FACULTY OF LAW
Lund University

SIRAWIT PRADISKOOL

Refugee Protection in Time of Mass Influx: A Case Study on Southeast Asian Countries and their Intergovernmental Arrangements

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Eleni Karageorgiou

Term: Spring 2017

CONTENTS

PREFACE 3

ABBREVIATIONS 4

INTRODUCTION 6
- CONTEXT, PURPOSE, AND PERSPECTIVE 6
- RESEARCH QUESTIONS 8
- METHODOLOGY 8
- OUTLINE 9

BASIC CONCEPTS AND DISCOURSE 11
- The definition of 'mass influx' under international law and the status of persons in the scenario 11
  - Mass Influx 11
  - The status of persons in time of mass influx 13
- The legal concept of 'temporary refuge' in case of a mass refugee influx 15
  - The principle of non-refoulement 16
  - Non-penalization on the ground of illegal entry 18
  - Basic human rights protection 20
- The role of international community in the case of mass influx 21
- Challenges 23

PAST EXPERIENCE OF REFUGEE PROTECTION IN SOUTHEAST ASIA 25
- The spread of communism across the region 25
- The national law and temporary refuge in countries of first asylum in early 1975 27
- A role of Association of Southeast Asian Nations 30
- The Comprehensive Plan of Action by UNHCR 32
  - The First Stage (1975-1978) 32
  - The Second stage (1979-1988) 34
  - The Third stage (1989-1990s) 35
- Challenges 36

DRAWING FROM HISTORY: THE CURRENT APPROACH OF REFUGEE PROTECTION AT THE NATIONAL LEVEL 38
- Thailand 39
- Malaysia 43
- Indonesia 46
- Challenges 49

TEMPORARY PROTECTION AT ASEAN ORGANIZATIONS 51
- Human rights standards at the regional level 51

Legal framework 51
ASEAN Human Rights Declaration 52
The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN 54
Mechanisms 55
ASEAN Intergovernmental Commission on Human Rights (AICHR) 55
ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) 56
Solitary versus solidarity 57
The approach of principle of solidarity/burden-sharing in ASEAN at practice (political assessment context) 57
Translating the principle of solidarity and burden-sharing into action 61
Challenges 63

CONCLUSION AND CURRENT CHALLENGES 65

BIBLIOGRAPHY 67
Literatures 67
UN Documents 68
ASEAN's Instruments 71
National Legislations 71
Online Sources 71

PREFACE

"Migrationsverket bedömer därför att du inte har visat att du har din försörjning tryggad under den ansökta tillståndstiden"

(The Swedish Migration Board estimates that you have not shown that you have shown proof of sufficient means of subsistence during the requested permit period)

A decision made by Migrationsverket on 27th September 2017 refusing my application for extended residence permit to study in Sweden during the second semester.

"By the way, I made it!"

Said by me while drinking wine with friends in Lund
24 May 2018.

This thesis is dedicated to all the people who become subject to restriction in any form. First of all, I would like to take this opportunity to express my sincere respect to my supervisor, Eleni Karageorgiou, who has always been patient and supporting me in completing this thesis. Without your expertise in refugee law, this thesis would not be completed.

I would like to extend my gratitude to Professor Vitit Muntarbhorn for being so inspirational. I would not have been here without your guidance. I'm really indebted to you. Furthermore, this expression also goes to Mr. Voraphol Malsukhum, another lecturer in law at Chulalongkorn University, to help me get access to many resources.

The acknowledgement is also paid to my family for being so supportive in every step of my life. I would like to thank Pat for the love that you gave me while I was writing this thesis. To my friends in Sweden, Erlina, Juan, Ana, Victoria, Flavia, Jonathan and Ayaka, my master life would not have been full of fun and joy. Finally, I would like to say thank you to myself for being very positive throughout this four months.

.

ABBREVIATIONS

ACMW	The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.
ACWC	The ASEAN Commission for the Promotion and Protection of the Rights of Women and Children.
AICHR	The ASEAN Intergovernmental Commission on Human Rights
AHRD	The ASEAN Human Rights Declaration
ASEAN	The Association of Southeast Asian Nations
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CPA	The Comprehensive Plan of Action
CRC	Convention on the Rights of the Child
EXCOM	The Executive Committee of the Programme of the United Nations High Commissioner for Refugees
EU	The European Union
ICCPR	The International Covenant on Civil and Political Rights
ICM	The Intergovernmental Committee for Migration
LPDR	Laos People's Democratic Republic
UN	The United Nations
UNDP	United Nations Development Programme
UNHCR	The United Nations High Commissioner for Refugees
UNTAC	The United Nations Transitional Authority in Cambodia
UPR	Universal Periodic Review

ODI	Overseas Development Institute
TAC	Treaty of Amity and Cooperation in Southeast Asia
TOR	Terms of reference

INTRODUCTION

CONTEXT, PURPOSE, AND PERSPECTIVE

The United Nations High Commissioner for Refugees (UNHCR) describes a situation where the number of people crossing the international border has suddenly increased in which neither if exist, the normal individual asylum procedures nor the response capacity of individual State are able to deal with the assessment of such large numbers as a mass influx.[1] The dilemmas between the protection of its people's interest as a whole and the protection of others the interest of others have challenged the host State's capacity and demands an urgent response; on the one hand, State must respect the right of person to seek asylum and the principle of non-refoulement; on the other hand, maintaining the public order and national security are also the first priority.

At international law context, the receiving State has an obligation to provide a 'temporary refuge' for any person participating in the large-scale of movement.[2] Towards achievement of a satisfactory solution, the State alone cannot bear the burden. Based on humanitarian ground, the international cooperation also plays a vital role in this scenario—UNHCR calls this is a reflection of a spirit of solidarity and burden-sharing amongst international community such as states, regional organization or United Nations etc.[3]

History has shown that Southeast Asian countries have once experienced the mass exodus of Vietnamese, Cambodians, and Laotians during the Indochinese war. According to the historical data, a group of these affected persons had been sought for temporary refuge across Southeast Asian Countries—many refugees from Vietnam, Cambodia, and Laos were forfeited mainly by the Thai Government. In response, the Comprehensive Plan of Action (CPA) had been introduced as an effective solution for the host countries by UNHCR. The CPA is an agreement between interested governments, such as countries of origin, country of first-asylum and country of resettlement, with the aim to provide a durable solution for Indochinese refugees and those who did not fall within the scope of refugee definition. While the issue of Indochinese refugees had been successfully created in the late of 1980s, an evidence suggests that those refugees were living under inhumane conditions comparing to

---

[1] UNHCR EXCOM Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004).

[2] UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx' (1981) EC/SCP/16 (1981), para. 4.

[3] Ibid.

the standard treatment recommended by UNHCR.[4] Sara E. Davies pointed out that some of the provision of CPA becomes a leeway of the receiving States for pushing their responsibilities or to lower the standard of refugee protection.[5]

In present, the region has faced with the new challenge. Unlike the event of Indochina crisis, the continual outflow of Rohingya people from Myanmar can be still witnessed amongst neighboring countries for decades. While the reaction of the international community, including Myanmar, towards the large-scale violence against its people, has been dismissed, the recent scale of mass influx was witnessed in Bangladesh—UNHCR estimates that around 600,000 of them are entered into Bangladesh since 27 August 2017. With no sign of actual commitment from Myanmar in the issue, the prediction can be that history would likely to repeat itself in the region.

As above-mentioned, the thesis intends to highlight the present legal and practical obstacles to the enjoyment of temporary protection of refugees, in case of large-scale movements, in Southeast Asia and particular in ASEAN countries. The thesis main argument is that the rights of refugees in the time of mass influx is continually being undermined in the region because of two main reasons:

First, I argue that the international standard of treatments for refugees are not fully recognized in the region. UNHCR has demonstrated that the conceptualization of refugee protection in time of mass influx is the same as the one at a normal time. Furthermore, the international human rights standards should also apply with regard to temporary protection. Despite none of the main host countries in Southeast Asia has ratified the 1951 Convention Relating to the Status of Refugees and its 1967 protocol, they are still bound by the international customary law and international human rights instruments towards the issue. Regrettably, the focus of refugee protection have never been discussed seriously in most of the host countries and is regarded as an ad-hoc agenda. This essay embarks on an assessment would be divided into three areas: namely the principle of non-refoulement, the non-penalization of refugees and the basic human rights protection regarding the time of temporary refuge.

Second, I argue that regional institutions meant to support and facilitate those standards of treatment across Southeast Asian countries are partially adopted at ASEAN

---

[4] Muntarbhorn V, *The Status of Refugees in Asia* (Clarendon Press 1992)

[5] Davies SE, "Realistic Yet Humanitarian? The Comprehensive Plan of Action and Refugee Policy in Southeast Asia" (2008) 8 International Relations of the Asia-Pacific 191, p. 340 and Muntarbhorn V, *The Status of Refugees in Asia* (Clarendon Press 1992), pp. 47-52.

organizations. UNHCR has established that the international community as a whole is responsible for the protection of refugee lives. Particularly, in time of mass influx, the humanitarian imperative and the spirit of solidarity must be shown in adopting a coherent solution. Following this, ASEAN, the only one regional organization in Southeast Asia, is governed by this rule. In assessing ASEAN legal institutions and its application I focus on two questions: first, the question of refugee rights on the ground; and second, the question of solidarity between ASEAN states.

As a few studies about refugee protection in Southeast Asia have been directly assessing to this specific issue. In the light of this analysis undertaken in this study would offer ASEAN countries and its intergovernmental organization a better understanding of the legal gaps related to temporary protection of refugees in mass influx situations and of ways the law should be reformed so as far the region to be better prepared in case of a future 'crisis'.

RESEARCH QUESTIONS

The thesis focuses on the responsibility of Southeast Asian States regarding the temporary protection of refugees in the time of mass influx. Within this context, it would examine the international assistance from the ASEAN organization as a complementation for its member States and its people. To be noted, the thesis would not examine further to the adoption of durable solutions, rather it would limit itself to the obligations of States between the admission of refugees and the durable solutions and to ways in which the ASEAN organization should support its member states during this intermediate stage. According to the above, the research question would be, first, what are the legal and practical challenges to the enjoyment of refugees protection in time of mass influx in ASEAN region?; and second, how these challenges lead to obstruction of the enjoyment of the protection of refugees in the time of mass influx in the region?

METHODOLOGY

The research will adopt a doctrinal legal approach based on the international refugee and human rights regime. Throughout the thesis, the rule of interpretation under Vienna Convention on the Law of Treaties (VCLT) will be used as the main source. Therefore, the interpretation of the international law will be adopted in accordance with the ordinary

meaning and in line with the aim and purpose of the rule.[6] In addition, the travaux préparatoires will also be observed if such interpretation leaves some doubts.[7]

At the general principle, the argument is consist of the analysis of rules provided in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocols, the guidelines/conclusions provided by Executive Committee of the United Nations High Commissioner for Refugees (EXCOM), the Advisory Opinion of International Court of Justice and the General Comment of Human Rights Committee.

In the regional context, the support arguments would make a reference to the two critical events, namely Indochina War and the situation of Rohingya people. On the front of legal analysis, the assessment shall be undertaken from the interplay between regional and national level. By this means, the existing rules regarding the protection of persons in time of mass influx, such as the ASEAN Charter, the regional human rights instruments and the Terms of Reference (TOR) and its Blueprint of ASEAN mechanism, shall be the subject to evaluation. In addition, the reports on the global trends and country profile provided by United Nations High Commissioner for Refugees (UNHCR), The documents submitted to the UPR and the reports of NGOs such as Human Rights Watch and Amnesty International will be included in the discussion.

OUTLINE

The Thesis is divided into six chapters. Chapter 1 provides the scope of the thesis, including the background and context of the issue, the area of inquiry, the research question and the methodology.

Chapter 2 begins with the overview of the current basic concepts and discourse of characteristic of temporary protection in time of mass influx and the principle of solidarity. In addition, it intends to highlight the implications of such character for the management of refugee protection at international level. By this means, the assessment will be adopted in regard of the definition of mass influx, the legal status of those participating in large-scale of movements, the principle of non-refoulement, the non-penalization of refugee for their illegal entry, the basic human rights protection and the principle of solidarity.

Chapter 3, 4 and 5 are devoted to the study of the application of temporary protection concepts provided by UNHCR in practice. In chapter 3, it recalls the historical background of

[6] Vienna Convention on the Law of treaties (Concluded 23 May 1969, entered into forced 27 January 1980) 1155 UNTS 333 (VCLT) art 31.
[7] Ibid., art 32.

refugee protection in Southeast Asia and examines the ASEAN approach towards the situation of mass refugee influx during the Indochina war. It aims for giving a comprehensive understanding of how international community reacts to the international standards of temporary protection and how such concepts apply to the situation at that time.

Chapter 4 presents the analysis of current situation in the ASEAN host countries, namely Thailand, Malaysia and Indonesia. Drawing from the Rohingya refugee[8], it argues that the current protection of them are lower than the international standard because of the non-recognition of international law and the absent of implementation of its obligation.

Chapter 5 evaluates the regional framework and how it complements the guidelines of temporary protection. The purpose is to review the current arrangements and to identify the flaws and gaps in ASEAN context.

Chapter 6 concludes and addresses the current legal and practical challenges to the refugee protection in time of mass influx in Southeast Asia.

[8] The examination will be carried out merely in those three countries—since the rest are not a popular destination of Rohingya people, the prediction should be that only Thailand, Malaysia and Indonesia are likely to confront with the situation of mass influx than the rest of ASEAN countries.

BASIC CONCEPTS AND DISCOURSE

Due to the large-scale movements of people entering one country, the crisis has created particular challenges for the international community in order to seek a proper and readiness solution. For addressing on the legal and practical challenges of the enjoyment of temporary protection of refugees in ASEAN, it is inevitable, to begin with, the understanding of its fundamental concepts and instruments under international law related to the issue. Thus, in Chapter 1, the structure is divided into three areas of assessment: first, the definition of mass influx and the legal status of those who participate in large-scale of movements; second, the obligations of host states to provide temporary refuge under international refugee law and international human rights law such as the prohibition against non-refoulement, the non-penalization on the ground of illegal entry and the basic human rights protection; and third, the discussion on the principle of solidarity/burden-sharing of international community.

1. The definition of 'mass influx' under international law and the status of persons in the scenario

1.1. Mass Influx

The term 'large-scale influx', 'mass exodus' or 'massive flow' are not explicitly mentioned in the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol. Rather the terms have gained understanding from a number of events in history. At the end of World War I, The rising number of displaced persons and the uncertainty of their legal status lead to the development of comprehensive plan for protection of those affected.[9] however, it was not until the World War II where the terms were addressed explicitly in the international documents. For instance, the outflow of people from Hungarian uprising in 1956—amounting to 50,000 people seeking protection in Austria—resulted to the call of United Nations High Commissioner for Refugees (UNHCR) to the international community in providing an urgent solution on the crisis. It appears that UNHCR described the phenomenon as 'large-scale influx'.[10] This suggests that UNHCR's perspective, towards the crisis, at that time attached to the rapid change of the number of newcomers. However, the shift of thought was changed

[9] Hurwitz AÌG, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009)
[10] UNHCR 'Report of the United Nations High Commissioner for Refugees' (New York 23 November 1956) UN Doc A/C.3/SR.690, paras 7 and 11.

again during the late 1970s. In occasion of Indochina war, the world had witnessed the continual outflows of Indochinese refugees across Southeast Asia—UNHCR estimated that more than one million people had been displaced internally and internationally during twenty years of crisis.[11] History demonstrated that those millions of Indochinese people had sought refuge in different countries across the region and to that the word 'massive flow' or 'dramatic refugee exodus' were used to describe the phenomenon in UNHCR's documents.[12]Besides the internal and international conflicts, the cause of mass influx can also be a result of the natural disaster. For instance, in 1985 the terms of 'mass exodus' were picked to describe the situation where people fled from the severe drought and famine in the African region.[13]

Although the various terms had been used occasionally in the UN's documents, UNHCR has never sought to clarify a fixed legal term of crisis—there was in 1981 that some of the experts pointed out the need to define or qualify the term of the situation, however, the discussion was taken out at the UNHCR's agenda.[14] t was until 2004 that the Executive Committee of the United Nations High Commissioner for Refugees (EXCOM) had conducted the study to address the basic principle for protection of refugees and asylum-seekers in response to the emergency situation and agreed to refer the crisis as 'mass influx':

> (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.[15]

According to the statement, those terms are not exhaustive. Professor Guy S. Goodwin-Gill pointed out that 'a mass influx exists only when the combination of the flow's size and suddenness makes an individual refugee status determination procedurally impractical,

---

[11] Cutts M, "Chapter 4: Flight From Indochina," *The state of the world's refugees, 2000: fifty years of humanitarian action* (UNHCR 2000), p. 80.
[12] Ibid.
[13] UNGA Res 41/29 A/RES/41/29 (31 October 1986), para. 2.
[14] UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21-24 April 1989)' (17 July 1981) UN Doc EC/SCP/16/Add.1, para 24.
[15] UNHCR EXCOM Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004), para (a).

placing strains on the host's institutions and resources.'[16] He later added that 'the UNHCR was of the opinion that a mass influx cannot be defined in absolute numerical terms because its very existence depends on the resources of the receiving State.'[17] In his suggestion, it means that the weight is given to the effectiveness of State's capacity in responding to the problem— there are no requirements for a certain amount of people or of the rapid rate, if such large-scale arrivals possibly disrupt the State's capacity, the situation can be considered as a 'mass influx.'

Overall, the adoption of fixed legal terms of mass influx is not yet confirmed by UNHCR—the current guideline only provides the broad observation of the crisis in which can be subject to change. For the purpose of this thesis, the mass influx shall be interpreted in the way that it is the situation where persons, who are the victims of large-scale violence from internal conflict, international conflict or natural disaster, participate in movements by crossing international borders into other countries apart from their countries of origin or country of former habitual residence. Consequently, such movements have created serious problems that one state cannot alone provide the protection for all of the victims.

1.2. The status of persons in time of mass influx

Generally, a person who owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of particular group or political opinion, is protected under the 1951 Convention Relating to Status of Refugees and its 1967 Protocol because he or she is entitled to refugee status.[18] Indeed, a person who is not defined as the refugee under the 1951 Convention, shall not claim any protection under the refugee law. Such personal scope of the Convention can be interpreted that it is primarily restricted to a person whose civil and political rights have been violated other than to a person whose economic, social

---

[16] Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (Oxford University Press 2007), p. 335 and RO Brussels, 'UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx' (15 September 2000) <http://www.refworld.org/docid/437c5ca74.html> accessed 24 May 2018.

[17] Ibid.

[18] Under the Article 1A(2) the definition of 'refugee' is any person who 'owing to a 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/her nationality and is unable or, owing to such fear, unwilling to avail him/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her habitual residence is unable or, owing to such fear, unwilling to return to it.' However, any person, who is refugee, may be excluded from international refugee protection; (1) if he/she are receiving protection or assistance from a UN agency other than UNHCR (the Article 1D of the 1951 Convention); (2) If he/she is not in need of international protection because he/she has been recognized by authorities of another country in which he/she has taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); (3) if there are serious reasons for considering that he/she has committed certain serious crimes (Article 1F of the 1951 Convention).

and cultural rights such as the right to adequate standard of living including food and housing, to health, to education, and to non-discrimination have been infringed; it appears in a very exceptional cases that those rights constitute sufficient proof of a well-founded fear of being persecuted for reasons under the 1951 Convention.[19]

As described to the definition of mass influx that the situation impacts individual variously and being formed by different types of person.[20] This creates a challenge of the lack of the regulation of mass influx in 1951 Refugee Convention—the inconsistency between the definition of conventional refugee in a normal situation and in a time of crisis. Thus, the problem arising when the process of individual assessment cannot protect all of those affected equally according to the conventional refugee protection—it is limit to only a person who can prove that they fall within the scope of convention refugee status. For example, the case when a person is not the main target of persecution but somehow he or she are affected from collateral damages resulting from military operations, or the case that national economy is shunned by the war to which the majority of the population cannot sustain themselves. As a result, the 'individual' refugee definition under the 1951 Refugee Convention is not applicable to the time of crisis.

It seems to that international community and UNHCR are aware of dilemma under the refugee convention. Instead of the amendment, the groups of experts were of the opinion that according to the United Nations General Assembly Resolution 1388 (XIV), the provision could be used to resolve the issue.[21] With some creativity, the terms of 'Good offices' are introduced under the Resolution and has been used as a technical mechanism for prioritizing a group refugee determination in time of crisis—the terms apply to the groups refugee determined to be prima facie within the UNHCR's competence without examining the refugee status of individual members of group at initiative level.[22] Respectively, such interpretation is supported by the practices of states and UNHCR in providing temporary protection for a group of persons on a prima facie basis in the situations of mass influx—for example, Thailand had provided a temporary refuge based on a prima facie for Laotians and

---

[19] For a comprehensive study on the ideas of claimant of refugee status based on socio-economic rights, please see Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*(Cambridge University Press 2007), pp. 236-289.

[20] The reason for migratory of each person can occur from armed conflict, generalized violence, human rights violations at random and/or the ineffectiveness of national protection.

[21] Jackson IC, *The Refugee Concept in Group Situations* (Nijhoff 1999), p. 88 and UNGA Res 1388 (XIV) A/RES/1388 (20 November 1959).

[22] Ibid., p. 90.

Vietnamese coming into country during the Indo Chinese war.[23] In this broad sense, persons who are justified based on this interpretation can, therefore, access to the temporary protection equally. However, this does not mean that the refugee clarification under the 1951 Refugee Convention is disregarded, rather it will be used later for the accession to refugee resettlement.

In sum up, the individual determination of refugee status would only be applicable to a normal situation or after the adoption of a durable solution where a person travels individually or with a few companions. In contrast, the group-based determination should be rewarded in the time of mass influx in regard to temporary protection. Consequently, a person participating in large-scale movements will be derived equally a humanitarian protection (the obligation to provide such protection will be discussed below) under refugee regime on grounds of a condition of the country of origin or of former habitual residence. Hence, for the purpose of the thesis, the term 'refugees' will be used as referring to this prima facie refugee.

2. The legal concept of 'temporary refuge' in case of a mass refugee influx

In the consequence of mass influx disruption, the concept of the international protection had constantly been sought by the UNHCR. At the meeting of the Expert Group on the temporary refuge in situations of large-scale influx, the UNHCR was of the opinion that 'when considering the various problems arising in the mass-influx situations, it was necessary to ensure that the basic principles for the protection of refugees and asylum-seekers were maintained.'[24] In order to guarantee the protection of persons in the time of mass influx, the first requirement for protection is to ensure that all persons are admitted to a host country equally.[25] In other words, the receiving State has an obligation, at least, to provide a 'temporary refuge' for asylum-seekers. Hence, this section intends to explore the nature of temporary refuge—what is its relevant legal concepts and its function in an international system?

---

[23] Muntarbhorn V, *The Status of Refugees in Asia* (Clarendon Press 1992), pp. 78-81 and Albert M, " Prima Facie Determination of Refugee Status: an Overview and Its Legal Foundation" (Refugee Studies Centre vol. 55, January 2010) <https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf> accessed 18 May 2018.

[24] UNHCR 'Note on Non-Refoulement (Submitted by the High Commissioner)' (23 August 1977) UN Doc EC/SCP/16 (1981), para. 4.

[25] UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21-24 April 1989)' (17 July 1981) UN Doc EC/SCP/16/Add.1.

The phrase of 'temporary refuge' was described by the EXCOM as a humanitarian obligation—for the numbers of problems existing from the refusal of asylum-seekers at the sea, it was first referred to the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters—and in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge.[26] Such obligation requires State to open the border and welcome asylum-seekers into State's territory. Following to the opinion of G.J.L. Coles[27], the expert pointed out that the legal nature of temporary refuge was not a new form of protection under the international refugee law, and it should be studied and developed amounts to saying nothing more than existing rules.[28]

2.1. The principle of non-refoulement

As above-mentioned paragraph, an assessment of the State practices, G.J.L Coles then concluded that 'temporary refuge can be defined as that protection characterized by the principle of non-refoulement which is accorded a person and which is temporary pending the obtaining of a durable solution— he also emphasized in his footnote that the interpretation of temporary refuge must conduct in a more extended legal sense to cover all persons arriving *en masse*.[29] Following his approach, UNHCR had reiterated explicitly in a number of its guidelines that the fundamental legal concept of temporary refuge derived from the principle of *non-refoulement*.[30]

The term 'refouler' is originally a French word meaning 'to force back' or 'to send away.' However, under the article 33(1) of the 1951 Convention, the drafters had referred the word to 'expel', 'return' or 'any manner whatsoever' which results to endanger a protected person's life or freedom.[31] According to this, UNHCR has established that an assessment of its *travaux préparatoires*[32], the refouler shall include any actions which result to the rejection

---

[26] UNHCR EXCOM Conclusion no. 15 (XXX) 'Refugees without an Asylum Country' (1979), para (c) and (f).
[27] A former senior legal advisor of UNHCR.
[28] Coles GJL, "Temporary Refuge and the Large Scale Influx of Refugees" (1978) 7 Australian Year Book of International Law 189.
[29] Ibid., p. 12.
[30] See UNHCR EXCOM Conclusions no. 15 (XXX), 52 (XXXIV), 77 (XLVI), 80 (XLVII), 85(XLIX), 89 (LI), 91 (LII), 94 (LIII) and 100 (LV).
[31] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33(1).
[32] A French word means the preparatory work of the treaty. Pursuant to Article 32 of the 1969 Vienna Convention defines that 'the preparatory work of the treaty is a supplementary means of treaty interpretation is permitted only where the meaning of the treaty language ambiguous or obscure; or pursuant to Article 31 of the 1969 Vienna Convention that when the meaning of the treaty is manifestly absurd or unreasonable. See Vienna

of refugees at the frontier, high seas or at the other states territories as long as such action is the exercise of State jurisdiction over a person.[33] In pursuit of this practice, the application of non-refoulement obliges state not to reject any refugees or displaced persons who come within its jurisdiction, if such rejection results to the danger of such person's life. Furthermore, the rule has also been confirmed that it attain the characteristic of international customary law.[34] In this sense, the application of the principle of non-refoulement must be respected by all States, regardless of their record of ratification.

In addition, the non-refoulement principle is also an integral part of various international human rights instruments—this has been recognized as a complementary protection from human rights regime. To extend, State has an obligation not to transfer any persons to another country if it would result in exposing him/her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel inhuman or degrading treatment or punishment.[35] Under the Article 3 paragraph 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the principle has been stressed explicitly that:

> 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

As a matter of fact, The Human Rights Committee confirmed that such prohibition also embedded in the Article 6 and 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR). In its General Comment, the right to life and the right to be free from torture or cruel, inhuman and degrading treatment or punishment requires States Parties must not expose individuals to the danger of their lives or such treatment upon return to another country by way of their extradition, deportation, expulsion or otherwise removal.[36] Similar to the international refugee law, the prohibition of non-refoulement under the human

---

Convention on the Law of Treaties (with annex) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 333 (Vienna Convention).

[33] UNHCR 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), paras. 23-31.

[34] Ibid., para 15.

[35] Ibid, paras. 17-20.

[36] UN Human Rights Committee, 'General Comment No. 31' in 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para. 12.

rights instruments is acquired the extraterritorial characteristic.[37] In the question of the status of international customary norm, it appears the disagreement between two bodies; on the one hand, the Human Rights Committee views that the right against torture, the rights not to be of cruel, inhuman or degrading treatment, and the right to life are absolute and, as a fundamental and inherent component, the prohibition against non-refoulement shall be the part of customary norm[38]; on the other hand, UNHCR is of the opinion that the complementary protection of human rights against non-refoulement attained its customary norm only to the right to be free from torture and the right to life.[39]

To sum up, the prohibition of non-refoulement is applied under the temporary protection of refugees in the time of mass influx. The state has a negative obligation under such principle not to reject any group of persons, who are victims of massive human rights violence, at its frontier or when they fall within its jurisdiction in regardless of their accession to the 1951 Refugee Convention. Apart from the refugee regime, the complementary of human rights protection also obliges State that ratified the human rights instruments to protection any persons, regardless of their status, not to adopt any measures which result to reject individuals, who have been in its jurisdiction, to other territories where the rights to life, the right not to be tortured and the freedom from cruel, inhuman or degrading treatment will be violated. These also support the temporary protection for all persons, not only refugee under the 1951 Refugee Convention. However, there is still in doubt on the question of their characteristic of the international customary norm—whether States that are not parties to the human rights instruments should oblige the rules. In the light of this thesis, it will approach the interpretation of UNHCR where only the complementary protection of the right to life and not to be tortured are bound all states.

2.2. Non-penalization on the ground of illegal entry

Apart from the protection against non-refoulement, a number of experts at the meeting on Temporary Refuge in Situation of Large-Scale Influx had also expressed that the

---

[37] UN Committee Against Torture, 'General Comment No. 1' in 'The Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)' (21 November 1997) UN Doc CAT/C/60/R.2 (2017), paras. 7-11 and UN Human Rights Committee, 'General Comment No. 31' in 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.1, paras. 10-12.

[38] UN Human Rights Committee, 'General Comment No. 24' in 'Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/21/Rev.1/Add.6 (1994), para 8.

[39] UNHCR 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007), para. 21.

host states also have to provide some of the standard of treatment to those who participate in large movements under the period of temporary refuge.[40] In the Conclusion of EXCOM, it recommended that a minimum protection must be provided in regard to humanitarian basis.[41] Foremost, the EXCOM recalled that State should not penalize refugees on the ground of illegal entry which it is rarely for asylum-seekers to enter a country of refuge with the regular means in the context of a large-scale influx. The Article 31 of the 1951 Convention Relating to the Status of Refugees provides as follows;

> 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence;
> The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

From the text, State Party to the 1951 Convention and its 1967 Protocol has an obligation to undertake certain standards of treatment to refugees who, coming directly from a territory where their life or freedom was threatened on the ground of race, religion, nationality, member of particular social group or political opinion, enter the country by irregular/illegal means. However, according to the travaux préparatoires, the phrase 'coming directly from a territory where their life or freedom was threatened in the sense of Article 1' needs to be interpreted by reference to the object and purpose of the 1951 Convention which is 'to assure the widest possible protection of refugees rights and freedoms.'[42] Therefore, it maybe covers to the persons who have shortly transited other countries, who are unable to find protection in any country to which they flee, or who have 'good cause' for not applying in such country. In this sense, a person who participates in the large-scale movement shall potentially enjoy such protection since their illegal entry resulted from the mass violations of

[40] UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21-24 April 1989)' (17 July 1981) UN Doc EC/SCP/16/Add.1, para. 21.
[41] UNHCR EXCOM Conclusion no. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981).
[42] Ibid., paras 9-12.

human's life in the country of origin to which he or she can not avail themselves of protection.

Once asylum-seekers are entitled to the safeguard, State cannot impose any penalties which are the result of their illegal presence or entrance.[43] Nonetheless, some of the measures may be justified under the scope of the provision. The second paragraph of the Article 31 states that the restriction on freedom of movement can be applied, if necessary, in some specific circumstances at the only certain period. In the context of mass influx, the Receiving State usually applies the restriction on a group of asylum-seekers by establishing a temporary settlement camp.[44] According to such practice, the EXCOM stressed that while the restriction of asylum-seekers can impose in the interest of public health and public order, however, State needs to take into account that the restriction must be avoided unless there are no possible options (last resort) and in the line of human rights principles, namely the right to be equal before the law and fair trial.[45] In the section below, it will, therefore, seek to identify the related basic protection while asylum-seekers are being subjected to the limitation of freedom of movement and waiting for the durable situation.

2.3. Basic human rights protection

While State retains the power to limit the freedom of movement, the EXCOM is aware that the measure adopted for those people of concern must be, at least, in accordance with personal security, safety, and well-being—this suggests that the interplay between refugee law and human rights law. At the Conclusion no. 22, the guidelines had been listed in a number of protection that the receiving State should provide for asylum-seekers in the settlement camp:

It affirmed that the fundamental civil rights in the Universal Declaration of Human Rights should be enjoyed by asylum-seekers—however, it could be read that the right to life, the rights to private and family life and the right to be equal before the law and fair trial were fundamental.

---

[43]The drafters of the provision appeared to interpret the word 'penalties', including 'prosecution', 'fine', 'imprisonment', and 'other restrictions on freedom of movement.' This also support by the Statement of the Department of International Protection given that 'any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by States against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as penalty.'

[44]The influx of Hungarian refugees into Austria (1956), the influx of refugees from East Pakistan into India (1971), or the IndoChinese refugees in South East Asia (1975-1980) etc.

[45] UNHCR EXCOM Conclusion no. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), p 2, and Conclusion no. 44 (XXXVII) 'Detention of Refugees and Asylum-Seekers' (1986), para (b).

In respect of the right to life, the text explained that the basic necessities of life including food, shelter and sanity and health facilities must be available for asylum-seekers; this consideration must also be taken while choosing a location of the settlement camp, and State should be mindful that asylum-seekers who flee from the plight need extra understanding and sympathy. The unavailability of the basic necessities could result into an act amount to cruel, inhuman or degrading treatment, or in a worst-case scenario, the loss of life.

According to the right to be equal before the law and fair trial, the committee gives slightly suggestion that 'asylum-seekers are to be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities.'[46] lthough comparing this with the subject to restriction, asylum-seekers should, therefore, be able to challenge the decision of State, if there is reasonable ground for providing better measures.

For the right to family life, the committee is of the opinion that a unified family is the most important condition in the time of mass influx, therefore, all possible assistance should be given for the tracing of relatives. In respect of the rights to private life, the registration of births, deaths, and marriages should also be arranged, if possible.

Lastly, there should be no discrimination on any ground towards every level of practices. The committee also suggests that a vulnerable group including minors and unaccompanied children are needed more attention and assistance than the other.[47] Nonetheless, all of practice and policy of receiving State must be in accordance with the principle of non-discrimination.

3. The role of international community in the case of mass influx

As mentioned above, it is the duty of a host state to provide a temporary protection for those who participate in large-scale movements. However, it is undeniable that such large-scale influx creates a problem for a host country to which beyond the capacity of one

[46] UNHCR EXCOM Conclusion no. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), para (f).

[47] The clarification was later defined in the Conclusion no. 100 of EXCOM stating that the particular protection based on sexual and gender-based violence and military recruitment, or any grounds are needed for refugee women, refugee children and older refugees, including those with special protection concerns. (see UNHCR EXCOM Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004), para (d).)

state. According to EXCOM, the principle of international solidarity is established under its guidelines for including all international sectors to help to resolve the crisis.[48] For the discussion at the meeting of expert group on the situation of large-scale influx, the principle of international solidarity has been raised and stressed by the delegate from Australia; G.J.L. Coles defined that 'if the principle of non-refoulement is a fundamental principle, so is the principle of international solidarity. No universal system of protection applicable to large-scale influx situations will be workable satisfactory unless both principles are made twin pillars of the system.'[49]

However, the principle itself was not recently developed at that Meeting, history shows that the principle of solidarity was consulted since the beginning of adoption of the 1951 Refugee Convention. In the discussion of its Preamble, the travaux préparatoires acknowledged that French government was aware that while the Convention does not regulate asylum, the result from granting an asylum to refugee might place unduly heavy burdens on that certain countries—this would include a situation where certain countries may be faced with a mass influx of refugees.[50] Therefore, the proclaiming of the principle of burden-sharing in the preamble of the 1951 Convention has been made in dealing with a problem which may arise from the grant of asylum.[51] Paul Weis also pointed out that during the debate of amendment of the Preamble of 1951 Convention, the international cooperation in the field of protection is not only regarded from the delegates, but also in the field of assistance.[52]

Following to the guidelines of UNHCR, EXCOM specified that regarding the situation of mass influx, a satisfactory solution cannot be achieved without international cooperation, State shall take all necessary measures within the framework of international solidarity to assist, at their request, States which have admitted asylum-seekers in particular situation.[53] For UNHCR, it is true that the action could be taken in form of bilateral and multilateral agreements at a universal level or with UNHCR, however, the primary

---

[48] UNHCR EXCOM Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004).

[49] UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21-24 April 1989)' (17 July 1981) UN Doc EC/SCP/16/Add.1, p. 22.

[50] Weis P, *The Refugee Convention, 1951: the Travaux Preparatoires Analysed* (Cambridge University Press 1995), pp. 14 and 33.

[51] Paragraph 4 of the Preamble of the Refugee Convention.

[52] Weis P, *The Refugee Convention, 1951: the Travaux Preparatoires Analysed* (Cambridge University Press 1995), pp. 12- 33.

[53] UNHCR EXCOM Conclusion no. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), p 3.

consideration should be given to the possibility of finding suitable solutions within the regional context.[54]

From state practices, the burden-sharing framework can conduct in respect of facilitating voluntary repatriation, promoting local settlement in the receiving State or providing resettlement possibilities in third countries. Importantly, it can also play a critical role to ensure that the causes leading to large-scale influxes are addressed and resolved in a country of origin or of former habitual residence. Regarding the crisis arising from mass influx, the international cooperation shall become a supplementary measure to lighten the unduly burdens of the receiving State in providing the protection of refugees. For instance, the joint cooperation on surveillance at the sea could possibly save every asylum-seekers' lives, the regional financial system in time of crisis can increase the standard of living of asylum-seekers or the central regional army unit could also help protect and settle the crisis or chaos that arises in receiving country due to the large-scale of uninvited foreigners.

In conclusion, the principle of solidarity or burden-sharing can be given in form of bilateral or multilateral agreement at the international level. It is a supporting measure to lighten the heavy burden of receiving State. In the time of mass influx, a satisfactory solution will not be achieved unless the international cooperation has been sought; the cooperation framework should be directed towards facilitating voluntary repatriation, promoting local-resettlement in the receiving State and, if possible, providing resettlement in third countries. Besides the granting of temporary refuge in receiving, the standard of protection will be critically improved through the financial, technical or resource assistance from different international actors.

4. Challenges

The notion of mass influx is subject to discussion at the international community for decades. However, the crisis has never been treated separately from the existing rules of international law—the various measures can be found under the 1951 Refugee Convention and the human rights instruments. The current development suggests that the achievement of refugee protection in time of mass influx is placed in hand of international community: on the one hand, it is the duty of host state to provide a temporary protection for refugees; on the

[54] UNHCR EXCOM Conclusion no. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), p 3.

other hand, the international community can also contribute to those affected state in field of assistance.

While the measures have been established and clarified by the EXCOM studies, the limitation of measures provided under the conclusions is that they cannot be perceived as a legal character—the conclusion originally created to advise UNHCR.[55] Given that in consideration of the state obligation, some measures can be avoided by States that are not parties to the 1951 Refugee Convention and its 1967 protocol or the core human rights instruments. The problem may not arise under the prohibition of non-refoulement since it became a customary norm. Rather, the dilemma is generated on the principle of non-penalization of refugee for their illegal entry and some basic human rights protections since the rules are not acquired the status of the customary norm and, according to the VCLT, it needs the consent of State to authorize such protection.[56] The same problem is made so obvious in the principle of solidarity since it is based on the ground of humanitarian voluntary and the vague definition of humanitarian assistance measures.

In sum up, the first obstacle to the enjoyment of refugee protection in time of mass influx can be found at the international principle since the measures itself derived from the existing principles of international refugee and human rights law and the Conclusions of EXCOM which has no legal-binding effect. Given that the availability of temporary protection and international assistance depend on the current ratified treaty, the international customary law and the voluntary of states or of international entities in which the latter seems to be impractical to reality (this dilemma will be found visibly in the following chapters).

[55] Hurwitz AÌG, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009), pp. 252-255.
[56] Article 13, 14, 15, 16, 17 of VCLT.

PAST EXPERIENCE OF REFUGEE PROTECTION IN SOUTHEAST ASIA

This section describes briefly the causes of the Indochinese war and the pattern of forced migration in the Southeast region. It is also giving some comments regarding the fixation of the situation. First, it argues that the temporary refuge in the country of first asylum/receiving State before the adoption of durable solution could not be found in municipal legislation in each ASEAN countries, rather the protection depends on each national policy— even after the adoption of the Comprehensive Plan of Action, the offer for temporary refuge was still in condition. Secondly, the approach of ASEAN to the issue is completely full of political bias. With no concrete laws and a common asylum system in the region, the situation of refugees at that time was undeniably at risk. Instead of relying on every international entity, the faith of refugees is mainly pushed into the responsibility of UNHCR.

1. The spread of communism across the region

After the Second World War, the clash between ideologies had spread across the world. Likewise in Southeast Asia, the region became a battlefield in the struggle against Communism. Particularly, the communism had rapidly taken over in Vietnam, Cambodia, and Laos— from the words of President Eisenhower, the spread of the communism in the region was described as a domino effect.[57] As a result, the war against communism affected people heavily and that created a large scale of migration across the region.

In Vietnam, after successfully separating South Vietnam (the Republic of Vietnam) from North Vietnam (the Democratic Republic of Vietnam— know as a communist State), the political tension between two nations had never been ceased. As supported by China and Soviet, the communism had expanded over North Vietnam and became rapidly stronger in neighboring countries. In 1960, the worry of United States in the spread of communism in Southeast Asia led to the sending of anti-communist forces into South Vietnam. The tension between Great Power (China, Soviet and United States) had transformed Vietnam into a battlefield for fifteen years. Apart from the fighting between non-communism and

[57] Eisenhower DD, "Domino Theory" (The speech at the News Conference, USA 7 April 1954).

communism in Vietnam, the history also suggested that there was also conflict among the communist believers after the victory over the South Vietnam—China was portrayed as a new foreign enemy that Vietnam, Cambodia, and Laos wanted to expel from the region.[58] According to the words of Vitit Muntarbhorn, the proxy war had created a massive waves of displacement of people from South Vietnam across the region since 1975[59]—the steady flow overland and by sea between 1975 and 1977 of approximately 1,500 per month; and the heavy flow of boat people after 1977, which reached more than 60,000 per month by June 1979.[60] It was until a sharp rise in 1988 which the first-asylum countries in the region stated clearly that they could no longer take care of those asylum-seekers anymore.[61]

In Cambodia front, after becoming an independent State from France, the nation had experienced with the political disturbances during the 1970s and the earlier of 1980. The first wave of refugees outflow was marked during the overthrow of Lon Nol Government by the Khmer Rouge led by Pol Pot in 1975. Under the Pol Pot regime, the nation was forced to turn into the agricultural society; the citizens must work in the agriculture sector in believing that it was the main income of the country, the sources of knowledge such as books, library, university etc. were completely banned and outlawed. As a result, any persons who disobeyed the rules would become a subject of torture or persecution—the pieces of evidence show that millions of people died from the persecution, malnutrition, and overwork.[62] UNHCR estimates that about 200,000 persons escaped the brutality of Khmer Rouge to Vietnam, Laos, and Thailand.[63] After the downfall of Pol Pot regime, the second wave of displaced persons happened in 1978 due to the succession of Heng Samrin Government supported by the Vietnamese forces. With the promise to destroy Pol Pot regime and to establish an independent democracy for Cambodia, a person who was suspected to be a member of

---

[58] KNair KK, *ASEAN-Indochina Relations since 1975: the Politics of Accommodation* (Strategic and Defence Studies Centre, Research School of Pacific Studies, Australian National University 1984), pp. 195-208.

[59] On that year the North Vietnamese troops invaded South Vietnam and successfully took control of the whole country. The fall of Saigon (a capital city of South Vietnam) and the reconciliation between the North and the South Vietnam resulted to an outflow of non-communist supporters into neighbouring countries.

[60] Muntarbhorn V, *The Status of Refugees in Asia* (Clarendon Press 1992), p. 23.

[61] For example, Thailand which was the main country of first asylum at that time declared an 'interdiction policy' which resulted to the refusal of temporary refuge (See Muntarbhorn V, *Indochinese Refugees in Thailand: Prospects for Longstayers* (Public Affairs Institute 1989).

[62] The Genocide in Cambodia (April 1975)

[63] See the Annex 1 'Background Noted Dated 9 July 1979 prepared by the United Nations High Commissioner for Refugees for the Meeting on Refugees and Displaced Persons in South-East Asia' (UNHCR 'Meeting on Refugees and Displaced Persons in South-East Asia, Convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments' (7 November 1979) UN Doc A/34/627.) and Robinson WC, *Double Vision: a History of Cambodian Refugees in Thailand* (Asian Research Center for Migration, Institute of Asian Studies, Chulalongkorn University 1996).

Khmer Rouge or had engaged with Khmer Rouge in any level including marriage was subjected to arbitrary arrest or killing. The invasion of Heng Samrin under Vietnamese forces and the adoption of the Anti-Khmer Rouge policy created, at least, more of 10,000 people fleeing from Cambodia to neighbouring countries.

For Laos, the warfare against communism also occurred during the war against communism. At the time, Laos was in the middle of a civil war between the Royal Lao government led by Vang Pao and the Communist Pathet Lao. To stop the domino effect in the region, the United States had chosen to support Vang Pao, a highest-ranking Hmong leader, in believing that if the Royal Lao could establish the government, Laos would be used as a buffer State against communism for them. Therefore, Hmong troops under Vang Pao had received support from the Central Intelligence Agency (CIA) in assembling thousands of people in northern jungles of Laos. However, after the fall of Saigon (A capital city of South Vietnam), the Hmong troops were abandoned by the United States, and that the slaughter of Hmong had begun in 1975. This results in a massive wave of tribal groups fleeing into Neighbouring Thailand, the records show that about 100,000 Hmong resettled outside Laos, including in the United States.[64] In extension, after the establishment of the Communist Pathet Lao government people who could not stand for a new regime had managed to flee across the Mekong River—UNHCR calls those persons a lowland Lao who fled due to fears of being persecuted for political, economic and religious ground.[65]

2. The national law and temporary refuge in countries of first asylum in early 1975

As shown in the above section, the number of conflicts in a region between the 1970s and 1980s create massive influxes of refugees across the region. The main factor that pushes people on the plight is due to warfare; the majority are victims of armed conflicts, the other are victims of indirect causes arising from the warfare such as epidemic and famine. UNHCR estimates that during the Indochina war, more than a million people from Vietnam, Cambodia, and Laos had been displaced across Southeast Asia since 1975.[66] The record

[64] Shay C, "The Hmong and the CIA" *TIME* (December 30, 2009) <http://content.time.com/time/world/article/0,8599,1950590,00.html> accessed April 13, 2018.

[65] Cutts M, "Chapter 4: Flight From Indochina," *The state of the world's refugees, 2000: fifty years of humanitarian action* (UNHCR 2000), p. 97.

[66] UNHCR 'Meeting on Refugees and Displaced Persons in South-East Asia, Convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979 and subsequent developments' (7 November 1979) UN Doc A/34/627, para 10.

shows that Indonesia, Malaysia, Philippines, Singapore, and Thailand became a safe haven for those who fled from the tragic— according to UNHCR, the prime destination that Laotian, Cambodian and Vietnamese had chosen is Thailand whereas most of ASEAN countries confronted with Vietnamese.[67] This section will, therefore, give an overview of the situation of temporary refuge, mainly on the admission of asylum-seekers, among those countries before the adoption of Comprehensive Plan of Action of UNHCR.

At the time of refugees outflow in 1975, none of ASEAN countries were parties to the 1951 Refugee Convention and its 1967 Protocol. On the front of human rights instruments, neither International Covenant on Civil and Political Rights (ICCPR) nor International Covenant on Economic, Social and Cultural Rights (ICESCR) was also ratified. While the conventional obligations were absent, the dualist-system also obstructed the applicability of international customary law since international law and principle need to be translated into municipal law (Implementation). Regarding the non-recognition of refugee rights, most of them had no laws concerning the protection of refugees provided, the closest law which governs refugee affairs would be the national immigration law.[68]

The obstacle to the realization of temporary protection is that refugees were considered as perpetrators instead of victims. Following that, they became a subject to the prohibition of entering a country and penalization on the ground of illegal entry:

For Indonesia, besides aliens can apply for a temporary residence on humanitarian grounds under the Directive No. 411/Sek/1976, this cannot be the case if such person can follow the conditions provided by the Dutch Royal Decree, No. 330 of 1949: Royal Decree on Admission of Aliens into Residence in Indonesia. The Indonesian immigration law states that the permit shall be given to aliens who have a valid passport, or those who are certain that they can return to their country of origin.[69] Yet, the Indonesian President can exempt case-by-case from those requirements.[70] For the illegal entry, the Ministry of Justice may order the vessel to turn back from the country.[71] The unauthorized entry may also be used as a ground for punishment.[72]

---

[67] Cutts M, "Chapter 4: Flight From Indochina," *The state of the world's refugees, 2000: fifty years of humanitarian action* (UNHCR 2000), p. 98.
[68] Muntarbhorn V, *The Status of Refugees in Asia* (Clarendon Press 1992), pp.52-54.
[69] The Dutch Royal Decree no 330 of 1949: Royal Decree on Admission of Aliens into Residence in Indonesia (ID), art 1(4)(a) and 1(4)(b) (Indonesia).
[70] Ibid., art 1(5).
[71] Ibid., art 8(a)(2).
[72] Ibid., art 13.

Similar to the other Southeast Asian countries, a person who wishes to enter Malaysia must promptly provide a true document and visa under the immigration law. In contrast, a person who enters unlawfully will be considered as a prohibited immigrant.[73] Furthermore, the Director General of Immigration reserved a power to limit or prohibit the entry as if such means is contrary to the public security.[74] As the same to Indonesia, those requirements provided for entry may be exempt in case-by-case according to the State discretion.[75]

In the Philippines, the procedure was established by the Commonwealth Act No. 613 (the Philippines Immigration Act of 1940), section 29(a) provided that a person who cannot give proper documents as required under the Act shall be excluded from entry into the Philippines.[76] Though, it states within the same section that stowaways might be justified but still it depends to the discretion of the Commissioner of Immigration.[77] For using a misleading information or false document, Aliens are subjected to deportation to the country from where they came.[78]

On the Singapore front, only a person, who enters through the procedures provided by the Immigration Act 1963, is allowed to reside in the countries.[79] Alike to the previous-mentioned countries, a person who illegally enters Singapore is considered as a prohibited immigrant. The illegal entry is also considered as a criminal offence.[80] For the protection of public order, the Minister has a power to prohibit or limit any person from entering the country. However, the exception for entry could be justified by the discretion of the Controller of Immigration.[81]

Regarding Thailand situation, the local migration law is based under the Immigration Act of 1950, as revised in 1954. Section 15 defined a person who illegally enters into the country as alien. For the admission, a person needs to provide a true document to Thai authorities, a person who fails to do so, or for maintaining the public order the Ministry of Interior may refuse for entry, shall not enter into Thailand.[82] Unlike the others, there is no

---

[73] The Immigration Act 1959/63 Revised 1975, ss 6 and 8 (Malaysia).
[74] Ibid., s 9.
[75] Ibid., s 10.
[76] The Philippine Immigration Act of 1940 (PH), s 29(a).
[77] Ibid.
[78] Ibid., ss 36 and 45(d).
[79] The Immigration Act 1963, s 8(3)(h) (Singapore).
[80] Ibid., s 8(5).
[81] Ibid., s 10.
[82] Thai Alien Registration Act BE 2497, ss 15 and 16 [In Thai].

exception provision for special entry. Interestingly, under section 18 of the Immigration Act, it states that a person who intends to transit the country is not subjected to this Act, refugee who intend to resettle in third-country might benefit from this provision.[83]

As a result, the refugee protection was completely absent in country of first asylum in Southeast Asia at the beginning of the phrase. Those who seek for refuge in such countries in early 1975 could not enjoy the temporary refuge under the existing legal framework since they were not regarded as a legal person—the rights or protection under the current international standard could not transfer to them. As mentioned above, they became the victims of refoulement and the penalization under the current law. Although some exception could be made, their lives still depend fully on the State's discretion.

3. A role of Association of Southeast Asian Nations

Established in 1967, the Association of Southeast Asian Nations or ASEAN was composed of five original member States such as Indonesia, Malaysia, the Philippines, Singapore, and Thailand. As set out in the Bangkok Declaration[84], the intergovernmental organization's primary purpose is to create an environment in which each member State's survival could be ensured through the fostering of regional stability and the limitation of competition between them.[85] By this means, the final sentence of the Declaration states that:

> 'the Association represents the collective will of the nations of South-East Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom and prosperity.'

This was later strengthened by the adoption of Treaty of Amity and Cooperation in Southeast Asia (TAC)—the treaty aims for giving further clarification of guidelines of member States in their interaction with each other. Basically speaking, to maintain peace, security and economic growth, ASEAN believed that those achievements can be assumed through the promoting of State equality and the principle of non-interference.[86] Besides the written agreements, those principles can also be witnessed from the idea of the establishment of its

---

[83] Ibid., s 18.

[84] The ASEAN Declaration (Bangkok Declaration) 8 August 1967 <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/> accessed 22 May 2018.

[85] McInnes C and Rolls MG, *Post-Cold War Security Issues in the Asia-Pacific Region* (F Cass 1994), pp. 65-79.

[86] Treaty of Amity and Cooperation in Southeast Asia (24 February 1976) <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/> accessed 22 May 2018, art 2.

mechanism. According to the Bangkok declaration, the member States agreed to carry out its functions by setting up an annual meeting of Foreign Ministers, a standing Committee to implement the decision of meeting, an ad-hoc committee or special committee on the special issue and a national secretariat.[87] Technically speaking, those functions were based heavily on consensus and consultation i.e. there was no discussion on setting up a regional parliament or council of ministers with law-making power, the power of enforcement, or judicial system. Moreover, the realization of human rights mechanism was complete absence at that time.[88] As read from the Bangkok Declaration, the perception of ASEAN towards the security of its people can be interpreted by the peace and security of ASEAN nations (State-centric).

In a wake of Indochina conflict, these features of ASEAN (consensus and consultation) had significantly exposed the difficulties of the Organization in protecting those people who flee from the conflicts. All attempts of ASEAN regarding the Indochina Conflict is paid to the protection of the interest of its own member States and of its own ASEAN citizenships respectively. Indeed, the intergovernmental Organization is driven by political will and a plain statement rather than taking a proactive action. The ministerial meeting in 1979 could be one example. With regard to the refugees, the Foreign ministers of ASEAN define those who fled from warfare in Southeast Asia as 'illegal immigrants/displaced persons'.[89] Instead of becoming an accommodator, ASEAN turns itself into bystander or perpetrator and start a blame game among countries. The joint communique agreed (a non-legal binding document) by ASEAN nations had called for a sympathy of countries of resettlement and support from UNHCR in dealing the issue. It agreed that due to a heavy burden of countries of first asylum ASEAN countries would repatriate those illegal immigrants.[90] Furthermore, it expressed that Vietnam is supposed to be a responsible country for the exodus and that they should have a decisive role to play in the resolution of the problem.[91]

---

[87] The ASEAN Declaration (Bangkok Declaration) 8 August 1967 <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/> accessed 22 May 2018.

[88] The initiative development of human rights mechanism in the region was a response to the World Conference on Human Rights at Geneva in which it had raised the issue of need for all regions of the world to have both national and regional institutions for the promotion and protection of human rights. As a result, the ASEAN member States adopt a joint communiqué of the ASEAN Foreign Ministers at the meeting in Singapore on 23-24 July 1993 (see Muntarbhorn V, *Developing Regional Mechanisms: Process and Progress* (Martinus Nijhoff publishers 2013), pp. 105-168).

[89] Joint Communique of the Twelfth ASEAN Ministerial Meeting Bali 28-30, June 1979 <http://asean.org/?static_post=joint-communique-of-the-twelfth-asean-ministerial-meeting-bali-28-30-june-1979> accessed 22 May 2018, para 22.

[90] Ibid., para 24.

[91] Ibid., para 25.

Although the crisis significantly caused a severe political, socio-economic and security problem in ASEAN countries. Regrettably, the discussion on the protection of those who flee from warfare left in silence. According to the whole period of the crisis, there was no attempt to set up a mechanism for refugee protection or to condemn its Member States on the violation of customary law or international standards, or even to lighten the burden of its own member States—the approach had continuously adopted even until 1989.[92]

4. The Comprehensive Plan of Action by UNHCR

The continual outflow of asylum-seekers, both by land and sea, from Laos, Vietnam, and Cambodia across the region creates a heavy burden for Countries of the first asylum rapidly. The crisis is a result from the dimension of an exodus, the present denials of asylum and the imbalance between the large numbers arriving and the rate at which durable solutions are being found for them.[93] By this means, there are several attempts seeking for a proper solution for the mass displacement of persons in Southeast Asia. Regarding the non-existence of laws in ASEAN countries and the absent of rule-based mechanism of ASEAN, it is undeniable to say that the initial action on refugee temporary protection falls into UNHCR.

4.1. The First Stage (1975-1978)

In December 1978, the High Commissioner for Refugees called for a meeting between the interested governments regarding the crisis in South-East Asia at Geneva. According to the consultative meetings, UNHCR stressed that the problem of refugees and displaced persons must be treated in a humanitarian and non-political way which required a spirit of solidarity among South-East countries. While UNHCR would become a central communication between states, international governmental and non-governmental organizations, the following urgent measures must be carried out by interest countries[94]:

First, all counties of the first asylum must provide a temporary refuge in accordance with internationally accepted humanitarian principles;

---

[92]Joint Communique Of The 22nd ASEAN Ministerial Meeting Bandar Seri Begawan, 3 – 4 July 1989 <http://asean.org/?static_post=joint-communique-of-the-22nd-asean-ministerial-meeting-bandar-seri-begawan-3-4-july-1989> accessed 22 May 2018, paras 21-30.

[93] Ibid., para 2.

[94]UNHCR 'Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General' (7 November 1979) UN Doc A/34/627, see the Appendix to Annex I, pp. 11-12.

Second, the establishment of special centres in the first-asylum countries for processing resettlement in an orderly way;

Third, to increase a resettlement rate, the generosity of every country must be available since the countries of first asylum alone were already overcrowded by asylum-seekers and displaced persons.

Fourth, the most vulnerable groups of persons who sought for international protection were 'boat people', it suggested that many have lost their lives during the flight at the high seas, so the operation for rescue at sea must be made jointly among offshore-territory countries in supporting of UN's programmes.

Fifth, promoting a stability for the region is needed, UNHCR stressed that the improvement of economic conditions in the Indochina peninsula would help redress the devastation caused by war, and in turn, this would encourage a voluntary repatriation in the region.

According to the agreement, some of $US 95 million was spent on resettlement of refugees who had been resided in countries of first asylum. For example, in 1979, about 81,500 of those who stayed in Thailand had been resettled.[95] In boat cases, the improvement was not satisfied— apart from the assistance on food, water supply and basic sanitation of UNHCR, the push-back policy still was a common thing in the region. Moreover, there was no sign of commitment from offshore-territory countries to rescue at sea in boat cases. At that time, the resettlement of boat people could happen only outside the region. For the orderly departure programme focusing on a family reunion and other humanitarian cases, it appeared a sign of Memorandum of Understanding with the Vietnamese government and UNHCR— this still needs for further development on implementation. For refugee processing centres, they were established successfully in Indonesia and it was expected to expand to the Philippines in cooperating with Japan, Switzerland Indonesia, and UN. While it appears a progressive on implementation, still many areas need more additional assistance. Together with the recent break-down conflicts in Cambodia, it signifies that the problem had run ahead of the solution— since the new arrival of asylum-seekers and the resettlement rate are not corresponding. Therefore, in 1979 UNHCR again attempted to seek for new solutions to the build-up crisis.

[95] Ibid., see the Annex I, p. 3.

4.2. The Second stage (1979-1988)

The multiple and complex factors causing of mass refugee exodus following with the denials of asylum and the imbalance between the large numbers arriving and the rate of resettlement, the seeking for new solution was held again between 20 and 21 July 1979 in Geneva—the seats were composed of sixty-five governments, the interested intergovernmental organizations, and grouping of non-governmental organizations.[96] For the conclusion, at this time Governments agreed that they should reduce the situation of a backlog of Laotian, Vietnamese and Cambodian refugees strictly by increasing the rate of resettlement of both asylum-seekers who travel by land and by sea. Following the announcement of pledges totalling $US 160 millions, the framework of the plan of action was not new rather it was a continuation of previous work such as to establish more of the orderly departure programmes in Vietnam, to build more processing centres in the countries of first asylum, to increase more staffs and assistance in the interested countries, or to arrange more rescue operation at the sea etc.[97]

While the emergency relief to the Cambodian people were ongoing alongside with the 1979 Plan,— as so far UNHCR and ICRC had delivered some 300 tons of food, medicines, various materials, and vehicles into the country[98]—the focus was paid heavily to Vietnam because UNHCR believed that such promoting on orderly departure would reduce or stop the new coming of boat people and the loss of asylum-seeker lives at the sea, which could also give a manageable proportion of influxes in the country of first asylum.[99] Regarding the resettlement plan, the meeting reiterated that the principle of asylum and non-refoulement have prevailed and that they need to be respected by all countries, even in the countries where the 1951 Refugee Convention and its 1967 Protocol were absent—however, it was still not of the characteristic of legal binding. As a result, ASEAN Countries only agreed to provide temporary refuge as long as Vietnam promised and committed to upholding orderly departures, and as long as the resettlement was available not only at the regional level but at the global level.

Gradually, years by years, the agreements of 1979 had faced obstacles by the reason that the orderly programme created a side-effect which encouraged more and more people to risk their lives travelling by sea, and that become disproportionate between the rate of new

---

[96] Ibid., pp. 5-6.
[97] Ibid., pp. 7-12.
[98] Ibid., paras 52-59.
[99] Ibid, para 44.

arrivals[100] and the resettlement of them—the presence of large numbers of asylum-seekers still in camps were added up by the new waves of refugee outflow. Promptly with the lack of commitment of the interested government and the resurrection of push-back policy among interested governments, it becomes apparent that the agreement of 1979 is unrealistic, and to that, the new formula is needed.[101]

4.3. The Third stage (1989-1990s)

According to the size, tenacity, and complexity of the refugee problem in the region and the inefficiency of the 1979 Plan of Agreement, the new formula had again been sought by the international community. In 1989, the international community agreed to adopt the Comprehensive Plan of Action (CPA)— at this time the focus shifted from the commitment of the countries of resettlement to between of the countries of origin and countries of first asylum[102]—with five main objectives: first, to end clandestine departures and to promote regular departure programmes in the country of origin; second, to guarantee that all asylum-seekers will be given a temporary refuge while waiting for a status-determination process; third, to provide a refugee status in accordance with the international refugee law; fourth, to resettle those who arrived before and after the cut-off date (14 March 1989); and fifth, to repatriate those who did not fall within the scope of refugee and to reintegrate them in their country of origin.[103]

For political reason, the situation of Cambodian refugees and displaced persons were excluded from the agenda and had been discussed separately. Again UNHCR had focused heavily on promoting and building up the regular departure programme in Vietnam—the government decided to enforce penalties against the clandestine departures. Together with UNHCR, countries of resettlement and countries of transit, they decided to promote and facilitate the regular departure programme with a more orderly system.[104] Apart from the focus on departure programme, resettlement of persons and voluntary repatriation were still a vital component of the plan. By this means, the first-asylum countries agreed to undertake a guarantee of temporary refuge and of refugee determination procedure to those arriving in the

---

[100] UNHCR estimated that the number of asylum-seekers were greater than the crisis of 1979.

[101] Cutts M, "Chapter 4: Flight From Indochina," *The state of the world's refugees, 2000: fifty years of humanitarian action* (UNHCR 2000), p. 86.

[102] UNGA 'Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General' (22 September 1989) UN Doc A/44/523.

[103] Ibid.

[104] Ibid., Annex Declaration and Comprehensive Plan of Action, para 4.

region. Although the respect of international refugee, human rights, and humanitarian law was stressed by UNHCR, it should be noted that the screening process of refugee is supported by national legislation and competent national authority.[105] For promoting voluntary repatriation, the monitoring of the situation in the countries of origin and the guarantee of reintegration would be supported by the international organization, mainly UNHCR. However, the weakness of the CPA is that it allows States to adopt a forced return measure to any person who falls outside the screening test— it implicated that voluntary return should be attempted firstly if fails, alternative procedures will be justified.[106]

For the situation of Cambodian refugees, the meeting in Paris in August 1989 could not deliver the Comprehensive Plan of Action as expected. In contrary, the four rival[107] manage to agree that the Cambodian refugees at the Thai border should be allowed to return home once the peace agreement is reached.[108] Eventually, in 1991, the peace agreement was signed, this placed Cambodia under the control of a United Nations Transitional Authority in Cambodia (UNTAC). The plan required all involved parties to disarm and demobilize 70 per cent of troops, release their political prisoners, open their 'zones' to international inspection and electoral registration, and most importantly, permit all Cambodian refugees displaced in Thailand to return home.[109] Subsequently, UNHCR succeeded in closing the camps and repatriating more than 360,000 people to Cambodia.

5. Challenges

For more than twenty years since the first outflow of refugees in Southeast Asia, the international community thus finally brought to an end of resettlement and of repatriation of refugees and displaced persons in the region—overall during 1975 and 1997 more than millions Vietnamese, Laotians and Cambodians were resettled in other countries and nearly 500,000 of them were repatriated to the countries of origin.[110] On the positive side, the

---

[105] Ibid., Annex Declaration and Comprehensive Plan of Action, para 12.

[106] Ibid., Annex Declaration and Comprehensive Plan of Action, para 14.

[107] The Four political factions are the State of Cambodia under Prime Minister Hun Sen, and the three resistance factions calling the Coalition Government of Democratic Kampuchea are composed of the United National for an Independent, Neutral, Peaceful and Cooperative Cambodia (FUNCINPEC) led by Prince Norodom Sihanouk, the Khmer People's National Liberation (KPNLF) headed by former Prime Minister Son Sann and the Party of Democratic Kampuchea (Khmer Rouge) led by Pol Pot.

[108] The Paris Peace Conference (1989).

[109] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (entered into forced 23 October 1991) Treaty Series No. 111 (1991) (Paris Peace Accords)

[110] Cutts M, "Chapter 4: Flight From Indochina," *The state of the world's refugees, 2000: fifty years of humanitarian action* (UNHCR 2000), figure 4.1 p. 85.

history once has shown the spirits of the international community for resettling those who are victims of war and the strong commitment of interest States throughout the joint rescue operation at sea, the adoption of orderly departure programme and the granting of temporary refuge. Still, those process took nearly twenty years for translating those international standards into reality. On the negative side, the life of refugee protection was based on the current immigration law and the policy. In common, they were subject of penalty for their illegal entry and push-back policy of host countries. In regard to regional protection, ASEAN could not provide much assistance to its Member State and temporary protection because the framework was based on consensus and consultation.

As illustrated above, the phenomenon in ASEAN can be explained by the reason that: First, none of the host countries had ratified the refugee convention and the core human rights instruments—states did not bound by any obligations under the refugee convention and the complementation of human rights instruments was also absent. It is true that the host countries were bound by the customary norm, still, the respect to the rules was the option, not the obligation. For oftentimes, the non-refoulement were violated by the ASEAN host countries, still, the ASEAN organizations could not regulate its member states.

Second, on the front of principle solidarity, UNHCR is faced with difficulties since the principle itself lacked legal basis and could be provided on the ground of humanitarian and sympathy. Giving that ASEAN and its Member States can choose to approach the principle of solidarity anytime as long as they want to. In exchange, the temporary protection was placed on political will—the political bias can be witnessed in some of the provision of CPA.

In sum up, the impairment of principle of solidarity together with the absence of legal obligation under international instruments in ASEAN had cumulate problems for decades in the region.

DRAWING FROM HISTORY: THE CURRENT APPROACH OF REFUGEE PROTECTION AT THE NATIONAL LEVEL

The previous chapter has shown that during the time of Indochinese outflow crisis, many refugees and displaced persons in the region could not attain their full rights due to the non-existence of national legislation and the prevail of ad-hoc politics across the region. The difficulty is also to blame on the absent of international instruments which could be bound by them—all of them were not parties to the 1951 Refugee Convention and its 1967 protocol and the core human rights instruments. As a result, it took for more than fifteen years until the refugee problems were settled down. Following the guidelines of UNHCR, history had shown that the resettlement of refugees in the time of mass influx shall be more organized if those laws and policies are incorporated. To extend, the receiving of protection or assistance will transfer to refugees without delay, if those international principles are implemented at national legislation adequately.

Although there is no longer a large-scale of mass influx, comparing to the one we have seen during the Indochina period, a forced movement within the region still can be witnessed. One of the examples is the situation of Rohingya people, a Muslim minority group living in North-western Rakhine State in Myanmar. With large-scale violence against them by other ethnic groups and Myanmar military since the 1970s, many of them have been forced to seek refuge in neighbouring countries.[111] For ASEAN Countries, the prime destination that Rohingya choose for refuge are Thailand, Malaysia, and Indonesia.[112] In 2016, UNHCR estimated that over 168,000 Rohingya had fled Myanmar since 2012.[113] The rate of outflow reached its peak in last year, since August 2017, when it appears that around 600,000 of Rohingya managed to cross the international border into Bangladesh. According

[111] Mathieson D, *Perilous Plight: Burma's Rohingya Take to the Seas* (Human Rights Watch 2009).

[112] The Overview of UNHCR's operation in Asia and Pacific (2017) estimates that 102,600 and 87,000 of Myanmar refugees were hosted in Thailand and Malaysia respectively <http://www.unhcr.org/59c288937.pdf> accessed 13 May 2018.

[113] UNHCR 'Mixed-Movements in Southeast Asia 2016' <http://www.refworld.org/pdfid/590b18a14.pdf> accessed 13 May 2018.

to the situation, the scale of Rohingya movement is almost similar to the one during the Indochina war. Yet the large-scale of flow did not take place in ASEAN countries, the plausible scenario could also occur in the region—according to the words of UN special rapporteur on the Situation in Myanmar, 'not only the one seeing in Rakhine State but ethnic minority groups in other areas of the country have been persistently victims of the military's campaign of domination and discrimination for generations.'[114] Therefore, the investigation will be focusing continuously on the prime destinations of Rohingya in Southeast Asia such as Thailand, Malaysia, and Indonesia. The purpose is to show to what extent that prompt and coherent response to the situation of mass refugee influx by the ASEAN States has developed since the Indochina war, drawing from the situation of Rohingya refugees.

1. Thailand

For Thailand, Rohingya use both land and seas route to enter the country—some choose Thailand as a final destination, the others use it as a transit country on the journey to Malaysia and Australia.[115] On the front of international refugee rights, Thailand has not yet ratified the 1951 Convention Relating to the Status of Refugees and its 1967 Protocols—however, as stated earlier in the first chapter, the principle of non-refoulement is a norm of customary international law. Nonetheless, for human rights umbrella, Thailand is party to seven core international human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT), and the Convention on the Rights of Persons with Disabilities (CRPD)—there are also regional human rights instruments, a non-binding documents that enshrine the rights of ASEAN people. Despite the fact that Thai government does not accession to the international refugee convention, many of the international refugee rights in time of mass influx reflected under these instruments and that Thailand is undeniably has a duty to protect

[114] 'Lee Y, "Statement by Special Rapporteur on the Situation of Human Rights in Myanmar at the 37th Session of the Human Rights Council" (*OHCHR | Convention on the Rights of the Child* March 12, 2018) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed May 24, 2018

[115] *The Human Rights of Stateless Rohingya in Thailand* (Institute of Human Rights and Peace Studies, Mahidol University 2014), p. 5.

the people who reside within its jurisdiction regarding any kinds of status, including refugees and displaced persons.[116] OOn crucial point, Rohingya should enjoy the temporary protection, at least, in fifth main aspects without discrimination: first, the protection against refoulement; second, the right to life; third, the right to be fair trial and equal before the law; and fourth, the freedom of movement (except on ground of public security); and fifth, the right to the private and family life.

The Constitution of the Kingdom of Thailand B.E. 2560 (2017) enshrines the non-discrimination treatment under Chapter III section 27—although it is controversial among the words using in the title of the Chapter 'the rights and liberties of Thai people', section 27 has replaced to 'all persons'.[117] Given that Rohingya are also entitled to the rights protected under the Constitution equally.[118] However, the treatment of Rohingya (and other refugees) in Thailand have not improved since the Indochinese refugee crisis. With the help of UNHCR, nine temporary camps were successfully established around Thai border connected to Myanmar, namely; Ban Mai Nai Soi, Ban Mae Surin, Mae Ra Ma Luang, Mae La Oon, Mae La, Umpiem, Nu Po, Ban Don Yang and Tham Hin.[119] Still, Thai government perceives the refugee issue not of Thailand but of UNHCR and to that it should be under review of the international community. As a result, the country does not give refugees and asylum-seekers any legal status. In fact, there lacks permanent legislation regulating to the refugee affair or the establishment of formal refugee protection framework—it is true that the situation of mass influx has temporary nature but the explicit framework will help remove some difficulties during the crisis as suggested in Chapter 2.

From the available reports of NGOs, the push-back policy against newcomers still can be witnessed and keep reintroducing at the sea and its frontier.[120] According to the Amnesty International, it appears that during the 2015 boat crisis[121], Thailand's military government enforced a 'push-back' policy to boats filled with hungry and malnourished refugees into

---

[116] The Constitution of the Kingdom of Thailand BE 2560 (Royal Gazette no. 134 section 40 kor) [in thai], see Chapter 2.
[117] Ibid., s 27.
[118] Ibid., s 25.
[119] UNHCR 'Thailand-Myanmar Border Refugee Population Overview (March, 2018)' <https://www.unhcr.or.th/sites/default/files/u11/Thailand_Myanmar%20Border_Refugee%20Population%20Overview_Mar%202018.pdf> accessed 14 May 2018.
[120] UN Human Rights Committee, 'The stakeholder submission to Universal Periodic Review on Thailand' (25 July 2011) UN Doc A/HRC/WG.6/12/THA/1.
[121] The report estimates that almost 5,899 Rohingya had arrived in Thailand since October 2012. (Lefevre AS, "After Burma Violence, Almost 6,000 Rohingyas Arrive in Thailand" (*The Irrawaddy* February 8, 2013) <https://www.irrawaddy.com/news/asia/after-burma-violence-almost-6000-rohingyas-arrive-in-thailand.html> accessed 13 May 2018).

international waters, driving them towards Malaysia and Indonesia.[122] Although Thailand has an obligation towards the protection against refoulement under international refugee law (customary norm) and under international human rights law (the right to life), such push-back policy is obviously against those international standards. The phenomenon could be explained to that the Thai authorities did not prepare for the arrival of Rohingya and because of the non-existence of national law relating to the asylum system or the unpredictable policy.

In addition, there is also unjustified treatment among those who leave in temporary refugee camp situated at the border and those who live outside the camp. As stated earlier that refugees and asylum-seekers in Thailand have no legal status, all of them, who live outside the temporary camp, are subject to arrest, detention, and deportation under the Immigration Act B.E. 2552 (1979).[123] the paragraph 1 of section 54 provides that 'Any alien who enters or come to stay in the Kingdom without permission or when such permit expires or is revoked, the competent official will deport such alien out of the Kingdom.' Given that for those who live outside the camp, Thai authorities do not concern them as victims of violence but persons who have committed a crime, or 'illegal migrant'—the interview adopted in Bangkok suggests that almost all long-term Rohingya migrants had experienced police harassment and arrest, or been deported.[124] It is true that according to the protection of non-penalization for their illegal entry, Thailand has no obligation under the refugee instruments, however, such practice lead to the cycle that perceived against non-refoulement in which has stated earlier that the Thai government is bound by.

In addition, those who been taken to Immigration detention centre located around Thailand, have confronted with indefinite detention—some reports suggest that two young Rohingya died in custody.[125] This leads to violation of freedom of movement since the justification can be adopted on the ground of public order or security, not of the ground of illegal entry. Although the condition of Bangkok detention centre is better than the others, the situation is still defined as 'extremely overcrowded'—The detainees were housed in two

---

[122] Gaughran A. 'Rohingya Fleeing Myanmar Face Difficulties in Thailand (Amnesty International 29 September 2017)' <https://www.amnesty.org/en/latest/news/2017/09/rohingya-fleeing-myanmar-face-difficulties-in-thailand/> accessed 13 May 2018.

[123] Thailand Immigration Act BE 2522 (Royal Gazette no. 96 section 28 special edition, 1979) [in thai].

[124] *The Human Rights of Stateless Rohingya in Thailand* (Institute of Human Rights and Peace Studies, Mahidol University 2014).

[125] Petrova D. 'The Equal Rights Trust - Universal Periodic Review Submission: Thailand and its treatment of Rohingya boat people (14 March 2011)' <http://www.equalrightstrust.org/ertdocumentbank/Thailand_UPR_Submission_140311.pdf> accessed 13 May 2018, para 19.

cells; sixty-six in a large 40 x 12 foot room and ten in a smaller 12 x 12 foot room).[126] For the other detention centre, Human Rights Watch revealed that 'Rohingya boat people' were taken to Phang Nga detention centre on the south of Thailand, while 276 Rohingya men were living in two-cage like cells designed to hold only 15 persons[127] (Indeed, the handling of refugee should be processed promptly).

As stated earlier that persons can be subject of limitation to the freedom of movement on the ground of public security. For those living in a temporary camp, although their life condition has been improved since Thailand government strengthened its partnership with UNHCR.[128] And, in 2012, There was also an introducing of fast-track procedure for family members whose their relatives already registered in the camp.[129] Yet the access to the adequate standard of living, such as shelter, food, education, health services, birth registration and religious practices, is in shortage. Generally, those who live in refugee camp rely merely on the weekly food distributions and humanitarian assistance provided by NGOs and UNHCR.[130] The report of NGOs in 2017 disclosed that the communication to those camps are still hard to reach since most of them are located in the mountain area—some have no electricity grid and phone service.[131] For some camps, the shelters are made of poor materials, during the rainy season the flash floods can cause damage to infrastructure easily.[132] On the front of a healthcare system, the access is very limited and inadequate due to the overcrowded—depression and alcohol addiction are very common among teenagers since going outside the camps will make them become subjects to arrest, detention and deportation.[133] That assessment seems to conform to what UN special rapporteur on the Situation of Human Rights in Myanmar had witnessed during her visit to Thailand. She had

---

[126] Ibid., para 21.

[127] Human rights Watch 'Thailand: End Inhumane Detention of Rohingya' (3 June 2013) <https://www.hrw.org/news/2013/06/03/thailand-end-inhumane-detention-rohingya> accessed 13 May 2018.

[128] *The Human Rights of Stateless Rohingya in Thailand* (Institute of Human Rights and Peace Studies, Mahidol University 2014)

[129] Petcharamesree S, "ASEAN and Its Approach to Forced Migration Issues" (2015) 20 The International Journal of Human Rights 173, p. 178.

[130] Humanity & Inclusion 'Refugees in Thailand' (2017) <http://www.hi-us.org/refugees_in_thailand> accessed 14 May 2018 and UNHCR 'Thailand Fact Sheet (January 2016)'<http://www.unhcr.org/protection/operations/50001e019/thailand-fact-sheet.html> accessed 14 May 2018.

[131] Ibid.

[132] Ibid.

[133] Ibid., the rate of adult suffering from mental illness is increasing in parallel to the number of suicides.

pointed out in her Statement that 'refugees in the camps were unable to enjoy their basic human rights, where they are once again faced with a perilous situation.'[134]

According to these violations, the constitution of Thailand protects those affected by providing that they can invoke the provisions to exercise his or her right to bring a lawsuit or to defend himself or herself in the court.[135] However, since Rohingya are considered as an illegal migrant under the immigration law, it is impossible for them to challenge those and seek remedies from the government.

Besides the establishment of UNHCR Thailand in seeking for refugee solutions in the country, those operation carried out in UNHCR is lack of international basis—since there is no ratification of the Refugee Convention and its protocols, all of the operations must be endorsed by the Thai government.[136] The recent report has exposed the difficulties arising during the programme that there is lack of cohesion between the works of Thai governments and UNHCR. In 2016, the government did not allow them to conduct refugee status determination screenings for ethnic Rohingya from Myanmar.[137] Given that the procedure for moving Rohingya to refugee camps situated across the country cannot proceed.

In sum up, for fifth aspects of temporary protection, neither of them are recognized fully by the government. Although the protections could be enjoyed by the various human rights instruments ratified by the government and their rights are protected under the current Constitution, the life of Rohingya (and other refugees) is still in jeopardy.

2. Malaysia

The second popular destination of 'Rohingya boat people' is in Malaysia—most of them have continued the journey from Bangladesh and Thailand, with current 69,880 registered with UNHCR in the country.[138] Similar to Thailand, the Malaysia government did not ratify the international refugee convention and its protocol. On the front of human rights

---

[134] Lee Y, 'End of Mission Statement by UN Special Rapporteur on the Situation of Human Rights in Myanmar' (Seoul 1 February 2018) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22619&LangID=E> accessed 13 May 2018.

[135] The Constitution of the Kingdom of Thailand B.E. 2560 [in Thai], s.25.

[136] UNHCR 'Thailand Fact Sheet (January 2016)'<http://www.unhcr.org/protection/operations/50001e019/thailand-fact-sheet.html> accessed 14 May 2018.

[137] Human Rights Watch, 'Thailand Events of 2016' <https://www.hrw.org/world-report/2017/country-chapters/thailand> accessed 13 May 2018.

[138] UNHCR, 'Figure at the Glance in Malaysia' <http://www.unhcr.org/figures-at-a-glance-in-malaysia.html> accessed 14 May 2018.

instruments, the country is party to only three core conventions: namely, the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All of Discrimination Against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD). In assessing core aspects of temporary protection, Malaysia has given a hard time for the temporary protection of refugee in countries since a few international instruments are recognized by the government. However, it must recall that the governments still have the obligations towards the international customary law—at least, the protection against refoulement and the right to life.

The guarantee of the right to non-discrimination in the Federal Constitution of Malaya (Constitution of Malaysia, revised in 2007) is weakened in principle—the section 8 provides that there shall be no discrimination against 'citizens' on the ground only of 'religious, race, descent, place and gender'. According to the interpretation of the prohibition against the discriminatory act, it is impossible for Rohingya women and children or any refugees/displaced persons to enjoy such right since all of them are Stateless and foreigners. Malaysia does not have a legal, policy or administrative frameworks for responding to refugee issues. Surprisingly, there are no refugee camps in the country—as provided by UNHCR, refugees and displaced persons are living in urban areas across the country.[139] Most of the refugees in the country, inducing Rohingya, have no legal status and are so-called 'prohibited immigrants'.[140]

On the front of protection against refoulement, those who come into Malaysia's territory will usually be denied access. Under the Immigration Act 1959/63 (amended in 2006), it gives a power to authorities to disembark any unauthorized ship.[141] The reports have shown that the refoulement against refugees are subject to be witnessed in practice. For instance, during the crisis at Andaman sea in 2015, the 'Rohingya boat people' were towed out of the territorial water.[142] In some cases, the faith is unknown—in 2015, the investigation

---

[139] Ibid.

[140] The Immigration Act 1959/63 (amended 1 January 2006), s 8(2)(h) (Malaysia).

[141] Ibid., s 20(4).

[142] Reynolds S and Hollingsworth A, 'Malaysia: Rohingya Hope for Little and Receive less' (Refugees International, 17 November 2015) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=564b3d5b4&skip=0&query=Rohingya%20people&coi=MYS> accessed 14 May 2018.

of Amnesty found that the mixed-migratory of boat people (Rohingya and Bangladeshis) remains in Malaysia but no further clarification of their conditions from the governments.[143]

For the arrest and detention issue, the section 15 of the Immigration Act 1959/63 (amended in 2006) stated clearly that those who enter the country unlawfully shall be liable to fine of up to ten thousand ringgit (around US$2,500) or imprisonment of maximum to five years, or to both.[144] Amnesty International reveals that many of them, once were captured, are transferred to immigration detention facilities where they are held for an indefinite period.[145]

For the standard of living aspect, most of the refugees are systematically victims of abuses by state authorities and the other groups or economic situation. According to the study of Overseas Development Institute (ODI), the absence of legal status renders them to become vulnerable to employment or authorities.[146] the interviews reveal that they are subject to none or partial payment of wages, physical abuse, and sexual harassment.[147] Due to unfair or absent of wage payment, Rohingya/Refugees are subsequently living in crowded and unsanitary conditions. While the others are entitled to the UNHCR cards, their lives are not yet improved—UNHCR card lacks the legal basis, giving them cannot access to work, travel, enroll to school and healthcare facilities provided by governments.[148] In 2017, the progress had been made slightly when the governments have developed a pilot programme to allow 300 Rohingya people to work illegally within the country.[149]

Despite the cooperation between Malaysia and UNHCR on humanitarian grounds, the sign shown by governments still reiterated its position that they are not the primary responsible (as provided in the previous paragraph) for refugee affairs rather the accountabilities are placed for UNHCR and NGOs—similar with Thailand's position, the works of NGOs and UNHCR need to endorsed by the government. Within its limited

---

[143] Amnesty International, 'Malaysia: One Year on, no justice for the 'boat crisis' survivors' (28 May 2016), <https://www.amnesty.org/en/latest/news/2016/05/malaysia-one-year-on-no-justice-for-the-boat-crisis-survivors/> accessed 14 May 2018.

[144] The Immigration Act 1959/63 (amended 1 January 2006), section 15(4) (Malaysia).

[145] Amnesty International, Abused and Abandoned 'Refugees Denied Rights in Malaysia' (2010).

[146] Overseas Development Institute (ODI), 'Livelihood Strategies of Rohingya Refugees in Malaysia 'We Want to Live in Dignity' (June 2016), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=57922bbb4&skip=0&query=Rohingya%20people&coi=MYS> accessed 14 May 2018.

[147] Ibid.

[148] Human Rights Watch, 'submission to the Universal Periodic Review of Malaysia: 31st session of Universal Periodic Review' (29 March 2018), <https://www.hrw.org/news/2018/03/29/submission-universal-periodic-review-malaysia> accessed 14 May 2018.

[149] Ibid., 'the creation of temporary work permits enabling Rohingya refugees to undertake legal employment in Malaysia. However, these schemes have yet to be successfully adopted and implemented – the 2006 plan to issue 10,000 temporary work visas, for example, was halted after a few days amidst corruption claims'.

capacity, UNHCR has provided for all activities related to registering, documenting and determining the status of asylum-seekers and refugees.[150] Nonetheless, towards the government's attitude, UNHCR sometimes cannot perform its duties to the fullest—with its creativity, Rohingya were encouraged to register through an ethnic community rather approach to UNHCR directly.[151]

Overall, the temporary protection in time of mass influx is not fully furnished and cannot gain the benefit from human rights standard since the country bound by a few international instruments. At the national law, Rohingya and other refugees are recognized as prohibited immigrants which will be subjected to punishment under the immigration law. The standards of living of Rohingya people, including those vulnerable groups such as women and children, in Malaysia is still in worries since the reports suggest that the daily life of Rohingya is lower than the international standard. Although the government has the obligation towards the principle of non-refoulement and the right to life, the actual circumstances have pointed out that these protections are being violated at the national jurisdiction.

3. Indonesia

Likewise Thailand and Malaysia, Indonesia is not the party to the 1951 Refugee Convention and its 1967 protocols. For the status of ratification on human rights instruments, Indonesia has ratified eight core documents; namely, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of Child (CRC), International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families and Convention on the Rights of Persons with Disabilities—the governments also give its signatory to Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in 27 September 2010. According to the statistic, therefore, Indonesia become the country that had ratified the most international human rights instruments in ASEAN.

---

[150] UNHCR, 'Malaysia Fact Sheet' (August 2015) <http://www.unhcr.org/protection/operations/56167f6b6/malaysia-fact-sheet.html> accessed 14 May 2018.
[151] Ibid.

In assessing of municipal law and the Constitution of the Republic of Indonesia, the protection of refugees seems to be undertaken seriously by the government. Under the article 28D of the 1954 Constitution of Republic Indonesia (the fourth amendment of 2002)[152], it recognized the 'every person shall have the right of recognition, guarantees, protection, and certainty before a just law, or of equal treatment before the law.' By this means, in 2016, the Governments has adopted the Regulation of the President concerning about the protection of refugees.[153] Unlike Thailand and Malaysia, it obliges all central governments to work closely with UNHCR in the handling of refugees—creditably, it has included local communities, apart from governmental bodies, NGOs and international entities, to participate in refugee affairs. According to the Regulation, the number of provisions has been reflected the international standard of refugee protection and, according to this, it gives benefits to prompt and coherent actions during the time of mass influx:

First, the government has recognised the legal status of refugees. Under article 1(1) of the Regulation, 'foreign refugee' refers to a foreigner who resides within the territory of Indonesia due to well-founded fear of persecution on the grounds of race, ethnicity, religion, nationality, membership of a particular social group and different political opinions, and does not wish to avail him/herself of protection from their country of origin/or has been granted the status of asylum-seeker or refugee by UNHCR.[154] Some comments were made that under the provision, it leaves out those fleeing disasters, instead referring only to those fleeing persecution.[155] Or the using of the word 'within territory' has given that persons who fall within State jurisdiction are not included in a narrow sense. However, the article 3 of the Regulation provides that all of the procedures must duly observe generally applied international provisions. This means that, in the sense, all international refugee standards, including the international customary law, can come into play.

Second, the principle of non-refoulement can be found generally under the Regulation. For instance, the article 4 gives duties to all key factors in handling refugees which, regarding the purpose of formulating policies, include to finding, placement,

---

[152] The Constitution of the Republic of Indonesia (fourth amendment of 2002) <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf> accessed 15 May 2018 [unofficial translation].

[153] Regulation of the President of the Republic of Indonesia Number 125 Year 2016 Concerning the Handling of Foreign Refugees (31 December 2016) <http://www.refworld.org/pdfid/58aeee374.pdf> accessed 15 May 2018 [unofficial translation].

[154] Ibid., art 1(1)

[155] The Converstation, 'Indonesia's refugee—not ideal, but a step in the right direction (6 September 2017) <https://theconversation.com/indonesias-refugee-policy-not-ideal-but-a-step-in-the-right-direction-75395> accessed 15 May 2018.

safeguarding and immigration supervision.[156] These follow with the adoption of search and rescue at Indonesian waters operation and procedure regarding the rescue under Chapter II of the Regulation.

Third, the procedure of refugee status screening and the operation of shelter/temporary shelter are organized and arranged under the laws. For example, article 20 obliges national authorities to collect all personal data of such concerned people and in Chapter III regulates the procedure after the assessment of their status.

Following this Regulation, the national framework can incorporate refugee and human rights affair within the humanitarian basis[157]—all laws concerning immigration and all governmental bodies must take into its concerns. In practice, Rohingya and other refugees are allowed to stay in Indonesia temporarily with the protection of basic human rights on the ground of legal and humanitarian basis. The sign of sympathy has been shown not only at national authorities but also at local communities—Rohingya boat people have been rescued by the local fishermen in Banda Aceh for over a year.[158]

On the front of cooperation with UNHCR, under the new regulation, the main responsibility for refugee protection is not the United Nations agency but falls within the governmental works. While the initiative actions are adopted by local authorities, UNHCR becomes a true supporter—according to the UNHCR website, the key priorities in 2018 are paid on registration and documentation of refugees and those who are persons of concern. For example, UNHCR promised to continue its works towards strategic refugee status determination and identifying appropriate temporary stay and resettlement opportunities.[159]

To sum up, although Indonesia has not yet ratified the 1951 Refugee Convention and its 1967 protocol, the temporary protection seems to gain advantages from the complementation of human rights instruments. The progress can be witnessed from the adoption of the new law in 2016. According to this, the four aspects of temporary protection are recognized before the law. First, the protection against non-refoulement are incorporated

---

[156] Regulation of the President of the Republic of Indonesia Number 125 Year 2016 Concerning the Handling of Foreign Refugees (31 December 2016), art 4(2).

[157] Ibid., art 3.

[158] Reuters, 'Fishermen Rescue Rohingya Muslims at Sea off Indonesia, With More Arrivals Expected' (April 6, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-indonesia/fishermen-rescue-rohingya-muslims-at-sea-off-indonesia-with-more-arrivals-expected-idUSKCN1HD0RG> accessed 15 May 2018 and 'Boat Carrying 76 Rohingya Lands in Indonesia' (April 20, 2018) <https://www.reuters.com/article/us-myanmar-rohingya-indonesia/boat-carrying-76-rohingya-lands-in-indonesia-idUSKBN1HR1CV> accessed 15 May 2018.

[159] UNHCR, 'Global Focus UNHCR operations: Indonesia (2018)' <http://reporting.unhcr.org/node/10335> accessed 15 May 2018.

under the new law and there is the establishment of rescue programme at Indonesia water. Second, Rohingya people (and other refugees) is recognized by the law and becomes a right holder in Indonesia giving that all of those basic human rights protection could be claimed equally by them without non-discrimination. While the standard of temporary treatments for Rohingya and other refugees are continuously improved, the progress still need to be observed carefully in a long-term situation—the challenges suggest that the government are now facing with the management of refugee resettlement and long-term stay.[160]

4. Challenges

There are uncertainties in the development of refugee temporary protection amongst ASEAN host countries according to these two main challenges. The first key challenge for the host countries is that none of them have ratified the 1951 Convention Relating to Status of Refugees and its 1967 Protocol. For the temporary protection, they are, therefore, attached merely to the human rights instruments and the international customary law. According to the status of ratification on human rights instruments, Malaysia is the weakest country that has ratified the human rights treaties; only three core human rights standard had ratified. Towards the policy on refugee protection, the negative side has been shown in Thailand and Malaysia—regrettably, the governments considered themselves as 'bystanders', not the key actors—whereas the further step has been taken in Indonesia.[161]Although the governments have been working closely with UNHCR, the assistance in Malaysia and Thailand are still in limited and need the approval from the governments—in 2016, UNHCR is not allowed to collect the information and conduct the verification status procedure in Thailand.

Second, the non-implementation of refugee rights under the human rights instruments reflects the unresolvable and unmanageable of newcomers and those who already reside in countries. Although The temporary protection can be found and complemented by various human rights instruments and international customary law, the violations still can be seen

[160] Baskoro Y, 'Asylum-seekers, Refugee Stranded in Indonesia's Immigration Detention Centres' (26 January 2018), <http://jakartaglobe.id/news/asylum-seekers-refugees-stranded-indonesias-immigration-detention-centers/> accessed online 20 May 2018. The Conversation, 'Excluded from Indonesian Society, Refugee are vulnerable to homelessness and suicides' (17 April 2018) <https://theconversation.com/excluded-from-indonesian-society-refugees-are-vulnerable-to-homelessness-suicides-94992> accessed onlinve 20 May 2018. Cochrane J, 'Refugee in Indonesia Hope for Brief Stay. Many Be Stuck for Life' (26 January 2018) <https://www.nytimes.com/2018/01/26/world/asia/indonesia-refugees-united-nations.html> aceessed 20 May 2018.

[161] This can be explained throughout the historical and sociology circumstances; Indonesia was once the country that suffered from tsunami in 2006 the most, the majority of Indonesian are muslims, or the ASEAN headquarter situated in Jakarta.

amongst the host countries—according to the reports, the standard of living of refugees in the host countries vary in practice:

On the front of non-refoulement, the 'push-back' policies and the deportation on a ground of illegal entry are continuously upheld at the border of Thailand connected to Myanmar and at the Andaman sea between Thailand and Malaysia—although they are bound by the principle of non-refoulement under the international customary law.

For the protection of human rights, Thailand and Malaysia perceive Rohingya and refugees as 'illegal migrants' or 'prohibited immigrants', giving that the penalization for their illegal entry can be witnessed in the countries—the indefinite detention on ground of illegal entry, which contradicts to the freedom of movement under human rights, is justified in Thailand, whereas the arrest and fine penalty on the ground of illegal entry apply to Rohingya under both Thai and Malaysian legislation.

In daily life aspect, Rohingya people are living in dire situations in Malaysia: on the one hand, they cannot work and that they cannot support themselves; on the other hand, if they could work, they become a subject of unfair paid and abuses at the workplace. In Thailand, the life of Rohingya at the detention centre is unbearable since the government did not proceed any status verification for them and the conditions in detention centre across the country are under the standards of living—they become the most vulnerable group amongst those living in the camp and on the street. Whereas the justification of detention on the ground of public security is adopted, the situation on camp is still in worry.

On the front of Indonesia, the credit is paid to the government since they have committed themselves to the issue. Unlike Thailand and Malaysia, the government has recognized those people as 'foreigner refugees' and to that, they become a legal person who is entitled before the law. In 2016, the new legislation on the handling of refugees was incorporated in the national framework and gives benefit for Rohingya people and the opportunity of UNHCR to provide the resettlement for them. Therefore, the international standard of temporary protection is furnished fully under this law. However, the practices still need for further development. Overall, the development of refugee on the aspect of temporary protection seems to be improved in Indonesia legal system rather than in Thailand and Malaysia.

TEMPORARY PROTECTION AT ASEAN ORGANIZATIONS

The problem arising from mass refugee influx creates many aspects of the issue which required an intensive support from the international community. This, in term of international law, is called the principle of solidarity/burden-sharing. The lesson from Indochina war and the ongoing of Rohingya situation suggests that to react more adequately and speedily, besides the implementation of international law and the enactment of legislation relating to the protection of refugees at the national level, the international involvement has also played a vital role in resolving the crisis. As the previous chapter has shown that the failure of refugee protection in time of mass influx (and in normal time) can be observed in Thailand and Malaysia. In this chapter, ASEAN, the only rule-based organization in the region, will the main focus. It argues that since there were significant changes in a framework and the revision of the ASEAN Statute in 2007, yet the prioritization of refugees in the time of mass influx is still out of concern. In this chapter, two main question will be on the discussion: first, the question of refugee rights on the ground; and second, the principle of solidarity.

1. Human rights standards at the regional level

Although the scale of forced migration in the region may currently be smaller, comparing to the one seen during the Indochina war, the region is again at the forefront of the discussion of mass refugee influx as more than one millions of Rohingya people are subjected to persecuted and forced to leave Myanmar in search of international protection and a better life. Nonetheless, the development of refugees protection in the ASEAN remains in slow progress as the false impression has been that the situation of mass influx is not an imminent problem.

1.1. Legal framework

In principle, there is a counterbalance between the protection of the interest of its Member States and its people. As read from purposes and principles of 2007 ASEAN Charter, the people-oriented approach is reflected by various articles such as Article 1(4) ‘to ensure that the people of ASEAN people live in peace’, Article 1(6) ‘to alleviate poverty’, Article 1(9) ‘to promote sustainable development so as to the high quality of life of its

peoples', Article 1(10) 'to develop human resources for the empowerment of peoples of ASEAN' or Article 1(11) 'to enhance the well-being and livelihood of the peoples of ASEAN' etc. Following to these promises, the human rights bodies have been incorporated within the regional framework under the Article 14, giving that ASEAN and its Member States shall act in accordance with the 'respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice'.

Altogether, this leads to the creation of regional human rights bodies; the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). Nonetheless, the separate refugee framework is still absent at the Regional level, the examination of the standard of temporary protection shall inevitably be adopted under the human rights umbrella.

1.1.1. ASEAN Human Rights Declaration

Being adopted in Jakarta, Indonesia in 2013, the ASEAN member States agreed to undertake a closer steps towards the protection of its people as enshrined in ASEAN Charter. Some assessments can be made towards the issue of refugee rights in time of mass influx.

On the positive side, AHRD gives a number of significant protection in which they could support the minimum protection of refugees and displaced persons while they are temporarily residing in the host countries in time of mass influx. For instance, on the civil rights angle, the right to life is respected alongside with the protection against torture, ill-treatment, and slavery.[162] On the protection of private and family life, Article 19 and 21 state that the protection of family units is perceived as a natural and fundamental unit of society which need to be respected from society and the ASEAN Member States[163] and that every person has the right to free from arbitrary interference with their privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation.[164] For the right to be equal before the law and fair trial, every person is entitled to be presumed innocent until proven guilty in accordance with the law in a fair and public trial,

[162] ASEAN Human Rights Declaration, arts 11, 13 and 14.
[163] Ibid., Article 19.
[164] Ibid., art 21.

by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.[165]

On the negative side, the number of assessments can be observed in following. First, on the front of special treatment of vulnerable people, there is highly doubt in the principle. In general, the protection of human rights should be provided equally to all persons without distinction of any kind such as race, gender, age, language, religion, political or other opinions, national or social origin, economic status, birth, disability or the other status. For international human rights law, the special treatments can also be justified for protecting some of the vulnerable groups. AHRD states in Article 4 that 'the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.' The comment can be made that unlike the 1993 Bangkok Declaration, the protection of vulnerable groups in the regional instrument does not specifically refer to 'refugees and displaced persons', it was written in the broad sense that includes 'vulnerable and marginalized'.[166] Given that there is an uncertainty on the question that whether refugees and displaced persons should be included in the term of 'vulnerable and marginalized groups'.

Second, beyond the issue of protection of the specific group, the guarantee of the right to temporary refuge in another country is incomplete and is adopted in a partial view. According to the Declaration, the rights to freedom of movement and the right to seek and receive asylum are mentioned in Article 15 and 16, respectively. For the protection of freedom of movement, it provides that 'every person has the right to freedom of movement and residence within the borders of each State'. Some experts have pointed out that this right is, in some respects, broader than the rights contained in the International Covenant on Civil and Political Rights (ICCPR)—the Article 12 of ICCPR restricts the freedom of movement to 'everyone lawfully within the territory of a State'.[167] Still, the right to seek and receive asylum can only be implemented 'in accordance with the laws of such State and applicable international agreements'.[168] Most importantly, the protection against refoulement is absent from the instrument. Although there are significant provisions relating to the protection of the right to life and the right not to be tortured or ill-treatment, there is still no clarification on the

[165] Ibid., art 20(1).
[166] Ibid., art 4.
[167] Kneebone S, ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States (Ashgate Publishing Ltd., 2014), p. 312.
[168] Article 16 of ASEAN Human Rights Declaration

principle against non-refoulement—whether or not it is implied under the protection against torture or the arbitrary of life deprivation?

Third, the terms of human rights under AHRD are not absolute and can be subjected to withdraw in any occasions. As read from the Article 7, it states that 'the realization of human rights must be considered in the national and regional context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds'. Following with the Article 8, for the purpose of securing the rights and freedoms of others, the article empowers the Member States to restrict some of rights and freedoms in regard of national security, public order, public health, public safety, public morality or general welfare of the peoples in a democratic society.[169] Therefore, the rights of refugee in time of mass influx may be subjected to the limitation if it becomes outweigh the rights of others concerning to the public order or national security.

Fourth, the huge obstacle to the realization of these rights is that AHRD has no legal-binding effect. Sarcastically, this does give the declaration a power to undermine ASEAN's Member States' human rights obligations under international standards.[170]

1.1.2. The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN

As spoken in the AHRD that women and children are vulnerable groups which deserved a special treatment. The recent development can be found in 2013, on the occasion of 23rd ASEAN summit in Brunei, the ten governments agreed to adopt a new roadmap for an elimination of all forms of violence against women. According to the Declaration, the attention has been drawn towards the issue in much broader sense than in AHRD—this could be explained by the reason that all ASEAN Members States are parties to the Convention on Elimination all Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC).[171] Regrettably, the Declaration is drafted in five pages with full of aims and purposes—this seems to contradict to the perception that the declaration should be more specific on the women and child rights that the Member States wish to guarantee. On the front of the protecting and promoting the rights of women and children, the Declaration

---

[169] Ibid., art 8.

[170] Muntarbhorn V, The ASEAN Human Rights Declaration: A Legal Analysis (American Bar Association, 2014), <https://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf> accessed 21 May 2018.

[171] Muntarbhorn V, *Unity in Connectivity?: Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff 2013), p. 150.

provides that the ASEAN Member States should give more attention and all of the effort especially to those who live under vulnerable conditions including those in disaster, armed conflict, refugee camps, on the move and statelessness.[172] Therefore, whether this statement will be adopted appropriately shall be investigated later in below section.

1.2. Mechanisms

On the front of implementation the rights, ASEAN currently has established three mechanisms to deal with human rights issues, namely ASEAN Intergovernmental Commission on Human Rights (AICHR), ASEAN Commission on the Rights of Women and Children (ACWC) and ASEAN Committee on Migrants Workers (AMW). In regard to refugee temporary protection, AICHR and ACWC will be subject of discussion correspondingly. With the designation to promotion rather than protection, the mandate, and functions of AICHR and ACWC is clearly unrealistic for refugee protection in time of mass influx (and also in general)—the two mechanisms encounter with a number of difficulties in translating its promises into reality. Some observations can be made in the following section.

1.2.1. ASEAN Intergovernmental Commission on Human Rights (AICHR)

According to AICHR Terms of Reference (TOR), the mandate focuses heavily on the promotion of human rights in the region—five from fourteen terms deal with the promotion activities such as raising public awareness, promoting capacity-building of ASEAN countries, encouraging ASEAN countries to ratify the international human rights instruments etc.[173] Interestingly, the rest are written to avoid any political-confrontation such as Article 4.8 'to encourage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN' or Article 4.10 'to obtain information from the ASEAN Member States'. Although the function to perform a protection duty is unclear, on the positive side, AICHR could, if they so desired, interpret its mandates expansively and creatively. For instance, as mentioned, they could seek to obtain information from the member States on the protection and promotion of human rights which could comprise the refugee rights. And also they can

[172] See the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN <http://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW_violenceagainstchildren.pdf> accessed 24 May 2018.

[173] Article 4.3, 4.4, 4.5, 4.6 and 4.7 of Terms of References of ASEAN Intergovernmental Commission on Human rights (AICHR TOR) <http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Inter-Governmental%20CHR.pdf> accessed 24 May 2018.

encourage the Member States to consider acceding to the international refugee protection instruments.[174] On the front of the negative side, it has been shown that the TOR has no explicit provision to enable the body to full monitoring the human rights situation such as to visit the country or to communicate with the victims directly.[175] Most importantly, AICHR has no decision-making power since all works under of human rights umbrella need an approval from the ten member States.[176] These seem to be a huge obstacle for the protection of the interest of its people and to that the implementation of the rights, in reality, is adopted partially.

1.2.2. ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)

For ACWC, the same approach can be found in Article 5.1, 5.3, 5.5, 5.13. and 5.15.[177] In fact, all of the mandates of ACWC were drafted heavily on the focus of promotion and supplementation, not a complementation.[178] Since all of ASEAN countries acceded to the CRC and CEDAW, some of the measures are provided additionally such as to encourage Member States to participate in Universal Periodic Reviews of UN, to collect information for CEDAW and CRC or to assist Member States in preparing of CEDAW or CRC report.[179] In the same front to AICHR, the TOR of ACWC does not provide a direct complaint channel of victims or country-visiting power to the ACWC and the decision-making power falls within the competence of ten member States.[180] In spite of the promise to protect those who live in vulnerable situation, the issue of women and children in refugee camp have not been properly discussed—regarding to the 2012-2016 Work Plan of Action, the focus has been paid to the

---

[174] Ibid., art 4.5.

[175] "Surprisingly, the complaint of human rights violation transfers into ASEAN secretariat's competent. Article 7 of AICHR TOR gives power to ASEAN secretariat for bringing relevant issue to the attention of AICHR" See
Muntarbhorn V, *Unity in Connectivity?: Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff 2013), p. 137.

[176] Article 6.1 of AICHR TOR.

[177] Terms of Reference of ASEAN Commission on the Protection and Promotion of the Rights of Women and Children (2010) <http://www.asean.org/storage/images/2012/Social_cultural/ACW/TOR-ACWC.pdf> accessed 24 May 2018.

[178] Ibid., arts 5.1-5.16.

[179] Ibid., arts 5.6, 5.7, 5.10 and 5.11.

[180] Ibid., Article 7.1.

rights of women migrant workers, the combating against human trafficking and child sexual exploitation.[181]

Overall, the protection of refugee rights at the regional level is very problematic. While the adoption of separate refugee instruments is the best answer, there is still no discussion or preparation for that. Apart from the non-legal binding effect, under the human rights umbrella, the non-refoulement and the rights to seek and receive asylum is incomplete according to the AHRD. Whereas some of the human rights could complement the temporary protection, the huge obstacle is that all of them are not absolute and can be derogated. On the front of the rights of vulnerable groups, the Declaration on Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN does not provide any specific rights provisions rather than focusing on the aims and principles—one of the aims is to give the protection for a refugee who is living in refugee camp. However, when it comes to the implementation of the rights, AICHR and ACWC struggle critically on protecting its people—the farthest that those two can do is to promote, encourage individual states, create a workshop or educate its Member States. To what extent, it is obvious that the development at regional human rights mechanism is not adequate when it comes to the protection of refugee in time of mass influx.

2. Solitary versus solidarity

2.1. The approach of principle of solidarity/burden-sharing in ASEAN at practice (political assessment context)

On the front of the concept of solidarity/burden-sharing, the step forward has been made through the adoption of ASEAN charter in 2007—this is believed that it is a call for more 'constructive engagement'. The requirement for collective responsibility in transboundary challenges or mutual cooperation between ASEAN and its States has also been stressed out in the Charter:

> (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity.[182]

[181] The 16th Meeting of The ASEAN Commission on The Promotion and Protection of The Rights of Women and Children (ACWC) <http://asean.org/the-16th-meeting-of-the-asean-commission-on-the-promotion-and-protection-of-the-rights-of-women-and-children-acwc/> accessed 11 May 2018.

[182] Article 2.2(b) of ASEAN Charter (2007).

Still, the principle of non-interference is maintained and perceived as a major obstacle for the implementation of such statement—from the main fifteen principles, five of them has been referenced to it. As read from the following principles of ASEAN:

> (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
> (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;
> (e) non-interference in the internal affairs of ASEAN Member States;
> (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;
> (k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

As a matter of fact, these two dialogues (the principle of solidarity and the respect of state sovereignty) must be compromised with each other: on the one hand, the respect of state sovereignty maintains the existence of each individual state; on the other hand, the collective responsibility assures that all of the States are continually survived by living in more peace and secure world.[183]As a matter of fact, these two dialogues (the principle of solidarity and the respect of state sovereignty) must be compromised with each other: on the one hand, the respect of state sovereignty maintains the existence of each individual state; on the other hand, the collective responsibility assures that all of the States are continually survived by living in more peace and secure world. In the other words, the principle of collective responsibility must prevail if such problem perceived as a threat to the international community. On the front of refugee and displaced person in time of mass influx, UNHCR reiterated in a number of documents (as stated in Chapter 1) that all international entities play a significant role in dealing with the issue and to that the requirement of solidarity/burden-sharing is upheld for providing an affected countries a humanitarian assistance or justifying any state's practices—the contribution could be undertaken in the country of origin, the country of first-asylum and the country of resettlement.

[183] UNGA, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565.

In assessing of practices, there is uncertainty towards the approach of ASEAN to the principle of solidarity and the principle of non-interference:

In fear of political confrontation, the principle of solidarity was undermined by the principle of non-interference throughout the whole period of the Indochinese refugee crisis. For the role of ASEAN, the humanitarian assistance that the organization had provided for its member states was the adoption of the statement calling for the respect of international law and to promote peaceful measures.[184] Whereas the principle of non-refoulement was violated generally by the ASEAN host countries, the Organization remained silence in believing that the decision of border control is of the State and is justified in any circumstances. Indeed, ASEAN chose not to intervene its Member States in any issues arising from the protection of refugee since it perceived that was an internal affair and could be in contrary to peaceful measure (see further in Chapter 3).

For Rohingya situation, the approach towards the issue is unchanged. The mass human rights violations against Muslim minorities in Myanmar has been tested the responsibility of its Organization by many times in the past ten years. Although the Secretary-general of ASEAN urged the ten Member States to that 'the situation of Rohingya people damages the cooperation in ASEAN and is wider than strategic and national security implications'[185], the response of Member States has spoken louder—Myanmar refused to participate and made a clear statement that the situation was under control.[186] On the front of protecting its people, the attempt to raise the issue for ASEAN Intergovernmental Commission on Human Rights (AICHR) is unsurprisingly failed since it was opposed by some other representatives, who considered it to be an internal issue that should be dealt with at the national level.[187]

These two incidents have shown that the comprehension of the non-interference in ASEAN are unlimited and outweigh the principle of solidarity/burden-sharing. As a result, it has created a situation where the problem has never been treated through collective responsibility but rather left in solitary. In the other words, each State is left to take

---

[184] Tom Ginsburg, "The State of Sovereignty in Southeast Asia," 99 American Society of International Law Proceedings 419 (2005), 419-422.

[185] Petcharamesree S, "ASEAN and Its Approach to Forced Migration Issues" (2015) 20 The International Journal of Human Rights 173.

[186] Ririhena Y, 'ASEAN chief: Rohingya Issue Could Destabilize the Region' (The Jakarta Post, 30 October 2012) <http://www.thejakartapost.com/news/2012/10/30/asean-chief-rohingya-issue-could-destabilize-region.html> accessed 10 May 2018.

[187] Petcharamesree S, "ASEAN and Its Approach to Forced Migration Issues" (2015) 20 The International Journal of Human Rights 173.

individual action based on own interest instead of taking a cooperation towards achieving a common aim.

On the related front, the issue of the environmental catastrophe, ASEAN seems to avoid the principle of non-interference. As a consequence of Cyclone Nargis, Myanmar was severely affected—84,500 were killed and 53,800 went missing.[188] In fact, the scale of affected people is no greater than the one demonstrated in the refugee phenomenon. However, in this scenario, ASEAN chose to uphold the legal obligation to intervene and address the issue collectivity in order to maintain the public order and social cohesion in its societies. In urgent response, ASEAN seems to disregard Myanmar's initial hesitation and convince the Myanmar government to cooperate with the international community in helping the affected people on the ground of humanitarian assistance.[189] According to the special ASEAN Ministerial Meeting, the governments agreed to establish the ad hoc mechanism to 'facilitate the effective distribution and utilization of assistance from the international community, including the expeditious and effective deployment of relief workers, especially health and medical personnel'—the ad hoc mechanism was composed of the implementation plan of action sectors, the financial institution, and the monitoring body.[190] This indicates that there is a reluctant in dealing with the issue of a humanitarian crisis.

To sum up, there is an uncertainty among the upholding of non-interference when it comes to the need for humanitarian assistance in the region; on the front of catastrophe resulting from human rights persecutions, ASEAN is more likely to outweigh the principle of solidarity to a non-interference whereas the situation of Nargis Cyclone, the voice of individual State is disregarded and the act of solidarity/collectivity is prevail. Yet the answer to the approach, towards individual action and solidarity, is still kept in the Pandora's box. The most likely scenario for accountability should, therefore, be adopted through the lens of regional instruments and frameworks.

---

[188] IFRC, Myanmar: Cyclone Nargis 2008 Facts and Figures (3 May 2011) <http://www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/myanmar-cyclone-nargis-2008-facts-and-figures/> accessed 10 May 2018.

[189] Seah D, The ASEAN Charter (International and Comparative Law Quarterly: Cambridge University Press, 2009), 1-16.

[190] Special ASEAN Foreign Ministerial Meeting Chairman's Statement (2008) <http://asean.org/special-asean-foreign-ministers-meeting-chairman-s-statement-singapore/> accessed 21 May 2018). Creac'h Y and Fan L, 'ASEAN's Role in the Cyclone Nargis Response: Implications, Lessons and Opportunities' (Humanitarian Exchange no. 14, 2008) <https://odihpn.org/magazine/asean%C2%92s-role-in-the-cyclone-nargis-response-implications-lessons-and-opportunities/> accessed 21 May 2018.

2.2. Translating the principle of solidarity and burden-sharing into action

As mentioned above, this section will examine the ASEAN mechanism on the capacity front in supporting its Member States towards the situation of mass influx apart from the uncertainty in its approach. Expanding from 1967 Bangkok Declaration, the new legal framework, legal personality, and commitments are introduced in thirty pages—it requires ASEAN and its Member States to act in accordance with several principles.[191] As read from the preamble of Charter, one of the main aims of ASEAN is to:

> 'CONVINCED of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities'.

Conversely, this seems to be far-reaching for the Organization. As happened in the Human Rights mechanisms, the original framework of ASEAN remains unchanged. According to the ASEAN framework, on the front of decision-making power, the superior organs is reserved for the Annual meeting calling 'ASEAN Summit'—its power is also extended to the discussion about any emergency situations affecting ASEAN and to adopt appropriate measures[192] Whereas any ASEAN bodies may bring the issue before the Meeting, Article 7.2(b) gives a power to ten members to decide on the outcome.[193] Some might say that this could lead to the adoption of Comprehensive Plan of Action or the implementation of regional assistance, however, the process of decision-making still cannot avoid the political tension and this cannot serve as a readiness response to the situation as promised—the annual meeting held twice a year and, the special meeting can be held by the competence of ASEAN chairmanship.

Nevertheless, the dilemma can also be read from the Article 20 of ASEAN Charter. In paragraph 1 of the Article states clearly that the decision-making must be based on consultation and consensus, whereas the paragraph 2 under the same article provides the solution in case of the consensus cannot be achieved that ASEAN may decide how specific decision can be made.[194] Again, those two vague principles open for an indefinite answer

---

[191] Charter of Association of Southeast Asian Nations (2007).
[192] Ibid., art 7.2(d).
[193] Ibid, art 7.2(b).
[194] Ibid., arts 20.1 and 20.2.

regarding the decision-making issue—whether that specific decision should be based on consensus or not.

Apart from the centralization of decision-making power, the approach of those other ASEAN mechanisms can not subsequently fulfill the standard of international assistance and remains weak. Although, the Charter sets out the framework for institutional accountability as well as a compliance system. Still, The main obstacle is that the approach undertaken in each ASEAN organs is based heavily on supplementation of ASEAN countries rather than complementation to them. In other words, the ASEAN mechanisms are not designed for taking any proactive action. The evidence can be found in the ASEAN Charter and the Work Plan of Action of each body:

ASEAN Community, the latest subordinate organs of ASEAN Ministerial bodies, is created in the 2007 ASEAN Charter to ensure that each of ASEAN countries is maintained its harmonious environment in three different aspects such as economic, political and security, and socio-cultural. The three main responsible areas are 'to ensure the implementation of a decision of ASEAN Summit, 'to coordinate the work with different sectors and the other Community Councils and ' to submit the reports or recommendations to ASEAN Summit'.[195] On the question of how to ensure the implementation, the blueprint of ASEAN provides that it shall 'promote the institutional presence at national level' or 'raise awareness of the existence of the Community'.[196] This means that the greatest capacity for implementation of the decision of ASEAN Summit for ASEAN Community Council is to focus on the promotion and raising awareness at the national level.

For the original organs of ASEAN since 1967, Secretary-General of ASEAN has been seen as a guardian of ASEAN Charter and other subsequent instruments or agreements. In principle, it has the responsibility 'to facilitate and monitor progress in the implementation of ASEAN rules and principles' and 'to report or give recommendations for the other ASEAN bodies or the Member States'.[197] In this sense, it generally accepts that the support from Secretary-General of ASEAN will be adopted in terms of consultation and recommendation. Interestingly, the term of facilitating and monitoring invites the question of how far this should be adopted. However, in the Statement of the latest Secretary-General of

[195] Ibid., art 9.4
[196] ASEAN Political-Security Community BluePrint 2025 (ASEAN Secretariat, 2016).
[197] Ibid., Article 11.2(b) and (d).

ASEAN, H.E. Dato Lim Jock Hoi confers those terms as nothing more than technical assistance in a way of consultation.[198]

On the front of the common budget of ASEAN, there was an establishment of ASEAN Foundation, the only current permanent budgetary organs under the ASEAN Charter. Its purpose is 'to support other ASEAN bodies by promoting awareness'.[199] Undeniably, the far reach of budgetary support is to promote and provide technical assistance to each programme adopted by ASEAN bodies which, as above described, completely involves with the institutional capacity-building through awareness-raising or technical assistance.[200] Hence, the scope of financial assistance for the Member States falls outside the scope of principle. Given that Member States, if needed, must bring an issue into the ASEAN Meeting in which its power of approval depends on, again, the consensus of ten Member States.

For the assessment, most of ASEAN organs still cover by the networking, consultation, and consensus aspects. Despite those principles are fundamental, in the time of mass influx, the protection of refugee requires more concrete action and effective response. Ironically, the current assistance that ASEAN could provide for its Member States is to promote and provide technical assistance.

4. Challenges

In the hand of ASEAN, the enjoyment of the protection for refugee in time of mass influx is problematic. In principle, the ASEAN Charter promises to protect the interest of its Member States and its people equally throughout the strengthening of cooperation and institution-building.[201] Nevertheless, the improvements are not done properly. On the highway towards the principle of solidarity, the line is uncertain and surrounded by the political tension. In terms of refugee rights, the separate instrument is absent and the rights provided under the human rights umbrella is impaired. Consultation, consensus, and non-confrontation have been referred to its mechanisms. As a matter of fact, the competence of ASEAN is limited to the areas of information, exchange, training of responsible officials and

---

[198] H.E. Dato Lim Jock Hoi Secretary-General of ASEAN, the speech at the Handover Ceremony for the Transfer of Office of the Secretary-General of ASEAN (Jakarta, 2018).
[199] Article 15 of the ASEAN Charter (2007).
[200] Memorandum of Understanding on the Establishment of ASEAN Foundation (revised, 2000) <https://cil.nus.edu.sg/wp-content/uploads/2017/07/2000-Revised-MOU-on-ASEAN-Foundation-1.pdf> accessed 24 May 2018.
[201] The Preamble of ASEAN Charter (2007).

law enforcement agencies, and workshops. These suggest that ASEAN does not concern the refugee protection in time of mass influx (or in normal situation) as a significant problem and the terms of ‘effective response’ have been turned into propaganda.

CONCLUSION AND CURRENT CHALLENGES

In assessing of international standards, history, and current situation, the conclusion can be drawn that the international refugee protection in time of mass influx can not fully authorize in Southeast Asia.

For the Indochina crisis, the arrangement on refugees protection between ASEAN countries had been continuing for decades before the settlement. History shows that the several attempts had been adopted until the appropriate solutions were identified. According to the fact, the situation exposed two main difficulties in the arrangement of refugee protection in Southeast Asia. First, all of ASEAN countries did not recognize the international standards and to that, they did not implement those rules into the national framework. Second, the arrangements between ASEAN countries is lack of solidarity and merely depends on the political will.

Drawing from the lessons, the examination of temporary protection in ASEAN are adopted further in the current situation of ASEAN host countries by using the example of Rohingya people. The outcome suggests that the obstruction of the enjoyment of the protection of refugee is left unchanged. At present, most of the host countries still recognize a refugee as an illegal migrant or so-called a prohibited migrants, giving that Rohingya and other refugees can not avail themselves for the temporary protection—the violation of non-refoulement, the penalization of refugees for their illegal entry and the undermined standard of living still can be witnessed in Thailand and Malaysia. At the regional level, the shift of thought on people-oriented are developed steadily. Although there are separate human rights instruments, the realization of refugee rights is unfinished. On the front of monitoring mechanisms, networking, consultation, and consensus are the core principles. Indeed, they are embedded in every ASEAN mechanisms. This can conclude that the complementation of regional standards limits itself to only technical assistance and is governed fully by a political factor.

According to these obstacles in the region, the root cause can be attributed to the impairment of the international obligations towards the temporary protection of refugee and the principle of solidarity:

The current legal and practical notion suggests that the international refugee protection measures in time of mass influx depend on the refugee convention, the international human rights instruments, and the customary law. As a result, the obligation to the protection of refugee would be enforced if states are parties to each of international instruments. Regrettably, none of the host countries in Southeast Asia are parties to the 1951 Refugee Convention and its 1967 protocol. Although, some of the rules in temporary protection could be circumvented by the international human rights law and the international customary law. As mentioned earlier, the violation of the international rules still can be observed in practices—the problem is made so obvious in Malaysia since the government are parties to only three human rights instruments such as CEDAW, CRC, and CRPD or the refugee admission still perceived by ASEAN Countries as the option, not the obligation towards the protection against non-refoulement.

Whereas the violations of international obligation on refugee affairs in Southeast Asia are ongoing, the reluctance is also combined with the ineffective of the principle of solidarity. The rule itself is based heavily on the sign of sympathy and the humanitarian basis. Giving that the justification on the principle varies, depending on State's discretion. In addition, the forms of sympathy and humanitarian basis are explicitly vague. There have no minimum standards for international entities to justify its action. Altogether, the implication is that countries can opt to limit its international assistance in form of encouragement while no one could argue against that.

BIBLIOGRAPHY

Literatures

Coles GJL, “Temporary Refuge and the Large Scale Influx of Refugees” (1978) 7 Australian Year Book of International Law 189

Cutts M, “Chapter 4: Flight From Indochina,” *The state of the world's refugees, 2000: fifty years of humanitarian action* (UNHCR 2000)

Davies SE, “Realistic Yet Humanitarian? The Comprehensive Plan of Action and Refugee Policy in Southeast Asia” (2008) 8 International Relations of the Asia-Pacific 191

Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*(Cambridge University Press 2007)

Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (Oxford University Press 2007)

The Human Rights of Stateless Rohingya in Thailand (Institute of Human Rights and Peace Studies, Mahidol University 2014).

Hurwitz AÌG, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009)

Jackson IC, *The Refugee Concept in Group Situations* (Nijhoff 1999)

KNair KK, *ASEAN-Indochina Relations since 1975: the Politics of Accommodation* (Strategic and Defence Studies Centre, Research School of Pacific Studies, Australian National University 1984)

Kneebone S, ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States (Ashgate Publishing Ltd., 2014).

Mathieson D, *Perilous Plight: Burma's Rohingya Take to the Seas* (Human Rights Watch 2009)

McInnes C and Rolls MG, *Post-Cold War Security Issues in the Asia-Pacific Region* (F Cass 1994).

Muntarbhorn V, *Developing Regional Mechanisms: Process and Progress* (Martinus Nijhoff publishers 2013)

Muntarbhorn V, *Indochinese Refugees in Thailand: Prospects for Longstayers* (Public Affairs Institute 1989)

Muntarbhorn V, *The Status of Refugees in Asia* (Clarendon Press 1992)

Muntarbhorn V, *Unity in Connectivity?: Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff 2013).

Petcharamesree S, "ASEAN and Its Approach to Forced Migration Issues" (2015) 20 The International Journal of Human Rights 173

Robinson WC, *Double Vision: a History of Cambodian Refugees in Thailand* (Asian Research Center for Migration, Institute of Asian Studies, Chulalongkorn University 1996)

Seah D, The ASEAN Charter (International and Comparative Law Quarterly: Cambridge University Press, 2009)

Tom Ginsburg, "The State of Sovereignty in Southeast Asia," 99 American Society of International Law Proceedings 419 (2005).

Weis P, *The Refugee Convention, 1951: the Travaux Preparatoires Analysed* (Cambridge University Press 1995)

UN Documents

Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (entered into forced 23 October 1991) Treaty Series No. 111 (1991) (Paris Peace Accords)

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

UNGA, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565.

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

UNGA Res 41/29 A/RES/41/29 (31 October 1986)

UNGA Res 1388 (XIV) A/RES/1388 (20 November 1959)

UNHCR 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007)

UNHCR 'Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General' (7 November 1979) UN Doc A/34/627.

UNHCR EXCOM Conclusion no. 15 (XXX) 'Refugees without an Asylum Country' (1979)

UNHCR EXCOM Conclusion no. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981)

UNHCR EXCOM Conclusion no. 44 (XXXVII) 'Detention of Refugees and Asylum-Seekers' (1986)

UNHCR EXCOM Conclusion no. 52 (XXXIV) 'International Solidarity and Refugee Protection' (1988)

UNHCR EXCOM Conclusion no. 77 (XLVI) 'General' (1993)

UNHCR EXCOM Conclusion no. 80 (XLVII) 'Comprehensive and Regional approaches within a Protection framework' (1996)

UNHCR EXCOM Conclusion no. 85 (XLIX) 'Conclusion on International Protection' (1998)

UNHCR EXCOM Conclusion no. 89 (LI) 'General' (2000)

UNHCR EXCOM Conclusion no. 91 (LII) 'Registration of Refugees and Asylum-seekers' (2001)

UNHCR EXCOM Conclusion no. 94 (LIII) 'Civilian and Humanitarian Character of Asylum' (2002)

UNHCR EXCOM Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004)

UNHCR 'Meeting on Refugees and Displaced Persons in South-East Asia, Convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979 and subsequent developments' (7 November 1979) UN Doc A/34/627

UNHCR 'Note on Non-Refoulement (Submitted by the High Commissioner)' (23 August 1977) UN Doc EC/SCP/16 (1981)

UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx' (1981) EC/SCP/16 (1981)

UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21-24 April 1989)' (17 July 1981) UN Doc EC/SCP/16/Add.1

UNHCR 'Report of the United Nations High Commissioner for Refugees' (New York 23 November 1956) UN Doc A/C.3/SR.690.

UN Committee Against Torture, 'General Comment No. 1' in 'The Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)' (21 November 1997) UN Doc CAT/C/60/R.2 (2017)

UN Human Rights Committee, 'General Comment No. 24' in 'Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/21/Rev.1/Add.6

UN Human Rights Committee, 'General Comment No. 31' in 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13

UN Human Rights Committee, 'The stakeholder submission to Universal Periodic Review on Thailand' (25 July 2011) UN Doc A/HRC/WG.6/12/THA/1

Vienna Convention on the Law of treaties (Concluded 23 May 1969, entered into forced 27 January 1980) 1155 UNTS 333 (VCLT).

ASEAN's Instruments

ASEAN Human Rights Declaration (2013)

ASEAN Political-Security Community BluePrint 2025 (ASEAN Secretariat, 2016).

Charter of Association of Southeast Asian Nations (2007).

National Legislations

Thai Alien Registration Act BE 2497 [In Thai]

Thailand Immigration Act BE 2522 (Royal Gazette no. 96 section 28 special edition, 1979) [In Thai]

The Constitution of the Kingdom of Thailand BE 2560 (Royal Gazette no. 134 section 40 kor, 2560) [In Thai].

The Dutch Royal Decree no 330: Royal Decree on Admission of Aliens into Residence in Indonesia (1949) (Indonesia)

The Immigration Act 1959/63 (Revised 1975) (Malaysia)

The Immigration Act 1959/63 (Act 155) (amended 1 January 2006) (Malaysia)

The Immigration Act 1963 (Original Enactment: M. Ordinance 12 of 1959) (Singapore)

The Philippine Immigration Act of 1940 (Commonwealth Act no. 613, Official Gazette)

Online Sources

Albert M, " Prima Facie Determination of Refugee Status: an Overview and Its Legal Foundation" (Refugee Studies Centre vol. 55, January 2010) <https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf>

Amnesty International, ‘Malaysia: One Year on, no justice for the ‘boat crisis’ survivors’ (28 May 2016), <https://www.amnesty.org/en/latest/news/2016/05/malaysia-one-year-on-no-justice-for-the-boat-crisis-survivors/>

The ASEAN Declaration (Bangkok Declaration) 8 August 1967 <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>

Audrey Gaughran ‘Rohingya Fleeing Myanmar Face Difficulties in Thailand (Amnesty International 29 September 2017)’ <https://www.amnesty.org/en/latest/news/2017/09/rohingya-fleeing-myanmar-face-difficulties-in-thailand/>

Baskoro Y, ‘Asylum-seekers, Refugee Stranded in Indonesia’s Immigration Detention Centres’ (26 January 2018), <http://jakartaglobe.id/news/asylum-seekers-refugees-stranded-indonesias-immigration-detention-centers/>

Cochrane J, ‘Refugee in Indonesia Hope for Brief Stay. Many Be Stuck for Life’ (26 January 2018) <https://www.nytimes.com/2018/01/26/world/asia/indonesia-refugees-united-nations.html>

The Constitution of the Republic of Indonesia (fourth amendment of 2002) <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf> accessed 15 May 2018. [unofficial translation].

The Conversation, ‘Excluded from Indonesian Society, Refugee are vulnerable to homelessness and suicides’ (17 April 2018) <https://theconversation.com/excluded-from-indonesian-society-refugees-are-vulnerable-to-homelessness-suicides-94992>

The Converstation, ‘Indonesia’s refugee—not ideal, but a step in the right direction (6 September 2017) <https://theconversation.com/indonesias-refugee-policy-not-ideal-but-a-step-in-the-right-direction-75395> accessed 15 May 2018.

Creac’h Y and Fan L, ‘ASEAN’s Role in the Cyclone Nargis Response: Implications, Lessons and Opportunities’ (Humanitarian Exchange no. 14, 2008) <https://odihpn.org/magazine/asean%C2%92s-role-in-the-cyclone-nargis-response-implications-lessons-and-opportunities/>

The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN <http://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW_violenceagainstchildren.pdf>

Humanity & Inclusion 'Refugees in Thailand' (2017) <http://www.hi-us.org/refugees_in_thailand>

Human Rights Watch, 'submission to the Universal Periodic Review of Malaysia: 31st session of Universal Periodic Review' (29 March 2018), <https://www.hrw.org/news/2018/03/29/submission-universal-periodic-review-malaysia>

Human rights Watch 'Thailand: End Inhumane Detention of Rohingya' (3 June 2013) <https://www.hrw.org/news/2013/06/03/thailand-end-inhumane-detention-rohingya>

Human Rights Watch, 'Thailand Events of 2016' <https://www.hrw.org/world-report/2017/country-chapters/thailand>

IFRC, Myanmar: Cyclone Nargis 2008 Facts and Figures (3 May 2011) <http://www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/myanmar-cyclone-nargis-2008-facts-and-figures/>

Joint Communique of the Twelfth ASEAN Ministerial Meeting Bali 28-30, June 1979 <http://asean.org/?static_post=joint-communique-of-the-twelfth-asean-ministerial-meeting-bali-28-30-june-1979>

Joint Communique Of The 22nd ASEAN Ministerial Meeting Bandar Seri Begawan, 3 – 4 July 1989 <http://asean.org/?static_post=joint-communique-of-the-22nd-asean-ministerial-meeting-bandar-seri-begawan-3-4-july-1989>

Lee Y, 'End of Mission Statement by UN Special Rapporteur on the Situation of Human Rights in Myanmar' (Seoul 1 February 2018) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22619&LangID=E>

'Lee Y, "Statement by Special Rapporteur on the Situation of Human Rights in Myanmar at the 37th Session of the Human Rights Council" (March 12, 2018)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed May 24, 2018

Lefevre AS, "After Burma Violence, Almost 6,000 Rohingyas Arrive in Thailand" (*The Irrawaddy* February 8, 2013) <https://www.irrawaddy.com/news/asia/after-burma-violence-almost-6000-rohingyas-arrive-in-thailand.html>

Memorandum of Understanding on the Establishment of ASEAN Foundation (revised, 2000) <https://cil.nus.edu.sg/wp-content/uploads/2017/07/2000-Revised-MOU-on-ASEAN-Foundation-1.pdf>

Muntarbhorn V, The ASEAN Human Rights Declaration: A Legal Analysis (American Bar Association, 2014), <https://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>

Overseas Development Institute (ODI), 'Livelihood Strategies of Rohingya Refugees in Malaysia 'We Want to Live in Dignity' (June 2016), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=57922bbb4&skip=0&query=Rohingya%20people&coi=MYS>

Petrova D. 'The Equal Rights Trust - Universal Periodic Review Submission: Thailand and its treatment of Rohingya boat people (14 March 2011)' <http://www.equalrightstrust.org/ertdocumentbank/Thailand_UPR_Submission_140311.pdf>

Terms of Reference of ASEAN Commission on the Protection and Promotion of the Rights of Women and Children (2010) <http://www.asean.org/storage/images/2012/Social_cultural/ACW/TOR-ACWC.pdf>

Terms of References of ASEAN Intergovernmental Commission on Human rights <http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Inter-Governmental%20CHR.pdf>

'UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx' (15 September 2000) <http://www.refworld.org/docid/437c5ca74.html>

UNHCR, ‘Figure at the Glance in Malaysia’ <http://www.unhcr.org/figures-at-a-glance-in-malaysia.html>

UNHCR, ‘Global Focus UNHCR operations: Indonesia (2018)’ <http://reporting.unhcr.org/node/10335>

UNHCR, ‘Malaysia Fact Sheet’ (August 2015) <http://www.unhcr.org/protection/operations/56167f6b6/malaysia-fact-sheet.html>

UNHCR ‘Mixed-Movements in Southeast Asia 2016’ <http://www.refworld.org/pdfid/590b18a14.pdf>

UNHCR ‘Thailand-Myanmar Border Refugee Population Overview (March, 2018)’ <https://www.unhcr.or.th/sites/default/files/u11/Thailand_Myanmar%20Border_Refugee%20Population%20Overview_Mar%202018.pdf>

UNHCR ‘Thailand Fact Sheet (January 2016)’<http://www.unhcr.org/protection/operations/50001e019/thailand-fact-sheet.html>

Regulation of the President of the Republic of Indonesia Number 125 Year 2016 Concerning the Handling of Foreign Refugees (31 December 2016) <http://www.refworld.org/pdfid/58aeee374.pdf> accessed 15 May 2018 [unofficial translation].

Reuters, ‘Boat Carrying 76 Rohingya Lands in Indonesia’ (April 20, 2018) <https://www.reuters.com/article/us-myanmar-rohingya-indonesia/boat-carrying-76-rohingya-lands-in-indonesia-idUSKBN1HR1CV>

Reuters, ‘Fishermen Rescue Rohingya Muslims at Sea off Indonesia, With More Arrivals Expected’ (April 6, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-indonesia/fishermen-rescue-rohingya-muslims-at-sea-off-indonesia-with-more-arrivals-expected-idUSKCN1HD0RG>

Reynolds S and Hollingsworth A, ‘Malaysia: Rohingya Hope for Little and Receive less’ (Refugees International, 17 November 2015) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=564b3d5b4&skip=0&query=Rohingya%20people&coi=MYS>

Ririhena Y, ‘ASEAN chief: Rohingya Issue Could Destabilize the Region’ (The Jakarta Post, 30 October 2012) <http://www.thejakartapost.com/news/2012/10/30/asean-chief-rohingya-issue-could-destabilize-region.html>

The Overview of UNHCR’s operation in Asia and Pacific (2017) <http://www.unhcr.org/59c288937.pdf>

Shay C, “The Hmong and the CIA” *TIME* (December 30, 2009) <http://content.time.com/time/world/article/0,8599,1950590,00.html> accessed April 13, 2018.

Special ASEAN Foreign Ministerial Meeting Chairman's Statement (2008) <http://asean.org/special-asean-foreign-ministers-meeting-chairman-s-statement-singapore/>

Treaty of Amity and Cooperation in Southeast Asia (24 February 1976) <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/> accessed 22 May 2018.

The 16th Meeting of The ASEAN Commission on The Promotion and Protection of The Rights of Women and Children (ACWC) <http://asean.org/the-16th-meeting-of-the-asean-commission-on-the-promotion-and-protection-of-the-rights-of-women-and-children-acwc/>