Asian Perspectives and Realities in Asylum Protection and Associated Human Rights

"Can the International Association of Refugee Law Judges (IARLJ) assist?"

By Allan Mackey and Maya Bozovik

Presented at the 11th World Conference of the IARLJ,

Athens, Greece – 29 Nov - 1 Dec 2017

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I. Introduction and Aims

The Athens' conference marks 20 years of experience and knowledge that the International Association of Refugee Law Judges (IARLJ) has built up in trying to promote its objectives of fostering the recognition of refugee status and complementary protection[2] as individual rights established under international law, and that the determination of that status should be made by judges pursuing the highest standards of the international rule of law.

The potential coverage for a paper as such is substantial given the sheer number of countries involved and vast cultural and historical differences. From a long-term viewpoint, some Asian countries have been historically generous in their treatment of refugees and many continue to be so. The individual right to seek and enjoy asylum from persecution (as set out in Article 14 of the Universal Declaration of Human Rights, 1948), is now widely accepted as customary international law in most countries, including Asia, but this right has to be considered alongside the traditional Asian principles and norms of non-interference and non-intervention. It must thus be understood that, at the outset, durable surrogate protection solutions will only result when a workable Asian balance is achieved in the countries we cover in this paper.

We consider that the IARLJ, given its 20 years of relevant worldwide experience and knowledge, can work with, and materially assist Asian Judges, and other parties involved, to deliver pragmatic, objective, apolitical, efficient and economical answers in the development and operation of both their asylum determination and migration law systems.

The aim of this paper is twofold:

a. To give an overview of current asylum laws and practices in the Asia-Pacific countries

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[2] In this paper unless otherwise stated we use the term "asylum" to cover both refugee and complementary protection.

covered by the newly expanded IARLJ Asia-Pacific chapter.[3]

b. From this overview, and the accumulated 20 years of experience, to suggest how the IARLJ (particularly the Asia-Pacific chapter) can inclusively provide meaningful involvement, support, useful advice and professional development assistance for judges and other decision-makers in Asia and Pacific countries.

The paper covers:

I. This introduction and our Aims.

II. An international overview of both the asylum and human rights-related International / United Nations Treaties, Declarations and other relevant legal instruments and related material that have potential application for countries in the region.

III. Regional asylum-related legal instruments and co-operation in Asia, past and present. We refer to and include, in full, (with her kind agreement) an excellent, topical paper "Refugee Protection in the Asia Pacific Region" by Dr Savitri Taylor from La Trobe University, Australia.[4]

IV. Overview 'fact sheet' coverage of the 14 countries[5] using material from UNHCR, Asia-Pacific Refugee Rights Network (APRRN), Dr Savitri Taylor, and our own research, comments and challenges noted. The statistical information provided in these fact sheets has been collated via several sources, including UNHCR publications, and research and correspondence with professionals working in the different Asian countries. While we have endeavoured to provide accurate and up-to-date statistics, these are presented to an overall view and not guaranteed to be precisely current or accurate. For monthly up-to-date figures, we would suggest reference to monthly UNHCR reports and the like.

V. A suggested meaningful future role for the IARLJ in the Asia-Pacific region in both asylum and related migration judicial and other decision-making. We discuss how the IARLJ (noting the likely extension of its objectives to include upholding the highest principles of international migration law) can work with judges to support them in the Asia-Pacific area. This role, we suggest, should continue to use and better understand the proven International Treaty/Human rights approach to

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3 The Asia-Pacific chapter covers so called: 'East Asia', 'South Asia', 'Southeast' Asia' and the Pacific Islands and includes New Zealand and Australia. Thus the countries in Central Asia (including all of the "Stan" countries and Iran and Russia are not included).

4 See Appendix 1 and, online: http://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region (Last accessed 19 November 2017).

5 We cover fourteen countries in the region which include: the seven UNHCR signatory countries /territories: Cambodia, China, East Timor, Japan, Macau, Republic of Korea, and The Philippines; and seven of the non-signatory, larger or otherwise significant countries / territories: Hong Kong, India, Indonesia, Malaysia, Myanmar, Taiwan and Thailand.

refugee and protection law and practices, whilst recognising local modifications will be needed, as appropriate, and without unduly compromising the underlying principles of non-interference in internal affairs held by many Asian states. In suggesting this, we note the UN position here is that sovereignty is actually strengthened by states' compliance with international human rights law and the principles of the Vienna Convention on the Law of Treaties, 1969.

II. The International / United Nations overview

As agreed on and documented in numerous United Nations (UN) publications, the UN principle of 'responsibility to protect' (R2P) asserts that "the international community has a right and a duty to intervene in states that cannot or will not protect the human rights of their people against genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law".[6] This section of the paper will discuss the evolution of R2P since 2008/2009 and its relevance to the grant of asylum as a measure in applying the principle. Whilst, at the UN level, Asian states have maintained a continuing interest in the R2P initiative, the implementation of an increased commitment to asylum protection law and principles in this region has been gradual at best.

In 2008 Barbour and Gorlick examined the practical value and extent of R2P.[7] They argued that the principle ought not to be applied in such a narrow manner that it would only be evoked in the context of imminent danger or execution of the four crimes. This was because in such a case, the concept would only be relevant within the very limited scope of military or humanitarian intervention. It was also asserted that such a reading of the concept would render it ineffective as intervention in the context of imminent or occurring crimes "will, by definition, fail to prevent every time". The writers called for "preventive and rehabilitative actions" which would be "particularly suited to prevention, response, and rehabilitation".[8]

More relevantly, Barbour and Gorlick referred to a report issued by the International Commission on Intervention and State Sovereignty (ICISS), where the ICISS recognised three responsibilities embraced by R2P, namely: responsibility to prevent, react and rebuild.[9] While the ICISS emphasised that the primary importance was the responsibility to prevent, Barbour and Gorlick noted that asylum as a measure was "largely overlooked in the R2P debate...".[10] The authors provided historical examples related to WWII where the absence of asylum grants resulted in significant loss of life. They therefore described the grant of asylum in such situations as "the most practical, realistic and least controversial response to assisting victims of mass atrocities".[11]

The 2010 Report of the Secretary-General called for further development of the concept while encouraging Member States, the UN system and civil society to foster a continuing

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6 Ban Ki-Moon *Implementing the Responsibility to Protect: Report of the Secretary General* (UN Doc. A/63/677, 30 January 2009).

7 The UN Refugee Agency Policy Development and Evaluation Service *Embracing the 'responsibility to protect': a repertoire of measures including asylum for potential victims* (July 2008) at p2.

8 Ibid at 21.

9 The International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (December 2001), paras 2.32, XI.

10 Barbour and Gorlick *supra* n. 7, at 22.

11 Ibid.

conversation related to "critical implementation issues".[12] The Secretary-General also called for early and flexible responses which would be tailored to the circumstances of the particular case. He also placed emphasis on the importance of correct assessment of "the situation on the ground and of the policy options available to the United Nations and its regional and sub regional partners".[13]

In the Information Note to the Interactive Dialogue on The Role of Regional and Sub-regional arrangements in implementing R2P, the President of the General Assembly described R2P as an 'evolving principle'.[14] The 2011 report acknowledged that "it has become increasingly evident that the views of neighbouring States and regional bodies may be taken into account… when determining which course of action to take…" member states' diversity in interests and experience was also referred to, cautioning that a "single standard, benchmark or template" ought not to be applied to all regions. This however was followed by an emphasis on the universal nature of R2P. It was concluded that implementation of the principle "should respect institutional and cultural differences" and that "each region will operationalise this principle at its own pace and in its own way".[15]

The Secretary-General encouraged intra-regional dialogue among governments, civil society and independent experts. One of the bodies listed in this paragraph was the Association of South East Asian Nations (ASEAN). It was stated that "each region must move forward, step by step, to ensure that populations are more protected and that the risk of mass atrocity crimes recedes with each passing year". Lastly, it was stressed that the responsibilities set out in the 2005 Outcome Document "must not be diluted or diminished through reinterpretation at the regional, sub-regional, or national levels".[16] This report also set out the three pillars of the Secretary-General's strategy, namely the protection responsibilities of the State, international assistance and capacity-building; and timely and decisive response.[17] ASEAN was also referred to in the context of a comment that whilst several regional groups were at an earlier stage of development, "they will look for ways to broaden and deepen these relationships as a matter of high priority".[18]

The 2012 report of the Secretary-General focused on Pillar three. It was explained that the pillars were not sequenced. The Secretary-General noted that further work was needed "on the impact of incentives and disincentives in responsibility to protect situations". Such efforts were said to include "further research on what drives resistance to non-coercive measures

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12 *Early warning, assessment and the responsibility to protect, Report of the Secretary-General* (UN Doc. A/64/864, 14 July 2010) at p6, para 14.

13 Ibid at 8, para 19.

14 *The role of regional and sub-regional arrangements in implementing the responsibility to protect, Report of the Secretary-General* (UN Doc. A65/877-S/2011/393, 27 June 2011) at p1.

15 Ibid at 3, para 6.

16 Ibid at 3, para 6.

17 Ibid at 5-6, para 9.

18 Ibid at 12, para 40.

and on ways to overcome such resistance".[19] It was also emphasised that early response and non-coercive measures were the primary aim.[20]

In 2011 the President of Brazil introduced a new initiative, namely "responsibility while protecting". This was welcomed by the Secretary-General in his 2012 report. The Government of Brazil since facilitated discussions with other member states in efforts to "refine and apply the concept first elaborated at the 2005 World Summit". Both Special Advisers participated in the discussions.[21] In short, the initiative is centred on close monitoring and early identification of evidence of incitement, dehumanising rhetoric and mobilisation of sections of the population. The aim is to engage with states before tensions and conflicts arise. Here the focus is on trends and developments and a dismissal of emotive language or subjective reporting in the media.[22]

Amongst other issues, the 2013 report of the Secretary-General described constitutional protections as an important platform of "accommodating distinct national concerns while guaranteeing the protection of fundamental human rights".[23] The Indonesian National Human Rights Commission was referred to as an example of a body which was "equipped with extensive legal powers and a mandate to investigate possible human rights violations".[24] The report also discussed adoption of targeted measures to prevent atrocity crimes, as well as a number of challenges and steps to be taken in the future.[25]

The 2014 report discussed the provision of assistance to other States to protect their populations. The following tools were set out under the topic of "civilian assistance":

a. Provision of dispute resolution expertise to other States
b. Human rights monitoring
c. Law enforcement and criminal investigation
d. Protection of refugees and internally displaced
e. Protection of civilians in humanitarian emergencies.[26]

The report summarised the last 10 years of efforts to develop and promote R2P. The Secretary-General described the report as reaffirming "the enduring relevance of the

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19 *Responsibility to protect: timely and decisive response* (UN Doc. A/66/874-S/2012/578, 25 July 2012) at p 10, para 36.
20 Ibid at 10, para 37.
21 Ibid at 13, para 50.
22 Ibid at 14, para 52.
23 *Responsibility to protect: state responsibility and prevention* (UN Doc. A/67/929-S/2013/399, 9 July 2013) at p8, para 35.
24 Ibid at 12, para 51.
25 Ibid at 15-16.
26 *Fulfilling our collective responsibility: international assistance and the responsibility to protect* (UN Doc. A/68/947-S/2014/449, 11 July 2014) at pp15-16, paras 60-66.

principle",[27] which was also described as narrow in scope and limited to providing protection to "only the most serious international crimes".[28] The Secretary-General stated that the principle is based "on the conviction that State sovereignty is enhanced through more effective protection of populations from atrocity crimes". The concept of R2P and State sovereignty were therefore described as "allies, not adversaries".[29]

The Secretary-General expressed concern that 48 Member States had not become parties to the Convention on the Prevention and Punishment of the Crime of Genocide. At the time of writing, twenty-eight Member States had not yet become parties to one or both of Additional Protocols I and II to the Geneva Convention.[30] He called on peacekeeping missions "to be guided by more strategic and forward-looking assessments of threats to populations that incorporate the perspective and the protection strategies of local actors, particularly women and children".[31]

In 2016, the Secretary-General acknowledged that the frequency and scale of atrocity crimes had increased over the last several years.[32] As at July 2016, there were 21.3 million refugees and more than 40.8 million internally displaced persons.[33] In 2015, the UN conducted a number of reports which led to findings that more work needed to be done on the prioritisation of prevention, focus on "the structural drivers of conflict and violence" and "strengthening preventive diplomacy tools to resolve disputes".[34]

The 2017 report focused on strengthening accountability of Member States in the implementation of R2P. The Secretary-General encouraged the practice of informal thematic panels, followed by a yearly formal interactive debate.[35] It was stressed that the "Security Council has a responsibility to ensure that its mandates are tailored to the context and that peace operations are adequately resourced".[36] It was noted that in situations where it is difficult to assure direct accountability and vulnerable populations are under stress due to the risk of atrocity crimes, bodies with mandates for protection "must represent the views and interests of vulnerable populations". This included the High Commissioners for Human Rights and for Refugees.[37]

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27 *A vital and enduring commitment: implementing the responsibility to protect* (UN Doc. A/69/981-S/2015/500, 13 July 2015) at p1.

28 Ibid at 5, para 11.

29 Ibid at 5, para 12.

30 Ibid at 7, para 20.

31 Ibid at 11, para 33.

32 *Mobilising collective action: the next decade of the responsibility to protect* (UN Doc. A/70/999-S/2016/620, 22 July 2016) at p3, para 8.

33 Ibid at 3, para 9.

34 Ibid at 17, para 60.

35 *Implementing the responsibility to protect: accountability for prevention* (UN Doc. A/71/1016-S/2017/556, 10 August 2017) at pp7-9, paras 20-26.

36 Ibid at 11, para 31.

37 Ibid at 15, para 42.

The New York Declaration on Refugees and Migrants of 19 September 2016 signified the commitment on the part of UN Member States to a framework which would deal with large movements of people seeking protection.[38] The initiation of the arrangement is to lie with UNHCR in partnership with states and other partners.[39] The aim would be to promote "equitable sharing of responsibilities".[40] Turk and Garlick expect that the Global Compact on Refugees in 2018 will "articulate States' continued commitment to uphold the fundamental principle of *non-refoulement* and other relevant protection standards, notably asylum and refuge".[41] The Compact would recall States' "obligations to admit those seeking protection to their territory and to provide them with access to group-based protection mechanisms or fair and efficient procedures, and to respond adequately to their basic needs".[42]

The Asia-Pacific Refugee Rights Network (APRRN)[43] has noted that, while the New York Declaration text is non-binding, it "marks a commitment by states to a normative framework for more effective and coordinated responses to refugee issues…".[44] APRRN also argued that commitment to the New York Declaration is particularly significant to the Asia-Pacific region as a number of states are not yet parties to the 1951 Refugee Convention.[45] It was also noted in this report that the Asia-Pacific region, in addition to the Middle East, has the lowest percentage of states parties to the 1951 Refugee Convention and the 1967 Protocol. This is in spite of the fact that a high number of countries in Asia-Pacific host "substantial numbers of refugees".[46]

UNHCR's 2017 Global Update states that there are more than 9.5 million people of concern in the Asia-Pacific region. Out of these, approximately 3.7 million are refugees, 2.4 million are internally displaced persons and 1.6 million are stateless people.[47] Due to an increase in the number of refugees in the Middle East, refugees in Asia-Pacific account for 15 per cent of the global demographic. This has resulted in a decrease in financial support in the region.[48] The Asia Pacific Refugee Rights Network (APRRN) noted the possibility of trialling the application of the Comprehensive Refugee Response Framework within a state in the Asia-

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38 Volker Turk and Madeline Garlick "From Burdens and Responsibilities to Opportunities: the Comprehensive Refugee Response Framework and a Global Compact on Refugees" (2016) 28(4) *International Journal of Refugee Law* 674.

39 Ibid at 674.

40 Ibid.

41 Ibid at 677.

42 Ibid.

43 See later for a description of APRRN.

44 Asia Pacific Refugee Rights Network *Reflections on the significance of the New York Declaration on Refugees and Migrants for the Asia Pacific region* (12 June 2017) at p1, para 5.

45 Ibid at 1, para 5.

46 Ibid at 4, para 27.

47 Ibid at 4, para 28.

48 Ibid at 5, para 29.

Pacific region; however, this had not yet taken place. Pilot projects had been limited to East Africa and Central America.[49]

Recent academic comments

The University of Leeds recently hosted a workshop discussing the extent and scope of R2P in the context of refugees. Dan Bulley presented a paper whereby he argued that R2P was "somewhat conservative, to the extent that it contains no requirement to grant asylum". Bulley described R2P as part of the problem, as he perceived the principle as a mechanism which retained the status quo and the current treatment of refugees within the European Union.[50]

Jason Ralph and James Souter have referred to Wiener's paper related to constructivist international relations theory, which tells us that the meaning of a norm is not actually fixed. As such, it can always be contested, in spite of being "settled" to an extent. Ralph and Souter therefore argued that, in its current formulation, R2P was failing to protect populations. This was found to be a "good reason to contest the formulation". They therefore encouraged a forward-looking approach which would re-imagine the norm as opposed to reinterpreting the originally intended norm.[51]

Alise Coen has argued that "in the wake of mass atrocity situations, facilitating access to asylum, granting temporary protection, and upholding the principle of *non refoulement* represent essential steps towards fulfilling the international norm of 'R2P". Coen identified a different issue, namely the need for a method of responsibility sharing of the task of protecting refugees across the international community. Susan Martin has also acknowledged that debate surrounding R2P has been focused on conflict-induced displacement. In her 2017 paper, she explored the extent to which the UNHCR ought to engage with persons displaced by natural disasters and similar causes. She argued that UNHCR has evolved to protect persons whose governments are willing but unable to protect, or are unwilling to protect. [52]

Summary

To summarise the above, it is noted that the UN has promoted a balanced approach which values both state sovereignty and the protection of vulnerable populations. It is submitted that countries in the Asia-Pacific region can certainly benefit from this approach, which is aligned with an understanding that sovereignty is actually strengthened by states' compliance

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49 Ibid at 8, para 42.

50 Jason Ralph and James Souter *Introduction: The Responsibility to Protect and the Refugee Protection Regime* (10 March 2017) (https://www.ethicsandinternationalaffairs.org/2017/introduction-rtop-refugee-protection-regime/) (Last accessed 19 November 2017).

51 Ibid.

52 Ibid.

with international human rights law. While Security Council publications have not always expressly discussed the grant of asylum as a measure in applying the principle of R2P, there have been significant mentions of relevant concepts such as the protection of refugees and internally displaced persons as civilian assistance; and there has been ongoing encouragement for states to ratify and implement core instruments of international human rights law and humanitarian law.

It is also emphasised that the Security Council has acknowledged that it has a responsibility to ensure its mandate is specifically tailored in a manner which represents the views and interests of the vulnerable populations. It is therefore concluded that there is scope for the accommodation of large groups by the grant of asylum as part of applying the R2P principle. Lastly, UN Member States' commitment to the establishment and development of a comprehensive framework has been further strengthened with the New York Declaration.

III. Asian regional legal instruments and civil society co-operation - past and present

The Comprehensive Plan of Action for Indochinese Refugees (CPA)

The CPA was first designed in July 1979 as a solution to the displacement of one million refugees from Vietnam, Laos and Cambodia. The arrangement was based on the premise that countries of first asylum such as Indonesia, the Philippines, Malaysia, Thailand and Hong Kong would provide temporary protection to refugees from Vietnam and Laos. In turn, Western states such as the USA, Canada and Australia would also resettle large numbers of refugees.[53] Two mechanisms were added to the initial arrangement, namely a regional refugee status determination process and a repatriation programme for persons who were not found to be refugees.[54] More than one million refugees were resettled via this programme.[55]

The Manila Process 1996

In December 1996, the International Organisation for Migration organised a regional Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia in Manila. This meeting, followed by several others, was named the Manila Process and was attended by sixteen states (17 including Hong Kong). Ten out of sixteen states were ASEAN states. The purpose was to exchange general information, work together to harmonise legislation and penalties; and to expand dialogue concerned with irregular movements. It has been said that the Process led to an increase in awareness of the issue.[56]

The Bangkok Declaration 1993

The Bangkok Declaration was to serve the purpose of addressing the question of international migration. The focus was on regional cooperation in the context of irregular and undocumented migration.[57] The Bangkok Declaration contained no references to refugees or human rights or the role of the UNHCR.[58] Kneebone and Debeljak describe the language of the Declaration as "typical of the 'securitised' concept of irregular migration and the regional response to human trafficking in the 1990s".[59]

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53 Asia Pacific Refugee Rights Network *Past and present responsibility-sharing arrangements for refugees in the Asia Pacific* (9 July 2017) (http://www.unhcr.org/5968c2c67.pdf) (Last accessed 19 November 2017).

54 Ibid at 2, para 7.

55 Ibid at 3, para 8.

56 Moretti Sebastien *UNHCR and the migration regime complex in Asia-Pacific between responsibility shifting and responsibility sharing* (2016) New Issues in Refugee Research Paper No 283.

57 Susan Kneebone "The Bali Process and Global Refugee Policy in the Asia-Pacific Region" (2014) 27 *Journal of Refugee Studies* 596-618 at 600.

58 Ibid.

59 Ibid.

Abass and Ippolito[60] acknowledge that the 1993 Bangkok Declaration was perceived by some as "heralding the beginning of a shift to human rights" and by some as a "strident and defensive declaration of 'Asian values' or Asian 'exceptionalism' on human rights questions".[61] However, they do acknowledge that the Declaration demonstrated that Asian States viewed the improvement of human rights as the responsibility of the West due to inequalities between the Global North and South regions.[62] This Declaration also did not specifically refer to refugees and displaced persons.[63]

The Conference on People Smuggling, Trafficking in persons and Related Transnational Crime ("the Bali Process")

The first formal meeting within the Bali Process was held in 2002 at the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime. Kneebone explains that the Bali Process had "mixed origins as a bilateral process between Australia and Indonesia".[64] She argues that the Bali Process has many similarities with ASEAN discourse, particularly "in its avoidance of the language of human rights to frame refugees".[65]

Australia and Indonesia established a formal mechanism, namely the Regional Cooperation Model. The focus was on prevention of people smuggling. The model involved cooperation from both governments, UNHCR and the International Organisation for Migration (IOM). It allowed for UNHCR processing in Indonesia as an alternative to processing refugee claims in Australia.[66] There is an over-arching consensus that the Bali Process was led and managed by Australia and largely served the best interests of this state.[67] In 2016, Bali Process members adopted a declaration that recognised the importance of "victim-centred and protection-sensitive strategies" as well as "strict respect for the principle of *non-refoulement* and the need for comprehensive and long-term solutions for mixed migration flows".[68] APRRN describes the Bali Process as a forum for norm-setting, particularly where states have been unwilling to recognise refugees in the past.[69]

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60 Ademola Abass and Francesca Ippolito "The ASEAN community, human rights security and development: where do refugees fit?" in *Regional approaches to the Protection of asylum seekers: an international legal perspective* (Routledge Taylor and Francis Group, London, United Kingdom; New York, USA, 2016) 301-318.

61 Ibid at 303.

62 Ibid.

63 Ibid.

64 Kneebone, *supra* n. 57, at 598-601.

65 Ibid.

66 Ibid.

67 Ibid.

68 APRRN, *supra* n. 44, at 8, para 28.

69 Ibid at 9, para 29.

ASEAN Political-Security Community (APSC) and the 2007 Charter

The APSC was tasked with the issue of refugees. Abass and Ippolito argue that refugees were mentioned within the ASEAN Community only in the APSC Blueprint and in the context of 'post-conflict peace building'.[70] In this way, the authors argue, refugees are "conceived double narrowly, both within a security paradigm and as 'victims of conflict', for whom 'orderly repatriation' and resettlement… is promoted".[71] Abass and Ippolito also note that refugees were not referred to in the ASEAN Socio-Cultural Community Blueprint which was established for the purpose of realising an ASEAN Community that would be 'people centred and socially responsible'.[72] Other academics have been optimistic about the evolution of the concept of 'human security' within the region. For instance, Caballero-Anthony has argued that the human security concept has in fact evolved into a 'people centred' discourse and is reflective of the concept of human rights.[73]

Jakarta Declaration on Addressing Irregular Movement of People 2013

The Special Conference on Irregular Movement of Persons in Jakarta was organised following an increase in tensions between Australia and Indonesia within the Bali Process. Thirteen states were gathered out of which six were ASEAN member states. The meeting resulted in the adoption of the Jakarta Declaration on Addressing Irregular Movement of Persons. The document was based on prevention, early detection, prosecution and protection.[74] Follow up meetings were also held, including an International Workshop on the Protection of Irregular Movements of Persons at Sea in April 2014. The second meeting was related to irregular maritime issues. Sebastien argues that this indicated that the focus of the Jakarta Declaration Process was narrowed down to irregular maritime movement issues, once again side-lining the issue of providing protection for refugees.[75]

ASEAN Human Rights Declaration 2012

This legal instrument was adopted by all members of the ASEAN with the purpose of establishing a framework "for human rights cooperation in the region" and contribution "to the ASEAN community building process…".[76] The Declaration was adopted in 2012. It is observed that the General Principles of the Declaration commence with standard concepts such as:

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70 Abass and Ippolito, *supra* n. 60, at 305.
71 Ibid.
72 Ibid.
73 Ibid at 307.
74 Sebastien, *supra* n. 56, at 20-21.
75 Ibid at 21.
76 ASEAN Human Rights Declaration (18 November 2012) at 3, Preamble.

a. Entitlement to rights and freedoms regardless of any "distinction of any kind" i.e. non-discrimination principles.
b. Equality before the law.
c. Recognition of the rights of vulnerable and marginalised groups as being "inalienable, integral and indivisible part of human rights and fundamental freedoms".
d. Right to effective and enforceable remedy within the legal system.
e. Recognition of individual responsibility with the "primary responsibility" resting with all ASEAN Member States "to promote and protect all human rights and fundamental freedoms".
f. Recognition of the universal nature of human rights.[77]

In the second half of the General Principles, the Declaration outlines what can be classed as "limitations" and/or "qualifiers", such as:

a. Recognition of particular context in light of "different political, economic, legal, social, cultural and historical and religious backgrounds".
b. Exercise of human rights and fundamental freedoms "with due regard to the human rights and fundamental freedom of others".
c. Limitations determined by law with an emphasis on security.
d. Emphasis on meeting "the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society".[78]

The remainder of the Declaration addresses civil and political rights; economic, social and cultural rights; the right to development; and the right to peace. Most relevantly, the Declaration affirms that every person has:

a. "an inherent right to life which shall be protected by law".[79]
b. "the right to personal liberty and security".[80]
c. the right not to be "subject to torture or to cruel, inhuman or degrading treatment or punishment".[81]
d. the right to freedom of movement and residence; and the right to leave one's own country and return to it.
e. the right to seek and receive asylum in another State in accordance with the laws of that State and applicable international agreements.[82]

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77 Ibid at 4, General Principles.
78 Ibid at 5, General Principles.
79 Ibid at 5, Civil and political rights.
80 Ibid at 6, Civil and political rights.
81 Ibid.
82 Ibid.

The Declaration has been received with mixed academic commentary. For instance, Human Rights Watch criticised it for "falling below international standards of acceptability".[83] A significant number of scholars also criticised the Declaration for the limitations imposed by the 'ASEAN Way', while the American Bar Association welcomed the Declaration with optimism.[84] Jones argues that the Declaration is not novelty but is instead "part and parcel of a continuum of past ASEAN behaviour stretching back to the 1993 Vienna Declaration on Human Rights".[85]

Jones also argues that "ASEAN's procedural and regulatory norms have inhibited formal change and are currently being employed to blunt progressive reform and change in ASEAN's human rights regime".[86] Further, he submits that "human rights standards at the regional level of ASEAN are rhetorically equivalent to international standards but are stripped of their universal potency by accentuating and emphasising particular textual understandings of international human rights declarations and transposing these into ASEAN human rights standards".[87] APRRN has noted that the ASEAN Declaration "lacks any policy, framework or mechanism directly related to displacement".[88] The ASEAN community however has been commended for developing the 2025 Vision on Disaster Management which also recognised occurrence and risks arising out of human-induced disasters.[89]

UNHCR commentary

In March 2011, the Assistant High Commissioner (Protection) UNHCR stated that, while "asylum-related issues, until quite recently, have been somewhat on the periphery of the discussions... [t]here is now an evolution of thinking in this regard".[90] Kneebone argues that this indicates that UNHCR has changed the agenda under the Bali Process to now focus on protection needs.[91] The 2011 arrangement between Australia and Malaysia was to proceed on the basis that UNHCR and the IOM have the ability to fulfil the roles and functions which were outlined in the Operational Guidelines. The High Court of Australia, in *Plaintiffs M70*, held that states could not "abdicate their responsibilities to asylum seekers to non-state parties, such as IOM and UNHCR".[92] The UNHCR was criticised by APRRN for its involvement

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83 William J. Jones "Universalising Human Rights the ASEAN Way" (2014) 3 *International Journal of Social Sciences* 72-89 at 1.
84 Ibid.
85 Ibid.
86 Ibid at 74.
87 Ibid at 77.
88 APRRN, *supra* n. 44, at 9, para 30.
89 Ibid at para 31.
90 As cited in Kneebone, *supra* n. 57, at 608.
91 Ibid.
92 Ibid.

in the Arrangement, albeit that UNHCR's involvement could have been categorised as "cautious support".[93]

According to Kneebone, UNHCR seems to have developed "an agenda-setting role" in the Bali Process. In September 2011, UNHCR prepared a Note on the Operationalisation of the Regional Cooperation Framework in the Asia Pacific Region. The Preamble acknowledged that, while the document did not refer to human rights or legal rights 'as such', the language of 'humanitarian concerns' impliedly referred to refugees and asylum seekers and their protection needs.[94] UNHCR proposed the establishment of a Regional Support office which would facilitate the Framework and support and strengthen cooperation among Bali Process Member States.[95]

A Regional Support Office was established in Bangkok in September 2012 and is co-managed by Australia and Indonesia. Kneebone notes that the Office "largely reflects the agenda of the Bali Process and the Australian government's national policy on irregular movement in the region".[96] While UNHCR has expressed disappointment with the lack of progress on refugee protection, the Director of International Protection was optimistic about the prospects of the Office in his speech at the Special Conference in Jakarta in August 2013.[97]

ASEAN Intergovernmental Commission on Human Rights (AICHR)

The AICHR was established in 2008 as a human rights body which would "uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties".[98] It is important to note that the AICHR does not have investigative powers. While a number of academics have criticised the body for lacking this power, others have pointed out that it has the potential to encourage human rights debates and to emphasise the commitment to strengthen regional cooperation and promote human rights within the ASEAN community.[99]

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93 Ibid.
94 Ibid.
95 Ibid at 609.
96 Ibid.
97 Ibid.
98 As cited in Yuyun Wahyuningrum *The ASEAN Intergovernmental Commission on Human Rights: origins, evolution and the way forward* (2014) at 14 (https://www.idea.int/sites/default/files/publications/the-asean-intergovernmental-commission-on-human-rights-origins-evolution-and-the-way-forward.pdf) (Last accessed 19 November 2017).
99 Ibid.

Asia Pacific Refugee Rights Network (APRRN)

The APRRN was established in 2008 "as a platform for refugee rights advocated to better work together and engage with relevant stakeholders".[100] APRRN's work is divided into capacity strengthening, joint advocacy and information sharing. There are six thematic working groups namely immigration detention, statelessness, regional protection, legal aid and advocacy, women and girls at risk and youth. APRRN consists of approximately 158 organisational members and 146 individual members. The membership includes legal aid providers, service providers, academics, human rights defenders, students, development practitioners and refugee communities.[101]

This section outlines some of APRRN's activities over the last year. In 2016, APRRN organised several regional and national events such as the 6th Asia Pacific Consultation on Refugee Rights. APRRN was also actively involved in supporting Thai non-government organisations and civil society organisations during their engagement with Thailand's Universal Periodic Review. Further, along with INHURED International and PRP Nepal, APRRN members hosted a National Roundtable in Kathmandu Nepal. In 2015, Refugee Rights Network Pakistan was created with support from APRRN's South Asia Working Group. In October 2016, the APRRN Secretariat and the International Detention Coalition travelled to Tokyo, Japan, to attend discussions about the promotion of Alternatives to Detention.[102]

Over the course of 2016, APRRN continued discussions on national action plans in Indonesia, Malaysia and Thailand. Preliminary discussions with members in Taiwan were also commenced.[103] APRRN also had significant engagement with the ASEAN Intergovernmental Commission on Human Rights regarding the maritime movements of the Rohingya and recommendations to improve human rights protection for Rohingya refugees. APRRN is involved in ASEAN conferences on an ongoing basis, such as the recent ASEAN People's Forum/ASEAN Civil Society Conference in 2016.[104] APRRN has also had significant engagement with the ASEAN Commission on the promotion and protection of the rights of women and children, the Regional Support Office of the Bali Process and regional meetings on alternatives to immigration detention.[105] There has also been a long-standing relationship with UNHCR as well as significant contribution to the Global Compact for Refugees / Comprehensive Refugee Response Framework.[106]

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100 Asia Pacific Refugee Rights Network *APRRN 2016 Annual Report* (2016) (http://aprrn.info/wp-content/uploads/2017/08/APRRN2016.pdf) (Last accessed 19 November 2017).

101 Ibid at 4.

102 Ibid at 6-9.

103 Ibid at 10.

104 Ibid at 11.

105 Ibid at 12-13.

106 Ibid at 15.

We note, also, other civil society activities in this field, including other non-government organisations (NGOs) and lawyers (such as *Zennanren* in Japan, the Justice Centre Hong Kong and *Gong Gam* in the Republic of Korea) have become well established and do an excellent job, often pro bono. Several of these are also, of course, members of APRRN. At the more academic level, it is good to see growing regional co-operative networks such as ANRIP (the Asian Network for Refugee and International Protection) developing as well. With their potential for sharing research, workshops, conferences and related studies they will also provide a good bridge between academe, civil society NGOs and government officials.

IV. FACT SHEETS OF 14 ASIAN COUNTRIES[107]

Cambodia (November 2017)

Overview

Cambodia is a signatory to the Refugee Convention and its Protocol and has a domestic framework for refugee status determination (RSD).[108] Cambodia acceded to the Refugee Convention in 1992 but took over refugee status determination from UNHCR in 2009. The Refugee Office was created in 2008, followed by the enactment of the Sub-Decree on Procedure for Recognition as a Refugee in 2009. The Ministry of Interior determines refugee claims.[109]

Human Rights Watch has criticised the Sub-Decree for not conforming to the Refugee Convention definition of a refugee. In particular, Human Rights Watch has argued that the threshold imposed by the government of Cambodia is higher than that intended in the Convention. The translation of a 'well-founded fear of persecution' includes the qualifier of 'serious persecution'. Ministers are also granted "wide reaching powers to refuse and expel asylums seekers".[110] Appeals are made to the same body that made the initial decision, which is also concerning. There is no option of appealing to a court of law or judicially reviewing a refugee decision.[111]

The Kaldor Centre for International Refugee Law has criticised Article 7 of the Sub-Decree as it allows the government to deny entry to anyone deemed to pose a threat to national security or public order or who has committed a "very serious international or non-political crime". This opens up the risk of rejecting prospective asylum seekers at the border without assessing their claim.[112] The Centre has also pointed out that the RSD process is a lengthy one and asylum seekers are not allowed to be accompanied by legal representatives at important stages.[113] The Centre has questioned the Cambodian authorities' understanding of the definition of 'refugee' as, in response to criticisms for repatriating asylum seekers, the spokesperson for the Cambodian Secretary of State reportedly stated that 'political refugees'

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107 Much help with these from the several UNHCR country offices and APRRN fact sheets is acknowledged.

108 JRS Asia Pacific *The search: protection space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (2012) at p25 (http://www.jrs.net/assets/regions/apr/media/files/the_search.pdf) (Last accessed 19 November 2017).

109 Ibid at 26.

110 Ibid.

111 Ibid.

112 Andrew and Renata Kaldor Centre, Australia's Global University *Factsheet: Cambodia and refugee protection* (6 July 2015) at p4. (http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cambodia_and_refugee_protection.pdf) (Last accessed 19 November 1017).

113 Ibid.

from Vietnam and China were not refugees but were "just getting away from the government... we call it illegal immigration".[114]

Agreement with Australia

In September 2014, the governments of Australia and Cambodia signed an agreement providing for the relocation of refugees from Nauru to Cambodia. It is noted that negotiations did not involve Parliament or civil society in either country. The agreement has been criticised by UNHCR, politicians, lawyers, refugees and human rights advocates. The then UN High Commissioner for Refugees, António Guterres, described the agreement as a "worrying departure from international norms".[115] The Kaldor Centre for International Refugee Law describes the agreement as "an attempt by Australia to shift its responsibilities to refugees who sought protection in its territory onto one of the least developed countries in the region, which currently is not in a position to meet the needs of refugees..."[116] Other issues have also been raised:

a. Practical details remain unclear such as cost, the number of refugees to be relocated and conditions of their accommodation in Cambodia.
b. While, in theory, only refugees who agree are to be resettled in Cambodia, "significant pressure" has been placed on refugees to resettle.
c. It is anticipated that a large number of "guarantees" to refugees set out in the agreement are unlikely to be met.
d. It is not apparent how the agreement will be enforced in the face of obvious clashes with Cambodian domestic law (for instance, where the agreement guarantees rights to refugees which are not provided for in domestic law).
e. The agreement "carries a significant risk of violating Australia's obligations under international refugee and human rights law".[117]

Accomplishments and issues

Refugee Action Coalition, an Australian NGO, argues that, in spite of being a signatory to the Refugee Convention, Cambodia "has a record of human rights abuses and a record of failing to uphold the rights of asylum seekers and refugees...".[118] In 2009, the government of

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114 Ibid at 6.

115 Andrew and Renata Kaldor Centre, Australia's Global University *Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia* (January 2017) at p1 (http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cambodia-agreement_0117.pdf) (Last accessed 19 November 2017).

116 Ibid at 2.

117 Ibid at 2.

118 Refugee Action Coalition fact sheet *Life in Cambodia: the facts* (2015) at p2 (http://www.refugeeaction.org.au/wp-content/uploads/2015/05/Cambodia-fact-sheet.pdf) (Last accessed 19 November 2017).

Cambodia deported Uighur asylum seekers back to China. In February 2015, it sent 36 Christian Montagnard asylum seekers back to Vietnam. While, in theory, it recognised refugees' right to hold a resident's card and, after seven years, becoming eligible for citizenship, Refugee Action Coalition notes that no recognised refugees have been granted resident's cards or citizenship.[119]

Amnesty International reports that, in January 2017, the Ministry of Interior agreed to process the refugee claims of 170 Montagnard asylum seekers.[120] Prior to this, 13 persons within the same group had been granted refugee status and were transferred to the Philippines, awaiting resettlement in a third country. Approximately 29 asylum seekers returned to Vietnam voluntarily.

UNHCR has stated that the government of Cambodia "has made great efforts to meet its obligations under Article 35 of the 1951 Refugee Convention, which requires cooperation and information sharing with UNHCR in the exercise of its mandate".[121] The Cambodian authorities have been said to have provided UNHCR with statistical information and full access to the RSD process including access to interviews.[122] However, UNHCR has recommended an amendment to Cambodia's national asylum law so as to incorporate complementary forms of protection and an independent appeal mechanism. UNHCR has also urged the government of Cambodia to work with UNHCR in order to process applications within the anticipated timeframes set out in its national law.[123]

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119 Ibid at 2.

120 Amnesty International *Cambodia Annual Report 2016/17* (https://www.amnesty.org/en/countries/asia-and-the-pacific/cambodia/report-cambodia/) (Last accessed 19 November 2017).

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: Kingdom of Cambodia* (18 January 2014) at p2 (https://www.upr-info.org/sites/default/files/document/cambodia/session_18_-_january_2014/unhcr_upr18_khm_e_main.pdf) (Last accessed 19 November 2017).

122 Ibid.

123 Ibid at 4.

China (November 2017)

Overview

China acceded to the 1951 Convention and its 1967 Protocol in September 1982. This was not reflected in China's domestic laws as promptly as one would anticipate. Article 32 of China's Constitution establishes general principles on asylum and is limited to granting asylum based on political reasons. Article 46 of China's Exit and Entry law states that recognised refugees and refugee claimants may be granted ID cards. A comprehensive legal framework relating to refugees has not yet been finalised.[124] Refugee status determinations are carried out by UNHCR Beijing. Recognised refugees are usually resettled in a third country. Non-Indochinese refugees are treated differently as they have no right to employment. They are, however, provided support by UNHCR. In November 2013, UNHCR stated that refugee children would be allowed to attend public schools in five Chinese provinces. This was however limited to primary school level.

It is noted that Article 20 of the Exit and Entry Law provides for any foreigners who may wish to enter China urgently "for humanitarian reasons". They are able to apply for visas to enter China at the border. This process can be burdensome as it also requires preapproval by the Chinese authorities before the individual arrives at the border. UNHCR reports that a large number of refugees initially enter on student or tourist visas.[125]

Key statistics

The US Library of Congress reports that, over the past two decades, the number of refugees and asylum seekers arriving in China has increased. As of June 2015, there were 301,057 refugees (300,000 were Indochinese and 564 were asylum seekers). The main source countries were Somalia, Nigeria, Iraq and Liberia. Historically, there have also been large numbers of arrivals from North Korea and Myanmar. The Chinese government does not recognise persons fleeing from North Korea and Myanmar as refugees, however. Following the large scale conflict in Myanmar in 2009, the Chinese Government responded promptly by hosting more than 30,000 ethnic Kokangs. While they were housed in camps, they were not referred to as refugees.

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[124] US Library of Congress *Refugee Law and Policy: China* (21 June 2016) (https://www.loc.gov/law/help/refugee-law/china.php) (Last accessed 19 November 2017).

[125] Ibid.

UNHCR comments[126]

On his recent visit to Beijing, the UN High Commissioner for Refugees, Filippo Grandi, acknowledged China's potential to utilise development projects in an effort to "address the root causes of displacement". The Commissioner met with top government officials, UNHCR's Goodwill Ambassador, Yao Chen, and future diplomats at the China Foreign Affairs University. The Commissioner emphasised that UNHCR and China have been cooperating for 40 years and that, during this timeframe, "China has become a major actor on the international stage". He then expressed his hopes that China would invest resources in countries hosting large numbers of refugees.

UNHCR reports that China's contribution to refugee programmes has increased from US$2.8 million in 2016 to US$12.5 million in 2017. A significant amount was contributed toward the Belt and Road forum in Beijing. The forum is led by China and is aimed at developing a platform for international cooperation in the trade sector, investment, infrastructure, connectedness and exchanges. It currently includes 60 countries including Asia, Europe and Africa. The Commissioner also sees this initiative as a way of providing refugee solutions in the future. He also views China as having the ability to "stabilise areas in conflict and address the root causes of displacement".

Issues apparent

The Chinese Government repatriates North Korean refugees to the Democratic People's Republic of Korea in spite of the fact that there has been "substantial evidence that repatriated persons face torture, imprisonment, execution, and other inhuman treatment".[127] China's repatriation of North Korean refugees is in breach of its international obligations under the 1951 UN Convention and its 1967 Protocol. China also has obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

North Korean women who enter China illegally are particularly vulnerable to human trafficking. It has been estimated that approximately 70 to 80 per cent of women leaving the Republic of Korea are women. Many are trafficked from the Republic of Korea into China for the purpose of forced marriage and commercial sexual exploitation. It is observed that China's refusal to recognise them as refugees denies them legal protection and has been said to encourage trafficking of women and girls within China. The government of China has international legal obligations in this respect too, namely under the Convention on the

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[126] Vivian Tan *China can play key role in solving refugee crises – UNHCR chief* (8 June 2017) http://www.unhcr.org/en-au/news/latest/2017/6/593946b64/china-play-key-role-solving-refugee-crises-unhcr-chief.html) (Last accessed 19 November 2017).

[127] Congressional Executive Commission of China *Annual Report* (5 October 2017) (https://www.cecc.gov/sites/chinacommission.house.gov/files/2017%20Annual%20Report%20_2.pdf) (Last accessed 19 November 2017).

Elimination of All Forms of Discrimination against Women and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

In March 2017, Reuters reported an increased numbers of arrivals from Myanmar in light of recent ethnic conflict. The Chinese authorities provided blue disaster relief tents housing more than 20,000 persons.[128] However, in March 2015 Chinese authorities in the Chinese province of Yunnan were preventing food suppliers from reaching refugee camps where ethnic Kokang were staying. The Chinese police in Dehong had issued an order banning vehicles with Myanmar registration plates from driving on roads along the Chinese side of the border. The ban also applied to vehicles at a refugee camp.[129]

[128] James Pomfret *Relief camp in China swell as thousands flee conflict in Myanmar* (13 March 2017) (https://www.reuters.com/article/us-myanmar-insurgency-china-refugees/relief-camp-in-china-swells-as-thousands-flee-conflict-in-myanmar-idUSKBN16K0JW) (Last accessed 19 November 2017).

[129] Radio Free Asia *Crisis in Yunnan's refugee camps as Chinese police block suppliers* (3 March 2015) (http://www.rfa.org/english/news/myanmar/camps-03032015102947.html) (Last accessed 19 November 2017).

East Timor (November 2017)

The law of East Timor does provide for the grant of refugee status, however, according to the US Department of State (DOS), the legal system is not in line with international standards. The DOS has expressed concern that East Timor's regulations related to refugee status "may preclude genuine refugees from proving their eligibility for such status". This is due to applications for status being allowed only within the first 72 hours of arrival. Foreign citizens who have already been present in East Timor are able to apply for refugee status within 72 hours of the situation in their home country becoming "too dangerous for a safe return". [130] These time limits are clearly of concern and are not in accord with established international refugee law. UNHCR has recommended that the 72 hour limitation be removed. It has also been suggested that the government of East Timor establish an age, gender and diversity sensitive approach when assessing refugee claims. This would also include early identification and continuous assessment of persons with specific needs.[131]

East Timor acceded to the 1951 Convention and its Protocol in 2003. The country's 2002 Constitution of East Timor specifically recognises the fundamental human rights provided for in international legal instruments. Asylum matters are provided for in the 2003 Immigration and Asylum Act. Refugee claims are determined by the Immigration Service with assistance from the UNHCR.[132] East Timor is both a source country and a destination country for persons who have been subjected to forced labour and sex trafficking.[133]

In spite of domestic legislative provisions and assistance from the UNHCR, East Timor has unfortunately, at times, taken action which was not in the spirit of the Refugee Convention. For instance, in 2013, a group of Rohingya arrived at an East Timorese island after experiencing difficulties with their boat. It was reported that the East Timorese police attempted to push the group off the island, stating that they were not welcome on East Timor territory.[134]

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130 United States Department of State *Timor-Leste 2015 Human Rights Report* (2016) at p11 (https://www.state.gov/j/drl/rls/hrrpt/2015humanrightsreport/index.htm?year=2015&dlid=252805#wrapper) (Last accessed 19 November 2017).

131 Ibid at 4.

132 Inside Story *Asylum seeker processing in East Timor: a solution for whom?* (9 March 2011) (http://insidestory.org.au/asylum-seeker-processing-in-east-timor-a-solution-for-whom/) (Last accessed 19 November 2017).

133 UNHCR *Submission by the United Nations High Commissioner for Refugee for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Timor-Leste* (March 2016) at p1 (http://www.refworld.org/docid/57fb98b24.html) (Last accessed 19 November 2017).

134 ABC News *Myanmar's Rohingya Muslims turned away by East Timor* (18 July 2013) (http://www.abc.net.au/news/2013-07-18/rohingya-muslims-seeking-asylum-in-australia-turned-away-by-/4829342) (Last accessed 19 November 2017).

Hong Kong SAR (October 2017)

Overview

Hong Kong is not a party to the Refugee Convention 1951 but is a party to the CAT and to the International Covenant on Civil and Political Rights (ICCPR). In the early 2000s, claims for *non refoulement* were made pursuant to Hong Kong's obligations under CAT only. This was later followed by additional claims under ss8 & 11 of the Hong Kong Bill of Rights Ordinance CAP383 (HKBORO). Later still, under domestic humanitarian protection obligations, the provisions of Article 33 of the Refugee Convention came to be recognised as a pre-emptory norm and/or rule of customary international law. In order to determine *non refoulement* claims on all applicable grounds a unified screening mechanism named "USM" commenced operation on 3 March 2014. For the past three years, therefore, claims have been made against expulsion, return or extradition from Hong Kong to another country on grounds including risks of (a) torture under CAT, (b) torture or cruel, inhuman or degrading treatment or punishment under Article 3 of section 8 of HKBORO; and (c) persecution with reference to the *non refoulement* principle under article 33 of the 1951 Refugee Convention.

The USM developed following a series of test cases brought to challenge the prior mixed Hong Kong "state led" and "UNHCR led" processes. This chain of decisions[135] (*Prabakar, Ubamaka, C and Ors, and ST* by the Hong Kong Final Court of Appeal (HKFCA)), which, as can be seen, included many references to soundly established customary, international refugee and complementary protection law[136], compelled the Hong Kong government to intervene and

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[135] *Secretary of Security v Sakthevel Prabakar* (2004) 7 HKCFA 187; *Ubamaka Edward Wilson v Secretary for Security and Another* [2012] HKCFA 8; C *and Others v Director of Immigration and Another* [2013] HKCFA 19; and *ST v Betty Kwan and Ors* [2014] HKCA 309; CACV115/2013 (26 June 2014).

[136] For example: *ST,* at [38]: "In the context of a CAT claim, what is involved is the fundamental human right of the claimant to be free from torture. That is an absolute human right, which admits of no exception." *Ubamaka*, at [6]: "This Ordinance (HKBORO) was enacted for the purpose of implementing a treaty obligation by incorporating into the domestic law of Hong Kong the provisions of the ICCPR as applied to Hong Kong and is aimed at providing for the protection of these fundamental human rights, which are now entrenched by BL (Basic Law) art 39." *C v Ors* at [3]-[5] and [56]: "[3] The United Nations Convention Relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (collectively, the "Convention") impose important obligations on contracting state parties. Such obligations include an obligation to "facilitate the assimilation and naturalization of refugees" (Art 34). A refugee is a 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; or who …" (Art 1A(2)) [4] Both the UK and the PRC are contracting states to the Convention. However, as is permissible under Art 40, neither the UK (prior to 1997) nor the PRC has applied the Convention to Hong Kong Special Administrative Region ("HKSAR"). [5] It is the firm policy of the HKSAR not to grant asylum to refugees. That policy is not challenged. It is not contended that HKSAR Government ("HKSARG") is obliged to "facilitate the assimilation and naturalization of refugees…" and [56]. To conclude, I am of the view that, given it is the practice of the Director, when deciding whether or not to exercise his power under the Immigration Ordinance to remove a refugee claimant to the country of putative persecution, to have regard to humanitarian considerations, and that whether such claim is well-founded, is a *relevant humanitarian consideration, the Director must determine whether the claim is well-founded. Moreover, any such*

assume responsibility for determining all claims for *non refoulement* protection in the region. Primary claims are made and determined by officers of the Immigration Department. An appeal is then available to the Torture Claims Appeal Board (TCAB) and, ultimately, to the Court system including the HKFCA.

Key statistics

Hong Kong has shown very low acceptance rates by comparison to the developed world (at around 0.72% at first instance and 1.5% on appeal to the TCAB). There have been recent appointments of increasing numbers of immigration assessment officers and TCAB members to address the relatively substantive backlogs which have built up in the processing of claims.

In the first half of 2017, the Hong Kong Immigration Department (ImmD) received 1,128 *non-refoulement* claims, a decrease of 55 per cent and 41 per cent respectively as compared with the monthly averages of 2015 and 2016. Most of the claimants originated from South-Asian and Southeast-Asian countries such as India (21 per cent), Pakistan (21 per cent), Bangladesh (13 per cent) and Vietnam (12 per cent). During the same period, ImmD determined 2,033 claims; another 871 claims were withdrawn. As at the end of June 2017, there were 8,205 claims pending determination by ImmD, a decrease of 25 per cent and 18 per cent respectively since the end of 2015 (10,922 pending claims) and the end of 2016 (9,981 pending claims).

Since the commencement of USM, 8,355 claims have been rejected by ImmD, out of which 7,619 lodged an appeal to the TCAB. As at the end of June 2017, 4,522 appeals were pending determination by the TCAB. The number of TCAB members (all part time) has increased from 19 in 2104/15 to 90 as at 30 June 2017.

Issues

Lawyers and NGOs in Hong Kong working in this area raise a number of concerns which they claim go to the heart of the fairness and operation of the USM. These include:

a. Poor quality of decision-making and inadequate training by both immigration officers and TCAB adjudicators
b. Unreported (or even redacted) decisions by the TCAB leading to inconsistent decision-making and lack of accountability.
c. Gatekeeping - USM lack of clear policy is claimed to create risk of arbitrary, unfair or unclear operation of initial access.

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determination must satisfy the high standards of fairness required having regard to the gravity of the consequence of the determination."

d. Pushbacks - the risk of *refoulement* before a person at risk has been able to register their claim.
e. Denial of liberty through prolonged detention.
f. Denial of access to support, housing, food, healthcare etc.
g. Adverse credibility assumptions - made when there is delay in the lodging a protection claim.
h. Difficulty in obtaining legal aid and unlawful prosecution - such as for the use of false immigration documentation by protection claimants.

Areas where the IARLJ has and can assist

Between 2013 and 2015, IARLJ members provided assistance and training on customary international refugee and complementary protection law and best procedures and practices in RSD (particularly at the appellate level). This included providing overviews from well-established and relatively well regarded jurisdictions and their jurisprudence and best practices in RSD and appeals. The IARLJ trainers provided particular assistance to ImmD officers and the TCAB adjudicators in the development of efficient, issues-based decision-making, the elimination of backlogs, and how to assess and determine all of the three primary issues in the USM in the same process, hearing and decisions.[137]

For the future, the continuing offer of IARLJ support remains. For example, given that given Hong Kong remains a predominately "common law" jurisdiction, training would assist in practices that ensure that the TCAB makes and publishes its decisions (in redacted format) based on international refugee and protection law jurisprudence of a similar nature to the cases relied upon in the core binding HFCA decisions behind the USM. These precedent decisions, and perhaps the use of country guidance cases as well, could provide first instance decision makers with sound law and guidance to follow. Likewise, a set of sound, detailed country-by-country decisions could be made and then used as guidance in a sound,

[137] For example those determinations should concentrate on: **Issue one: The CAT obligations.** The core issue here is to determine – "Objectively, on the facts as found (i.e. accepted), are there substantial grounds for believing the claimant would be in danger of being subjected to torture (as defined in s. 37U(1) of the Immigration Ordinance (Cap115)/Article 1 of the CAT) if expelled, returned (*refouler*) or extradited from Hong Kong to another state?**" Issue two: Obligations under S 11 (1) of the Hong Kong Bill of Rights Ordinance CAP 383 (HKB0R0)** when seen against the non-derogable and absolute rights contained in Article 3 of the Bill of Rights. The core issue to determine here is: **"**Objectively, on the facts as found (i.e. accepted), are there substantial grounds for believing the claimant will be subjected to torture, inhuman or degrading treatment or punishment, if returned (*refouler*) from Hong Kong?" **Issue three: Humanitarian protection obligations, noting that Hong Kong is not a signatory to the RC but arising under Hong Kong's acceptance of the non refoulment provisions in Article 33** of the Refugee Convention 1951 (RC), as a pre-emptory norm and/or a rule of customary international law. Here the core issue to determine is: **"**Objectively, on the facts as found (i.e. accepted), does the claimant have a well-founded fear (i.e. real chance or risk) of being persecuted (as fully defined in Article 1A (2) RC), for one or more of the reasons in Article 1A (2), if returned (*refouler*), subject only to the exclusion and/or cessation provisions of Articles 1C – F of the CSR 1951?"

sustainable system, which is much needed to reduce manifestly unfounded or abusive claims and appeals.

India (November 2017)

Overview

India is not a party to the 1951 Convention or its Protocol. The country does not have a domestic legislative system for determining refugee claims. It has, however, a long-standing tradition of hosting refugees and the Government largely respects the principle of non-refoulement. The Indian Foreigners Act 1946 applies to all non-Indian nationals, including refugees and asylum seekers. According to the United States Department of State, refugee policy is determined on an ad hoc basis. UNHCR has been cooperating with the Indian government since 1981. The Government of India determines refugee claims made by Tibetans and Sri Lankans. UNHCR registers other asylum seekers and determines the refugee claims of nationals coming from non-neighbouring countries.[138]

Accomplishments and concerns

Currently, there are approximately 174,303 Tibetan and Sri Lankan refugees; and approximately 33,558 refugees and asylum seekers from non-neighbouring countries. Recognised refugees are able to obtain a 'stay visa' or a 'long term visa'. The Government of India provides access to public health, education and legal aid to all refugees and asylum seekers. However, these services are not always accessible due to lack of awareness and language barriers. Refugees and asylum seekers are vulnerable to exploitation in the workplace.[139]

UNHCR has continuously recommended accession by India to the 1951 Convention. UNHCR describes the 1951 Convention as a key legal document which would establish the juridical status of refugees and set the minimum standards of treatment of refugees in India.[140] In spite of not having a domestic legal framework, UNHCR describes India's ad hoc protection measures as "positive administrative frameworks", including the most recent introduction of long term visas. UNHCR notes that challenges do remain, particularly because "lack of specific legislation does not allow for consistency and coherence in the national asylum framework".[141]

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138 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, 27th Session – India* (August 2016) at p1 (http://www.refworld.org/docid/591971124.html) (Last accessed 19 November 2017).

139 Ibid.

140 Ibid at 4.

141 Ibid at 5.

Detention

UNHCR has also noted that approximately one per cent of asylum seekers are reportedly detained due to 'irregular entry' and being in breach of the Foreigners Act 1946. UNHCR's continued advocacy has resulted in some asylum seekers being released. India does not provide for any alternatives to detention for detained asylum seekers. UNHCR has emphasised that it strongly believes that "detention should only be used as a matter of last resort and should in no way constitute an obstacle to the ability of asylum seekers to pursue their asylum applications".[142]

Access to education

While the Government of India guarantees education to all children including child refugees and asylum seekers (pursuant to the Right to Education Act), child refugees and asylum seekers in some areas face barriers in accessing education. This is due to the fact that some local government authorities request documentation which non-Indian nationals do not possess.[143]

Access to UNHCR

The US Department of State notes that the 1946 Foreigners Act does not contain the term 'refugee', which means that the Act treats refuges as any other foreigners. Refugees without adequate documentation have been vulnerable to forced repatriation. The Government of India has traditionally granted refugee status on humanitarian grounds in the context of specific situations. This, however, has resulted in "varying standards of protection for different refugee and asylum seeker groups". The government did recognise refugees from Tibet and Sri Lanka and also honoured UNHCR decisions regarding refugee claims related to persons from other countries. While UNHCR does not maintain an official presence, the government did permit UNHCR staff access to refugee centres and allowed it to operate in Tamil Nadu. It is noted, however, that the authorities did not permit UNHCR direct access to Sri Lankan refugee camps, Tibetan settlements or asylum seekers in Mizoram. It did permit asylum seekers from Mizoram to travel to New Delhi to meet UNHCR officials.[144]

Registrations

As to the registration of asylum seekers, UNHCR estimated registration of 6,870 Rohingya and 6,855 Chin from Burma in New Delhi. Tens of thousands of additional asylum seekers remained unregistered. After the end of the Sri Lankan civil war, the government of India

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142 Ibid at 6.

143 Ibid at 6, 7.

144 United States Department of State *India 2016 Human Rights Report* at pp27 (https://www.state.gov/documents/organization/265748.pdf) (Last accessed 19 November 2017).

stopped registered Sri Lankans as refugees. The Tamil Nadu government has worked with UNHCR on the provision of exit permission for Sri Lankan refugees who wished to repatriate voluntarily.[145] The government of India has allowed "many UNHCR-registered refugees, and others" the right to work in the informal sector. Some refugees have reported discrimination by employers.[146]

Treatment of Rohingya

Human Rights Watch has recently spoken out against the threat of the Indian government forcibly returning ethnic Rohingya refugees to Myanmar.[147] On 9 August 2017, the Indian Minister of State for Home Affairs stated in Parliament that "the government has issued detailed instructions for deportation of illegal foreign nationals including Rohingyas". He also noted that there were approximately 40,000 Rohingyas "living illegally in the country". According to the UNHCR approximately 16,500 Rohingya living in India are registered. Minister Rijuju told Reuters that while UNHCR is registering Rohingya, India is "not a signatory to the accord on refugees". As far as the Minister was concerned, this group consisted of 'illegal immigrants' without a basis for being in the country. Human Rights Watch has stated that this statement does not accurately reflect India's obligations under international refugee law because the government is still bound by customary international law not to forcibly return any refugee to a place where they face a serious risk of persecution or threats to their life or freedom.

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145 Ibid at 27.

146 Ibid.

147 Human Rights Watch *India: Don't Forcibly Return Rohingya Refugees* (17 August 2017) (http://www.refworld.org/docid/599ae77f4.html) (Last accessed 19 November 2017).

Indonesia (November 2017)

Overview

Indonesia is not a state party to the 1951 UN Convention Relating to the Status of Refugees or its 1967 Protocol. There is no domestic legal framework for providing protection to refugees and asylum seekers. The Government of Indonesia formally acknowledges the customary international law principle of *non refoulement*.[148] As of December 2016, 14,405 persons were registered with UNHCR Indonesia. This included 6,578 asylum seekers and 7,827 refugees. The main source countries were Afghanistan, Somalia, Myanmar, Iraq, Iran, Nigeria, Sri Lanka and Palestine.[149]

APRRN describes the Presidential Decree signed on 31 December 2016 as a positive step. In particular, the Presidential Decree outlines how government departments and international organisations ought to allocate resources and respond to refugees. The Decree addresses functions such as search and rescue, detention, living arrangements, voluntary return and deceased refugees. The Decree also provides for the possibility of the transfer of refugees to a shelter, temporary shelter or even open residential facilities, the issue of government identification and the establishment of minimum standards for shelters. Another possibility under the new Decree is the specific placement of refugees with special needs and transfers between shelters for the purpose of family reunification. It is noted, however, that the Decree does not clarify whether asylums seekers will be subject to the same rights and entitlements as refugees.[150]

Indonesia is a co-chair of the Bali Process and was the leader in meetings leading up to the Jakarta Declaration. Mathew and Harley argue that factors against Indonesia's non-ratification of the Refugee Convention include the floodgates argument, burden on the economy, national security, drug trade concerns and the fear of radicalisation by Rohingya and other Muslims.[151] Indonesia is a lower-middle income country with many Indonesians living on less than $2.00 a day. It is noted, however, that the ratification of the Refugee Convention and Protocol is on Indonesia's agenda. The right to seek asylum is enshrined in the country's Constitution. A bill for the parliamentary ratification of the Convention and Protocol has also been drafted.[152]

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148 Asia Pacific Refugee Rights Network *Indonesia* (March 2017) (http://aprrn.info/pdf/Indonesia%20Factsheet_MAR%202017.pdf) (Last accessed 19 November 2017).

149 Ibid at 1.

150 APRRN and Save the Children *Unlocking childhood: current immigration detention practices and alternatives for child asylum seekers for refugees in Asia and the Pacific* (May 2017) at 45.

151 Penelope Mathew and Tristan Harley *Refugee Protection and Regional Cooperational in Southeast Asia: a fieldwork report* (March 2014) at p15. (http://www.mcrg.ac.in/WC_2015/Reading/D_RefugeeProtection.pdf) (Last accessed 19 November 2017).

152 Ibid at 16.

Refugee status determination

UNHCR conducts RSD procedures on behalf of the Indonesian government. Asylum seekers have the option of arriving lawfully on a 30-day visa exemption which cannot be extended. While asylum seekers are eventually considered to be over-stayers, they are granted cards which protect them against arrest. In theory, only persons found to be in 'off limit' areas or breaching reporting conditions should be arrested. However, arbitrary arrest and detention still take place.[153] There are significant delays in the processing of refugee claims, particularly outside designated UNHCR office towns. Once a person is recognised as a refugee, they are submitted for resettlement in a third country. As of 1 July 2014, persons recognised as refugees in Indonesia are no longer eligible for resettlement in Australia.[154]

Detention

Conditions vary between facilities. However, the following issues are of particular concern: overcrowding, unsanitary environment, lack of basic necessities including food, violence and abuse and lack of access to legal services. As of December 2016 approximately 30% of the overall refugee and asylum seeker population were detained. The number of children in detention has decreased considerably since the opening of a shelter in Makassar in December 2015. There are no provisions for release on bail. UNHCR has the ability to release families and unaccompanied children from detention by submitting a letter and attempting to accelerate the determination process. In 2014 and 2015, approximately 4,000 refugees and asylum seekers surrendered to immigration detention due to an inability to support themselves.[155]

Access to healthcare

Access to healthcare has also been an ongoing issue due to costs. While asylum seekers and refugees have the ability to attend local state-run medical clinics, their ineligibility for National health Insurance prevents them from being able to afford such treatment.[156]

Shift in domestic policies and Australia's influence

In May 2015, a large number of boats of Bangladeshi and Rohingya refugees and migrants were intercepted. After initially refusing to accept any boats, the government of Indonesia eventually agreed to allow 2,000 people into the country. The condition was that all would be resettled by May 2016. This deadline was not met and was later acknowledged to be

153 Ibid at 2.
154 APRRN *supra* n. 148, at 2.
155 APRRN *supra* n. 148, at 3.
156 APRRN and Save the Children, *supra* n. 150 at 43.

unrealistic.[157] In June 2016, a boat carrying 43 Sri Lankan Tamils entered waters near Indonesia. The authorities tried to turn it around but, eventually, allowed the passengers to disembark.[158]

Australia has influenced Indonesia's domestic policies to a great extent. In a publication issued by the Overseas Development institute, it is argued that Australia's policy of funding countries such as Indonesia while setting a negative example has "led to greater restrictions on the part of Indonesia, including the increased use of immigration detention, the growing criminalisation of refugees and boat pushbacks. All of these measures are in clear contradiction of the spirit of the Refugee Convention".[159]

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[157] Overseas Development Institute *Closing borders: the ripple effects of Australian and European refugee policy. Case studies from Indonesia, Kenya and Jordan* (September 2016) at p9 (http://www.refworld.org/docid/57dbed964.html) (Last accessed 19 November 2017).

[158] Ibid at 10.

[159] Ibid at 10.

Japan (October 2017)

Overview

In addition to being a signatory (since 1982) to the 1951 UN Convention relating to Status of Refugees and its 1967 Protocol, Japan is also a party to most of the major international human rights instruments. The introduction, in a UNHCR Tokyo paper published in May,[160] includes a good overview of Japan's strong political and financial support to UNHCR activities at the same time as the need for strengthening Japan's refugee status determination and national asylum systems:

> "The Government and the people of Japan continue to provide strong political, financial and other relevant support to UNHCR's global activities in relation to refugees, internally displaced persons (IDP) as well as stateless persons. UNHCR deeply appreciates this support, which has been critical in our – and our partners' - efforts to respond to an ever increasing number of humanitarian crisis situations world-wide.
>
> UNHCR also wishes to express its sincere appreciation to the Government of Japan for undertaking- during the previous legislative period - a number of important steps in support of domestic refugee protection matters. Such steps include the decision to admit 150 Syrian students and their family members under scholarship programmes and to initiate regular consultations with UNHCR to discuss a wide range of domestic asylum issues. UNHCR also wishes to acknowledge it has been given an opportunity to actively contribute to the deliberations of the Monitoring Committee, which was newly created to oversee the pre-screening process in the context of refugee status determination procedure with a view to efficiently handle an increasing number of asylum applications.
>
> It is hoped that Japan will continue its leadership role in the area of international cooperation. Equally, it is hoped that the Government will proactively pursue its efforts to further strengthen its national asylum system with a view to ensuring that all persons in need of international protection will have access to their rights enshrined in the 1951 Convention relating to the Status of Refugees (hereafter 1951 Convention).
>
> Against this backdrop, UNHCR updated the original document released in July 2015[161] to highlight our areas which are critical to the work of the office in light of today's circumstances – together with a set of recommendations – which we hope to pursue with the Government and other relevant stakeholders in close dialogue and in a spirit of partnership. We hope that presenting the four thematic areas listed below in one document will serve as a useful reference point for all interested in global as well as domestic affairs related to refugees and stateless persons.
>
> 1. Partnership and public awareness
> 2. Establishment of a comprehensive asylum system
> 3. Resettlement and Humanitarian Admission

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160 UNHCR *Points of consideration related to global and domestic refugee and statelessness issues (Update I)* (May 2017) (http://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points_for_Consideration_ENGLISH_May_2017.pdf) (Last accessed 19 November 2017).

161 UNHCR *Comments on the Draft 5th Immigration Control Basic Plan* (July 2015) (http://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Final_UNHCR_Comments_ENG.pdf) (Last accessed 19 November 2017).

4. Statelessness."

The highlights of the UNHCR fact sheet on Japan published in February 2016 also give more detail to the overview.[162]

Key asylum statistics[163]

Total numbers between 1982 - end 2016

- Convention refugees: 688 (those recognised upon appeal 131)
- Indochinese refugees: 11,319[164]
- Resettled refugees (Myanmar refugees resettled from Thailand and Malaysia): 152[165]
- Persons granted other form of asylum (humanitarian status): 2,543
- Total number of applications: 41,046
- Total persons granted Convention refugee status and other form of asylum: 14,673

2016 statistics

- Newly filed asylum applicants: 10,901
- Recognised as Convention refugees: 28
- Special permission for residency on humanitarian ground: 97
- Total number of those granted asylum: 125
- The number of asylum applications pending at the first instance: 10,067[166]
- The number of asylum applications pending at the appeal instance: 8,734 [167]

Number of asylum applications by nationality:

- Indonesia 1,829
- Nepal 1,451

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162 See UNHCR *Japan Factsheet* (February 2016) (http://www.unhcr.org/protection/operations/5000196c13/japan-fact-sheet.html?query=UNHCR%20Japan%20fact%20sheet) (Last accessed 19 November 2017).

163 Ministry of Justice (Japan) website http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri03_00122.html (Last accessed November 2017). All numbers in the Statistics section come from this source unless indicated otherwise.

164 Refugee Assistance Headquarters website http://www.rhq.gr.jp/japanese/know/ukeire.htm (Last accessed November 2017).

165 Ministry of Foreign Affairs of Japan website http://www.mofa.go.jp/mofaj/press/release/press4_005106.html (Last accessed November 2017).

166 Ministry of Justice response to the Inquiry by Member of House of Councillors Michihiro Ishibashi (27 June 2017) (http://www.jlnr.jp/legislative/20170615-q[20170627-a]ishibashi-michihiro%20[refugee%20protection].pdf) (Last accessed November 2017).

167 Ministry of Justice response to the Inquiry by Member of House of Councillors Michihiro Ishibashi (27 June 2017) (http://www.jlnr.jp/legislative/20170615-q[20170627-a]ishibashi-michihiro%20[refugee%20protection].pdf) (Last accessed November 2017).

- The Philippines 1,412
- Turkey 1,143
- Viet Nam 1,072
- Sri Lanka 938
- Myanmar 650

The number of refugees and humanitarian status holders granted protection origin between 2007 and 2016 (10 years) totaled 2014 (refugees & humanitarian status holders):[168]

Country	Total
Myanmar	1,822
China	68
Syria	61
Afghanistan	49
Others	514

Detention

There were 430 asylum-seekers (219 at first instance, 211 on appeal) in detention at the end of 2016.[169]

Areas where IARLJ has and can assist

IARLJ members have conducted a number of further professional development courses in Japan in Association with UNHCR, Universities, bar associations, the Japanese the Ministry of Justice and several NGOs and assisted the UNHCR in the preparation of recommendations and points for consideration to the Ministry of Justice officials. There are a growing number of high quality lawyers who are assisting claimants, primarily on a pro bono basis.

International human rights law in this area, and in particular refugee law, it appears, has not been seen as part of the curriculum for the training of lawyers or judges, although more universities are now providing courses in related areas. Professional development with the Japanese judiciary by international judges, including the IARLJ, and academics has been limited; however in 2016 the UNHCR was able, for the first time, to conduct a series of courses.

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168 These figures are based on UNHCR Annual Statistical Report (ASR) 2016.

169 Ministry of Justice response to the Inquiry by Member of House of Councillors Michihiro Ishibashi (27 June 2017) (http://www.jlnr.jp/legislative/20170615-q[20170627-a]ishibashi-michihiro%20[refugee%20protection].pdf) (Last accessed 20 November 2017).

As can be seen from the overview and statistics, the number of asylum applications has been increasing year upon year. Successful applications are continuously at very low levels on any international comparative and backlogs in assessment are growing. Unfortunately, these include increasing numbers of repeat applications and appeals by failed applicants. It appears, on comparative analysis, that the standard of assessment at all levels has considerable room for improvement and there are very few references to best international human rights-based law and practices. The submissions made by UNHCR in the papers referred to below, set out the needs and manner improvements could be achieved and it is in this area that the IARLJ (particularly the Asia-Pacific chapter) should continue to offer assistance.

References and further information[170]

For further reading please refer to the footnote below.

[170] UNHCR *Points of Consideration related to global and domestic refugee and statelessness issues (Update I)* (May 2017) (http://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points_for_Consideration_ENGLISH_May_2017.pdf);
Report by Advisory Panel to Monitor the Review Process of Operation of the Refugee Recognition System ("the Monitoring Committee") (28 July 2017) (Unofficial translation of Monitoring Outcomes of the Review Process of Operation of the Refugee Recognition System) (http://www.moj.go.jp/content/001230329.pdf);
Ministry of Justice *Outline of the Revisions for Operation of the Refugee Recognition System* (http://www.moj.go.jp/content/001166543.pdf);
Japan Federation of Bar Associations *Proposals on Refugee Status Recognition System and Status of Refugee Applicants in Japan* (https://www.nichibenren.or.jp/en/document/opinionpapers/140221.h).

Republic of Korea (November 2017)

Overview

The Republic of Korea (RoK) is a state party to the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 1967 Protocol since 1992. The Refugee Act and its Presidential Decree and Regulations came into force in July 2013. The refugee law regulates all major areas concerning the protection of asylum-seekers and refugees in RoK, including provisions on the definition of asylum-seekers, refugees and humanitarian status holders; procedures for the submission of asylum claims at ports of entry; Refugee Status Determination (RSD) procedures; administrative appeal by the Refugee Committee; assistance to persons of concern, including accommodation in the Immigration Reception Centre, education, vocational training and resettlement of refugees to RoK.

Key statistics

The RoK government started accepting asylum applications in 1994. Since then, the number of asylum-seekers has steadily increased, and 7,542 applications were registered in 2016, up from 5,711 in 2015 and significantly up from 2,896 applications in 2014. However, the recognition rate remains low. As of December 2016, out of 21,981 total accumulative applications, 655 were recognised as refugees, and 1,051 were granted humanitarian status. The majority of asylum-seekers are male (19,027 male and 3,765 female asylum-seekers). Asylum-seekers' five major countries of origin in RoK are Pakistan (3,601), Egypt (2,503), China (2,226), Nigeria (1,345) and Syria (1,223). The five major countries of origin of recognised refugees are Myanmar (170), Bangladesh (96), Ethiopia (88), Pakistan (47) and Democratic Republic of the Congo (32). 874 Syrian asylum-seekers were granted humanitarian status and 4 have been recognised as refugees.

National Refugee Law

A major breakthrough was achieved with the enforcement of the Refugee Act and the accompanying Decree and Regulations from 1 July 2013. However, certain provisions are not in line with international refugee law and need to be amended. This is particularly the case in relation to access to asylum at ports of entry. Moreover, there remain many issues concerning administrative appeal, local integration, civil registration and documentation, detention, family reunification and higher education.

Access to and quality of RSD

Most asylum-seekers enter RoK via Incheon International Airport, and the Refugee Act and accompanying Decree and Regulations allow asylum applications at the airport. However, the Act and Decree grant airport border officials the authority to not refer asylum claims to formal RSD procedures and to reject them on a number of grounds, which could lead to

refoulement. In particular, access to asylum by certain nationalities appears to be further limited since the series of terrorist attacks in some countries and incidents of security breaches at ports of entry (eg, 28 male Syrians who remained in Incheon airport for more than six months in 2016, pending their successful appeal against the non-referral decision at Incheon District Court).

The recognition rate of asylum applications in RoK remains low. There are concerns about the respect of procedural safeguards during administrative RSD procedures and about the quality of the RSD assessments. RSD officers often lack systematic RSD training and heavily focus on credibility and supporting evidence (COI, evidentiary documents), while at the same time facing large caseloads and often a scarcity of trained interpreters in relevant languages. Administrative appeals are processed by a Refugee Committee which does not guarantee essential procedural rights, such as the right to personal interview. The Refugee Committee is not an independent standing review body. Judges reviewing asylum cases at court level also often lack professional knowledge about refugee law and RSD procedures and rotate frequently.

Resettlement

The Refugee Act and its Enforcement Decree provide for resettlement of refugees to RoK (Article 12 of the Decree). The 3-year-Pilot Resettlement Plan was approved in April 2015, under which each year up to 30 refugees from Myanmar currently living in the refugee camps of Thailand will be resettled to RoK. The first group of 22 Karen refugees (4 families) arrived in RoK in December 2015 and stayed for about 9 months in the Immigration Reception Center (IRC) undergoing training in Korean language and preparing for local integration. A second group of 34 Myanmar refugees arrived from Thailand in October 2016 and a third group of 30 Myanmar refugees arrived in RoK in July 2017.

Detention

The arbitrary and long-term detention of persons of concern is one of the main concerns. Most of the detained asylum-seekers are detained, because they worked without work permit or because they had false documents or no valid visa. The detention is arbitrary, because there is no judicial review of it and it can be renewed indefinitely by Ministry of Justice every three months (i.e. there is no ceiling period). Detained persons can apply for temporary release on compelling medical or humanitarian grounds but this is, in practice, granted only rarely.

Self-reliance, basic needs and essential services

One of the main obstacles for the local integration and self-reliance is access to livelihood. According to the Refugee Act, humanitarian status holders and refugees are allowed to work.

However, most of them face difficulties to find employment, because they lack Korean language skills and their education and professional experience in their countries of origin are not recognised in RoK.

With the enforcement of the Refugee Act, asylum-seekers can apply for and may receive basic financial assistance of approximately 400 USD/month/person up to six months from the date of asylum application. After six months, they can apply for a work permit to engage in employment activities. Reduced financial assistance is provided to asylum-seekers in the IRC, which has the capacity to accommodate up to 82 residents. While refugees are eligible for the basic social welfare services provided by the local government, humanitarian status holders are not entitled to any financial assistance or basic social welfare services.

As for medical care, asylum-seekers heavily rely on charity organisations and hospitals, due to the limited assistance provided by the government. Only refugees and legally employed asylum-seekers and humanitarian status holders have access to national health insurance services. Access to education is granted based on the Education Act and the Refugee Act. For primary and secondary education, current regulations foresee the admission for children regardless of their nationality and residence status. However, the decision to grant access lies with the school principal, which may result in arbitrary implementation of this provision.

Birth registration

The current law and administrative practice in RoK does not allow for birth registration of or the issuance of birth certificates to foreigners or stateless persons. Foreigners have to register their children with their embassies, which is often impossible for persons of concern.

Macau (November 2017)

Macau is a Special Administrative Region of the People's Republic of China.[171] According to the US Department of State, Macau's domestic laws provide for the grant of refugee status under the UN Convention against Torture. The government has also developed a system for assessing and granting refugee status. Macau has also acceded to the 1951 Convention and its Protocol. According to Macau's laws, recognised refugees ought to "ultimately enjoy the same rights as other SAR residents".[172] There have however been significant delays in refugee claim processing due to lack of resources. During this time asylum seekers are not able to be deported to their country of origin. Further, persons with ongoing refugee claims are entitled to government support related to accommodation, health care and education for children.

Macau SAR adopted Law 1/2004, namely the Regime of Recognition and Loss of Refugee Status. It also established the Refugees Commission which is to be responsible for analysing applications for the recognition of refugee status. The representative of the Office of the UNHCR is informed of the decisions made pursuant to this procedure. Recognised refugees are entitled to an identity card and a travel document. They also receive equal treatment as other existing residents. Declined refugee claims may be appealed to the Court of Second Instance. Refugee claimants must be informed of their right to assistance from interpreters, protection by law, confidentiality, and free legal consultation service, inclusion of their spouse and children and basic living conditions grants.[173]

As part of the 2016 Concluding observations on the fifth period report of Macau, the Committee against Torture recommended that the Government of Macau establish appropriate mechanisms aimed at the early identification of victims of trafficking and at referring such victims to the refugee status determination process.[174]

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171 United States Department of State *China (includes Tibet, Hong Kong, and Macau) 2016 Human Rights Report* (https://www.state.gov/documents/organization/265546.pdf) (Last accessed 19 November 2017).

172 Ibid at 142.

173 UN Committee on the Elimination of Racial Discrimination (CERD) *Consideration of reports submitted by States parties under article 9 of the Convention, fourteenth to seventeenth period report of States parties due in 2015: Macao, China* (3 April 2017) (http://www.refworld.org/country,,,,MAC,,5978a0d54,0.html) (Last accessed 19 November 2017).

174 UN Committee against Torture *Concluding observations on the fifth periodic report of Macao, China* (UN Doc. CAT/C/CHN-MAC/CO/5, 3 January 2016) at pp6-7 (http://www.refworld.org/docid/58beda8d4.html) (Last accessed 19 November 2017).

Malaysia (November 2017)

Overview

Malaysia has not ratified the 1951 UN Convention Relating to the status of Refugees nor its 1967 Protocol. APRRN notes that Malaysia "lacks an effective domestic legislative and administrative framework to protect refugees within its territory".[175] Refugees and asylum seekers are considered to be over-stayers who have entered the country illegally and are thus unable to participate in the formal labour market. There are no refugee camps in Malaysia and refugees and asylum seekers generally live in towns and cities. As at January 2017, approximately 150,430 persons were registered as persons of concern with UNHCR Malaysia. The main source countries are Myanmar, Afghanistan, Iran, Iraq, Palestine, Pakistan, Somalia, Sri Lanka, Syria and Yemen.[176]

Refugee status determination

Over the last two years there have been significance changes within the determination process, which resulted in a reduced access to registration. Non-Burmese and non-Rohingya asylum seekers are allowed to register with UNHCR while Burmese (including Rohingya) are prevented from direct registration unless they have been released from immigration detention referred by a non-government organisation or are already registered within the UNHCR system. There have been significant delays in processing, particularly with regard to claims made by persons living outside of the main UNHCR office area.

The Malaysian government launched a new registration program for the collection of biometric data of asylum seekers. This program however does not seem to serve the purpose of providing benefits or protection mechanisms and is not intended to replace the UNHCR registration and card process.[177] UNHCR explains that the new ID card and biometric data collection system will be accompanied by a smart phone application which will enable the police and immigration enforcement officers to verify whether an individual is registered with UNHCR. This in turn is expected to support implementation of alternatives to detention,

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175 Asia Pacific Refugee Rights Network *Malaysia* (March 2017) (http://aprrn.info/pdf/Malaysia%20Factsheet%20for%20NZ_MAR%202017.pdf) (Last accessed 19 November 2017).

176 Ibid.

177 Asean Parliamentarians for Human Rights *Examining Human Rights in the Context of ASEAN regional Migration: Summary Report of Findings from APRH Fact-finding mission to Malaysia* (3-7 August 2017) at p8 (https://reliefweb.int/sites/reliefweb.int/files/resources/APHR_Malaysia-Fact-Finding-Mission-Report_Sep-2017.pdf) (Last accessed 19 November 2017).

including efforts to minimise risks of criminal prosecution for illegal entry under the Immigration Act.[178]

Lack of access to legal aid has brought about the establishment of non-government organisations such as Asylum Access Malaysia.[179] Asylum Access Malaysia (AAM) is part of the Asylum Access international group of organisations. Asylum Access Malaysia was launched in 2014 and provides legal services for refugees and asylum seekers, training sessions and engagement with UNHCR and other stakeholders. AAM also provides learning opportunities for lawyers, universities and other organisations within the refugee legal aid network in Malaysia. AAM has noted on its website that the Malaysian government "has evidenced a greater willingness for dialogue on subjects such as refugee rights and human trafficking".[180]

Detention

Conditions have been largely described as substandard with issues such as overcrowding, insufficient access to water, provision of food, poor sanitation and inadequate medical care leading to deaths in detention. Children are detained with adults. While UNHCR has the ability to secure release of refugees and asylum seekers registered with the agency, this process can take months or even years. Due to being stateless, Rohingya make up 75% of the refugees detained in internally displaced camps in Malaysia. The government has established a working group to study and make recommendations on alternatives to detention models for children.[181]

Access to health care

Health care has been described as "difficult or impossible to access" due to cost, language barriers and fear of being arrested. Persons holding UNHCR issued cards are entitled to a 50% subsidy.[182] However, the Immigration Department has been reported to have a presence in government hospitals where 'irregular' migrants, including asylum seekers, have been arrested.

Access to education and employment

Out of Malaysia's overall asylum seeking population approximately 34,859 are children. Asylum seekers are ineligible to attend government primary schools. Less than 40% of asylum

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178 UN High Commissioner for Refugees *Progress Report mid-2016. Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019* (August 2016) at p60 (http://www.refworld.org/docid/57b850dba.html) (Last accessed 19 November 2017).

179 Asylum Access website http://asylumaccess.org/program/malaysia/ (Last accessed 19 November 2017).

180 Ibid.

181 APRRN, s*upra* n. 175 at 2.

182 Ibid.

seeking school aged children has access to formal education. Alterative learning centres have been challenged by lack of resources and qualified teachers. Classes are overcrowded and held at unhygienic premises.[183] Having no legal right to work, refugees are "highly vulnerable to exploitation and abuse, including unpaid wages, poor or dangerous working conditions, and the absence of recourse to justice due to their 'irregular' status in the country".[184]

[183] Ibid at 3.
[184] Ibid.

Myanmar (November 2017)

Overview

Myanmar is not a signatory to the UN Convention relating to the Status of Refugees or its 1967 Protocol nor does it have any formal national asylum framework. Myanmar is a refugee producing country. In October 2015 Myanmar signed a nationwide ceasefire agreement. The National League for Democracy was elected in government in April 2016. APRRN notes that this has "provided some limited space for advocacy and the promotion of refugee right within Myanmar".[185]

Key statistics

As of December 2015 there were approximately 1,414,357 persons of concern. Most of these were stateless Rohingya, which is a population that is not recognised by the Myanmar Government. There were further 25,265 returned internally displaced persons, 451,089 internally displaced persons, two returned refugees and only one asylum seeker. During late 2016, approximately 69,000 Rohingya fled the Northern Rakhine state to Bangladesh which already has a population of approximately 400,000 stateless Rohingya.[186]

Treatment of Rohingya

It is estimated that approximately one million stateless persons resided in Rakhine State before 25 August 2017 (all self-identifying as Rohingya). Rohingya have been born and raised in Myanmar for multiple generations. This situation has come about as a result of restrictive legislative provisions which grant citizenship based on race and not place of birth or descent. Filippo Grandi, United Nations High Commissioner for Refugees, recently stated as follows: "Nowhere is the link between statelessness and displacement more evident than for the Rohingya community of Myanmar, for whom denial of citizenship is a key aspect of the entrenched discrimination and exclusion that have shaped their plight for decades".[187]

There have been continued reports of killings, violence, and rape. The British High Commissioner of Bangladesh has stated that this treatment "might be tantamount to genocide". The Rohingya are not allowed to marry without government approval and are forbidden from having more than two children. They cannot become Myanmar citizenships unless they officially identify as Bengali.[188]

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185 Asia Pacific Refugee Rights Network *Myanmar* (February 2017).

186 Ibid at 1.

187 UN High Commissioner for Refugees *Statelessness and the Rohingya Crisis* (10 November 2017) (http://www.refworld.org/docid/5a05b4664.html) (Last accessed 19 November 2017).

188 Ibid at 2.

APRRN has called for immediate action on part of the Australian government in placing urgent pressure on the Myanmar government. The Australian Government has also been called to increase humanitarian assistance to those fleeing the Rakhine State, provide financial assistance to UNHCR and work with other Southeast Asian governments in the region. APRRN has also pointed out that Australia has resettled only 37 Rohingya since 2013 and "should urgently increase the number of Rohingya who are resettled as refugees".[189]

A joint publication of the Asian Forum for Human Rights and Development and APRRN cautions that humanitarian aid activities have been suspended for a prolonged period of time in the Northern Rakhine state. This included non-government organisations and the UN World Food Programme.[190] In October 2017 the United Nations Children's Fund (UNICEF) launched an appeal for an emergency response to reach 720,000 children. The refugee crisis level was increased to Level 3.[191]

Radio Free Asia reports that lawmakers from western Rakhine state have recently urged the government of Myanmar to build more ethnic Rakhine villages in the northern part of the state where a crackdown on Rohingya Muslims has forced tens of thousands of people to flee in the last four months. General Than Htut stated that 36 ethnic Rakhine villages had already been built. There were no mentions of further plans to construct more villages. An initiative was also implemented for the introduction of non-Muslim families by providing each new non-Muslim household with a place to live, farmland, garden space, equipment and food.[192]

A Rakhine Advisory Commission was appointed in attempts to resolve religious and ethnic divisions and reconsider resettling Muslims. The Commission consists of nine members and is led by former United Nations chief Kofi Anan. The members received feedback that the conditions were not yet such that ethnic Rakhine Buddhists could work with local Muslims. While the Commission is not tasked with evaluating human rights in Rakhine, it was suggested that the government of Myanmar allow displaced Rohingya to return to their homes and aim to shut down internal camps. The Myanmar government officially agreed with the findings and committed to implementing the majority of the 30 recommendations.[193]

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189 Ibid at 3.

190 Ibid at 4.

191 UN News Service *As Rohingya crisis continues, UNICEF seeks funds to reach 720,000 children in need* (2 October 2017) (http://www.refworld.org/docid/59d3912b4.html) (Last accessed 19 November 2017).

192 Radio Free Asia *Myanmar's Rakhine lawmakers want more 'ethnic villages' in Muslim-majority areas* (5 June 2017) (http://www.refworld.org/docid/5971a81713.html) (Last accessed 19 November 2017).

193 Ibid.

The Philippines (November 2017)

Overview

The Philippines is one of the few countries in the Asia-Pacific region to have acceded to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol in 1981 and the first country in Southeast Asia to sign the 1954 Convention relating to the Status of Stateless Persons in 2011.

Legal framework

a. General Principles, para 16: Everyone has the right to receive and seek asylum in another State in accordance with the laws of such State and applicable in international agreements.
b. Philippine Immigration Act Sections 13(a) and 47(b)

While the Philippines has no specific legislation concerning refugees and asylum seekers, Department of Justice Circular No. 58 of the Department of Justice, Series of 2012, sets out the procedure for refugee and stateless status determination. This statute also established the Refugee and Stateless Persons Protection Unit (RSPPU) which operates within the Department of Justice. The following orders and circulars, jurisprudence and memoranda of understanding were issued with relation to refugees and asylum seekers in the Philippines:

a. Department of Justice Order No 94 - established the Refugee Processing Unit in 1998
b. NSO Memorandum Circular No 2004-01 - Children in Need of Special Protection in 2004 - includes refugee children
c. Department of Justice Circular No 58 - established the national refugee and stateless status determination procedure
d. Department of Labour and Employment Circular No 120-12 - affirms the right to access employment through the issuance of permits of refugees and stateless persons
e. Memorandum of Understanding between UNHCR and Public Attorney's Office - entered into in 2013 and renewed in 2017, outlines the framework of cooperation with regard to access to free legal assistance, counselling and representation of refugees and asylum seekers in all stages of administrative, judicial and quasi-judicial proceedings (i.e., immigration and detention cases), including civil, criminal and labour cases
f. Department of Justice Circular No 793 - Guidelines on Immigration Matters involving Asylum Seekers, Refugees and Stateless Persons and on Detention of Child - clarifies the duties and responsibilities of the Bureau of Immigration and facilitates streamlining of the services providing by the Bureau of Immigration and Department of Justice RSPPU

g. *Republic of the Philippines vs Kamran Karbasi*, G.R. No. 210412, July 29, 2015 – a Supreme Court decision favourably granting the petition for naturalisation of a refugee where it recognised that the Naturalisation Law must be read in light of the developments in the international human rights law with respect to the granting of nationality to refugees and stateless persons. The decision is a welcome development as naturalisation requirements and procedures remain stringent for foreigners in general.
h. Department of Labor and Employment's Order No. 146-15, series of 2015 - Revised Rules for the Issuance of Employment Permits to Foreign Nationals - reaffirms the right to access employment through the issuance of permits of refugees and stateless persons.
i. Inter-Agency Agreement on the Protection on the Protection of Asylum Seekers, Refugees, and Stateless Persons in the Philippines - aims to institutionalise the mechanisms in providing appropriate assistance and services to persons of concern.

Key statistics

The Philippines was hosting 477 refugees and 277 asylum seekers as of September 2017.

Achievements and issues

Refugees and asylum seekers are issued identity documents, alien registration cards and travel documents. There is access to courts and free legal assistance. Provided the required thresholds are met, asylum seekers are also able to access judicial and administrative citizenship procedures. In 2013 a Memorandum of Understanding between UNHCR and the Public Attorney's Office related to free legal assistance was signed and renewed in 2015. This commitment was further renewed in April 2017. Furthermore, university-based legal aid clinics such as the San Beda Legal Aide Bureau and the Ateneo Human Rights Center provide complementary legal services for persons of concern. The Philippines has also fulfilled its commitments under the Ministerial Meeting of State Parties to the Refugee and Statelessness Conventions in December 2011 by commencing the issuance of machine readable Convention travel documents to refugees and stateless persons.

Refugees and stateless persons are allowed to work in the country except for industries reserved for Filipino nationals. This right is reinforced by the issuance of the Department of Labor and Employment (DOLE) Order No, 120-12 and Department Order No 146-15. Since 2013, the Bureau of Immigration has also been providing special work permits for asylum seekers.

In 2015 the Philippines Inter-agency Steering Committee (IASC)[194] for the Protection of Refugees and other Persons of Concern was set up to address practical gaps and institutionalise key policy recommendations to address the serious challenges of providing material assistance and social services to asylum seekers, refugees, and stateless persons. In October 2017, the IASC signed the Inter-agency Agreement on the Protection of Refugees, Asylum Seekers and Stateless Persons. The agreement addresses the commitments of agencies to make government services accessible to persons of concern.

Eight petitions for naturalisation have been granted by the courts since 2006. One refugee is awaiting the completion of the judicial requirement to take oath as a Filipino citizen. The self-reliance initiative was implemented in 2007, involving partnerships with three private companies (i.e., Starbucks Philippines, San Miguel Corporation and Human Heart Nature).

[194] The Inter-Agency Steering Committee for the Protection of Persons of Concern consists of the following members: Bureau of Immigration (BI), Commission on Higher Education (CHED), Department of Education (DepEd), Department of Foreign Affairs (DFA), Department of Health (DOH), Department of the Interior and Local Government (DILG), Department of Justice – Refugees and Stateless Persons Protection Unit (DOJ-RSPPU), Department of Labor and Employment (DOLE), Department of Social Welfare and Development (DSWD), Department of Trade and Industry (DTI), the Judiciary, Public Attorney's Office (PAO), Philippine Charity Sweepstakes Office (PCSO), Philippine Health Insurance Corporation (PhilHealth), Professional Regulation Commission (PRC), and the Technical Education and Skills Development Authority (TESDA).

Taiwan (October 2017)

Overview

Taiwan is not a member of United Nations due to the "One China" policy. However a Refugee Bill (originally drafted many years back) passed its first reading with little debate in the Legislative Yuan in July 2016. This Bill/Act, if passed, would of course be purely domestic legislation. The Bill, as it is now, from an international viewpoint, has several positives but also some negatives. For example the definition of "refugee" is taken directly from Article 1A (2) of the Refugee Convention 1951, whilst on the other hand it includes a very restrictive "safe third country" of transit provision. There has been no further progress with the Bill in 2017 from either the ruling (DPP) party nor the biggest opposition party (KMT). However, some minor parties may present the Bill again on the urging of local human rights NGOs.

Taiwan has incorporated into its domestic law the equivalent provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and now conducts regular two yearly reviews of these using an independent review committee chaired by Manfred Novak. Their latest report, published in January 2017, addressed the need to bring workable *non refoulement* provisions into domestic law in conjunction with the Refugee Act and the existing domestic provisions equivalent to the terms of Articles 6 and 7 of the ICCPR. Following an update review meeting of the Novak report in October 2017, it appears senior Ministry of Interior policy advisors in the Administrative Branch of government have now been tasked with drafting policy and details for "claim assessment mechanisms" for the Refugee Act and ICCPR obligations.

In April 2017 the IARLJ (AP Chapter), along with the Taiwan Association for Human Rights (TAHR) and APRRN, took part in a roundtable forum on refugee and protection issues. This included active participation by the National Immigration Agency (NIA), members of Parliament, the President of the Legislative Yuan and the Secretary-General of the Judicial Yuan. As a follow-up to this, in late October 2017, IARLJ members conducted short introductory professional development courses for several judges and another for the National Immigration Agency (NIA).

Key statistics

As noted these is currently no legal mechanism for the assessment of refugees and other asylum seekers, or for the regularising of their status, under domestic immigration law. The principle of *non refoulement* is thus not procedurally embedded. As a result, it appears, from this lacuna, that some claimants, who potentially could well have been have recognised as refugees internationally may have been repatriated. Until systems are put in place this may happen in the future.

Cases are presented to the NIA. In 2017 claims made so far include: 317 from Tibet, 1 from Uganda, 1 from Cameroon, 2 from Turkey, and 2 from China.

Issues

A major issue that is constantly and controversially debated in Taiwan is how claimants from the People's Republic of China should be treated and assessed. It would also appear this may be a significant reason why the Refugee Bill is not brought back before Parliament by the major parties. As the UN, and UNHCR are required to follow the one China policy, there is no engagement with Taiwan. The issue of potential Chinese claimants is clearly politically charged in Taiwan and China. There are arguments presented from both viewpoints. The first is that claimants from China should be treated as entitled to Taiwanese nationality, in a similar manner as between North and South Korea, or in the past East and West Germany. The other approach is that claims from China should be treated as asylum claims in the same manner as all other claimants from around the world. From the point of view of offshore experts, international and regional NGOs who may wish to offer to give assistance to Taiwan, this could be seen as a dilemma as, clearly, they would not wish to be seen as interfering in the domestic affairs of either Taiwan or China.

Taiwan civil society representatives have requested international support for continued support in the following areas:

a. Lobbying the Parliament to pass the Refugee Bill and introduce sound internationally consistent RSD law and procedures.
b. Lobbying the NIA to adhere to the principle of *non refoulement*.
c. Assistance with the training of NIA officers, judiciary, lawyers and NGOs in core principles international refugee law and how to deal with refugee claims in Taiwan.
d. Providing ongoing assistance to lawyers and NGOs in Taiwan for individual cases.

Areas where IARLJ has and can assist

The assistance given by the IARLJ to date has been purely to provide an apolitical, independent overview of international refugee and complementary protection law and practices. Consistency with established customary international law in these fields will best enable reciprocity in the treatment of both refugees/protected persons and the potential return of failed claimants. The recent training given strictly followed this approach, as will be future calls for assistance.

Thailand (November 2017)

Overview and key statistics

Thailand is not a signatory to the 1951 UN Convention relating to the Status of Refugees or its 1967 Protocol nor does it have a formal framework for refugee status determination.[195] Rohingyas from Myanmar constitute the majority of Thailand's refugee and refugee claimant population.[196] As of April 2016 approximately 120 000 asylum seekers and refugees are residing in Thailand (102,998 from Myanmar, 9500 from Bangkok). The other main nationalities are Pakistani, Sri Lankan, Rohingya, Vietnamese, Lao Khmong, Syrian, Somali and other African nationalities. Between January and October 2016, 4,501 refugees from Myanmar were resettled in third countries. Further 2,136 were submitted for resettlement consideration.[197]

As Thailand is a member of ASEAN and the ASEAN Human Rights Declaration which includes the right to receive asylum, the Thai government "generally does not return refugees or asylum seekers".[198] Thailand was also a member of the Executive Committee of the High Commissioner's Programme and it hosts the Refugee Status Office established under the Bali Process.[199] Mathew and Harley point out that Thailand is an upper middle economy and as such "should take some responsibilities for refugees". However, they also note that it is "clear that [Thailand] will not be dictated to by other, more developed countries such as Australia".[200]

Urban refugees

There has been a significant increase in the number of asylum seekers living in urban areas. This has put a strain on service providers, placing vulnerable groups at further risk (such as women, children and unaccompanied minors).[201] There are significant claim processing delays. For instance, asylums seekers from Pakistan are faced with interview dates up to 3 or 4 years in advance. During this waiting time they have no protection and are subject to extortion bribes, arbitrary arrest and detention.[202]

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195 Asia Pacific Refugee Rights Network *Thailand* (March 2017) (http://aprrn.info/pdf/Thailand%20Factsheet_MAR%202017.pdf) (Last accessed 19 November 2017).
196 Ibid at 1.
197 Ibid.
198 Mathew and Harley, *supra* n. 151.
199 Ibid at 6.
200 Ibid at 6.
201 APRRN, *supra* n. 195 at 1.
202 Ibid at 2.

Refugees on Thailand-Myanmar border

Approximately 100,000 refugees from Myanmar reside in nine temporary camps placed along the border between Thailand and Myanmar. Conditions remain harsh due to noticeable reduction in service provision and funding. Due to ceasefire agreements between the Myanmar army and ethnic groups, the Royal Thai Government and the government of Myanmar announced plans to repatriate over 100,000 refugees. In October 2016 a total of 71 refugees left Thailand to return to Myanmar.[203]

Stateless Rohingya refugees

Rohingya refugees from Myanmar continue to arrive by land and by sea. There is a huge reliance on smugglers, which exposes Rohingya to significant risks such as being held for indeterminate periods in human trafficking camps. Further, Rohingyas who have been rescued from human traffickers by Thai authorities have been subject to indefinite detention in immigration detention centres or government run shelters. The tightening of border policies by Thailand and Malaysia has resulted in human traffickers abandoning hundreds of Rohingya asylum seekers and Bangladeshi migrants at sea. Thailand has maintained its position following inter-government discussions in continuing to redirect boats that attempted to disembark. There are currently no statistics on the number of lives lost at sea.[204]

Detention

In accordance with Thailand's Immigration Act BE.E. 2522, anyone who enters the country without proper documentation is considered to be an 'illegal alien'. There are no alternatives to immigration detention. Immigration detention conditions are "gravely substandard". Declined asylums seekers and stateless refugees may face indefinite periods in detention.[205]

In a shared publication between Save the Children and APRRN, it is noted that recent financial contributions towards a UNHCR initiative to clear a large backlog has resulted in 1,508 cases being determined in the second half of 2016.[206] This publication also refers to a recent Thai court decision whereby a refugee child was placed within Thailand's child protection system as opposed to being placed in detention.[207] Save the Children and APRRN noted that this was a positive development. It was also noted that Thailand does in fact have the legal framework for alternative detention such as use of the bail process, issuing of temporary work permits for victims of trafficking and use of family shelters.[208]

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203 Ibid at 2.
204 Ibid at 2.
205 Ibid at 3.
206 APRRN and Save the Children, *supra* n. 150 at 27.
207 Ibid at 32.
208 Ibid at 33.

According to Jones, there have been progressive Thai administrations such as the Yingluck administration which was "quite eloquent in crafting its message of rights awareness and promotion and in fact should be commended for honouring its pledge to the Human Rights Council in withdrawing reservations to CEDAW".[209] Jones also refers to the Special Rapporteur's visits in Thailand where surveillance and a balancing act between national security and basic human rights were at the forefront of discussions.[210]

[209] Jones, *supra* n. 83 at 80.
[210] Ibid at 81.

V. A suggested meaningful future role for the IARLJ in Asia-Pacific

Past IARLJ involvement in East Asia

The IARLJ's involvement in the region goes back almost 20 years, to the Philippines and the first use of the original IARLJ training manual produced in co-operation with UNHCR and York University, Toronto, which was trialled in a one-week course in Manila.

Professional development courses and other assistance have been provided by experienced IARLJ members in **the Philippines** and with exchange visits to New Zealand and Australian tribunals on many occasions up to the present. These have mainly been carried out in co-operation with UNHCR Manila, the University of Ateneo, the Human Rights Centre, and the Department of Justice.

In **Japan**, IARLJ members have carried out many similar courses and provided other guidance and assistance regularly since 2000, in close co-operation with UNHCR Tokyo, the University of Tokyo, the University of Osaka, the International Christian University of Tokyo, the Japan Federal Bar Association (*Zennaren*) and various NGOs.

In the **Republic of Korea** IARLJ members have carried out similar activities as in Japan since 2006/7. These have been undertaken in conjunction with UNHCR Seoul, the Korean Immigration Department and the judiciary, the Korean Bar Association and the Korean Judicial Research Institute (KJRTI). In June 2016, at the KJRTI, the IARLJ held the first Asia-Pacific conference "The Role of the Judiciary in Asylum and Other International Protection Law in Asia" in conjunction with UNHCR, KBA and the Institute. The Asia-Pacific Chapter of the IARLJ was formally established at this conference.

In **Hong Kong SAR**, IARLJ members have conducted several training courses and given related advice for the Torture Claims Appeals Board (TCAB) and the Immigration Department at the request of the Secretary of the Security Bureau and the Immigration Department.

In **Taiwan** in 2017, in association with APRRN, IARLJ members conducted training courses in refugee and complementary protection law at the Taiwan Judicial Academy, the National Immigration Agency and for the Bar Association and assisted with advisory work on Taiwan's draft Refugee Bill in discussions with the Judicial Yuan and the Legislative Yuan.

Preliminary discussions for similar professional developments courses and RSD / procedural advice are in train with some other states in the area as well.

Research review

Before discussing our suggested way forward for the Asia-Pacific chapter, we review the research above and note the levels of accession to the most relevant international protection and human rights treaties and the current state of refugee/complementary protection

assessment systems (where they exist). We then look at some of the common issues and challenges with asylum and mixed migration facing many in East, South and South East Asian countries and we briefly set out how the IARLJ has worked with judges and decision-makers in many Asia-Pacific countries in the past.

International

Clearly, at the UN/international level, it is expected and hoped that numerous states in the Asia-Pacific region will now take significant steps towards developing effective legal systems to accommodate the increasing numbers of persons seeking protection in the region. However, given the historic, comparatively gradual take-up by most Asian states of surrogate protection obligations, international human rights law based assessment and the granting of basic rights (such as those contained in Articles 2-33 of the Refugee Convention) to refugees and other 'protected' persons in past years, such optimism must be tempered with the reality of Asian non-intervention principles.

Regional

At the regional level, by far the greatest commitments to surrogate asylum protection principles and IHRL-based principles and procedures are in the ASEAN countries. It appears that there is a growing realisation by many Asian states that their involvement in the Bali Process and other agreements to control trafficking and people smuggling must be coupled with sound international asylum law and procedures and the application of humane migration law outcomes.

It has been our experience over the past 20 years that the committed and dedicated UNHCR officers in the region, and the many (often pro bono) lawyers, deserve high praise. Despite painfully slow progress on protection issues, their perseverance continues unabated and should inspire the IARLJ to continue its efforts with independent, apolitical assistance to all these people.

Civil society

At the civil society level, the work of APRRN in particular is seen as very worthwhile. Their careful work and advocacy over the past 8-9 years with many Asian states, whilst at the same time assisting asylum seekers and refugees and running public awareness programmes in the region, has encouraging potential to lead to good relationships with several states and more soundly based "international rule of law" asylum outcomes.

Individual state commitment

While, at the state level, only seven of the states we are considering are parties to the Refugee Convention and Protocol there is however a relatively high level of accession to the ICCPR and

CAT (Articles 6 and 7 of ICCPR and Article 3 of CAT of course include *non refoulement* obligations on signatory states). Of the fourteen countries we cover in the fact sheets, 10 are parties to ICCPR and 10 (although not exactly the same group) are parties to CAT. If we look at all 23 countries in the region, we find 15 are ICCPR parties and, again, 15 are parties to CAT (again not the same grouping).

Of significance however, India and Malaysia are not parties to the ICCPR, China and Malaysia are not parties to CAT and Taiwan is not a party to the UN itself (due to the "One China" policy) and thus to neither treaty. Taiwan has, however, in recent times passed local laws that effectively incorporate the terms of ICCPR and ICESCR into domestic law and these commitments are regularly independently audited by an international review committee. Further, a local "Refugee Bill" incorporating some direct definitions from the Refugee Convention has passed its first reading in the Legislative Yuan and will hopefully come back before the Yuan soon for enactment.

While several countries permit UNHCR to carry out RSD systems in their jurisdictions, as will be noted from the Fact Sheets above, only five of these states have formally established their own RSD or complementary protection assessment systems. These are Cambodia, ROK, Japan, the Philippines, and Hong Kong SAR (In East Timor, Government officials make decisions but there is no 'formal' assessment process). Two or three other states, such as Taiwan are actively working towards such systems/mechanisms. With the exception of the Philippines and some high level HK judicial decisions (noted above), similar common problems in the application of sound internationally consistent refugee/complementary law and procedures are apparent in the other four countries now carrying out their own determinations.

Can the four established RSD systems be improved?

It is our view that, in the four countries concerned, an apparent failure at all levels to accept, or perhaps realise, the benefits of applying sound and tested international law and procedures does seem to be a large contributor to their operational problems. There are costly inefficiencies, excessive repeat claims and appeals and related backlogs, at both primary and appeal levels of decision-making in three of these countries. These problems combine to produce perceived (and real) abuse, and public/media disquiet towards asylum law and refugees and protected persons who have genuine needs. A vicious circle often then results, with more and more restrictive laws and procedures being introduced to deal with the symptoms of so-called 'abuse' instead of addressing the causes that have resulted from the failure to learn, apply and implement sound, internationally accepted asylum law and procedures and humane migration/deportation law.

Overall Conclusion

We suggest that the best, most effective and pragmatic overall protection and migration outcomes in Asia (as elsewhere) will follow from adopting the international treaty/human rights approach to refugee and protection law and practices, coupled with the application of humane domestic migration and deportation laws. We consider that this can be done whilst still recognising that various local modifications will be used that do not unduly compromise the underlying principles of non-interference in internal affairs, held by many Asian states. As we note, sovereignty is actually strengthened by states' compliance with international human rights law and following the principles of the Vienna Convention on the Law of Treaties, 1969.

It is the experience of IARLJ members involved in international training and advisory roles that it has now become well-established that the best overall RSD/protection assessment results will only be achieved when they follow sound customary international refugee and human rights law. This approach will also be greatly enhanced when the assessment of all asylum related claims and issues, arising in conjunction with mixed migration situations, is done in a 'one stop' process. This means following a process of assessments, done strictly in the following order:

a. At the international rights and surrogate protection obligations based level first. Thus Step 1 is refugee status determination (RSD), then Step 2 is: 'complementary protection' - covering *non refoulement* under CAT Art 3, ICCPR Arts 6 and 7 or Art 2, 3 ECHR (or in EU "Subsidiary protection"), and only then, finally --
b. Step 3 - Any form of domestic (immigration /privilege based) humanitarian or family related protection (such as where there are exceptional circumstances of a humanitarian nature and it is not contrary to public order).

To carry out this type of assessment process or mechanism efficiently, in the modern reality of international people movements, clearly and essentially requires much training or professional development. This will involve both first instance decision-makers (hopefully who are also not immigration or border protection officers) and also all appeal/review tribunal members and appellate judges, to be well trained in **both** internationally compliant asylum law and procedures **and relevant** domestic migration/deportation law and procedures.

This approach is now well established in Europe, Canada, many African states and in Australia and New Zealand. In Hong Kong, the "USM" is attempting to adopt what is effectively a domestic version of this.

We see assisting the implementation and sound application of internationally compliant asylum laws and procedures, including 'one-stop' processing, and the interrelated application of fair and humane migration and deportation law as the most important and useful role for the IARLJ in Asia Pacific. To do this the Asia Pacific Chapter IARLJ can now build on the

established networks and expand these on the same co-operative approach as used to date in Asia.

We conclude that, in this way, the IARLJ can best advance its objectives and provide support and exchanges of views with judges in Asia- Pacific. Also, where appropriate, the IARLJ can provide expertise and assistance to other decision makers, government officials, lawyers and NGOs in the region, where requested.

We hope that the role of the IARLJ, particularly as it extends its objectives to become an International Association of Refugee and Migration Judges, will thus (as elsewhere) become a meaningful and useful one in all of the Asia-Pacific region.

Appendix 1

REFUGEE PROTECTION IN THE ASIA PACIFIC REGION

Resource person: **Dr Savitri Taylor** is an Associate Professor in the Law School at La Trobe University in Australia. She is willing to discuss specific issues related to the contents of this page with individuals.

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Definition of the Asia Pacific Region

There is no universally adopted definition of the "Asia-Pacific region". Unless otherwise stated, the definition adopted for the purposes of this page is the Office of the United Nations High Commissioner for Refugees (UNHCR) operational definition of "Asia & the Pacific" which consists of Central Asia, East Asia and the Pacific, South Asia, South East Asia and South West Asia. Likewise, UNHCR operational definitions of sub-regions will be used.

Relevant International Legal Instruments

As shown in the Table below, many countries in the Asia Pacific region have not been prepared to become parties to the Convention Relating to the Status of Refugees or its Protocol, but some of these countries are at least parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and/or the International Covenant on Civil and Political Rights. These treaties impose *non-refoulement* obligations which are not limited in application to "refugees" within the meaning of the Refugee Convention and Protocol and are not subject to exceptions. Moreover, the principle of *non-refoulement* is generally regarded as being part of customary international law and thus binding even on states which are not parties to any of the treaties previously mentioned (Cf James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 363-7 who questions the correctness of the orthodox view).

Table: Treaty parties at 31 October 2017 (NB reservations and declarations not noted)

Country or territory	Refugee Convention* and/or Protocol*	CAT*	ICCPR*
Central Asia			
Kazakhstan	Yes	Yes	Yes
Kyrgyz Republic	Yes	Yes	Yes
Tajikistan	Yes	Yes	Yes
Turkmenistan	Yes	Yes	Yes
Uzbekistan	No	Yes	Yes
East Asia & the Pacific			
American Samoa (USA)	Yes	Yes	Yes
Australia	Yes	Yes	Yes
China	Yes	Yes	No

Cook Islands	No	No	No
Federated States of Micronesia	No	No	No
Fiji	Yes	Yes	No
French Polynesia (France)	Yes	Yes	Yes
Hong Kong SAR (China)	No	Yes	Yes
Japan	Yes	Yes	Yes
Kiribati	No	No	No
Macau SAR (China)	Yes	Yes	Yes
Marshall Islands	No	No	No
Nauru	Yes	Yes	No
New Caledonia (France)	Yes	Yes	Yes
New Zealand (including Tokelau)	Yes	Yes	Yes
Niue	No	No	No
North Korea	No	No	Yes (but purported withdrawal)
Northern Mariana Islands (USA)	Yes	Yes	Yes
Palau	No	No	No
Papua New Guinea (PNG)	Yes	No	Yes
Samoa	Yes	No	Yes
South Korea	Yes	Yes	Yes
Solomon Islands	Yes	No	No
Tonga	No	No	No
Tuvalu	Yes	Yes	Yes
Vanuatu	No	Yes	Yes
South Asia			
Bhutan	No	No	No
India	No	No	Yes
Maldives	No	Yes	Yes
Nepal	No	Yes	Yes
Sri Lanka	No	Yes	Yes
South East Asia			
Bangladesh	No	Yes	Yes
Brunei	No	No (but signed on 22 September 2015)	No
Burma (Myanmar)	No	No	No
Cambodia	Yes	Yes	Yes
East Timor	Yes	Yes	Yes
Indonesia	No	Yes	Yes
Laos	No	Yes	Yes
Malaysia	No	No	No
Mongolia	No	Yes	Yes
Philippines	Yes	Yes	Yes
Singapore	No	No	No
Thailand	No	Yes	Yes
Viet Nam	No	Yes	Yes
South West Asia			
Afghanistan	Yes	Yes	Yes
Iran	Yes	No	Yes
Pakistan	No	Yes	Yes

* The most recent ratification status data (including reservations and declarations) can be obtained by clicking the hyperlinks [in the online version of Dr Taylor's report].

EXCOM Conclusions

101 countries are members of the Executive Committee of the High Commissioner's Program (EXCOM), which is responsible for approving UNHCR's program and budget and also provides advice to the High Commissioner. At most of its sessions, EXCOM adopts consensus resolutions called Conclusions on International Protection. While legally non-binding, these EXCOM Conclusions arguably have "strong political authority" (James Hathaway, *The Rights of Refugees under International Law*, 113-4) and are worth keeping in mind particularly when dealing with Asia Pacific countries which are not parties to the Refugee Convention or Protocol but are members of EXCOM (i.e. Bangladesh, India, Pakistan, and Thailand).

The Bangkok Principles on Status and Treatment of Refugees

The Asian-African Legal Consultative Organization (AALCO) is a body which advises its 47 member states on matters of international law. In 1966, the organization adopted the legally non-binding Bangkok Principles on Status and Treatment of Refugees. In 1970 it went on to adopt an addendum to the Bangkok Principles dealing with the "right to return" and in 1987 it adopted another addendum dealing with "principles of burden sharing".

Between 1996 and 2001, the AALCO Secretariat, UNHCR and member states devoted substantial time and resources to discussing and settling upon a revised consolidated text of the Bangkok Principles. The process culminated in adoption of the legally non-binding Revised Bangkok Principles at AALCO's 40th session held in June 2001. The aims of adoption were specified as being, *inter alia*, to inspire member states to adopt national legislation relating to the status and treatment of refugees and to provide a guide to dealing with refugee problems. Unfortunately, neither the original nor the revised Bangkok Principles have had much impact on state practice to date.

ASEAN Human Rights Declaration

The Association of South East Asian Nations is an inter-governmental organization which was established in 1967. The ten members of ASEAN are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Since 15 December 2008, ASEAN has been governed by the ASEAN Charter, which is a legally binding treaty.

In November 2012, the ASEAN Heads of State adopted the legally non-binding ASEAN Human Rights Declaration. Article 16 of the Declaration states that "Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements." However, ASEAN members have been reluctant to put asylum seeker issues on ASEAN's formal agenda because of the perception that it would involve a breach of the Charter principle of non-interference in the internal affairs of member states.

The Almaty Process

The Almaty Process was informally inaugurated at a Regional Conference on Refugee Protection and International Migration in Central Asia held in Almaty, Kazakhstan in March 2011. The Conference was organized by UNHCR, the International Organization for Migration (IOM) and the UN Regional Centre for Preventive Diplomacy for Central Asia and funded by the European Commission. The five Central Asian republics participated in the conference along with Afghanistan, Azerbaijan, China, Iran, the Russian Federation and Turkey. Civil society representatives were also present. At the end of the March 2011 conference, the state participants adopted the legally non-binding Almaty Declaration. The Declaration emphasized the need to enhance cooperation to control irregular migration in a manner which "preserves the asylum space and is consistent with international law, notably the principle of *non-refoulement*". It also foreshadowed the possible creation of a Regional Cooperation Framework.

In September 2012, officials designated as National Coordinators by Kazakhstan, Kyrgyz Republic, Tajikistan and Turkmenistan met and adopted a proposal for a Regional Cooperation Framework to Address Mixed Movements in Central Asia and a complementary Regional Action Plan. The proposed Regional Cooperation Framework was described as consisting of "a set of Common Understandings" covering areas where joint action was desirable. The proposed Regional Action Plan was described as "a menu of concrete actions to be taken in these key areas of Common Understanding" modelled on UNHCR's 10-Point Plan of Action.

A second Ministerial level regional conference was held in Almaty in June 2013. It appears that the original goals of this conference were to endorse the Regional Cooperation Framework and Regional Action Plan proposals and to decide on the operating modalities of an on-going Almaty Process. As things transpired, the June 2013 conference communique formally endorsed a document titled The Almaty Process: Operating Modalities but in relation to the September 2012 Regional Cooperation Framework proposal simply noted that it "could be used as a basis for developing a broader regional cooperation framework".

The Operating Modalities document contemplates the establishment of a Support Unit for the Almaty Process with a composition yet to be determined. In the meantime, the UNHCR and IOM offices in Kazakhstan are undertaking Support Unit functions. Almaty Process Ministerial Conferences are supposed to be held on a biennial basis and senior officials are supposed to meet annually.

The Almaty process presently has seven members: Afghanistan, Azerbaijan, Kazakhstan, Kyrgyz Republic, Tajikistan, Turkey, and Turkmenistan.

The Bali Process and Cognate Initiatives

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) was inaugurated at a Ministerial level conference co-chaired by Australia and Indonesia in February 2002. Forty five states and territories are "Bali Process" members. All of the countries in UNHCR's operational sub-regions of East Asia and the Pacific, South Asia, South East Asia and South West Asia are members as are Iraq, Jordan,

Syria, Turkey, the United Arab Emirates and the United States of America. Several other countries participate as observers. IOM, UNHCR, and the United Nations Office on Drugs and Crime are also Bali Process members, with ten other intergovernmental organizations and processes able to participate as observers.

At the Fourth Regional Ministerial Conference of the Bali Process, Ministers agreed to a legally non-binding Regional Cooperation Framework (RCF) which is set out in the Final Co-Chairs' Statement of 30 March 2011. In the Final Co-Chairs' Statement, it was also stated that Ministers saw the UNHCR discussion paper entitled Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement, which was presented at the Ad Hoc Group UNHCR Regional Cooperation on Refugees and Irregular Movements Workshop in Manila on 22 to 23 November 2010, as being a "useful foundation for operationalizing the framework" (para. 23).

A Regional Support Office was established in September 2012 to facilitate the operationalization of the RCF. It is located in Bangkok but is under the co-management of Australia and Indonesia.

On 20 August 2013, Ministers from 13 source, transit and destination countries meeting in Jakarta adopted the legally non-binding Jakarta Declaration on Addressing Irregular Movement. Although the meeting was not held under Bali Process auspices, the Jakarta Declaration references the Bali Process and the RCF. Like the RCF, the Jakarta Declaration is primarily focused on border control. However, UNHCR gave the Declaration an enthusiastic reception, because, like the RCF, it affirms a commitment on the part of the states concerned to a protection-sensitive approach to cooperation.

On 29 May 2015, high-level representatives from 17 regional countries participated in a Special Meeting on Irregular Migration in the Indian Ocean in Bangkok, along with representatives from UNHCR, IOM and UNODC. Representatives of several other countries were present as observers. The meeting had been called by the Thai Government in response to a sharp rise in irregular sea movement mostly by stateless Rohingya from Burma and Bangladeshis, though use of the term "Rohingya" was resolutely avoided in order to secure the participation of the Burmese Government. The meeting resulted in "proposals and recommendations [being] put forward" for protection of people stranded at sea; prevention of irregular migration and the smuggling and trafficking of people; and addressing (unspecified) root causes. The participants also agreed to continue discussions bilaterally and regionally, including through the Bali Process. UNHCR described the meeting outcomes as "positive", but also alluded to the elephant in the room saying "[a] key part of the solution lies in addressing the root causes of flight, including citizenship issues in Myanmar." A second Special Meeting on Irregular Migration in the Indian Ocean was held on 4 December 2015 with no discernible outcome.

At the Sixth Regional Ministerial Conference of the Bali Process, Ministers adopted the legally non-binding Bali Declaration on People Smuggling, Trafficking in Persons, and Related Transnational Crime of 23 March 2016. The Declaration emphasizes that irregular migration "requires a comprehensive regional approach, based on the principles of burden sharing and collective responsibility" (para 3). It refers to the need "to address the root causes of irregular movement" (para 4), "to enhance safe and orderly migration pathways" (para 4), and to take a "victim-centred and protection sensitive approach" to managing irregular

migration, including through improved identification of those in need of protection and the grant of protection to them (para 5). The Declaration encourages member states "to identify more predictable disembarkation options" for irregular maritime migrants (para 5) and also says:

> "We encourage member states to explore potential temporary protection and local stay arrangements for asylum seekers and refugees, subject to domestic laws and policies of member states. We acknowledge the need for adequate access to irregular migrants wherever they are, by humanitarian providers especially the UNHCR and the IOM, as appropriate. We encourage member states to explore alternatives to detention for vulnerable groups." (para 6)

The Declaration goes on to encourage the implementation of law enforcement responses to people smuggling and trafficking (para 8), welcome the provision of both resettlement places and "appropriate local solutions" for refugees (para 9) and recognize that "timely, safe and dignified return of those found not to be entitled to international migration is an important element of orderly migration" (para 10). It also foreshadows a "mechanism of the Bali Process to facilitate timely and proactive consultation to respond to emergency situations" (para 14).

UNHCR welcomed the Bali Declaration in a statement which also calls for "a new compact that finds creative ways to absorb people in need of international protection within the region".

In March 2017, Australia and Indonesia announced the establishment of a Bali Process Government and Business Forum which is intended to enable government-business cooperation in combating human trafficking and related exploitation. The Forum met for the first time in August 2017.

In September 2017, at the instigation of the co-chairs, the Bali Process Steering Committee (consisting of Australia, Indonesia, Thailand, New Zealand, UNHCR and IOM) decided to trigger the consultation mechanism foreshadowed in the Bali Declaration in response to a new outflow of Rohingyas from Burma, mainly to Bangladesh. As a first step, senior officials of Bangladesh, Burma and Steering Committee members had a confidential meeting in Jakarta on 13 October 2017 at which they agreed to continue to engage in non-public dialogue on the issue.

Australia's Role in the Region

On 15 June 2015, the United Nations High Commissioner for Human Rights said:

> "Australia's response to migrant arrivals has set a poor benchmark for its regional neighbours. The authorities have also engaged in turn-arounds and push-backs of boats in international waters. Asylum-seekers are incarcerated in centres in Papua New Guinea and Nauru, where they face conditions that the Special Rapporteur on Torture has reported as amounting to cruel, inhuman or degrading treatment as defined by CAT. They also violate the Convention on the Rights of the Child, as the Australian Human Rights Commission has justifiably declared. Even recognized refugees in urgent need of protection are not permitted to enter Australia, which has set up relocation arrangements with countries that may be ill-prepared to offer them any durable solution.

> Such policies should not be considered a model by any country."

The arrangements to which the High Commissioner was referring are described below.

Australia's Arrangements with Nauru and Papua New Guinea

In August 2012, the Australian government procured amendments to the *Migration Act 1958* (Cth) giving the Minister for Immigration the power to designate a country as a "regional processing country" as long as he or she thinks it is in the national interest to do so. The only safeguard against an inappropriate designation is the power which federal parliament has to disallow the legislative instrument making the designation.

The legislative amendments cleared the way to establish capacity on Nauru and PNG to process the asylum claims of unauthorized maritime arrivals (UMAs) transferred from Australia. The governments of Nauru and PNG agreed to such capacity being established and UMAs arriving in Australia after 13 August 2012 were warned that they "risk[ed] transfer to a regional processing country".

On 29 August 2012, Australia and Nauru signed a legally non-binding Memorandum of Understanding (MoU) relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues.

The governments of Australia and PNG, in fact, had a legally non-binding MoU relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues in place between them since 19 August 2011. After amending the *Migration Act* in 2012, the Australian government entered into further negotiations with the PNG government which resulted in the signing on 8 September 2012 of an updated version of the MoU.

Of particular note in the present context, Australia's MoUs with both Nauru and PNG referenced the RCF in their preamble and one of the stated objectives of each MoU was "to continue discussions as to how the [Assessment Centre (PNG)/Regional Processing Centre (Nauru)] might over time undertake a broader range of functions under the regional cooperation framework".

On 10 September 2012, the Australian Minister for Immigration designated Nauru as a regional processing country despite UNHCR expressing concern. On 9 October 2012, the Minister designated PNG as a regional processing country. Again, the designation was made despite UNHCR expressing concern. Both designations were approved by federal parliament and are in force.

On 19 July 2013, the Prime Ministers of Australia and PNG announced that the two countries had entered a Regional Resettlement Arrangement (RRA). The arrangement was later formalized in a new MoU which replaced the one signed on 8 September 2012. Pursuant to the RRA, UMAs arriving in Australia following 19 July 2013 can be transferred to PNG for processing of asylum claims and, if found to be refugees, will be resettled in PNG or another "participating regional, including Pacific Island, state" but not in Australia. On 3 August 2013, the Prime Minister of Australia and the President of Nauru announced that they had signed a new MoU to replace the one signed on 29 August 2012. The new MoU provides for UMAs arriving in Australia to be transferred to Nauru for processing of asylum claims and

for their resettlement in Nauru if found to be refugees, subject to the case-by-case agreement of the Nauruan government. Australia's current Coalition government pressed ahead with the implementation of the MoUs with both Nauru and PNG.

Thus far, Nauru has only been prepared to grant 20 year visas to transferees whom it recognizes as refugees (extended from first five and then ten years).

At the beginning of 2015, the PNG government informed transferees that those recognized as refugees by PNG would be granted refugee visas, which would need to be renewed annually, and would be able to apply for citizenship after eight years of residence. However, resettlement commenced only after Cabinet endorsed PNG's National Refugee Policy in October 2015.

On 26 April 2016, the PNG Supreme Court ruled that amendments to the PNG Constitution intended to enable the detention of transferees at a processing centre built on the Lombrum naval base on Manus Island PNG were invalid and that such detention was therefore unconstitutional and illegal. The court ordered the illegal detention to be brought to an end. The following day, the PNG Prime Minister announced that the processing centre would be closed and the Australian government would be asked to make "alternative arrangements" for the asylum seekers held at the processing centre. He added that those found to be "legitimate refugees" were welcome to settle in PNG if they wished to do so. Subsequently, the transferees, who continued to live in the processing centre compounds, were given the same (restricted) freedom of movement as others living on the Lombrum naval base. On 13 March 2017, the PNG Supreme Court held that, as a result of the new arrangements, the PNG government had complied with its April 2016 order to end the illegal detention of the transferees. Nevertheless, on 8 April 2017, the Prime Ministers of Australia and PNG agreed to work towards closing the Manus process centre by 31 October 2017. Residents of the centre were informed that by that date they would have to move to designated alternative accommodation in Lorengau, the main town on Manus Island, where services would be provided. Recognised refugees were given the option of being transferred to Nauru instead. Those found not be refugees were given the option of assisted voluntary repatriation, with the eventual alternative being forced repatriation. Australia is underwriting the costs of these arrangements as required by the RRA. At 5pm on 31 October, all contractors, Australian officials and PNG immigration officials left the Manus processing centre, electricity and water were cut off and all service provision ceased. However, as at 2 November 2017, 606 transferees were still refusing to leave the centre saying that they feared for their safety outside it. Compounding their dilemma, if they had all been prepared to relocate, the capacity of the alternative accommodation then available would have been exceeded.

Australia's Arrangement with Cambodia

The legally non-binding Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia was signed on 26 September 2014. It will remain in effect for four years unless terminated earlier by either party giving six months' written notice (clause 17).

The MoU, which makes reference to the agreement on regional cooperation reached at the Fourth Ministerial Conference of the Bali Process, provides for the permanent settlement in

Cambodia of persons recognized as refugees in Nauru who also "meet the entry and settlement requirements of the Kingdom of Cambodia" (clause 4). The MoU emphasizes that such settlement must be voluntary on the part of the refugees and that the "number of Refugees settled, and the timing of their arrival into Cambodia under this MOU, will be subject to the consent of the Kingdom of Cambodia" (clause 5). The Cambodian government indicated that it would be trialing the arrangement with three to four people in the first instance. The first four refugees to be settled under the arrangement arrived in Cambodia on 4 June 2015. A fifth refugee was settled in Cambodia in November 2015, a sixth in November 2016 and a seventh in May 2017.

The MoU provides for settled refugees to be given permanent resident status under Cambodian law (clause 8) and to be treated in accordance with Cambodia's Refugee Convention obligations (clause 9). The Operational Guidelines accompanying the MoU make specific reference to freedom of movement, access to public education, work rights, and family reunion.

Australia has agreed to assist Cambodia to provide "settlement services for the integration of Refugees into the Cambodian community" (clause 10). The services are supposed to be "commensurate with local community standards" and "delivered at a location outside of Phnom Penh" (clause 10). The Operational Guidelines accompanying the MoU elaborate on the services to be provided and state that they will be provided for an initial period of 12 months with the need for extension being assessed on a case-by-case basis. Disquietingly, Operational Guideline 25 additionally provides that, within 12 months of settlement, "Australia will help facilitate the process of voluntary repatriation of the Refugees under the MOU to their country of nationality, or to another country where the Refugee has a right to enter and reside, as consented or requested by the Refugee." In fact, four of the seven refugees have since returned home.

As well as undertaking to "bear the direct costs of the settlement arrangements" (clause 12), Australia is providing an additional AUD 40 million in development assistance to Cambodia over four years in exchange for its cooperation (clause 11).

UNHCR has stated that it is "deeply concerned" at the precedent set by the Australia-Cambodia Arrangement which it describes as "a worrying departure from international norms".

Australia's Arrangement with the United States

On 13 November 2016, the Australian government announced that UMAs, who had already arrived and been transferred to Nauru or PNG, would be considered for refugee resettlement in the United States by officials of that country upon referral by UNHCR. After taking office in January 2017, President Trump reluctantly agreed to honour the deal to resettle up to 1,250 refugees who passed the United States' strict vetting process. As at 23 October 2017, 25 refugees from PNG and 29 from Nauru had been given places in the United States resettlement program for the fiscal year ending 30 September 2017 and Australia anticipated that more would be given places in the resettlement program for the fiscal year ending 30 September 2018.

Civil Society Initiatives

The Asia Pacific Refugee Rights Network (APRRN) is a network of civil society organizations and individuals with a commitment to advancing refugee rights in the Asia Pacific region. APRRN, which was established in November 2008, engages in information sharing, mutual capacity building and advocacy. It has developed its own *Vision for Regional Protection*. APRRN is developing a Research and Consultation Strategy and a Plan of Action to support achievement of its *Vision*.

Another civil society initiative is the Asia Dialogue on Forced Migration (formerly called the Track II Dialogue on Forced Migration) which commenced in August 2015 and consists of a series of meetings convened by the Centre for Policy Development and partner organizations. The Co-Chairs' Statement of the Senior Official's Meeting which preceded the Sixth Regional Ministerial Conference of the Bali Process welcomed input from the Dialogue and supported a recommendation made by it to review the region's response to the previous year's Indian Ocean irregular migration crisis and to draw lessons from it. The recommendation found its way into the Ministerial Conference Final Co-Chairs' Statement, though without acknowledgement of its provenance.