

# **Refugee protection in ASEAN: The right to be recognized as a refugee**

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## **Abstract**

Refugee crisis remains an unresolved issue in different parts of the world, including in Southeast Asian region. However, the problems relating to asylum-seekers and refugees, asylum are not taken into serious consideration by ASEAN governments with the absence of a comprehensive regional mechanism. In particular, the process to obtain the refugee status in ASEAN is underdeveloped because of the unwillingness to accept the so-called non-contributors. Due to the reluctance to interfere the sovereignty and internal affairs of other countries, ASEAN member states hardly take any significant action to alleviate the vulnerability of unlawful migrants. That the legal status of refugees is not well recognized leads to the violation of the rights of refugees, which requires further attention and collective action from ASEAN governments. By exploring the international and regional mechanism applicable to tackling refugee issues, this paper shall provide a brief description and evaluation of refugee status determination procedures, together with policies and ad-hoc responses from ASEAN member countries. At last, this paper shall offer recommendation towards the refugee recognition process and refugee protection policies and frameworks.

*Keywords: Refugee status determination (RSD), refugee protection framework, ASEAN mechanism*

## **Introduction**

The attitude towards refugee issues at national level of ASEAN countries is very cautious and hesitant, as most states neither conform to international refugee protection instruments nor establish domestic refugee protection system, thus asylum-seekers and refugees are often classified as “illegal immigrants” under immigration act<sup>1</sup>. Being a refugee is not an automatic consideration, but a status granted by countries at its discretion, so countries have a pivotal role in refugees acknowledgement and recognition.

The first part of this essay will discuss refugee as a transnational issue to emphasize the importance of cooperation and solidarity in refugee protection and further explain the legal status of refugees in Southeast Asia. Then, I will make a comparative analysis of the refugee status determination procedure under international and regional framework, highlighting the good practices and policy failures in RSD procedures. Finally, this paper shall offer recommendation towards the refugee recognition process and refugee protection policies and frameworks.

### **1. The needs to protect refugees in ASEAN**

#### **1.1. Migration and refugee as a transnational issue**

The concepts surrounding human mobility evolves with the progress of international laws. Under classical international law, the legal status of aliens shall illustrate the inter-state relationship as a result of “the dual dependency on both the territorial and original state”<sup>2</sup>. From the public international law perspective, migration law regulates the relationship between a State and ‘aliens’ who enter the State and remain within it. In other words, migration should be investigated and recognized amid the interaction among states.

Under public international law, migration clashes with the concept of state sovereignty. Countries, at their discretion, are entitled to limit the entrance to its territories by immigration policies for the sake of national security and stability control. Based on the theory elaborated by Ayelet Shachar, “the trinity of territorial, cultural and economic”<sup>3</sup> constitutes major barriers for aliens to be accepted into a socially and hierarchically constructed community<sup>4</sup>. In most cases, countries have the power to decide the “worthiness” of aliens to get in and those who are not eligible<sup>5</sup>.

From the human right law perspective, the legal protection of migrants has risen from “the notion of a minimum standard” that states shall respect and fulfil to ensure fundamental rights

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<sup>1</sup> Vitit Muntarbhorn, 'Regional Refugee Regimes: Southeast Asia', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 455

<sup>2</sup> Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2014) 28(1) *Georgetown Immigration Law Journal* < <https://ssrn.com/abstract=2469785> > accessed 15 October 2022

<sup>3</sup> Ayelet Shachar, 'Gated citizenship' (2022) 26(4-5) *Citizenship Studies* 647

<sup>4</sup> *ibid* 637

<sup>5</sup> *ibid* 630

for every individual<sup>6</sup>. Customary laws require states to shoulder the responsibility to protect and enforce natural rights of people within its jurisdiction<sup>7</sup>. Article 1 of the UDHR claims the freedom and equality for “all human beings”, which stands as the orientation for all UN members to exclude no one. The unequal treatment between citizens and non-nationals leads to the violation of the non-discrimination principle. ‘Should countries treat people who contribute and those who don’t with the same attitude’ is a controversy among politicians but is unquestionable in the context of human rights.

In the field of international migration and refugee law, the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention) with 146 state parties<sup>8</sup> and the 1967 Protocol with 147 state parties<sup>9</sup> set forth the basic definition, the legal status and guidelines for refugee protection. The United Nations High Commissioner for Refugees (UNHCR) was, *inter alia*, established on 1<sup>st</sup> January 1951, and has become the main agency under the auspices of the United Nations to provide support to not only refugees but also persons of concerns irrespective of dates and geography<sup>10</sup>.

More recently, underlining the importance to have a comprehensive approach addressing refugee issues, New York Declaration for Refugees and Migrants (New York Declaration) (under Resolution No. 71/1) was unanimously adopted by United Nations General Assembly in 2016, which show global commitment from the United Nations and member states. New York Declaration also offers the grounds for the negotiation and adoption of two new global compacts in 2018 on refugees and on safe, orderly and regular migration as complementary instruments that enhance in-depth coordination and solidarity on migration issues.

However, it is persuaded to say that migration law is fragmented and separated without a central system or comprehensive instrument/mechanism following different types of migrants and the interchangeable nature of forced and voluntary migration. Therefore, migration issues demand profound cooperation and unity on the regional and global scale to identify core problems and figure out practical solutions.

## 1.2. The complications of refugee crisis in ASEAN

Refugee crisis remains an unresolved issue in different parts of the world, including in Southeast Asia. According to UNHCR, at the end of 2021, there are 89.3 million forcibly displaced people worldwide as a result of persecution, conflict, violence, human rights abuse

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<sup>6</sup> Vincent Chetail, ‘The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights’ (2014) 28(1) Georgetown Immigration Law Journal < <https://ssrn.com/abstract=2469785> > accessed 15 October 2022

<sup>7</sup> Joseph H. Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49(2) The Review of Politics 251-73

<sup>8</sup> United Nations, ‘States parties, including reservations and declarations, to the 1951 Refugee Convention’ (UNHCR, 2019) < <https://www.unhcr.org/5d9ed32b4> >

<sup>9</sup> United Nations, “States parties, including reservations and declarations, to the 1967 Protocol Relating to the Status of Refugees” (UNHCR, 2019) < <https://www.unhcr.org/protection/convention/5d9ed66a4/states-parties-including-reservations-declarations-1967-protocol-relating.html> >

<sup>10</sup> UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (1979) para 15

or events seriously disturbing public order, 27.1 million of whom are refugees<sup>11</sup>. From 2016 to 2021, there are nearly 1.5 million refugees<sup>12</sup> originated from ASEAN under UNHCR's mandate (mostly from Myanmar), while Thailand, Malaysia, and Indonesia are the largest host countries for refugees in Southeast Asia<sup>13</sup>. The number of refugees in ASEAN is not significant compared to the world refugee population, but there are some underlying issues worth briefing in the refugee situation in these countries. Better understanding of these issues will be the grounds for solving the ongoing crisis of the region.

*First*, the demographic of refugees received by Southeast Asia is of great diversity, ranging from large groups such as Rohingya people from Myanmar and people Afghanistan to people from other parts of Asia, Africa, and Europe. It is extremely challenging to cater to the increasing number of refugees with a wide range of races, cultures, religions, and languages, which requires extra resources for a differentiated support system.

*Second*, the protection mechanism in ASEAN region is inadequate due to the inactive engagement in refugee protection instruments and framework at an international and regional level. The principle of non-interference, a guiding principle stated in the Bangkok Declaration<sup>14</sup> since the formation of ASEAN and re-stated in other ASEAN Charter and the Terms of Reference of the ASEAN Inter-governmental Commission on Human Rights (AIHCR), seems construe with the principle of state sovereignty under public international law, but can also be interpreted as an excuse for unwilling support for mutual development.

*Third*, the response towards refugees and migration among ASEAN countries is temporary and adhoc. Most countries in the region consider themselves as a temporary transit point for persons of concerns. The newly developed policies are provisional and unsystematic, just as a responsive action towards crisis. For instance, the Andaman Sea crisis is the catalyst for the issuance of Presidential Regulation No.125 of 2016 in Indonesia for refugee management<sup>15</sup>.

*Fourth*, data collection in migration is challenging due to the volatile and clandestine nature of the journey. The lack of data is a global problem; however, in ASEAN, the figures are even harder to obtain following the above reasons.

In short, refugee crisis in ASEAN requires collective efforts from different countries, both the original, transit and destination countries, as well as the pressure from international organizations and politics, to drastically address the core problems where refugee issues arise and strengthen the legal status of refugees.

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<sup>11</sup> UNHCR 'Refugee Data Finder' (UNHCR, 2021) <<https://www.unhcr.org/refugee-statistics/>>

<sup>12</sup> *ibid*

<sup>13</sup> 'Thailand, Malaysia and Indonesia' (*European Civil Protection and Humanitarian Aid Operations*, accessed 18 October 2022) <[https://civil-protection-humanitarian-aid.ec.europa.eu/thailand-malaysia-and-indonesia\\_en](https://civil-protection-humanitarian-aid.ec.europa.eu/thailand-malaysia-and-indonesia_en)>

<sup>14</sup> Derived from Bangkok Declaration 1967: [countries]... are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their people.

<sup>15</sup> Antje Missback and others, 'Stalemate: Refugees in Indonesia – Presidential Regulation No. 125 of 2016' (2018) CILIS Policy Paper Series 14 <<https://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers/stalemate-refugees-in-indonesia-presidential-regulation-no-125-of-2016>> accessed 17 October 2022

### 1.3. Legal status of refugees in ASEAN

According to the widely accepted definition of refugees under the 1951 Refugee Convention: Refugee is any person, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out 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, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”<sup>16</sup>. Asylum seekers and refugees normally flee their country of origin in an urgent and forceful manner, so there is high chance that they are deprived of, or they leave, without valid travel or identification documents. Such forced migration might lead to statelessness, trafficking in persons or smuggling, the most extreme cases of vulnerability. They are likely exposed to transnational crimes as perpetrators or victims, which emerges from their desperate situations.

The Bangkok Principles on Status and Treatment of Refugees 1966, developed by the Asian African Legal Consultative Organization with many members from ASEAN states, includes a definition of the term “refugee” similar to the 1951 Refugee Convention and sets out minimum standards of treatment for aliens. However, Southeast Asian governments have not reached any inter-state agreements or regional treaties or an independent judicial or supervisory body that formalizes the refugee protection system. Therefore, regional protection for asylum-seekers and refugees relies largely on general human rights mechanism that do not specifically address the rights and responsibilities of refugees, which leads to the fragile status of refugees in ASEAN.

All ASEAN states are parties to three core human rights treaties: Convention on Elimination of Discrimination against Women, Convention on the Rights of the Child and the Convention on the rights of persons with disabilities, a narrow and general scope of protection targeted to women, children and people with disability, which does not reflect the particular risks and hardships of those with duplicate vulnerabilities enclosed with migration. The ASEAN Human Rights Declaration affirms “the right to seek and receive asylum in another state in accordance with the laws of such state and applicable international agreement”<sup>17</sup>, which offers a vague implementation possibility without enforcing obligation and practicability.

Without recognition and an appropriate legal status in the country, persons of concern shall be exposed to exploitation, deportation, repatriation, and penalization, together with very limited access to work, health care services, education and personal security under national system.

## 2. Refugee status determination procedures: a comparative overview

Refugee status determination (RSD) is a legal and administrative process that examines the eligibility of an alien who seeks protection outside the country of his or her origin under

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<sup>16</sup> Article 1

<sup>17</sup> Article 10 of the ASEAN Human Rights Declaration

international, regional, domestic legislation or under UNHCR's mandate<sup>18</sup>. RSD is the official contact point between asylum seekers and the country of transit or country of destination<sup>19</sup>, which acts as a critical step in the identification and recognition of persons of concern. The refugee status is primarily determined at the discretion of States; however, UNHCR may conduct the eligibility assessment in countries and territories which have not established a formal guidance and framework to support refugees<sup>20</sup>.

This section shall provide a general description of RSD under UNHCR's mandate and provide a comparative analysis of the RSD contemporary practice in ASEAN.

## **2.1. RSD under UNHCR's mandate as a model framework for refugee recognition**

From the historical perspective, RSD, a post Second World War term to address the sanctuary-seeking process, has long been deploying either a group-based or an individualized approach to assess the admissibility of refugee claims<sup>21</sup>.

A group-based or *prima facie* approach, usually in case of large-scale movements, acknowledges the refugee status based on apparent and objective circumstances in the country of origin that poses risks of persecution without formal evidence<sup>22</sup>. Given the urgent and massive nature of migration flow, *prima facie* basis has been a common and traditional practice to recognize refugees, also applicable to both groups and individuals as part of a simplified or accelerated process<sup>23</sup>, widely adopted by States and UNHCR<sup>24</sup>. For example, an automatic refugee status is granted to asylum seekers from conflict-affected areas in Africa such as South Sudan, Ethiopia and Democratic Republic of Congo in Uganda where a progressive refugee legal framework is observed<sup>25</sup>. However, it is worth noting that rejection or revocation of refugee status must be on case-by-case basis.

The individualized approach is utilized in a regular RSD process with the aim of distinguishing refugees from other types of migrants in case of mixed flows of asylum applicants<sup>26</sup>.

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<sup>18</sup> UN Executive Committee of the High Commissioner's Programme, 'Refugee Status Determination' EC/67/SC/CRP.12 (2016) para 1

<sup>19</sup> Rebecca Hamlin, 'International Law and Administrative Insulation: A comparison of refugee status determination regimes in the United States, Canada, and Australia' (2012) *Law & Social Inquiry* 34(4) 933-968

<sup>20</sup> UNHCR 'Procedural standards for Refugee Status Determination under UNHCR's Mandate' (2020)

<sup>21</sup> Bruce Burson, 'Refugee Status Determination', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press (2021) 569

<sup>22</sup> UNHCR 'Guideline on International Protection No. 11: Prima facie recognition of Refugee status' HCR/GIP/15/11 (24 June 2015) para 4

<sup>23</sup> According to UNHCR's 'Effective processing of asylum applications: Practical considerations and practices', A simplified RSD process can be used where there is a degree of homogeneity of claims that are manifestly well-founded in such areas of origin, ethnicity or religion. An accelerated RSD refers to a procedure which involves a substantive and individualized assessment of the claim with specific needs or with heightened physical or legal protection needs.

<sup>24</sup> UNHCR 'Guideline on International Protection No. 11: Prima facie recognition of Refugee status' HCR/GIP/15/11 (24 June 2015) para 4

<sup>25</sup> Norwegian Refugee Council, 'Refugee status determination: A study of the process in Uganda' (2018)

<sup>26</sup> Richard Stainsby, 'UNHCR and individual refugee status determination' (*Forced Migration Review*) <<https://www.fmreview.org/statelessness/stainsby>> accessed 18 October 2022

The refugee status is recognized in both approaches pursuant to (i) Article 1A(2) of the 1951 Refugee Convention and its 1967 Protocol, (ii) any relevant regional refugee instruments or (iii) any statutes and guidelines developed by UNHCR or the United Nations General Assembly. UNHCR also makes sure that “family members and dependent of a recognized refugees may be granted derivative refugee status” under certain conditions<sup>27</sup>.

In 2020, UNHCR has reviewed and updated “Procedural standards for refugee status determination under UNHCR’s mandate” to reflect a comprehensive approach towards the examination of individual claims as part of the responsive efforts to adapt timely to emergency situations, i.e., Covid 19 pandemic.

The standard process for RSD helps identify persons of concern and realize their status in the community, which basically comprises the following phases:

### **Reception**

In each country of mandate, UNHCR shall establish detailed and location-specific procedures for the orderly entry and reception of asylum seekers in conformity with the guideline on standard physical facilities for RSD procedures, and the appropriate waiting areas must be accessible without delay and discrimination in order to protect the dignity and privacy of individuals<sup>28</sup>.

### **Registration and Application**

According to the Handbook for registration 2003 issued by UNHCR, “Refugee registration is the recording, verifying, and updating of information on persons of concern to UNHCR with the aim of protecting and documenting them and of implementing durable solutions<sup>29</sup>”. In principle, once registered, persons of concern are less likely to suffer from arbitrary arrest, detention and repatriation, and able to get access to the rights, services and assistance they need. The requirements that contracting parties to the 1951 Refugee Convention to provide administrative assistance (Article 25), exempt fiscal charges (Article 29) or provide appropriate information and statistical data relating to the condition of refugees (Article 35) highlight the duty to conduct purposeful registration for anticipated resource allocation.

Asylum applications, the critical step in the recognition process, are generally carried out concurrently with the registration procedure. In this stage, asylum seekers and their family members/dependants must complete the individual registration form that permits UNHCR to gather comprehensive information under ‘appropriate conditions’<sup>30</sup>. The appropriate conditions include the right to privacy and confidentiality, sufficient time of response, full understanding of requested information and necessary assistance to reflect factual situations<sup>31</sup>.

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<sup>27</sup> UNHCR ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020) 230

<sup>28</sup> *ibid* 98

<sup>29</sup> UNHCR ‘Handbook for registration’ (2003) 6

<sup>30</sup> UNHCR ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020) 105

<sup>31</sup> *ibid* 105

Within a reasonable period, generally not exceeding 6 months since the date of registration<sup>32</sup>, registration interviews, preferably an in-person meeting, must be conducted in a “non-intimidating, non-threatening and impartial manner, with due respect for the safety and dignity of asylum-seekers<sup>33</sup>” by qualified interviewers that would provide all-inclusive assessment. Especially, in response to Covid-19 crisis, remote participation in RSD interviews is accepted through telephone or videoconference with careful consideration, which might accelerate the process when in-person interviews encounter insurmountable obstacles<sup>34</sup>. The interview is conducted to elicit and verify information related to the claim, so the interviewers should adopt an inclusive approach to structure the list of questions<sup>35</sup>. For cases under a *prima facie* approach when interviews are not necessary, the refugee status should be recognized solely on the information gathered at the registration stage and application form<sup>36</sup>.

After the RSD registration and application, it is advisable that UNHCR, in consultation with the local government where appropriate, issue valid identity documents as a provisional protection scheme for such asylum seekers in the host country<sup>37</sup>.

### **Decision-making process**

The individual claim of refugee status shall be assigned to qualified and well-trained Eligibility Officers subject to processing capacity<sup>38</sup> and the nature of the case. The credibility assessment shall be based on (i) the reliability of relevant documents and (ii) the genuineness of the claims concluded from material facts. Before notified the applicants, RSD decisions might experience a review procedure in case of substantive or procedural errors and be referred to the RSD supervisor for further assessment<sup>39</sup>. RSD decisions are generally expected within three months after the interview. However, in practice,

Positive decisions should be informed by UNHCR Office with implications and next steps for the official enjoyment of refugee status, whereas applicants whose claims are unsuccessful will be informed of the reasons and given sufficient support to submit appeal applications if needed<sup>40</sup>. The cases otherwise can be closed, re-opened, cancelled, revoked or ceased under certain conditions, and the decision-making process must always conform to the criteria and principles stipulated in the RSD procedures.

### **Post-recognition**

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<sup>32</sup> *ibid* 126

<sup>33</sup> *ibid*, p106

<sup>34</sup> UNHCR, ‘Key procedural considerations on the remote participation of asylum seekers in the refugee status determination interview’ (15 May 2020)

<sup>35</sup> UNHCR ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020) 153

<sup>36</sup> *ibid* 145

<sup>37</sup> *ibid* 113

<sup>38</sup> According to the ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020), the factors that should be considered to assess the processing capacity include the familiarity of the Eligibility Officer with the case facts, the nature of the interviews, the complexity of the claims and workload.

<sup>39</sup> UNHCR ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020) 173

<sup>40</sup> *ibid* 256

Refugee status is officially recognized by an identity document issued by or jointly with the local authority. Other rights and duties of refugees are pursuant to the laws of hosting countries.

There are three ‘durable solutions’ to refugees developed by UNHCR to end the cycle of displacement, including: local integration, voluntary repatriation, or resettlement. Voluntary repatriation is based on the right to return to one’s own country, or the right to nationality, as set out in various human rights instruments<sup>41</sup>. Local integration encourages the economic and social integration and contribution to the host community under the protection of the host government. Resettlement involves the transfer of refugees to a third country where accept them as refugees with permanent residence status<sup>42</sup>. All solutions are closely linked together as part of a comprehensive approach to tackle refugee crisis as well as linked to the whole RSD process, as data collected from previous phases will be a meaningful tool to identify the needs and preference of asylum-seekers to select suitable next steps.

Overall, there are some outstanding points in standard RSD procedures that UNHCR and its stakeholders must adhere to in all mandates to ensure the best interest of asylum applicants.

*Firstly*, UNHCR publicly emphasizes on the data and confidentiality protection duty from its staff and partners to maintain the integrity of the procedures and build trust for the system<sup>43</sup>. In principle, disclosure of personal information obtained from RSD procedures (especially sensitive data such as photographs, biometric data) to third parties must be justified on ‘legitimate purposes<sup>44</sup>’ that shall not incur any risks for the individuals concerned and jeopardize the performance and operation of the UNHCR’s system with the free and informed consent of the applicants<sup>45</sup>.

*Secondly*, support services, including interpretation, legal representation, are available to ensure the fairness and transparency of the mandate and strengthen the credibility of the final decisions. ‘Trained and qualified interpreters’ are required at all stages – during reception, registration, screening, decision-making, appeal, cancellation, revocation, cessation and re-opening procedures, considering the specific and sensitive needs of applicants<sup>46</sup>. The right to access justice of asylum seekers are facilitated as much as possible with accredited legal and procedural advice or experienced/well-trained representatives throughout the RSD procedures<sup>47</sup>.

*Thirdly*, RSD procedures are carried out in a differentiated model that takes into account age, gender and disability. A child-centred approach gives due weight to the child’s level of

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<sup>41</sup> UNHCR ‘Handbook on voluntary repatriation: international protection’ (Geneva, 1996)

<sup>42</sup> UNHCR ‘Handbook on resettlement’ (2011) 28

<sup>43</sup> UNHCR ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020) 20

<sup>44</sup> Based on the ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020), legitimate purposes include but not limit to: identifying persons who are in need of protection as refugees, as well as persons who are not eligible for international protection; carrying out national immigration formalities; issuing personal documents, such as travel documents and documents necessary to prove identity and refugee status, to obtain access to assistance and services, and/or to exercise basic rights, which is consistent with the best interest of the individual concerned or to necessary for UNHCR to carry out its mandate

<sup>45</sup> UNHCR ‘Procedural standards for Refugee Status Determination under UNHCR’s Mandate’ (2020) 23

<sup>46</sup> *ibid* 46

<sup>47</sup> *ibid* 64

mental and physical development and maturity via a best interest assessment or a best interest determination procedure with regard to individual children claims<sup>48</sup>. One key criterion for refugee reception centres is “adequate space including private space for breastfeeding women and a child-friendly corner<sup>49</sup>”. Applicants with physical and/or mental disabilities/illness are provided with “medical, psycho-social or other specialized resources<sup>50</sup>” to ease their vulnerabilities and safeguard their meaningful participation during the procedures.

*Fourthly*, the anonymous feedback and complaints mechanism is supposedly available to applicants and other individuals regarding the services in RSD process<sup>51</sup>, accompanied by a monitoring and oversight responsibility to respond to such feedbacks in a timely and appropriate manner<sup>52</sup>.

These are the important principles that are integral to an effective, impartial and accurate refugee status recognition system, and not only UNHCR but host countries should also undertake during the whole process. Following this conclusion, it is evident that UNHCR, whose mandates cover 51 countries and support more than refugees, plays a vital role in navigating and managing the refugee flow especially with the increasing number of persons of concerns seeking international protection.

## **2.2. Critical analysis of typical RSD procedures implemented in immigration policies of ASEAN countries**

### *2.2.1. Philippines and Cambodia*

Among ten states, only two ASEAN states are parties to the 1951 Refugee Convention and its Protocol, namely the Philippines and Cambodia. Therefore, together with the support from UNHCR, each country develops domestic regulations and procedures on refugee recognition.

Several legal documents in Philippines afford the protection of refugees and stateless persons, such as the Philippine Immigration Act of 1940, the 1987 Family code, the Philippine Passport Act of 1996<sup>53</sup>. In 2012, Philippines has issued Department Circular No. 58 that regulates the refugee and stateless status determination procedure in conformity with the international instruments. The document has expressed the progressive commitment of the Philippines to basic principles in migration laws such as the promotion of family unity, non-detention, non-refoulement and non-punishment<sup>54</sup>. In addition, Refugees and Stateless Persons Protection Unit is established to “facilitate the identification, determination and protection of refugees and stateless persons” by assisting and coordinating with public and private organizations and UNHCR to handle the RSD procedure<sup>55</sup>. In 2022, the President of the Philippines issued Executive Order No. 163 to institutionalize access to protection

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<sup>48</sup> *ibid* 74

<sup>49</sup> *ibid* 39

<sup>50</sup> *ibid* 86

<sup>51</sup> *ibid* 59

<sup>52</sup> *ibid* 62

<sup>53</sup> UNHCR, ‘UNHCR Submission on the Philippines: UPR 27th Session’ (September 2016) <<https://www.refworld.org/docid/5a12b54c0.html>> accessed 18 October 2022

<sup>54</sup> Section 3, Department Circular No. 58 by Department of Justice of the Philippines

<sup>55</sup> Section 5, Department Circular No. 58 by Department of Justice of the Philippines

services for refugees, stateless persons and asylum seekers, which enhances the available support for persons of concerns through an inter-agency committee. A notable point in this Executive Order is the requirement to respect the confidentiality in the RSD procedures, which is not stated in previous regulations<sup>56</sup>,

For Cambodia, Chapter 4 and 5 of Sub-decree No. 224 (2009) sets out a detailed procedure for granting refugee status and refuge derivative status, which bears resemblance to UNHCR's mandate from the reception, application, RSD interview to decision-making. Support services such as free interpretation and a legal representative or guardian throughout the process are available, specifically addressing the needs of minors and those with disabilities.

However, the asylum system is not effectively operated in line with the country's commitment. According to the Submission by UNHCR for UPR in 2018 for Cambodia, some immigrants whose claims deserve refugee status under UNHCR's standards were not acknowledged by the Refugee department due to insufficient support in asylum application or the lack of transparency and impartiality in RSD procedures. In fact, the RSD procedure might take years to complete, which heightens the risks of arrest and deportation for asylum-seekers<sup>57</sup>.

### *2.2.2. Indonesia, Malaysia, and Thailand*

Although Indonesia, Malaysia and Thailand host the majority of the refugees in the region, these countries are not parties to the 1951 Refugee Convention and its Protocol. In this case, UNHCR engages with states to provide temporary protection and implement RSD procedures for arriving asylum-seekers<sup>58</sup>, but the unwilling cooperation from states and unsupportive policies impede the progress of such engagement.

Despite the absence of a comprehensive national legal framework for refugees, Indonesia expresses a good will to protect asylum and refugees. Article 28G(2) of Indonesia Constitution<sup>59</sup> protects "the right to obtain political asylum from another country". Article 28(1) reiterates the idea of Article 14 of the Universal Declaration of Human rights 1948 on the possibility to an asylum system. However, the scope of refugee protection in Indonesian laws is limited as the only acceptable ground for asylum is the political basis, and in fact it is impossible to claim this right under this law. In 2016, after many years of delay, with the event of the Andaman Sea crisis, Presidential Regulation No. 125 in the handling of foreign refugees has been issued to support the refugee identification. However, this Regulation specializes in the detection and treatment to refugees from a conservative perspective that refugee issues as a security issue, with various links to emergency situations and disaster, governed by the national police<sup>60</sup>. Although Indonesia no longer uses detention centres for

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<sup>56</sup> Section 8, Executive Order No/ 63 by the President of the Philippines dated 28 February 2022

<sup>57</sup> UNHCR, 'UNHCR Submission on Cambodia: 32nd UPR session' (December 2018) <<https://www.refworld.org/docid/5c52c9b74.html>> accessed 17 October 2022

<sup>58</sup> UNHCR, 'Global report on Southeast Asia 2013' (2013)

<sup>59</sup> Indonesia Constitution of 1945, Reinstated in 1959, with amendments through 2002

<sup>60</sup> Article 12, Presidential Decree on refugees 2016

refugee shelters<sup>61</sup>, thousands of asylum-seekers live in poor conditions in limbo or homeless for years, even refugee children. The 2011 Immigration Law spares no space to address asylum and refugee issues when it allows the immigration authority to deny entry of anyone without valid travel documents. As a result, UNHCR is the primary agency in charge of RSD arrangement.

Malaysia has no comprehensive legal or policy framework for the identification and recognition of refugees. The Immigration Act 1959/63 stipulates many cases of prohibited immigrants, which infers the criminalization of irregular migrants. The Malaysian government newly approves of a Tracking Refugee Information System (TRIS), linked to the refugee identity card issued by UNHCR, as a method to keep track the location of refugees. According to the Home Ministry, the system is used to improve the employment opportunities and other policy-related matters, but the TRIS website mentions the objective of monitoring the status of refugees and asylum-seekers for the sake of national security<sup>62</sup>. In fact, this system is publicly criticized for its “invasive and dehumanizing” nature since registered refugees shall be exposed to the risks of abuse and restriction of movement<sup>63</sup>.

In 2019, Thailand enacted the *Prime Minister’s Office Regulation on the screening of Aliens entering the Kingdom and unable to return to their country of origin* (B.E. 2562), a historic legal instrument that attempts to fill the gap of refugee recognition beside concerted efforts to alleviate the regional refugee crisis. The Regulation integrates the non-refoulement principle in RSD procedures to some extent, permit the temporary stay and provide education for refugee children. Before the enforcement of this regulation, Thailand did have a process of registration until 2005; The refugee status recognized under UNHCR’s mandate was considered as a basis for third-country resettlement, the only solution for refugees; Asylum-seekers arriving in Thailand are highly at risk of deportation or repatriation as a consequence of criminal penalties for illegal entry/stay under Immigration Act<sup>64</sup>.

Regarding the new screening mechanism, it manages to stipulate the general administrative procedures but fails to formulate eligibility criteria. Aliens pending refugee status shall be given a document identifying the status of Person under screening (Article 19), but the legal status of these people and their family is missing from the laws<sup>65</sup>.

However, the Immigration Acts of Malaysia and Thailand seem to avoid mentioning ‘asylum-seekers’ and ‘refugees’, which shows the reluctance to distinguish refugees and other migrants and regards all persons of concern as ‘aliens’ or ‘illegal immigrants’.

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<sup>61</sup> The Special Rapporteur on the human rights of migration, Questionnaire: Ending immigration detention of children and seeking adequate reception and care for them’ (60/Pol-II/IV/2020)

<sup>62</sup> Wael Qarssifi, ‘Refugees in Malaysia worry government tracking system a ‘trap’ (Aljazeera, 2022) <<https://www.aljazeera.com/news/2022/8/11/refugees-in-malaysia-worry-refugee-tracking-system-a-trap>> accessed 18 October 2022

<sup>63</sup> FMT Reporters, ‘UNHCR cardholders urged to register with govt’s TRIS to get benefits (Free Malaysia Today, 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/09/07/unhcr-cardholders-urged-to-register-with-govts-tris-to-get-benefits>> accessed 18 October 2022

<sup>64</sup> Chapter 6 Deportation of aliens, Thailand Immigration Act 1979,

<sup>65</sup> Jittawadee Chotinukul, ‘Thailand and the National Screening mechanism: A step forward for refugee protection?’ (2020) 25 The Global Migration Research paper 19

### 2.2.3. Brunei Darussalam, Laos, Singapore, Vietnam

Brunei, the Lao People's Democratic Republic (Lao PDR), Singapore and Vietnam are not parties of the 1951 Convention, and these countries that hold a certain degree of reluctance towards refugees. The comparatively low number of refugees in these countries makes it a less urgent need for policy planning in dealing with the refugee crisis.

Brunei is reported to have no asylum-seekers and refugees, and most of the cooperation between the government of Brunei and UNHCR is on stateless mandate<sup>66</sup>. The Immigration Act 1956 provides no clue on the possible admission of persons of concerns and impose punishment including detention or monetary fines on prohibited immigrants.

Similarly, Vietnam has no official regulation that recognize the status of asylum-seekers or refugees in spite of its effort on targeting trafficking in persons and statelessness. The Law on Immigration of foreigners of Vietnam does not approve of immigrants without valid travel document (Article 20) and illegal entry shall be initially imposed monetary fine<sup>67</sup> and then criminalized with potential imprisonment<sup>68</sup>. Deportation is the next step for illegal immigrants<sup>69</sup>.

Singapore does not stipulate any refugee legislation and procedures, and UNHCR is in charge of RSD procedures and refugee arrangement in this country. Under Immigration Act 1959, people without a valid entry permit are deemed as 'prohibited immigrants'<sup>70</sup> and unlawful entry shall be liable on conviction in terms of monetary fines and/or 6-month imprisonment<sup>71</sup>, leading to detention before they are removed from the country<sup>72</sup>.

Lao PRD reports very few cases of asylum-seekers, refugees or stateless persons in the country<sup>73</sup>. However, UNHCR continues its supervision role for the protection obligation of the country towards asylum-seekers and RSD procedures<sup>74</sup>.

The ethnic conflict in Myanmar's Rakhine state makes 940,000 Rohingya people become refugees in other countries, mainly in Bangladesh, as of October 2022<sup>75</sup>. Given that Myanmar is a sending country rather than a destination for refugees, this essay shall not discuss the immigration policy of Myanmar.

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<sup>66</sup> UNHCR, 'UNHCR Submission on Brunei Darussalam: 33rd UPR Session' (2019)

<<https://www.refworld.org/docid/5ccab7d67.html>> accessed 17 October 2022

<sup>67</sup> Article 17 of Decree No. 167/2013/ND-CP on the administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence

<sup>68</sup> Criminal Code 2015

<sup>69</sup> Article 18 of Decree No. 144/2021/ND-CP on administrative penalties for violations against regulations on social safety, security, order, social evils, fire prevention and firefighting; rescue; domestic violence prevention and control

<sup>70</sup> Article 8 of Singapore Immigration Act 1959

<sup>71</sup> Article 15 of Singapore Immigration Act 1959

<sup>72</sup> Article 34 of Singapore Immigration Act 1959

<sup>73</sup> 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: Lao People's Democratic Republic (June 2014 <<https://www.refworld.org/docid/54c0d9414.html>> accessed 18 October 2022

<sup>74</sup> UNHCR, 'Global report on Southeast Asia 2013' (2013) 5

<sup>75</sup> 'Rohingya Refugee Crisis' (United Nations Office for the Coordination of Humanitarian) <<https://www.unocha.org/rohingya-refugee-crisis>> accessed 18 October 2022

### 3. Evaluation and recommendation for the ASEAN refugee protection scheme

#### 3.1. Regarding the RSD procedures

Although some ASEAN countries present good practices in adopting legislation and administrative procedures for refugee protection, there are institutional and systematic gaps in structuring an inclusive RSD procedure. The right to recognition of refugees in ASEAN is undermined due to the insufficient planning and anticipation in policy making. The empty or little record of refugees in some states does not reflect the future flow of migrants, and it is evident that migration trend continues to prevail at least in the context of ongoing conflicts and climate change.

Based on the general analysis above, the government of ASEAN countries should prioritize the following matters to enhance in part or the whole RSD procedures:

Fairness and efficiency should be the first priority during the whole refugee status determination process from reception, registration, screening, interviewing, result notification, appeal, cancellation, revocation, or cancellation, whether the refugee claims are successful or not, to avoid any delay of human rights enjoyment and ensure the best interest principle.

Regarding the reception of refugees, detention or imprisonment should never be the initial reaction to unlawful immigrants as they are not yet criminals. It is important for countries to carefully apply custody with minimum standards or set up reception centres with appropriate physical facilities. It is highly recommended that governments work closely with UNHCR's mandate on the reception of incoming refugees.

The registration and application procedures should be handled with due care to ensure confidentiality in data management and fairness in assessment. It is reported that many Afghanistan refugees are stuck in Malaysia and Indonesia for years in uncertainty hoping to be resettled<sup>76</sup>. There should be no delay in asylum application processing or identification procedures for asylum-seekers.

The burden of proof to seek refuge should rely on both individuals and the authorities, and the Philippines has internalized this principle in its formal procedure<sup>77</sup>. In some cases, other than *prima facie* recognition, it is infeasible for the immigrants to obtain a valid travel or identity document, or any evidence that reveals their reasonable fear of persecution. Under UNHCR's mandate, the refugee status is additionally evaluated via interview, which helps measure the complexity of a refugee claim.

For countries that have established a domestic RSD procedure, the process should state clear eligibility criteria, rights and benefits of applicants and apply a need-based approach that address the specific needs of different groups including minorities, women, children, people with disability or illness, LGBT... Support services to ensure transparency and integrity of

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<sup>76</sup> Bryony Lau, 'Will Afghan refugees stranded in Southeast Asia be resettled?' (Foreign Policy, 2021) <https://foreignpolicy.com/2021/09/28/will-afghan-refugees-stranded-in-southeast-asia-be-resettled/> accessed 18 October 2022

<sup>77</sup> Section 9, Department Circular No. 58 by Department of Justice of the Philippines

the procedure including interpretation and legal advice should be available to every asylum-seeker where necessary. Confidentiality duty ought to be handled with care and responsibility.

Together with result notification, governments should carefully instruct the next steps of refugees among the three durable solutions of UNHCR. Unsuccessful asylum-seekers must be treated with dignity whether they stay or leave the country.

### *3.2. Regarding the promotion of rights of asylum-seekers and refugees*

Refugee issues should not be regarded as a threat to national security but a global human right concern that requires the drastic action from the international community. The non-refoulement principle according to the customary law must be stringently adhered in all circumstances to prevent the vicious cycle of migration. This fundamental principle should be extended to not only the threat of persecution under the 1951 Refugee Convention but also other imminent life-threatening risks. Case *Teitiota v. New Zealand* raises a question of whether an imminent risks from environmental degradation and climate change can be considered a substantive ground for refugee status, which, under the broad interpretation of the right to life (Article 6 of the International Covenant on Civil and Political Rights), also results in urgent displacement beyond borders.

Besides, other key principles such as non-punishment, non-detention, the priority of family reunion, non-deprivation of citizenship and non-discrimination should be integrated in the immigration act and related regulations for the sake of vulnerable groups. Refugees should not be deemed as “illegal” because most of them do not inflict any crimes stipulated under national legislation, and the fact that they are the victims of failed political systems shall not make them dangerous to the society. Therefore, treating asylum seekers and refugees as unwanted non-nationals renders a negative attitude towards migration without admitting that freedom of movement is a human right and migration is just part of the trend.

As the basic commitment to international refugee protection standards, ASEAN countries should take into serious consideration to accede to the 1951 Refugee Convention and its 1967 Protocol, as refugee crisis is a global issue and should be widely addressed. The accession to such Convention represents a willingness to provide refugees with protection, and a shared responsibility will alleviate the burden for all other countries. In a broad sense, to fully protect the interests of migrants, ASEAN countries should become a party to International Convention on the protection of the rights of all migrants workers and members of their families, the 1954 Convention relating the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, as asylum seekers and refugees, especially women and children, are at risk being victims of statelessness, trafficking and other crimes.

In terms of a regional enforcement body, ASEAN countries have established AICHR to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN<sup>78</sup>”, but its role should be expanded beyond the scope of encouragement and consultation. The cooperation of ASEAN in migration issues emphasizes on trafficking in persons, business

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<sup>78</sup> AIHCR, ‘Terms of reference’ (2009) <<https://aichr.org/wp-content/uploads/2020/02/TOR-of-AICHR.pdf>>

and human rights, women and children's rights, transnational crimes, which are vital, but overlooks the refugee issues to some extent. Therefore, AICHR should develop new regional instruments on refugees and migration which are consistent with international standards and take more drastic action to promote such standards. Refugee issues should be integrated in official projects and mandates of the agency. The cooperation between AICHR and UNHCR should be strengthened in supporting countries in RSD procedures and instructing next steps for recognized refugees in alignment with the principles and values that ASEAN countries share and believe.

Immigration policies in ASEAN explicitly express a certain degree of discrimination in terms of gender, contribution capacity and self-reliance. For example, in most countries, the definitions of prohibited or illegal immigrants employ discrimination against people with disability and illness, which refuse the entry of any people suffering from mental disorder or mental defective or contagious disease (in case of Covid-19 pandemic), for the sake of national security. However, towards a more equal freedom of movement, the local authorities should consider the potential-based approach to help migrants and refugees become the active contributors, not the burden of the country.

More importantly, countries are advised to engage a comprehensive and adaptable system that effectively proceeds asylum applications<sup>79</sup>. In other words, national policy makers, especially from countries not ratifying the 1951 Refugee Convention and its Protocol, should acknowledge and target refugee issues in a more sustainable and systematic way by gradually incorporating basic principles of such instruments into domestic laws, together with drafting and enforcing a reasonable legislative and administrative framework which can forecast the vulnerability of persons of concerns during the reception, registration, acceptance or resettlement process. A responsive action towards refugee should be carefully implemented following a need-based approach in order to ensure their inherent rights and freedom in various contexts, from which foreseeable risks are exposed. Moreover, emerging risks from urgent situations such as disasters, pandemic and conflicts should be predicted and integrated into response mechanism so that the crisis will be within manageable level.

It is of great importance that governments keep track of the asylum seekers and refugees for their best interest, not for the purpose of control and isolation. Such documentation and data collection process must ensure the right to privacy and respect the dignity of refugees, which means that recorded data should not be used as a deterrence for future enjoyment of rights, i.e., to avoid xenophobia towards aliens.

On the other hand, refugees should be seen as an opportunity. Government should attach considerable significance to the refugee empowerment approach, or local integration, as a durable and long-term solution for the naturalization of newcomers that allows them to resettle and contribute socially and economically to the host society. Recently, Philippines has initiated a Complementary Pathways program to welcome Rohingya refugees with a study program that will strengthen refugees' skills and self-reliance capacities<sup>80</sup>. The

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<sup>79</sup> UNHCR, 'Effective processing of asylum applications: Practical considerations and practices' (2022) para 34

<sup>80</sup> UNHCR, Philippines welcomes Rohingya refugees through complementary pathways program

naturalization process in the Philippines is also facilitated by Circular No. 96-2022 of the Office of the Court Administration, which simplifies the procedures to obtain Philippine citizenship of refugees and stateless persons<sup>81</sup>.

Finally, the advocacy for refugee recognition is the catalyst for changes in ASEAN. Due to certain limits on the freedom of speech and the politics-sensitive nature of the issue, the information about asylum-seekers and refugees are not explicitly displayed on domestic media. UNHCR and other organizations did not succeed in access to some restricted areas where refugees and returnees of deportation reside.

### **Conclusion**

The right to be recognized as refugee, which closely related but unlimited to refugee status determination, is as important as other human rights, as RSD procedures open the gate to social protection and the enjoyment of other fundamental rights for asylum-seekers and refugees, especially those who suffer from multiple vulnerability aspects. ASEAN countries should broaden their legislative and administrative base to provide humanitarian support to persons of concern, especially asylum-seekers and refugees, to comply with human right standards and international commitment to address migration issues.

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<sup>81</sup> OCA Circular No. 96-2022 issued by the Supreme Court of the Republic of the Philippines