Introduction

'Humanitarian Responses' to Refugees in Southeast Asia

Susan Kneebone, Max Walden, Reyvi Mariñas and Antje Missbach

> Rather than seeing the Southeast Asian region as the perpetual exception and global outlier on refugee matters, it may be more productive to see the region as a necessary starting point for rethinking what refugee protection should be – not just in the region, but also beyond.
>
> –Itty Abraham, Chapter 1 (this volume)

The focus of this book is refugee protection in Southeast Asia, a region[1] that is often considered to be an 'outlier' in refugee law. Most accounts on refugee protection in Southeast Asia – including those of many of the authors in this book – begin with the twin propositions that first, this is a region where states have 'rejected' the international refugee protection regime and, second, that Southeast Asia has the least evidence of a 'regional' approach to refugee issues when compared to other regions such as Latin America and Africa, despite it being one where refugees have been hosted for decades and where they continue to be hosted. The region is currently impacted by two significant ongoing and protracted regional refugee crises: the flight of the Rohingya people from Myanmar and the plight of the Afghan people. This book explores how refugee protection is manifested in the Southeast Asian nations of Indonesia, Thailand and Malaysia ('the three states' for the purposes of this Introduction) that host the largest numbers of refugees in the region. By using the example of

these three states, the purpose of this book is to promote new thinking on protection of refugees in Southeast Asia, and on resolving tensions between states, actors and institutions in the region. This introduction serves to contextualize the cultural, political and historical landscape of refugee protection in the three states, and briefly introduces the themes that will be explored in this book.

Framing the Issue: Rejecting the 'Rejection' Argument as the Starting Point

The 'rejection' argument (with the associated perception of the international refugee protection regime as a 'European' project) is based on the fact that few states in the region have signed the 1951 Refugee Convention and/or its 1967 Refugee Protocol (together the 'Refugee Convention framework') (Davies 2007). This rejection of the Refugee Convention framework and its norms and institutions ('the international refugee protection regime', as further explained below) is often thought to reflect a postcolonial as well as a regional exceptionalism stance (Krause 2021; Abraham 2023). For example, Abraham (Chapter 1) argues that to sign the 1951 Refugee Convention would be 'a diminution of hard-won postcolonial sovereignty'. The rejection argument is often accompanied by an indictment of the 'failure' of states in the region to learn from their experiences as countries of first asylum during the Indochinese crisis and the ensuing Comprehensive Plan of Action for Indochinese Refugees (CPA), which operated from 1989 to 1996. It should be noted, for example, that these 'outlier' states have not subsequently legislated refugee protection measures at the national level. When refugee protection is granted by states, it is mostly framed as a 'humanitarian' response, even in those states that have signed the 1951 Refugee Convention. In Southeast Asia, only three states – Cambodia,[2] the Philippines and Timor Leste – are parties to the 1951 Refugee Convention and/or the 1967 Refugee Protocol; however, implementation of international obligations even in these countries is imperfect (Muntarbhorn 2021: 430–32). For example, although the Philippines has been a signatory to the 1951 Refugee Convention since 1981 and has welcomed asylum seekers during recent crises, it does not offer an official refugee status (Moretti 2022: 96).[3]

However, in this volume we move away from the rejection argument and the associated call for regional solutions, and focus instead on how states in the region understand refugee protection as situated between humanitarianism and sovereignty. From that perspective, strategies for dealing with the 'protection deficit' can evolve. Despite differences in their legal contexts and practices, in all three states (Indonesia, Thailand and Malaysia), refugees are

regulated as discretionary humanitarian exceptions to national immigration legislation (see Chapters 5, 6 and 10). Southeast Asian states generally avoid using the term 'refugees' at the national level, even though states must deal with the term in the international fora (Muntarbhorn 2021: 424). A defining feature of the three states under consideration is their rejection of the special status of refugees in international law, and their nonrecognition of the legal category of 'refugee' (with the partial exception of Indonesia, as explained below – see Chapter 4).

Southeast Asian states view their international human rights law obligations to refugees as emergency 'humanitarian' obligations. In a joint statement made in 2015 responding to the regional refugee crisis of the Rohingya people, the Foreign Ministers of Indonesia, Malaysia and Thailand – nations that border the Andaman Sea – pledged to uphold their 'responsibilities and obligations under international law and in accordance with their respective domestic laws, including the provision of humanitarian assistance' (Ministry of Foreign Affairs of Malaysia 2015). At that time, in a stance that echoed the decades-earlier CPA, these states agreed to grant asylum on a temporary, twelve-month basis on the condition that these refugees be resettled or repatriated by the international community at the conclusion of the twelve-month period. However, these promises and conditions were not fulfilled. When the COVID-19 pandemic struck, it coincided with renewed arrivals of Rohingya refugees by boat in 2020 and again in 2021 (following the coup in Myanmar). At that time, they were met with harsh border protection measures and forced returns. In a joint statement between the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM) and the United Nations Office on Drugs and Crime (UNODC) (UNHCR, IOM and UNODC 2020), these international agencies called for a 'regional solution'. Further, the UNHCR has again called upon states to deliver a 'comprehensive regional response' to Rohingya refugee sea crossings, noting a 360% increase in the number of sea crossings in 2022 compared to the previous year. It has been estimated that at least 348 people died in the Andaman Sea and the Bay of Bengal during 2022 (UNHCR 2023).

By contrast, a number of local scholars (Dewansyah and Handayani 2018; Prabandari and Adiputera 2019; Islam et al. 2021) and some of the contributors to this collection (see Chapters 1, 6 and 7) argue for 'local' and 'localized' national responses to refugee protection in place of international refugee protection. This book responds to these suggestions and to the view that:

> The national level practices highlighted in [South and Southeast Asia] show that there is precedent for non-Refugee Convention States to accommodate and protect refugees in their territories, even without treaty obligations. Domestic mechanisms to confer rights and legal status do exist, and can serve

> as a foundation for positive practices regionally and globally. (Islam et al. 2021: 27)

This upsurge in regionally based scholarship on refugee protection suggests that there is an 'appetite for change' and a potential rethinking of the relationship of Southeast Asian states to the international refugee protection regime. As some of the chapters in this book will explain (and is also discussed further in this introduction), there is incremental change in approaches to refugee protection in Southeast Asian states following the Global Compacts process in 2018 (see Chapters 7 and 8).

The theme of this book thus moves away from framing Southeast Asia simply as one of regional 'exceptionalism'. In doing so, the notions of humanitarianism and sovereignty serve as strong counterpoints to reframe how refugee protection is understood and granted by states in the region, and the extent to which these understandings reflect the fault lines of the international refugee regime. In this book we ask: what is a 'humanitarian response' to refugees and what are the implications of the humanitarian responses of Southeast Asian states for the key norms of international refugee law, such as the right to seek asylum and a 'durable solution'? What lessons do the humanitarian responses of Southeast Asian states to the 'refugee problem' have for understanding the fault lines of the international refugee regime? Does the current call for global and multi-stakeholder 'bottom-up' responses to refugees as a problem of forced migration play into how states construe their sovereignty as a matter of national security, rather than as involving responsibility (see Chapter 4 in this volume) and obligations to refugees in their territory (Aleinikoff 2018)? These are the issues that we consider in this book.

In this volume, we stress the internal and external dimensions of sovereignty whilst recognizing other interconnected concepts of sovereignty – that is, sovereignty in its internal and external dimensions on the one hand, and the territorial and jurisdictional aspects of sovereignty on the other hand. Internal sovereignty refers to the distribution of power within the state, whereas external sovereignty is related to the state's role within the international order and its capacity to act as an independent and autonomous actor in the world system (Heywood and Chin 2023: 120). The chapters in this book bring out these different concepts of sovereignty through various lenses of analysis. For example, Kuncoro and Prabandari in Chapter 4 explain how in political theory the concept of sovereignty incorporates responsibility; Coddington in Chapter 5 describes how the Thai government has introduced a refugee screening mechanism to produce 'affective' impressions of sovereignty using scholarship on affect and emotion in human geography; and Petcharamesree in Chapter 10 employs Seyla Benhabib's normative principles on sovereignty. These different uses

of sovereignty and the link between sovereignty and human rights are summarised in the Conclusion.

The authors in this book examine how refugee protection has been practised in Southeast Asia, both historically and in contemporary times. The chapters by scholars from the region, representing different disciplines including anthropology, law, political science, economics and geography, explain the perspectives of regional actors, states, refugees, civil society and international organizations. The book is structured into three main parts, each containing three chapters: Part I – Historical Moments and Perspectives on Refugee Protection in Southeast Asia; Part II – Country Studies; and Part III – The Refugee Convention: Protection by Nonstate Actors. Part IV – Refugee Protection in Southeast Asia: Between Sovereignty and Humanitarianism, contains two concluding chapters.

In the remainder of this introduction, we first situate refugees within the regional context, before examining the meaning of 'humanitarian' in the context of refugee protection. The key starting point is that in Southeast Asia, the refugee is seen as a 'problem' resulting from irregular mixed and forced migration (Chapters 1, 7 and 10; Petcharamesree 2016) rather than as an individual with a status in international law. This perception explains the state focus on territorial control and national 'sovereignty' in the context of irregular migration (McConnachie 2014). The main reason for migration regulation in the region is concern surrounding labour migration, a concern that results from uneven development within the region (Chapter 1; McConnachie 2014). A common characteristic between the three states is their economic dependence on labour migration and the interconnection between the three states due to their geographical proximity. Amongst the three states, Indonesia is a sending state of labour migrants, many of whom work in Malaysia and, to a lesser extent, Thailand. As Petcharamesree (2016) has noted, this dependence colours the approach of Southeast Asian states to forced migration, including towards refugees.

Background: Southeast Asia as a Regional Actor in Refugee Protection

In this section we provide some social, political and economic context for the three refugee hosting states of Indonesia, Malaysia and Thailand. Although these three states host a small fraction of the global refugee population (estimated by the UNHCR at June 2022 to be 21.3 million) (UNHCR, copy on file), their practices of refugee protection and implementation of international norms are influential beyond Southeast Asia, reaching surrounding states such as Bangladesh (which carries much of

the burden of Rohingya refugees from Myanmar) and the broader Asia-Pacific region, which hosts a large percentage of the global refugee population. In its *AsiaPacific Migration Report 2020* report, the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) estimated that at the end of 2019, there were over 7.8 million refugees and people in refugee-like situations in Asian-Pacific countries, representing 38% of the global refugee population and the largest regional refugee population in the world (ESCAP 2020: 8). UNHCR estimates that at the end of 2021, there were 11.3 million 'persons of concern' in Asia and the Pacific, of whom 4.4 million were in refugee-like situations and 2.4 million were stateless (UNHCR 2022a: 3). A total of 88% of these persons were hosted in neighbouring countries (UNHCR 2022a: 3).

Southeast Asia is a subregion of the Asia-Pacific and comprises many states that were formerly colonised by European powers (with the exception of Thailand, as discussed in Chapter 2). The term 'Southeast Asia', itself arguably a postcolonial construct, is synonymous with the Association of Southeast Asian Nations (ASEAN), which was formed in 1967 in response to Cold War concerns, with an avowed economic and security focus. ASEAN now comprises all Southeast Asian states except Timor Leste, which will become its eleventh member in the near future (ASEAN 2022). The lack of a regional approach to refugee protection is often attributed to the influence of 'the ASEAN Way' and, in particular, to the effect of the principle of 'non-interference' on the sovereignty of other member states (see Chapters 1 and 10). The ASEAN Way arguably prioritizes regional security and state interests, including the rights of its citizens, over the human rights of foreigners (including refugees). However, the postcoup 2021 Myanmar (formerly Burma) crisis has tested the resolve of ASEAN states, particularly Malaysia and Indonesia – two states that have been directly impacted by the Rohingya refugee crisis – which have been unusually strident in their criticism of Myanmar (Ho 2023; see also Chapter 10).

As of March 2022, Thailand was hosting over 100,000 'persons of concern' (namely refugees, asylum seekers and others in need of international protection, in the UNHCR's wording), including 91,401 Myanmar refugees who had been living in so-called 'temporary shelters' or camps on the Myanmar–Thailand border for decades, and 5,155 urban asylum seekers and refugees. At that time, there were also 561,329 persons registered by the Thai government as stateless (UNHCR 2022d). In Malaysia, there were 182,960 refugees and asylum seekers registered with the UNHCR as of the end of May 2022. Some 157,040 were from Myanmar, comprising 104,330 Rohingyas, 23,030 Chins and 29,680 other ethnic groups that had come from conflict-affected areas or were fleeing persecution in Myanmar. The remaining individuals were 25,920 refugees and asylum seekers fleeing war and persecution from fifty other countries (UNHCR Malaysia n.d.).

In Indonesia, there were 13,174 UNHCR registered persons in February 2022 (UNHCR 2022c). Thus, Malaysia hosts the largest number of refugees out of the three states considered, with Thailand and Indonesia in second and third place, respectively. Interestingly, this order correlates with the economic position of each of the countries, as described below. However, Malaysia's economic position is not the sole reason for its ranking as the 'lead' country in hosting refugees; there are other social, economic and political factors that explain the three states' capacity and willingness to host refugees, as will be set out below.

In the case of Indonesia, the lower number of refugees reflects a change in Australian policy towards the resettlement of refugees, and a reduction in funding to the international organizations that assist refugees and asylum seekers in Indonesia (Kneebone 2019; see also Chapters 3, 9 and 10). As Masardi (Chapter 3) points out, Indonesia can no longer be considered a temporary transit country because the majority of its refugees have resided there for ten years or more. Although Southeast Asian states treat refugee protection as requiring an 'emergency' humanitarian response (as explored in this introduction), most refugees in Southeast Asia are in 'protracted' refugee situations due to a lack of 'durable solutions', namely the ability to either integrate in the host country, to return safely to their home country or to be resettled in a third country.

In the case of Malaysia, another important factor that explains the size of the refugee population is its status as a Muslim-majority country, as well as its strong economic position. As Hoffstaedter and Jalil (Chapter 6) explain, the Malaysian government has provided 'humanitarian exceptions' to refugees in the form of work permits for some groups, based on ethnic, cultural or religious and political ties. In 2016, the government launched a pilot scheme to provide work to 300 Rohingya refugees in the plantation and manufacturing sectors (Towle 2017) as an 'alternative pathway' to asylum. However, the scheme was generally considered a failure as many Rohingya dropped out of the programme (Yap 2022). Hoffstaedter and Jalil (Chapter 6) argue that plantation work was not suitable for the urban-living refugees engaged in the pilot scheme.

As to the relative strengths of their economies, Indonesia is the tenth largest economy in the world in terms of purchasing power parity (World Bank 2022), and the largest economy in ASEAN. With its gross national income (GNI) per capita reaching US$4,050 in 2019, the World Bank declared Indonesia an upper-middle income country in July 2020 (Akhlas 2020). However, due to an economic downturn caused by the COVID-19 pandemic, Indonesia lost its upper-middle income status after just a year, reversing progress on poverty reduction (Jiao and Sihombing 2021). By contrast, the World Bank declared Malaysia an upper-middle income country in 1992 (Yeap 2021) and expects that it will reach high income status

between 2024 and 2028 (World Bank 2021). Malaysia's GNI per capita in 2021 was US$10,930, in contrast to Thailand's GNI per capita of US$7,260 and Indonesia's $4,140 (World Bank n.d.).

Lower levels of economic development in Indonesia, as well as enduring challenges with poverty alleviation, continue to shape its protectionist economic and labour policies, in contrast to the heavy economic reliance on migrant labour in Malaysia and Thailand. This has significant implications for refugees and asylum seekers in Indonesia, who are seen as an economic burden. Indonesia is the third largest source country in Asia for labour migration and accounts for 65% of its overall emigration (Economist Impact 2021: 12). It is among the largest recipients of remittances in the Asia-Pacific region, but is less dependent on remittances for economic development than countries such as the Philippines, Nepal and Pakistan (Economist Impact 2021). Immigrants account for just 0.07% of the total Indonesian workforce, with only 98,761 foreigners granted work rights in 2020 (Palmer 2021) in a country of some 280 million people.

By contrast, Malaysia is a major destination country for labour migration, particularly for workers from neighbouring Indonesia. With more than three million migrant workers (comprising 1.76 million documented migrant workers and up to 1.46 million irregular migrants) according to World Bank estimates, in a country of roughly 33 million people, the International Labour Organization says that migrants account for some 20% of Malaysia's workforce (Jakkula 2020). Workers from Indonesia and Bangladesh alone are estimated to account for 15% of the total employed persons in Malaysia (Theng Theng and Romadan 2020).

Official statistics show that at the end of 2019, there were 2.9 million registered migrant workers in Thailand, accounting for at least 7.6% of the total labour force (Jakkula 2021). United Nations (UN) agencies estimated in 2018 that there were more than 4.9 million non-Thai residents living and working in the country, with some 3.9 million migrant workers from Cambodia, Laos, Myanmar and Vietnam (Harkins 2019: 9). The number of documented migrants appeared to decline in 2022, likely due to the COVID-19 pandemic, with around 2.2 million of the labour force identified as documented migrants out of a labour force of 38.7 million and an overall population of roughly 70 million (International Labour Organization 2022).

In the context of the states' ageing populations, labour migrant populations in both Malaysia and Thailand are projected to continue growing. However, despite significant contributions to the economies of Malaysia and Thailand, public attitudes to migrant workers – both documented and undocumented – have been shown to be negative and discriminatory in both countries (Jakkula 2020, 2021). Labour migrants to both countries tend to work in low-skilled jobs, with 99% of migrants in Thailand and 95%

of migrants in Malaysia having attained less than a secondary education (Testaverde et al. 2017: 51). Official data in Indonesia, meanwhile, indicate that most immigrants working in the country are directors, managers or other professionals in the services sector (*Indonesia Investments*, 12 May 2018). High levels of undocumented labour in informal sectors in Malaysia and Thailand therefore provide scope for refugees and asylum seekers to work, albeit clandestinely. In contrast, as a less wealthy country that has few foreign workers, these opportunities are fewer in Indonesia.

These social, economic and political differences inform both how states perceive refugees (see Chapters 4, 6 and 9) and, conversely, how refugees think about state protection (see Chapter 3).

'Humanitarian Responses' to Refugees: Emergencies or Durable Solutions?

The term 'humanitarian' is a chameleon word. According to *The Shorter Oxford English Dictionary on Historical Principles* (1973), its literal meaning is that of 'having regard to the interests of humanity … at large' – a definition that has moral and normative tones of universality. Ninette Kelley defines it as embracing 'equal and unconditional compassionate concern for all fellow humans' (Kelley 2023: 155). But in the context of refugee protection, 'humanitarian' takes on different colours (Chimni 2000). For example, an emphasis on refugees as a 'problem' of forced migration or crises leads to thinking about protection in temporary terms. Keegan, Jones and Khakbaz note that:

> In many Southeast Asian hosting countries, refugee protection responses are generally only suitable for short-term and temporary interventions or crisis responses to humanitarian needs. (Chapter 7)

On the other hand, as a number of the authors in this book explain (see Chapters 6 and 10), refugees are framed in national laws as exceptions to immigration control. For example, Coddington describes the:

> affective impressions of humanitarian protection and administrative competence within Thai migration governance, while still securitizing migration and maintaining the dependence on ad hoc, arbitrary migration enforcement. (Chapter 5)

In the first example, Keegan, Jones and Khakbaz refer to refugee protection as an example of crisis management, or what Barnett (2014) refers to as 'emergency humanitarianism'. In the second example, Coddington uses the term 'humanitarian protection' to describe the extralegal, discretionary responses of the state; the sense in which the term is commonly used

to describe refugee protection in Southeast Asia (Kneebone, Missbach and Jones 2021). In the context of the three states, Dewansyah and Handayani (2018) describe this approach as a form of emergency humanitarian intervention. They suggest that it 'reflects how the sovereignty of the state, especially in the immigration powers, reconciles the influx of refugees as a forced migration phenomenon' (2018: 484). The 'privileged' position of the refugee in international law (Turton 2006) has no place in such 'humanitarian' responses, as refugees are seen as a problem of mixed and forced migration.

As is well known, the individualised refugee definition of the 1951 Refugee Convention developed historically in response to the need for refugees to have a status in international law (Kneebone 2014: 100–3). But refugee law does not guarantee state membership in a new host state,[4] nor does it impose a duty upon host states to offer citizenship (only a duty to 'facilitate' assimilation and naturalization under Article 16 of the 1951 Refugee Convention). However, the 1951 Refugee Convention definition emphasizes grounds for protection, which by and large arise from the person's civil or political status. Andrew Shacknove (1985) describes the granting of refugee status as an act of 'surrogacy'. He explains that the refugee definition presupposes that the bond of allegiance of a citizen with their country of origin – i.e. the persecuting state – has been severed and needs to be repaired.

The international refugee protection regime recognises the unique status of a refugee in international law and arguably the right to a permanent or 'durable solution'. As Jane McAdam has pointed out, the granting of Refugee Convention status entitles a refugee to certain rights (2008: 267). These rights include (in addition to nonrefoulement, which is a principle of customary law), at a minimum, nondiscrimination as to race, religion or country of origin (Articles 3 and 4), and freedom from penalization for illegal entry (Article 31(1)).

By contrast, in all three states – Malaysia, Thailand and Indonesia – refugee protection is granted at the national level and is granted as a 'humanitarian' exception to the illegal immigration status of refugees (if granted at all). In Chapter 10, Petcharamesree describes this as deliberate 'de facto refugee policy'. In Chapter 2, Napaumporn and Kneebone describe Thailand's selective responses to different ethnic groups under its national laws and policies, which have led to a legacy of unprotected stateless persons. In Chapter 6, Hoffstaedter and Jalil explain that the Malaysian government has provided 'humanitarian exceptions' in the form of permits for selective groups of individuals based on ethnic, cultural or religious and political ties. They argue that the 'Malaysian way' is in line with other countries in the region that prioritise national sovereignty in providing refugee protection, rather than applying a principled framework based on

international law. In Indonesia, by contrast, there are national laws that refer to refugees, but that have not been implemented except through 2016 Presidential Regulation concerning the Treatment of Refugees (PR 125), which is a form of subsidiary legislation (see further below).

The fact that most refugees in Southeast Asia settle in urban areas is another factor that greatly influences state responses. Abraham (Chapter 1) argues that the high numbers of international refugees in urban settings in Southeast Asia create a dilemma in the context of urban poverty. He refers to the 'shadow discourse of economic migrants and political refugees', suggesting that recognition of the special status of international refugees creates an unwelcome rupture and political disharmony in Southeast Asia between the local population and refugees who are competing for scarce urban resources. Coddington (Chapter 5) and Keegan, Jones and Khakbaz (Chapter 7) also consider the tensions that hypervisible urban refugees create for policy makers to be of relevance, especially in Thailand.

The prevailing understanding of humanitarian responses to refugees in Southeast Asia is that they involve emergency discretionary, extralegal decisions (Kneebone, Missbach and Jones 2021). This is quite different from the hallmark norms of emergency humanitarianism as understood in political science, namely, neutrality, impartiality and independence, and 'a hands-off attitude toward politics' (Kneebone 2010: 227–31; Barnett 2014). For example, when the UNHCR was established in 1950 to deal with the post-Second World War refugee crisis, its statute referred to its 'humanitarian' and 'non-political' role. Article 2 provided emphatically that:

> The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.

Whilst the work of UNHCR has been criticized for its non-neutral stance on occasions, the key takeaway is that in principle, emergency humanitarian protection should be nonpolitical.

Asylum Norms and Procedures: Sovereignty and Humanitarianism

A 'regime' as understood in international politics is generally defined as 'principles, norms, rules and decision-making procedures' that states apply to an issue (Betts 2009: 8–9, citing Krasner 1983: 2). The international refugee protection 'regime', of which the Refugee Convention framework is part, has been described by leading refugee law scholar Guy Goodwin-Gill 'in two words and by two inter-locking concepts: protection and solutions' (2003: 26). As Goodwin-Gill explains, protection at its 'most

basic' means asylum and nonrefoulement, with 'solutions' referring to the three 'durable' outcomes or 'solutions' for individuals as designated by the UNHCR, namely integration through the granting of asylum, voluntary return or repatriation to the country of origin, and permanent resettlement in a third state (Kneebone and Macklin 2021).

Asylum is a fundamental principle of international law and constitutes the protection that a state grants to any individual in need of protection in its territory irrespective of their status in international law (Gil-Bazo 2015: 7). Thus, asylum is an expression of state sovereignty, as it involves the discretionary power of the state to grant asylum if they wish to do so. As Maria-Teresa Gil-Bazo explains (2015: 7), asylum is different from refugee status in that asylum is an institution for protection, while refugee status refers to one category of individuals who may benefit from such protection. The right to asylum is accepted as a core principle of the international refugee protection regime by both legal and international relations scholars (Goodwin-Gill 2003: 26; Betts 2009: 6–7).

However, the normative basis of the sovereign institution of asylum and its content are contested. Gil-Bazo and Elspeth Guild contend that historically, the practice of asylum pre-dates the existence of the international refugee protection regime, and that its origin is in 'bodies of norms for human conduct'. They argue that its normative character can be found in its nature as a religious command, based on the duty of hospitality and protection towards strangers (Gil-Bazo and Guild 2021: 868). They further point out that that the tradition has continued to this day because the principle of asylum has now been enshrined in constitutions around the world as a right of refugees and other persecuted individuals. For them, asylum is an 'institution of protection' that covers not only refugees within the 1951 Refugee Convention definition, but also all those in need of protection (Gil-Bazo and Guild 2021: 872).

While states in Southeast Asia grant asylum as a temporary or humanitarian solution, they do not process refugees (see Chapter 10) or permit them to integrate into their communities. As Matthew Price (2009: 13) explains, this humanitarian approach to asylum recognizes the 'urgency of need for protection', regardless of whether the need results from persecution, civil war, famine, extreme poverty or some other cause. The humanitarian approach to asylum does not distinguish between refugees and other forced migrants.

This 'emergency' or humanitarian view of asylum has received support amongst some international refugee scholars, such as James Hathaway and Alexander Neve (1997), and Peter Schuck (1998: 297), who favour temporary protection over permanent asylum programmes in refugees' regions of origin in situations of mass influx as a means of promoting broader solutions based on collective action. By contrast, Price (2009: 70) argues that asylum has an 'expressive character'; it advances an instrumental goal that enforces

international norms against persecutory states. Kelley (2023), however, distinguishes asylum as sanctuary (granted in sacred places) from 'political' asylum, which she describes as imbued with 'humanitarianism'.

There is a further debate about the content of the right to asylum centred around Article 14 of the Universal Declaration of Human Rights (UDHR), which states that '[e]veryone has the right to seek and enjoy in other countries asylum from persecution'. The question is whether Article 14 of the UDHR provides a procedural right and/or substantive rights to individuals seeking asylum.[5] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen (2008: 441, 446) argue that the genesis and formulation of Article 14 shows that it was intended to maintain a 'procedural right' – that is, the right to an asylum process.

However, Alice Edwards (2005) provides a different interpretation of Article 14. Rather than focusing on the procedural right, she emphasises the 'right to *enjoy* asylum' in Article 14 of the UDHR, which she contrasts with the 'right to seek asylum'. She argues that Article 14 suggests, at a minimum, a right 'to benefit from' asylum, which includes socio-economic rights under the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) (to which Indonesia and Thailand, but not Malaysia, are signatories – see Table 0.1), and specifically the right to family life and reunification, and the right to work (Edwards 2005: 308–28).

Uniquely, Article 28G(2) of the 1945 Constitution of the Republic of Indonesia (1945 Indonesian Constitution) expressly provides for 'the right to obtain political asylum'. In their recent article, Bilal Dewansyah and Ratu Durotun Nafisah argue that the right to asylum under the Indonesian Constitution 'is the highest norm in the Indonesian legal system' and that it imposes legal obligations on the state to implement the right (Dewansyah and Nafisah 2021: 537). They agree with Edwards' views about the content of the right and regard it as 'uncontroversial' that having an appropriate determination procedure is essential to ensure the right to nonrefoulement and thus to seek asylum (Dewansyah and Nafisah 2021: 541). However, they point out that in Indonesia, this 'human rights-based' approach has been significantly weakened by the dominance of humanitarian 'immigration-control' approaches in dealing with refugees and asylum seekers.

In Indonesia, PR 125 permits the UNHCR to determine the status of refugees and asylum seekers, applying a definition that mirrors the one in the 1951 Refugee Convention (Kneebone, Missbach and Jones 2021). However, this does not prevent state officials from applying immigration laws and dealing with refugees and asylum seekers as 'illegal migrants' (*Qasemi's Case*, discussed in Kneebone, Missbach and Jones 2021: 446–48). The absence of a special status for refugees means that in the view of Indonesian law and immigration officers in the field, refugees are tantamount to illegal immigrants who enter the state without a permit or proper

documentation (Kneebone, Missbach and Jones 2021: 440, 447–48). Dewansyah and Nafisah (2021) argue that PR 125 represents a securitized immigration law approach to refugees.

As there are no special procedures at the national level in any of the three states under consideration to determine the status of refugees (see Chapter 10), refugees are denied access to durable solutions, such as integration, and resettlement places in third countries are limited. The reluctance to integrate refugees reflects concerns over national identity and social harmony. For example, as Hoffstaedter and Jalil explain in Chapter 6, the Malaysian government has provided 'humanitarian exceptions' in the form of permits for selected groups of individuals, based on their ethnic, cultural or religious and political ties.

This discussion shows that a humanitarian concept of asylum strengthens the discretionary power of states as to whether to admit refugees. In Chapter 10, Petcharamesree states that '[a]n ad hoc approach based on humanitarianism results in marginalizing refugees from state protection', including access to human rights. As emphasized by Edwards (2005), in Southeast Asia this results in refugees being unable to enjoy essential rights, such as the rights to healthcare, education and work (Moretti 2022: 180). Moretti (2022: 153, citing UNHCR 2011) describes the plight of refugees in Southeast Asia as one of 'benign neglect'. He also suggests that the 2018 Global Compact on Refugees was developed to deal with that situation (Moretti 2022: 154). In the next section we analyse the impact of the 2018 Global Compact on Refugees (GCR) on the region.

'Humanitarian' Responses and the Global Community: The Global Compacts

International relations scholar Alexander Betts suggests that the purpose of the international refugee protection regime is to serve a 'global public good' (Betts 2009: 8, 25), stressing the shared role of states in refugee protection and for the implementation of durable solutions (Betts 2010: 18). While both Goodwin-Gill (2003) and Betts (2009) stress the need for durable solutions, in contrast to Goodwin-Gill's focus on protection and solutions for refugees, Betts' emphasis is on states' roles in sharing and solving the 'refugee problem' rather than on an individual entitlement to a rights-conferring status. The value of Bett's state-focused regime analogy is that it emphasizes contextual factors, such as norms, power structures and architecture or institutions, and provides political explanations for the development of specific refugee policies.

The global lack of durable solutions for refugees and other forced migrants to respond to the 2015 twin crises of mass exodus of refugees from

Syria and Myanmar (Kneebone 2016) prompted the international community to gather in 2016, resulting in the 2016 New York Declaration for Refugees and Migrants (2016 New York Declaration). As Taylor explains in Chapter 8 of this book, a key feature of the 2016 New York Declaration is the invitation to 'private sector and civil society, including refugee and migrant organizations to participate in multi-stakeholder alliances to support the commitments' (New York Declaration on Refugees and Migrants: [15]) that was made by the participating states. The global commissions that followed the 2016 New York Declaration led to the two Global Compacts in 2018; the Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM), to which Indonesia, Thailand and Malaysia all made commitments.

The GCR, whose drafting was led by the UNHCR, has four objectives:

(i) to ease pressures on host countries;
(ii) to enhance refugee self-reliance;
(iii) to expand access to third country solutions; and
(iv) to support conditions in countries of origin for refugees to return in safety and dignity.

These objectives are to be achieved through 'the mobilization of political will, a broadened base of support, and arrangements that facilitate more equitable … Contributions among States and other relevant stakeholders' (GCR [7]).

The GCR provides for 'more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees' (GCR [1]).

The GCM expresses the participating states' 'collective commitment to improving cooperation on international migration'. The objectives of the GCM include opening up more regular migration pathways, reducing the vulnerabilities of migrants during the migration process, providing migrants with access to basic services, using detention only as a measure of last resort, promoting inclusion and social cohesion, and strengthening international cooperation for safe, regular and orderly migration.

The common point between the 2016 New York Declaration and the Global Compacts is the emphasis placed on the need for a broadened base of support and stakeholders, for expanded 'pathways' or third-country solutions to protection, including complementary pathways and for international cooperation and burden/responsibility sharing. Although the Global Compacts are soft law instruments, it has been suggested that they could lead to the development of international refugee law (Janmyr 2021) through the internalisation of protection norms.

The participation by Southeast Asian states in these processes and the commitments made as part of these compacts contrast with the drafting of the 1951 Refugee Convention, in which states in Southeast Asia were

largely unrepresented, or at best represented by colonial powers (Krause 2021). Indonesia made nine pledges under the GCR, including to 'design a refugee empowerment programme, in cooperation with UNHCR and IOM', to 'provide access to basic and secondary education for refugee children' and to 'enhance cooperation with UNHCR'. Malaysia made only one pledge: to 'promote the objectives of the GCR (Refugee Compact) and the 2030 agenda'. As explained below, Malaysia's policy is one that serves to expand third-country protection beyond resettlement to complementary pathways, such as through work and higher education visas. Thailand made fifteen pledges, including to 'enhance social protection for stateless persons', to 'promote access to education for stateless children' and for the 'provision of access to age-appropriate health care for children in need of international protection in Thailand'.

The questions that follow from this are as follows: are the objectives of the Global Compacts compatible with the rights of refugees to nondiscriminatory treatment? What are the implications for state responsibility and global burden sharing? Will these compacts lead to a stronger uptake of 'durable solutions'? For example, most refugees in transit in Southeast Asia hope for eventual resettlement in a third country. As a result, as Masardi (Chapter 3) has explained, refugees in transit are prepared to 'settle for less' through informal protection as they wait for resettlement; they do not seek full integration, but do want some work or 'livelihood' rights, plus rights to healthcare, birth and marriage certificates, and freedom of movement within the country. Whilst complementary pathways, such as work visas, might appeal to the Malaysian and Thai governments because of their respective needs for labour migrants, the challenge of the new policy on complementary pathways is to balance them with the responsibility of states to resettle refugees in ways that do not discriminate between refugees (such as according to gender, youth, ability and work skills). In the 2030 agenda referred to above, the UNHCR insists on the distinction and 'additionality' of complementary pathways to resettlement, but also suggests that the former might operate as a 'progressive approach' (UNHCR 2022e: 9) to resettlement. Complementary pathways entail an uneasy balance or 'trade-off' between refugee rights and sovereign state interests.

As discussed earlier, Malaysia's economy is highly reliant on migrant workers, who account for at least one-fifth of its labour force. Various actors, from civil society activists to business groups, and indeed some officials, have increasingly seen the potential for Malaysia's 104,000-strong Rohingya population to be self-sufficient and contribute to the economy through being granted legal work rights (Bernama, 29 April 2022). The potential for the success of this approach is illustrated by the work pilot for 300 Rohingya refugees described above. However, an upsurge in xenophobia towards foreigners, and particularly Rohingya refugees, precipitated

by the COVID-19 pandemic saw employment opportunities decline amid large-scale detention of migrants for alleged breaches of lockdown and authorities stopping traders from hiring migrant workers at markets in Kuala Lumpur (Sukhani 2020; Walden 2020). In times of crisis, refugee rights are the first casualty.

Access to higher education is another complementary pathway that is heralded as a successful outcome of the compacts, through programmes such as the World University Service and the Opening Universities for Refugees educational initiative.[6] Whilst these programmes have achieved impressive outcomes, visas for such opportunities are only available for select groups, such as refugee youth. However, these opportunities could lead to more participation by refugees in refugee advocacy and governance (a second goal of the Global Compacts, as discussed below).

There is evidence that the engagement of the three states with the Global Compacts is enabling other actors to work with them to achieve incremental change for refugees. As Taylor describes in Chapter 8, the Asia Pacific Refugee Rights Network (APRRN), which has a multi-institutional base, has engaged with the Global Compacts processes from 2016 to 2023, as well as with states in the region. In Chapter 7, Keegan, Jones and Khakbaz discuss how HOST International worked with the Thai government (and within Malaysia) and with other nonstate organizations to implement alternatives to detention for child refugees detained as 'illegal immigrants'. In Thailand this led to a Memorandum of Understanding on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres (Royal Thai Government 2019).

Thailand is also working on programmes to safely return refugees from Myanmar who are willing to be voluntarily repatriated. This project achieves Objective (iv) of the GCR: to support conditions for safe return in countries of origin. Keegan, Jones and Khakbaz (Chapter 7) describe ongoing dialogue between the UNHCR, the Thai government, private sector organizations and nongovernmental organizations (NGOs) to explore opportunities to improve conditions in areas of return in southeast Myanmar through the implementation of 'appropriate development interventions' for refugees who wish to return home. Moreover, on a bilateral basis, the Thai government, through its development cooperation arm, is engaged with the National Unity Government of Myanmar (hereinafter 'the Myanmar government') to support programmes to enhance skills capacity and livelihoods in the regions bordering Thailand (UNHCR Global Compact on Refugees 2020).

As noted earlier, one of Indonesia's pledges under the Global Compacts was to 'provide access to basic and secondary education for refugee children'. Progress was made towards the pledge with an Indonesian Ministry

of Education Circular Letter (75253/A/A4/HK/2019) released in mid-2019, which stipulated the requirements for refugee children to attend Indonesian public schools, including their possession of a UNHCR identity card that is provided following successful determination of status by the UNHCR (Kneebone, Missbach and Jones 2021). While significant barriers to entry remain, further complicated by the normalization of remote learning during the COVID-19 pandemic, this signals progress towards the goal of formal primary and secondary education for refugee children in Indonesia (see the discussion in Chapters 3 and 4). Further, Indonesia (which is a labour-exporting country) issued a circular in September 2023 requiring local officials to provide work training services for refugees.

A second shift heralded by the Global Compacts is from treating refugees as primarily objects of governance to accepting them as important participants in the process of governance (Milner and Klassen 2021: 12). Taylor (Chapter 8) describes how the APRRN is working to increase the participation of refugees and refugee-led organizations in its work. It is recognized by these scholars that progress towards achieving this goal may be slow. In Chapter 3, Masardi explains that refugees in transit countries feel very vulnerable and are unwilling to jeopardize their situation by engaging too strongly in advocacy against the state. As demonstrated by the Indonesian context, prominent refugee activists instead report preferring that the UNHCR represent them in negotiations with the host state and the international community.

Shortly before finalizing this introduction, the Global Refugee Forum 2023 (GRF) had taken place in Geneva from 13 to 15 December 2023. A notable feature of GRF 2023 was that there was little direct participation by the three states in the process, other than Indonesia, as noted above. In the case of Malaysia, the All-Party Parliamentary Group Malaysia (APPGM) on Refugee Policy, which provides a platform for refugee issues to be discussed in the Parliament, participated, but for the large part the majority of the pledges were made by nonstate actors. This raises the question of whether the GCR has had the effect of making states more aware of their sovereign responsibilities (Aleinikoff 2018) or whether with the emphasis on multi-stakeholder participation it has diffused that responsibility.

Whilst the Global Compacts represent a crucial turning point in the development of governance on international migration and refugee issues, it is unclear whether they will impact the perception of refugees as a problem of forced and mixed migration in Southeast Asia, and thus lead to better recognition of refugees' human rights. That said, the Global Compacts should nonetheless lead to better awareness of the needs and rights of refugees through engaging with a broader range of actors.

Table 0.1 Human rights obligations

Relevant treaty obligations	Indonesia	Malaysia	Thailand
1966 International Covenant on Civil and Political Rights (ICCPR)	23 February 2006	X	29 October 1996
1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)	23 February 2006	X	5 September 1999
1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	25 June 1999	X	28 January 2003
1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	13 September 1984	5 July 1995	9 August 1985
1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)	28 October 1998	X	2 October 2007
1989 Convention on the Rights of the Child (CRC)	5 September 1990	17 February 1995	27 March 1992
1990 International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICPRMW)	31 May 2012	X	X
2006 Convention on the Rights of Persons with Disabilities (CRPD)	30 November 2011	19 July 2010	29 July 2008

Note: Prepared by Reyvi Mariñas. The dates in the table pertain to the date of ratification of the treaty.

Susan Kneebone is a Professorial Fellow and Senior Associate of the Asian Law Centre, and Research Affiliate of the Peter McMullin Centre on Statelessness, Melbourne Law School, University of Melbourne. She is the Chief Investigator of the Australian Research Council (ARC) project *Indonesia's Refugee Policies: Responsibility, Security and Regionalism*, Discovery Project 180100685. She supervises Ph.D. students on refugee law, statelessness and forced migration issues in Southeast and East Asia, and has published widely on law, governance and forced migration in these areas. She is currently leading an ARC-funded project on *The Role of Community Sponsorship for Refugee Resettlement in Australia*. She recently completed an ARC project on *Towards Development of a Legal Framework for Regulation of International Marriage Migration*.

Max Walden is a Ph.D. student and Research Assistant under the Australian Research Council project *Refugee Policies: Responsibility, Security and Regionalism*, Discovery Project 180100685 at the Melbourne Law School. He has recently completed his doctoral thesis, entitled '"Not Served on a Silver Plate": The Role of Civil Society Actors in Promoting the Human Rights of Refugees in Indonesia'. He has taught the politics of asylum policy at Deakin University and is also a journalist and editor who works for *The Age* newspaper in Melbourne.

Reyvi Mariñas is a Research Fellow on the Australian Research Council project *Refugee Policies: Responsibility, Security and Regionalism*, Discovery Project 180100685 at the Melbourne Law School. In 2019 he completed his Ph.D. thesis at Monash University Law School, entitled 'Conscious Citizenship: The Political Activism of the Filipino Diaspora in Australia through the Lens of Hannah Arendt'. He is the author of two chapters on 'Citizenship' and 'Refugee and Immigration Law' in the Philippines to be published in the *Elgar Concise Encyclopedia of Asian Law* (Sarah Biddulph and Kathryn Taylor (eds), forthcoming). He is also an Australian lawyer, practising in the areas of immigration and refugee law, administrative law and human rights law.

Antje Missbach is Professor of Sociology at Bielefeld University, specializing in global and transnational migration and mobility. She is a Partner Investigator on the ARC project *Refugee Policies: Responsibility, Security and Regionalism*, Discovery Project 180100685. She is the author of *Separatist Conflict in Indonesia: The Long-Distance Politics of the Acehnese Diaspora* (Routledge, 2012) and *Troubled Transit: Asylum Seekers Stuck in Indonesia* (ISEAS, 2015), and is co-author of *Indonesia: State and Society in Transition* (Lynne Rienner, 2019). Her latest book, *The Criminalisation of People Smuggling in Indonesia and Australia: Asylum out of Reach*, was published in 2022 (Routledge).

Notes

1. Southeast Asia is a subregion of the broader Asia-Pacific region, which covers several overlapping regions such as East Asia (including Japan and the Republic of Korea, or 'South Korea') and South Asia (India, Sri Lanka and Bangladesh).
2. Cambodia acceded to the 1951 Refugee Convention in 1992, but it was not until 2009 that the Cambodian government took over Refugee Status Determination (RSD) from the UNHCR, following the creation of the Refugee Office in 2008 (JRS Asia Pacific 2012: 26). Cambodia accepts a small number

of refugees in the region and currently hosts twenty-four refugees (Korobi 2024).

3. The Philippines only hosts a small number of the region's refugees, given its geographical location on the eastern edge of maritime Southeast Asia. In 2021, the Philippines hosted 1,300 refugees and asylum seekers in comparison to Malaysia, Indonesia and Thailand, which hosted a combined total of 289,000 refugees and asylum seekers (Chen 2021). In 2012, the Department of Justice (DOJ) issued Departmental Circular No. 58 'Establishing the Refugee and Stateless Status Determination Procedure'. Although the UNHCR and some scholars have lauded the Philippines as providing a 'good practice' for its 'continued commitment to improve the country's protection space and policies for POC [persons of concern]' (UNHCR 2022f; see also van Waas 2012), there is lack of transparency about its practices and the number of persons who receive an RSD. Further, such status does not lead to a 'durable solution'. Those found to be refugees have lived in the country for many years and have acquired de jure or de facto integration into Philippine society (Temprosa 2016: 267). However, local integration through naturalization is very slow and eligibility requirements are quite stringent, including a minimum of ten years' residence in the Philippines (JRS Asia Pacific 2012: 50).
4. See the example of the Philippines, discussed in n 3 above.
5. The UDHR is not a binding instrument, but reflects the consensus of the international community concerning international norms, many of which are enshrined in other human rights instruments. For the treaty obligations undertaken by the three states, Thailand, Indonesia and Malaysia, see Table 0.1.
6. Opening Universities for Refugees (OUR) was founded as an independent initiative by Gül Inanç in Singapore and was later registered as a Charitable Incorporated Organization in the United Kingdom between 2017 and 2021. Since 2021, OUR has run as an independent initiative and partners with the Centre for Asia Pacific Refugee Studies at the University of Auckland, New Zealand. Starting from January 2022, OUR will run a new programme called 'OUR US' with the Ethiopian Refugee Development Council in the United States.

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