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Illegal Immigrants or Illegal Refugees?

A Study of the Refugee Protection for Burmese Refugees in Thailand

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Abstract

This thesis seeks to investigate the structural circumstances regarding the poor refugee protection for Burmese refugees in Thailand. Acknowledging that existing laws are politically motivated, the first part of this thesis examines the political context that determines the structure of the legal framework. The second part of the thesis scrutinizes the juridical framework concerning refugees, namely international law, regional instruments and Thai national law. The conclusion suggests that the Royal Thai Government's political stance can be seen as a result of non ratification of International Conventions as well as an undermining of refugee protection in national Thai law. Theoretically, the thesis approaches the issue from a realist perspective and applies concepts of state sovereignty and national security to address the matter. Through such an approach, refugees are considered as threatening to national stability and integrity in Thailand. The case study assumes that more general conclusions can be made concerning the tendencies of states to prioritise its own interests above humanitarian principles, such as Human Rights, which can have a negative effect on refugees in need of protection.

Keywords: *Refugee Protection, Refugees, National security, State sovereignty, Thailand, Burma*

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1. Introduction

In September 2007 Burma[1] attracted international attention due to the saffron demonstration, in which monks and demonstrators were shot down by the ruling military junta called the State Peace and Development Council (SPDC). This demonstration is just one out of many crackdowns since SPDC seized power over Burma and its citizens in 1988 (Ganesan 2007:23). As SPDC controls all executive, legislative and judicial power and holds back almost all basic Human Rights; millions of people from Burma are therefore seeking refuge in Thailand (www.freedomhouse.org). When entering Thailand another kind of Human Rights abuse commences for a majority of the fleeing citizens from Burma, as refugees and migrants are seen as unwanted and are more or less unprotected by the national Thai law. Inside the refugee camps, refugees have access to the most basic needs mainly based on humanitarian goodwill from NGOs and assistance of United Nations High Commissioner for Refugees (UNHCR). Outside the camps, refugees are facing problems as illegal immigrants (Lang 2002:82,92). This thesis is partly written in Thailand as an attempt to better comprehend why the juridical framework is insufficient concerning refugee protection.

1.1 Purpose of Study

The purpose of this thesis is to give a broad and comprehensive perspective regarding the problems concerning the lack of protection for Burmese refugees in Thailand, and more specifically the reasons of this problem. Thus, this thesis seeks to investigate the structural circumstances that define this problem, namely the legal framework and political aspects.

1.2 Research Questions

Following the purpose of this study, the research questions are formulated so as to answer two crucial questions. Firstly, acknowledging that existing laws are politically motivated and are recipient to changes in the political landscape, it is required to examine the political context that determine the structure of the legal framework concerning refugee protection in Thailand. Secondly, the legal framework must be closely examined. The obligations under international

[1] In 1989 the military junta, SPDC, adopted The union of Myanmar as the official name of the state. However, the name Burma is widely used, as many states and opposition groups refuse to recognize the SPDC. The name Burma will be used in this thesis.

as well as other legal levels that Thailand is subject to must be identified. Outlining carefully what kinds of legal and political aspects that Thailand is subject to will therefore constitute the focus of this thesis.

1.3 The Structure of the Thesis

After presenting the theoretical approach, the thesis goes on to introduce the reasons to why refugees are fleeing Burma, also how they are treated in the host country Thailand. It examines the political situation in Burma and particularly scrutinizes the role of the State Peace and Development Council (SPDC), as well as it explains how Thai authorities have positioned themselves towards the Burmese refugees over time. This part aims to give the reader a short and comprehensive insight of the situation for a significant number of Burmese inside Burma as well as in Thailand. The second part outlines the political context in the region that represents the reasons for Thailand's non-compliance to adopt and comply to international refugee laws, as well as the construction and content of national law. This part seeks to put the situation for Burmese in Thailand in a context, as it is unfeasible to understand and to analyze an occurrence of this magnitude without a political context. The third part outlines the juridical framework concerning Thailand's position regarding international law, regional instruments and domestic law. This part intends to scrutinize problematic and conflicting areas between international law and Thai national law. The last part of the thesis presents a concluding analysis and suggests conclusions regarding the poor refugee protection in Thailand.

1.4 Methodology

This thesis will approach the analysis by using a case study of the Thai treatment of refugees. The choice of using a case study to analyse the problematic handling of refugees is fruitful in pinpointing the core problems in refugee protection.

The major part of the literature on the subject is explaining the weak refugee protection as a result of the Southeast Asian realistic perspective regarding state sovereignty and regionalism. This thesis claims that this is just one out of many aspects that is essential to examine with regard to explaining the reasons for the problematic situation for Burmese refugees in Thailand. Almost all current literature is insufficient in highlighting the fact that it is the legal

framework itself that is vague in its definitions; which results in the poor treatment of refugees in Thailand. One possible reason for the absence of a thorough discussion in contemporary literature can be that the vagueness of the laws and its praxis are complex, and no one seems to know the distinctions between the definitions of the laws and its outcomes. Often both NGO workers and the Royal Thai Government (RTG) are not differentiating between migrants, refugees and asylum seekers, but instead distinguish the groups as people living outside the camps, and those living inside the camps. According to this thesis, this is an arbitrary distinction, not reflecting the actual legal definitions or the reasons for people to seek refuge in the first place. This is a serious problem as only the legal framework should define such a distinction, as the law is a corner stone in refugee protection and by not following the legal distinctions it can lead to an ambiguous treatment of refugees. However, the vagueness in national Thai law had made it almost impossible to do a proper distinction between refugees and migrants. This can be seen as one of the core elements to explaining the problematic situation regarding refugee protection in Thailand. This was one reason to let the research questions of this thesis focus on the roots of weaknesses concerning refugee protection.

In this thesis, when referring to people fleeing from Burma to Thailand to seek refuge, the word refugee will be used. This is not in compliance with the law definitions as defined by the Thai government. However from an international law perspective it would be more appropriate to use this term throughout the thesis. Therefore knowing that this is a problematic assumption, this thesis uses the term refugee, while also emphasising that this definition is not unproblematic as it can also be an arbitrary definition for a whole group of very diverse individuals.

Scrutinizing Thailand's poor refugee protection and its causes requires an explanation of the country's juridical and political structure, as the laws are an outcome of the political context, but also because the law influences the political climate. In the analysis of the political context, this thesis has chosen to focus upon the political factors that are shaping the political climate in the region. More specifically, it deals with how the political factors are shaping Thailand's approach to Human Rights and refugee protection. Initially, the analysis seeks to capture a more general debate of how Human Rights are received in Southeast Asian and particularly in Thailand. As Asian values is constantly a matter of controversy in the literature regarding Human Rights in Southeast Asia, this thesis starts by analysing if arguments from

this perspective can to some extent explain the underlying reasons for the poor refugee protection in Thailand. To give a more comprehensive perspective of this matter the thesis also examine arguments stating that the poor refugee protection has nothing to do with a Southeast Asian approach to Human Rights, but rather that the poor protection belongs to the realist debate of state sovereignty, interests and protectionism. To exemplify this stance the Association of Southeast Asian Nations (ASEAN) is analysed, as the organisation is reflecting and in the same time reinforcing a strong spirit of state sovereignty in the region. This can also be seen as a strong factor affecting refugee protection in Thailand as well as explaining the RTG:s stance towards Burmese refugees.

Moreover, the 1951 Refugee Convention, international customary law, regional instruments and the national Thai law are analysed. Although Thailand has not ratified the 1951 Refugee Convention, it is still relevant to highlight the importance of the convention as its definitions set the standards for refugee protection, but also as regional and national laws must be analysed in comparison to the convention. The definitions of the convention are also significant as UNHCR, which has an important role in refugee protection in Thailand. The analysis regarding the juridical framework ends with an analysis of the national law, as these are the laws that refugees actually are exposed to when entering Thailand. Furthermore, national law is also the standard by which refugee protection is carried out, thus also the main cause of confusion regarding the definitions within the legal framework. As mentioned before this thesis claims that this confusion is a central problem for the treatment of refugees in Thailand.

2. Theoretical Framework: Human Rights in between Realism and Idealism?

In the field of refugee protection it is possible to distinguish two different approaches, namely realism and idealism. The realism approach has a state centric perspective with border control, state interests and sovereignty as central concepts. From this perspective no distinction is made between refugees, asylum seekers and illegal immigrants as they are equal in the sense that they are all entering another state's territory and must be controlled for the sake of internal security and stability (Lavenex 2001:26). On the other hand the idealistic approach emphasizes state behaviour to be governed by a spirit of international solidarity, cooperation and uniformity. Public opinion should determine the interest of the state and all states should be a part of an international organisation and obey its rules and norms (Dunne 2001:170f). When it comes to asylum seekers, refugees and illegal immigrants the approach focuses upon the individuals and emphasizes the norm of Human Rights. Essential from this point of view is not the border crossing as such, but the rights that can be enjoyed by the individuals. Crucial for refugees is their right to receive protection and have access to asylum procedures.

Lavenex (2001) states that states often pursue a middle way of the two approaches, as efficient control and respect for liberal values are interdependent. Too much of the idealistic approach can undermine state sovereignty, while too much internal security undermines international Human Rights (2001:26). Is Lavenex' middle way really embarked upon? We can find thousands of examples arguing it is not. For example; the wall between Mexico and the US, the asylum politics of "fortress Europe", illustrates that many states are applying the realistic approach, instead of the idealistic. This can be exemplified in that the globalised world is still based on a Westphalian order and that states must act from their own interest for survival (Scholte 2001:22). In other words states interests are often prioritised before the international common good.

When focusing on the behaviour of the RTG regarding refugee protection, realism will work as excellent platform of explaining the political context and the juridical framework regarding Thailand. Below, the foundations of realism will be explained and the realist view towards Human Rights. As refugees from a realist perspective can be interpreted as an external threat to the national security, the terms security and refugee protection will be analysed. To further

motivate the theoretical choice of the thesis the context of state building in Southeast Asia will also be explained as this has contributed to the regions strong appeal to state sovereignty. As realism has a state centric perspective it is also essential to see how ASEAN, as an important regional organisation, can be explained from a realist perspective.

2.1 Human Rights and Realism

From a realist perspective states are rational actors in an international anarchic system. As the states are the highest authority in the international system, states must rely on self help to defend themselves for survival and secure their interests towards other states. The struggle of power is described in zero-sum terms, which creates a power balance that gives an international stability within the anarchic system (Dunne & Schmidt 2001:150f). States are acting as units based on collective will and the authority of the state defines its national interests. From a realist perspective states distinguish the politics with interaction with other states and the domestic politics (Nadig 2002:12). The politics between nations can be understood in terms of "interest defined in terms of power" and as the states always acts from its own interests to gain more power, the state will also refuse to allow norms of other domains to interfere in decision making, for example moral and ethical principles (Nadig 2002:12 Ganesan 2003:225).

As Human Rights is based on international norms and morality, serving the common good, the realistic perspective would argue that Human Rights are not used in another sense than to gain political goodwill toward other states within the international power struggle between states.

In the light of "the double effect of globalisation", namely the sub-national fragmentation as well as super-national integration, the realist state centric definitions can be seen as out of date (Nadig 2002:2). This is a result of, that the states has no longer just one appurtenant in the stance of state sovereignty, as they partly are giving up the sovereignty to be more secured in the international order. Because of this Nadig means that realism is not sufficient for the phenomenon of refugee and migrant flows. Quite the opposite, this thesis claims, that realism can explain the lack of refugee protection, as it is a result of an exaggerated state sovereignty which interprets refugees as a national security threat. One can claim that realism faces difficulties in explaining multilateral organisations. However, one can claim that from a

realistic approach these formations can also be seen as another way to protect national interest (Ganesan 2003:222). For example ASEAN as a Southeast Asian strong regional organisation is promoting and upholding state sovereignty and non interference instead of intruding it, as states are always the primarily actors (Weatherbee 2005:19). As Weatherbee (2005) points out "*ASEAN is an international cooperation through which member-states pursue national interests. ASEAN's policy output cannot be explained without locating and understanding the national interest being expressed through it. Whatever is understood as an ASEAN regional interest is based on the consensus harmonizing of national interests in order to present a formal united front*" (2005:17).

It is also appropriate to argue that realism is the correct perspective to use when analysing state behaviour in Southeast Asia, due to the colonialist and the post-colonialist context. Although Thailand was never colonised, it has affected Thailand a lot, as the historical context are reflecting the contemporary political climate with an exaggerated belief in state sovereignty (Lee 2006:143). The identity of the region is regularly recognised to the Second World War as the return of the colonised territories was negotiated following the Japanese occupation in 1945. However, the political independence was achieved in the middle of the Cold War context, as the newly independent states were being dragged into the global power struggle. The ideological conflict that was going on in Europe was also reflected in Southeast Asia which resulted in a considerable external involvement regarding the Indochina War. As the newly independent states tried to establish themselves during the context of the Cold War, they were to a great extent influenced by realist ideas and norms such as national security and protectionism (Ganesan 2003:229f). It was also in this context ASEAN was established as a response to the interstate disputes and can be seen as a catalytic factor of ASEAN's formation which also is strongly affected by realism as the organisation is based on principles on a devoted state sovereignty (Ganesan 2003:231).

2.2 National Security and Refugee Protection

Security issues are traditionally related to the Cold War world order when military threats and protection via military means were top priority for states. After the cold war the security threats widened, to also include for example; health risks, environmental degradation and uncontrolled migrant flows (Nadig 2002:2). Stricter visa requirements, enforced border control are measures of states protecting themselves from migrant flows, so called external

threats. (Nadig 2002:13f). As states interpret refugee flows as an external threat, and refugee protection as an internal threat that endangers the national unity, stability and security, Human Rights are a threat to the national survival. Human Rights as such tend to be a threat from realist approach to national security and state sovereignty as a ratification of a treaty means a small abandonment of state sovereignty (Lang 2002:14). Especially when refugees are creating oppositional groups toward the state they have fled from, as this can disturb the diplomatic interstate relations (Lang 2002:95). One can also claim that states tend to easily subscribe cultural, social and economical rights because ratification means just that the state must work towards the goal to achieve this rights, but when it comes to civil and political human rights these must be achieved due to the ratification, otherwise the rights are violated. When it comes to refugee protection states must also consider a long going responsibility and the economic loss the protection induces, which makes these rights harder to enforce compared to other Human Rights (Davis 2006:573f). In other words, the focus is not to protect the potential threat to the nation, but instead protecting the nation from the external threat. The principle to self-help still prevail the will to cooperate for the common good (Nadig 2002:13f). As Andrew Linklater (1999) explains international law "*granted sovereign states the right to decide how far to honour universal moral obligations*." This is not a question about the impact of the principles of refugee protection, but a question about a challenge regarding states sovereignty and its protection (1999:480). Once again, the Human Rights falls between a realist and an idealist approach, where every state is consider the appropriate balance between the common good and its own interests. Therefore based on a realist approach the reasons for a state to disregard ratification of human rights are many.

To sum up, this thesis argues that states are prioritizing their own interests before principles regarding Human Rights, despite of a globalised world, states are still the supreme unit in world affaires. From a realist point of view, refugees can be seen as external threats as they are crossing the border and can thereby endanger the national security. As states must be protect themselves from external threats, states tries to undermine refugee protection, for example by enforcing stricter visa regulations, undermine the standards at refugee camps and implement stricter laws. By undermining the refugee protection, states tends to violate the Human Rights regarding refugees. When it comes to Thailand, one can argue, that the realist perspective is of extra significance as the region was strongly influenced by the cold war context, an approach that is institutionalised in the regional political climate, for example by ASEAN. Further, the vagueness in law is seen as the core poor refugee protection and the

causes can be found in a devoted state sovereignty. When having this approach it can be possible to also draw general conclusions of the refugee protection, not only this particular case study.

3. Brief Introduction

This chapter is divided in two parts. The purpose of the first part is to give a brief introduction to the political situation in Burma, more specifically the politics of SPDC. The second part intends to give an insight to Thailand's political stance towards Burmese refugees.

3.1 Brief Modern History of SPDC

Since the independence of Burma from Great Britain in 1948, the Burmese citizens have only experienced a democratic election once. Through a coup d'état carried out in 1962, General Ne Win seized power over Burma and established the Burma Socialist Programme Party (BSPP). The country has since then been ruled by a military regime (Ganesan 2007:22). In an attempt to adopt the "Burmese way to socialism" by changing the social, political and economical system, the BSPP forbade all political organisations and imprisoned outspoken leaders, monks and students. As a result of this process the economical situation worsened as a majority of foreign investors abandoned the country, which isolated Burma from the rest of the world (Kyaw Yin Hlaning 2007:155, Ganesan 2007:22). Despite of the banning of political organisations, some informal student organisations managed to organise demonstrations which were repeatedly suppressed by the government. Nevertheless, the student activism played a huge role in 1988 at a big pro-democracy demonstration also known as the "the four eight democratic movement" when protested against the SPDC´s economic mismanagement and political oppression, which finally brought down the socialist regime (Kyaw Yin Hlaning 2007:160, Ganesan 2007:23). The demonstrations was suppressed by the military and one of the leaders, General Saw Maung, took the power over Burma and established the State Law and Order Restoration Council (SLORC), now known as the State Peace and Development Council (SPDC). The new military regime did not improve the situation for its citizens and enforced more or less the same restrictions as the BSPP. Due to fear of being arrested, the first mass movement into Thailand took place and the anti-government political activities continued in Thailand (Kyaw Yin Hlaning 2007:160f, Ganesan 2007:23).

In 1990 the government organized an election for the first time in 30 years. The election was evidently won by the opposition party, National League for Democracy (NLD) with an

overwhelming majority. However, the military regime refused to step down and instead arrested and detained many members and supporters of NLD and put the leader of the NLD Aung San Suu Kyi in house arrest. As a reaction to the outcome of the election, activists and students allied with ethnic insurgent groups to unite them against the military junta. These groups are constantly persecuted by the regime in order to silence the opposition (Ganesan 2007:23). The situation for the opposition has not improved since. The latest proof, the increased international attention, might be the Saffron demonstration. In fact the situation has been unaffected since the last decades and the SPDC is a major violator to its citizen's basic Human Rights.

An indirect effect of the SPDC's economic mismanagement and government corruption gives that at least 30% of the population is facing extreme poverty (www.freedomhouse.org.). The government is also directly violating Human Rights by forced relocation programs, the use of forced labour when it comes to portering, construction and repair of military facilities as well as national infrastructure (Human Rights Watch 2007, International Labour Office 2005:199). As a reaction to these extensive Human Rights abuses, many Burmese has fled the country or moved to the border areas were ethnic minority groups are traditionally living. The numbers of people living as displaced persons inside Burma, and those who have fled the country is unclear. Figures indicate that around 500 000 people lives as displaced in the country and millions of people have crossed the border to neighbouring states (www.refugeesinternational.org).

3.2 Thailand's Political Stance towards Burmese Refugees

Often an increasingly tense political situation in a particular country creates fears from its neighboring states, that the unstable situation will have a negative spill over effect regionally. To ensure political and economic stability in the region many states are getting more protective and unwilling to let the situation spread in to their own territory. Accordingly, Thailand's stance towards Burmese refugees has been influenced by different levels of protectionism, depending on the situation inside Burma over time, which has also affected in what extent RTG has interpreted refugees as an external threat.

In the beginning of the 80's the uprising conflict in Burma was season-based and most of the people fleeing to Thailand returned home when the situation allowed. During this time the

local attitude, as well as the approach of RTG towards refugees, was uncomplicated much due to the small amount of people seeking refuge but also due to the fact that the need for shelter was seen as temporary solution. As the refugee situation was not interpreted as threatening the state, the restrictions were limited and the Ministry of Interior (MOI) even established a platform for helping Burmese by letting an umbrella organisation assist with humanitarian aid along the border (Lang 2002:82,84).

In 1984 the situation in Burma became increasingly untenable and the Burmese were forced to seek refuge in Thailand on a more permanent basis. When Thai authorities noticed that the situation in Burma did not improve, the government changed their friendly approach to a more restricted one (ibid.). To fully understand the modification of the approach, it is of significance to mention the Indo-China crises that created a massive flow of refugees into Thailand. Thailand was at this time one of the biggest host countries in the region from all three Indochinese countries (Lee 2006:144f). The hosting situation was an issue on the international agenda within a Cold War context and Thailand was basically unable to help the amount of people in need of aid. As history seemed to repeat itself, now facing a Burmese refugee flow, the Thai government attempted to keep down the numbers of refugees by the new approach. By decreasing humanitarian aid in the camps by supplying the newly established semi-permanent camps with a minimum of staff and supplies meeting only the basic living standards, the RTG hoped that Thailand would not once again become a refugee magnet (Lang 2002:91).

From the 80's until present day, the situation has worsened in Burma which has resulted in a massive refugee movement from Burma into Thailand, figures indicates that around 1.5 to 3 million fled to Thailand (www.refugeesinternational.org, UNHCR 2006:7). The numbers of refugees living in Thailand are unknown, but speculations estimate that there is about 140 000-200 000 refugees in the nine permanent camps along the Thai-Burmese border and around 200 000 people living outside the camps (Lang 2002:11, www.refugeesinternational.org, UNHCR 2006:7).

3.2.1 Definitions of Refugees by the RTG

As the national Thai law concerning refugees is diffuse and unable to distinguish between different groups, the RTG is using an arbitrary distinction concerning refugees as people living in refugee camps and people living outside the camps as illegal immigrants are treated differently by the Thai authorities, and are therefore also facing different Human Rights abuses (Lang 2002:82,92). The distinction can be seen as nothing else than a geographical definition, as the Burmese in the refugee camps as well as the people outside the camps can have the same preconditions for seeking refuge in Thailand.

In fact, the term refugee does not exist in the legal vocabulary of Thailand and refugee camps are referred to as temporary shelters (Lang 2002:18). Instead of using the term refugees three different definitions are made to classify people who seek refuge in Thailand. These are *displaced persons*, *people fleeing fighting* and *illegal immigrants*. The definition "people fleeing fighting" is the closest definition of refugees to be found in Thai law. The definition is however rather narrow as it is limited towards people fleeing as an indirect cause to the conflict within Burma. People defined as displaced persons can be assisted on a humanitarian basis, but the term is rarely used. More commonly though, is that refugees are defined as *illegal immigrants*, as they are entering the state illegally (Lang 2001:3).

The definitions are arbitrary as they do not have any clear regulations of who fits the description of the different definitions and that they are used differently in different provinces, for different groups and also differ from time to time (Lang 2002:98). As these laws do not manage to correspond to mixed migration movements, the laws are in general defining asylum seekers, refugees and migrant workers as a group of the same character, namely illegal immigrants. As these groups are not distinguished between, refugees are unable to enjoy the protection they are entitled to by the international law standards (UNHCR 2006:9f). The definitional blur is reflecting the protective stance the RTG is having towards Burmese refugees. By applying vague definitions, the state undermines the refugee protection in Thailand and is implicitly refusing refugees to their rights to enjoy protection. The legal definitions will be further analyzed later in the thesis.

3.2.2 Treatment inside Refugee Camps

In general the RTG has accepted the existence of refugee camps and its populations with the approach that Burmese refugees can be granted a *prima facie* asylum as long as it is low-key and the humanitarian aid do not endanger national security or political interfere the diplomatically relation between Bangkok and Rangoon (Lang 2002:95). In other word as long as refugees are staying in the refugee camps, Thailand has no objections.

Because of the humanitarian aid, provided by NGO:s with the assistance of UNHCR, the situation inside the camps is at the first sight good as the population has access to education, healthcare and food. However, inside the camps, refugee protection is jeopardized for several reasons, mainly because the RTG constantly shifts their approaches towards the provided assistance. For example; admission boards is functioning on and off and UNHCR's work with identifying refugees is sometimes forbidden by the RTG. This is causing delays and many people living inside the camps are left without status, which excludes them from the provided assistance of UNHCR (Human Rights Watch: 2008, Bureau of Democracy, Human Rights, and Labour:2008). As a result, the refugees are more or less caught in the camps until the situation in Burma improves. Another example that endangers the refugee protection and Human Rights inside the camps is that ethnic groups has set up traditional legal systems, independent of domestic and international laws, which RTG does not want to be associated with (Burma Lawyers' Council: 2007:46f). The fairly good conditions inside the camps can be seen as a way for Thai authorities to control the refugees and secure the nation from political instabilities.

3.2.3 Treatment outside Refugee Camps

The RTG has a more restricted stance towards people living outside the camps. As these people are treated as illegal immigrants they have basically no access to any rights and can face deportation or detention. (Human Rights Watch 2004:7, Bureau of Democracy, Human Rights, and Labour:2008, Amnesty International:2008). Political uprisings of oppositional groups often face harsh consequences, as Thailand does not want to jeopardise diplomatic relations with Burma. For example demonstrations outside the Burmese Embassy in Bangkok led to changes in RTG's policies towards Burmese refugees (Huguet & Punpuing 2005:10). In general, RTG is after a political uprising monitoring oppositional groups and trying to silence them by issue detentions, deportations or by forcing urban refugees to the refugee camps. Simultaneously, as

a response to political uprisings RTG is regularly enforcing stricter visa regulations and banning UNHCR to screen for asylum seekers to determine refugee status (Human Rights Watch 2004: 2, 5, 9, 31).

The policy adjustments are obviously devastating for the protection of refugees, as political activists have a harder time to getting into Thailand because of stricter visa regulation and are to a larger extent risking deportation (Human Rights Watch 2004:8, 31). The absence of UNHCR screening asylum seekers to determine refugee status, place tens of thousands of refugees in a legal limbo, as Thailand then is left without a functioning admission system (Human Rights Watch 2004:11). When these policy shifts emerge, many agencies often fear that without UNHCR determining the refugee status, the Thai government will take over the procedure and define refugees just as persons "fleeing fighting" according to Thai law. This includes further restrictions, as the definition is leaving out those who are fleeing because of persecution or indirect causes of Human Rights abuse (Human Rights Watch 2004:4).

The treatment of refugees outside the camps clearly indicates that refugees are seen as threatening, especially when it comes to oppositional groups when Thailand immediately enforces harsh restrictions that affect all Burmese in Thailand. To support this stance The former Prime Minister Thaksin quoted following when explaining deportation of Burmese migrants and urban refugees: "*They most be controlled…They live here and give birth to a lot of children. They shot our students. They are bring diseases lone gone from our country back to us, including tuberculosis and elephantiasis. They sell drugs and rob and kill our people*" (Human Rights Watch 2004:20).

To conclude, cracking down political uprisings by oppositional groups to prevent a conflict that can disturb diplomatic relation with Burma and the national stability is prioritised before a functional refugee protection towards all groups of refugees no matter of character.

4. Thai-Burma Political Context

As the juridical and the political spheres are in constant interaction with each other and therefore also have an impact on each other, it is not possible to understand the juridical framework without analyzing the political realities, through which the juridical framework is established and efficacious in. To understand laws concerning refugees and refugee protection in Thailand it is necessary to explain some of the political factors that can determine and shape the establishment of the refugee laws and its praxis.

4.1 Poor Refugee Protection: Asian Values or a Global Trend?

To capture a more general discussion about the ideological approach concerning Human Rights, including international refugee laws in Thailand this part will firstly consider arguments presented by Asian values, to analyze if they are feasible and can explain the poor refugee protection. Secondly, to give a more comprehensive attribute to the general analysis about Thailand's approach towards Human Rights, this part will also reflect on arguments that can explain Thailand's lack of refugee protection as a global trend which highlights state interests and protectionism. Thirdly, ASEAN as a strong regional actor is scrutinized, as the organization is based on and strongly promotes state sovereignty. The last part includes an example of good neighborliness, influenced by ASEAN, between Thailand and Burma.

4.1.1 Asian Values and Poor Refugee Protection

The academic discussion about Asian values can be seen as an attempt to explain the poor Human Rights record in Asia. The main arguments of Asian values includes the idea that Southeast Asian countries have a different approach than the West of how to achieve Human Rights and democracy and that Human Rights as a western establishment can not be implemented in an Asian context. A part of this argument has its roots in the fact that different types of rights are emphasized to a greater extent in the West compared to Southeast Asia. The West is often promoting civil and political rights as these rights are from the western perspective compatible with democracy and Human Rights. On the other hand, Southeast Asia has a more holistic perspective, therefore economical, social and cultural rights are as important as civil and political rights. Southeast Asian countries claim that Human Rights come through economical development which can only be accomplished trough social and

cultural stability. It is argued that the stability best can be achieved in an environment of law and order by a disciplined and coercive political system with strong authorities. This is one reason why strong governance in the sake of economical development is tending to override the aim of democracy and Human Rights in Southeast Asia (Weatherbee 2005:223). However, there is no obvious relationship between political repression and a strong economical development, as a strong government does not automatically generate an economic development which in turn nurtures the implementation of Human Rights and democracy (Langlois 2001: 34ff), as Langlois quotes "If dictators made countries rich, Africa would be an economic colossus."

Another prominent argument when explaining the poor Human Rights record in Southeast Asia is the fact that 1951 Refugee Convention was established by the West and neglected Southeast Asia in the drafting process. The convention was, in its first version, limited to help refugees after the Second World War and therefore the definitions were limited to the time and geographical space of the Second World War. The result of the narrow definition led to an exclusion of Southeast Asian refugees and negligence from the Southeast Asian states to give financial support to the UN when the refugees in the region were not defined as such anyhow (Davis 2006:563). In the 60's the 1967 protocol to the Refugee Convention was established to terminate the time and geographical limitations. Still, many Southeast Asian states refused to ratify the newly formulated convention, claiming that the refugee definition was still too narrow and not suitable in an Asian context (Davis 2006:563, Weatherbee 2005:223, Lee 2006:142f). According to Davies (2006) the rejection of the Refugee Convention was partly a consequence of fact that many the states had already embedded the definition of refugees and the states obligations in customary practice (2006:563). Another significant reason not to ratify the convention is that many Southeast Asian countries claim that the responsibility burden is unfair. This argument is twofold. Firstly, the western countries are more economically developed and therefore have better opportunities to help less developed countries that are facing refugee flows. Secondly, the Refugee Convention was established and developed in west, therefore western countries have a more pressing responsibility to see that the goals are fulfilled (Lee 2006:142f).

These arguments are often used by RTG to defend the non ratification of the Refugee Convention and thereby also their treatment toward Burmese refugees. To exemplify the MOI has argued that the obligations stipulated in the convention are too demanding and unrealistic,

therefore there is no need for ratification. Moreover, by a non participation in the Refugee Convention more flexibility is given to Thailand to respond towards refugees entering the state (Lang 2002:92f).

These arguments have more of a realistic character than one of Asian values, considering the fact that Thailand fears that ratification will lead to a larger amount of refugees. This in turn will be hard to handle, and can endanger the national stability and increase an international presence concerning the monitoring the refugees situation. One can claim that if refugee protection was fulfilled in all the western countries, Asian values would be a considerable factor in the weak refugee protection. But as the western countries' record concerning refugee protection is far from perfect, as the non-refoulement principle is violated by Thailand as well as by Sweden and Turkey, refugees cannot enjoy their Human Rights in Asia or in Europe, it is difficult to draw any general conclusions that Asian values are causing the poor refugee protection in Southeast Asia. Still, this does not mean that Asian values do not influences the way Human Rights is looked upon in Southeast Asia.

4.1.2 Poor Refugee Protection as a Global Trend

If Asian values can explain the poor refugee protection as a cause of Southeast Asian non compliance with Human Rights, Feller (2006) on the other hand states that the arguments and methods for states to escape the responsibility to a proper refugee protection is rather founded in state interests and state security. This is so because the host countries are worried about late reparation and a large scale of refugees that is threatening to the political, economic and social situation (2006:513f). Lee (2006) explains that Southeast Asian states are extra vulnerable as the region is still in a phase of state building and political and economic development, therefore refugees can easily be interpreted as threatening to state boundaries and political institutions hence leading to a weakening of the state structure (2006:138). Refugees can also be seen as threatening the political stability as other countries unwanted anti-governmental groups can cause a political chaos in the host country (Lee 2006:139). The protective stance toward refugees is also a result of the realistic political approach many Southeast Asian states has adopted. From this point of view refugee movements and a proper refugee protection is seen as a potential risk to lose power and control over the state territory and threatening to the state sovereignty (Lee 2006:140). In other words national interest and security must be prioritised before moral principles and humanitarian principles for the survival of the state

(Lee 2006:141). Compare to the Asian values, which can only be applied in a Southeast Asian context, state protectionism toward refugees as an external as well as an internal threat can be seen as a global trend.

This global trend is worsening the refugee protection, as states tend to mix up the two terms refugee protection and migrant control (Feller 2006:513f). The blur between refugee protection and migrant control is not only founded in the juridical framework, but also in other contexts such as in media, within the political arena, and even in the academic discourse. The result of this confusion, in many different spheres, reflects the public mind, the policies of government as well as the juridical framework (Feller 2006:515). As the distinction is fading away, the misconception of refugees and migrants are leading to ill conceived responses which undermine refugee protection. Refugees are not migrants, even if their situations can share some common elements (Feller 2006:514). Of course there can be problems to separate these two groups' intentions, as the intentions can be of a mixed character. However; the confusion is dangerous to refugee protection, as it fails to take in account the fundamental distinctions between people who are forced to flee and those who migrate for economic improvements (Feller 2006:515f).

The confusion is both affecting individuals in search of refuge, but also to the state as it has different responsibilities depending on people that is crossing the border is defined as migrants or as refugees. Because refugees lacks protection from their country of origin, they are international recognised as a group benefited by the refugee protection of the legal international framework, soft law guidelines as well as assistance from UNHCR (Feller 2006:516). The needs of migrants are different and so is the legal framework that they can benefit from. There are no rules or guidelines to regulate interstate cooperation on migration nor is there an international body for this particular concern. As migrants needs are multifaceted and concern so many different spheres such as health, labour, education, different international bodies protect and monitoring there needs, but the character as a group do not have any legal underpinnings (Ibid).

Feller's arguments can quite easily be exemplified by the situation in Thailand concerning refugees. Firstly, the irregular migration movements are leading to confusion in the distinction between migrants and refugees (UNHCR 2008:1). Secondly, the juridical framework is in its self blurred and makes no clear distinction between refugees and migrants, as refugee

protection is undermined by the national Thai law refugees are mostly defined as illegal immigrants and can thereby not enjoy their rights they are entitled to according to in the international law. Secondly, the Thai authorities are making official statements referring to migrants and refugees are threatening to the Thai society. For example the former Prime Minister Thaksin esteemed; "*Illegal border crossings by migrant workers and human traffickers*" as the second of the six threats facing Thailand (Amnesty International:2008). Taking the stance that refugees and migrants are threatening and unwanted in Thai society, can also affect the civil society's stance towards people seeking refuge in Thailand, and later endanger the praxis and out coming of the Thai law concerning refugees.

4.2 ASEAN

As Thailand's poor refugee protection can be explained more as a result of state interests and a strong protectionism rather than a specific Asian phenomenon as Asian values, it is essential to look further into some of the factors creating such a strong spirit of state sovereignty. One of the factors that set the standards and can not be left out when studying political influences in Southeast Asia is ASEAN (Weatherbee 2005:15,19,88).

4.2.1 The Foundation of ASEAN

ASEAN was established in 1967 with the purpose to: "*Accelerate economic growth, social progress and cultural development in the region and to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter*" (www.aseansec.org). Although the purpose does not include political co-operation, ASEAN did functioned as a collective political security alliance, as a reaction from the noncommunist states of Southeast Asia to the supposed common threat of communism posed by the Sino-Soviet split, expansive Vietnam and domestic communist insurgencies (Tan Sri Ghazali Shafie 1981:335). After the Cold War, ASEAN in the Singapore declaration of 1992, contained the external security threat as an important purpose for the regional co-operation. As well as in 2003 ASEAN leaders agree on that one of the pillars the co-operation should rely on was security (www.aseansec.org). The importance of security in ASEAN co-operation indicates that since the post-colonial period Southeast Asian countries have had a strong disposal to protect themselves, as sovereignty has been one of the driving forces behind the

traditional understanding of the state and nation. The approach of protectionism and state security became even more essential for the member states due to the establishment of ASEAN in a Cold War context, with explicit regional threats (Langlois 2001:38f, Davies 2006:564).

To manage a successful ASEAN co-operation, in a region marked by a strong state sovereignty ASEAN has a consensus decision-making process and has no organizational authority over the member stats policies or behavior. ASEAN is also based on some fundamental principles that respect the states sovereignty and self interests (Weatherbee 2005;89). These principles are:

- mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
- the right of every State to lead its national existence free from external interference, subversion or coercion;
- non-interference in the internal affairs of one another;
- settlement of differences or disputes by peaceful manner;
- renunciation of the threat or use of force; and
- effective cooperation among themselves (www.aseansec.org).

The purpose of the principles, also referred to as the “ASEAN way” is, besides maintaining state sovereignty and non-interference, to not allow any disputes between the member states to disturb the regional stability and the function of the association itself, as well as let no ties between ASEAN state and non-ASEAN states have a negative influence on the relations between ASEAN member states. The “ASEAN way” can be interpreted as a particular Southeast Asian cultural bias towards non-confrontation (Weatherbee 2005:121) and can to some extent be related by the arguments of Asian values. However, one can still claim that this can be seen as a conflict avoidance system in a region with an extreme form of state sovereignty. Moreover, the principles are reflecting the political approach in the region and are the other way around also strengthening the spirit of non interference, state interests and protectionism, which can have a negative effect on the implementing of Human Rights and refugee protection (Langlois 2001:38f, Davies 2006:564).

4.2.2 ASEAN and Human Rights

The Bangkok Declaration also referred to as ASEAN declaration, is in paragraph five announcing its statement towards the enforcement of Human Rights in the region. "*State have the primary responsibility for the promotion and protection for Human Rights through appropriate infrastructure and mechanisms and also recognize that remedies must be sought and provided primarily through such mechanisms and procedures*". The declaration as a whole excludes any detailed references to civil and political rights; instead it highlights state sovereignty, territorial integrity and the principle of non-interference. This paragraph signifies that ASEAN's respect of state sovereignty and non-interference is overriding the enforcement of Human Rights and sees the implementation as the member states own internal business. As there is no consensus on Human Rights in ASEAN, Human Rights can even symbolize a regional complication which is blocking major the strategic concerns and the cooperation within ASEAN (Weatherbee 2005:219).

4.2.3 ASEAN and Burma

To exemplify the strength of the non interference principle Burma was recognize as a member in 1997. By the membership, ASEAN took an opposite stance towards the general international community by recognising and thereby also approving the SPDC. But according to the non interference principle the SPDC's internal politics and massive Human Rights violations, was not of interest for the regional cooperation, instead the membership was recognised trough "constructive engagement" which would give ASEAN an opportunity to influence SPDC's political move and its concerns towards Human Rights, instead of criticize it as the western states have done. (Weatherbee 2005:231f, Ganesan 2005:47). This argument can although easily be seen as logically inconsistence towards the non interference principle and the membership can instead be seen in the light of partly a political move, to prevent a closer alliance between Burma and China, and an economical alliance, as the ASEAN members would through the alliance get access to Burma's natural resources (Weatherbee 2005:229).

4.3 Good Neighborliness between Thailand and Burma

The relationship between Thailand and Burma is highly affected by ASEAN's respect to state sovereignty and non interference regarding Burmese refugees. According to this fundamental principle Thailand is not to intervene or put pressure on SPDC's regime nor its violations towards its citizens. To preserve a diplomatic engagement and trade connections Thailand is trying to not getting judgmental towards the military regime. Quite the contrary, Thailand is maintaining SPDC's regime, by for example silence Burmese anti regime groups by detention or deportation. As mentioned above this is not only affecting political refugees in a negative way, but also the refugee protection in Thailand as such (HRW 2004:8).

The relationship between Burma and Thailand is marked by economic integration. For example Burma's natural gas supply has become a significant factor in Thailand's energy equation, the trade also includes teak, stones and marine products (Ganesan 2005:46f). But the economic co-operation is also affecting Burmese refugees in Thailand. As Hyndman (2002) states, the economic integration is exchanged with Human Rights and asylum, as Thailand tends to be more eager to support an intrastate trade than enforcing refugee protection for Burmese refugees. For example Thailand defended SPDC, when Karen Refugee Committee[2] urged the Thai government to allow UNHCR to provide aid and assistants to refugees seeking shelter along the border when the SPDC carried out an onslaught in the beginning of 1997. The response from the RTG was to accuse the committee of trying to make the situation to an international issue, as the RTG consider the happening as one of Burma's internal affairs, but most of all an humanitarian invention would endanger the economic cooperation with Burma (Hyndman 2002:39,44). This indicates that the principles of ASEAN is deeply institutionalised in intra state relations and is easily overriding Human Rights.

[2] Karen is one of the ethnics groups in Burma, and is in camps organised as committees to serve the interests of the camp population (Burma Lawyers' Council 2007:40).

5. The judicial Framework concerning Refugees in Thailand

This part of the thesis will examine the juridical framework regarding refugees in Thailand. This chapter is divided in three parts were every part is analysing one of the three legal levels. The first part will present the international level concerning refugee protection, presenting 1951 Refugee Convention, compulsory international law and UNHCR in relation with Thailand. The second part focuses upon the some of the regional treaties Thailand has signed and the effectiveness of these towards refugee protection. The last part outlines the definitions of refugees in the national law. After outlining the three juridical levels, an analysis of the juridical framework concerning refugees in Thailand will be presented.

5.1 Refugee Convention

Thailand has not ratified the refugee convention (www.unhcr.org). Still, the refugee convention is important as the convention is a foundation in refugee protection and the base of UNHCR's work in Thailand.

The Refugee Convention is the first and the only global instrument and regulates the treatment for those who is in danger of persecution and are outside their country of origin (Feller et. al 2003:3). The 1951 Refugee Convention and its 1967 protocol have three main purposes (Davies 2006:563). Firstly, it creates a universal definition of who can be recognized as a refugee, the Refugee Convention 1951 defines a refugee as a person who: *"Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence…, is unable or, owing to such fear, is unwilling to return to it."* Secondly it is aiming to set standards to guide states' response to refugees and asylum seekers. This includes a record of the basic rights they are entitled to, for example the rights to employment, welfare, identity papers, access to courts, social security, education housing, freedom of movement and prohibit the state from violating the non-refoulement principle. The principle will be presented in the next part as an essential contribute to the international customary law.

Thirdly, it seeks to promote a consistency behavior in the process of provide asylum, which can be improved by assistance from UNHCR. UNHCR's mandate and involvement in Thailand's refugee protection will be further analysed later in the thesis.

5.2 Customary International Law

The enforcement of refugee protection in international law is not totally dependent on whether a state has ratified the Refugee Convention or not, as states are by law obligated to the international customary law, which involve a minimal protection towards refugees (UNHCR 2005:28,32). Basically, the refugee protection has two key elements in the customary international law; these are the *non-refoulement principle* and *access to asylum.* Access to asylum is declared in Article 14(1) in the Universal Declaration of Human Rights 1948: "*Everyone has the right to seek and enjoy in other countries asylum from persecution*" The right to seek asylum is compliance with the right to non-refoulement, stipulated in Article 33 of 1951 Refugee Convention as it implicates that: "*No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion*"

5.2.1 Thailand and Customary International Law

Thailand is violating the non-refoulement principle, by executing both informal and official deportations. Most common are that Burmese are deported to unofficial border points, without being handed over to Burmese authorities (HRW2004:7, Amnetsy International: 2008, Bureau of Democracy, Human Rights, and Labour :2008, UNHCR 2006:10, US Committee for Refugees and Immigrants:2007). When official deportations are occurring Burmese authorities are provided with a list of the deportees in accordance with a Memorandum of Understanding between Thailand and Burma (UNHCR 2006:10, US Committee for Refugees and Immigrants:2007).Often it is political activists that are subjected to deportation, as a way to silence potential demonstrations or to avoid disturbance that can concern the political stability in Thailand as well as harm the diplomatic relation with Burma (HRW 2004:29).

5.3 UNHCR

According to the UNHCR Statute, annexed to Resolution 428 (V) of the United nations General Assembly of 1950, UNHCR's mandate is to "*provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them*". On top of this mandate General Assembly and ECOSOC has expanded UNHCRs responsibilities to include the delivery of humanitarian assistance and protection activities towards people other than refugees. When a state does not have a functional asylum system, UNHCR have the mandate to identify refugees, also referred as Refugee Status Determination (HRW 2004:24). As the definition refugees can be politically sensitive; UNHCR is instead using the term *persons of concern*. The definition is basically the same as the definition in the 1951 Refugee Convention with the exception that it does not include member of a particular social group (Lang 2002:173, Huguet & Punpuing 2005:10). For the individuals UNHCR's determination is essential as the status is giving UNHCR the mandate to help them towards a more sustainable situation which is voluntary return, local integration and resettlement, depending on the particular situation (Executive Committee of the High Commissioner's programme: 2008).

5.3.1. UNHCR and Thailand

Thailand approved the presence of UNHCR when it requested assistance because of the inability of the state to handle the extreme refugee flows caused by the Indochina crisis. Since then Thai authorities has grown an acceptance towards UNHCR's involvement and in 1998 the RTG accepted a permanent role for UNHCR at the Burmese border (Lang 2002:93f). Even tough UNHCR have a mandate to assist Thailand by improving the refugee protection, the RTG tends occasionally to limit the role of UNHCR, by questioning its mandate and job assignments on the basis that Thailand has not ratified the 1951 Refugee Convention. Thai authorities is for example on regular basis questioning UNHCR's refugee status as they do not always consider the status as a valid reason for not detaining, imprisoning and deporting refugees (Lang 2002:178).

UNHCR seek to improve the situation for refugee protection in Thailand, both on a structural level by promoting admissions boards along the borders, as well on an individual level by determining refugee status (Lang 2002:93f, UNHCR:2008). As mentioned above, UNHCR is also tying to improve the situation for refugees by enforcing more sustainable solutions. In the

case of Thailand these solutions have been of various success; voluntary return is rarely used because of the situation in Burma, local integration on the other hand is in some extent used, as the RTG can sometimes assist Thai citizenship for refugees that lived in Thailand for many years (UNHCR 2006:39). Although, resettlement is an extremely time and resource demanding process and can not be used as a solution for the large amount of refugees, it is the most adequate solution for a majority of the refugees in Thailand and are seen by UNHCR as well as by RTG the as one of the most sustainable of the three solutions (UNHCR 2006:40).

Thailand is a member of the UNHCR's Executive Committee (ExCom) is enforcing an improvement concerning refugee protection, as the ExCom elaborates the standards and principles that govern international protection and covering a wide range of protection issues that are not addressed in any depth in international law, such as responses to massive refugee crises and maintaining a humanitarian character of asylum. Although Thailand is not a member of Refugee Convention, the state can be an integral part of an international protection framework, influencing national policies as well as UNHCR's operations through the membership in ExCom (UNHCR 2005:30).

5.4 Regional Instruments and Thailand

Thailand is a signatory to Asian-African legal consultative committee (AALCC) which established the *Bangkok principles* in 1966 (updated in 2001). The AALCC encompasses Asian and African states with the main assignment to consult on regional and international activities regarding refugee protection. The Bangkok principle acknowledges the existence of refugees and insists that member states will uphold the non-refoulement principle as well as provide asylum. Its also includes a wider refugee definition than the definition found in 1951 Refugee Convention. As the principle is a soft law instrument and it should be seen as a political stance more than a legal commitment (UNHCR 2005:25), as it is neither enforced nor monitored and serve only as a guide to appropriate treatment towards refugees. Moreover, the principle does not generate any regional expectations concerning the treatment of refugees and is valid as long as state security is maintained. Concerning these limitations, the responsibility remains on each state to decide whether or not to apply the guidelines in particular circumstances which sadly generates a minimal effect of the member states treatment towards refugees, but nevertheless the principle can be recognized as a will to improve (Davies 2006:563).

5.5 Domestic Law in Thailand

As mentioned earlier the Thai national law concerning refugees is vague which reflects the RTG sensitivity concerning refugee protection. Considering the law strictly, the term refugee do not exist and thereby also lacks of a proper refugees protection (Lang 2002:18). As presented above instead of the term refugees, *illegal immigrants*, *displaced persons* and *people fleeing fighting* are used to classify people entering Thailand to seek refuge. The definitions are further analysed below.

5.5.1 Illegal Immigrants

People crossing the border into Thailand without visa or a valid passport are entering Thailand in breach of 1979 Immigration Act and are defined as *illegal immigrants* and are therefore subject to arrest, prosecution and deportation. As this law does not manage to correspond to mixed migration movements, the law in general is applied to asylum seekers, refugees as well as migrant workers. When no distinction is made between these groups, the more vulnerable groups tends to be left out and are therefore unable to enjoy the protection they are assured from international law standards (UNHCR 2006:9f).

5.5.2 Displaced Persons

The term *Displaced persons* are also seen as illegal immigrants by national law, as the official legal term relates to a clause in the "regulations concerning displaced persons from neighbouring countries" issued by the Thai Ministry of Interior 1954. According to the MOI a "displaced person" is a person "who escapes from dangers due to an uprising, fighting, or war, and enters in breach of Immigration Act." Because the law stipulates that entering Thailand in the breach of the Immigration Act, displaced persons are also classified as illegal immigrants (Lang 2002:92f). This definition was most prominently applied on people arriving before 1979, during the Indochina crises, post 1979 arrivals are often just referred to as illegal immigrants (Lang 2002:90,92).

5.5.3 Persons Fleeing Fighting

The term *persons fleeing fighting*, is maybe the closest definition of refugees to be found in the national Thai law. The definition, has been used since the 90's and is fairly narrowed as it is limited towards people fleeing as an indirect cause to the conflict within Burma. In 2004 the definition was replaced by the broadened definition "*persons fleeing persecution or for other reasons*" (UNHCR 2006:15). This definition is the only one in the national Thai law that actually can make an exception from obeying the Immigration Act and has been used to

permit refugees from Burma a temporary asylum and to reside temporary in the refugee camps due to persecution in Burma (UNHCR 2006:8, US Committee for Refugees and Immigrant: 2007, Phunthip 2007:10).

To exemplify the blur concerning refugees and migrants it is essential to look upon what is stipulated in the national law and the praxis. As stated above the definitions in law are not able to respond to mixed migration flows, as basically all people entering Thailand without a visa is defined as illegal immigrants. In other words, refugees lacks of protection according to the national Thai law. However, in practise Burmese are loosely referred to as displaced persons or refugees and the Thai policy marks that Thailand is able "accept and assist the displaced persons on a humanitarian basis", which means that the policy should grant displaced persons temporary shelters (refugee camps) until the situation in Burma is improving (Lang 2002:18, 93). Even though they are not defined as refugees according to the Refugee Convention, they are defined as "displaced persons fleeing fighting" which is not even a term stipulated in the laws, they are seen as refugees with genuine claims to asylum and are able to enjoy temporary asylum in the refugee camps (UNHCR 2004:1).

5.6 An Analysis of the Juridical Framework

The laws concerning refugees are de facto the corner stone of refugee protection, as they regulate the outcome of the treatment of refugees. However, the laws are depending on the political context they were established and developed in. As such, the laws are reflecting the political climate. In the case of Thailand the lack of protection in contemporary national law, the non ratification of the refugee convention and the violations of international customary law clearly reflects Thailand's stance towards refugees. This undoubtedly indicates that RTG fears that a proper refugee protection that stipulates an international standard will transform Thailand to a refugee magnet, which can lead to a national instability.

As outlined above Thailand is a member of ExCom and is also a signatory on Asian-African legal consultative committee. In the case of Thailand the credibility of the commitments to improve the refugee protection on an international level can be questioned when the national laws de facto undermines Human Rights and refugee protection, especially considering the non ratification of the Refugee Convention and the lack of respect towards, and compliance with, the international customary laws concerning refugees.

The acceptance of UNHCR's assistance must however be seen as an improvement concerning refugee protection in Thailand. But as outlined above the RTG have objections regarding UNHCR's mandate in Thailand. As Thai authorities do not accept the refugee status issued by UNHCR, they are also contradicting the work of UNHCR.

Simultaneously, due to the Thai policies, the illegal immigrants are unofficially called refugees and can gain a minimum of protection in refugee camps. However, even though they might be called refugees or displaced persons, their legal status is unmodified, while officially still unprotected despite unofficial announcements. Official statements also refer to refugees as illegal immigrants as threatening to national security, which indicates a contradiction on behalf of the Thai government. As long as the RTG is not confirming the unofficial term by implementing it in national law, it can be interpreted as nothing but political goodwill. To conclude, the legal definition and the unofficial terms makes people seek refuge in Thailand as "illegal refugees" which is a contradiction in itself. Moreover, the vagueness in national law provides no distinction between refugees and migrants that disregard the need of protection for refugees. As claimed above, states with an exaggerated spirit of state sovereignty do not refer refugees to their needs, but the fact that aliens are committing a violation by crossing a state border, and thereby endangering the state security.

6. Concluding Analysis

The purpose of this thesis was to give a broad and comprehensive perspective regarding the problems concerning the lack of protection for Burmese refugees in Thailand, and more specifically the reasons of this problem from a legal and a political aspect. Using a realist perspective, the thesis claimed that despite the more globalised world, states are acting as sovereign units in an anarchic world order. To survive and maintain the power balance concerning intrastate relations, states must always refer to its own interests and security. From this perspective the state stability is intimidated by external threats which are interpreted seriously as it is actually a threat to the state survival and can affect the power balance.

In the case of Thailand Burmese refugees are seen as threatening national security and stability because the amount of the refugee flows and the long going responsibility of hosting the Burmese refugees as the situation in Burma does not seem to improve. When looking at the development of refugees as a threat, it has emerged over time. In the beginning of the 80's Thailand hosted a quite small amount of refugees over a limited period of time, refugees was not seen as threatening and treated by respect both from Thai authorities as well as the local population. When the situation in Burma worsened and the refugee flows was getting more intense, the RTG immediately restricted its approach, as refugees now was seen as a threat to the national stability. Thailand hosted an enormous amount of refugees during the Indochina war which also contributed to the protective stance towards Burmese refugees. From a realist perspective for Thailand to apply the idealistic approach would be devastating as the amount of refugees will probably rise enormously and the responsibility of hosting and providing necessary protection and support to the refugees will be financially, politically and socially demanding.

As the stating point of this thesis claims, the laws are shaped by the political context. In the case of Thailand, one can argue that the political development and the political establishment can best be explained through a realist approach and that the political climate reflects and nurtures a radical state sovereignty, which can also be recognised in the juridical framework concerning refugees. As this thesis suggests several political factors have contributed to the spirit of state sovereignty in the region. The region has been strongly influenced by the colonial political approach and developed a strong spirit of state sovereignty in the state building process during the post colonialism period. Even though Thailand never was

colonised, the state has developed in a colonised context and therefore also been influenced by it. Moreover, the region was strongly shaped by the Indochina crisis in the Cold War context. As the period was pervade with power balance, sovereignty and military external threats along with the state development in the region, many governments adopted a realist political approach, as the only natural approach at the time. This was the context in which ASEAN emerged as a regional organisation. To institute a successful regional co-operation in this particular political context, it was necessary to also enforce the principles of state interests and non interference as a foundation for the co-operation. The foundation of ASEAN does not only reflect the regional political climate, but also maintain the spirit of realism.

As the laws are shaped and established in this particular political context this thesis suggest that the juridical framework concerning refugees is a result of Thailand's political approach. Firstly, the Refugee Convention is not ratified as Thailand fears that more Burmese will enter Thailand, and the responsibility burden will be too high to bear, as the situation in Burma will not improve. The international customary laws are occasionally violated as a result of deporting political active refugees mainly to maintain the diplomatic bounds with Burma, to secure ongoing and upcoming trade co-operation but also to stabilise politically uprisings within Thailand. These two political statements made by Thai authorities, clearly indicates that refugees are seen as threats, not just external but also internal that are jeopardising national security and stability. Even though assistance from UNHCR is accepted, Thailand still illustrates its power towards refugees by occasionally restricting UNHCR's presence.

As outlined above the national law concerning refugees are insufficient as its undermining the refugee protection as its a lot of Burmese seeking refuge in Thailand are classified as illegal immigrants, hence their reasons for fleeing Burma are incorporated with the refugee definitions according to the Refugee Convention, as well as give them the rights they should be able to enjoy according to the international Human Rights. According to realism, the lack of protection is implicitly illustrating refugees as unwanted and as an obvious threat to the nation.

In conclusion, this thesis suggests that the cause of the poor refugee protection for Burmese refugees in Thailand is exaggerated by a spirit of sovereignty that interprets refugees as a security threat to the state. As we can see the political climate in Thailand is in line with the general global trend towards refugees and migrant workers. National security, national

interests in the name of state sovereignty are prioritized before humanitarian principles such as human rights which is affecting refugees in need of protection. An improvement of refugee protection can only be done by recognizing refugees in law. Furthermore, this can only be realized if the definitions in laws are taking into account that refugees are not equal to migrants and are in need of proper human rights protection. But, to be able to do this, the political climate and environment must also allow these changes and enforce them into policies. This conclusion should not be seen just for this particular case, but more as a general conclusion.

7. List of acronyms

AALCC	Asian-African legal consultative committee
AMM	ASEAN ministry meeting
ASEAN	Association of Southeast Asian Nations
BSPP	Burma Socialist Programme Party
MOI	Ministry of Interior
NGO	Non-governmental organisation
NLD	National League for Democracy
RTG	Royal Thai Government
SLORC	State Law and Order Council
SPDC	State Peace and Development Council
UNHCR	United Nations High Commissioner for Refugees

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