(2) also implies that refugees who do not meet the requirements of art. 31(1) may in some cases be subject to restrictions on their movement. Both encampment and detention are arguably among such measures that may be deemed necessary to restrict the freedom of movement of refugees.

6.3.2. Southeast Asia and the duty of non-penalization for irregular entry

Freedom of movement and the duty of non-penalization for irregular entry into the territory of a state are formally recognized by the countries in Southeast Asia that are parties to the Refugee Convention. In the Philippines, the 2012 Department Circular no 058 expressly provides for the principle of 'non-detention on account of being stateless or refugee'.¹¹³ In Cambodia, the Sub-decree adopted in 2009 provides that refugees are to receive a residence card, while asylum seekers are to receive a preliminary stay permit, in the form of a visa in their passport or an official letter issued by the authorities, pending a decision on their case.¹¹⁴

In countries that are parties to the 1951 Convention, the authorities are in principle responsible for the registration and issuance of identity documents.¹¹⁵ In other states, it is generally UNHCR that undertakes these functions. Those registered by UNHCR in these other countries, for example in Malaysia, Thailand or Indonesia, be they asylum seekers or refugees, receive a 'registration card'. The issuance of a registration card or an identity document in these contexts has a protective function: such documents not only attest to the status of the persons concerned, they may also contribute to guaranteeing a certain level of protection – at the very least against arrest and *refoulement* when asylum seekers and refugees come into contact with

¹¹¹ 1951 Convention, art. 31(2).

¹¹² Noll, 'Article 31' (n 108) 1268–1272.

¹¹³ Philippines, Department Circular no 058 Establishing the Refugees and Stateless Status Determination Procedure (18 October 2012) section 3.b.

¹¹⁴ Cambodia, Sub-Decree no 224 of 2009, on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia (17 December 2009), arts. 15 and 8.

¹¹⁵ 1951 Convention, art. 27.

authorities or civil servants.¹¹⁶ Yet, the documents issued by UNHCR may not be officially recognized by the authorities, as is the case in several countries in Southeast Asia. The question then arises as to how far the authorities recognize UNHCR registration cards and to what extent people registered by UNHCR are treated differently from other irregular migrants.

An examination of the practice of states shows that there is a tendency to distinguish between irregular migrants and persons of concern to UNHCR in the region when it comes to the enforcement of immigration laws.¹¹⁷ In Malaysia, for example, urban refugees holding a UNHCR registration card are largely tolerated in the country and benefit from extensive freedom of movement. Several commentators have noted the ‘tacit acknowledgment’ by the authorities of the presence of refugees in the country.¹¹⁸ In 2014, the Director of Immigration Enforcement was quoted as saying:

In this administration based on the elements of humanity, the government allows any illegal immigrants who received recognition from the UNHCR to stay temporarily in Malaysia until resettled to a third country. We do not know the period they can stay in Malaysia for the time being because this involves national security matters. The easiest thing to say is that the government is ‘closing one eye’ on the matter.¹¹⁹

A specific directive, addressed to prosecutors but not made public, was issued by the Attorney General of Malaysia in 2005 to instruct them to refrain from prosecuting UNHCR cardholders for immigration offences. This policy has since been confirmed by the authorities on various occasions. For instance, in July 2010, the Foreign Minister of Malaysia explained that refugees, as irregular migrants, were in principle subject to detention under the Immigration Act, but that ‘on humanitarian grounds, these people are handed over to the UNHCR (on request) if they can prove that they are under the protection of the organization and had obtained verification from it’.¹²⁰ While deplored the lack of formal structures and frameworks to deal with refugee issues in Malaysia, UNHCR noted in 2013 that the government had put in place

ad hoc administrative arrangements to facilitate the work of UNHCR in providing assistance and protection to refugees and asylum seekers,

116 ExCom, Conclusion no 91 (LII) on Registration of Refugees and Asylum-Seekers (2001).

117 Sébastien Moretti, ‘Keeping Up Appearances. State Sovereignty and the Protection of Refugees in Southeast Asia’ (2018) 17:1 European Journal of East Asian Studies 20–25.

118 Caitlin Wake, “Turning a Blind Eye” The Policy Response to Rohingya Refugees in Malaysia’, Humanitarian Policy Group Working Paper (November 2016) 3.

119 Equal Rights Trust, ‘Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia’, London (October 2014) 30–31.

120 Quoted in Lego, ‘Protecting and Assisting Refugees in Malaysia’ (n 5) 77.

among which are the recognition by the Government of UNHCR-issued identity documents to asylum seekers and refugees, which has resulted in a significant decrease in the arrest and detention of individuals who possess them.¹²¹

While numerous cases have been reported of asylum seekers and refugees being arrested – a phenomenon that the authorities have partly justified by the large number of counterfeit cards in circulation¹²² – there seems to be increased respect for UNHCR-issued registration cards in Malaysia.¹²³ In 2018, UNHCR noted that it ‘enjoy[ed] good cooperation with the authorities in the application’ of the 2005 directive.¹²⁴ The UN Country Team in Malaysia also ‘welcomed the growing acceptance by law enforcement officials of UNHCR-issued documents (UNHCR cards, Certified True Copies of UNHCR cards, Asylum Seeker Certificates and appointment cards) and the reduction in detention of refugees and asylum seekers’.¹²⁵ Moreover, UNHCR generally has access to its persons of concern who are detained (although access can vary over time) and it is often able to secure their release, although the process can take a long time.¹²⁶

The situation is more problematic for those who are arrested and detained *before* they have been registered by UNHCR, in which case detention seems to be applied as punishment for irregular entry. When Malaysian authorities intercept ‘boat people’, for example, they may prosecute them for violating immigration laws, without giving them the opportunity to contact UNHCR. It is thus only at the end of their sentence, after they have been transferred to an IDC, that the people concerned might be registered. In addition, UNHCR often experiences difficulties in accessing persons of concern and

121 UNHCR, ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: Malaysia’ (March 2013).

122 See Mayuri Mei Lin, ‘UNHCR Barred from Issuing ID Cards, Minister Says’, *The Malay Mail* (20 July 2016) <www.malaymail.com/news/malaysia/2016/07/20/unhcr-barred-from-issuing-id-cards-minister-says/1165605> accessed 16 January 2021.

123 See e.g. UNHCR, ‘But When Will our Turn Come? A Review of the Implementation of UNHCR’s Urban Refugee Policy in Malaysia’, PDES/2012/02 (May 2012) 13–14; Lego, ‘Protecting and Assisting Refugees in Malaysia’ (n 5) 89.

124 UNHCR, ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report, Universal Periodic Review, 3rd Cycle, 31st Session, Malaysia’ (March 2018).

125 Human Rights Council, ‘Compilation on Malaysia: Report of the Office of the United Nations High Commissioner for Human Rights’, A/HRC/WG.6/31/MYS/2 (3 September 2018), para. 86 <<https://undocs.org/A/HRC/WG.6/31/MYS/2>> accessed 20 January 2021.

126 See e.g. Asia Pacific Refugee Rights Network (APRRN), ‘Malaysia Factsheet’ (March 2017) <https://aprrn.info/pdf/Malaysia%20Factsheet%20for%20NZ_MAR%202017.pdf> accessed 20 January 2021; UNHCR, ‘Progress Report 2018, Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees, 2014–2019’ (February 2019) 49–54.

securing their release from IDCs if they have not been registered prior to their arrest.¹²⁷ This arguably corresponds to a rather restrictive interpretation of art. 31(1) of the Refugee Convention that provides that refugees would not be penalized for irregular entry if they ‘present themselves without delay to the authorities’ – in the present case UNHCR.¹²⁸ One of the main issues in this regard is the fact that asylum seekers might have to wait months to obtain just the first interview with UNHCR in Malaysia. In the meantime, they are vulnerable to the strict application of immigration laws.

The picture has been somewhat bleaker in Thailand. The registration cards provided by UNHCR offer an effective protection against return, but not necessarily against detention. Asylum seekers and refugees who possess a registration card thus remain at risk of being arrested, in which case they may be held indefinitely in IDCs, as the Thai authorities generally refuse to release them without a guarantee that they will leave the territory. There has been some progress recently in terms of alternatives to detention, with asylum seekers and refugees being released on bail with the support of NGOs, but these positive developments remain limited.¹²⁹

Yet, there are hopes that the National Screening Mechanism established by the Thai authorities in December 2019 might contribute to putting an end to the detention of asylum seekers and refugees. Indeed, the new regulation specifies that ‘[an] alien who claims that there is a reasonable ground to be a Person under Protection’ must submit a request in this regard, which should be addressed within 30 days.¹³⁰ If it is determined that the person concerned ‘is eligible to submit a request to be a Person under Protection’, then the authorities ‘shall issue a document identifying the status of the alien as a Person pending Status Screening’ (in other words, as an asylum seeker).¹³¹ The Regulation then provides that the person concerned may be allowed ‘to reside wherever deemed appropriate’ pending the rest of the procedure.¹³² While the details of the procedure are still to be announced, in theory a person seeking asylum should not be penalized for irregular entry into the territory of Thailand, and the period of detention, for administrative purposes, should not exceed one month.

¹²⁷ UNHCR, ‘But When Will Our Turn Come?’ (n 123) 22; UNHCR, ‘Compilation Report UPR Malaysia’ (2013) (n 122).

¹²⁸ See Moretti, ‘Keeping Up Appearances’ (n 117) 20–25; Sébastien Moretti, ‘Southeast Asia and the 1951 Refugee Convention: Substance without Form?’ (2021) 33:2 *International Journal of Refugee Law*.

¹²⁹ See also UNHCR, ‘Progress Report Mid-2016, Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees, 2014–2019’ (August 2016) 71–75.

¹³⁰ Thailand, Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562 (25 December 2019) cl. 16 and 17.

¹³¹ Ibid., cl. 18 and 19.

¹³² Ibid., cl. 20.

6.3.3. Indonesian–Australian cooperation and increased immigration detention in Indonesia

Indonesia has traditionally tolerated the presence of asylum seekers and refugees on its territory. In 2002, it adopted the Directive on Procedures Regarding Aliens Expressing Their Desire To Seek Asylum and Refugee Status, which specified that the presence and the ‘status’ of the persons concerned must be respected, provided that they have obtained an attestation letter or an identification card from UNHCR.¹³³ This meant that they would not be processed like other irregular migrants, including when it came to arrest, detention and repatriation. In this way, as noted by Tan, the Directive ‘protect[ed] asylum seekers and refugees from detention or deportation while their refugee status determination [was] pending, or after it [was] approved’.¹³⁴ In the same vein, another Directive adopted in 2010 stated that ‘an irregular migrant’s status within the country shall not be in question provided that such person: a. has obtained an Attestation Letter of Asylum Seeker from the UNHCR; or b. has been granted refugee status by UNHCR’.¹³⁵ In addition, the Directive established a system of community housing, set up by IOM and funded by Australia, to receive asylum seekers and refugees pending their RSD and/or resettlement. The persons concerned were to remain in certain areas designated by the authorities and to report to the authorities on a regular basis.¹³⁶

In general, however, the treatment of asylum seekers and refugees in Indonesia has been significantly affected by the initiatives of the Australian Government aimed at preventing the arrival of irregular migrants to its territory via Indonesia.¹³⁷ In particular, the increase in the detention of asylum seekers and refugees has been linked to Australian policies.¹³⁸ As noted by several commentators, Indonesia ‘rarely detained asylum seekers before Australia began actively to encourage it to do so’.¹³⁹ Under a Regional Cooperation Agreement (RCA) concluded in 2000, the Australian authorities have indeed been supporting Indonesia in intercepting – and

133 Indonesia, Directive from the Director General of Immigration no F-IL.01.10-1297 on Procedures Regarding Aliens Expressing Their Desire To Seek Asylum and Refugee Status (30 September 2002).

134 Nikolas Feith Tan, ‘The Status of Asylum Seekers and Refugees in Indonesia’ (2016) 28:3 IJRL 377.

135 Indonesia, Regulation of the Director General of Immigration no IMI.1489.UM.08.05 Year 2010 Regarding Handling of Irregular Migrants (17 September 2010), art. 3(1).

136 Ibid., art. 3(2).

137 See e.g. Tan, ‘Asylum Seekers and Refugees in Indonesia’ (n 134) 365–383; Savitri Taylor and Brynna Rafferty-Brown, ‘Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia’s Indonesian Solution’ (2010) 22:4 IJRL 558–592.

138 See e.g. Amy Nethery, Brynna Rafferty-Brown, Savitri Taylor, ‘Exporting Detention: Australia-funded Immigration Detention in Indonesia’ (March 2013) 26:1 JRS 88–109.

139 Ibid., 98.

detaining – persons thought to be intent on travelling irregularly to Australia. As part of the RCA, Australia has provided Indonesia with equipment, technical assistance and training to strengthen its borders. It has also funded IOM to work in the IDCs in Indonesia, where such persons have generally been held. Services provided by IOM in IDCs include not only the provision of basic services, such as food and medical care, but also the provision of Assisted Voluntary Return and Reintegration services and the refurbishment of immigration detention facilities.

For its part, UNHCR has been responsible for the RSD of those who are referred by IOM as having expressed an asylum claim. In such cases, asylum seekers should in principle be placed in community shelters managed by IOM, pending a decision on their asylum claim and subsequent resettlement – a process that usually takes several years. Those who have been intercepted on their way to Australia would, however, remain in the IDC during the RSD. The ‘Code of Conduct for Asylum Seekers and Refugees in Indonesia’ that was drafted in 2008 contained a provision that specifically warned people of the consequences of illegal departure. It stated: ‘If you try to leave Indonesia illegally, you need to understand that this is not only dangerous and may put the lives of you and your family at risk, but you may also be detained by the authorities’.¹⁴⁰ It is only if and once they are found to be refugees that they would be placed in community shelters.

Besides the RCA, other restrictive policies aimed at preventing the movements of migrants and refugees transiting through Indonesia on their way to Australia led to an increase in the number of people being detained in Indonesia. These included the Law no 6 on Immigration developed with the support of Australia and adopted in 2011, which is characterized by a strong focus on the fight against smuggling and the absence of any provision on asylum.¹⁴¹ In addition, the Operation Sovereign Borders to ‘stop the boats’ has been in place since 2013, and in 2014 Australia announced that it would no longer resettle any more refugees from Indonesia. Coupled with the significant increase in the numbers of asylum seekers and refugees in Indonesia in the years before that, these developments have led to a bottleneck situation. A large number of people are stranded in Indonesia seeking to register with UNHCR to remain in the country ‘because they could no longer afford to support themselves independently outside the detention system’,¹⁴² which has added to the RSD backlog. While the 2016 Presidential Regulation Concerning the Handling of Foreign Refugees provided for mandatory temporary detention for persons rescued at sea or found within

140 UNHCR, ‘Code of Conduct for Asylum Seekers and Refugees in Indonesia’ (October 2008).

141 Indonesia, Law no 6 of 2011 about Immigration (5 May 2011).

142 Anje Missbach, ‘Accommodating Asylum Seekers and Refugees in Indonesia: From Immigration Detention to Containment in “Alternatives to Detention”’ (2017) 33:2 *Refugee* 35.

the territory, it also called for the placement of asylum seekers and refugees in shelters.¹⁴³ A large number of people nevertheless remained in immigration detention facilities due to the lack of availability in the community housing run by IOM.

Against this backdrop, it appears that the increasing resort to the detention of asylum seekers and refugees in Indonesia over the past few years does not really reflect a restrictive position on the part of the Indonesian authorities vis-à-vis asylum seekers and refugees. Rather, this has to a large extent been the result of Australia's containment policies. This link between the Australian policies and immigration detention in Indonesia was made obvious following the announcement by IOM in March 2018 that it would no longer receive any funding under the RCA to support people newly arriving in Indonesia.¹⁴⁴ The Australian Government justified this change of policy by the risk that the care provided by IOM might become a 'pull factor'.¹⁴⁵ Since the 2016 Presidential Regulation put the responsibility for hosting refugees on local governments, without IOM's support, the Indonesian authorities decided to release all asylum seekers from the IDCs.¹⁴⁶ As of December 2020, there were approximately 13,700 asylum seekers and refugees in the country,¹⁴⁷ with only a few of them remaining in the IDCs, mainly for disciplinary reasons; they were 4,200 in detention in 2016.¹⁴⁸

6.4. Access to socio-economic rights for urban refugees in Southeast Asia

In many Southeast Asian countries that are not parties to the 1951 Convention, asylum seekers and refugees in urban settings are *de facto* protected against *refoulement*. In some cases, they are also protected against penalization for irregular entry into the territory of a state. But what about their treatment in a country of asylum? Access to education, healthcare and employment are particularly important for refugees, but there is some uncertainty regarding the application of some of these rights in the case of irregular migrants, including asylum seekers and refugees (Section 6.4.1).

143 Indonesia, Regulation of the President of the Republic of Indonesia no 125 Year 2016 Concerning the Handling of Foreign Refugees (31 December 2016), ch 3.

144 Moretti, 'Substance without Form' (n 128).

145 Antje Missbach, 'Falling Through the Cracks: The Impact of Australia's Funding Cuts on Refugees in Indonesia', *Policy Forum* (8 August 2018) <www.policyforum.net/falling-through-the-cracks/> accessed 17 January 2021.

146 Directorate General of Immigration (Indonesia), 'Restoring the Function of Immigration Detention Centres', IMI-UM.01.01-2827 (20 July 2018).

147 UNHCR, Population Data <www.unhcr.org/data.html> accessed 20 July 2021.

148 Dio Herdiawan Tobing, 'Indonesia Refugee Policy Is on Right Track', *The Jakarta Post* (24 January 2019) <www.thejakartapost.com/academia/2019/01/24/indonesia-refugee-policy-is-on-right-track.html> accessed 17 January 2021.

Yet, asylum seekers and refugees who have been recognized by UNHCR in those countries may be able to enjoy a basic *de facto* status at the national level, as evidenced by the fact that they have more ‘privileges’ than other irregular migrants when it comes to particularly important economic and social rights (Section 6.4.2). While these privileges may be limited, they demonstrate further the fact that non-signatory countries in Southeast Asia recognize the specific situation of refugees.

6.4.1. Rights to education, healthcare and employment

A particularly important social right for refugees and refugee children is the right to education provided both in the 1951 Convention and under international human rights law. The 1951 Convention stipulates that ‘Contracting States shall accord to refugees the *same treatment as nationals* with regard to primary education’ (emphasis added).¹⁴⁹ This provision is not subject to any condition concerning the degree of presence of a refugee in the territory of a state, which means that the obligation exists as soon as someone is physically on the territory of a state. Similarly, art. 13 of the ICESCR,¹⁵⁰ which provides that States parties ‘recognize the right of everyone to education’, is not subject to the reservation provided for in art. 2.3 covering economic rights. Another important legal basis for the right to education in Southeast Asia is the Convention on the Rights of the Child, to which all countries in the region are parties. The CRC provides that states parties ‘recognize the right of the child to education’ and that they shall ‘make primary education compulsory and available free to all’.¹⁵¹ Discrimination regarding access to education on the basis of nationality is prohibited under the Convention.¹⁵² The ASEAN Human Rights Declaration also provides that ‘every person’ has the right to education.¹⁵³ It must be noted, however, that most of these instruments focus on primary education, which should be made available to all, whereas higher education may be subject to other conditions.

Southeast Asian states parties to the relevant human rights instruments have an obligation under international human rights law to provide primary education to children of all migrants, whatever their status. This obligation is reinforced under domestic law in some countries, with the constitutions of Indonesia and Thailand providing for a right to education for all persons on their territory. The only exception is Malaysia, as the country is not party to the ICESCR and it has made a reservation to art. 28.1(a) of the CRC, regarding the right of the child to education. Malaysia has noted that this provision

¹⁴⁹ 1951 Convention, art. 22.

¹⁵⁰ ICESCR, art. 13.1.

¹⁵¹ Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art. 28.1.

¹⁵² Committee on the Rights of the Child, ‘General Comment no 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’ (2005), para. 41.

¹⁵³ AHRD, art. 31(1).

will only be applied ‘if it is in accordance with the Constitution, domestic law and the national policies of the Malaysian Government’.¹⁵⁴ Against this backdrop, and with the exception of Malaysia, it is clear that Southeast Asian states *recognize* a right to education for refugee children; whether refugees have an effective access to this right is another question.

Somewhat surprisingly, the 1951 Convention does not include any provision on the right to health. Article 23 only provides that refugees should be accorded ‘the same treatment with respect to public relief and assistance *as is accorded to their nationals*’ (emphasis added), but this provision only benefits refugees who are ‘lawfully staying’ in the country.¹⁵⁵ As a matter of fact, access to health is better covered by international human rights law than by refugee law. The ICESCR provides that states ‘recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.¹⁵⁶ This right concerns refugees as much as any other individuals. The ASEAN Human Rights Declaration also includes a provision relating to health which states that ‘every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable health-care services, and to have access to medical facilities’.¹⁵⁷

The right to work in the Refugee Convention is subject to the same limitations regarding the level of presence of a refugee in the territory of a state, that is, a refugee should be ‘lawfully staying’ to benefit from ‘*the most favourable treatment accorded to nationals of a foreign country in the same circumstances*’ as regard the right to engage in a wage-earning employment’ (emphasis added).¹⁵⁸ The right to work is thus not inherent to the status of refugee, since they need to be lawfully staying in the country of asylum to benefit from this right. It has also to be noted that art. 17 of the Refugee Convention – like art. 26 on the freedom of movement – is among those that have raised the greatest number of reservations – more than 20 – while many other states consider that art. 17 is only a recommendation.¹⁵⁹ In both law and practice, restrictions on access to work are common for asylum seekers and refugees in many countries, including in countries where they are lawfully staying,¹⁶⁰ and *a fortiori* when they are admitted on a temporary basis.

¹⁵⁴ UNGA, ‘Convention on the Rights of the Child, Declarations and Reservations’, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en-EndDec> accessed 17 January 2021.

¹⁵⁵ 1951 Convention, art. 23.

¹⁵⁶ ICESCR, art. 12.1.

¹⁵⁷ AHRD, art. 29(1).

¹⁵⁸ 1951 Convention, art. 17(1). See also arts. 18 (self-employment) and 19 (liberal professions).

¹⁵⁹ For an overview of the reservations and declarations made to the 1951 Convention, see <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 17 January 2021.

¹⁶⁰ See e.g. Asylum Access and the Refugee Work Rights Coalition, ‘Global Refugee Work Rights Report’ (2014).

Enshrined in several international human rights instruments,¹⁶¹ the right to work is considered to be important to ensure an acceptable level of personal security and self-reliance for everyone. The Committee on Economic, Social and Cultural Rights stated in its General Comment no 18 on the right to work that the right to work ‘is a fundamental right’, that it is ‘essential for realizing other human rights’ and that it forms ‘an inseparable and inherent part of human dignity’.¹⁶² Yet, its applicability in developing countries – including in Southeast Asia – is limited by art. 2.3 of the ICESCR, which provides that developing countries ‘may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’. Even though the ASEAN Human Rights Declaration states that ‘every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed’,¹⁶³ it appears that under international human rights law there is no such thing as a right to work in Southeast Asian countries.

These examples illustrate both the complexity of the Refugee Convention, which do not guarantee the whole range of rights to every refugee, and the importance of international human rights as a complementary/ alternative source of protection in non-signatory states. In sum, while there is arguably a right to education for refugee children in Southeast Asian states, there is a lack of clarity regarding the right to health for people staying irregularly in the territory of a state, as is the case for asylum seekers and refugees in many countries in Southeast Asia. When it comes to the right to work, however, there is arguably no obligation for countries that are not parties to the 1951 Convention in Southeast Asia to give asylum seekers and refugees access to the labour market. This being said, access to basic services for refugees, including education and healthcare, remains difficult in developing countries in general, even if they are parties to the Refugee Convention, as governments have already difficulties in guaranteeing access to these services for their own population.

6.4.2. More favourable treatment of refugees and asylum seekers in non-signatory states?

When it comes to non-signatory states, one way to determine whether they recognize that refugees have specific needs is to see whether, and to what extent, the concerned persons have better access to services and the labour market than other irregular migrants. Indeed, there is evidence that asylum seekers and refugees are treated better in some regards, although often on an informal basis.

161 UDHR, art. 23.1; ICESCR, art. 6.

162 CESCR, ‘The Right to Work. General Comment no 18. Article 6 of the International Covenant on Economic and Cultural Rights’, E/C.12/GC/18 (6 February 2006).

163 AHRD, art. 27(1).

Access to public education for refugee children is in principle possible in Thailand and Indonesia, with NGOs facilitating their enrolment. In Thailand, the 1999 National Education Act and a 2005 Cabinet Resolution on Education for Unregistered Persons provide that education in the country is compulsory, free and available to everyone irrespective of the legal status. Under these two documents, every child, irrespective of their legal status or nationality, is entitled to 15 years of free education, which normally covers pre-primary, primary and both lower and upper secondary education.¹⁶⁴ The right to ‘quality education’ for ‘every child’ in Thailand has been subsequently recognized in the 2017 Thai Constitution.¹⁶⁵ In Indonesia, access to education for asylum seekers’ and refugees’ children was recognized in July 2019, with the Ministry of Education issuing a Circular Letter formally allowing refugee children to attend public schools at both primary and secondary levels in the country. Between July and December 2019, more than 500 refugee children enrolled in primary schools in the country and the government has committed to do more as part of its pledges in the context of the Global Refugee Forum.¹⁶⁶ There are some practical obstacles in both countries, however, such as language barriers, the fact that families might refuse to send their children to school for fear of detection, the indirect costs of education provided (e.g. uniforms, books and travel to school) or the fact that local schools may refuse to give children access to the structure.

By contrast, in Malaysia, asylum-seeking and refugee children have no access to public schools and the authorities, according to UNHCR, have shown ‘very little flexibility’ on this issue.¹⁶⁷ The government has a different view, however, as it claims that it respects the right to ‘access to education’ of children of irregular migrants, including asylum seekers and refugees, but on condition that this education is provided by other actors.¹⁶⁸ The education of the asylum-seeking and refugee children is indeed provided by UNHCR and other NGOs through an informal parallel system of community-based learning centres.¹⁶⁹

¹⁶⁴ See UNICEF, ‘Education Knows No Border: A Collection of Good Practices and Lessons Learned on Migrant Education in Thailand’ (December 2019).

¹⁶⁵ Thailand, Constitution of the Kingdom of Thailand (6 April 2017). Note that s. 54 of the 2017 Constitution provides that the state ‘shall ensure every child receives quality education for twelve years from pre-school to the completion of compulsory education free of charge’.

¹⁶⁶ See UNHCR, ‘Global Compact on Refugees, Pledges and Contributions’ <<https://globalcompactrefugees.org/index.php/channel/pledges-contributions>> accessed 17 January 2021. This is a continuously updated set of pledges and contributions made.

¹⁶⁷ UNHCR, ‘But When Will Our Turn Come?’ (n 123) 26.

¹⁶⁸ Human Rights Council, ‘National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to the Human Rights Council Resolution 5/1, Malaysia’, A/HRC/WG.6/4/MYS/1/Rev.1 (19 November 2008), para. 38 <https://digitallibrary.un.org/record/643202/files/A_HRC_WG.6_4_MYS_1_Rev.1-EN.pdf> accessed 21 January 2021.

¹⁶⁹ JRS, ‘The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines’ (2012) 61; UNHCR, ‘But When Will our Turn Come?’ (n 123) 25–29.

In 2018, UNHCR estimated that only 35 per cent of school-age registered children regularly attended informal schools.¹⁷⁰ While these structures do not receive government funding, since the government alleges a lack of resources and the need to prioritize its own citizens, UNHCR has nevertheless noted a ‘positive sentiment surrounding refugee education’ in Malaysia over the past years, with the Ministry of Education agreeing to register and provide licences to all learning centres catering to refugee children. This means that education activities for refugees are no longer merely tolerated in Malaysia but they are now officially recognized by the government.¹⁷¹

In Thailand and Malaysia, irregular migrants, like any other migrants in the country, are generally allowed to access the public or private health services, if they can meet the costs. Problems arise for those who may not be able to pay for these services, which is the case for the large majority of asylum seekers and refugees. In Thailand, foreigners, including UNHCR-registered asylum seekers and refugees, are excluded from the universal health coverage, which ensures that Thai people have access to essential health services. Nevertheless, the Ministry of Public Health in Thailand has a budget for irregular migrants and primary healthcare is generally available to everyone who needs it. In addition to this and to the health-related services provided directly by NGOs, asylum seekers and refugees have access to secondary healthcare if they are referred to public health structures by UNHCR or by NGOs, which cover the costs involved but at a reduced rate compared to that normally applied to foreigners. In sum, asylum seekers and refugees normally have better access to services than other irregular migrants in Thailand. While the system in place relies to a great extent on the presence of external partners, it is tolerated and somehow supported by the authorities.

Asked about refugees’ access to health in the context of the UPR in 2009, the Malaysian Government stressed the fact that health services in the country were ‘publicly and privately provided’ and that, while private services could be accessed through either insurance or a fee, the public primary healthcare facilities were ‘accessible to all, without any discrimination, regardless of social grouping, gender, citizenship and affordability to pay, including migrant workers irrespective of their legal status’.¹⁷² While this may be true, it is to be noted that an irregular migrant presenting himself or herself to a public hospital in Malaysia for emergency medical care might well be taken in charge, but he or she would also most likely be reported

170 UNHCR, ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report, Universal Periodic Review, 3rd Cycle, 31st Session, Malaysia’ (March 2018).

171 UNHCR, ‘2018 Annual Report: UNHCR – Educate A Child Programme’ (2019) 53–57.

172 Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review. Malaysia. Addendum. Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review’, A/HRC/11/30/Add.1 (3 June 2009), para. 17 <<https://daccess-ods.un.org/TMP/7168241.73927307.html>> accessed 20 January 2021.

to the authorities. When it comes to asylum seekers and refugees, however, UNHCR registration cards are generally recognized in the hospitals and UNHCR cardholders in Malaysia do benefit from certain advantages. These include free treatment for HIV/AIDS sufferers and a 50 per cent discount on the fees normally charged to foreigners (nationals pay less) upon presentation of their card to the public health authorities. In 2014, refugees even had access to an insurance scheme established by UNHCR to give refugees access to the national insurance system at a premium of US\$45 per year/family, but the system collapsed when the former Prime Minister Najib Razak decided to increase the price of the hospital fees for foreigners in the mid-2016s, placing by the same token the costs of some services beyond the reach of many.¹⁷³ As in Thailand, several international organizations and local NGOs also offer a broad range of healthcare services to asylum seekers and refugees exclusively.¹⁷⁴

While there is no right to work for asylum seekers and refugees in Thailand and Malaysia, there is some tolerance when it comes to work, even though asylum seekers and refugees would most likely be performing the so-called 3D (Dirty, Dangerous and Difficult) jobs like most other irregular migrant workers in those countries. Malaysia tolerates people registered with UNHCR working in certain sectors where extensive labour is needed, such as construction or work on plantations,¹⁷⁵ where they are typically paid between 60 and 70 per cent of the salary a national would receive for the same task. Already in 2012 UNHCR noted that

while the legal and social status of refugees in Malaysia remains very weak, they benefit to some extent from the pragmatic attitude of the country's government and people. In a growing economy and diverse society, there is a degree of tolerance for foreign nationals who provide the country with cheap and unregulated labour, doing jobs that Malaysians regard as too dangerous, demanding and poorly paid.¹⁷⁶

Other commentators have noted the privileged access of UNHCR cardholders to the labour market despite their irregular status.¹⁷⁷ Providing refugees

¹⁷³ Human Rights Council, 'Compilation on Malaysia. Report of the Office of the United Nations High Commissioner for Human Rights', A/HRC/WG.6/31/MYS/2 (3 September 2018), para. 88 <<https://undocs.org/A/HRC/WG.6/31/MYS/2>> accessed 20 January 2021.

¹⁷⁴ JRS, 'The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines' (2012) 55–63. See also Hakimie Amrie Hisamudin, 'Medical Group, UNHCR Join Hands to Open Healthcare for Refugees', *Free Malaysia Today* (3 March 2020) <www.freemalaysiatoday.com/category/nation/2020/03/03/medical-group-unhcr-join-hands-to-open-healthcare-centre-for-refugees/?mc_cid=b8a1aa86e1&mc_eid=6169557cc> accessed 17 January 2021.

¹⁷⁵ UNHCR, 'But When Will Our Turn Come?' (n 123) 9.

¹⁷⁶ Ibid., 11–12.

¹⁷⁷ Wake, 'Turning a Blind Eye' (n 118) 15.

with a legal right to work in the country nevertheless remains a sensitive issue. A pilot initiative was launched in Malaysia in 2016 whereby a group of 300 Rohingya refugees would be allowed to work legally,¹⁷⁸ but it remains to be seen whether this scheme will be expanded.

This tolerance remains limited and informal, however, as Thailand and Malaysia are afraid of creating a ‘magnet effect’ by leading asylum seekers and refugees to believe that they would be allowed to work. This is evidenced by the fact that both governments have launched massive regularization campaigns for irregular migrant workers over the past two decades, generally followed by crackdowns on irregular migration, and yet they systematically exclude asylum seekers and refugees from those schemes. As Muntarbhorn observed, ‘one of the ironies of the situation’ is that those seeking refuge are not allowed to work and are in fact condemned to remain ‘irregular’ in the country, while those who enter illegally for economic reasons are more likely to have a regular status and access to work.¹⁷⁹ This seems to indicate that the states concerned do not want asylum to become a backdoor to irregular economic migration. For its part, Indonesia remains quite strict regarding access to employment for asylum seekers and refugees considering the lack of work opportunities in the country.

6.5. Conclusion

This overview provides a telling picture regarding the ambiguity of some Southeast Asian states towards refugees. While the framework to deal with asylum seekers and refugees remains in the immigration laws of these countries, there is nevertheless an increasing tendency among states in the region, such as in Malaysia, Thailand and Indonesia, *de facto* to recognize that asylum seekers and refugees must be treated differently from other irregular migrants when it comes to enforcing such laws.

Southeast Asian states respect to a large extent the prohibition of *refoulement*. By increasingly refraining from detaining asylum seekers and refugees for irregular entry and presence onto their territory, even though this practice remains uneven, they tend to respect one of the most important rules provided for in the Refugee Convention (and as such not applicable to them) regarding the treatment of asylum seekers and refugees, that is, the ‘non-penalization’ clause in art. 31(1). There is also an increasing tendency among those states towards greater tolerance of asylum seekers and refugees compared to other irregular migrants when it comes to social and economic

¹⁷⁸ See APRRN, ‘Summary of the Asia Pacific Refugee Rights Network’s Submissions to the 2017 Consultations on the Global Compact on Refugees’ (12 and 13 December 2017) annex <www.unhcr.org/5a3bbe4c7.pdf> accessed 17 January 2021.

¹⁷⁹ Vinit Muntarbhorn, ‘Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study’ (2004).

rights, although access to basic services is mostly provided by international and non-international organizations. This distinction that is made in practice, if not *de jure*, between refugees and other irregular migrants demonstrates that these states do recognize the main principles underpinning international refugee law. In a sense, the protection and assistance provided to asylum seekers and refugees in these countries appear as an ‘exception to the rules’ related to the treatment of irregular migrants.

There are still major gaps in refugee protection in the region and much more could be done both to reduce the detention of asylum seekers and refugees and to ensure their full access to all services necessary for their well-being. While it remains important to call on non-signatory states to accede to the Convention, a perhaps more effective vector to strengthen refugee protection in those countries could be through negotiated arrangements and *ad-hoc* solutions negotiated with the concerned governments and aimed at improving concretely the situation of asylum seekers and refugees in a way that corresponds to the principles enshrined in the Refugee Convention.

Another avenue to explore in parallel in order to advance refugee protection is the use of the judicial system. Through judicial engagement, UNHCR and refugee advocates may indeed be able to influence the interpretation of international and national laws in a way that recognizes the specific situation of asylum seekers and refugees. For instance, the High Court of Malaysia held in a case of 2009 that an asylum seeker should not be subjected to whipping because of a breach of the Immigration Law. The Court stated:

Asylum-seekers and refugees, if they have not committed acts of violence or brutality, or are habitual offenders, or have threatened our public order, should not be punished with whipping. However, such persons can help themselves by giving documentary proof of their registration with their own community here or with the UNHCR Office in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees who are only waiting to be resettled.¹⁸⁰

For its part, the Hight Court of Malaya in the State of Kedah Darul Aman held in a 2018 judgment that the detention of a group of Rohingya children under the Immigration Act represented a violation of their rights as a child under both the CRC and national child law. It thus ordered that the children concerned be released and sent to a shelter.¹⁸¹ Obtaining such decisions by

¹⁸⁰ Quoted in Vinit Muntarbhorn, ‘Regional Refugee Regimes. Southeast Asia’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 435–436.

¹⁸¹ See *Ruwaida Royeda Binti Muhammad Siddiq and Six Other Children v Commandant Immigration Depot Belantik, Kedah and Others*, KA-44-81-09/2018, High Court of Malaya, September 2018, <www.refworld.org/cases/MYS_HC,5d838ce14.html> accessed 17 July 2021. See also Muntarbhorn, ‘Regional Refugee Regimes. Southeast Asia’ (n 180) 435–436.

judicial bodies through strategic litigation can contribute to transforming what the government consider to be a mere ‘privilege’ into a right.

This means that it is not sufficient to look at the instruments to which states are parties to assess the degree of protection available to refugees. It is also necessary to consider their practice in that regard and to understand how the severity of immigration laws may be attenuated through practical arrangements or judicial decisions. Unfortunately, there is not any comprehensive theoretical framework to compare and assess the relationship between international norms under refugee law and the degree of compliance by states that are not parties to the Refugee Convention. In the case of Southeast Asia, however, it can be argued that the standard of treatment offered by the main non-signatory countries of asylum in the region is somewhere in between the standards of treatment provided for in the 1951 Convention for refugees who are present on the territory of a state and those who are ‘lawfully staying’ in a state. What is clear is that Southeast Asian states do not want to offer refugees – or more generally foreigners – the same level of treatment that is guaranteed under law to nationals. This distinction between nationals and non-nationals, whatever their status, partly explains the reluctance of Southeast Asian states to accede to the Refugee Convention.

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7 The search for solutions

Besides response to the immediate needs of refugees, efforts should focus on finding durable solutions to their plight. There are traditionally three so-called durable solutions to refugee problems, that is, local integration and resettlement, which represent a solution in exile, or voluntary repatriation to the country of origin. Neither the 1951 Convention, the Statute of the UNHCR, nor any other international instrument relating to refugees establishes a formal hierarchy between these three solutions. There is, however, an ‘order of preference’ which comes from General Assembly resolutions or from the Conclusions of UNHCR’s ExCom. Voluntary repatriation is generally considered the ‘preferred’ solution in most refugee situations,¹ followed, if return to the country is not possible, by local integration and finally by resettlement, which is considered as a ‘last resort’ solution. Yet, it has not always been like this. The order of preference for several decades seemed to favour integration into new communities (the so-called “exilic bias” of international refugee law), particularly in countries of asylum.²

Until the mid-1970s, there was still a certain balance between the different durable solutions to refugee problems. This balance, however, was disrupted by the scale, duration and specificities of the Indochinese refugee crisis. As local integration was not politically acceptable to host countries in the region and voluntary repatriation not an option in the context of the Cold War, resettlement became the major, if not the only, solution to the crisis for more than a decade. The magnitude of the operations in Southeast Asia played an important role, however, in the phenomenon of ‘compassion fatigue’, which led to increasingly restrictive measures being adopted by Western states in the first half of the 1980s.

1 See e.g. UNHCR, ‘Ministerial Communiqué’, HCR/MINCOMMS/2011/6 (8 December 2011), para. 7.

2 Gervase Coles, ‘The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry’ in Alan E Nash (ed), *Human Rights and the Protection of Refugees under International Law* (Nova Scotia, Institute for Research on Public Policy 1988) 216–217.

The search for solutions for refugees accepted on a temporary basis in Southeast Asian countries remains one of the main challenges. Although the number of refugees is far smaller than during the Indochinese crisis, and despite the fact that some of the states in the region are now more prosperous, in Southeast Asia local integration remains generally limited, except for specific groups of people with close ethnic ties with local populations (Section 7.1). Resettlement has been, and remains, the most favoured durable solution as far as Southeast Asian states are concerned. Yet, resettlement has increasingly been restricted, partly as a consequence of the operations in Southeast Asia during the Indochinese crisis (Section 7.2). Against this backdrop, there has been an increasing focus on voluntary repatriation since the CPA, amidst questions regarding respect for the principle of ‘voluntariness’ by Southeast Asian states (Section 7.3). Another particularly important aspect of the discussions around durable solutions has been the issue of the ‘root causes’ and the prevention of the conditions that lead to displacement, with Southeast Asian states contributing to bring the issue of the responsibility of the countries of origin into global discussions (Section 7.4).

7.1. The limits of local integration in Southeast Asia

The integration of refugees in countries of asylum used to be the practice in the years following the adoption of the Refugee Convention, in a context where refugees were primarily a European issue. Already facilitated by the fact that the persons concerned were also from Europe, local integration was justified at the time both on economic grounds, with refugees representing a workforce that European states needed, and/or on ideological grounds, since refugees were viewed as victims of communist regimes. Local integration was also the main solution to refugee problems in Africa in the 1960s and 1970s, based on liberal asylum policies pursued by the states in the region.³

It has often been said that Southeast Asian states refuse to accede to the 1951 Convention because they do not want to integrate refugees.⁴ Yet, under the Convention there is no obligation for states to allow refugees to remain on their territory, let alone to grant them permanent residence or citizenship. Article 34, which is often referred to in support of this argument, merely states that contracting states ‘shall as far as possible facilitate the assimilation and naturalization of refugees’. It is to be noted that several groups of refugees have been allowed by Southeast Asian states to settle on their territory, but those states consider that it is their prerogative to decide

³ See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (opened for signature 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art. II.1.

⁴ See Section 2.2.

who can remain within their borders (Section 7.1.1). Apart from these specific cases, however, local integration remains a rather exceptional durable solution in the region (Section 7.1.2).

7.1.1. Conditions for local integration in Southeast Asia

Southeast Asia experienced a number of refugee movements between the end of World War II and the beginning of the Indochinese crisis, with a large number of people going to Thailand. The Thai Government facilitated the permanent integration of certain groups of people on its territory through a system of classification associated with different entitlements for each group, including possibly the right to work in the country and access to Thai citizenship for children born in Thailand. This was the case in particular for a large number of Vietnamese who fled the fighting in their country in 1945 and settled in the north of Thailand, as well as for a number of Chinese who were part of the former nationalist army (Kuomintang) defeated by communist troops in 1949 and who came to northern Thailand in the early 1950s, many of them supporting Thailand in its fight against the communists at the border. It was also the case for groups of non-combatant Chinese who arrived in Thailand between 1950 and 1978 and were unable to return to China for political reasons or who claimed to be family members of those who had already settled in the country. For all these groups, assimilation had largely been facilitated by the close ethnic ties with the populations at the Thai border.

Thailand has been much more restrictive with regard to the integration of refugees since the beginning of the Indochinese refugee crisis, although there have been a few cases where people seeking asylum have received Thai nationality.⁵ This was the case also for some Karen people fleeing the conflict in Myanmar as well as for a group of Cambodian refugees from Koh Kong who arrived in Thailand between 1977 and 1978, but who were themselves of Thai origin. Indeed, the Koh Kong region had belonged to Thailand before being integrated into Cambodia after World War II under pressure from the French Government. Many of them were to be granted Thai citizenship, subject to certain conditions that illustrate Thailand's concerns with regard to integration: they were required to speak Thai, their names had to be similar to Thai names and they had to be loyal to Thailand and the monarchy.⁶

Malaysia has also offered permanent asylum to different groups of refugees, usually based on their common religion. Between the late 1960s and

5 Vittit Muntarbhorn, 'Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study' (2004).

6 Vittit Muntarbhorn, 'International Protection of Refugees and Displaced Persons: The Thai Perspective' (Law Association for Asia and the Western Pacific 1981) 17.

the mid-1980s, Malaysia granted citizenship to tens of thousands of people from the Philippines who had fled to Sabah, east Malaysia. They were primarily Muslims who had fled the armed conflict between the central authorities and the Moro National Liberation Front, an armed group claiming independence in Mindanao. In the late 1970s, Malaysia also accepted a group of around 10,000 refugees from Cambodia who had fled both the Vietnam War and the Khmer Rouge exactions and who had transited to Thailand to settle down and stay in the country.⁷ They were in fact Muslim Cambodians (the ‘Cham’) and were allowed to stay and integrate into Malaysia. This was officially for ‘humanitarian reasons’ but also because of the close cultural and ethnic links between them and the Malays, including the common religion.⁸ Malaysia also offered asylum to 300 Bosnian refugees fleeing the conflict in former Yugoslavia in 1992, as well as to some 3,000 Syrian refugees in 2015 and 2016 who received the IMM13 permits.⁹

As Muntarbhorn explained in his seminal book on the subject, in Southeast Asia the ethnic factor ‘interplays with governmental attitudes towards refugees in terms of admission for temporary refuge and long-term assimilation’.¹⁰ In Thailand, permanent integration is considered as a ‘favour’ offered only on an exceptional basis, generally when there are close ethnic links between the populations and always with the utmost discretion. The Thai authorities are convinced that publicizing this would constitute a pull factor for economic migrants. In Malaysia, people have been accepted on a permanent basis because of their religion, regardless of their ethnic origin. Whether they came from Cambodia, Myanmar, the Philippines and more recently Bosnia or Syria, all of them were Muslims. It appears, however, that ethnicity or religion is a more decisive criterion when it comes to integrating refugees in the long term than when it comes to providing a temporary refuge.

7.1.2. *Ruling out local integration as a durable solution for refugees in Southeast Asia*

Apart from these exceptional circumstances, the main asylum states in Southeast Asia have generally ruled out local integration as a durable solution for refugees. While UNHCR contemplated the possibility of supporting local integration for the Indochinese refugees as early as 1975, with

7 Gerhard Hoffstaedter, ‘Refugees, Islam, and the State: The Role of Religion in Providing Sanctuary in Malaysia’ (2017) 15:3 *Journal of Immigrant and Refugee Studies* 290–295.

8 Danny Wong Tze-Ken, ‘Research on Cham History in Malaysia’ (2008) 3 *Asian Research Trends* 25–27.

9 Hoffstaedter, ‘The Role of Religion in Providing Sanctuary in Malaysia’ (n 7) 290–295; Azlizan Mat Enh, ‘Malaysia’s Foreign Policy towards Bosnia-Herzegovina 1992–1995’ (2010) 18:2 *Pertanika Journal of Social Sciences & Humanities* 311–320.

10 Vittit Muntarbhorn, *The Status of Refugees in Asia* (OUP 1992) 16.

the United States offering financial support for that purpose, Southeast Asian states soon made it clear that they expected the Indochinese to leave their territory at the earliest possible time. They reaffirmed their position on many occasions, alleging security issues, economic considerations and the risk of creating a pull factor. In 1978, for example, in response to a suggestion that it should allow displaced persons to settle down in Thailand, the Thai Ministry of the Interior responded that 'even if funding were on hand, political and national security matters coupled with the shortage of arable land makes it impossible for us to consider this alternative'.¹¹

Unlike Thailand, Malaysia did not have to accommodate large groups of Cambodians or Laotians refugees and the country was economically strong and relatively sparsely populated compared to its size. Yet, the government excluded local integration on ethnic and economic grounds, arguing that it could affect an already fragile ethnic balance between the Malay majority and an already large Chinese minority and jeopardize the development of the country.

Although less exposed to the arrival of 'boat people' than Thailand or Malaysia, Indonesia and the Philippines resorted essentially to the same arguments. At the December 1978 meeting of Asian experts, for example, the representative of Indonesia made it clear that 'as a matter of policy, Indonesia is not in a position to accept Indochinese refugees for permanent resettlement, because of its heavy burden in caring for its own people'. The representative of the Philippines explained that 'the Philippine government does not accept refugees', adding that 'beset as it is by the attendant problems of a Third World country attempting to move forward and the high expectations of its people for a better life, the Philippines cannot afford to open its doors to refugees for resettlement'.¹² As a result, the entire response to the Indochinese refugee crisis, including the 1989 CPA, was premised on the idea that local integration was not an option.

Another similar example of a Southeast Asian state – one that is party to the Refugee Convention – refusing to be left with a residual population of refugees is that of Cambodia with regard to the Montagnard refugees. In January 2005, UNHCR, Cambodia and Vietnam signed a Memorandum of Understanding regarding some 750 'Central Highlands ethnic minority people' – as they were referred to in the document in order to avoid the term 'refugee' – who had been seeking asylum on Cambodian territory. Like the CPA, the agreement sought to bring an end to this issue and close the temporary sites in Cambodia by providing for the resettlement of refugees and the return of those not in need of protection. Local

11 Thailand, 'A Call for Humanity: Displaced Persons from Indochina in Thailand' (May 1978).

12 UNHCR, 'Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons', HCR/120/25/80 (14–18 April 1980).

integration was not an option as far as the Cambodian Government was concerned. The problem, however, was related to the refugees who did not want to be resettled or to return to Vietnam, at least for the time being. The MoU provided that:

Those who neither want to resettle in a third country nor to return to Vietnam will have one month following determination of their status to decide either to go to a third country or to come back to Vietnam. If then they do not decide, the Royal Government of Cambodia and the UNHCR will work with the Vietnamese Government to bring them back to Vietnam in an orderly and safe fashion and in conformity with national and international laws.¹³

In other words, the agreement, to which UNHCR was party, provided that *refugees*, like non-refugees, would be repatriated against their will should they refuse to be resettled. Thus, the Memorandum of Understanding represented a clear violation by the Cambodian authorities of their obligation of *non-refoulement* under the Convention.¹⁴ Furthermore, it was made possible with the complicity of UNHCR, which justified its involvement by arguing that the agreement was the only way to ‘secure’ the principle of temporary asylum in Cambodia.¹⁵ For those who arrived in Cambodia after the conclusion of the MoU, it was agreed that ‘the Royal Government of Cambodia and UNHCR will consider and decide whether to resettle them in third countries or repatriate them to Vietnam’.¹⁶

Various attempts to convince Southeast Asian states to reconsider their position and agree to integrate refugees have been made, but without much success. In Thailand, the tens of thousands of refugees who have been living in the camps at the border are officially not allowed to stay and their situation has become one of the most protracted refugee situations in the world. In general, asylum seekers and refugees registered by UNHCR in the region are accepted in the territory of those states but on a temporary basis only. In some cases, however, such as in the case of many Rohingya in Malaysia, they are able to navigate the system. They find work in the informal sector and have access to some services, including

¹³ Memorandum of Understanding Between the Government of the Socialist Republic of Vietnam, the Royal Government of Cambodia and the United Nations High Commissioner for Refugees on the Settlement of Issues Relating to the Vietnamese Central Highlands Ethnic Minority People in Cambodia (January 2005).

¹⁴ HRW reported that some of the returnees suffered detention, mistreatment and even torture upon return. See HRW, ‘No Sanctuary. Ongoing Threats to Indigenous Montagnards in Vietnam’s Central Highlands’ (June 2006) 29–34.

¹⁵ UNHCR, ‘Briefing by Erika Feller on the Memorandum of Understanding signed by UNHCR, Vietnam and Cambodia on Montagnards in Cambodia’ (25 January 2005).

¹⁶ Vietnam-Cambodia-UNHCR MoU (n 13).

sometimes education, to the extent that they achieve a level of a *de facto* integration.¹⁷

As is often the case, the Bangkok Principles reflected these developments at the regional level. Considering the many economic, political and social issues, the Working Group on the issue of durable solutions established as part of the meeting held in 1996 recommended that no reference to local integration should be made in the new version of the document.¹⁸ While noting that this solution was more likely to be considered in the context of individual refugees, the Working Group considered that local integration ‘should be approached with caution’ and that ‘the time is not ripe yet to consider adding this element to the Bangkok Principles’.¹⁹ As a result, the final 2001 version of the Bangkok Principles merely provides:

States shall . . . use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.²⁰

Thailand had requested the addition of the phrase ‘particularly the States which are not the States of first refuge’ after the term ‘States’ at the beginning of the sentence in order to ‘emphasize the equal responsibility of all member States, and not only States of first refuge’.²¹

The long-standing position of Southeast Asian states has arguably contributed significantly to weakening the perception – common at the time – that states should accept refugees on a permanent basis. Long considered as the main solution to refugee problems, local integration as a durable solution has subsequently been marginalized. Some commentators have gone as far as to refer to local integration as ‘forgotten solution’.²² It is only recently that there has been renewed interest in local integration as a durable solution, although such developments are unlikely to have an impact on asylum in Southeast Asia. For instance, despite the fact that they are parties to the

17 Samuel Cheung, ‘Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience’ (2011) 25:1 JRS 50–70; Caitlin Wake, ‘“Turning a Blind Eye”: The Policy Response to Rohingya Refugees in Malaysia’, Humanitarian Policy Group Working Paper (November 2016) 4–6.

18 AALCO, ‘Report of the AALCC/UNHCR Seminar to Commemorate the 30th Anniversary of the Bangkok Principles Concerning the Treatment of Refugees, Manila, Philippines, December 1996’, New Delhi, AALCC Secretariat (1998).

19 *Ibid.*

20 AALCO, ‘Final Text of the AALCO’s 1966 Bangkok Principles on the Status and Treatment of Refugees’ (adopted 24 June 2001), art. II.4.

21 AALCO, ‘Status and Treatment of Refugees’ in ‘Selected Documents of the 39th Session of AALCC Held in Cairo (19 February–23 February 2000)’ (2000).

22 Karen Jacobsen, ‘The Forgotten Solution: Local Integration for Refugees in Developing Countries’, UNHCR New Issues in Refugee Research 45 (2001).

Refugee Convention and have adopted specific legal frameworks to deal with refugees, the Philippines and Cambodia essentially limit local integration to the issuance of residency permit.²³ The acquisition of nationality in both countries is much more difficult. It is to be noted also that while several Southeast Asian states have welcomed the adoption of the Global Refugee Compact, their reaction with regard to the CRRF was much more cautious, as it was arguably perceived as promoting some form of local integration under another name.²⁴

7.2. The rise and fall of resettlement

Resettlement, that is, the transfer of refugees from a country of first asylum to a third state willing to receive them on a permanent basis, represents another durable solution for refugees. In the hierarchy of traditional durable solutions available to the international community to respond to refugee movements, resettlement is generally considered the default solution, when neither voluntary repatriation nor local integration is possible, or in emergency situations where rapid resettlement is the only way to protect refugees whose lives are in danger. In the context of the Cold War, however, resettlement was much more important. In Southeast Asia, resettlement became a significant part of the response to the Indochinese refugee crisis; yet, the magnitude of the operations contributed to the overall ‘disenchantment’ with resettlement as a durable solution (Section 7.2.1). With local integration being ruled out, in the absence of any prospects for the voluntary repatriation of refugees, resettlement has remained by far the favoured solution for states in the region (Section 7.2.2).

7.2.1. *The Indochinese refugee crisis and the disenchantment with resettlement*

From the mid-1970s, resettlement of the Indochinese refugees quickly became a priority for the so-called states of first asylum. In Thailand, the first groups of refugees had been taken care of by the authorities, but with the rapid increase in the number of arrivals, the Kingdom soon requested the assistance of the international community. A first agreement with UNHCR signed in July 1975 provided that UNHCR would seek durable solutions – either voluntary repatriation or resettlement – for the Indochinese refugees. As the number of Vietnamese ‘boat people’ arriving in other

²³ See Philippines, Department Circular no 058 – Establishing the Refugees and Stateless Status Determination Procedure (18 October 2012) section 15; Cambodia, Sub-Decree no 224 of 2009, on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia (17 December 2009), art. 15.

²⁴ The CRRF was rolled out in a dozen countries throughout 2017 and 2018 (including in Afghanistan), but not in South or Southeast Asia.

countries across the region increased significantly in the following years, and with the countries of first asylum threatening to push back new arrivals, resettlement became the main solution to the situation of Indochinese refugees. By the end of June 1979, nearly 197,000 refugees had been resettled, with a large majority – some 180,000 people – going to the United States, France, Australia and Canada.²⁵ Yet, this proved to be insufficient.

The 1979 Meeting on Refugees and Displaced Persons in South-East Asia thus formalized an arrangement in which Southeast Asian states committed to continue to guarantee temporary asylum to Indochinese refugees in exchange for their rapid resettlement. This meeting resulted in an increase in the number of resettlement places guaranteed by Western states, thus leading to what Wain described as ‘one of the great population shifts in history’.²⁶ In addition, it also led to the development of new initiatives, such as the system of processing/transit centres across the region or the so-called Orderly Departure Programme (ODP). The latter provided that people in need of protection, that is, refugees, would be transferred directly from their country of origin, Vietnam, to a country of resettlement.

The possibility of setting up transit centres was first proposed by Malaysia during the meeting of interested governments organized in December 1978 as a way of facilitating resettlement. The transit system, it was argued, would contribute to reducing the burden on countries of first asylum by distributing refugees among countries. The ASEAN countries subjected this proposal to a number of conditions: in particular, guarantees had to be given by third states concerning the resettlement of refugees within a ‘reasonable’ period of time to avoid transit states ending up with a ‘residual problem’, while the costs related to the development, maintenance and administration of these centres would need to be covered by the international community.²⁷ The first transit centre for Indochinese refugees was established in the Bay of Manila, the Philippines, in January 1980 and hosted refugees transferred from other camps in Thailand, Malaysia, Singapore or Hong Kong. A second centre opened in December 1980 in Indonesia, on the island of Galang. Refugees were resettled after an average stay of three to five months. This transit system represented a good example of the new function that resettlement had just taken on in the context of the Indochinese crisis. In such circumstances, resettlement was no longer directly aimed at providing protection to groups or individuals; rather, it was a ‘tangible expression of international solidarity’ and a

25 W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998) 52.

26 Barry Wain, *The Refused: The Agony of the Indochina Refugees* (Kow Jones (Asia) Company Ltd 1981) 80.

27 ASEAN, ‘Statement on behalf of ASEAN by Chairman of the ASEAN Standing Committee’ (21 February 1979).

responsibility-sharing mechanism intended, so to speak, to protect the provision of first asylum in the region.²⁸

The ODP for Vietnamese was another innovative measure introduced in 1978 as part of the discussions on family reunifications and endorsed at the 1979 Meeting. In January 1979, Vietnam had announced that it would allow its nationals to migrate legally rather than them having to flee the country. A Memorandum of Understanding was concluded on 30 May 1979 between the Vietnamese Government and UNHCR, which provided for the departure under the ODP of persons wishing to join their families and other persons constituting humanitarian cases. While the initial idea was to facilitate departures for family reunification, the United States added other groups of people of interest to them in the negotiations. These were people who had been placed in re-education camps in Vietnam because of their links with the United States during the war and children with American fathers who had served in Vietnam.²⁹ The programme was based on an exchange of lists between Vietnam and governments willing to receive Vietnamese on a permanent basis. While there were many difficulties at the beginning of the programme, with only 2,000 departures between June and December 1979, the pace progressively increased, with more people leaving the country under the ODP than 'boat people' arriving in 1984.³⁰ The programme was considered at the time as a major innovation for UNHCR: combined with the organization of information campaigns in Vietnam, it arguably marked 'the first occasion in which UNHCR became involved in efforts to pre-empt a refugee problem rather than simply dealing with its aftermath'.³¹ Yet, the process raised legitimate questions about the (un)likelihood that people who were supposedly victims of persecution would register themselves with the authorities to leave the country.

In terms of the resources, range of activities and number of governments and organizations involved, international humanitarian efforts in the region between the end of the 1970s and the mid-1980s were undoubtedly 'one of the most extensive in history'.³² Resettlement in the context of the Indochinese refugee crisis was heralded by UNHCR as 'the "success story" of the international community's commitment to find a lasting solution to the plight of Indochinese fleeing war, conflict and persecution'.³³ These

28 UNHCR, 'Global Consultations on International Protection/Third Track: Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities' EC/GC/02/7 (25 April 2002), para. 5.

29 Judith Kumin, 'Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?' (2008) 27:1 RSQ 105–111.

30 Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Nijhoff 2008) 111.

31 UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 79.

32 UNHCR, 'Role of the Office of the United Nations High Commissioner for Refugees in South-East Asia (1979–1983)', JIU/REP/84/15 (1984) 4.

33 UNHCR, 'Addendum to the Report of the United Nations High Commissioner for Refugees' A/42/12/Add.1 (22 January 1988) annex, para. 13.

unprecedented efforts had consequences, however. In particular, the massive resettlement operations of Indochinese refugees contributed to a shift of policy and a harder stand by Western states regarding the admission of refugees from developing countries. The decrease in resettlement places was also accompanied by a radical rethinking of resettlement as the main solution in the context of the Indochinese crisis. While some states highlighted the difficulties faced by refugees in integrating into their new society, others argued that the rapid resettlement of the refugees had compromised any chances of finding better solutions for them, that is, voluntary repatriation. Some governments also claimed that resettlement had become part of the problem by providing an incentive spurring more people to leave and take their chances.³⁴

Concerned by the prospect of being left with a 'residual problem', countries of first asylum in Southeast Asia in turn adopted dissuasive measures or returned people seeking asylum. Against this backdrop, the CPA sought precisely to limit access to resettlement for Vietnamese asylum seekers, whereas the priority for ASEAN countries was to make sure that those already in camps would leave at the earliest possible time. A deadline for the introduction of the RSD mechanism to deal with the arrival of Vietnamese asylum seekers was agreed.³⁵ Those who arrived in countries of first asylum before that date continued to be considered *prima facie* refugees and were subsequently resettled. Those arriving after that date were subject to the new procedure and only those who were considered as refugees had access to resettlement. In total, more than 80,000 Vietnamese departed under the CPA, including some 32,000 Vietnamese recognized as refugees under the new regional procedure.³⁶ In addition, the CPA specified that third-country resettlement should continue to 'play an important role' with regard to Laotian refugees, who were estimated to number nearly 70,000 in Thailand at that time.³⁷ It is estimated that 44,000 Laotians were resettled under the CPA.³⁸

All in all, throughout the duration of the crisis, some 1,315,000 refugees, including 235,000 Cambodians, were resettled from countries of first asylum in the region to third countries.³⁹ In addition, some 650,000

34 Astri Suhrke, 'Indochinese Refugees: The Law and Politics of First Asylum' (May 1983) 467
Annals of the American Academy of Political and Social Science 112.

35 The deadline was set on 14 March 1989 for Thailand and Malaysia and 17 March for the Philippines and Indonesia. Singapore maintained its no-entry policy during the time of the CPA.

36 Robinson, *Terms of Refuge* (n 25) 194.

37 UNGA, 'Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General', UN doc A/44/523 (22 September 1989), Annex, Declaration and Comprehensive Plan of Action, para. 17.

38 Robinson, *Terms of Refuge* (n 25) 194.

39 Ibid., 272.

Vietnamese were resettled under the ODP.⁴⁰ The vast majority of them went to Western countries, in particular the United States, Canada, Australia and France. The resettlement programme for Vietnamese refugees involved more than 700,000 people and may still represent the largest resettlement programme ever set up by UNHCR. Due to its scale, duration and mixed nature, it is arguably the Indochinese refugee crisis that led to what UNHCR called ‘the disenchantment with resettlement’.⁴¹ Referring to the massive resettlement operations of Indochinese refugees at the end of the CPA, UNHCR presented the problem in the following terms:

The Vietnamese programme has in many ways cast a long shadow over the role of resettlement as a solution and a means of protection. There is now general agreement that the decision taken in 1979 to offer resettlement to the boat people arriving in South-East Asia acted as a ‘pull factor’, helping to create an unmanageable exodus of people, an increasing number of whom left their homeland for economic and social reasons, rather than to escape from persecution. As a result of this experience, one can assume that the industrialized states will be wary about making an open-ended commitment to the resettlement of an entire refugee population in the foreseeable future.⁴²

While by the mid-1980s resettlement had in practice, if not in principle, become ‘the preferred durable solution’ to refugee problems, the quasi-automatic transfer of the Indochinese refugees to third countries for some 15 years contributed to a new reflection about the role of resettlement.⁴³ In just a few years, resettlement would come to be regarded as a ‘last resort’,⁴⁴ or as ‘the least preferred solution to a refugee problem’⁴⁵ that should only be resorted to ‘in the absence of other options and when there is no alternative way to guarantee the legal or physical security of the person concerned’.⁴⁶ The approach also became more individualized, with resettlement being increasingly used in a ‘strategic’ way, in UNHCR’s words, with a focus on certain categories of particularly vulnerable persons such as women at risk,

⁴⁰ Kumin, ‘Orderly Departure from Vietnam’ (n 29) 117.

⁴¹ UNHCR, *State of the World’s Refugees 2000* (n 31) 103.

⁴² UNHCR, *The State of the World’s Refugees 1995: In Search of Solutions* (OUP 1995), ch 2.

⁴³ UNHCR, *The State of the World’s Refugees 2006: Human Displacement in the New Millennium* (OUP 2006) 142–143.

⁴⁴ UNHCR, ‘Resettlement as an Instrument of Protection: Traditional Problems in Achieving This Durable Solution and New Directions in the 1990s’ EC/SCP/65 (9 July 1991), para. 2.

⁴⁵ UNHCR, *State of the World’s Refugees 1995* (n 42), ch 2.

⁴⁶ UNHCR, *The State of the World’s Refugees 1997: A Humanitarian Agenda* (OUP January 1997), ch 2.

victims of torture or violence, or persons in need of medical care that is not available in the country in which they are located.⁴⁷ In recent years, less than 1 per cent of refugees have benefited from resettlement as a durable solution on a yearly basis.

7.2.2. *Resettlement in Southeast Asia today*

Despite these developments, resettlement has remained particularly important for some countries, including for the members of the AALCO. In 1996, the participants at the meeting to review the Bangkok Principles considered that ‘resettlement countries should be encouraged to receive refugees in a non-discriminatory manner and in the spirit of international cooperation, because this also constituted a kind of burden-sharing by the international community’.⁴⁸ The final version of the Bangkok Principles adopted in 2001 provides that ‘voluntary repatriation, local settlement or third country resettlement, that is, the traditional solutions, all remain viable and important responses to refugee situations, even while voluntary repatriation is the pre-eminent solution’.⁴⁹ Resettlement is also referred to as one of the main measures to ensure international solidarity and cooperation in burden-sharing.⁵⁰

In Southeast Asia more particularly, resettlement is still the main potential durable solution for people who have spent some time in a country of first asylum but who cannot remain there and who are not able to return home in a more or less distant future. In this respect, refugee resettlement from Southeast Asian countries, mainly to the United States, has represented a disproportionate share of the overall resettlement effort over the past decade. In 2010, for example, some 24,420 people from Myanmar were resettled out of 72,914, making them the second-largest group after Iraqi refugees.⁵¹ The following year, Thailand and Malaysia represented two of the three largest resettlement operations globally, with 9,600 and 8,400 departures, respectively.⁵² In Thailand, resettlement was envisaged as a ‘strategic’ tool in the context of the refugees in the camps at the border with Myanmar in 2004.⁵³ Between 2005 and December 2020, 129,263 people were resettled from Thailand,⁵⁴ including 114,063 people from Myanmar who had been

47 ExCom, General Conclusions no 99 (LV) on International Protection (2004) and no 108 (LIX) on International Protection (2008).

48 AALCO, ‘Report of the Seminar Commemorating the 30th Anniversary of the Bangkok Principles’ (n 18).

49 AALCO, ‘2001 Bangkok Principles’, art. VIII.1.

50 Ibid., art. X.4.

51 UNHCR, ‘Projected Global Resettlement Needs 2012’ (2011).

52 UNHCR, ‘A Year of Crisis. UNHCR Global Trends 2011’ (June 2012).

53 UNHCR, ‘Note on International Protection’ A/AC.96/1024 (12 July 2006), para. 12.

54 UNHCR, Resettlement Data <www.unhcr.org/resettlement-data.html> accessed 17 January 2021.

staying in the refugee camps at the border.⁵⁵ Some 97,750 people were resettled from Malaysia and 7,649 people from Indonesia between 2003 and 2020.⁵⁶ The Australian Government curtailed resettlement opportunities from Indonesia in 2014, considering that they constituted a pull factor.

Moreover, a regional Emergency Transit Mechanism (ETM) was established in Southeast Asia in August 2009, with the signing of an agreement between the Philippines, UNHCR and IOM. This made the Philippines the second country in the world, after Romania, to formally become a transit country for refugees in need of evacuation from countries of first asylum, pending their final resettlement in a third state. Those concerned include refugees at risk of being returned or whose lives are threatened; refugees in detention for whom resettlement appears to be the only solution and for whom a transfer is necessary in order to secure their release; refugees with significant protection problems; refugees who are difficult to access in the country of first asylum; or refugees for whom the final destination must be kept secret.⁵⁷

These transit mechanisms are partly inspired by the experience of the Indochinese refugee crisis. As was the case for transit centres in Indonesia and the Philippines, they represent a form of burden- and responsibility-sharing to reduce the pressure on first asylum countries in Southeast Asia and thus contribute to the safeguarding of the institution of asylum. Guarantees of resettlement must also be given in advance, to ensure that no one will stay in the Philippines for too long. According to a UNHCR note:

A form of standby commitment by resettlement countries would provide the element of predictability that countries hosting an [Emergency Transit Facility] would be expecting, as was earlier the case during implementation of the Comprehensive Plan of Action for refugees arriving by boat from Vietnam in the late 1970s and early 1980s under the Rescue at Sea Offers (RASRO) and Disembarkation Resettlement Offers (DISERO) schemes.⁵⁸

The agreement provides that the ETM could support up to 20 people in transit simultaneously. The procedure is highly confidential to avoid any

⁵⁵ UNHCR, Resettlement of Myanmar Refugees from Temporary Shelters in Thailand (31 December 2020) <<https://data2.unhcr.org/en/documents/details/84234>> accessed 20 January 2021.

⁵⁶ UNHCR, Resettlement Data <www.unhcr.org/resettlement-data.html> accessed 17 January 2021.

⁵⁷ UNHCR, 'Guidance Note on Emergency Transit Facilities: Timisoara, Romania / Manila, Philippines / Humenné, the Slovak Republic' (4 May 2011).

⁵⁸ UNHCR, 'Information Note and Recommendations from UNHCR: Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, Geneva, 6–8 July 2010' (19 May 2010).

friction between states of origin of refugees, some of whom are members of ASEAN, and states of first asylum.

Yet, while the number of resettlements from Southeast Asia may seem relatively significant, from the point of view of Southeast Asian states, it is still insufficient. People recognized as refugees by UNHCR may have to wait for a long time to have the opportunity to depart to a third country. At the same time, and somewhat paradoxically, Southeast Asian states remain concerned not to open the door to resettlement too much, for fear of bringing in new asylum seekers. To avoid giving the impression that there is a ‘right to resettlement’, UNHCR introduced a paragraph in the Code of Conduct for Asylum Seekers and Refugees in Indonesia, published in 2008, that expressly mentioned the fact that not all refugees would necessarily be resettled:

Recognized refugees are assisted to find suitable solutions which may include voluntary return when conditions permit or the possibility of resettlement in a third country. Please note, however, that recognized refugees are not automatically entitled to resettlement, nor may they select a specific country for resettlement submission. . . . The chances for successful resettlement are globally very limited. *Therefore, as a recognized refugee, you should understand that not all recognized refugees will and can be resettled in a third country.*⁵⁹

The issue of resettlement in Southeast Asia must also be considered from a regional perspective, as it appears that changes in resettlement policy in one country may have consequences for other countries. The length of the RSD procedure, which can typically last for years, is a crucial element in this respect.⁶⁰

7.3. An increasing focus on repatriation

Compared to local integration and resettlement, voluntary repatriation represented the durable solution for which UNHCR and the international community had arguably the most limitations in terms of mandate, influence, time and resources.⁶¹ In fact, voluntary repatriation in principle ‘takes place when protection against *refoulement* is still called for’, which indeed raises questions regarding the promotion of return in such

59 UNHCR, ‘Code of Conduct for Asylum Seekers and Refugees in Indonesia’ (October 2008) (emphasis in original).

60 JRS, ‘The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines’ (2012) 33–34.

61 Bupinder S Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23:3 RSQ 56.

circumstances.⁶² This partly explains why voluntary repatriation is not mentioned in the Refugee Convention, nor in its Protocol.⁶³ Voluntary repatriation is only provided for in UNHCR's Statute, thus emphasizing the fact that the organization should not be involved in forced return.⁶⁴ Put differently, it appears that the notion of voluntary repatriation 'is not, in and of itself, legally relevant to the treaty-based duty of protection which binds governments'.⁶⁵

Yet, voluntary repatriation has increasingly come to be considered as 'the most desirable and durable solution to problems of refugees and displaced persons of concern' to UNHCR,⁶⁶ with the other two durable solutions now being seen as 'mere palliatives to the refugees' abnormal state of affairs'.⁶⁷ Voluntary repatriation, it has been said, is the only solution that at the same time meets the concerns of host states, which are no longer willing to receive large numbers of refugees on a permanent basis; the interests of donor states, which prefer their money to be invested in the development of the countries of origin rather than in host states; and the aspirations of refugees themselves, the vast majority of whom are assumed to prefer to return home.⁶⁸ This 'idealization of the solution of repatriation'⁶⁹ has been accompanied by a reaffirmation of the 'right of return' under international law,⁷⁰ now considered as 'the basic principle underlying voluntary repatriation'.⁷¹ Needless to say, this shift, which dates back to the early 1980s, also reflected an attempt by Western countries 'to exclude the developed world from the search for durable solutions' as they sought alternative solutions to resettlement.⁷²

⁶² Marjoleine Zieck, 'Reimagining Voluntary Repatriation' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 1065–1066.

⁶³ The 'voluntariness' criterion only comes into play in relation to some of the cessation clauses. See 1951 Convention, art. 1C(1), 1C(2) and 1C(4).

⁶⁴ UNGA, 'Statute of the Office of the United Nations High Commissioner for Refugees', A/RES/428(V) (14 December 1950), para. 8(c), specifying that the High Commissioner shall provide for the protection of refugees by 'assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities'.

⁶⁵ James C Hathaway, 'The Right of States to Repatriate Former Refugees' (2005) 26 *Immigration and Nationality Law Review* 207–208.

⁶⁶ UNHCR, 'Report of the United Nations High Commissioner for Refugees', A/ 38/121 (17 August 1983), para. 54.

⁶⁷ Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Content' (2004) 23:3 RSQ 2.

⁶⁸ UNHCR, *State of the World's Refugees 1995* (n 42), ch 2.

⁶⁹ Chimni, 'From Resettlement to Involuntary Repatriation' (n 61) 58.

⁷⁰ See in particular UNGA, Universal Declaration of Human Rights (10 December 1948) UNGA res 217 A, art. 13.2; International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 12.4.

⁷¹ UNHCR, *Handbook – Voluntary Repatriation: International Protection* (January 1996), ch 2.

⁷² Buphinder S Chimni, 'Perspectives on Voluntary Repatriation: A Critical Note' (1991) 3:3 IJRL 542.

In spite of this, there is ample evidence that Southeast Asian states have generally respected and often reaffirmed the principle of ‘voluntary’ repatriation of refugees both in words and action (Section 7.3.1). There have been cases where return was not really voluntary, though in many cases, in particular during the Indochinese refugee crisis, and notwithstanding the quality of the RSD, those who were compelled to return were people who were found to be not in need of international protection – meaning that states could legitimately and legally send them back to their countries of origin (Section 7.3.2). In other situations, Southeast Asian states have legitimized their actions based on the so-called “fundamental change” of circumstances in the country of origin, which corresponds to one of the cessation clauses of the 1951 Convention. Although this practice may be subject to criticism, it does indicate a recognition of the principles underpinning international refugee law (Section 7.3.3).

7.3.1. Voluntary repatriation of refugees in Southeast Asia

UNHCR had already engaged in voluntary repatriation operations in the 1970s, particularly in Africa, but some of the most important operations during this period were carried out in South Asia, with the repatriation, between 1973 and 1974, of nearly 10 million people from India to Bangladesh.⁷³ In Southeast Asia, the repatriation of the Indochinese refugees to Laos and Vietnam became an object of discussion from the very outset of the crisis, yet very little progress was made in this regard for some 15 years. With the asylum countries in the region precluding local integration and the possibilities of resettlement becoming increasingly limited throughout the 1980s, other solutions needed to be found for the tens of thousands of Indochinese refugees lingering in camps in Southeast Asian countries. It is in these circumstances that the issue of repatriation began to receive renewed attention in the region.

The organization of the International Conference on Indo-Chinese Refugees in June 1989 and the adoption of the CPA for Indochinese refugees provided the opportunity to further translate this new focus on voluntary repatriation into practice. Yet, the CPA was generally silent on the voluntary repatriation of persons recognized as refugees, since the agreement was precisely that the Vietnamese asylum seekers found to be refugees would be resettled. References to voluntary return in the CPA were in fact made in relation to those found not to be in need of international protection, that is, non-refugees. Indeed, section F of the CPA titled ‘Repatriation/Repatriation Plan’ provided that ‘persons determined not to be refugees should return to their country of origin’ and that ‘in the first instance, every effort will be made to encourage the *voluntary* return of such persons’.⁷⁴ By providing that non-refugees should ideally

73 UNHCR, *State of the World's Refugees 2000* (n 31) 68–76.

74 UNGA, ‘Declaration and CPA’ (n 37) Annex, Declaration and Comprehensive Plan of Action, para. 12 (emphasis added).

return on a voluntary basis, the CPA was applying a criterion that in principle does not apply to such situations, as under international law states have the right to return people who are not in need of international protection. The CPA was arguably the first instrument of this kind to declare that people fleeing communist countries might be repatriated. Thus, one way to mitigate this position was to insist on the voluntariness of their return. All in all, as part of a vast repatriation programme that last for the entire duration of the CPA, nearly 95,000 Vietnamese returned home ‘voluntarily’ from Thailand, Indonesia, Malaysia, the Philippines, Singapore and Hong Kong.⁷⁵ Many, it seems, had agreed to return because they had no alternative but to stay in the camps indefinitely, where living conditions were being made more difficult.

The same logic applied to the Laotian asylum seekers in Thailand. Despite lengthy negotiations between the Thai Government and that of Laos to facilitate the return of those who had not been recognized as refugees at the end of the process set up in 1985 and who agreed to return, very little progress was made until 1989. Against this backdrop, the CPA provided for trilateral negotiations between UNHCR, Thailand and Laos to be held in order to ‘accelerat[e] and simplif[y] the process for both the return of the screened out and voluntary repatriation to the Lao People’s Democratic Republic under safe, humane and UNHCR-monitored conditions’.⁷⁶ As of 1 March 1997, just over 27,000 Laotians had voluntarily returned to Laos, most of them lowland Lao.⁷⁷ Surprisingly, three-quarters of them had been recognized as refugees and were not forced to return.⁷⁸ The main problem remained the Hmong, as many of them were not particularly interested in resettlement nor did they want to return home under the circumstances that still prevailed in Laos at the time. Yet, most of the Hmong who found refuge in Thailand eventually agreed to return, either on their own or as part of a repatriation programme.⁷⁹

The return of the Cambodians in the early 1990s represented another major operation organized by UNHCR. The Cambodians had been deliberately excluded from the CPA because they were considered to be ‘displaced persons’ instead of refugees and because of the particular political situation prevailing in Cambodia, which required a political settlement. The conclusion of the Comprehensive Cambodian Peace Agreement (‘Paris Agreement’) in 1991 following the withdrawal of Vietnam from Cambodia and the establishment of the UNTAC in February 1992 signalled that the time had come to encourage refugees to return, ahead of the elections scheduled for May 1993. UNHCR

⁷⁵ Richard Towle, ‘Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?’ (2006) 18:3–4 IJRL 555–556.

⁷⁶ UNGA, ‘Declaration and CPA’ (n 37) Annex, Declaration and Comprehensive Plan of Action, para. 16.

⁷⁷ UNHCR, ‘Report of the United Nations High Commissioner for Refugees’, A/52/12 (2 May 1997), para. 151.

⁷⁸ UNHCR, *State of the World’s Refugees 2000* (n 31) 101–102.

⁷⁹ Robinson, *Terms of Refuge* (n 25) 120–122.

was tasked with organizing the repatriation and reintegration of more than 360,000 people living in camps on the border with Thailand, in cooperation with other organizations. A tripartite Memorandum of Understanding was also signed between UNHCR, Thailand and the Supreme National Council (SNC) in Cambodia on the organization of the voluntary repatriation of the displaced persons, which provided that repatriation should take place under conditions of safety and on a voluntary basis.⁸⁰ Despite the volatile situation that still prevailed in the country, the repatriation of the Cambodians proceeded as planned. The vast majority of them were effectively repatriated between 1992 and 1993, on time to participate in the elections. Their repatriation was then considered as ‘voluntary’, even if many of those concerned had eventually agreed to return simply because they did not have any other choice except going back by their own means.⁸¹ In total, nearly 387,000 Cambodians were repatriated during this period, the vast majority from Thailand, with a few thousand also being repatriated from Indonesia, Vietnam or Malaysia.⁸²

When the modalities of the CPA were agreed, one of the main points of contention concerned the measures to be taken with regard to persons who were refused refugee status at the end of the RSD procedures and who nevertheless refused to return to their country of origin. This particularly sensitive issue also concerned some displaced persons from Cambodia who refused to return to their country. According to the CPA, if sufficient progress was not being made towards their voluntary return ‘after the passage of reasonable time’, then ‘alternatives recognized as being acceptable under international practice should be examined’.⁸³ This ambiguous wording was the result of a lack of consensus on measures to be taken in this situation, with the United States and Vietnam opposing forced return, while Southeast Asian states made it clear that they did not want to stay with any ‘residual problem’ and that a solution needed to be found. Interestingly, it is the United Kingdom and Hong Kong which began to expel rejected Vietnamese asylum seekers ‘under dubious circumstances’ as early as December 1989.⁸⁴ It took a few years after the

80 Tripartite Memorandum of Understanding among the Royal Thai Government, the Supreme National Council of Cambodia, and the Office of the United Nations High Commissioner for Refugees relating to the Repatriation of Cambodian Refugees and Displaced Persons from Thailand (21 November 1991), art. 1.

81 W Courtland Robinson, ‘Refugee Warriors at the Thai-Cambodian Border’ (2000) 19:1 RSQ 35–36.

82 UNHCR, ‘Report of the United Nations High Commissioner for Refugees’, A/49/12 (31 August 1994), para. 4.

83 UNGA, ‘Declaration and CPA’ (n 37) Annex, Declaration and Comprehensive Plan of Action, para. 14.

84 Ann C Barcher, ‘First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?’ (1991–1992) 24 New York University Journal of International Law and Politics 1256. See also Linda Hitchcox, ‘Repatriation: Solution or Expedient? The Vietnamese Asylum Seekers in Hong Kong’ (1990) 18:1 Asian Journal of Social Science 116–117.

adoption of the CPA for a solution to emerge, with the ASEAN states, the Government of Vietnam and UNHCR signing tripartite agreements on the ‘orderly repatriation’ of rejected Vietnamese asylum seekers, with a deadline for the repatriation of all Vietnamese set on 25 June 1996.⁸⁵ In the meantime, the conditions in the camps were made harsher in order to spur some people into leaving on their own or accepting the conditions offered to them under the voluntary repatriation programme. The last camps of rejected Vietnamese asylum seekers in Thailand and Indonesia were closed in February 1997. In total, some 14,000 people were reported to have returned to Vietnam under the so-called Orderly Repatriation Programme (ORP), bringing the total number of Vietnamese returned home within eight years to some 110,000.⁸⁶

As for the displaced persons at the border between Thailand and Myanmar, it must be noted that despite the Thai Government’s insistence on the fact that they are expected to return to Myanmar, and although rumours concerning their imminent repatriation have spread from time to time, it has so far respected the principle of voluntary repatriation. While acknowledging that discussions regarding the repatriation of the displaced persons had taken place, the Representative of Thailand to the ExCom assured delegates in October 2012 that the Kingdom ‘[would] not overly rush things’.⁸⁷ Since then, the authorities have reiterated on various occasions the fact that they would only send the refugees back on a ‘voluntary basis’.⁸⁸ A programme to facilitate the voluntary repatriation of the displaced persons was agreed by the two governments in 2016, with UNHCR’s support, and Thailand committed as part of the Global Refugee Forum to do more to ‘move forward the repatriation process . . . in a systematic and sustainable manner’.⁸⁹ Yet, as of August 2020, only 1,102 people had returned to Myanmar under its auspices.⁹⁰

⁸⁵ A first Memorandum of Understanding between the Indonesian Government, Vietnam and UNHCR was signed on 2 October 1993 concerning an ‘orderly repatriation’ programme for Vietnamese. Similar agreements were subsequently concluded with Malaysia, the Philippines, and Thailand.

⁸⁶ Towle, ‘Processes and Critiques of the CPA’ (n 75) 555–556.

⁸⁷ National Security Council of Thailand, ‘Statement by Mr Anusit Kunakorn, Deputy Secretary-General of the National Security Council of Thailand at the 63rd Session of the Executive Committee of the Programme of the UNHCR’ (2 October 2012).

⁸⁸ See e.g. Government of Thailand, ‘Thailand: PM Meets with United Nations High Commissioner for Refugees’ (7 July 2017) <<https://reliefweb.int/report/thailand/thailand-pm-meets-united-nations-high-commissioner-refugees>>; Supalak Ganjanakhundee, ‘Thailand Rejects UN Report on Myanmar Refugees on Border’, *The Nation* (4 February 2018) <www.nationthailand.com/asean-plus/30337949> both accessed 17 January 2021.

⁸⁹ See UNHCR, Global Compact on Refugees, Pledges and Contributions <<https://globalcompactrefugees.org/index.php/channel/pledges-contributions>> accessed 17 January 2021.

⁹⁰ UNHCR, Fact Sheet Myanmar (September 2019) <<https://reporting.unhcr.org/sites/default/files/UNHCR%20Myanmar%20Fact%20Sheet%20-%20September%202019.pdf>> accessed 16 January 2021.

In sum, the principle of the voluntary character of repatriation has generally been upheld by the main non-signatory states in Southeast Asia when it comes to attaining durable solutions for people they consider as being in need of international protection. The importance of this principle is also evidenced by the inclusion of a specific provision on voluntary repatriation in the final version of the Bangkok Principles adopted in 2001. Article VII of the Bangkok Principles is similar to art. V of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. It reaffirms, in particular, ‘the essentially, voluntary character of repatriation’, which should be respected in all cases, and adds that ‘no refugee shall be repatriated against his will’.⁹¹ At the same time, the Bangkok Principles reinforces the right of return, which is referred to in the document as a ‘natural right’.⁹² This means that the countries of asylum do expect refugees to be able to return should they wish so and that their countries of origin should not prevent them from returning.

7.3.2. Fundamental change of circumstances in the country of origin

While Southeast Asian countries were heavily criticized for their determination to return screened-out asylum seekers in the early 1990s, despite their sovereign right to do so, the crisis in former Yugoslavia and the provision of a temporary protection to those fleeing that conflict led to a sudden resurgence of interest among Western governments in their own right to repatriate people who were no longer in need of international protection. Voluntary return remained preferable, but it had become politically more acceptable to envisage the return of persons found no longer to be in need of international protection including under some form of constraint if necessary, as long as this could be effected in ‘safety’ and ‘dignity’.⁹³ As Edwards noted, compared to the provision of asylum granted under the Refugee Convention, the focus of temporary protection schemes is more ‘on speedy return as soon as the cause of flight has dissipated, at times regulated merely by administrative discretion’.⁹⁴

Besides the cessation clauses based on a voluntary action undertaken by the refugee himself or herself, the Refugee Convention contains more controversial cessation clauses linked to a so-called change of circumstances in the country of origin. These concern situations where ‘the circumstances in connexion with which [a person] has been recognized as a refugee have

91 AALCO, ‘2001 Bangkok Principles’, art. VII.1.

92 Ibid., art. VI.4.

93 See James C Hathaway, ‘The Meaning of Repatriation’ (1997) 9:4 IJRL 551–558; Buphinder S Chimni, ‘The Meaning of Words and the Role of UNHCR in Voluntary Repatriation’ (1993) 5:3 IJRL 453–457.

94 Alice Edwards, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13:2 Melbourne Journal of International Law 18 612.

ceased to exist'⁹⁵; or if, in the case of a person who has no nationality, 'the circumstances in connexion with which [he or she] has been recognised as a refugee' have 'ceased to exist' and the person concerned is 'able to return to the country of [his or her] former habitual residence'.⁹⁶ These two cessation clauses allow for the return of refugees to be organized without states having to take the will of those concerned into account, precisely because in such cases they are no longer considered to be refugees based on a purported 'objective' analysis of the situation. As noted by Hathaway,

because refugee status is explicitly conditioned on the continuation of a risk for refugees in the State of origin, it may be revoked when there has been a sufficient change of circumstances in that country to undercut the need for protection.⁹⁷

While still insisting on the importance of 'voluntariness' as a condition for repatriation, the UNHCR Handbook on Voluntary Repatriation, published in 1996, also acknowledged the importance of 'an overall, general improvement in the situation in the country of origin so that return in safety and with dignity becomes possible for the large majority of refugees'.⁹⁸ The issue that these developments raised were expressed by UNHCR in the following terms:

The international community's desire to promote the return of refugees has been so strong that both States and humanitarian organizations have started to re-examine the concept of voluntary repatriation. Most crucially, they are asking, should repatriation always take place on a voluntary basis and at a time of the refugee's own choosing? If conditions have improved in their country of origin and if safety in their country of asylum cannot be guaranteed, could refugees not be expected or required to go home?⁹⁹

According to UNHCR, there are three requirements to be fulfilled for refugee status to be considered to have ceased by reason of a change of circumstances. First, the so-called change of circumstances must be 'of a fundamental nature' so that the cessation of refugee status 'only comes into play when changes have taken place which address the causes of displacement

95 1951 Convention, art. 1C(5).

96 Ibid., art. 1C(6).

97 Hathaway, 'The Meaning of Repatriation' (n 93) 551. See also Hathaway, 'The Right of States to Repatriate Former Refugees' (n 65) 201–242.

98 UNHCR, *Handbook – Voluntary Repatriation* (n 71) section 3.1. See also ExCom, General Conclusions no 65 (XLII) (1991), para. (q) and no 69 (XLIII) on Cessation of Status (1992); UNHCR, 'Note on the Cessation Clauses', EC/47/SC/CRP.30 (30 May 1997).

99 UNHCR, *State of the World's Refugees 1997* (n 46), ch 2.

which led to the recognition of refugee status'. Second, the change in circumstances must be 'enduring' – time must therefore be allowed to assess the evolution of the situation before taking a decision on repatriation. Finally, the persons concerned must have re-availed themselves of the protection of their country. Such protection should not only be 'effective and available' but also go beyond mere physical security; a new link must in fact be established between the state and the returnees.¹⁰⁰ The nature of political changes and the improvement of the human rights situation in the country of origin are important factors to be taken into account in this regard. If the aforementioned three conditions are not met, then the persons concerned, although they have returned to their country, should be able to return to the country of asylum and benefit again from its protection. The main issue, however, is that in the absence of any specific mechanism, the countries of asylum remain sole in charge of determining whether the conditions in a country of origin have improved sufficiently.

The fundamental change of circumstances in the country of origin became an important aspect of the discussion for Thailand in the context of the residual caseload of Cambodian displaced persons at the border. The Representative of Thailand to the ExCom indicated as early as 1992:

Repatriation is indeed the key to the refugee problem, especially when it comes to massive arrivals of asylum seekers or migratory movements. In the former cases, repatriation should take place once the political climate of the country of origin is conducive to it and, in the latter, when it has been found that the asylum seeker is not, strictly speaking, a refugee.¹⁰¹

The Tripartite Memorandum of Understanding signed in November 1991 between UNHCR, Thailand and the SNC on the voluntary repatriation of displaced persons from Cambodia expressly provided that if the contracting parties agree that 'the circumstances that create the status of genuine refugee have ceased to exist', then the principle of voluntary repatriation would 'no longer be relevant'.¹⁰² In other words, while return to Cambodia was to be voluntary as long as conditions in the country were not considered sufficiently good, the consent of Cambodian displaced persons would no longer be necessary if the conditions that prompted them to leave at the first place ceased to exist. This reflected the cessation clause in art. 1C(5) of the 1951 Convention, emphasizing a change in the situation in the country of origin.

¹⁰⁰ UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)', HCR/GIP/03/03 (10 February 2003).

¹⁰¹ UNHCR ExCom, 'Summary Record of the 473th Meeting, Held at the Palais des Nations, Geneva, on Monday, 5 October 1992', A/AC.96/SR.473 (1992).

¹⁰² Tripartite MoU on the Repatriation of Cambodian Refugees from Thailand (n 80).

There were indeed several hundred Cambodians who refused to return to their country, even though it had been made clear that they would not be allowed to remain in Thailand and that they were required to go back to their country for the elections which took place in 1993. Only a small number of them were eventually resettled abroad, when they were able to demonstrate that the reasons for their flight were still valid following the conclusion of a political agreement and the holding of elections in Cambodia. All the others, about 600 cases, were returned to Cambodia by the Thai authorities in May 1993.¹⁰³ The operation to repatriate refugees and displaced persons from Cambodia was thus completed.

Thailand has resorted to the ‘fundamental change of circumstances’ argument on various other occasions. For instance, the Thai authorities returned asylum seekers belonging to the Mon ethnic group, who had found refuge in Thailand, to Myanmar between 1995 and 1997 under the pretext that the area was ‘safe’ following agreements concluded between the various armed factions in Mon State and the Myanmar Government.¹⁰⁴ During the same period, they sent some 430 refugees of Pa’O ethnic minority back to Shan State in Myanmar, arguing that ‘there was no longer any fighting in their home villages’.¹⁰⁵ It is doubtful, however, that any evaluation was carried out to ensure that the conditions as set out by UNHCR to consider resorting to the ‘ceased circumstances’ clause were all met.

There have also been concerns that the Thai authorities may resort to the same line of arguments with regard to the refugees in the camps at the border with Myanmar. In 2003, UNHCR noted, in relation to the improvement in relations between Thailand and Myanmar and the fact that ethnic groups in Myanmar that had been fighting the government were defeated or had concluded an arrangement, that ‘a change of the most fundamental kind [was] taking place in Thailand’.¹⁰⁶ Against this backdrop, UNHCR noted that ‘both developments [had] opened up possibilities of voluntary repatriation’ but that there remained ‘a real danger that this repatriation will either be forced or occur spontaneously at a massive scale with disastrous consequences on the returnees, the local population and/or infrastructure in places of origin/return in Myanmar’.¹⁰⁷ So far, however, Thailand has agreed that the conditions for their return are not yet ripe for the repatriation to take place and the government continues to speak about ‘voluntary’ repatriation. While this attitude is evidence of the recognition of the specific

¹⁰³ Robinson, *Terms of Refuge* (n 25) 250.

¹⁰⁴ See HRW, ‘Unwanted and Unprotected: Burmese Refugees in Thailand’, C1006 (1 September 1998). See also AI, ‘Kingdom of Thailand. Erosion of Refugee Rights’, ASA 39/03/97 (September 1997) 5–7.

¹⁰⁵ AI, ‘Kingdom of Thailand’, *ibid.*, 5.

¹⁰⁶ Quoted in W Courtland Robinson, ‘Thailand: Background Paper on Human Rights, Refugees and Asylum Seekers’, Writenet (July 2004) 34–35.

¹⁰⁷ Quoted in *ibid.*, 34–35.

protection needs of refugees, it also makes clear that protection might stop if the conditions that led to their displacement come to an end.

The ambiguous role of UNHCR with regard to the application of the ceased circumstances clause must also be noted, since the organization has at times recommended cessation ‘in contexts where political changes have not been fully consolidated’, essentially as a way ‘to show public confidence in a new regime or State, despite significant concerns about the fundamental and durable nature of change’.¹⁰⁸ In Malaysia, the UNHCR Office announced that, as of May 2018, the Chin refugees from Myanmar – an estimated 31,150 persons – would have to go back to Chin State considering the ‘positive developments in the state which are durable and sustainable’.¹⁰⁹ While it is not clear if this decision was taken under some pressure from the Malaysian authorities or if it was taken independently by UNHCR, it did cause an outcry among NGOs¹¹⁰ and was eventually reversed following the worsening of the security situation in southern Chin State in early 2019.¹¹¹

7.4. Addressing the root causes of refugee flows

In the early 1990s, UNHCR started to emphasize the need to address also the so-called “root causes” of refugee flows, an issue that had been largely put aside during the Cold War period. In its view:

An even better ‘solution’ to refugee problems would be to prevent them from occurring, by removing or mitigating the underlying causes of the conflicts and human rights abuses that force people to become refugees. Convinced that there will be no end to refugee emergencies until the international community has found ways to deal effectively with the root causes of coerced displacement, the High Commissioner has placed prevention alongside solutions as an integral part of her strategy and has increasingly oriented the Office towards the promotion and support of efforts by the international community to alleviate situations

108 Georgia Cole, ‘Cessation’ in Costello, Foster and Jane McAdam, *The Oxford Handbook of International Refugee Law* (n 62) 1035.

109 Rashvinjeet S Bedi, ‘UNHCR: Chin Refugees No Longer Need UN Protection as Myanmar’s Chin State Now Stable’, *Star Online* (29 June 2018) <www.thestar.com.my/news/nation/2018/06/29/unhcr-chin-refugees-no-longer-need-un-protection-as-myanmars-chin-state-now-stable/> accessed 17 January 2021.

110 ExCom, ‘NGO Statement on the Asia and the Pacific’, 74th Meeting of the Standing Committee (5–7 March 2019) <www.re liefweb.int/report/world/executive-committee-high-commissioner-s-programme-standing-committee-74th-meeting-ngo-0> accessed 17 January 2021.

111 UNHCR, ‘UNHCR Says Ethnic Chin Refugees May Require Continued International Protection as Security Situation Worsens in Myanmar’ (14 March 2019) <www.unhcr.org/news/press/2019/3/5c8a31984/unhcr-says-ethnic-chin-refugees-require-continued-international-protection.html> accessed 17 January 2021.

in countries of origin that threaten to create internal displacement and new refugees or that prevent those who have already fled from returning home.¹¹²

This statement represented a significant shift compared to the traditional approach to refugee flows. For a long time, until the end of the 1970s, there was considerable reluctance among humanitarian organizations to discuss the question of the root causes of refugees flows and to act to prevent the conditions that cause the mass exodus of refugees at the first place rather than to treat the symptoms or address the effects of such displacement. The root causes of refugee movements are predominantly political and therefore it was considered that humanitarian actors should not be involved in such issues.

For Southeast Asian states, the issue of the root causes and the responsibility of the countries of origin when it comes to generating refugee outflows has been a particularly important dimension of the discussions around refugee issues. Their insistence on pointing at the responsibility of the countries of origin and their continuous calls for measures aimed at addressing the causes of displacement contributed significantly to bringing this issue to the top of the agenda (Section 7.4.1). In the case of the Rohingya, which today represents the main humanitarian challenge in the region, this approach has been increasingly at odds with the sacrosanct principle of non-interference in the internal affairs of other states (Section 7.4.2).

7.4.1. The responsibility of countries of origin

The responsibility of countries of origin was indeed emphasized for the first time by the ASEAN states in the context of the Indochinese refugee crisis, when they called upon the international community to take measures to address the large-scale movements of Vietnamese asylum seekers directly at its source. The Meeting on Refugees and Displaced Persons that took place in Geneva in 1979 was the first meeting of this kind at which the main country of origin of refugees was present. With the ODP and the development of mass information campaigns (considered as a major innovation at the time), Vietnam agreed to take measures to limit the number of people leaving the country irregularly. The situation in Cambodia, which had been dealt with separately, was also brought before the UN bodies by the ASEAN states, which called for an immediate withdrawal of Vietnamese forces and demanded that the UN Security Council

¹¹² UNHCR, 'Note on International Protection' A/AC.96/815 (31 August 1993), para. 4. See also, UNHCR, 'Note on International Protection', A/AC.96/799 (25 August 1992), para. 5.

¹¹³ See in this regard Lau Teik Soon, 'ASEAN and the Cambodian Problem' (1982) 22:6 *Asian Survey* 548–560.

takes steps in this direction.¹¹³ They also called for a new international conference to address the Cambodian refugee problem to be convened as part of a more comprehensive strategy including a political component.¹¹⁴ This is arguably the origin of the debate on the causes of refugee movements and of reflections on the possibilities for the international community to tackle these causes so as to prevent refugee influxes by acting directly at the source of the problem.¹¹⁵

It is in this context also that suggestions were made to impose sanctions on states responsible for committing atrocities against their nationals, thus forcing them to leave their homeland. A 'heated' discussion on root causes took place for the first time within the UN system in the context of the Third Committee of the UNGA in 1980 with regard to Cuba and Vietnam, both of which were accused of encouraging mass exoduses.¹¹⁶ It was followed by the adoption by the UNGA in 1980 and 1981 of a series of resolutions noting 'the responsibilities of States with regard to averting new massive flows of refugees and emphasizing the fact that 'massive flows of refugees may not only affect the domestic order and stability of receiving States but also jeopardize the stability of entire regions and thus endanger international peace and security',¹¹⁷ thus making the link with the Chapter VII of the UN Charter. A Special Rapporteur was appointed by the Commission on Human Rights to prepare a study on the forces which get people on the move. Its main contribution was arguably the proposal that the UN establishes an early warning system regarding potential situations of massive exoduses.¹¹⁸ At the same time, the UNGA also established a Group of Governmental Experts on

¹¹⁴ An international conference was organized in New York in July 1981, at the end of which a plan for a comprehensive political settlement of the situation in Cambodia was adopted, but subsequently never implemented. The ASEAN states referred in particular to UNGA Resolution 34/22 of November 1979, which called for 'immediate withdrawal of all foreign forces from Kampuchea' and appealed to all states 'to refrain from any interference in the internal affairs of Kampuchea in order to enable its people to decide their own future and destiny'. UNGA, 'The Situation in Kampuchea', A/RES/34/22 (14 November 1979). See also UNGA, 'The Situation in Kampuchea', A/RES/35/6 (22 October 1980).

¹¹⁵ Muntarbhorn, *The Status of Refugees in Asia* (n 10) 148–150.

¹¹⁶ Johanne Thorburn, 'Root Cause Approaches to Forced Migration: Part of a Comprehensive Strategy? A European Perspective' (1996) 9:2 JRS 122–124.

¹¹⁷ UNGA, 'International Co-operation to Avert New Flows of Refugees', A/RES/35/124 (11 December 1980); UNGA, 'International Co-operation to Avert New Flows of Refugees', A/RES/36/148 (16 December 1981).

¹¹⁸ The Human Rights Commission appointed former High Commissioner for Refugees Prince Sadruddin Aga Khan as Special Rapporteur. See United Nations Commission on Human Rights, 'Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Study on Human Rights and Massive Exoduses', E/CN.4/1503 (31 December 1981).

International Co-operation to Avert New Flows of Refugees.¹¹⁹ These developments were paralleled, and in part supported, by an increasing emphasis on the need to promote voluntary repatriation as the most desirable solution.¹²⁰

Yet, despite this increasing attention on the need to avert new refugee flows, few measures were taken to translate these commitments into action and to clarify, on the one hand, what would be the legal nature of the obligations of states in terms of avoiding to create refugee flows and, on the other, what would be the consequences for states deemed responsible for a breach of their international obligations in this regard.¹²¹ Ironically, many states in Asia were opposed to any initiative to ‘avert’ flows ‘because of shared problems of ethnic minorities, and a fear of intrusive external pressures in their own affairs’.¹²²

It was arguably the CPA that best embodied the fundamental paradigm shift from a traditional model that UNHCR described as ‘reactive’ and ‘exile-oriented’ to a ‘proactive’, ‘homeland-oriented’ and ‘holistic’ approach with an emphasis on prevention and actions in the host country to prevent or mitigate refugee movements and promote voluntary repatriation.¹²³ Speaking to the ExCom, the representative of Thailand once said that the CPA had set ‘an important precedent for cooperative action’, insofar as it brought attention to the need to ‘tackle the problem at source’. Noting that ‘durable solutions would not be possible if the role of countries of origin was neglected’, he welcomed ‘the greater priority attached by UNHCR to creating an enabling environment inside countries of origin to help prevent further outflows’.¹²⁴ This new approach recognizing the need to include the countries of origin was endorsed by UNHCR shortly after the adoption of the CPA, with the issue of ‘root causes’ becoming an integral part of any so-called comprehensive approach. The 1991 ‘Note on International Protection’ stated that it had become necessary to ‘move from the traditional view of the refugee problem as one of the receiving country’s responsibility only’ and that ‘there should be new focus on the nature of States’ responsibilities, including those of countries of origin’.¹²⁵ Since then, the need to address

¹¹⁹ The Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees was established pursuant to resolution 36/148 of 16 December 1981. The report of the Group was submitted in 1986. See UNGA, ‘International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General’, A/41/324 (13 May 1986).

¹²⁰ See in particular ExCom, Conclusion no 40 (XXXVI) on Voluntary Repatriation (18 October 1985), para. (c) and (d).

¹²¹ Rainer Hofmann, ‘Refugee-Generating Policies and the Law of State Responsibility’, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (1985) 704–709.

¹²² Thorburn, ‘Root Cause Approaches’ (n 116) 128.

¹²³ UNHCR, *State of the World’s Refugees 1995* (n 42), ch 1.

¹²⁴ ExCom, ‘Summary Record of the 562nd Meeting, Held at the Palais des Nations, Geneva, on Monday, 30 September 2002’, A/AC.96/SR.562 (9 October 2002), para. 73–74.

¹²⁵ UNHCR, ‘Note on International Protection’, A/AC.96.777 (9 September 1991), para. 41.

the root causes has been emphasized in several ExCom Conclusions.¹²⁶ The Global Compact on Refugees also notes that ‘addressing root causes is the responsibility of countries at the origin of refugee movements’.¹²⁷

This approach was reflected in the 2001 final version of the Bangkok Principles. Article VIII.3 of the Principles provides that ‘the issue of root causes is crucial for solutions and international efforts should also be directed to addressing the causes of refugee movements and the creation of the political, economic, social, humanitarian and environmental conditions conducive to voluntary repatriation’.¹²⁸ Some states in Southeast Asia, for example Singapore and Thailand, would have liked the text to be even clearer regarding the responsibility of the state of origin of refugees and the related legal implications.¹²⁹

7.4.2. The Rohingya and the right of return under international law

Despite the growing consensus on the importance of acting directly to address the causes of refugee movements, this remains an issue over which humanitarian organizations have little control. The international community has limited scope for action, if there is no political will in the country of origin to resolve the situation that led to the displacement of populations. This, unfortunately, explains why little progress has been made in recent years in resolving one of the most tragic situations of recent times, that is the persecution and continuing forced displacement of the Rohingya.

By mid-2020, there were approximately 1 million Rohingya asylum seekers and refugees in the Asia-Pacific region. This included 860,000 people in Cox’s Bazar, Bangladesh, a large majority of whom had fled in late August 2017, plus tens of thousands of them who had sought refuge in other countries across the region over the past decades.¹³⁰ Bangladesh, which is not party to the Refugee Convention, had already provided refuge to hundreds of thousands of Rohingya on two occasions in the late 1970s and in the 1990s. In both cases, between 200,000 and 250,000 people had fled and were subsequently repatriated to Myanmar, with the exception of some 30,000 Rohingya who have remained in two refugee camps in Bangladesh since the mid-1990s.

¹²⁶ See in particular ExCom, Conclusion no 62 (LXI) on International Protection (1990), para. (a)(vi); no 80 (XLVI) Comprehensive and Regional Approaches within a Protection Framework (1996), para. (a); no 100 (LV) International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations (2004), para. (j)(iii); no 109 (LXI) Protracted Refugee Situations (2009), para. (a); no 112 (LXVII) International Cooperation from a Protection and Solutions Perspective (2016), para. 8.

¹²⁷ See GCR, UN doc A/73/12 (Part II) (2 August 2018), para. 8.

¹²⁸ AALCO, ‘2001 Bangkok Principles’, art. VIII.3.

¹²⁹ AALCO, ‘Status and Treatment of Refugees’ (n 21) Annex III.

¹³⁰ See UNHCR, ‘The Displaced and Stateless of Myanmar in the Asia-Pacific Region. An Overview of the Current Situation for Rohingya and Other Persons of Concern for Myanmar and UNHCR’s Response across the Region’ (January 2021).

The root causes of these movements are well known and have been reiterated countless times by a broad range of actors over the past years. It suffices here to quote part of the report produced by the International Fact-Finding Mission on Myanmar in 2018, which perfectly summarizes the situation:

The Rohingya have gradually been denied birth registration, citizenship and membership of the political community. This lack of legal status and identity is the cornerstone of the oppressive system targeting the Rohingya. It is the consequence of the discriminatory and arbitrary use of laws to target an ethnic group and deprive its members of the legal status they once possessed. It is State-sanctioned and in violation of Myanmar's obligations under international law because it discriminates on the basis of race, ethnicity and religion. It has a profound impact on the enjoyment of all other human rights.¹³¹

To respond to a situation created and sustained by systemic discrimination and denial of the rights of citizenship over a long period, an Action Plan aimed at addressing the situation of the Rohingya refugees in Bangladesh was developed by UNHCR for the High Commissioner's Dialogue in 2008. This envisaged 'an approach that included efforts to address the root causes of displacement and to increase prospects for return . . . through an enhanced political dialogue with the relevant actors'.¹³² Apart from UNHCR, many other actors, including the ASEAN states, have stressed the need to address the root causes of the Rohingya situation. For instance, the Summary of the Special Meeting on Irregular Migration in the Indian Ocean which was convened in 2015 by the Thai Government to respond to the Bay of Bengal and Andaman Sea crisis included a section stressing the need to address the 'factors in the areas of origin', including 'promoting full respect for human rights and adequate access of people to basic rights and services such as housing, education and healthcare'.¹³³ The 2016 Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime also highlights 'the need to address the root causes of irregular movement of persons and forced displacement'.¹³⁴ For Southeast Asian states, the duty to

¹³¹ Human Rights Committee, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar', A/HRC/39/CRP.2 (17 September 2018), para. 491.

¹³² UNHCR, 'Protracted Refugee Situations, High Commissioner's Initiative' (December 2008).

¹³³ See 'Summary', Special Meeting on Irregular Migration in the Indian Ocean', Bangkok, Thailand (29 May 2015).

¹³⁴ Bali Process, 'Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime. The Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime', Bali (23 March 2016), para. 4.

address the root causes of movements alongside other measures has indeed been a constant in any discussions around refugee issues.

Particularly noteworthy, while ASEAN has been largely silent on this situation, Malaysia and, to a lesser extent, Indonesia have on various occasions reacted to the treatment of the Rohingya.¹³⁵ For example, in September 2017, Malaysia issued a separate statement to distance itself from the official ASEAN Chairman's Statement on the humanitarian situation in Rakhine state,¹³⁶ criticizing the actions of the Myanmar Government and declaring that 'Malaysia will continue to speak about the plight of the Rohingyas'.¹³⁷ In New York, in September 2019, the then Prime Minister of Malaysia, Mahathir Mohamad, publicly condemned the 'genocide' perpetrated by the authorities in Myanmar.¹³⁸ In Indonesia, the government has also been under pressure from its own population to take a harder stance against Myanmar.¹³⁹ While these criticisms remain relatively scarce, they do represent a quite unusual challenge to the principle of non-interference in the internal affairs of other ASEAN states.

The emphasis on the need to address the root causes of the Rohingya's flight is related to the discussion on the 'right of return' under international law and the correlative obligation of states to admit their nationals. Although it is not included in the Refugee Convention, the 'right of return' is arguably a key principle of refugee protection and is considered by some as a rule of international customary law.¹⁴⁰ During the Indochinese refugee crisis, for instance, ASEAN states reaffirmed on many occasions 'the legitimate right' or the 'inalienable right' of the Cambodian refugees and displaced persons 'to return to their own countries'. The fact that the right of return

¹³⁵ Antje Missbach and Gunnar Stange, 'Muslim Solidarity and the Lack of Effective Protection for Rohingya Refugees in Southeast Asia' (2021) 10:5 Social Sciences 166–182.

¹³⁶ ASEAN, 'ASEAN Chairman's Statement on the Humanitarian Situation in Rakhine State' (September 2018) <<https://asean.org/wp-content/uploads/2017/09/1.ASEAN-Chairmans-Statement-on-the-Rakhine.pdf>> accessed 17 January 2021.

¹³⁷ Malaysia, 'Statement by YB Dato Saifuddin Abdullah, Foreign Minister of Malaysia on the Report of the United Nations Independent International Fact-Finding Mission on Myanmar' (29 August 2018) <www.kln.gov.my/web/guest/speeches-statements/-/asset_publisher/mN2jZPwqWjGA/content/statement-by-y-b-dato-saifuddin-abdullah-foreign-minister-of-malaysia-on-the-report-of-the-united-nations-independent-international-fact-finding-mission?inheritRedirect=true> accessed 17 January 2021.

¹³⁸ TN Alagesh, 'Dr M: Ensure Safety of Returning Rohingya Refugees', *The New Straits Times* (23 June 2019) <www.nst.com.my/news/nation/2019/06/498522/dr-m-ensure-safety-returning-rohingya-refugees?mc_cid=4c2e3aa4e8&mc_eid=6169557ccd> accessed 17 January 2021.

¹³⁹ See e.g. 'Indonesia's Muslims Urge More Support for Myanmar's Rohingyas', *Euronews* (16 September 2017) <www.euronews.com/2017/09/16/indonesias-muslims-urge-more-support-for-myansmars-rohingyas> accessed 17 January 2021.

¹⁴⁰ Vincent Chetail, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective' in Alexander T Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Press 2003) 59.

is provided for in the Bangkok Principles and that it has been regularly reaffirmed by Southeast Asian states in ASEAN declarations demonstrates that this principle bears great importance in the region.¹⁴¹

Since the Rohingya are stateless, one of the main issues regarding their right of return relates to the connection between them and the country to which they claim to have the right to return, namely Myanmar. In other words, is the right to return to a country limited to the ‘nationals’ of this country? In fact, the main international and regional human rights instruments provide that ‘everyone’ (in the case of the UDHR) or ‘every individual’ (in the case of the African Charter on Human and Peoples’ Rights) has the right to ‘to return to his country’,¹⁴² whereas the ICCPR provides that ‘no one shall be arbitrarily deprived of the right to enter his own country’.¹⁴³ The wording in the AHRD is similar to that of the UDHR: ‘Every person has the right to leave any country including his or her own and to return to his or her country’.¹⁴⁴ The 1966 version of the Bangkok Principles included an article on the right of return,¹⁴⁵ while the final version of the Bangkok Principles provides that a refugee who has no nationality shall have the right to return ‘to the State of which he is a habitual resident’.¹⁴⁶ Against this backdrop, it could be argued that the scope of the right of return extends beyond a country of nationality and that both nationals and people with special links with a particular country should benefit from the right of return there.¹⁴⁷ Indeed, the Human Rights Committee considers in relation to the ICCPR:

The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (‘no one’). Thus the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase ‘his own country’. The scope of ‘his own country’ is broader than the concept ‘country of his nationality’. It is not limited to nationality in the formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose

¹⁴¹ See Sébastien Moretti, ‘The Challenge of Durable Solutions for Refugees at the Thai-Myanmar Border’ (2015) 34:3 RSQ 84.

¹⁴² UNGA, Universal Declaration of Human Rights (10 December 1948) UNGA res 217 A, art. 13.2; African Charter on Human and Peoples’ Rights (opened for signature 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art. 12.2.

¹⁴³ ICCPR art. 12.4.

¹⁴⁴ AHRD (adopted 28 November 2012), art. 15.

¹⁴⁵ AALCO, ‘1966 Bangkok Principles’, art. 4.

¹⁴⁶ AALCO, ‘2001 Bangkok Principles’, art. VI.

¹⁴⁷ Chetail, ‘Voluntary Repatriation in Public International Law’ (n 67) 25.

nationality is being denied them. The language of Article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.¹⁴⁸

Against the backdrop of this interpretation of the right of return, even if the Rohingya are stateless they should have the right to return to Myanmar if they wish to do so, providing that they are able to prove that they have ‘special ties’ with Myanmar, including for instance the fact that they previously resided in the country. However, this is precisely where a further problem lies, since few of them are able to prove that they have been living in Myanmar for generations. Moreover, despite the corresponding obligation to accept those people, Myanmar seems unwilling to readmit the Rohingya – at least not all of them – to the country.

7.5. Conclusion

The search for durable solutions to refugee situations has arguably become one of the most significant challenges of our time. While voluntary repatriation continues to be considered the preferred solution to refugee situations, the number of people repatriated has considerably decreased over the past decades. With local integration often impossible and the number of resettlement places extremely limited, refugees are increasingly trapped in what UNHCR calls ‘protracted refugee situations’ – a phenomenon that UNHCR defines as a situation in which refugees have been displaced ‘for 5 years or more after their initial displacement, with no immediate prospect of a durable solution’.¹⁴⁹ In 2018, UNHCR estimated that 15.9 million refugees under UNHCR’s mandate were in protracted situations, that is, about three-quarters of the refugees under UNHCR’s mandate.¹⁵⁰ Southeast Asia is also experiencing this phenomenon, both in relation to the situation in the camps at the border between Thailand and Myanmar and in relation to the thousands of other asylum seekers and refugees present in the countries in the region who have been accepted on a temporary basis.

In a context where the traditional durable solutions cannot be envisaged in most cases, it is possible that states will increasingly invoke fundamental changes in the country of origin to push refugees to return to their countries.¹⁵¹ Yet, it is also possible to consider new ways of responding to refugee situations, as

148 Human Rights Committee, ‘General Comment no 27: Article 12 (Freedom of Movement)’, CCPR/C/21/Rev.1/Add.9 (1999), para. 20.

149 ExCom, Conclusion on Protracted Refugee Situations no 109 (LXI) (2009) preamble.

150 UNHCR, ‘Global Trends: Forced Displacement in 2018’ (2019).

151 Cole, ‘Cessation’ (n 108) 1045.

reflected in the discussions around a ‘fourth’ (non-durable) solution through the so-called labour mobility schemes. Indeed, while local integration and resettlement were envisaged as a lasting way of allowing refugees to remain in a host country by guaranteeing them a set of rights and even access to citizenship, the possibility of refugees becoming migrants may represent a more interesting alternative for states. For instance, providing refugees with the right to work means that they would be less likely to be dependent on state assistance, which could reduce the costs associated with the presence of refugees. States might also be reassured by the fact that they are not expected to integrate refugees permanently on their territory.¹⁵² The discussion on labour migration mobility thus links up with the recent emphasis in policy circles on the positive contribution of migrants to the economies of receiving states.¹⁵³

While the regularization of refugee status is certainly not an option in the case of a large number of refugees, it could be linked to a combination of other solutions. In general, UNHCR considers that ‘refugee mobility should be incorporated into the solutions framework’ as an option for some refugees, while other solutions are being pursued for other people.¹⁵⁴ The GCR mentions the possibility for some host countries to offer ‘other local solutions’, including ‘facilitat[ing] the appropriate economic, social and cultural inclusion of refugees’ on a temporary basis and ‘without prejudice to eventual durable solutions that may become available’.¹⁵⁵ Yet, while this approach may indeed open up new opportunities for refugees in protracted situations, it must nevertheless be implemented with caution as it may fuel confusion between migrants and refugees, whose situation is particular because of their specific international protection needs. Since the status of migrant worker is generally temporary, they are expected to return home in the more or less short term, unless they are allowed to extend their stay or decide to go ‘underground’. Refugees who obtain migrant worker status without their specific situation being recognized may lose the essential protection provided by the principle of *non-refoulement*, that is, the guarantee of not being sent back to territories where their lives or freedom would be threatened.

¹⁵² See in particular Katy Long, ‘Extending Protection? Labour Migration and Durable Solutions for Refugees’, UNHCR New Issues in Refugee Research 176 (October 2009) 5–13.

¹⁵³ This aspect of migration has been extensively discussed since 2007 in the context of the Global Forum on Migration and Development. The positive contribution of migrants to host states has also been highlighted in the 2030 Agenda for Sustainable Development. See UNGA, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’, A/RES/70/1 (21 October 2015), para. 29. It is also mentioned in the New York Declaration for Refugees and Migrants. See UNGA, ‘New York Declaration for Refugees and Migrants: Resolution Adopted by the General Assembly’, A/RES/71/1 (3 October 2016), para. 4. One of the objectives of the Global Compact for Safe, Orderly and Regular Migration aims precisely to ‘create conditions for migrants and diasporas to fully contribute to sustainable development in all countries’. UNGA, ‘Global Compact for Safe, Orderly and Regular Migration’, A/RES/73/195 (19 December 2018) objective 19.

¹⁵⁴ UNHCR, *The State of the World’s Refugees 2012: In Search of Solidarity* (OUP 2012) 89.

¹⁵⁵ Global Compact on Refugees (n 127), section II, para. 100.

While the grant of a temporary migrant worker status to refugees appears as the most promising possibility to find solutions for refugees, the idea has not yet really been accepted by Southeast Asian states.¹⁵⁶ In theory, Southeast Asia could be a good context for the implementation of labour mobility schemes for refugees, considering in particular the already large number of irregular migrants – who are estimated to number between 2 and 4 million in Thailand and Malaysia – and the fact that these two countries are heavily dependent on migrant workers for their development. On the one hand, the number of refugees registered with UNHCR in those countries is relatively limited compared to the number of irregular migrants, so this solution would not need to be applied to a large number of people. On the other hand, various economic sectors rely heavily on migrant workers, including construction, fisheries and plantation. Migrant workers are mostly also performing the most difficult and dangerous jobs. As such, they are not necessarily in competition with nationals on the labour market.

There are also precedents for such initiatives in Southeast Asia. Most notably, refugees from the south of the Philippines and from Aceh in Malaysia were given temporary permits allowing them to work in the country.¹⁵⁷ In 2004, the Malaysian Government appeared to be willing to regularize the presence of the Rohingya, who have much in common with the majority Malay community, and to grant to some 10,000 of them an IMM13 permit; however, the project was suspended during the registration process in 2006 amidst allegations of corruption and fraud.¹⁵⁸ Considering the limited resettlement opportunities and the dynamic labour market in the country, UNHCR has persevered with its efforts aimed at securing work and residence permit for refugees in Malaysia.¹⁵⁹ In Thailand, labour mobility schemes could be envisaged in the context of the repatriation of the refugees from the camps at the border with Myanmar. Pending their return, refugees could have access to regular working opportunities, which might not only benefit Thailand but also contribute to the development of Myanmar through remittances. Considering the relatively low rate of formal returns to Myanmar, discussions have been held between UNHCR and the Thai Government

¹⁵⁶ On labour mobility schemes, seen in particular UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action* (January 2007) section 7; UNHCR, ‘Refugee Protection and Durable Solutions in the Context of International Migration: Discussion Paper’, UNHCR/DCP/2007/Doc. 02 (19 November 2007).

¹⁵⁷ For further information, see Section 4.1.2.

¹⁵⁸ Jera Beah H Lego, ‘Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the “Humanitarian Exception”’ (2012) 17 Journal of Political Science and Sociology 82.

¹⁵⁹ See UNHCR, ‘Challenges and Way Forward in Handling Rohingya Refugees in Malaysia’, Presentation by Richard Towle, Representative of UNHCR Malaysia, for the International Conference on Rohingya 2017 (March 2017) <www.unhcr.org/news/latest/2017/3/59128a817/challenges-and-way-forward-in-handling-rohingya-refugees-in-malaysia.html> (accessed 20 January 2021).

regarding the regularization of the situation of a larger number of displaced persons by granting them a temporary work permit.¹⁶⁰ Temporary labour mobility options might be relevant also for those who may refuse to return to Myanmar or who could not return because of a well-founded fear of persecution.¹⁶¹

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¹⁶⁰ The Border Consortium, 'Mid-Year Overview, January-June 2019' (September 2019) 3.

¹⁶¹ Moretti, 'The Challenge of Durable Solutions' (n 141) 88–89.

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8 Conclusion

Reconciling Southeast Asia with international refugee law

A majority of Southeast Asian states, including the three main countries of asylum in the region, that is, Malaysia, Thailand and Indonesia, are not parties to the Convention relating to the Status of Refugees or its Protocol. There are no instruments relating specifically to refugee protection at the regional level other than the Bangkok Principles on the Status and Treatment of Refugees and the regional institutions such as the ASEAN and the Bali Process have generally refused to become involved in this issue, or they have done it only at the margin. Against this backdrop, it has been said that many states in Southeast Asia refused to accede to the Refugee Convention because they *reject* international refugee law and do not recognize refugees. In addition, it is often claimed that asylum seekers and refugees find themselves in a legal limbo due to the absence of a specific legal framework related to the protection of refugees at the regional and national levels in the non-signatory states in Southeast Asia.

However, when discussing the existence, or lack thereof, of a legal framework for the protection of refugees in Southeast Asia, it is also important to take into consideration the broader normative environment and to consider the development of human rights and customary law. From a legal perspective, the impressive development of international human rights law over the past decades, coupled with the fact that an increasing number of states in the region have become parties to the main international human rights instruments,¹ thereby accepting obligations that also applies to asylum seekers and refugees, has somehow reduced the importance of Southeast Asian states acceding to the Refugee Convention. After all, few provisions of the Convention have no equivalent under human rights law. The duty of non-penalization for irregular entry into the territory of a state, which takes into consideration the fact that refugees cannot be expected to comply with the administrative formalities when seeking asylum, is the most important provision in this regard.

¹ For further information, see Annex: overview of the ratifications by Southeast Asian states of the main international human rights instruments.

Furthermore, a number of rules important for the protection of refugees have become part of international customary law, which means that they bind all states, irrespective of their accession to the relevant treaties. This includes the principle of *non-refoulement*, the prohibition of torture or inhuman and degrading treatment, the prohibition of discrimination and the right to life. Against this backdrop, it appears that the rules pertaining to the protection of refugees in the region are far more numerous and developed than the states concerned might admit. As such, measures concerning asylum seekers and refugees that might once have been presented as a privilege offered to them on a ‘humanitarian’ basis only may now have become legal obligations by virtue of international human rights law.

This being said, from a refugee protection perspective, there is still a significant added value in Southeast Asian states acceding to the Refugee Convention. The inapplicability of any binding international instrument means that the protection of refugees in non-signatory states remains largely dependent on the goodwill of the authorities, with a high level of uncertainty and unpredictability. The fact that international human rights law, as Jane McAdam noted, is ‘strong in principle but weak in delivery’ and thus less able to provide refugees with the protection they need considering its very broad scope has already been noted by several commentators.² They have similarly pointed to the fact that states continue to support a different level of treatment for non-citizens when it comes to many human rights.³ The Convention, for its part, identifies a specific category of people deemed particularly vulnerable and provides them with a ‘legitimate purpose’ for being on the state of a territory, as well as with a set of entitlements that takes into consideration their specific situation.⁴ Accession to the Convention followed by the adoption of a specific legislative framework would also send a clear signal of openness towards asylum seekers and refugees and provide more predictability regarding their treatment.

Yet, accession to the Refugee Convention, as Goodwin-Gill observed, is not an end in itself: ‘Whether wider ratifications [of the Convention] would make a difference must always remain a moot question, for nothing is self-implementing, and results depend on actions, not words’.⁵ Many countries are parties to the Refugee Convention and do not necessarily respect their obligations. Among them is Australia, the alleged ‘regional hegemon’ in the Asia-Pacific, which should set a good example instead of

² Jane McAdam, ‘The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection’, UNHCR New Issues in Refugee Research 125 (5 July 2006) 1–6.

³ James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 119–153.

⁴ Tom Clark and François Crépeau, ‘Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law’ (December 1999) 17:4 Netherlands Quarterly of Human Rights 392.

⁵ Guy S Goodwin-Gill, ‘The Global Compacts and the Future of Refugee and Migrant Protection in the Asia-Pacific Region’ (2019) 30:4 IJRL 674.

implementing measure after measure that actually undermine the Refugee Convention. By contrast, this book argues that the main non-signatory states in Southeast Asia have long recognized the fact that refugees are in need of international protection and that they have long provided some form of protection to those who need it, even if the way they understand the parameters of international refugee law does not fully correspond to the Refugee Convention.

Indeed, as this book demonstrates, there is a long-standing practice with regard to refugee protection in Southeast Asia, which emerges with sufficient consistency to reflect a specific understanding or a specific regional approach to refugee issues. If there were to be a regional refugee instrument in Southeast Asia that might be acceptable to states in the region, it would probably contain the following elements: a reaffirmation of the ‘sovereign’ nature of the decision to grant or deny asylum; a broad definition of refugees that includes people fleeing persecution as well as people fleeing armed conflict and generalized violence; a set of exclusion and cessation clauses, including in the event of a fundamental change of circumstances in the country of origin; a reminder of the duties and responsibilities of refugees; a provision stating that states should use their best endeavours to receive refugees, at least temporarily; a reaffirmation of the principle of *non-refoulement*, including at the border; exceptions to the prohibition of *refoulement* for overriding reasons of national security or in order to safeguard the population in the case of mass influx;⁶ an emphasis on the principle of burden-sharing and the importance of international cooperation; references to the responsibility of the countries of origin and to the ‘natural’ or ‘inalienable’ right of return; and a more general statement regarding the standards of treatment for refugees that should be the same as those granted to ‘aliens in general’. The Bangkok Principles, it seems, represents a fairly good synthesis of what a refugee protection regime should look like according to Southeast Asian states.

This approach to refugee protection is largely based on the experience of Southeast Asian states during the Indochinese refugee crisis. This crisis represented one of the major refugee challenges during this pivotal period between the second half of the 1970s and the end of the Cold War, both because of its magnitude and exceptional duration and because of the specific way the ASEAN states reacted to the arrival of refugees. Several important changes in the international refugee regime are directly related to the Indochinese refugee crisis. Not least among them is the development of the concept of temporary refuge, which is widely recognized today. While the importance of burden-sharing and international cooperation has also been highlighted in other contexts, notably in Africa and in Latin America, the focus on the responsibility of the countries of origin and the debate around

⁶ This language is reflected in UNGA, ‘Declaration on Territorial Asylum’ UN doc A/RES/2312(XXII) (14 December 1967), art. 3.2, as discussed in Section 4.3.2.

'root causes' and the prevention of refugee movements arguably stem from the Indochinese refugee crisis and the insistence of Southeast Asian states on the need to do more to solve the situations in Vietnam and Cambodia. Last but not the least, their practice contributed significantly to the shift in the order of 'preferability' of the three durable solutions: the refusal to consider local integration and the phenomenon of 'disenchantment' with resettlement caused by the massive transfer of Indochinese refugees contributed to a renewed interest for voluntary repatriation, hailed as the 'ideal' solution from the mid-1980s onward.

Much has already been said regarding the decisive importance of the CPA. Indeed, its adoption has been seen as the embodiment of many of these changes. The CPA, it has been said, led to the resolution of the Indochinese refugee crisis while safeguarding temporary asylum in Southeast Asia and ensuring respect for the principle of *non-refoulement*. It has been presented as the 'most successful example' of a comprehensive approach to refugee situations, bringing together the countries of asylum, the international community and the countries of origin of refugees.⁷ Yet, the CPA did not so much 'influence' and shape the attitude of Southeast Asian states with regard to refugees, as has been said.⁸ Rather, it reflected and somehow endorsed the terms of the response imposed by those same states. A whole generation of international staff worked for the UNHCR in the context of the Indochinese refugee crisis and participated in the development and implementation of the CPA before progressing to the higher levels of the organization, thus perpetuating the legacy of that experience.

There has been a significant continuity in the practice of Southeast Asian states since the Indochinese refugee crisis, with the notion of temporary refuge, the principle of *non-refoulement* and the principle of burden-sharing remaining the three pillars of refugee protection in the region. While Malaysia, Thailand and, to a lesser extent, Indonesia generally refuse to use the term 'refugee', they do offer a temporary asylum to people fleeing persecution, armed conflict and generalized violence, that is, refugees. Those concerned are still considered as 'illegal migrants' in these countries, according to the terminology used by the governments, and as such are particularly vulnerable to the harsh application of immigration laws. In practice, however, UNHCR has been given a large margin of manoeuvre in those countries and the people registered by the organization enjoy treatment that is in many ways superior to that of other irregular migrants. UNHCR cardholders are protected against *refoulement* and

7 Volker Türk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28:4 IJRL 667.

8 See for instance UNHCR, *The State of the World's Refugees 2012: In Search of Solidarity* (OUP 2012) 207.

increasingly against arrest and detention, and they also benefit from a certain freedom of movement. While these countries do not provide the full range of rights provided for in the Refugee Convention – far from it – there are also some positive examples of privileged access to economic and social rights for refugees in these countries, alongside the assistance and services provided by a broad range of international organizations, NGOs and local associations. Although they remain limited and fragile, these developments are undeniable.

To some extent, the scope of protection that Southeast Asian states tend *de facto* to guarantee to refugees, despite their formal status as irregular migrants, is similar to the protection afforded under the 1951 Convention to persons who are ‘lawfully’ present in the territory of states parties. It is essentially in this gap between the practice and the law that the real ‘paradox’ regarding the protection of refugees in Southeast Asia lies. This paradox, where Southeast Asian states continue to rely *de jure* on immigration laws to deal with asylum seekers and refugees, while in practice they accept the limitations to their sovereignty posed by international refugee law, arguably reflects the need for them to reaffirm their sovereignty in the ‘age of migration’.⁹ From an international law perspective, however, this difference of treatment between refugees and other irregular migrants and the fact that states act in conformity with rules that are enshrined in a Convention to which they are not parties ‘may evidence the existence of acceptance [of such rules] as law’.¹⁰ Quite ironically, the practice of non-signatory states in Southeast Asia contributes to reinforcing certain international standards in the field of refugee protection that they have long been accused of rejecting.

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⁹ Stephen Castles, Hein de Haas, and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (5th edn, Guilford Press 2014).

¹⁰ International Law Commission, ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’, Yearbook of the International Law Commission, A/73/10, vol II, Part Two (2018) 139.

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UNHCR, *The State of the World's Refugees 2012: In Search of Solidarity* (OUP 2012).

Annex: overview of the ratifications by Southeast Asian States of the main international human rights instruments

	<i>ICERD</i>	<i>ICESCR</i>	<i>ICCPR</i>	<i>CEDAW</i>	<i>CAT</i>	<i>CRC</i>	<i>ICRMW</i>	<i>CRPD</i>	<i>ICPED</i>
Brunei Darussalam				24 May 2006 (a)	22 September 2015 (s)	27 December 1995 (a)		11 April 2016 (r)	
Cambodia	28 November 1983 (r)	26 May 1992 (a)	26 May 1992 (a)	15 October 1992 (a)	15 October 1992 (a)	15 October 1992 (a)	27 September 2004 (s)	20 December 2012 (r)	27 June 2013 (a)
Indonesia	25 June 1999 (a)	23 February 2006 (a)	23 February 2006 (a)	13 September 1984 (r)	28 October 1998 (r)	5 September 1990 (r)	31 May 2012 (r)	30 November 2011 (r)	27 September 2010 (s)
Laos	22 February 1974 (a)	13 February 2007 (r)	25 September 2009 (r)	14 August 1981 (r)	26 September 2012 (r)	8 May 1991 (a)		25 September 2009 (r)	29 September 2008 (s)
Malaysia				5 July 1995 (a)		17 February 1995 (a)		19 July 2010 (r)	
Myanmar		6 October 2017 (r)		22 July 1997 (a)		15 July 1991 (a)		7 December 2011 (a)	
The Philippines	15 September 1967 (r)	7 June 1974 (r)	23 October 1986 (r)	5 August 1981 (r)	18 June 1986 (a)	21 August 1990 (r)	5 July 1995 (r)	15 April 2008 (r)	
Singapore	27 November 2017			5 October 1995 (a)		5 October 1995 (a)		18 July 2013 (r)	
Thailand	28 January 2003 (a)	5 September 1999 (a)	29 October 1996 (a)	9 August 1985 (a)	2 October 2007 (a)	27 March 1992 (a)		29 July 2008 (r)	9 January 2012 (s)
Vietnam	9 June 1982 (a)	24 September 1982 (a)	24 September 1982 (a)	17 February 1982 (r)	5 February 2015 (r)	28 February 1990 (r)		5 February 2015 (r)	

Note: The table shows signatures (s), ratifications (r) and accessions (a) as of 31 December 2020. CAT = Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CEDAW = Convention on the Elimination of All Forms of Discrimination against Women; CRC = Convention on the Rights of the Child; CRPD = Convention on the Rights of Persons with Disabilities; ICCPR = International Covenant on Civil and Political Rights; ICERD = International Convention on the Elimination of All Forms of Racial Discrimination; ICESCR = International Covenant on Economic, Social and Cultural Rights; ICPED = International Convention for the Protection of All Persons from Enforced Disappearance; ICRMW = International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

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