

**“Asylum Law – Surrogate Protection:  
Asian Perspectives, Challenges and Contributions”**  
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In recent years there has been a shift in the conceptualisation of the UN. Once an organisation founded on the protection of state security, it has developed its guiding policy into one where state security is subservient to and conditional upon human security. This has been given voice principally through the ‘Responsibility to Protect’ (R2P), which asserts that the international community has a right and a duty to intervene in states that cannot or will not protect the human rights of their people against “genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law”.<sup>1</sup> Secretary-General Ban Ki-Moon endorsed the R2P in January of this year, releasing the first comprehensive UN Document on the concept, entitled ‘Implementing the Responsibility to Protect’.<sup>2</sup> It outlines measures for the General Assembly necessary to render the norm operational.

The rethinking of sovereignty and its acceptance by State parties has a flow on effect for each state in terms of their implementation of and obedience to international law, particularly human rights obligations. This developing principle appears at odds with traditional principles in Asia<sup>3</sup>, which have always emphasised respect for the sovereignty and territorial integrity of all nations and non-interference in the internal affairs of other States.<sup>4</sup> However, the normative shift at the global level has influenced policy in Asia to a certain extent.

Traditional values imbue Asian asylum law, leading to a lack of formal mechanisms for dealing with migration movements. Some countries have shown an historical generosity to (certain movements of) refugees, but there has been little consistency or certainty in these approaches. In order to face current challenges involving refugees and other displaced persons in the region, the traditional approach may need to be tempered by emerging global understandings of human security and protection. Given that there have been some steps in this regard in the Asian context, it is suggested that there are possibilities for reform which conform with both Asian values and international human rights obligations. Such options include the creation of a regional document pertaining to refugee status determination, or accession to the 1951 Refugee

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<sup>1</sup> *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change* (UN Doc. A/59/565) at 57, para [203].

<sup>2</sup> Ban Ki-Moon *Implementing the Responsibility to Protect: Report of the Secretary General* (UN Doc. A/63/677, 30 January 2009).

<sup>3</sup> This paper identifies Asia broadly, but with a concentration on Eastern, South-central and South-eastern Asia as defined by the UNDP World Population Prospects Database.

(See <http://esa.un.org/unpp/definition.html>). The following ten States will be focused on in particular: Cambodia, China, India, Indonesia, Japan, Malaysia, Myanmar, South Korea, the Philippines and Thailand.

<sup>4</sup> See for example the principles adopted by ASEAN States in Article 2 of the Association’s Treaty of Amity and Cooperation (Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976).

Convention coupled with an approach to decision-making within the framework of international human rights instruments. The benefits of either a regional, or an international law, approach are manifold.

Part I of this paper provides an overview of the concept of human security and the R2P, juxtaposing this with traditional Asian values. Part II moves from the general to the particular, categorising current treaty and constitutional obligations in asylum and human rights among certain Asian states. It also explores current Asian asylum practice. Part III asks whether, in light of the international reconception of sovereignty and security through developments like the R2P, change is desirable in Asian asylum law to realign practice with international legal philosophy. In this regard, two approaches will be suggested: the first, an international approach grounded in the 1951 Refugee Convention, as exemplified through New Zealand examples of refugee status determination; and the second, a regional approach, whereby Asian norms could find expression in an arrangement tailored to meet the unique Asian situation. Finally, Part IV clarifies the benefits of both alternate approaches: the focus on burden-sharing, the creation of consistent and harmonious asylum law and systems, and a depoliticisation of asylum decision-making in the region.

## I. AN OVERVIEW OF HUMAN SECURITY

Human security is an alternate perspective to the traditional national security concept. The two types have distinct objects: the traditional notion revolving around the state; whereas human security proponents argue that the proper referent should be the individual. Traditional security policies are designed to promote state demands, with other interests subordinated to the state. On the contrary, human security focuses on protecting individuals. Human security also broadens the scope of protection beyond mere safeguarding from external aggression (as in traditional security) to include, *inter alia*, environmental pollution, infectious diseases, and economic deprivation.<sup>5</sup>

The UN High-Level Panel report in 2005<sup>6</sup> contained 101 recommendations to bring about a redefinition of security to include both state and human security. In March 2005, the then Secretary-General of the UN, Kofi Annan, issued his own report in response, concentrating on development (“freedom from want”), security (“freedom from fear”) and human rights (“freedom to live in dignity”).

These reports were discussed at the World Summit in 2005 in order to decide steps for reform. The outcome was a pledge by the General Assembly to recognise their new shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The World Summit Outcome Document acknowledged this pledge at paragraphs [138]-[139].

This notion of sovereignty as responsibility is moving ever closer to a widespread acceptance at an international level. Paragraphs [138] and [139] from the World Summit Outcome Document as referred to above were reproduced in a Security Council Resolution authorising the deployment of UN peacekeeping troops to

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<sup>5</sup> United Nations Development Programme *Human Development Report 1994* (Oxford University Press, New York, United States of America, 1994) Chapter 2 “New Dimensions of Human Security”.

<sup>6</sup> *Supra* n. 1.

Darfur.<sup>7</sup> More recently, the current Secretary-General has written a report on the implementation of the R2P as operational policy. Ban Ki-Moon recommended that the General Assembly meet this year to consider the ways to take the 2005 commitment forward.

Anne-Marie Slaughter believes this reform is a “radical reconception” of security, solidarity and sovereignty.<sup>8</sup> There are two important points from this: first, that human security prevails over state security. The State must protect the welfare of its own peoples. In fact, sovereignty exists as a *means* for a state to ensure the security of its citizens.<sup>9</sup> Second, the state now has an additional duty to meet its international obligations. As the High-Level Panel put it: “States not only benefit from the privileges of sovereignty but also accept its responsibilities”.<sup>10</sup> The result is *conditional* sovereignty.<sup>11</sup>

In contrast are the traditional principles upheld throughout Asia, as exemplified by the Association of Southeast Asian Nations (ASEAN). Their guiding values are often referred to as the “ASEAN way”. There is more to the ASEAN way than non-intervention, such as commitment to the settlement of disputes by peaceful means and renunciation of the threat or use of force, however, the principle of non-interference will be the focus of this paper’s discussion as it impacts more directly upon current and future asylum practice.

Non-intervention features among the articles of the Treaty of Amity and Cooperation in Southeast Asia, the first treaty signed since the inception of the Association nine years earlier. ASEAN states have a common interest to retain state sovereignty and ensure that external powers, and even ASEAN’s own member states, cannot interfere with the way sovereign governments manage their own affairs.<sup>12</sup>

Similarly, Northeast Asian treaty arrangements reflect the principle. The Shanghai Cooperation Organisation (SCO), a mutual security arrangement, asserted in its 2001 Declaration on the Establishment of the Shanghai Cooperation Organisation that the Members will ‘mutually respect independence, sovereignty and territorial integrity, nor interfere in each other’s internal affairs’.<sup>13</sup>

During a 1993 Asian regional meeting, over forty Asian governments signed the Bangkok Declaration, asserting their collective take on universal human rights. The Declaration ‘emphasise[s] the principles of respect for national sovereignty, territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure’.<sup>14</sup> The Bangkok Declaration

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<sup>7</sup> S/Res 1706, Reports of the Secretary-General on the Sudan (31 August 2006).

<sup>8</sup> Anne-Marie Slaughter “Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform” (2005) 99 AJIL 619-631, 619-620.

<sup>9</sup> Ibid 628.

<sup>10</sup> *Supra* n. 1, at 21, para [29].

<sup>11</sup> Slaughter, *supra* n. 8, at 628.

<sup>12</sup> Beverly Loke “The ‘ASEAN Way’: Towards Regional Order and Security Cooperation?” (2005) Melbourne J. of Politics.

<sup>13</sup> Shanghai Cooperation Organisation, Declaration on the Establishment of the Shanghai Cooperation Organisation (15 June, 2001).

<sup>14</sup> Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok Declaration (UN doc. A/Conf.157/ASRM/8, 7 April 1993) at I(5).

further provides that States have the primary responsibility for the protection of human rights, and to provide the remedy when they are violated.<sup>15</sup> The Declaration represented a challenge to solidarity. It presented a cultural relativist position: national and regional culture maintain importance and influence the interpretation of international human rights norms.<sup>16</sup>

However, there are a number of pressures within the region to alter its state-centric view of human rights. The concept of human security has gained some traction recently in Asia. For example, the Government of Japan has stated that it is “striving to make this century a “human-centred century” and that it has been working on the dissemination of the concept of human security by such activities as holding international symposiums on this theme.<sup>17</sup> Japan’s Official Development Assistance Charter (ODA) of 2003 and its Medium-Term Policy on the ODA from 2005 specify human security as one of its basic policies. Additionally, Surin Pitsuwan, the current Secretary-General of ASEAN, strongly endorses the concept.

Furthermore, in December 2008 the ASEAN nations adopted a Charter committed to democracy and economic integration. One of the Charter’s main declarations is to strengthen democracy, enhance good governance and the rule of law, and to promote human rights. The Charter continues to affirm the principle of non-intervention, but also commits each State to uphold the UN Charter and international law.<sup>18</sup> The Charter also provides that ASEAN will establish a human rights body.<sup>19</sup> The Charter is part of a move away from non-interference, which has also manifested itself through the actions of states like Malaysia and China speaking about aspects of Myanmar’s regime, and most recently, in June of this year, Thailand and Bangladesh agreeing to take up with Myanmar the issue of Rohingya refugees fleeing Myanmar.<sup>20</sup>

While the constitutive documents of Asian regional organisations continue to support a non-interventionist stance, this attitude has come under pressure from international normative shifts.

Globally speaking, a transition from a “culture of sovereign impunity to a culture of national and international accountability”<sup>21</sup> is emerging. This has enormous implications for the responsibilities of each State, bestowing on the international community obligations beyond just the protection of their own citizens.

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<sup>15</sup> Andreas Follesdal “Human Rights and Relativism” 265-284 in Andreas Follesdal and Thomas Fogge (eds.) *Real World Justice: Grounds, Principles, Human Rights and Social Institutions* (Springer, 2005) p. 265.

<sup>16</sup> Rhonda L. Calloway, Julie Harrelson-Stephens “Are Human Rights Universal: Introduction” in Rhonda L. Calloway, Julie Harrelson-Stephens (eds.) *Exploring International Human Rights: Essential Readings* (Lynne Rienne Publishers, London, United Kingdom, 2007) 109-111, at p109.

<sup>17</sup> Ministry of Foreign Affairs of Japan website [www.mofa.go.jp/policy/oda/sector/security/action.html](http://www.mofa.go.jp/policy/oda/sector/security/action.html) (Accessed 19/06/09).

<sup>18</sup> Charter of the Association of Southeast Asian Nations [www.aseansec.org/AC.htm](http://www.aseansec.org/AC.htm) (Accessed 20 June 2009).

<sup>19</sup> Ibid, Article 14.

<sup>20</sup> “Dhaka, Bangkok to take up refugee issue with Yangon *Reuters* (01 June 2009).

<sup>21</sup> ICISS, *The Responsibility to Protect* Report of the International Commission on Intervention and State Sovereignty (December 2001) p. 14, para [2.18].

This seachange in global attitude, at least at the official level, brought about by the concepts of human security and conditional sovereignty leads one to ask whether a State now holds a responsibility to provide to strangers within its jurisdiction asylum or surrogate protection from potential risks of breaches of human security in their home country.

The pressing need to answer this question is clear when considering current challenges in the Asian region. The majority of Asian states have not acceded to the two international refugee law instruments, the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), and the 1967 Protocol Relating to the Status of Refugees (the Protocol). Whilst some governments have been able to incorporate international treaties into domestic legislation, where this has not been done, addressing protection of refugees' rights is an outstanding issue.<sup>22</sup> This varying government recognition of refugees and their rights constrains regional response. States usually negotiate in a bilateral manner concerning migrants and refugees, and with no regional mechanisms for appeal, there are no common standards available to individuals.<sup>23</sup> Refugee movements tend to be subsumed into greater migrant flows, as refugees go to the same destination countries as migrant workers and tourists (e.g. Malaysia and Thailand). This weakens the position of refugees. The formal mechanisms for dealing with movements are not yet fully developed, and are designed for security (territorial control) rather than protection of migrants. Having systems geared this way means they are less accommodating of vulnerable groups and facilitate resort to detention and/or deportation.<sup>24</sup>

According to UNHCR, at the end of 2007 there were 2.7 million refugees, 1.2 million people in refugee-like situations, 793,000 internally displaced persons and 1.6 million stateless persons in Asia.<sup>25</sup> In 2008, one third of the world's refugees were residing in the Asia-Pacific region.<sup>26</sup> The total number of refugees and people in refugee-like situations was estimated at 3.4 million at the end of 2008.<sup>27</sup>

The next part of this paper will consider the question whether human security extends state responsibility beyond mere protection obligations towards citizens. In order to do so, the asylum and human rights obligations of ten Asian States will be examined, within the framework of treaty and customary law.

## II. A CATEGORY OF OBLIGATIONS

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<sup>22</sup> Rafendi Djamin "Advancing Refugee Rights through an Intergovernmental Regional Body" 1<sup>st</sup> Asia Pacific Consultation on Refugee Rights (20-21 November 2008).

<sup>23</sup> Alice Nah "Overview of Refugees in Southeast Asia" 1<sup>st</sup> Asia Pacific Consultation on Refugee Rights (20-21 November 2008).

<sup>24</sup> Ibid.

<sup>25</sup> Susan Kneebone, "Book review of *Legitimizing Rejection: International Refugee Law in South East Asia*" (2009) 22(2) JRS 243, 243.

<sup>26</sup> UNHCR, *2008 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons* (16 June 2009).

<sup>27</sup> Ibid at 8.

The focus in this section will be on five states which have acceded to the Refugee Convention, namely Cambodia, China, Japan, South Korea, and the Philippines, as well as five states who are not parties to the Convention: India, Indonesia, Malaysia, Myanmar and Thailand.

This section will firstly consider the customary, or universal, law obligations of these ten nations through the prism of positivist views of international law. It will then identify the treaties to which each State is a party, where these are relevant to the human rights or asylum practices of the country as well as national legislation and constitutional arrangements in order to explain the way in which the refugee status determination processes operate in each country (see Appendix One). Finally, historical and current refugee practice will be canvassed at a regional level.

## A CUSTOMARY LAW

Whether additional obligations can be attributed to Asian states through the operation of customary or universal human rights law will now be considered. Custom is created through consistent and uniform state practice, coupled with *opinio juris*.<sup>28</sup>

Various academic commentators are of the view that there are a number of human rights which carry the status of universally binding obligations, regardless of a State's position vis-à-vis the various human rights treaties. This list includes the following rights relevant to the refugee context: freedom from systemic racial discrimination, genocide, slavery, extrajudicial execution or forced disappearance, protection against torture or cruel, inhuman and degrading treatment or punishment, and prolonged arbitrary detention.<sup>29</sup> If this were the case, there would be clear implications for states that had not chosen to sign onto all of the human rights treaties or the Refugee Convention.

For example, according to many, the right to *non-refoulement* carries the status of a peremptory and universal norm.<sup>30</sup> Goodwin-Gill and McAdam establish the principle in customary law using the following reasoning: both Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture (CAT) meet the standard for customary status as defined by the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*,<sup>31</sup> that is, they are 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.<sup>32</sup> The prohibition on *refoulement* to torture or cruel, inhuman or degrading treatment or punishment is absolute and the universality of the principle has been constantly emphasised in other international and regional instruments. This leads the two

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<sup>28</sup> *Opinio juris* is evidence of a belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it. See Hugh Thirlway "The Sources of International Law" in Malcolm Evans (ed.) *International Law* (Oxford University Press, New York, USA, 2003) pp. 117-143, 125.

<sup>29</sup> James C. Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, UK, 2005) p. 36.

<sup>30</sup> See for example Guy S. Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3<sup>rd</sup> Ed., Oxford University Press, New York, USA, 2007) p. 346.

<sup>31</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Reports 4 at [72].

<sup>32</sup> Goodwin-Gill and McAdam, *supra* n. 30, p. 345.

academics to the conclusion that the principle is “binding on all States, independently of specific assent.”<sup>33</sup> This would mean that all Asian states, whether they had signed onto the Refugee Convention and CAT or not, would be prohibited from returning any person where there are substantial grounds for believing that he or she would face a real risk of being subjected to torture.<sup>34</sup>

On the other hand, leading refugee law scholar James Hathaway rejects *non-refoulement* and the other aforementioned principles (other than the protection against systemic racial discrimination) as customary law, finding that there is insufficient state practice to justify their status.<sup>35</sup> Goodwin-Gill and McAdam assert that Hathaway has misunderstood the fundamentals of customary international law, because State practice does not have to be entirely consistent for custom to be established.<sup>36</sup> The ICJ observed in the *Nicaragua* case:<sup>37</sup>

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of recognition of a new rule.

Goodwin-Gill and McAdam see Hathaway as falling within a minority view, while the general consensus is that *non-refoulement* is a principle of customary international law.

This lack of agreement among scholars indicates that the status of these “universally binding” rights obligations is not certain. They do not sit comfortably with traditional Asian views which doubt the universality of human rights norms and uphold a state-centric view of human rights. Much more in line with both Asian values, and in these authors’ opinion, a realistic view of the international community and its interaction with international law, is a modern positivist approach to human rights law.

Modern positivism “accepts that international law is most sensibly understood as a system of rules *agreed to* by states, intended to govern the conduct of states, and ultimately enforced in line with the will of states”.<sup>38</sup> The underlying feature: the system is consent-based. To proponents of the modern positivist approach to international law, such as Hathaway, refugee rights are best safeguarded by reliance on duties established by treaty law, rather than by custom.<sup>39</sup>

Given these strictures governing the classification of norms as customary law, in Hathaway’s opinion it is likely that the only rights of relevance to refugees approaching this status is the protection against systemic racial discrimination as well

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<sup>33</sup> Ibid 345-346.

<sup>34</sup> And perhaps even being subjected to cruel, inhuman or degrading treatment or punishment; see Elihu Lauterpacht and David Bethlehem *The Scope and Content of the Principle of Non-refoulement: Opinion* (UNHCR, 20 June 2001).

<sup>35</sup> Hathaway, *supra* n. 29, p. 38.

<sup>36</sup> Goodwin-Gill and McAdam, *supra* n. 30, p. 353.

<sup>37</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, [1986] ICJ Reports 14, at para [186].

<sup>38</sup> Hathaway, *supra* n. 29, p. 10; emphasis added.

<sup>39</sup> Ibid.

as subjection to genocide or the most fundamental forms of slavery.<sup>40</sup> Additional rights or obligations may be pulled from general principles of law, which are those “which can be derived from a comparison of the various systems of domestic law, and the extraction of such principles as appear to be shared by all, or a majority, of them”.<sup>41</sup> A general principle of law can be considered to form a universally binding law where it has been “pervasively recognised in the domestic laws of states”.<sup>42</sup> Access to this information is available due to the many human rights treaties which call upon states both to enact domestic legislation to protect the human rights contained within the treaty and to report to the treaty’s overarching body.<sup>43</sup>

Hathaway cautions that this idea has not been fully explored, and that these reports are not “authoritative declarations of the status of particular human rights as general principles of law”.<sup>44</sup> Nevertheless, he considers that general principles of law confirm the customary norms mentioned above (that is, protection against racial discrimination, genocide and slavery) and add the right to be protected from arbitrary deprivation of life, torture and more general discriminatory practices.<sup>45</sup> These additional rights come from provisions of the International Convention on Civil and Political Rights (the ICCPR), the Genocide Convention, and CAT. Therefore, even if a State is not party to those agreements, they may be bound by those principles nonetheless given that they have attained the status of customary law.

It is prudent to be conservative when estimating which norms reach this status, as the *realpolitik* of international law is that States hold the ability to define their own limits of conduct. Given the lack of a mechanism by which States can be compelled to accept universally binding standards, the reality is that rules will only form part of the international legal system if they have been explicitly or impliedly agreed to by states.<sup>46</sup>

The advantage of this approach is that it guarantees legal certainty and enforceability. As Hathaway has explained:<sup>47</sup>

It is an approach to international law that minimises the potential for powerful states to bend the normative project to their will, and which sets a firm foundation from which to challenge exclusion of any part of a state’s population from real participation in the decision about whether to consent to the establishment of new international law.

Given the foregoing analysis, Hathaway believes that “there is little reason to believe that the human dignity of refugees can be adequately safeguarded simply by reliance on universal applicable norms of human rights law.”<sup>48</sup> Without reference to treaty-based human rights law, particularly the ICCPR, the International Covenant on

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<sup>40</sup> Ibid at 48.

<sup>41</sup> Thirlway, *supra* n. 28, p. 131.

<sup>42</sup> Hathaway, *supra* n. 29, p. 39. He suggests 168 states would meet this standard.

<sup>43</sup> Ibid at 39.

<sup>44</sup> Ibid at 41.

<sup>45</sup> Ibid at 48.

<sup>46</sup> Ibid at 18.

<sup>47</sup> Ibid at 24.

<sup>48</sup> Ibid at 47.

Economic, Social and Cultural Rights (ICESCR) and the Refugee Convention, refugees are entitled to “no more than the bare minimum of rights”.<sup>49</sup>

Regardless of whether one chooses to follow the approach of Goodwin-Gill and McAdam or that of the more conservative Hathaway, there is no customary right to be granted asylum.<sup>50</sup> There is not adequate support for the proposition that in international law an individual right to be granted asylum exists. States, in granting asylum, tend to emphasise that this is done as a State right, and does not attach to an individual.<sup>51</sup>

As discussed above, there may however be a customary right to *non-refoulement*, but for the purposes of this paper, the issue does not require resolution. As will be shown in the next section, the treaty-based obligations of all states establish the duty to refrain from *refoulement*. Furthermore, whether there is a right to seek asylum will be considered in the forthcoming discussion on the Universal Declaration of Human Rights (UDHR).

## *B TREATY LAW*

### *1 THE CHARTER OF THE UNITED NATIONS AND THE UNIVERSAL DECLARATION ON HUMAN RIGHTS*

#### The Charter of the United Nations:

The Charter of the United Nations (the UN Charter) is the constitutive document of the UN and the ICJ, and was signed on 26 June 1945. It is a constituent treaty, and all members are bound by its articles. Furthermore, Article 103 provides that Charter obligations prevail over all other obligations held by Member States. It is therefore pertinent to ask whether the UN Charter generates human rights obligations for its members.

The argument is sometimes made that there is a general duty to respect human rights under Articles 55 and 56 of the UN Charter, whereby Member States promise to “take joint and separate action in cooperation with the Organisation” in “furtherance of human rights and freedoms”.<sup>52</sup> However, it is not clear that this pledge should be read so as to constitute an agreement to be held accountable for human rights breaches.<sup>53</sup> The purpose of these two Articles is to pursue stability among nations, and therefore the context actually suggests that states are only bound to respect human rights insofar as non-compliance would negatively impact on interstate relations. States are not accountable for a failure to abide by human rights *per se*, but for “actions that are disruptive of peaceful and friendly relations among nations”.<sup>54</sup> As Hathaway notes,

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<sup>49</sup> Ibid at 48.

<sup>50</sup> Note however, that a regional or local custom regarding the right to political asylum was found to exist by the ICJ in *Asylum Case (Colombia v Peru)* [1950] ICJ Reports 266. This regional custom was confirmed by the 1984 Cartagena Declaration on Refugees (see also Section III(B) of this paper).

<sup>51</sup> Colin Harvey *Seeking Asylum in the UK: Problems and Prospects* (Butterworths, London, UK, 2001), p. 48.

<sup>52</sup> As explained in Hathaway, *supra* n. 29, p. 42.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid at 43.

the Security Council is similarly not empowered to intervene merely upon the violation of particular rights – the Council’s authority relates to a threat to international peace and security.<sup>55</sup>

There is one explicit protection in the Charter: that is, non-discrimination on the grounds of race, sex, language or religion. Beyond that, it is difficult to read into the UN Charter a duty on States to uphold a broad range of human rights norms.<sup>56</sup>

### The UDHR:

The UDHR was intended as a non-binding instrument by its drafters. Because it is not universally binding, there are technically no signatories to it. Instead, the Declaration was ratified through a proclamation by the UN General Assembly on Dec 10, 1948 with a count of 48 votes to none, with only 8 abstentions.<sup>57</sup> The final draft of the UDHR emerged from a geographically and culturally mixed committee. Major contributions were made by delegates from China, and India. As Geoffrey Robertson QC notes, 14 members of the 56-State General Assembly were Asian, four were African, and 20 were Latin American.<sup>58</sup>

The UDHR is significant for the way it recognised that certain rights were inalienable and for the “inspiration it provided for States drafting their own constitutions and for further developments in human rights law”.<sup>59</sup> Some of its rights have developed into customary international law, but it is the ICCPR and the ICESCR which translate most of its rights into legally binding form.

The UDHR contains reference to asylum-seeking in Article 14, but this was not transferred into binding form in either the ICCPR or the ICESCR. Article 14 is as follows:

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

In the original draft, the wording read “to seek and *be granted* asylum.”<sup>60</sup> However, an amendment was proposed by the UK representative to replace ‘be granted’ with ‘to enjoy’. The term ‘enjoy’ highlights the nature of the right in the UDHR as one predicated on state acceptance.<sup>61</sup> Although other rights in the UDHR have been subsumed into customary international law, this is not material to the enquiry as to the existence of a right to be granted asylum. Such a right has not been developed in the same regard.<sup>62</sup>

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid at 44.

<sup>57</sup> These came from Byelorussia SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR, Union of South Africa, and Yugoslavia. See Rhona K. M. Smith *Textbook on International Human Rights* (Oxford University Press, Oxford, United Kingdom, 2007), p. 36.

<sup>58</sup> Geoffrey Robertson QC *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Books, London, UK, 2006), p. 37.

<sup>59</sup> Harvey, *supra* n. 51, p. 49.

<sup>60</sup> Ibid at 50. See also UN Doc A/C3/285 as cited in Harvey, *supra* n. 51.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid at 49.

Therefore, flowing from the UDHR is only a weak right to *seek* asylum. If this is combined with the protection against *non-refoulement*, this may mean that an asylum-seeker is able to physically seek asylum, i.e. have his or her application examined, and therefore is entitled to some sort of admission, however temporary.<sup>63</sup>

## 2 STATE PARTIES TO THE REFUGEE CONVENTION

### (i) Cambodia

Cambodia is a state party to the major international human rights instruments, belonging to the ICCPR, ICESCR, the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and CAT.

Cambodia has been a state party to the Refugee Convention and the 1967 Protocol since 1992. Its national laws will soon provide for the granting of refugee status in accordance with the 1951 Convention and the 1967 Protocol, and the government is in the process of establishing a system for providing protection to refugees. The sub-decree establishing this system was agreed upon in late 2008 by the government and UNHCR, and it will soon be sent to the Council of Ministers for adoption.<sup>64</sup> The government also allows the Office of the UNHCR to process asylum-seekers in Cambodia.

In practice during 2008 the government provided some protection against the return of refugees to countries where they would be at risk. Through the assistance of UNHCR, the government also provided temporary protection to individuals not qualifying as refugees under the Convention.<sup>65</sup>

### (ii) China

China is a party to all of the human rights treaties (ICCPR, ICESCR, the Genocide Convention, CERD, CEDAW, CRC, and CAT), and the Refugee Convention (albeit with various reservations to a number of the treaties).<sup>66</sup> It ratified the Refugee Convention in 1972, but has not acceded to the Protocol.

However, in-country practices do not accord with their obligations on paper. Although the Constitution allows it to grant asylum to those who have sought it “for political reasons”, China does not have a procedure for doing so. China does permit a small number of asylum-seekers to remain, mostly in Beijing, while UNHCR determines their status and plans resettlement.<sup>67</sup> However, the 2001 report of the

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<sup>63</sup> Ibid.

<sup>64</sup> Duong Sokha “Status of refugees in Cambodia: the government takes over” *Ka-set* (27 March 2009).

<sup>65</sup> DOS 2008 *Country Report on Human Rights Practices: Cambodia* (February 25, 2009).

<sup>66</sup> Note that it has signed, but not ratified the ICCPR. However, good faith obligations to honour the Covenant arise upon signature – Article 18, Vienna Convention on the Law of Treaties 1969.

<sup>67</sup> World Refugee Survey 2008 – China [www.worldrefugeesurvey.org/index.php?title=China](http://www.worldrefugeesurvey.org/index.php?title=China) (Accessed 16 June 2009).

Committee on the Elimination of All Forms of Racial Discrimination recorded concern about differential treatment of refugees, namely those from North Korea, and the lack of objective refugee status determination (RSD) criteria.<sup>68</sup> Notwithstanding its obligations under the Refugee Convention (in particular Article 33), China deports North Koreans back to their home country, claiming that its principal obligation is to return North Koreans who have entered China “illegally”.<sup>69</sup> North Korean refugee seekers are one of three main groups of foreigners who may have a claim to refugee status in China. The other two are Vietnamese and Kachin Burmese.<sup>70</sup> There are around 300,000 Vietnamese in China, and this group has been treated reasonably by the authorities in terms of social benefits.<sup>71</sup>

Hong Kong lacks an asylum policy, and China does not consider that its obligations under the Convention and Protocol extend to it. In February 2008, a Hong Kong court ruled that the city is not bound by the principle of *non-refoulement* because it does not reach the level of *jus cogens*, or pre-emptory international norm.<sup>72</sup> Hong Kong also returned 1,350 mainland Chinese during the year, as it refuses to consider this group for asylum.<sup>73</sup>

(iii) *Japan*

Japan has committed to all of the relevant human rights treaties apart from the Genocide Convention. It acceded to the Refugee Convention and its Protocol in 1981 and 1982 respectively, both of which are implemented through the Immigration Control and Refugee Recognition Act 1981 (ICRRA).<sup>74</sup> First-instance determination is carried out by Refugee Inquirers within the Ministry of Justice. It is possible to make an application for temporary and ordinary refugee status, but an “objection procedure” is available only to those seeking the latter status.<sup>75</sup> Beyond this, there is the option of a type of Judicial Review. Japan does not have specialist Immigration, Asylum or Administrative courts and therefore these Judicial Reviews are heard before the general courts.

The majority of grantees in Japan come from Asian states. After Indo-Chinese refugees, those who have been granted refugee status include nationals of Pakistan and Afghanistan.<sup>76</sup>

However, since ratifying the Refugee Convention, Japan has only received 4,882 applications and recognised even less, a mere 410. This is a recognition rate of just

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<sup>68</sup> Shanthi Dairiam “Advancing Refugee Rights through International Human Rights Mechanisms” 1<sup>st</sup> Asia Pacific Consultation on Refugee Rights (20-21 November 2008).

<sup>69</sup> Claimed obligation to return is located within a still-secret Sino-Korean treaty of 1961 and its later protocols. See James D. Seymour, *China: Background Paper on the Situation of North Koreans in China* (Written report, commissioned by UNHCR, 2005), p. 5.

<sup>70</sup> *Ibid* at 11.

<sup>71</sup> *Ibid*.

<sup>72</sup> World Refugee Survey, *supra* n. 67.

<sup>73</sup> *Ibid*.

<sup>74</sup> Allan Mackey “Observation on Refugee Status Determination in Japan, and some New Zealand, United Kingdom, and European Union Comparisons” Discussion Paper for Peace-building Studies, No. 10 [Spring 2007], p. 4.

<sup>75</sup> See Articles 18-2, 61-2, and 61-2-9 of the ICRRA, in Mackey *supra* n. 74.

<sup>76</sup> Osamu Arakaki *Refugee Law and Practice in Japan* (Ashgate Publishing Limited, Hampshire, England, 2008), p. 31.

11.5%.<sup>77</sup> Why this is so, is unclear given that Japan is the safest country in the world, the second richest, and a major transit hub.<sup>78</sup>

(iv) *South Korea*

South Korea is a party to all of the foregoing human rights treaties, and the Refugee Convention. However, since South Korea signed the Convention in 1992, it has granted refugee status to just over 60 people.<sup>79</sup> Another 50 have been given permission to stay in the country on humanitarian grounds, but without any legal status.<sup>80</sup>

The Committee for CERD found the RSD criteria status too “stringent” in 2001; by 2003 the Committee was registering approval of the progress that had been made in improving the system for determining refugee status. Such progress included increased access to social services and the labour market afforded to refugees.<sup>81</sup> However, much remains to be done to standardise asylum procedures so that cases can be processed effectively and promptly. Human Rights Watch records concern at the delays in decision-making, and the fact that those individuals awaiting their final decision do not have permission to work.<sup>82</sup>

However, South Korea is generous to North Koreans arriving in their territory. The official policy of the South Korean government, “based on brotherly love toward fellow Koreans and universal humanitarianism” is to accommodate all North Korean refugees.<sup>83</sup> As of 2007, South Korea had admitted more than 10,000 North Koreans, not as refugees, but as citizens. This resettlement programme includes job training, healthcare services and financial assistance.<sup>84</sup>

(v) *The Philippines*

The Philippines has agreed to the terms of all of the relevant human rights treaties, and both the Refugee Convention and its Protocol (these latter two ratified in 1981). Despite its membership to the international refugee instruments, the Philippines possess no comprehensive legislation that provides for the processing of refugee claims. In practice however, the government does provide protection against the expulsion or return of individuals at risk of persecution. The Refugee Unit within the Department of Justice determines which asylum-seekers qualify as refugees, and this determination does implement basic provisions of the Refugee Convention.<sup>85</sup> In addition, the government cooperates with UNHCR.<sup>86</sup>

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<sup>77</sup> Ibid at 28-29. Figures current until 2008.

<sup>78</sup> Anderson “Book Review: Osamu Arakaki *Refugee Law and Practice in Japan*” (2009) 9(2) HR Law Review 339, 339.

<sup>79</sup> Figures current to end 2007 only.

<sup>80</sup> Human Rights Watch (HRW) *Korea Needs to Open its Doors* (August 20, 2007).

<sup>81</sup> Dairiam, *supra* n. 68.

<sup>82</sup> HRW, *supra* n. 80.

<sup>83</sup> J. R. Charny *Acts of Betrayal: The Challenge of Protecting North Koreans in China* (Refugees International, April 2005), p. 16.

<sup>84</sup> HRW, *supra* n. 80.

<sup>85</sup> DOS 2008 *Country Report on Human Rights Practices: Philippines* (February 25, 2009).

<sup>86</sup> Ibid.

### 3 OTHER STATES

#### (i) India

Although not party to the Refugee Convention or Protocol, India has ratified the other human rights treaties previously mentioned in this paper, except for CAT, which it has signed only. Its laws provide for the determination of refugee and asylum claims, but there is no uniform law to deal with the huge numbers of refugees<sup>87</sup> (411,000 in 2008).<sup>88</sup> The Foreigners Act and the 1948 Foreigners Order govern refugee determination, but this law does not contain the term ‘refugee’, meaning that asylum-seekers are placed in the same category as other immigrants.<sup>89</sup> The government can make orders “regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein”.<sup>90</sup>

The courts in India have devised what has been called a “shadow of refugee law”<sup>91</sup> by incorporating international standards in domestic law. The government is obliged by the Constitution to observe international law. Furthermore, Article 21 of the Constitution allows any person, including a refugee, to claim that an action against him is not a fair, just and reasonable procedure.<sup>92</sup> Article 14 forbids discrimination through arbitrary action. The Supreme Court has ruled that “the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise...”<sup>93</sup>

This guarantee of life in the 1950 Constitution protects refugees from *refoulement*. Refugee protection is therefore a part of Indian jurisprudence, with the right to protection against *refoulement*, the right to seek asylum, voluntary repatriation, the right to life and personal security in the country of asylum, and the right to equality and non-discrimination being affirmed in various judgments.<sup>94</sup>

In addition to judicial recognition, India grants Sri Lankans asylum under executive policies, based on political and strategic grounds, and Bhutanese and Nepalese live in India under friendship treaties.<sup>95</sup>

The government has no formal recognition of UNHCR grants of refugee status, but does not *refoule* them and bestows residence permits on some Afghans and Myanmarese mandate refugees.<sup>96</sup>

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<sup>87</sup> Institute of Peace and Conflict Studies *National Refugee Law for India: Benefits and Roadblocks* (December 2007), p. 1.

<sup>88</sup> World Survey 2008 – India [www.worldrefugeesurvey.org/index.php?title=india](http://www.worldrefugeesurvey.org/index.php?title=india) (Accessed 16 June 2009).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> Prabodh Saxena “Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future” (2007) *IJRL* 246, 251.

<sup>92</sup> *Ibid.* at 253.

<sup>93</sup> *National Human Rights Commission v. State of Arunchal Pradesh* AIR 1996 SC 1234, per Ahmadi C as cited in Saxena, *supra* n. 91 at p. 254.

<sup>94</sup> *Ibid.* at 255.

<sup>95</sup> World Survey, *supra* n. 88.

<sup>96</sup> *Ibid.*

For the most part, India has a generous refugee policy. Refusal at the frontier and mass *refoulement* are rare.<sup>97</sup>

(ii) *Indonesia*

Indonesia has ratified all of the aforementioned human rights treaties except for the Convention on Genocide. However, it is not a state party to either the Refugee Convention or its Protocol.

According to the US Department of State, the law does not provide for the granting of refugee status, and the government has not established a system for providing protection to refugees.<sup>98</sup> However, in practice the government provided some protection against the expulsion or return of refugees. Furthermore, although the constitution allows the government to prevent persons from entering or leaving the country, and the Law on Overcoming Dangerous Situations gives military forces powers to limit land, air and sea traffic in a declared state of emergency, the government did not use these powers in 2008.<sup>99</sup>

The government cooperates with UNHCR in providing assistance to IDP's, refugees, and asylum-seekers.. At the end of August 2008, there were 270 recognised refugees and 224 asylum-seekers residing in the country. Most were from Sri Lanka, Iraq, Afghanistan, Somalia or Myanmar.<sup>100</sup>

There have been recent developments: a presidential decree on asylum, and a domestic law currently being drafted in anticipation of signing the 1951 Refugee Convention.<sup>101</sup>

(iii) *Malaysia*

Malaysia does not belong to the full range of human rights treaties – it has only ratified CEDAW, CRC and the Genocide Convention. It has not signed onto the ICCPR, ICESCR, CERD, CAT or the Refugee Convention and its accompanying Protocol. There is no legal framework concerning status of refugee or asylum-seekers.<sup>102</sup> The current Immigration Act 1959/63 allows for the detention of asylum-seeking individuals at immigration detention centres, prosecution for immigration-related offences, and imprisonment or deportation.<sup>103</sup> Anyone entering the country without the appropriate documentation is deemed illegal and faces mandatory imprisonment for a maximum term of 5 years, a fine not to exceed RM10,000, or both, and mandatory caning not exceeding 6 strokes.<sup>104</sup>

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<sup>97</sup> Saxena, *supra* n. 91 at 248.

<sup>98</sup> DOS 2008 *Country Report on Human Rights Practices: Indonesia* (February 25, 2009).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> Nah, *supra* n. 23.

<sup>102</sup> CEDAW, *Report of the Committee on the Elimination of Discrimination against Women* (UN Doc. A/61/38, 2006).

<sup>103</sup> Dairiam, *supra* n. 68.

<sup>104</sup> DOS 2008 *Country Report on Human Rights Practices: Malaysia* (February 25, 2009).

However, the Committee on the Rights of the Child noted some improvements to the system in their June 2007 Report.<sup>105</sup> Malaysia had increased cooperation with the UNHCR, and the Attorney-General had issued written instructions in 2005 not to prosecute immigration-related offences committed by individuals with valid UNHCR documentation. The 2008 DOS Report confirms this, stating that the government generally did not deport individuals registered by the UNHCR who were being processed for resettlement in third countries.<sup>106</sup>

In practice, the government does not grant refugee status at all, nor provide protection against the expulsion or return of at risk persons.<sup>107</sup>

(iv) *Myanmar*

Like Malaysia, Myanmar has not signed or ratified the ICCPR, ICESCR, CERD, CAT or the Refugee Convention and its accompanying Protocol. It has only ratified CEDAW, CRC and the Genocide Convention. The law does not provide for the grant of asylum or refugee status, and the government has not established a system to provide such protection. In practice, the government does not grant refugee status or asylum.<sup>108</sup> However, it does cooperate with UNHCR to an extent. Despite the fact that the MOU between the government and UNHCR expired in 2007, the government continues to permit UNHCR to provide humanitarian assistance to Rohingyas in the north.<sup>109</sup> At the end of 2008, negotiations were continuing regarding UNHCR's status in the northern Rakhine state.<sup>110</sup>

(v) *Thailand*

Having ratified all of the aforementioned human rights treaties other than the Genocide Convention and the refugee-related agreements, Thailand nevertheless has a mixed history in their treatment of aliens. There is no refugee law, and the 2007 Constitution does not provide for asylum. Refugees and asylum-seekers are not entitled to any legal status distinct from other foreigners, and pursuant to the 1979 Immigration Act, the presence of the majority of them is illegal.<sup>111</sup>

At the end of 2008, Thailand was host to about 200,000 ethnic Shan individuals from Myanmar, although the government did not recognise them as refugees. Another 100,000 ethnic Karen and Karenni lived in closed camps, as well as about 50,000 additional Myanmar people outside the camps. A Provincial Admissions Board occasionally screens asylum-seekers for entry to camps, but an informal system of deportation operates.<sup>112</sup> The government no longer employs the formal mechanisms whereby the Immigration Detention Center and UNHCR screen and permit deportations.<sup>113</sup> According to the Committee on Civil and Political Rights, Thailand's

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<sup>105</sup> Dairiam, *supra* n. 68.

<sup>106</sup> DOS *Malaysia*, *supra* n. 104.

<sup>107</sup> *Ibid.*

<sup>108</sup> DOS 2008 *Country Report on Human Rights Practices: Burma* (February 25, 2009).

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

<sup>110</sup> *Ibid.*

<sup>111</sup> World Refugee Survey 2008 – Thailand [www.worldrefugeesurvey.org/index.php?title=Thailand](http://www.worldrefugeesurvey.org/index.php?title=Thailand) (Accessed 16 June 2009).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

screening and expulsion procedures contain no provisions guaranteeing respect for the rights protected by the ICCPR.<sup>114</sup>

#### 4 OBLIGATIONS AT THE GENERAL LEVEL

Having considered the refugee and more general human rights obligations of each State in turn, it remains to sketch out exactly what these obligations mean on a general level. Eight of the ten featured States are party to the ICCPR and the ICESCR, which confer important obligations. 86% of the world's refugees reside in States which have signed or ratified these two human rights covenants, which is more than the 68% who reside in a state party to the Refugee Convention or Protocol.<sup>115</sup> Therefore, refugee rights will in the majority of cases be an “amalgam of principles drawn from both refugee law and the Covenants”.<sup>116</sup> For those five states in focus that are not party to the Refugee Convention (India, Indonesia, Malaysia, Myanmar and Thailand), all the rights owed to refugees in those territories will have their provenance in the main human rights instruments. In the case of the other chosen five who are party to the Refugee Convention, (Cambodia, China, Japan, Korea, and Philippines), the Covenants are still of major significance. As Hathaway identifies, even where refugee law is the source of a stronger form of protection on a particular issue, the Covenants usually aid in the clarification of the responsibilities of states.<sup>117</sup>

For example, refugee-relevant obligations flowing from the ICCPR include the right to *non-refoulement*. Article 7 of the ICCPR provides: ‘No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Although *non-refoulement* is not explicitly proscribed, the Human Rights Committee has interpreted this non-derogable provision so as to prevent the removal of individuals to places where they would face a ‘real risk’ of a violation of ICCPR rights.<sup>118</sup> This provision provides a wider protection than the equivalent protection provided by Article 3 of CAT, as it is not limited only to torture, and there is no requirement that the ill-treatment be carried out by or with the assent of the State.<sup>119</sup>

Furthermore, the Human Rights Committee has accepted that removing an individual to face a real risk of violation of *any* ICCPR right could constitute *refoulement*. It is not limited to the Article 6 right to life or the Article 7 protection against torture and cruel treatment.<sup>120</sup>

All countries previously considered have also acceded to CEDAW and the CRC, meaning that each State is obliged to uphold and protect the rights of women and children in refugee situations. Furthermore, all States, with the exception of Malaysia and Myanmar, have acceded to CERD, obliging further protection of racial and ethnic

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<sup>114</sup> Dairiam, *supra* n. 68.

<sup>115</sup> Hathaway, *supra* n. 29, p. 9.

<sup>116</sup> *Ibid* at 9.

<sup>117</sup> *Ibid* at 10.

<sup>118</sup> *GT v Australia*, Communication No. 706/1996 (4 November 1997, UN doc. CCPR/C/61/0/706/1996) at para 8.1, as cited in Goodwin-Gill and McAdam, *supra* n. 30, p. 306.

<sup>119</sup> *Ibid*.

<sup>120</sup> General Comment 15: ‘The Position of Aliens under the Covenant’ (11 April 1986) as cited in Goodwin-Gill and McAdam, *supra* n. 30, p. 308.

minorities in a refugee situation.<sup>121</sup> However, as explained earlier, the application of customary international law, as well as general principles of law, would fill the lacunae left by those States' failure to become parties to CERD, as well as the failure of Indonesia, Japan and Thailand to accede to the Genocide Convention.

This paper now turns from the state-specific to current and historical *regional* refugee practice.

## *C REGIONAL ASYLUM PRACTICE*

### *1 HISTORICAL ARRANGEMENTS*

There has been cooperation in the past between particular states in Asia to create a regional RSD system as the solution to a mass exodus of refugees. The Comprehensive Plan of Action (CPA) was adopted in 1989 in response to the large numbers of Vietnamese (and Laotian to a lesser extent) fleeing their country. The CPA ended automatic resettlement and required that all Vietnamese Boat People (VNBPs) be screened to determine their individual refugee status.<sup>122</sup> It required partnership between countries of origin, of first asylum, resettlement countries and UNHCR. It attempted to “implicate all concerned parties...as well as the donor community in a coordinated, solutions-oriented set of arrangements for the *sharing of responsibilities* for the refugee population.”<sup>123</sup>

It was the first time that an international screening mechanism was introduced on a region-wide basis. It necessitated the involvement of governments of countries of first asylum, such as Thailand, Malaysia, Indonesia, the Philippines and Hong Kong. RSD systems had to be developed and implemented in these countries which had no previous experience, and which, apart from the Philippines, were not parties to the Refugee Convention. Procedures had to simultaneously be consistent regionally, and respect national laws. National officials had to be trained to make accurate assessments of the claims of asylum-seekers.<sup>124</sup>

The refugee criteria applied under the CPA was as following:<sup>125</sup>

The criteria will be those recognised in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, bearing in mind, to the extent appropriate, the 1948 Universal Declaration of Human Rights and other relevant international instruments concerning refugees, and will be applied in a humanitarian spirit taking into account the special situation of the asylum seekers concerned and the need to respect the family unit.

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<sup>121</sup> Chowdhury R. Abrar “Legal Protection of refugees in South Asia” (10) FMR 21, 23.

<sup>122</sup> Shamsul Bari “Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment” (1992) (4) IJRL 487, 487.

<sup>123</sup> Erika Feller “The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime” (2001) Washington Univ. J. of Law and Policy 129, 133. Emphasis added.

<sup>124</sup> Ibid at 491.

<sup>125</sup> See para 6(b) of the CPA.

The CPA preserved asylum processes in 4 out of 6 countries, reached its goal of resettling VNBP while driving a shift from clandestine departure to legal migration routes<sup>126</sup> and serves as an example of international solidarity and burden-sharing.

However, there were difficulties. The extended criteria importing additional humanitarian considerations caused difficulties in the implementation of the CPA.<sup>127</sup> Further issues with the arrangement have been identified by other commentators,<sup>128</sup> such as confusion over the meaning of persecution and the family unity principle, challenges to the fairness of procedures (such as a lack of adequate reasons at first instance<sup>129</sup>), and problems with assessing credibility. These difficulties accumulated such that the CPA was criticised for failing to develop a consistent approach region-wide, for amounting to international buck-passing, and for possessing imperfect screening processes.<sup>130</sup>

The major failing of the CPA was that it did not ensure the establishment of ongoing regional commitments to asylum in Asia. Current regional cooperation and views on asylum issues will be examined in the next sub-section, before the future path for asylum in the region is considered in Part III.

## 2 CURRENT ARRANGEMENTS

The majority of Asian states are signatories to the Asian-African Legal Consultative Organisation (AALCO) which was created, *inter alia*, to ‘serve as an advisory body to its Member States in the field of international law’ and to deliberate on issues related to international law referred to the Organisation by its Member States.<sup>131</sup> AALCO established the Bangkok Principles,<sup>132</sup> which acknowledge the existence of refugees, the right to seek and enjoy asylum, protection against *non-refoulement* and minimum standards of treatment.<sup>133</sup> However, these rights are qualified by an exception that limits the rights to cases where the security of the state is not threatened. Furthermore, the Bangkok Principles are declaratory and non-binding, aiming to ‘[inspire] Member States [to] enact national legislation for the Status and Treatment of Refugees and as a guide to deal with refugee problems.’<sup>134</sup> Compliance with the Principles is contingent on each individual State’s willingness to so comply, and this is not enforced by AALCO. Consequently the Principles have had little effect on Asian state practice towards refugees.<sup>135</sup>

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<sup>126</sup> W. Courtland Robinson “The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck” (2004) 17(3) *Journal of Refugee Studies* 319, 326.

<sup>127</sup> Bari, *supra* n. 122, p. 498.

<sup>128</sup> See for example Richard Towle “Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden Sharing?” (2006) *IJRL* 537; and W. Courtland Robinson, *supra* n. 126.

<sup>129</sup> Towle, *supra* n. 128, p. 547.

<sup>130</sup> Courtland Robinson, *supra* n. 126, p. 319.

<sup>131</sup> Article 1, Statute of the AALCO.

<sup>132</sup> 1966 Bangkok Principles on Status and Treatment of Refugees, adopted 24 June 2001 at the AALCO’s 40<sup>th</sup> Session, New Delhi.

<sup>133</sup> *Ibid*, see Articles I – IV.

<sup>134</sup> *Ibid*, at 2), Notes, Comments and Reservations Made by the Member States of AALCO.

<sup>135</sup> Sara E. Davies “The Asian Rejection? International Refugee Law in Asia” (2006) 52(4) *Aust. J. of Politics and History* 562, 563-4.

Unlike the regional African and Latin American arrangements (to be considered in the next section), “reciprocal regional expectations” of the treatment of refugees have not been created.<sup>136</sup>

In the South Asian context, there have been some moves at an unofficial level towards developing a regionally-consistent protection scheme in South Asia. The establishment of the Eminent Persons Group (EPG)<sup>137</sup> for South Asia by UNHCR was a significant step in this regard. The Group has agreed to hold regular regional Consultations to discuss accession to the Refugee Convention or alternatively, formulation of a regional regime.<sup>138</sup> At the Dhaka Consultation of EPG in November 1997, a model national law was approved. Its purpose is to establish a procedure for granting refugee status, to guarantee fair treatment and to institute the appropriate machinery.<sup>139</sup> The notion of a national law was upheld in the EPG’s 2004 ‘South Asia Declaration on Refugees’.

Although India has revised the model law into a form which became the ‘Refugee and Asylum Seekers (Protection) Bill 2006,<sup>140</sup> further progression of the model national law is yet to eventuate. However, the fact that governments are participating recognises the worth of the initiative, and indicates that these states are willing to engage with refugee issues.<sup>141</sup>

### III. ALTERNATIVE APPROACHES TO THE WAY FORWARD

Previous sections have highlighted the challenges facing the Asian region. Overall, asylum systems are either absent, or can be characterised as *ad hoc*, politicised and generative of inconsistent decision-making. Equally however, it can be said that many countries have been, and continue to be, generous in their approaches at times, and accommodate large numbers in mass influxes. Past practice in the region indicates that co-operation and regional solutions are possible. The CPA is one such example, although it should be used as a starting point only for future change. As Chowdhury Abrar has noted, a major hindrance to the development of a formal refugee regime in the region has been the “adherence to the policy of working out political solutions through bilateral negotiation between the host country and the country of origin, with the emphasis on sovereign jurisdiction”.<sup>142</sup> The CPA introduced RSD systems, but these need to deal with all influxes, rather than on a one-off basis.

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<sup>136</sup> Ibid 563.

<sup>137</sup> Constituted originally of eminent persons from Bangladesh, India, Nepal, Pakistan and Sri Lanka.

<sup>138</sup> Abrar, *supra* n. 121, p. 23.

<sup>139</sup> Ibid.

<sup>140</sup> Public Interest and Legal Support and Research Centre *Prefatory Note to the Refugee and Asylum Seekers (Protection) Bill 2006*. See also Saxena, *supra* n. 91, for discussion of the Bill from p. 256 onwards.

<sup>141</sup> Note in this regard the long Islamic tradition of hospitality, generosity and non-discriminatory protection. The custom of “aman” (safety) in the Qu’ran entails the protection of asylum-seekers, regardless of religious faith. As António Guterres (the UNHCR) has said, “more than any other historical source, the Holy Qu’ran along with the Sunnah and Hadith of the Prophet of Islam are a foundation of contemporary refugee law”. See UNHCR, “Foreword to the *Right to Asylum between Islamic Shari’ah and International Refugee Law: A Comparative Study* by Professor Ahmed Abu Al-Wafa” (António Guterres, 26 June 2009).

<sup>142</sup> Abrar, *supra* n. 121, p. 21.

The first option for the region would be accession for all States to the Refugee Convention, and adoption of a ‘human rights approach’ to the interpretation of the Convention. In countries like New Zealand, where this approach is followed, core norms of international human rights law are “relied upon to define the forms of serious harm which are within the scope of ‘being persecuted,’”<sup>143</sup> an element of the Convention’s definition of a refugee.

#### A HUMAN RIGHTS APPROACH

A person will be recognised as a refugee if they meet the inclusion clause of the Refugee Convention, Article 1A(2). The term ‘refugee’ shall apply to any person who:

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]

The ‘being persecuted’ aspect of the definition of ‘refugee’ is undefined in the Refugee Convention. The New Zealand Refugee Status Appeals Authority (RSAA, the Authority) has said that “‘being persecuted’ is the construct of two separate but essential elements, namely a risk of serious harm and a failure of state protection”.<sup>144</sup> An assessment of possible breaches of human rights may inform either the existence of serious harm or the existence of state protection. This is the ‘human rights approach’.

In *The Law of Refugee Status*, James Hathaway thus described the human rights approach:<sup>145</sup>

[...] refugee law ought to concern itself with actions that deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.

Hathaway has argued elsewhere that relying on core norms of international human rights law to define the serious harm aspect of being persecuted is both legally coherent and pragmatic. He states:<sup>146</sup>

Because international human rights law is constantly being authoritatively interpreted through a combination of general comments, decisions on individual petitions, and declarations of UN plenary bodies, there is a wealth of wisdom upon which refugee decision-makers can draw to keep the Convention refugee definition alive in changing circumstances. This flexibility of international human rights law makes it possible to address new threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of “what’s right, and what’s wrong”.

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<sup>143</sup> *Refugee Appeal No. 76044* (11 September 2008) at [61].

<sup>144</sup> *Refugee Appeal No. 74665/03* (07 July 2004).

<sup>145</sup> James C. Hathaway *The Law of Refugee Status* (Butterworths Canada Ltd., Canada, 1991), p. 108.

<sup>146</sup> James C. Hathaway “The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute” in IARLJ, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (1998) 80, 85.

The European Qualification Directive,<sup>147</sup> which ensures a common, minimum standards approach to asylum amongst 26 of the 27 European Union Member States, incorporates this approach through Article 9, which reads:

1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:
  - (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
  - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Likewise, the courts in Canada and the UK as well as the New Zealand RSAA accept the approach. In Canada, the Supreme Court recognised Hathaway’s description of the approach in *Canada v Ward*,<sup>148</sup> with the UK House of Lords following suit in *Horvath v Secretary of State for the Home Department*.<sup>149</sup>

The immediate follow-on question posed by the human rights approach was asked in *Refugee Appeal No. 74665*, when the RSAA stated:<sup>150</sup>

Recognising that “being persecuted” may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection, the question which arises is how one identifies “basic human rights”.

The Authority established that customary international law would be of limited assistance, given the notoriously difficult task of identifying sufficient state practice and *opinio juris*. Treaty law has been found to provide a “far more compelling legal foundation”.<sup>151</sup>

In *Refugee Appeal No. 71427*,<sup>152</sup> the RSAA identified the relevant core human rights as being those contained in the International Bill of Rights (the UDHR, ICCPR, ICESCR) as well as CERD, CEDAW, and the CRC.<sup>153</sup> The RSAA added that the universality of these instruments “will not permit social, cultural or religious practices in a country of origin from escaping assessment according to international human rights standards”.<sup>154</sup>

The human rights approach to being persecuted has been applied by the RSAA in different contexts including sexual orientation,<sup>155</sup> and gender based persecution.<sup>156</sup>

In *Refugee Appeal No. 1312/93 Re GJ* the appellant was a homosexual Iranian man. A

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<sup>147</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted).

<sup>148</sup> [1993] 2 SCR 689, 733 (SC:Can).

<sup>149</sup> [2001] 1 AC 489, 495 F.

<sup>150</sup> At [62].

<sup>151</sup> Ibid at [63].

<sup>152</sup> (16 August 2000).

<sup>153</sup> At [51].

<sup>154</sup> Ibid at [52].

<sup>155</sup> *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995).

<sup>156</sup> *Refugee Appeal No. 2039/93 Re MN* (12 February 1996); *Refugee Appeal No. 71427/99* (16 August 2000).

principal issue was whether sexual orientation could form a particular social group. The Authority acknowledged the application of the human rights approach in this interpretation of 'particular social group' when it stated:<sup>157</sup>

In this way, recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way...On this interpretation, the issue of sexual orientation presents little difficulty. [...] sexual orientation is a characteristic which is either innate or unchangeable or so fundamental to identity or to human dignity that the individual should not be forced to forsake or change the characteristic.

Although neither the UDHR nor the ICCPR make any provision for the protection of the rights of homosexuals, the anti-discrimination provisions of these two agreements are capable of encompassing sexual orientation.<sup>158</sup> Article 2 of each instrument articulates that all parties are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Refugee decision-makers have interpreted 'other status' to include homosexuality. Moreover, as the Authority accepted, to prohibit by law consensual homosexual acts in private was a violation of the right to privacy (Article 17, ICCPR).<sup>159</sup> Therefore, in such cases a core human right would be violated.

Gender-based persecution was comprehensively handled in *Refugee Appeal No. 2039/93 Re MN*, where the appellant claimed that she suffered oppression within her family as an Arab woman, and by society as a whole.

The Authority summarised her case as relying on the following four grounds:<sup>160</sup>

- (a) her race and religion.
- (b) her family background and the political activities of family members.
- (c) the oppression of female members of her family by male family members.
- (d) the oppression of women in Iranian society.

The appellant's principal claims were ordered according to the hierarchy of rights in the ICCPR. She feared violation of the following rights:

#### First Level Rights

*Article 6* The arbitrary deprivation of her life at the hands of male family members.

*Article 7* Torture or cruel, inhuman or degrading treatment or punishment at the hands of male family members.

*Article 18* The right to freedom of thought and conscience.

#### Second Level Rights

*Article 19* The right to freedom of opinion and expression.

*Article 17* Right to privacy.

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<sup>157</sup> *Refugee Appeal No. 1312/93* at 61.

<sup>158</sup> *Ibid* at 38.

<sup>159</sup> *Ibid*.

<sup>160</sup> *Ibid* at [3].

*Article 23* No marriage without free and full consent; and equality of rights.

The Authority reasoned that the concept of persecution is broad enough to include governmental measures that are abhorrent to that individual's deepest beliefs.<sup>161</sup> In assessing whether a female claimant faces persecution, proper weight must be given to the significance of her being required to comply with codes and requirements fundamentally at odds with her conscience and beliefs or deeply held convictions, or to engage in conduct that is abhorrent to her own beliefs, even though those beliefs are not necessarily religious beliefs. In coming to this conclusion, the Authority emphasised the Article 18 right to freedom of opinion and expression.<sup>162</sup>

More recently, the Authority delivered another important decision relating to gender in *Refugee Appeal No. 76044*, which involved an Alevi Kurdish woman who ended her marriage relationship in New Zealand following acts of violence towards her by her husband. She feared she would be killed by her husband, his family, or her own family in an 'honour killing' if she were to return to Turkey. The Authority found that honour killings are prevalent in Turkey, and that violence against women is widely tolerated by community leaders and at the highest levels of the judiciary and government.

In cultures where honour codes exist, honour-killing of women is "rooted in collectively monitored and policed codes of behaviour".<sup>163</sup> However, the Authority found that should the appellant be killed by any of the agents she feared, it would be a violation of her *international* right to life and right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Articles 6 and 7 ICCPR).<sup>164</sup> Even if the state of Turkey did not permit or condone honour killings, it was unable or unwilling to provide state protection. Therefore, the 'being persecuted' element of the definition was met.<sup>165</sup>

Reference to international rights provides significant advantages in harmonisation and consistency through an objective standard by which to assess the risk of being persecuted, *without* engaging with domestic laws and morality, and without making a political statement about the practices of a particular country. A huge body of comparative objective jurisprudence can be used to inform decision-makers. Because the ICCPR is so widely ratified and regularly invoked, its invocation in this context does not interfere with the affairs of a sovereign state, as it is the minimum standard to which each state has agreed to conform.

A possible second option for the region is to create its own unique regional document by which to govern its asylum procedures. Here, comparisons with both the African and the Latin American regional agreements are particularly useful.

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<sup>161</sup> *Refugee Appeal No. 2039/93*, at [99].

<sup>162</sup> *Ibid* at [81].

<sup>163</sup> Dr. Purna Sen "'Crimes of Honour', Value and Meaning" in Lynn Welchman and Sara Hossain (eds.) *"Honour": Crimes, Paradigms and Violence against Women* (Zed Books, 2005) at 51, as cited in *Refugee Appeal No. 76044* at [79].

<sup>164</sup> *Refugee Appeal No. 76044* at [65].

<sup>165</sup> *Ibid*.

## B A REGIONAL ARRANGEMENT

Whilst there are significant benefits of an objectively assessed, apolitical, human rights approach, from our country-by-country analysis it appears that a regional arrangement may potentially be more acceptable to Asian states, be in practical and more immediate terms, and be of greater benefit to their peculiar circumstances. It seems that few South Asian states have expressed interest in acceding to the Refugee Convention. Reasons for this include the perception that the Convention is unsuitable for the South Asian context given that the mass flows of refugees are often caused by general conflict, the wariness of the ‘interventionist’ policies of the UN and other international agencies, and the belief that South Asia as a region has been in reality generous to refugees and that accession will not necessarily improve the situation.<sup>166</sup>

A regional arrangement could meet these concerns. Such arrangements can be tailored to meet the particular exigencies and conditions of the region. For example, as will be explored in depth below, the Latin American regional arrangement contains a broad definition of ‘refugee’, allowing for situations of generalised violence, internal conflicts, and massive human rights violations.

Abrar has summarised the arguments by advocates of the regional approach as follows:<sup>167</sup>

- a) The complexity and size of population movements in South Asia defy *ad hoc* responses;
- b) There is sufficient commonality of problems, policies and practice among South Asian states to develop a regional approach; and
- c) A regional approach would allow South Asia to address its specific concerns on refugee issues, help improve coordination and solidarity among countries, and improve prospects for a solution.

As Eduardo Arboleda has identified, the definitions of refugee status in the Refugee Convention have been “rendered obsolete” by the realities in developing countries.<sup>168</sup> Both Africa and Central America have experienced mass influxes of mostly destitute people, fleeing as a result of internal instability, economic upheaval, natural disasters and war.<sup>169</sup> Both regions found it necessary to create regional arrangements to meet their unique situations.

The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) extended the legal definition of a refugee to individuals fleeing the consequences of aggression by another state or an invasion. Arboleda states that with its emphasis on objective conditions in the country of origin, it can “directly [address] the causes of mass influx situations in Africa”.<sup>170</sup> The OAU Convention has increased cooperation between African states. In the beginning years of the OAU, socio-economic rights were not a priority because of strict commitment to the OAU charter and its principles of non-interference and state sovereignty. Due to the OAU Convention, African states have subsequently

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<sup>166</sup> Abrar, *supra* n. 121, pp. 21-22.

<sup>167</sup> *Ibid* at 22.

<sup>168</sup> Eduardo Arboleda “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism” (1991) 3(2) *IJRL* 185, 188.

<sup>169</sup> *Ibid* at 186.

<sup>170</sup> *Ibid* at 189.

incorporated responsibility sharing: the Convention “creates joint responsibility of the OAU member states in relation to the refugee problem in that, in the name of ‘African solidarity’, those States endeavour to ease the burden of some of their Members...”<sup>171</sup>

Following the adoption of the OAU Convention, in 1981 the African Charter on Human and Peoples’ Rights established the rights of free movement and residence, return, asylum, and *non-refoulement* of every legal resident or refugee in any African State (articles 12 (1, 2, 3 & 4)).<sup>172</sup>

The African Union (AU) continues to adapt to its unique situational requirements. In October 2009, the AU expects to adopt a convention on Internally Displaced Persons (IDPs) which will provide similar rights to IDPs as those owing to refugees under the Refugee Convention. Africa has approximately 12 million IDPs, who are displaced within their own countries, and lack the same protections and benefits as refugees who have left the borders of their State.<sup>173</sup> It will be the first international legally binding instrument relating to internal displacement, and in endorsing it, UN Refugee High Commissioner Antonio Guterres stated that he hoped it “can become an example to be followed in other parts of the world”.<sup>174</sup>

The Latin American regional arrangement came about as a result of the work of academics and other experts pushing for change to meet the urgent needs of the region. In 1981, a Colloquium was held by the Institute of Legal Research of the National University of Mexico and the Mexican Secretariat of Foreign Affairs.<sup>175</sup> Here it was argued that the 1951 Convention was inadequate to confront the thousands of individuals fleeing generalised violence. The Colloquium had a significant impact: a broader refugee definition was recommended, and it was recognised that “refugee law does not exist in a vacuum” and that tradition, the social and political circumstances of a region, and the pragmatic response by the receiving states was a key way to consolidate asylum law.<sup>176</sup> A further meeting in 1984, sponsored by the University of Cartagena, the Regional Centre for Third World Studies and the UNHCR led to the adoption of the Latin American regional agreement as it exists today.

As recommended by the 1981 Colloquium, the 1984 Cartagena Declaration on Refugees (the Cartagena Declaration), widened the scope of the definition even further than the African regional definition had. It requires that two conditions be satisfied: that there be a threat to life, security or liberty; and that the threat result from one of five factors - generalised violence, foreign aggression, international conflicts, massive violations of human rights, or circumstances seriously disturbing public order.<sup>177</sup> Unlike the OAU, it is not a formally binding document, but it has

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<sup>171</sup> Guy Martin “International Solidarity and Co-operation in Assistance to African Refugees: Burden-Sharing or Burden Shifting?” (1995) Special Issue IJRL 250, 259.

<sup>172</sup> Ibid.

<sup>173</sup> “AU plans landmark convention on internal refugees” *Reuters* (26 June 2009).

<sup>174</sup> Ibid.

<sup>175</sup> Eduardo Arboleda “The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention – A Comparative Perspective” (1995) Special Issue IJRL 87, 91.

<sup>176</sup> Ibid at 92.

<sup>177</sup> Ibid at 203.

influenced RSD in many Latin American states and led to the amendment of immigration laws in certain states, for example Bolivia and Ecuador.<sup>178</sup>

Both have created or confirmed regional norms. OAU created regional law while the Cartagena Declaration confirmed customary legal rules for defining refugees.<sup>179</sup> Both are examples of a more *pragmatic* refugee definition, designed to adapt international refugee law to meet the problems in reality.

As the African and Central American examples demonstrate, regional agreements allow for the integration of “universal principles, regional values and State practices”.<sup>180</sup> Furthermore, while complementing international asylum and refugee instruments, they accommodate the specific demands of the region more directly. Push-factors in Asia are similar to those in Africa and Central America, especially when one considers the incidence of mass influx situations and the prevalence of natural disaster and consequent forced displacement in Asia. In 2007 it was reported that Asia-Pacific countries accounted for 90% of people affected by natural disasters around the world since 2000.<sup>181</sup> The effects of the disasters can be massive – the 2004 tsunami claiming the lives of a quarter of a million people; the 2005 Kashmir quake claiming 87,000; and the 2008 cyclone in Myanmar claiming over 100,000;<sup>182</sup> with millions of others often severely affected by the disaster. As this paper was being written, a flood in China was reported to kill 15, and displace over 500,000.<sup>183</sup> Oxfam has identified that it can be government failures in South Asia which turn natural disasters into humanitarian crises.<sup>184</sup>

A regional agreement may provide the flexibility and the tools to meet the root causes of displacement within that particular region.

#### IV. SHARED RESPONSIBILITY AND MUTUAL BENEFITS

Three main advantages would flow from the adoption of a common approach throughout Asia, whether it is based on the international human rights approach or on a regional document. As suggested at the outset, the positive implications are the ability for Asian states to share the responsibility or burden of refugee exoduses, the creation of a consistent and harmonious legal framework to ease decision-making, and to significantly detach decisions made about refugee populations from political, economic and administrative considerations.

Dissolution of *ad hoc* measures and the introduction of lasting mechanisms for RSD will allow a cooperative effort and contribute to the reduction of conflicts among states.

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<sup>178</sup> Eduardo Arboleda “The Cartagena Declaration”, *supra* n. 175, p. 98.

<sup>179</sup> Arboleda “Refugee Definition”, *supra* n. 168, p. 188.

<sup>180</sup> Arboleda “The Cartagena Declaration”, *supra* n. 175, p. 99.

<sup>181</sup> “Natural Disasters Plague Asia-Pacific” *Taipei Times* (21 August 2007).

<sup>182</sup> “S Asian Crises Blamed on Leaders” *BBC News* (10 April 2008).

<sup>183</sup> “Chinese floods kill 15, displace 550,000” *Reuters* (6 July 2009).

<sup>184</sup> “S Asian Crises Blamed on Leaders”, *supra* n. 182.

A common approach will set standards to guide states' response to asylum-seekers, and provide "a uniformity of response in the way that states provide asylum".<sup>185</sup> It introduces objectivity into the determination process, and establishes a region-wide consistent, or at least harmonious, body of jurisprudence to which decision-makers can refer. Fairness in, and accountability of decision-making will improve.

Having RSD processes governed by the law rather than *ad hoc* policy means that an act of granting asylum will be "better understood by other states as a peaceful, humanitarian and legal action under a judicial system, rather than a hostile political gesture."<sup>186</sup>

The solution may be a mixture of both approaches. A unique solution that transcends traditional understandings of regional agreements, rather than a cookie-cutter template borrowed from elsewhere, will have the advantage in that it may be better placed to directly tackle the Asian situation. The legal rules of refugee law will be brought together and concretised with the practical realities of the region. Provided that the arrangement covers a minimal number of rights, such as those suggested by Hathaway, plus the ICCPR Article 7 right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, it will bring the benefits outlined above.

An approach beyond the bilateral prepares Asia to meet the demands of today's globalised world. In a paper given by former NZ diplomat and one-time UN Security Council President Colin Keating at the recent Australia and New Zealand Society of International Law Conference, he mentioned the interconnectedness of peoples and problems regardless of borders, and made the statement that "the effect of bad political decisions taken locally or even in small or remote countries can very quickly produce waves that are felt globally".<sup>187</sup> This highlights the need for a durable solution for Asian States to respond to ripple effects of actions in other countries. If bad decisions can have global impact, the reverse could be true: good decisions may have a positive effect. Therefore if Asia can find a workable solution, it could enable a wide-spread diffusion of its regional values.

## V. CONCLUDING REMARKS

This paper sought to pull together the various threads of refugee and human rights law throughout Asia, focusing on 10 countries in particular, as well as the refugee and human rights obligations and practices in the region as a whole. It has summarised the current and historical situation in this regard, and attempted to blend this with traditional Asian values in order to suggest some options for reform to meet the root causes of displacement and movement of peoples.

The broad global remodelling of security as human security, embodied by the evolving R2P concept, confronts traditional principles in Asia grounded in the importance of State sovereignty and non-intervention. It is suggested that these global

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<sup>185</sup> Davies, *supra* n. 135, p. 563.

<sup>186</sup> Institute of Peace and Conflict Studies, *supra* n. 87, p. 7.

<sup>187</sup> Colin Keating "Prospects for the Multilateral Security System" Australia and New Zealand Society of International Law, Wellington, 2-4 July 2009, p. 9.

changes have not gone unnoticed or unheeded by Asian governments who have not remained immune to the pressure of international opinion. Of particular importance is the resulting increase in responsibilities owed by States not just to their own citizens, but to those of other States.

In addition to this potential high-level and general duty to citizens and other people within a State's territory, States have binding human rights obligations through various treaty arrangements as well as certain other obligations under customary international law and the general principles of international law. States accordingly may hold a customary duty not to *refoule* a non-citizen back to either torture or cruel treatment in conjunction with the duty to allow an individual to physically seek asylum, and most States will also possess this obligation through the application of treaties such as the ICCPR and CAT.

Given the fact that these obligations are owed by a significant number of Asian States, and the fact that on a region-wide basis, there is some history of hospitality towards refugees and asylum-seekers and cooperation through specific agreements such as the CPA, the authors conclude that the conditions and capability to establish a system for the durable solution to the refugee challenge exists in Asia.

The authors hasten to add that the best solution is an Asian solution, and thus will end this paper with a challenge for Asian academics, practitioners and decision-makers to engage in discussions and working groups to influence the development of a solution. There is a unique opportunity for experts to have a real impact in this area, such as that which occurred in the Latin American region.

## **APPENDIX ONE**

### **Status of Ratification of Human Rights Instruments**

#### **A. States party to the Refugee Convention**

	<b>CAMBODIA</b>	<b>CHINA</b>	<b>JAPAN</b>	<b>S. KOREA</b>	<b>PHILIPPINES</b>
<b>RC 1951</b>	1	1	1	1	1
<b>R. PROT</b>	1	0	1	1	1
<b>ICCPR</b>	1	1	1	1	1
<b>ICESCR</b>	1	0	1	1	1
<b>G. CONV</b>	1	1	0	1	1
<b>CERD</b>	1	1	1	1	1
<b>CEDAW</b>	1	1	1	1	1
<b>CRC</b>	1	1	1	1	1
<b>CAT</b>	1	1	1	1	1

#### **B. Other States**

	<b>INDIA</b>	<b>INDONESIA</b>	<b>MALAYSIA</b>	<b>MYANMAR</b>	<b>THAILAND</b>
<b>RC 1951</b>	0	0	0	0	0
<b>R. PROT</b>	0	0	0	0	0
<b>ICCPR</b>	1	1	0	0	1
<b>ICESCR</b>	1	1	0	0	1
<b>G. CONV</b>	1	0	1	1	0
<b>CERD</b>	1	1	0	0	1
<b>CEDAW</b>	1	1	1	1	1
<b>CRC</b>	1	1	1	1	1
<b>CAT</b>	Signed	1	0	0	1