

## REFLECTION

### THE CHILDREN OF MAE LA: REFLECTIONS ON REGIONAL REFUGEE COOPERATION

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#### CONTENTS

I	Welcome to Mae Sot .....	1
II	Protracted Refugee Situations in Southeast Asia .....	5
III	International Regulation of Migration .....	8
	A International Law .....	8
	1 Right to Seek and Enjoy Asylum .....	9
	2 <i>Non-Refoulement</i> .....	9
	3 Other Impediments to Expulsion .....	10
	4 Detention .....	11
	5 Economic, Social and Cultural Rights .....	11
	6 The Right to Work .....	12
	7 Other Rights .....	13
	8 Protection from Trafficking and Smuggling .....	13
	9 Statelessness .....	14
	B Regional Law .....	14
	C Intergovernmental Processes .....	16
IV	Regional Refugee Resettlement .....	18
	A Resettlement Programs .....	18
	B Dreams for a Better Future .....	19

#### I WELCOME TO MAE SOT

The town of Mae Sot in Northern Thailand is, on the surface, a sleepy town. The town of 120 000 is located on the border with Burma (or Myanmar), and is joined to the town of Myawaddy on the Burmese side by the Friendship Bridge, opened in 1997.<sup>1</sup> Lonely Planet cheerfully calls it a ‘small but simmering tourist destination’ with a ‘vibrant market, good restaurants and a fascinating cultural mix’.<sup>2</sup>

The trade of gems is in plain view in the main street and down by the Friendship Bridge. Burmese script is on almost every shop front. Service industries in Mae Sot, also referred to by the locals as ‘Little Burma’, are staffed

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<sup>1</sup> The bridge was closed by the Burmese authorities on 17 July 2010 but reopened on 5 December 2011: ‘Burma Reopens Friendship Bridge’, *The Irrawaddy* (online), 6 December 2011 <[http://www2.irrawaddy.org/article.php?art\\_id=22602&Submit=Submit](http://www2.irrawaddy.org/article.php?art_id=22602&Submit=Submit)>.

<sup>2</sup> Lonely Planet, *Introducing Mae Sot* (17 February 2009) <<http://www.lonelyplanet.com/thailand/tak-province/mae-sot>>.

principally by Burmese migrants, lawfully and unlawfully present in Thailand. More than 80 000 Burmese migrant workers fill the factories and sweatshops in the surrounding area.<sup>3</sup>

Thailand hosts over 3 million migrant workers, of which 80 per cent are estimated to come from Burma.<sup>4</sup> Many migrant workers are de facto refugees who have left their homes due to the same human rights abuses experienced by the people living in the camps.<sup>5</sup> Since 1984, the Burmese have fled to Thailand as a result of long-running ethnic conflicts and, later, because of opposition to the Burmese military government.<sup>6</sup> The conflicts in Burma have displaced an estimated 2 million Burmese outside their country, with over 500 000 displaced within Burma.<sup>7</sup>

Many Burmese live in the countryside around Mae Sot in one of the three main camps — Mae La, Nu Po and Umpiem Mai. Over 46 000 lived in Mae La alone in August 2012.<sup>8</sup> There are six other camps along the Thai–Burmese border.<sup>9</sup> Between July and December 2011, these camps were home to nearly 140 000 people.<sup>10</sup>

The camps, set up as temporary measures, have become part of the landscape. Residents of the camps are prevented from living or resettling elsewhere in Thailand. There are numerous young adults who have lived their whole life within a camp, who have no immediate prospect of life outside the camp, either in Thailand or in a third country. Some hope of a durable solution has emerged recently in the form of political reforms by the Burmese government,<sup>11</sup> which have included new ceasefire agreements in relation to ethnic conflicts.<sup>12</sup> However, the situation is fragile and, understandably, many Burmese migrants and refugees are likely to be reluctant to return in the near future.<sup>13</sup>

<sup>3</sup> Jürgen K Kremb, 'The Children of the Mae Sot Dump', *Der Spiegel* (online), 11 May 2007 <<http://www.spiegel.de/international/world/0,1518,515116,00.html>>. Estimates vary: for example, *The Economist* estimated it at over 120 000 in Mae Sot: 'Myanmar's Overflow', *The Economist* (New York), 19 March 2009, 45.

<sup>4</sup> Thailand Burma Border Consortium, 'Programme Report' (Report, Thailand Burma Border Consortium, January – June 2012) 12 <<http://www.tbcc.org/resources/resources.htm#reports>> ('*TBBC Programme Report: January – June 2012*').

<sup>5</sup> Ibid.

<sup>6</sup> Ibid app E ('*Camp Management Structures*').

<sup>7</sup> Marie Lall, 'Ethnic Conflict and the 2010 Elections in Burma' (Asia Programme Paper No ASP PP 2009/04, Chatham House, 23 November 2009) 13 <[http://www.chathamhouse.org/sites/default/files/public/Research/Asia/1109pp\\_lall.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/Asia/1109pp_lall.pdf)>.

<sup>8</sup> Thailand Burma Border Consortium, *Burmese Border Displaced Persons* (August 2012) <<http://www.tbcc.org/camps/2012-08-aug-map-tbcc-unhcr.pdf>>.

<sup>9</sup> There are normally nine camps but other camps open and close so the numbers vary: see generally Thailand Burma Border Consortium, *Camp Locations* <<http://www.tbcc.org/camps/camps.htm>>.

<sup>10</sup> *TBBC Programme Report: January – June 2012*, above n 4, 8.

<sup>11</sup> See *ibid* 4.

<sup>12</sup> As of 9–10 June 2012, only one ethnic armed group did not have a ceasefire agreement, namely, the Kachin Independence Organization: see Lawi Weng, 'Karen Sign Ceasefire with Naypyidaw', *The Irrawaddy* (online), 11 June 2012 <<http://www.irrawaddy.org/archives/6441>>.

<sup>13</sup> For example, on 19 June 2012, one armed group threatened to break the ceasefire agreement: see Lawi Weng, 'Ceasefire Is Breakable: NMSP', *The Irrawaddy* (online), 11 June 2012 <<http://www.irrawaddy.org/archives/7261>>.

The United Nations High Commissioner for Refugees ('UNHCR') observes the situation in Thailand:

The situation of refugees from Myanmar in camps in Thailand is one of the most protracted in the world. These refugees have been confined to nine closed camps since they began arriving in the 1980s. According to Thai law, those found outside the camps are subject to arrest and deportation. Legally, refugees have no right to employment. The prolonged confinement of Myanmar refugees in camps has created many social, psychological and protection concerns. The coping mechanisms of refugees have been eroded, and the restrictions imposed on them have increased their dependence on assistance.<sup>14</sup>

In 2005, the Thai Government stopped screening and registering new arrivals in the camps. The Thai Government began a census in late May 2011, at which time an estimated 40 per cent of camp residents were unregistered. Unregistered residents cannot access the health, education and other services available to registered residents.<sup>15</sup>

Those within the camps are unable to leave, and those caught outside can be deregistered, prosecuted and deported.<sup>16</sup> Refugees and asylum seekers cannot work legally and, if they do, they risk arrest or are forced to bribe police.<sup>17</sup> Despite this, many refugees run the risk.<sup>18</sup>

As the refugees cannot work, they rely on the food, health and shelter provided by international non-governmental organisations.<sup>19</sup> The Thailand Burma Border Consortium ('TBBC'), a coalition of non-governmental organisations, reports that due to rising commodity prices and the failure of funding to keep pace, it was forced to endure significant budget cuts:

Cumulatively the cuts to the food, shelter and [internally displaced persons] support have been about 26% in the last two years ... The basic food and shelter rations will now respectively be 78% and 50% of International Sphere Project standards and 50% less IDPs will be supported compared with 2010. Additionally TBBC has now stopped supplying all non-food items even to new arrivals. Clearly ongoing annual cuts on this scale are unsustainable.<sup>20</sup>

There are significant issues in the provision of education and health care. A recent survey reported that while almost all children completed primary school, only 11–20 per cent enrolled in secondary school.<sup>21</sup> This dramatic dropout rate resulted partly from attitudes relating to marriage, learning difficulties (including health problems and special learning needs) and the need for children to help

<sup>14</sup> United Nations High Commissioner for Refugees, *2012 UNHCR Country Operations Profile — Thailand* (2012) <<http://www.unhcr.org/pages/49e489646.html>>.

<sup>15</sup> Integrated Regional Information Networks, 'Myanmar–Thailand: Aid Workers Welcome Burmese Refugee Census' (9 June 2011) <<http://www.irinnews.org/Report/92941/MYANMAR-THAILAND-Aid-workers-welcome-Burmese-refugee-census>>.

<sup>16</sup> Inge Brees, 'Refugee Business: Strategies of Work on the Thai–Burma Border' (2008) 21 *Journal of Refugee Studies* 380, 384.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* 385.

<sup>19</sup> *TBBC Programme Report: January – June 2012*, above n 4, 113.

<sup>20</sup> *Ibid.* 3.

<sup>21</sup> Su-Ann Oh et al., 'Education Survey 2010' (Survey Paper, ZOA Refugee Care, Thailand, 10 May 2010) 56.

their family to work.<sup>22</sup> Another difficulty is the lack of incentive. As one aid worker explained: 'If a young boy knows that he will be working illegally in a factory whether or not he drops out after seventh grade or finishes tenth grade, what is the incentive to stay?'<sup>23</sup>

Access to health care is far better than that available either in Burma or outside the camps.<sup>24</sup> However, there are serious concerns about the prevalence of gender-based violence.<sup>25</sup> One report observed that:

Rape, sexual abuse and exploitation by Thai authorities, domestic violence, discrimination, forced sterilizations, sexual harassment, humiliation, child sexual abuse, trafficking into prostitution and labor and harmful traditional practices were all cited by a UNHCR consultant as occurring in refugee camps along the border.<sup>26</sup>

Burmese migrants who choose to live irregularly outside the camps gain freedom of movement, but at the expense of access to aid, health and education services. Unless they are in the small minority of those previously registered under a migrant labour program, they too are not able to work legally<sup>27</sup> and cannot access the Thai health system.<sup>28</sup> Even those who are registered 'often do not [access the health system] because of language differences, costs, low education and literacy, poor health knowledge, restrictions on movement and fear of arrest and deportation'.<sup>29</sup> Their jobs are 'dirty and dangerous'.<sup>30</sup> Burmese migrants are vulnerable to serious and systematic abuse by employers and police.<sup>31</sup>

The situation of Burmese children is of particular concern. Some children are born into the refugee camps. Others cross the border with their families or on their own to escape the ethnic conflicts or due to the threat of conscription into the armed forces or forced labour.<sup>32</sup> Other children cross the border to join family members or to escape poverty and social deprivation and, in some cases, in search of an education they cannot find in their native state. Others are trafficked across the border for use in sex work and as beggars.<sup>33</sup> Sadly, Mae Sot

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<sup>22</sup> Ibid 14.

<sup>23</sup> Jenny Perlman Robinson, 'Living in Limbo: Burma's Youth in Thailand See Few Opportunities to Use Education and Vocational Skills' (Report, Women's Refugee Commission, October 2008) 3.

<sup>24</sup> Sally Girvin, Sandra Krause and Julia Matthews, 'Thai-Burma Border Reproductive Health Assessment' (Report, Women's Refugee Commission, April 2006) 26.

<sup>25</sup> Integrated Regional Information Networks, 'Thailand: Addressing Sexual Violence in Mae La Refugee Camp' (15 January 2009) <<http://www.irinnews.org/Report/82372/THAILAND-Addressing-sexual-violence-in-Mae-La-refugee-camp>>.

<sup>26</sup> Girvin, Krause and Matthews, above n 24, 33.

<sup>27</sup> United Nations High Commissioner for Refugees, *Country Operations Profile — Thailand*, above n 14.

<sup>28</sup> Girvin, Krause and Matthews, above n 24, 16.

<sup>29</sup> Ibid 17.

<sup>30</sup> 'Myanmar's Overflow', above n 3.

<sup>31</sup> Kremb, above n 3.

<sup>32</sup> See, eg, Karen Human Rights Group, 'Grave Violations: Assessing Abuses of Child Rights in Karen Areas during 2009' (Year Review No 2010-01, 3 January 2010) <<http://khrhg.org/khrg2010/khrg1001.pdf>>.

<sup>33</sup> See, eg, Ekkapong Praditpong, '8 Kids Rescued from Burmese Suspects', *The Nation* (online), 27 July 2011 <<http://www.nationmultimedia.com/home/8-kids-rescued-from-Burmese-suspects-30161252.html>>.

is well known for its black market services, including in illicit drugs and people trafficking.

## II PROTRACTED REFUGEE SITUATIONS IN SOUTHEAST ASIA

In order to understand the plight of those in Mae La and the other camps in the countryside around Mae Sot, it is necessary to consider these situations more generally and the legal frameworks associated with them internationally and regionally. The situation of refugees in the vicinity of Mae Sot is known in the discourse of refugee practitioners as ‘protracted refugee situations’ (‘PRSs’).<sup>34</sup> The UNHCR Executive Committee defines such a situation as one in which refugees have been in exile ‘for 5 years or more after their initial displacement, without immediate prospects for implementation of durable solutions’.<sup>35</sup> Such situations

stem from political impasses. They are not inevitable, but are rather the result of political action and inaction, both in the country of origin (the persecution or violence that led to flight) and in the country of asylum. They endure because of ongoing problems in the countries of origin, and stagnate and become protracted as a result of responses to refugee inflows, typically involving restrictions on refugee movement and employment possibilities, and confinement to camps.<sup>36</sup>

In 2011, the UNHCR estimated there were 31 PRSs in 26 countries, accounting for 7.1 million refugees.<sup>37</sup> These estimates refer only to refugees registered with the UNHCR. In addition, the estimate excludes: the oldest and largest of the PRSs, namely that of Palestinian refugees; the Iraqi displacement in the Middle East; internally displaced persons; and various other urban or smaller situations.<sup>38</sup> The UNHCR’s more detailed study in 2004 identified 22 PRSs in Africa, and five in Asia involving 670 000 refugees.<sup>39</sup> The United States Committee for Refugees and Immigrants (‘USCRI’) estimated that, in 2008, there were 30 PRSs accounting for 8.45 million refugees.<sup>40</sup> The number, proportion and duration of these situations has increased significantly since the 1990s,<sup>41</sup>

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<sup>34</sup> James Milner and Gil Loescher, ‘Responding to Protracted Refugee Situations: Lessons from a Decade of Discussion’ (Forced Migration Policy Briefing No 6, Refugee Studies Centre, January 2011).

<sup>35</sup> *Report of the Extraordinary Meeting of 8 December 2009 of the Sixty-First Session of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, UN GAOR, UN Doc A/AC.96/1080 (29 December 2009) 3 [5].

<sup>36</sup> Executive Committee of the High Commissioner’s Programme, *Protracted Refugee Situations*, UN Doc EC/54/SC/CRP.14 (10 June 2004) [4] (‘*Protracted Refugee Situations*’).

<sup>37</sup> United Nations High Commissioner for Refugees, ‘UNHCR Global Trends 2011: A Year of Crises’ (Report, United Nations High Commissioner for Refugees, 18 June 2012) 12. The report and its annexes do not further identify these protracted refugee situations (‘PRSs’).

<sup>38</sup> Milner and Loescher, above n 34, 3.

<sup>39</sup> *Protracted Refugee Situations*, UN Doc EC/54/SC/CRP.14, [5].

<sup>40</sup> United States Committee for Refugees and Immigrants, ‘Warehoused Refugee Populations’ [2009] *World Refugee Survey* 26, 26. These statistics refer to populations of 10 000 or more, which are either deprived of freedom of movement or livelihoods in situations lasting more than five years. Over 8 million of these had been in such situations for 10 years or more. This was the last survey published.

<sup>41</sup> *Protracted Refugee Situations*, UN Doc EC/54/SC/CRP.14, [6].

As the example of Mae Sot shows, PRSs have many negative effects. These include the denial of human rights such as the right to a nationality, freedom of movement, employment and, in some cases, education.<sup>42</sup> Further, PRSs perpetuate poverty, expose refugees to forms of violence and exploitation, 'squander ... precious resources', and can foster instability, conflict and radical responses to prolonged frustration.<sup>43</sup>

Although most of the research on PRSs has focused on Africa, there has been some more recent attention paid to PRSs in Asia.<sup>44</sup> Robyn N Lui, using an expanded definition of PRSs,<sup>45</sup> identified 15 such situations in Asia as at 31 December 2006, accounting for 1.6–2 million refugees.<sup>46</sup> Five of these involve Burmese refugees (in India, Malaysia and Bangladesh as well as Thailand). In addition, Lui identified the following as PRSs in Asia: the Bihari refugees from India in Bangladesh; Bhutanese in Nepal and India; the Chakma from Bangladesh in India; Filipinos in Malaysia; Sri Lankans in India; Tibetans in Nepal and India; and North Koreans and Vietnamese in China.<sup>47</sup>

Within Southeast Asia, Thailand and Malaysia are the major hosts of refugees. The UNHCR's statistics, as at January 2012, record 89 253 refugees in Thailand and 86 680 in Malaysia.<sup>48</sup> Malaysia is host to large numbers of refugees, particularly Burmese, with estimates varying from 90 000–170 000.<sup>49</sup> These refugees exist within a very large population of irregular migrants, estimated at around 2 million.<sup>50</sup> They live in urban areas rather than refugee camps but are considered illegal aliens without any rights, including any protection from *refoulement*.<sup>51</sup> Illegal entry is punishable by fine, imprisonment of up to five years and whipping.<sup>52</sup> The Malaysian Government has carried out regular immigration raids.<sup>53</sup> Although the UNHCR carries out refugee status

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<sup>42</sup> Ibid [10].

<sup>43</sup> Ibid [11]–[13].

<sup>44</sup> Robyn N Lui, 'Such a Long Journey: Protracted Refugee Situations in Asia' (2007) 19 *Global Change, Peace & Security* 185, 186. See also Howard Adelman (ed), *Protracted Displacement in Asia: No Place to Call Home* (Ashgate, 2008).

<sup>45</sup> Lui defines this to include populations of 10 000 or more living for five years or more in restricted camps or settlements and ghetto-like urban settings: Lui, above n 44, 187.

<sup>46</sup> Ibid 188.

<sup>47</sup> Ibid. There is a paucity of up-to-date statistics on PRSs, with the United Nations High Commissioner for Refugees ('UNHCR') providing only global figures in its statistical reports since 2008: see, eg, United Nations High Commissioner for Refugees, 'UNHCR Global Trends 2011: A Year of Crises', above n 37, 13.

<sup>48</sup> United Nations High Commissioner for Refugees, *2012 Regional Operations Profile — South-East Asia* (2012) <<http://www.unhcr.org/pages/4b17be9b6.html>>.

<sup>49</sup> Amnesty International, 'Abused and Abandoned: Refugees Denied Rights in Malaysia' (Report No ASA 28/010/2010, June 2010) 5 <<http://www.amnesty.org/en/library/asset/ASA28/010/2010/en/2791c659-7e4d-4922-87e0-940faf54b92c/asa280102010en.pdf>>. The lower figure is the UNHCR's estimate and the higher figure the estimate by the US Committee for Refugees and Immigrants. The UNHCR estimated 76 200 of those to be from Burma, with much smaller populations from Sri Lanka (3100), Somalia (840), Iraq (550) and Afghanistan (540): at 5.

<sup>50</sup> It is estimated at 2.2 million by some: *ibid* 5. The UNHCR estimates it at 1.9 million: United Nations High Commissioner for Refugees, *2012 UNHCR Country Operations Profile — Malaysia* <<http://www.unhcr.org/pages/49e4884c6.html>>.

<sup>51</sup> Amnesty International, above n 49, 7.

<sup>52</sup> *Ibid* 7–8.

<sup>53</sup> *Ibid* 8–9.

determination ('RSD') procedures, in 2009 alone, 6800 asylum seekers registered by the UNHCR were detained.<sup>54</sup> The UNHCR reports that:

Malaysian law makes no distinction between refugees and undocumented migrants. Refugees are vulnerable to arrest for immigration offences. They may be subject to detention, prosecution, whipping and deportation. National NGOs have little capacity to support asylum-seekers and refugees, while international NGOs are unable to operate in the country.<sup>55</sup>

In comparison, the significant Filipino Muslim refugee population (around 57 000–70 000) in Sabah, Malaysia have been well-treated.<sup>56</sup> These refugees arrived as a result of civil war in the Mindanao region between 1972–84 and were granted permission to stay and work on humanitarian grounds. They were assisted by the UNHCR between 1976–87 in 34 resettlement villages, after which their administration was taken over by the Sabah and later the Federal Government. However, the generous treatment of these refugees has been adversely affected by the subsequent influxes of irregular foreign workers from Indonesia and the southern Philippines, and has left them vulnerable to changes in government policy including deportation as illegal migrants.<sup>57</sup>

The situation of refugees in Malaysia has received extensive attention since Australia's proposal to 'swap' refugees with Malaysia in 2011,<sup>58</sup> a proposal that was famously struck down by the High Court.<sup>59</sup> The USCRI in its last *World Refugee Survey* in 2009 marked both Thailand and Malaysia among the worst countries in terms of their treatment of refugees across a range of key indicia.<sup>60</sup> More recently, however, the UNHCR has reported improved cooperation with the Malaysian Government, including: opportunities for the UNHCR to present proposals to the Malaysian Government on 'the establishment of a legal and administrative framework for the management of asylum'; 'the provision of assistance to refugees'; and advocacy for the right of refugees to work and access education and health care.<sup>61</sup> Promises to improve refugee policy as part of the 'Malaysian Solution' do not appear to have materialised.<sup>62</sup>

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<sup>54</sup> Amnesty International, above n 49, 13.

<sup>55</sup> United Nations High Commissioner for Refugees, *Country Operations Profile — Malaysia*, above n 50.

<sup>56</sup> Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma over Their Future' (2009) 47 *Southeast Asian Studies* 52, 53.

<sup>57</sup> *Ibid* 62–3.

<sup>58</sup> See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed and entered into force 25 July 2011).

<sup>59</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 237–8.

<sup>60</sup> United States Committee for Refugees and Immigrants, 'Refugee Rights Report Card' [2009] *World Refugee Survey* 22, 22–5. The report card graded countries on various elements of protection, including physical protection, detention or access to courts, freedom of movement and residence, and the right to earn a livelihood. Malaysia and Thailand earned grades between D and F for each category.

<sup>61</sup> United Nations High Commissioner for Refugees, *Country Operations Profile — Malaysia*, above n 50.

<sup>62</sup> Human Rights Watch, 'Malaysia: Promises of Reform Unfulfilled' (24 January 2012) <<http://www.hrw.org/news/2012/01/23/malaysia-promises-reform-unfulfilled>>.

## III INTERNATIONAL REGULATION OF MIGRATION

A *International Law*

The situation of refugees in Southeast Asia raises particular problems because, as the UNHCR notes, ‘the legal frameworks for the protection of individual persons of concern to UNHCR in South-East Asia are weak’.<sup>63</sup> This is so even though there is a large body of international instruments dealing with migration and its implications.

In the region, only Cambodia, the Philippines and Timor-Leste have acceded to the cornerstone of international refugee law, the *Convention relating to the Status of Refugees* (‘*Refugee Convention*’)<sup>64</sup> and its revision through the *1967 Protocol relating to the Status of Refugees*.<sup>65</sup> None of these have yet incorporated these instruments into their domestic law.<sup>66</sup> Sara E Davies has documented a number of reasons for the lack of commitment to international law in the region. For example, it has been suggested that accession would ‘violate the good neighbour principle’, namely that Southeast Asian states should not interfere with sensitive issues in neighbouring countries.<sup>67</sup> Other reasons include the economic costs of accession<sup>68</sup> and the social costs of migrants in developing countries.<sup>69</sup> Another argument is that human rights reflect European rather than Asian values.<sup>70</sup> Finally, it has also been argued that Southeast Asian states learnt to ‘manipulate the refugee problem’ to secure aid following the Indochinese refugee crisis.<sup>71</sup>

The Thai Government is in a strange position, as it is not a signatory to the *Refugee Convention* but sits on the UNHCR Executive Committee. The UNHCR conducts RSD in Thailand for those outside the camps but not for those inside the camps.<sup>72</sup> As noted above, since 2005 the vast majority of newcomers have not been registered, although a pilot pre-screening process was conducted in 2009.<sup>73</sup> As a result, the UNHCR’s registered caseload in 2011 was 88 011, compared to the caseload of 137 157 reported by the TBBC.<sup>74</sup> The UNHCR also conducts RSD in Malaysia.<sup>75</sup>

<sup>63</sup> United Nations High Commissioner for Refugees, *Regional Operations Profile — South-East Asia*, above n 48.

<sup>64</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (‘*Refugee Convention*’).

<sup>65</sup> *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>66</sup> Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff, 2008) 5.

<sup>67</sup> *Ibid* 9–10.

<sup>68</sup> *Ibid* 10–12.

<sup>69</sup> *Ibid* 12–14.

<sup>70</sup> *Ibid* 14–15.

<sup>71</sup> *Ibid* 18: Davies argues that another source of the lack of obligation is the Eurocentric nature of the development of international law.

<sup>72</sup> United Nations High Commissioner for Refugees, *Country Operations Profile — Thailand*, above n 14.

<sup>73</sup> *TBBC Programme Report: January – June 2012*, above n 4, 6.

<sup>74</sup> *Ibid*.

<sup>75</sup> United Nations High Commissioner for Refugees, *Country Operations Profile — Malaysia*, above n 50.

While the *Refugee Convention* remains the cornerstone of international refugee law, it is supplemented by a range of other international instruments that affect states' international obligations to refugees, most prominently in human rights treaties but also in a range of migration and labour-related treaties. While a full account of these rights is beyond the scope of this reflection, we provide a brief summary of the key rights below.<sup>76</sup>

### 1 Right to Seek and Enjoy Asylum

The (non-binding) *Universal Declaration of Human Rights* declares that there is a right to 'seek and to enjoy' asylum in other countries.<sup>77</sup> This is a right that is expressly conferred by some regional treaties,<sup>78</sup> although not expressly by the *Refugee Convention*.

### 2 Non-Refoulement

The most fundamental protection afforded by the *Refugee Convention* is art 33, which protects against *refoulement*. The principle of *non-refoulement*, although more narrowly expressed in art 33, is understood today as prohibiting states from returning people to territories where there is a real risk of persecution as well as torture, inhuman or degrading treatment. The principle also extends to states returning people to third countries where there is a real risk that the third country would violate the principle of *non-refoulement*. This principle is also arguably a principle of customary international law.<sup>79</sup> There is, however, an exception to this protection in relation to dangers to security and serious criminal convictions.<sup>80</sup>

This principle is also established expressly in art 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'),<sup>81</sup> which prohibits *refoulement* in respect of a real risk of torture.<sup>82</sup> It is also implicit in the obligations of states under human rights treaties to 'secure'

<sup>76</sup> See especially James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005); Massimo Frigo, 'Migration and International Human Rights Law' (Practitioners Guide No 6, International Commission of Jurists, 2011) <<http://www.icj.org>>.

<sup>77</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948) art 14(1) ('UDHR').

<sup>78</sup> *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948) art XXVII ('American Declaration'). See also *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 22(7); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 12(3).

<sup>79</sup> See, eg, Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87.

<sup>80</sup> *Refugee Convention* art 33(2).

<sup>81</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>82</sup> Committee against Torture, *Views: Communication No 13/1993*, 12<sup>th</sup> sess, UN Doc CAT/C/12/D/13/1993 (27 April 1994) [9.2]–[9.3] ('*Mutombo v Switzerland*'); Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) 201 [9].

the rights of people within their jurisdiction which would be violated in another jurisdiction,<sup>83</sup> including under art 7 of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>84</sup> and like obligations.<sup>85</sup> The equivalent prohibition in the *European Convention on Human Rights*<sup>86</sup> has been a highly significant source of protection for European asylum seekers who fall outside the scope of the *Refugee Convention*.<sup>87</sup>

### 3 Other Impediments to Expulsion

International law also establishes that a state may violate its obligations by the removal of a person where that removal would unjustifiably interfere with the person's human rights.<sup>88</sup> This principle has been primarily applied in respect of the qualified right to respect for family life and private life.<sup>89</sup>

Further, the *Convention on the Rights of the Child* ('CRC') requires states to ensure a child is not separated from his or parents against their will, except when authorities determine that it is 'necessary for the best interests of the child'.<sup>90</sup> This criterion is the primary consideration for any decision concerning children under the *CRC*. Article 22 also binds states to ensure refugee children 'receive appropriate protection and humanitarian assistance' in the enjoyment of their human rights, and requires states to cooperate with international efforts at reunifying the children with their families.<sup>91</sup>

The Committee on the Rights of the Child, which supervises *CRC*, has expanded on the obligations of states in respect of unaccompanied and separated children outside their country of origin in its *General Comment No 6*.<sup>92</sup> These obligations impede expulsion where it is not in the best interests of the child,<sup>93</sup> and particularly in the case of trafficked children<sup>94</sup> and underage military

<sup>83</sup> See, eg, *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) 27 ('Soering'); *Chahal v United Kingdom* [1996] V Eur Court HR 1831, 1858 ('Chahal').

<sup>84</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>85</sup> See also Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [12]; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5(b) ('ICERD').

<sup>86</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 5(1) ('European Convention on Human Rights').

<sup>87</sup> See *Saadi v Italy* [2008] I Eur Court HR 179, 231; *Chahal* [1996] V Eur Court HR 1831; *Gül v Switzerland* [1996] I Eur Court HR 159, 174 [38].

<sup>88</sup> See *Soering* (1989) 161 Eur Court HR (ser A) 27; *Chahal* [1996] V Eur Court HR 1831.

<sup>89</sup> *ICCPR* arts 17, 23. See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 9, 24 ('CRC').

<sup>90</sup> *CRC* art 9(1).

<sup>91</sup> *Ibid* art 22.

<sup>92</sup> Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin*, 39<sup>th</sup> sess, UN Doc CRC/GC/2005/6 (1 September 2005).

<sup>93</sup> *Ibid* 22 [84].

<sup>94</sup> *Ibid* 16 [53].

recruitment.<sup>95</sup> *General Comment No 6* also covers such significant matters as access to asylum procedures, treatment of refugee children and family reunification.<sup>96</sup> The UNHCR Executive Committee has also issued several recommendations dealing with the facilitation of family reunification.<sup>97</sup>

Other rights that may restrict the legal right of a state to expel an asylum seeker include the right to freedom of religion or belief<sup>98</sup> and the right to an ‘effective remedy’ (as an asylum seeker may seek to remain in the state in order to access the remedy).<sup>99</sup>

#### 4 Detention

International human rights law governs both the capacity to detain and the conditions of detention. Article 9(1) of the *ICCPR* prohibits arbitrary arrest or detention and deprivations of liberty otherwise than established by law and art 10(1) requires that persons deprived of their liberty be treated with humanity and dignity. Further, art 31 of the *Refugee Convention* restricts the capacity of states to penalise those who travel without authorisation and limits the capacity of states to impose restrictions on movement. Along with art 10 of the *ICCPR*, the conditions of detention are also subject to the prohibition against cruel, inhuman and degrading treatment in both art 16 of the *CAT* and art 7 of the *ICCPR*.

#### 5 Economic, Social and Cultural Rights

International law provides refugees with a range of economic, social and cultural rights. Significantly, these include the right to an adequate standard of living,<sup>100</sup> health,<sup>101</sup> social security,<sup>102</sup> and education.<sup>103</sup> Lawfully present refugees are entitled, under the *Refugee Convention*, to treatment equal to that of nationals in relation to public relief and assistance, labour and social security

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<sup>95</sup> Ibid 17 [58]–[59].

<sup>96</sup> Ibid 19–26.

<sup>97</sup> United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees*, UN GAOR, 34<sup>th</sup> sess, Supp No 12, UN Doc A/34/12 (11 October 1979) [51]–[56]; United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees*, UN GAOR, 36<sup>th</sup> sess, Supp No 12, UN Doc A/36/12 (28 August 1981) [59]–[60]; United Nations High Commissioner for Refugees, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 52<sup>nd</sup> sess, Supp No 12A, UN Doc A/52/12/Add.1 (1997) [20(b)(i)]; United Nations High Commissioner for Refugees Executive Committee, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 53<sup>rd</sup> sess, Supp No 12A, UN Doc A/53/12/Add.1 (1998) [21(w)]; United Nations High Commissioner for Refugees Executive Committee, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, UN GAOR, 5<sup>th</sup> sess, Supp No 12A, UN Doc A/54/12/Add.1 (1999) [21(b)(iii)].

<sup>98</sup> *ICCPR* art 18.

<sup>99</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No 26 on Women Migrant Workers*, UN Doc CEDAW/C/2009/WP.1/R (5 December 2008) [21]–[22].

<sup>100</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 11–12 (‘*ICESCR*’).

<sup>101</sup> See, eg, *ibid* art 12; *UDHR* art 25(1); *ICERD* art 5(e)(iv); *CRC* art 24.

<sup>102</sup> See, eg, *ICESCR* art 9; *ICERD* art 5(e)(iv); *UDHR* arts 22, 25(1); *CRC* art 26.

<sup>103</sup> See, eg, *ICESCR* art 13; *ICERD* art 5(e)(v); *CRC* arts 28–9.

rights.<sup>104</sup> Those ‘lawfully’ staying are entitled to equal treatment with non-nationals in relation to housing.<sup>105</sup> Such refugees are also entitled to equal treatment with nationals in respect of elementary education and equal treatment with non-nationals in respect of other education.<sup>106</sup>

## 6 The Right to Work

Article 17 of the *Refugee Convention* obliges states to put refugees on the same footing as the most favourably treated aliens regarding the right to engage in wage-earning employment and, in certain circumstances, displaces the capacity of states to protect labour markets in respect of refugees. Other articles extend the most favourable treatment standard to entry into liberal professions, agriculture, industry, handicrafts or commerce or to establish commercial or industrial companies.<sup>107</sup> Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’) grants all people ‘the right to work’, including the right to an opportunity to ‘gain his living by work which he freely chooses or accepts’. The International Labour Organization’s (‘ILO’) *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*,<sup>108</sup> which applies to all 183 member states of the ILO, declares the prohibition of child labour; the principle of equality of treatment in labour; the eradication of slavery, servitude and forced labour; the freedom to join and establish trade unions; and freedom of assembly.<sup>109</sup>

The 1926 *Convention to Suppress the Slave Trade and Slavery*<sup>110</sup> also prohibits slavery and slavery-like conditions under its 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*.<sup>111</sup> Forced labour is also prohibited in international human rights law, including the basic human rights treaties<sup>112</sup> and under the 1930 *ILO Convention concerning Forced or Compulsory Labour*<sup>113</sup> and the 1967 *ILO Convention concerning the Abolition of Forced Labour*.<sup>114</sup> The abolition of child labour is a binding obligation on all ILO members,<sup>115</sup> and is

<sup>104</sup> *Refugee Convention* art 24.

<sup>105</sup> *Ibid* art 21.

<sup>106</sup> *Ibid* art 22.

<sup>107</sup> *Ibid* arts 18–19.

<sup>108</sup> International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up* (Declaration adopted by the International Labour Conference, 86<sup>th</sup> sess, Geneva, 18 June 1998) (‘*ILO Declaration*’).

<sup>109</sup> *Ibid* para 2.

<sup>110</sup> *Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927).

<sup>111</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 30 April 1956, 226 UNTS 3 (entered into force 30 April 1957).

<sup>112</sup> See, eg, *ICCPR* art 8(3); *ICESCR* art 6. See also Committee on Economic, Social and Cultural Rights, *General Comment No 18 on the Right to Work (Art 6 of the ICESCR)*, UN ESCOR, 35<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/GC/18 (24 November 2005) [32].

<sup>113</sup> *Convention concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

<sup>114</sup> *Convention concerning the Abolition of Forced Labour*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

<sup>115</sup> See *ILO Declaration*, above n 108, para 2(c).

further regulated by the 1999 ILO *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.<sup>116</sup>

In addition, international law also regulates workplace rights, including: the right to fair wages and remuneration;<sup>117</sup> the right to a decent living for workers;<sup>118</sup> the right of promotion;<sup>119</sup> the right to rest and leisure;<sup>120</sup> and the right of non-discrimination in relation to the workplace.<sup>121</sup> Lawfully present refugees are also entitled, under the *Refugee Convention*, to equality with other non-nationals in relation to self-employment.<sup>122</sup> Others lawfully staying in the country of refuge are entitled to equal treatment in relation to the rights of association,<sup>123</sup> engagement in paid employment and in professions.<sup>124</sup>

## 7 Other Rights

The *Refugee Convention* also provides a range of other rights to refugees, including: non-discrimination on the basis of race, religion or country of origin;<sup>125</sup> an obligation on the state to issue identity papers;<sup>126</sup> entitlement to travel documents;<sup>127</sup> and equality in relation to property rights.<sup>128</sup> Procedural rights, in respect of various substantive rights, also form an important part of protection for migrants.<sup>129</sup>

## 8 Protection from Trafficking and Smuggling

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* ('*Trafficking Protocol*'),<sup>130</sup> supplementing the *Convention against Transnational Organized Crime*<sup>131</sup> requires state parties to criminalise trafficking and take steps to prevent and combat trafficking. Importantly, state parties have duties to assist and protect victims, including by considering the adoption of measures to permit such victims to remain on the

<sup>116</sup> *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000).

<sup>117</sup> See, eg, *ICESCR* art 7(a)(i); *UDHR* art 23(3); *ICERD* art 5(e)(i).

<sup>118</sup> See, eg, *ICESCR* art 7(a)(ii); *UDHR* art 25(1).

<sup>119</sup> See, eg, *ICESCR* art 7(c).

<sup>120</sup> See, eg, *ICESCR* art 7(d); *UDHR* art 24.

<sup>121</sup> See, eg, *ICESCR* art 7; *UDHR* art 23(2); *ICERD* art 7(e)(i).

<sup>122</sup> *Refugee Convention* art 18.

<sup>123</sup> *Ibid* art 15.

<sup>124</sup> *Ibid* arts 17, 19.

<sup>125</sup> *Ibid* art 3.

<sup>126</sup> *Ibid* art 27.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid* arts 13–14.

<sup>129</sup> See, eg, *ibid* art 32(2).

<sup>130</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*').

<sup>131</sup> *Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

territory,<sup>132</sup> as well as measures to provide physical, social and psychological assistance to such victims.<sup>133</sup> The *Trafficking Protocol* also expressly states that it does not affect existing international obligations and, in particular, the principle of *non-refoulement*.<sup>134</sup>

The *Protocol against the Smuggling of Migrants by Land, Sea and Air* similarly requires states to criminalise smuggling, although it does not require states to criminalise the conduct of being smuggled.<sup>135</sup> States are obliged to: preserve and protect the human rights of those who have been the object of smuggling; protect migrants against violence inflicted upon them in the process of smuggling; and assist migrants whose lives or safety are endangered by being the object of human smuggling.<sup>136</sup> As with the *Trafficking Protocol*, these obligations do not affect existing international law obligations including the principle of *non-refoulement*.<sup>137</sup>

## 9 Statelessness

The 1954 *Convention relating to the Status of Stateless Persons* ('1954 Statelessness Convention')<sup>138</sup> provides a range of rights for the stateless equivalent to those in the *Refugee Convention*. The 1961 *Convention on the Reduction of Statelessness*<sup>139</sup> imposes obligations on states to reduce statelessness, while art 7.3 of the *CRC* imposes a requirement to register children upon birth and grant the right to a name, nationality and to know and be cared for by his or her parents where the child would otherwise be stateless. Article 35 of the *Refugee Convention* and art 32 of the *1954 Statelessness Convention* also requires states to facilitate the naturalisation of refugees and the stateless respectively.

## B Regional Law

In contrast to other regions, the Asia-Pacific has not adopted any regional refugee mechanisms. The only real regional statement has been the *Bangkok Principles on the Status and Treatment of Refugees* ('*Bangkok Principles*'),<sup>140</sup> instituted by the Asian–African Legal Consultative Committee ('AALCC'). This

<sup>132</sup> *Trafficking Protocol* art 7(1). See also United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the High Commissioner for Human Rights to the Economic and Social Council*, UN Doc E/2002/68/Add.1 (20 May 2002) 14–15.

<sup>133</sup> *Trafficking Protocol* art 6(3).

<sup>134</sup> *Ibid* art 14.

<sup>135</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) art 5 ('*Smuggling Protocol*'). See generally Claire Brolan, 'An Analysis of the Human Smuggling Trade and the *Protocol against the Smuggling of Migrants by Land, Air and Sea (2000)* from a Refugee Protection Perspective' (2002) 14 *International Journal of Refugee Law* 561.

<sup>136</sup> *Smuggling Protocol* art 16.

<sup>137</sup> *Ibid* art 19.

<sup>138</sup> *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

<sup>139</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

<sup>140</sup> Asian–African Legal Consultative Organization, *1966 Bangkok Principles on Status and Treatment of Refugees* (Declaration adopted by the Asian–African Legal Consultative Organization, 40<sup>th</sup> sess, New Delhi, 24 June 2001) ('*Bangkok Principles*').

intergovernmental organisation was formed in 1956 by seven Asian states, and has since expanded to cover 47 countries from Asia and Africa, including Malaysia and Thailand.<sup>141</sup> It operates largely as an advisory body and intergovernmental forum on international law, and refugee law has been an early and frequent topic of discussion.<sup>142</sup>

The *Bangkok Principles* were originally formulated in 1966, and have since been reviewed and supplemented,<sup>143</sup> with the final text updated in 2001. The *Bangkok Principles* extend the definition of refugee to other aspects of forced migration;<sup>144</sup> affirm the right to seek and enjoy asylum, subject to the state's 'sovereign right' to refuse asylum in accordance with its international obligations and national legislation;<sup>145</sup> affirm the principle of *non-refoulement*;<sup>146</sup> and mandate 'minimum standards of treatment' in relation to basic human rights.<sup>147</sup> The *Bangkok Principles* also affirm the promotion of 'comprehensive approaches' including development measures and addressing 'the causes of refugee movements'.<sup>148</sup>

Importantly for present purposes, in 1987 an addendum was added on 'burden sharing principles', which was subsequently incorporated as art X of the *Bangkok Principles*. Article X declares that the 'principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for refugees' through measures which are borne in particular by 'developed countries'.<sup>149</sup> This last emphasis was included after the *Bangkok Principles* were revised, when various governments expressed the view that 'the major share of the financial contribution [should] be borne by rich countries and there should be minimum financial burden on developing countries'.<sup>150</sup>

However, the *Bangkok Principles* are only declaratory and non-binding, and are aimed at 'inspiring member states' to enact national legislation. Compliance is neither enforced nor monitored and they have had 'little discernible effect on Asian state practice in relation to refugees'.<sup>151</sup> The Association of Southeast Asian Nations ('ASEAN') has not demonstrated any interest in a regional refugee instrument,<sup>152</sup> and the establishment of the ASEAN Intergovernmental Commission on Human Rights in 2009 has not yet resulted in any further

<sup>141</sup> Asian–African Legal Consultative Organization, *About AALCO* (2012) <<http://www.aalco.int/aboutus/>>.

<sup>142</sup> *Ibid.*

<sup>143</sup> See Pia Oberoi, 'Regional Initiatives on Refugee Protection in South Asia' (1999) 11 *International Journal of Refugee Law* 193, 195–7.

<sup>144</sup> *Bangkok Principles* art I.

<sup>145</sup> *Ibid* art II(1).

<sup>146</sup> *Ibid* art III.

<sup>147</sup> *Ibid* art IV.

<sup>148</sup> *Ibid* art VIII.

<sup>149</sup> *Ibid* art X.

<sup>150</sup> Asian–African Legal Consultative Organization, 'Status and Treatment of Refugees' (Paper presented at the 39<sup>th</sup> Session of the Asian–African Legal Consultative Committee, Cairo, 19–23 February 2000) <<http://www.aalco.int/scripts/view-posting.asp?recordid=297>>. The Government of Pakistan's comments are closest to the present wording, although the sentiments were shared by other states.

<sup>151</sup> Davies, above n 66, 4.

<sup>152</sup> *Ibid* 5.

progress, although ASEAN has issued declarations in respect of the rights of migrant workers and human trafficking.<sup>153</sup>

### C Intergovernmental Processes

A prominent, although less visible, aspect of refugee regulation is that of 'regional consultative processes' ('RCPs'). These are regional meetings that are informal and non-binding forums for governments to discuss regional migration issues, which operate independently of formal regional institutions.<sup>154</sup> In the Asian and Oceanian regions, the two most prominent RCPs are the Bali Process (formally known as the Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime) and the Inter-Governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants ('APC').<sup>155</sup>

The APC was established in 1996 by Australia as a forum for discussing population movements, including movements of refugee, displaced persons and migrants. It has 34 members and both the International Organization for Migration ('IOM') and the UNHCR are observers. The 'APC is informal in character and non-binding in decision making'.<sup>156</sup>

The Bali Process was established in 2002 at a Regional Ministerial Conference and is co-chaired by Australia and Indonesia.<sup>157</sup> There are 46 members, including the UNHCR and IOM, and there are 29 observers.<sup>158</sup> It focuses on 'practical measures to help combat people smuggling, trafficking in persons and related transnational crime in the Asia-Pacific region'.<sup>159</sup> The focus is on sharing information between government officials and ministers. Since 2009, refugees have been on the agenda of the Bali Process.<sup>160</sup>

<sup>153</sup> Association of Southeast Asian Nations, *Declaration against Trafficking in Persons Particularly Women and Children* (Declaration adopted by the Association of Southeast Asian Nations, 10<sup>th</sup> summit, Vientiane, 29 November 2004); Association of Southeast Asian Nations, *Declaration on the Protection and Promotion of the Rights of Migrant Workers* (Declaration adopted by the Association of Southeast Asian Nations, 12<sup>th</sup> summit, Cebu, 13 January 2007).

<sup>154</sup> Randall Hansen, 'An Assessment of Principal Regional Consultative Processes on Migration' (IOM Migration Research Series No 38, International Organization for Migration, February 2010).

<sup>155</sup> There are also regional consultative processes in the region dealing with migrant labour in particular, namely the Abu-Dhabi Dialogue and the Colombo Process: see generally International Organization for Migration, *RCPs by Region* (2011) <<http://www.iom.int/jahia/Jahia/policy-research/regional-consultative-processes/rcps-by-region>>.

<sup>156</sup> Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants, *Introduction to APC* (31 August 2012) <<http://www.apcprocess.net/index.html>>.

<sup>157</sup> Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *Bali Process* <<http://www.baliprocess.net>>.

<sup>158</sup> Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *About the Bali Process* <<http://www.baliprocess.net/about-the-bali-process>>.

<sup>159</sup> Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *Bali Process*, above n 157.

<sup>160</sup> See, eg, Foreign Ministers of Indonesia and Australia, 'Co-Chairs' Statement' (Statement made at the Third Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 14–15 April 2009) [18] <<http://www.baliprocess.net/conferences-and-officials-meetings>>.

It is difficult to assess the contribution of such processes to migration policy and law because of their informality and the fact that outcomes are not intended to be binding.<sup>161</sup> In particular, it is difficult to assess them because their discussions are confidential and, in general, they are not open to NGOs.

In late November 2010, the UNHCR proposed developing a Regional Cooperation Framework ('RCF'), or a set of 'common understandings', for dealing with irregular movement and asylum seekers, which could then be the basis for cooperation and regional support in processing and case management, resettlement and burden sharing, and repatriation.<sup>162</sup> In March 2011, the framework was adopted as part of the Bali Process.<sup>163</sup> The framework was based on five core principles, including that asylum seekers should

[w]here appropriate and possible ... have access to consistent assessment processes, whether through a set of harmonised arrangements or through the possible establishment of regional assessment arrangements, which might include a centre or centres.<sup>164</sup>

Another core principle was that refugees should be 'provided with a durable solution, including ... resettlement within and outside the region and, where appropriate, possible "in country" solutions'.<sup>165</sup> A steering group met in June 2011 to operationalise the framework. The Bali Process Ad Hoc Group later agreed to establish a Regional Support Office and to operationalise further elements of the RCF.<sup>166</sup>

The informal, non-binding and confidential nature of such mechanisms contrast with the values of formality, legal obligation and transparency that permeate international law. The implication is that governments value these forums precisely because they are insulated from the political and legal processes. Further, the structure of regional processes reinforces existing power structures. As Dr Alexander Betts states:

In this context, the ad hoc institutions created on a bilateral, regional and inter-regional level often serve to reinforce asymmetric power relations. They are often created as exclusive institutional frameworks which allow participating states to pragmatically include and exclude partner states on a pragmatic basis.

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<sup>161</sup> Amanda Klekowski von Koppenfels, 'Informal but Effective: Regional Consultative Processes as a Tool in Managing Migration' (2001) 39 *International Migration* 61, 66; Colleen Thouez and Frédérique Channac, 'Shaping International Migration Policy: The Role of Regional Consultative Processes' (2006) 29 *West European Politics* 370, 378; Hansen, above n 154.

<sup>162</sup> United Nations High Commissioner for Refugees, 'Regional Cooperation Approach to Address Refugees, Asylum Seekers and Irregular Movement' (UNHCR Discussion Paper, November 2011).

<sup>163</sup> Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *Regional Cooperation Framework* <<http://www.baliprocess.net/regional-support-office>>.

<sup>164</sup> Foreign Ministers of Indonesia and Australia, 'Co-Chairs' Statement' (Statement made at the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29–30 March 2011) [16(ii)] <<http://www.baliprocess.net/conferences-and-officials-meetings>>.

<sup>165</sup> Ibid [16(iii)].

<sup>166</sup> Foreign Ministers of Indonesia and Australia, 'Co-Chairs' Statement' (Statement made at the Fifth Meeting of Bali Process Ad Hoc Group Senior Officials, Sydney, 12 October 2011) <<http://www.baliprocess.net/conferences-and-officials-meetings/ad-hoc-group-senior-officials-meetings>>.

The dense network of ad hoc institutions creates possibilities for powerful states to engage in forum-shopping, selecting the institutional context for cooperation in accordance with their interests.<sup>167</sup>

#### IV REGIONAL REFUGEE RESETTLEMENT

##### A *Resettlement Programs*

In 2005, the Thai Government agreed to allow Burmese refugees on the border to be resettled in third countries. This is now the world's largest refugee resettlement program.<sup>168</sup> Most have departed for the United States (which accounted for nearly 13 000 resettled refugees in 2009) but Australia has also offered a significant number of places (2230 departed for Australia in 2009).<sup>169</sup> Smaller groups have left to Canada, Norway, Sweden, Finland, New Zealand, the United Kingdom, Ireland, Japan and the Czech Republic. Over 58 000 refugees have since been resettled.<sup>170</sup> However, the number of those in the refugee camps has been stable, as births and new refugees mostly match departures.<sup>171</sup>

The resettlement programs are not problem-free. The criteria for resettlement include the criteria of the third country. Countries such as Finland, Norway and Canada seek the 'most trained and educated refugees due to their integration potential'.<sup>172</sup> As skilled refugees leave for elsewhere, there has been an effect on the camps' teaching and medical resources.<sup>173</sup> One clinic lost 200 staff and the International Rescue Committee lost 80 per cent of its camp-based staff, although strategies are being adopted to cope with this brain drain.<sup>174</sup> Other difficulties with resettlement programs include the lack of information about the countries of resettlement and the potential for community-based organisations in the camps to be marginalised.<sup>175</sup>

Nevertheless, third country resettlement remains the most likely of the three 'durable solutions' for those on the Thai–Burmese border. The other two options — voluntary repatriation and local integration — remain unlikely, despite significant improvements in the Burmese political situation and advocacy by

<sup>167</sup> Alexander Betts, 'Global Migration Governance' (GEG Working Paper No 2008/43, University of Oxford Department of Politics and International Relations, November 2008) 16.

<sup>168</sup> United Nations High Commissioner for Refugees, 'Thailand: Resettlement of Myanmar Refugees Hits 50,000 Mark' (Briefing Notes, 30 June 2009) <<http://www.unhcr.org/4a49dcdd9.html>>.

<sup>169</sup> United Nations High Commissioner for Refugees Thailand, *Resettlement Statistics in Thailand* (9 August 2010) <<http://unhcr.or.th/news/statistics/366>>.

<sup>170</sup> United Nations High Commissioner for Refugees Thailand, *Resettlement of Myanmar Refugees* (2010) <<http://unhcr.or.th/what/resettlement>>.

<sup>171</sup> Integrated Regional Information Networks, 'Myanmar–Thailand: Border Camp Population Constant Despite Third Country Resettlement' (25 March 2011) <<http://www.irinnews.org/Report/92281/MYANMAR-THAILAND-Thai-border-camp-population-constant-despite-third-country-resettlement>>.

<sup>172</sup> Refugees International, 'Thailand: Burmese Resettlement Offering New Opportunities and Creating Complications' (Field Report, 21 May 2007).

<sup>173</sup> *Ibid.* 1.

<sup>174</sup> Integrated Regional Information Networks, 'Myanmar–Thailand: Refugee Camps Cope with Brain Drain' (24 October 2011) <<http://www.irinnews.org/Report/94047/MYANMAR-THAILAND-Refugee-camps-cope-with-brain-drain>>.

<sup>175</sup> *Ibid.*

NGOs and the UNHCR in the realm of local integration. Voluntary repatriation assumes: that the political situation will continue to improve and remain stable; that the other causes of migration (including ethnic conflict and poverty) will disappear; and that refugees who have fled desperate situations will be willing and able to return. For local integration to be a solution, the Thai Government will have to make significant changes to a longstanding refugee policy, which appears unlikely.

### B *Dreams for a Better Future*

In recent times, regional cooperation over refugees has been highly controversial. In the Australian context, regional cooperation has tended to be most closely associated with the Howard Government's agreements to process refugees in Papua New Guinea and Nauru,<sup>176</sup> and with the Gillard Government's agreement to process refugees in Malaysia, and, lately, further agreements to process refugees in Papua New Guinea and Nauru.<sup>177</sup> In Europe, regional cooperation has been most intensely discussed in the context of the UK Government's proposals in 2003 for 'transit processing centres' ('TPCs') and 'regional processing areas' ('RPAs').<sup>178</sup> The proposal for TPCs was that the IOM would manage a centre outside the European Union to screen out applicants from a 'white list' of states, and that those granted refugee status would be resettled on a burden-sharing basis. The proposal for RPAs was that asylum seekers would be returned to their regions of origin, where 'effective protection' could be offered to them. The proposal was, however, rejected by Germany and Sweden,<sup>179</sup> and heavily criticised by advocates and academics.<sup>180</sup> Around the same time, the UNHCR proposed other measures that would separate out groups clearly abusing the refugee system and processing their claims rapidly at a centre within the EU by joint EU teams.<sup>181</sup>

Other forms of regional cooperation have been most developed in the EU. The EU continues to develop a legal framework for the treatment of refugees, including harmonising elements of the definition, minimum procedural standards

<sup>176</sup> The 'Pacific Solution' refers to a legislative framework implemented by the Australian Government in 2001. Under the scheme, vessels harbouring asylum seekers would be intercepted before arriving on the mainland and their passengers sent to offshore processing centres where claims for refugee status would be determined. This strategy was set out in three acts: *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

<sup>177</sup> See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed and entered into force 25 July 2011).

<sup>178</sup> Letter from Prime Minister Tony Blair to His Excellency Mr Costas Simitis, 10 March 2003 <<http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>>. This was also discussed in a 2003 communication from the European Commission to the European Council and the European Parliament: Commission of the European Communities, 'Towards More Accessible, Equitable and Managed Asylum Systems' (Communication No COM(2003)315, 3 June 2003).

<sup>179</sup> 'EU Rejects Asylum Camps Plan', *The Guardian* (online), 20 June 2003 <<http://www.guardian.co.uk/world/2003/jun/20/eu.immigrationandpublicservices>>.

<sup>180</sup> See, eg, Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration and Law* 303, 319.

<sup>181</sup> See United Nations High Commissioner for Refugees, 'A Revised "EU Prong" Proposal' (Working Paper, 22 December 2003).

and minimum standards of treatment.<sup>182</sup> This framework also includes an agreement, the *Dublin Regulation*,<sup>183</sup> which transfers responsibility for refugees between EU members. The EU has also devoted resources to neighbouring transit countries to strengthen their capacity to manage migration, as well as to poorer members to offset the financial impact of large refugee influxes.<sup>184</sup> It has also established a joint border agency, Frontex.<sup>185</sup> Recently, the EU has adopted a joint resettlement program, which will adopt common criteria for resettlement and distribute financial resources to support reception of resettled refugees.<sup>186</sup>

Although there are many political difficulties and compromises involved in regional cooperative mechanisms, it remains true that regional cooperation is a necessary step to improving the lot of those in Mae La. Regional cooperation is required because host countries violate human rights which cause (often dangerous) secondary movements; due to the unequal distribution of refugees, uneven commitment to responsibility for refugees across the region and because of the need to address root causes.<sup>187</sup>

As John Menadue has recently argued, the fact is that, given our neighbours, there 'will be no satisfactory arrangement concerning refugees and asylum seekers and particularly boat people without regional cooperation'.<sup>188</sup> As he emphasises, such cooperation will not be a 'solution':

For whatever we can accomplish together with our neighbours, asylum flows will remain chaotic and unpredictable. Desperate and vulnerable people will never

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<sup>182</sup> *Council Directive 2003/9/EC of 27 January 2003 on Laying down Minimum Standards for the Reception of Asylum Seekers* [2003] OJ L 31/18; *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L 304/12; *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [2005] OJ L 326/13. See also Home Affairs Directorate-General, *Asylum* (4 October 2012) European Commission <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm)>.

<sup>183</sup> *Council Regulation (EC) No 343/2003 of the European Parliament and of the Council of 18 February 2003 on Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* [2003] OJ L 50/1 ('*Dublin Regulation*'). See also *Commission Regulation (EC) No 1560/2003 of 2 September 2003 Laying down Detailed Rules for the Application of Council Regulation (EC) No 343/2003 on Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* [2003] OJ L 222/3.

<sup>184</sup> Home Affairs Directorate-General, *External Aspects* (31 August 2012) European Commission <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index\\_en.htm#1](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm#1)>.

<sup>185</sup> *Council Regulation (EC) No 2007/2004 of 26 October 2004 on Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* [2004] OJ L 349/1. See generally Frontex, *Origin* (2012) <<http://www.frontex.europa.eu/about/origin>>.

<sup>186</sup> United Nations News Centre, 'UN Welcomes European Union's Adoption of Joint Resettlement Programme for Refugees' (30 March 2012) <<http://www.un.org/apps/news/story.asp?NewsID=41675&Cr=refugees&Cr1=>>>.

<sup>187</sup> Refugee Council of Australia, *Regional Cooperation* (May 2012) <<http://www.refugeecouncil.org.au/f/int-coop.php>>.

<sup>188</sup> John Menadue, 'A Regional Cooperation Framework' on *Centre for Policy Development* (3 February 2012) <<http://cpd.org.au/2012/02/john-menadue-a-regional-cooperation-framework-international-association-of-refugee-law-judges-australian-chapter>>.

abide by the 'rules' we seek to impose. But together with our neighbours we can do a lot better.<sup>189</sup>

One mechanism of regional cooperation might usefully focus on the plight of the long-term displaced. Its aim would be to resettle those who have been displaced for at least two years and who have no hope of escaping persecution or returning to their country safely. This mechanism could be piloted as part of the existing resettlement programs in Australia, New Zealand and Japan, as a way of implementing the *Bangkok Principles* on burden-sharing.

It is probable that the scheme would first need to operate on an intergovernmental basis, given the need for political flexibility and concerns over sovereignty. Nevertheless, it will be important to ensure a degree of credibility through some kind of independent oversight, either by the UNHCR or the IOM, or perhaps in the form of a Special Rapporteur as used in the United Nations human rights system.

Ideally, the process should be 'owned' as a regional process, and preferably tied to other benefits of regional cooperation. The development of a human rights framework in ASEAN might be one such opportunity for providing incentives for cooperation. It should be framed as a humanitarian response, which (as is also emphasised in the *Refugee Convention* and other refugee treaties) does not judge the states of origin. Further, building community support for this form of resettlement is vital.

There is no doubt that the prospects of such a scheme depend upon many variables and runs many risks. Some may consider it quaintly naïve, given the political climate. Yet we must not fall into the trap of thinking that the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*<sup>190</sup> is the end of the road, or that regional cooperation in refugee flows must negate our responsibilities under the *Refugee Convention*. The debate over regional cooperation has raised public awareness of the regional context of refugee protection and there is some capacity and political desire in the region to address these issues. The time may not be ripe, but if NGOs and refugee advocates can provide governments with a politically realistic proposal that begins to address the hugely complex issue of regional refugee flows, it will at least provide a policy alternative for consideration by governments at the next opportune moment. At the end of the day, we must have hope in order to provide hope for children in places like Mae La.

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<sup>189</sup> Ibid.

<sup>190</sup> (2011) 244 CLR 144.