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## A New History of Refugee Protection in Post-World War Two Southeast Asia: Lessons from the Global South

Natasha Emma YACOUB

University of New South Wales, Sydney, Australia  
[n.yacoub@unsw.edu.au](mailto:n.yacoub@unsw.edu.au)

(First published online 26 August 2022)

### Abstract

This article proposes re-thinking the history of refugee protection in the Southeast Asia region, focusing on the post-World War Two period (1945–1979). It fills a gap in the literature on this period, drawing on archival material. It disrupts a narrative of “human rights exceptionalism” in Southeast Asia. First, it examines the small but powerful role of Southeast Asian states during the drafting of the 1951 Convention relating to the Status of Refugees. These states challenged colonial powers and asserted human rights. Second, it considers the role of key refugee-hosting states in Southeast Asia in developing—with other post-colonial states—regional standards to protect refugees under the auspices of the Asian-African Legal Consultative Committee, the Aliens Principles of 1961 and Bangkok Principles of 1966. Third, it places international and regional action in the domestic context by drawing on the example of Thailand’s protection of Vietnamese refugees. It concludes that the approach in the post-WWII years points to an extended history of protecting refugees in Southeast Asia, and valuable lessons from the Global South for the region and beyond.

**Keywords:** Other Areas of International Law; Human Rights; History and Theory of International Law; International Organisations

People have been fleeing war, persecution and natural disasters seeking asylum in Southeast Asia since “time immemorial”.<sup>1</sup> The literature has been characterised by a narrative of “human rights exceptionalism” in Southeast Asia justifying a rejection of refugees.<sup>2</sup> This article examines refugee protection in the under-studied decades following World War Two (“WWII”), from 1945 to 1979<sup>3</sup> (the “post-WWII decades”). At this time, displacement resulted from tensions as states emerged from colonial rule and the Cold War played out in the region. An examination of state practice of non-signatory states to the 1951 *Convention relating to the Status of Refugees* and 1967 *Protocol relating to the Status of*

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<sup>1</sup> Vitit MUNTARBHORN, *The Status of Refugees in Asia* (New York: Clarendon Press, 1992) at 3–4. “Southeast Asia” as a region is defined as the Association of South East Asian States in this article. Debates around the definition of the region are outside the scope of this article.

<sup>2</sup> Sara Ellen DAVIES, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Boston: Martinus Nijhoff Publishers, 2007).

<sup>3</sup> 1979 is when a multilateral agreement was signed to address the exodus of Indochinese refugees following the 1979 Geneva Conference (discussed further in section 5 below). Prior to this date, there is a gap in the literature.

Refugees (the “1951 Refugee Convention”)<sup>4</sup> shows that they provided protection to refugees that often aligned with its principles.<sup>5</sup> Moreover, these experiences influenced their contribution to drafting international refugee law and regional refugee protection standards. This article re-thinks the history of refugee protection in Southeast Asia to counter the “human rights exceptionalism” narrative, focusing on the post-WWII decades to argue there was a non-linear continuum of refugee protection throughout time.

There is a lacuna in the literature on refugee protection in Southeast Asia in the post-WWII decades. This can be attributed in part to the fact that the Global North has dominated the production of knowledge about the international refugee regime.<sup>6</sup> Some scholarship in recent years has redressed the balance, offering perspectives of refugee protection practices in South Asia<sup>7</sup> and Southeast Asia.<sup>8</sup> This paper contributes to this literature, providing a perspective on refugee protection in Southeast Asia in the post-WWII decades. It draws on thousands of pages of archival material, including the *travaux préparatoires* of the 1951 Refugee Convention, official records of the Asian-African Legal Consultative Committee (“AALCC”),<sup>9</sup> and National Archives of Australia files. At an international level, the material reveals the intervention made by Southeast Asian states in the 1951 Refugee Convention drafting process. At a regional level, it shows that the AALCC drafters took into account state practice in refugee protection in drafting the 1961 *Principles Concerning Admission and Treatment of Aliens* (“Aliens Principles”)<sup>10</sup> as well as the contribution of Southeast Asian states in drafting the 1966 *Bangkok Principles on the Status and Treatment of Refugees* (“Bangkok Principles”).<sup>11</sup> At a national level, this archival material shows state practice in Thailand to protect Vietnamese refugees who arrived in 1946.

<sup>4</sup> United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, GA Res. 429(V), 189 U.N.T.S. 150 (entered into force 22 April 1954). Even though this treaty was limited to events occurring in Europe, until the 1967 Protocol removed this limitation, it was open for signature universally in the post-WWII period and several countries outside Europe acceded to it before 1967 (e.g. Australia, Ecuador).

<sup>5</sup> This paper assesses refugee protection in Southeast Asia that aligned with the standards in the 1951 Refugee Convention. This is not to say that these laws or the practice of these states was perfect, which would not conform with the reality of refugee protection anywhere in the world. Potential breaches of the 1951 Refugee Convention are outside the scope of the article.

<sup>6</sup> B.S. CHIMNI, “The Geopolitics of Refugee Studies: A View from the Global South” (1998) 11 *Journal of Refugee Studies* 350.

<sup>7</sup> A seminal text on state practice in refugee protection in South Asia, see Pia OBEROI, *Exile and Belonging: Refugees and State Policy in South Asia* (Oxford: Oxford University Press, 2006). Also, Ramasubramanyam examines the *ad hoc* protection mechanisms that have been established in the South Asia region, noting the “lacunae that persist with respect to conceptualizing displacement” in the region: Jay RAMASUBRAMANYAM, “Regional Refugee Regimes” in Cathryn COSTELLO, Michelle FOSTER and Jane MCADAM, eds., *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, 2021) 407. For state practices of non-signatory states outside Asia, in Latin America, and other states in the post-WWII period, see: Jacques VERNANT, *The Refugee in the Post-War World* (London: Allen & Unwin, 1953) at 3. For a perspective of refugee protection in Southeast Asia after WWII, drawing on Thai Cabinet material (in Thai), see: Natasha YACCOUB, Bongkot NAPAUMPORN, “Regional Refugee Protection in Southeast Asia in the post-World War Two decades: De-colonising the Narratives”, in Susan KNEEBONE, Antje MISSBACH and Reyvi MARINAS, eds., *Rethinking Refugee Protection in Southeast Asia: Between Responsibility and Sovereignty* (forthcoming).

<sup>8</sup> A seminal text on national refugee law and protection in Southeast Asia, focusing on the 1970s onward, is: Muntarbhorn, *supra* note 1.

<sup>9</sup> Several ASEAN member states developed inter-regional refugee standards in the 1960s under the auspices of the Asian-African Legal Consultative Committee (AALCC), a grouping that emerged from the Conference between African and Asian states, most of which were newly independent, in Bandung in Indonesia in 1955. The AALCC’s objective, stated in Article 1 of its Statute, includes: “to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern...”. The original membership of AALCC in 1956 was Burma, India, Indonesia, Iraq, Japan, Sri Lanka and Egypt. In 1961, Thailand became a member. The Committee now has forty-seven Asian-African Members, including all ASEAN nations.

<sup>10</sup> *Principles Concerning Admission and Treatment of Aliens* (25 February 1961) [*Aliens Principles*].

<sup>11</sup> *Bangkok Principles on the Status and Treatment of Refugees* (17 August 1966) [*Bangkok Principles*].

The literature on refugee protection in Southeast Asia has focused on the response to the largescale movement of refugees following the Second Indochina War in 1975<sup>12</sup> and its aftermath,<sup>13</sup> and this article puts a spotlight on the decades that preceded this. Clearly a defining moment, the international community responded to a large flow of refugees from Indochina with a conference in Geneva in 1979,<sup>14</sup> attended by 69 states, and agreed that Southeast Asian countries would offer temporary refuge to Indochinese refugees on the understanding that they would be resettled in the West.<sup>15</sup> One million Vietnamese refugees were resettled and a decade later, in 1989, when more individuals without international protection needs were leaving and resettlement numbers waned, another international meeting was held and the Comprehensive Plan of Action (“CPA”) was signed, offering a “focused political agreement”<sup>16</sup> for the remaining Indochinese refugees in Southeast Asia.<sup>17</sup> This was a time when countries in the Global North were heavily involved in both causing displacement and finding durable solutions for refugees. While it may explain the focus in the literature on this period, it is not where the history of refugee protection in Southeast Asia began. This article contributes to the literature with a focus on the years following WWII,<sup>18</sup> re-thinking the relevance of the CPA to refugee protection in the region.

Part I briefly explains the “human rights exceptionalism” narrative. Part II examines the role of Southeast Asian states in drafting international and regional refugee protection standards. The contribution of Southeast Asian participants in the drafting process of the 1951 Refugee Convention challenged colonial powers as well as affirmed the universality of human rights. The AALCC, as a regional body grouping of post-colonial states from Asia, Africa and the Middle East, drew upon international refugee law and human rights law to craft refugee protection standards, namely the Aliens Principles, which make special provision for individuals seeking asylum and Bangkok Principles. Part III explores a national

<sup>12</sup> The term “Indochina” originally referred to French Indochina (Vietnam, Laos and Cambodia) and later referred to a geographic rather than political area. The Second Indochinese War (1955–1975) began as a conflict between the United States-backed South Vietnamese government and its North Vietnamese-based communist opponents (supported by China and the Soviet Union). Fighting also occurred during this time in Cambodia and Laos between the US-backed government and Communist forces. A series of related conflicts followed. For a detailed analysis of displacement during these wars, see: United Nations High Commissioner for Refugees, Chapter 4 “Flight from Indochina” in *State of the World’s Refugees* (Geneva: UNHCR, 2000) at 79–83.

<sup>13</sup> For example: Penelope MATHEW and Tristan HARLEY, *Refugees, Regionalism and Responsibility* (Cheltenham: Edward Elgar Publishing, 2016); Sébastien MORETTI, *The Protection of Refugees in Southeast Asia: A Legal Fiction* (Abingdon: Routledge, 2022); W.C. ROBINSON, “The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck” (2004) 17 *Journal of Refugee Studies* 3; Davies, *supra* note 2; and UNHCR, *supra* note 10 at 79–103.

<sup>14</sup> From the late 1970s, a number of multilateral arrangements were developed to address the large numbers of refugees leaving the Laos People’s Democratic Republic and Vietnam by sea (Rescue-at-Sea Resettlement Offers Scheme and the Disembarkation Resettlement Offers Scheme). These agreements preceded the CPA.

<sup>15</sup> UNHCR, *supra* note 12 at 84.

<sup>16</sup> What was agreed was: resettlement states to take those found to be refugees according to individual status determination processes (until a certain ‘cut-off’ was reached); ASEAN states (plus Hong Kong) to offer first asylum; and Vietnam to facilitate return and prevent “clandestine departures”. See: Alexander BETTS, “Comprehensive Plans of Action: Lessons from CIREFCA and the Indochinese CPA”, UNHCR, *New Issues in Refugee Research*, Working Paper No. 120, January 2006 at 86.

<sup>17</sup> UNHCR, *supra* note 12 at 84.

<sup>18</sup> Although Southeast Asian states gained independence from Western powers over a period spanning almost four decades, the majority gained independence between 1948 and 1963. The dates of independence from Western colonial powers are as follows: Brunei, 1948 (from Britain); Burma, 1948 (from Britain); Cambodia, 1953 (from France); Indonesia, 1949 (from Holland); Laos, 1953 (from France); Malaya, 1957 (from Britain); the Republic of the Philippines, 1946 (from the United States); Singapore, 1963 (from Britain); Vietnam, 1954 (from France).

example, drawing on Thailand's treatment of Vietnamese refugees who arrived in 1946. Part IV re-thinks the relevance for Southeast Asia of the Indochinese exodus from the mid-1970s onwards, and multilateral agreements to manage their situation, in the context of refugee protection in the post WWII decades. The article concludes that there is a need to re-think history with a longer lens, moving away from the "human rights exceptionalism" narrative to learn lessons in refugee protection from the past.

## I. NARRATIVE ON REFUGEES AND HUMAN RIGHTS EXCEPTIONALISM

A narrative relating to Asian values and human rights exceptionalism in literature has been used to explain a lack of engagement of Southeast Asian states in protecting refugees and engaging with international refugee law. According to this narrative, human rights are not universal and must be based on "Asian values",<sup>19</sup> with the justification that "the region is too diverse for uniform standards; contrarily, that 'Asian values' differ from western 'international human rights standards'; that principles of sovereignty and non-intervention preclude external scrutiny...".<sup>20</sup> Even as the Association of Southeast Asian Nations ("ASEAN") regional human rights system developed, views persisted that "[t]he emerging... system seems unable to undermine the absoluteness of the sovereignty and non-interference principles which are still trademarks of the ASEAN human rights approach".<sup>21</sup> States were seen to rely on the "human rights exceptionalism" narrative for their own political purposes.<sup>22</sup>

"Human rights exceptionalism" and the failure to protect refugees has been a common theme in the literature, dating back to practices in the 1970s when non-entrée policies of Southeast Asian states to prevent Indochinese refugees entering their territory prompted international action, including the CPA for Indochinese Refugees.<sup>23</sup> These agreements secured temporary asylum in Southeast Asian countries on the understanding that refugees would be resettled outside the region. The legacy of these agreements was seen as a rejection of refugees in Southeast Asia in the decades that followed. For example, some states refuse to use the term "refugee" or develop national asylum policies to protect the status and rights of refugees,<sup>24</sup> and refugee rights are not respected.<sup>25</sup> Exceptionalism to

<sup>19</sup> Damien KINGSBURY and Leena AVONIUS, "Introduction" in Damien KINGSBURY and Leena AVONIUS, eds., *Human Rights in Asia: A Reassessment of the Asian Values Debate* (New York: Springer, 2008) 1.

<sup>20</sup> Ben SAUL, Jacqueline MOWBRAY and Irene BAGHOOMIANS "The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia-Pacific" (2011) 18(23) *Australian International Law Journal* 23. For a summary of the 'Asian way' to approach human rights, see: D. MAUZY, "The human rights and 'Asian values' debate in Southeast Asia: Trying to clarify the key issues" (1997) 10(2) *The Pacific Review* 210.

<sup>21</sup> Attilio PISANÒ, "Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration" (2014) 15(4) *Human Rights Law Review* 391 at 409.

<sup>22</sup> For example, Thabchumpon argues that the "Asian values" discourse was never really adopted by Thailand, but politicians would use rhetoric about the Thai style of human rights to suit their own purposes: Naruemon THABCHUMPON, "Human Rights in Thailand: Rhetoric or Substance on 'Asian Values'" in Damien KINGSBURY and Leena Avonius, eds., *Human Rights in Asia: A Reassessment of the Asian Values Debate* (New York: Palgrave Macmillan, 2008) 141. Also, Renshaw explains how 'tiger economies' used the rhetoric of 'human rights exceptionalism' for their political advantage in the late 1990s. Catherine Shanahan RENSHAW, "The ASEAN Human Rights Declaration 2012" (2013) 13(3) *Human Rights Law Review* 557.

<sup>23</sup> UNHCR, *supra* note 12 at 79-103. See also Robinson, *supra* note 13 at 3

<sup>24</sup> Davies explains that it is difficult to determine who is a refugee; that the term "illegal immigrant" is automatically used in the absence of refugee status determination procedures; and there is a bifurcated approach to refugees and migrants that may be linked to the use of 'illegal immigrant' for people requiring protection. Davies, *supra* note 2 at 7-8.

<sup>25</sup> Within the region, refugees remain in limbo without access to legal status or the legal right to work, subject to arrest and detention policies. For an overview of refugee protection in Southeast Asia, see Vitit

human rights and refugee protection at a regional level can be linked to non-entrée policies in more recent times, such as turnback of boats on the Andaman Sea.<sup>26</sup>

The exceptionalism narrative can also be used explain why there are very few signatories to the 1951 Refugee Convention, arguably viewed by Southeast Asian states as Western constructs.<sup>27</sup> Of the ten states in Southeast Asia—Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam—two states (Cambodia and the Philippines) acceded to the 1951 Refugee Convention. It does not sufficiently acknowledge the binding international human rights law framework for the protection of refugees in many Southeast Asian states,<sup>28</sup> nor does it acknowledge the intervention made by Southeast Asian states in the drafting process, set out below.

Examining the practice in refugee protection in Southeast Asia in the post-WWII decades disrupts the exceptionalism narrative, showing that it does not represent any “inherent truths about the unsuitability of rights and institutions to Asian traditions, values, diversity or cultural preferences”.<sup>29</sup> To the contrary, Southeast Asian states made a limited but poignant contribution in the drafting process for the 1951 Refugee Convention and contributed to the AALCC’s regional refugee protection standards, drawing on state practice in protecting refugees from 1945 to 1979.

## II. SOUTHEAST ASIAN STATES, INTERNATIONAL REFUGEE LAW AND REGIONAL REFUGEE PROTECTION PRINCIPLES

The post-WWII decades were critical in setting standards in Southeast Asia as states were emerging from colonial rule, regional institutions were in nascent stages, and refugees were on the move. There was limited accession to the 1951 Refugee Convention, which was developed through a process that Kraus describes as a “prioritisation of ‘the West’ over ‘the Rest’”.<sup>30</sup> The contribution of Southeast Asian states in drafting the 1951 Refugee Convention was limited but powerful symbolically in asserting the universality of human rights. This section examines the relevance of Southeast Asian states in drafting international refugee law and regional refugee protection standards under the auspices of the AALCC that disrupt the “human rights exceptionalism” narrative. The participation of Southeast Asian states in drafting the 1951 Refugee Convention was limited but powerful.

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MUNTARBHORN, “Regional Refugee Systems – Southeast Asia” in Catherine COSTELLO, Michelle FOSTER and Jane MCADAM, eds., *Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, 2021) 363.

<sup>26</sup> Natasha YACOUB, Nikola ERRINGTON, Wai Wai NU, and Alexandra ROBINSON, “Rights Adrift: Sexual Violence Against Rohingya Women on the Andaman Sea” (2021) 22(1) *Asia-Pacific Journal on Human Rights and the Law* 96.

<sup>27</sup> For example, Davies, *supra* note 2.

<sup>28</sup> All but four ASEAN states (Brunei Darussalam, Malaysia, Myanmar, Singapore) have ratified the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR]. All states have ratified the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, UN Doc. A/RES/39/46 (entered into force 26 June 1987) [CAT] except Malaysia, Myanmar and Singapore. Brunei Darussalam has signed and not ratified the CAT. There has been universal ratification of three human rights treaties in Southeast Asia: *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13, UN Doc. A/34/36 (entered into force 3 September 1981) [CEDAW]; *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, UN Doc. A/RES/44/25 (entered into force 2 September 1990) [CRC]; and *Convention on the Rights of Persons with Disabilities*, 24 January 2007, 2515 U.N.T.S. 3 (entered into force 3 May 2008) [CPRD]. Notably, Malaysia and Brunei Darussalam ratified CEDAW, CRC and CPRD but none of the other core international human rights law treaties.

<sup>29</sup> Saul, Mowbray, and Baghoomians, *supra* note 20 at 23.

<sup>30</sup> For a thought-provoking piece on the dominance of states of the Global North in drafting the 1951 Refugee Convention and its lasting effect, see: Ulrike KRAUSE, “Colonial roots of the 1951 Refugee Convention and its effects on the global refugee regime” (2021) 24 *Journal of International Relations and Development* 599.

### A. Southeast Asian States and the 1951 Refugee Convention Drafting Process: Universal Human Rights and Stand Against Colonial Power

The role of Southeast Asian states in the drafting process for the 1951 Refugee Convention may have been small in scale but was significant in potency. Of 278 archival documents of the *travaux préparatoires* for the 1951 Refugee Convention that were reviewed, there was documentation in relation to the involvement of Southeast Asian states in two of the meetings to draft the Convention. The limited role of states can be attributed to the fact that the majority remained under colonial rule at the time.<sup>31</sup> Indonesia and the Philippines however, both of which had gained independence by 1950, made statements supporting the universal application of human rights law to all individuals at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in 1951.<sup>32</sup>

The Philippines made a joint statement with Syria,<sup>33</sup> in relation to the so-called “colonial clauses” that stated, “[t]he provisions of the present Covenant shall extend to or be applicable equally to a signatory metropolitan State and to all the territories, be they Non-Self-Governing, Trust or Colonial Territories, which are being administered or governed by such metropolitan states”.<sup>34</sup> Emphasising the development in international law to include individuals as subjects of the law, the Philippines stressed that: “metropolitan powers might be regarded as principals whose international commitments should automatically extend to the colonial territories ... [since] inhabitants of the dependent territories were clearly as much entitled to the enjoyment of human rights as anyone else.”<sup>35</sup>

Colonial powers, they maintained, had responsibility under international human rights law to all individuals on the territories they administered or governed.

At the same meeting, the Representative from Indonesia expressed that a “colonial clause” would “in effect be giving a privileged class of human beings the right to decide arbitrarily how far the rights enjoyed unreservedly by themselves could be granted to less favoured classes.”<sup>36</sup> The delegation from Indonesia argued for the universal application of international human rights law, stating that: “all peoples whoever they were could claim the right to life, liberty and security of person and demand the abolition of slavery and servitude and the suppression of torture and cruel and inhuman or degrading treatment or punishment.”<sup>37</sup> At this drafting meeting, these Southeast Asian states did take a position of “human rights exceptionalism” based on “Asian values”. To the contrary, the delegates argued for the universal application of the law to all peoples. The role of Southeast Asian states in drafting the 1951 Refugee Convention may have been small in scale but not in magnitude, given its significance in expressing support for universalism of human rights and countering the exceptionalism narrative.

<sup>31</sup> Singapore, as a British Colonial Territory, participated the Ad Hoc Committee on Statelessness and Related Problems in 1950, raising in the context of statelessness the need for states to recognise travel documents. See: *Memorandum Submitted by the Representative of the International Refugee Organisation*, United Nations Economic and Social Council, Ad Hoc Committee on Statelessness and Related Problems, UN Doc E/AC.32/L.39 (19 February 1950) at 2.

<sup>32</sup> *Draft Convention relating to the Status of Refugees - Memorandum Prepared by the Legal Department*, United Nations General Assembly, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc A/CONF.2/21 (3 July 1951) [*Draft Convention on Refugee Status*].

<sup>33</sup> *Ibid.*, at 16.

<sup>34</sup> “Colonial clause” as recommended in General Assembly Resolution 422(V): see *Draft Convention on Refugee Status*, *ibid.*, at 21.

<sup>35</sup> *Ibid.*, at 16.

<sup>36</sup> *Ibid.* at 13.

<sup>37</sup> *Ibid.*

### B. The AALCC's Refugee Protection Principles: A South-South Regional Alliance

In addition to contributing to international refugee law, Southeast Asian states participated in drafting standards with the AALCC, a regional body that emerged from the Conference between African and Asian states in Bandung in Indonesia in 1955. A South-South alliance, most of these states were emerging from colonial rule. The AALCC engaged with both refugee rights and international law. In this context, it distinguished itself from other regional institutions that emerged at the time that did not engage with refugee rights, notably the Southeast Asian Treaty Organisation (SEATO) that preceded ASEAN.<sup>38</sup> SEATO was established on 8 September 1954, a North-South alliance including Australia, France, New Zealand, Great Britain, Pakistan, the Philippines, Thailand, and the United States, and was more security-oriented to prevent the rise of Communism. When Thailand called on SEATO in 1959 to help to negotiate for the return to Vietnam of refugees who fled the first Indochina war in 1946, it declined to do so.<sup>39</sup> At this time, the AALCC, a South-South initiative, was engaging actively on refugee rights.

The original membership of the AALCC in 1956 was Burma, India, Indonesia, Iraq, Japan, Sri Lanka and Egypt. In 1961, Thailand became a member. The AALCC's objective, stated in Article 1 of its Statute, includes: "to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern...".<sup>40</sup> The Committee now has forty-seven Asian-African Members, including *inter alia* all Southeast Asian nations, with the addition of Australia and New Zealand as its Permanent Observers.<sup>41</sup> As a body made up of government representatives, it provides advice on issues referred to it or that are considered of mutual concern to member states. In its first years, it engaged regularly with the issue of the status and rights of refugees. In doing so, it drew on state practice of Southeast Asian member states. It involved the cooperation of Southeast Asia with other states emerging from colonial rule in Africa and the Middle East.

The AALCC agreed on two sets of principles that relate to the status and treatment of aliens and refugees, the Aliens Principles in 1961, which made special provision for individuals seeking asylum, and the *Bangkok Principles on the Status and Treatment of Refugees* ("Bangkok Principles:") in 1966, which was re-affirmed in 2001. International refugee and human rights law principles were considered, in the context of the state practice and opinions of AALCC members. In preparation of the Bangkok Principles, states received advice from the United Nations High Commissioner for Refugees (the "UNHCR") as well as eminent international law professors. This section examines the drafting process of the

<sup>38</sup> SEATO was established through the *Southeast Asia Collective Defence Treaty*, 209 U.N.T.S. 24 (entered into force 19 February 1955) also known as the Manila Pact.

<sup>39</sup> The Australian Embassy provided the text of a letter presented by the Thai representative in a closed session of the Council of Representatives of SEATO on 18 March 1959. It stated that the Vietnamese had entered Thailand at the end of WWII. He said that they are estimated to be 50,000 and were generally law-abiding. However, there are a few Communists who have infiltrated the group and "have engaged in subversive activities at the detriment of Thailand's security". The Thai representative called on SEATO to help to solve the problem. Australia reported that SEATO decided it should not get involved in the repatriation because it would cause problems with Communists. SEATO remained seized of the issue. See *SEATO - Vietnamese in Thailand - Manila Treaty*, Memo 2515/4 to the Secretary of the Department of External Affairs (Canberra) from the Australian Embassy in Bangkok, (20 March 1959).

<sup>40</sup> "About AALCO", online: Asian African Legal Consultative Organisation <<https://www.aalco.int/about>>.

<sup>41</sup> There are presently 47 members: Arab Republic of Egypt; Bahrain; Bangladesh; Brunei Darussalam; Cameroon; Cyprus; Democratic People's Republic of Korea; The Gambia; Ghana; India; Indonesia; Iraq; Islamic Republic of Iran; Japan; Jordan; Kenya; Kuwait; Lebanon; Libya; Malaysia; Mauritius; Mongolia; Myanmar; Nepal; Nigeria; Oman; Pakistan; People's Republic of China; Qatar; Republic of Korea; Saudi Arabia; Senegal; Sierra Leone; Singapore; Somalia; South Africa; Sri Lanka; State of Palestine; Sudan; Syria; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates; Socialist Republic of Vietnam and Republic of Yemen.

Aliens Principles and Bangkok Principles, demonstrating that the AALCC accounted for state practice as well as the views of key refugee hosting states from Southeast Asia.

### 1. The AALCC's Aliens Principles

The AALCC adopted in 1961 the Aliens Principles,<sup>42</sup> standards for the status and rights of aliens that contain protections for individuals seeking asylum. The issue of the status of aliens had been referred to the AALCC by Japan in 1957. The discussion of states to adopt the Principles took account of the status and rights of individuals seeking asylum, including state practice of Southeast Asian member states as well as international law. Several post-colonial Southeast Asia passed laws governing the treatment of aliens or foreigners,<sup>43</sup> which were used to regulate the status and rights of refugees in the absence of specific national refugee laws. The AALCC drew on this practice. In the meeting to draft the Aliens Principles, Burma and Indonesia participated in the discussions as AALCC members and Cambodia attended as an observer.<sup>44</sup>

The Aliens Principles define an alien and conditions for admission to a state's territory, providing exceptions for refugees and stateless persons. Article 1 of the Aliens Principles define an "alien" as "a person who is not a citizen or national of the State concerned". While Article 2(1) sets out that the admission of aliens into a State shall be at the discretion of that State, Article 2(2)(ii) provides that a State may, "except in special circumstances, refuse admission into its territory of aliens who do not possess travel documents to its satisfaction". Both "political refugees" and "stateless persons" could exceptionally enter without travel documents to the country's satisfaction, according to the Committee's Commentary on Article 2.<sup>45</sup> Although not explicitly mentioned in the official records, this reflects state practice in several Southeast Asian countries where refugees were regulated through aliens laws.<sup>46</sup>

Drawing on state practice in Indonesia and Burma, the AALCC included an asylum provision. Article 6 of the Aliens Principles provides that the state may "offer or provide asylum in its territory to political refugees or to political offenders on such conditions as the State may stipulate as being appropriate in the circumstances". In drafting this provision, the Committee interpreted the "right to seek and to enjoy in other countries asylum from persecution", in Article 14(1) of the UDHR, as a right of the state and not an obligation.<sup>47</sup> In the Commentary on the Asylum Principles, the Committee stated that Article 6 "establishes the right of the State to grant asylum on its territory to foreign nationals fleeing from political, racial or religious persecution in their own State".<sup>48</sup> In drafting this protection, the Committee drew on the practice of member states in granting asylum to refugees, making particular reference to refugee hosting states in Southeast Asia. It noted that Indonesia's law provided for the grant of asylum to political refugees while the laws of Burma were silent in this regard and yet, the government of Burma had in practice been granting "asylum to political offenders".<sup>49</sup>

<sup>42</sup> *Aliens Principles*, *supra* note 10.

<sup>43</sup> For example: *Burma: Registration of Foreigners Rules, 1948*, 4 January 1949; *Philippines: Act No. 562 of 1950, Alien Registration Act*, 17 June 1950; *Thailand Alien Registration Act B.E. 2493 (1950)*, 14 December 1950.

<sup>44</sup> AALCC Secretariat, 'Final Report of the Committee on the Status of Aliens', in AALCC, *Report of the Fourth Session, Tokyo*, Asian-African Legal Consultative Committee Secretariat, February 1961, at 10-2 [AALCC Fourth Session Report].

<sup>45</sup> *Ibid.*, at 54.

<sup>46</sup> See section below for an example of state practice in Thailand.

<sup>47</sup> AALCC Fourth Session Report, *supra* note 45 at 68.

<sup>48</sup> *Ibid.*, at 67.

<sup>49</sup> *Ibid.*, at 68.



The AALCC drew on international law to set out the human rights of aliens more generally in the Aliens Principles. Regarding freedom of movement, Article 7(1) states that “subject to conditions imposed for his admission into the State, and subject also to the local laws, regulations and orders”, aliens have the right to move freely throughout the territory of the State; and to reside in any part of the territory of the State. However, Article 7(2) provides that the State may require:

an alien to comply with provisions as to registration or reporting or otherwise so as to regulate or restrict the right of movement and residence as it may consider appropriate in any special circumstances or in the national or public interest.<sup>50</sup>

In preparing this Article, the Committee drew on the work of eminent international law jurist, Oppenheim, that the “normal practice” of states is to “compel them to register their names for the purpose of keeping them under control”, an opinion which other legal scholars concurred with.<sup>51</sup> The Committee reviewed state practice of the member states and found that, subject to exigencies or emergencies, “aliens in the Member Countries of the Committee are permitted to travel about or reside in any part of the State they visit” and “registration of aliens is required in all the countries participating in the Committee”.<sup>52</sup>

The Committee further set out the rights of aliens in Article 8 to freedom from arbitrary arrest, freedom to profess and practise his [or her] own religion, protection of the executive and police authorities of the State, access to the courts of law, and legal assistance “subject to local laws regulations and orders”. In its Commentary on Article 8, the Committee noted that the rights of the individual may be derived from various sources. For example, the alien’s rights to liberty, freedom of religion and protection for his or her person and property had been viewed by “leading Western nations” as flowing from “the duty of States to all alien residents under customary international law”, with “scores of bilateral treaties and agreements” having been concluded providing for the enjoyment of these rights and privileges for the nationals of contracting parties within the territory of the other contracting party.<sup>53</sup> Thus, the Committee drew on international human rights law in formulating its standards. Further, it assessed the rights of aliens in Member Countries, finding that they were “normally permitted to enjoy personal liberty on par with nationals”.<sup>54</sup> Far from exceptionalism to human rights, the Committee drew on international human rights law to draft the Aliens Principles and specify rights of refugees and grounded it in state practice of the participating Southeast Asian member states.

## 2. *The AALCC’s Bangkok Principles*

At the Eighth Session to draft the Bangkok Principles in 1966, four Southeast Asian states were present, Indonesia, Malaysia, Thailand and the Philippines.<sup>55</sup> Burma was a member of the AALCC but did not send a representative. The subject “The Rights of Refugees” had been referred to the Committee by Government of the United Arab Republic (Egypt). The background for the referral by Egypt was to assist with the status and treatment of Palestinian refugees. In the memo referring the issue to the Committee, Egypt stated it

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, at 71.

<sup>52</sup> *Ibid.*, at 72.

<sup>53</sup> *Ibid.*, at 75.

<sup>54</sup> *Ibid.*, at 77-80.

<sup>55</sup> AALCC, *Report of the Eighth Session, Bangkok*, Asian-African Legal Consultative Committee Secretariat, 1966 [AALCC Eighth Session Report].

considered the status and rights of refugees to be mutual interest to the member countries. This section examines the contributions of Southeast Asian states in the Eighth Session to draft the Bangkok Principles, briefly charting the AALCC's discussions on the rights of refugees at preparatory meetings at the Sixth Session in 1964 and Seventh Session in 1965.

A preliminary discussion on "the rights of refugees" at its Sixth Session of the Committee was held in Cairo in 1964. Of the Southeast Asian member States, Indonesia and Thailand participated but Burma did not send a representative.<sup>56</sup> The Philippines attended as observers. At this session, the issues of the right to return to the country of origin and compensation in the event that a refugee cannot return, both critical to Palestinian refugees in the Middle East, were raised but could not be resolved. UNHCR attended and was invited to prepare a memorandum setting out relevant international refugee law for the Committee's consideration. More preparatory work was planned, and substantive discussions were held over until the following meeting.

The issue of the "rights of refugees" was considered in more detail at the Committee's Seventh Session in Baghdad in March 1965.<sup>57</sup> Indonesia, Thailand and Burma did not send a representative, and Malaysia participated in an observer capacity. At the meeting, the Committee identified further information that was needed but did not finalise the principles. The Secretariat of the Committee presented a working paper on aspects of international law and the UNHCR Deputy High Commissioner for Refugees Prince Sadruddin Aga Khan, participated in an advisory capacity.<sup>58</sup> It was decided that no new regional convention would be drafted but principles would be prepared and that, in the process of doing so, the Committee would examine the 1951 Refugee Convention.<sup>59</sup> "Principles concerning treatment of refugees" were prepared by the Secretariat, which reflected the text of the 1951 Refugee Convention for the Committee's consideration.<sup>60</sup> Issues that were to be resolved included the minimum standard of treatment of a refugee in the state of asylum and the constitution of international tribunals for determination of compensation claimed by refugees.<sup>61</sup>

The agenda item, the "rights of refugees", was a priority item at the Eighth Session of the Committee in Bangkok in August 1966. Thailand and Indonesia participated, Malaysia and the Philippines attended as observers, as did the UNHCR.<sup>62</sup> The points arising for consideration were: (a) the draft principles adopted by the Committee at its Baghdad session; (b) whether provisions should be made for the implementation of the right to return and the right to compensation; and (c) how far the Principles should incorporate the 1951 Refugee Convention.<sup>63</sup> Southeast Asian member states contributed to crafting key provisions, including the right to return, and right to compensation in the event of non-return, as refugee rights.<sup>64</sup>

The AALCC also included a provision on cessation of refugee status, which Thailand expressed in terms of the "right of the state" that grants protection. Article II(1)(ii) of

<sup>56</sup> AALCC, *Report of the Sixth Session, Cairo*, Asian-African Legal Consultative Committee Secretariat, March 1964, at 11-5.

<sup>57</sup> AALCC, *Report of the Seventh Session, Baghdad*, Asian-African Legal Consultative Committee Secretariat, 1965, at 8.

<sup>58</sup> *Ibid.*, at 9.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at 28-31.

<sup>61</sup> *Ibid.*, at 26.

<sup>62</sup> Burma was a member of AALCC but did not send a representative. AALCC *Eighth Session Report*, *supra* note 56 at 15-19.

<sup>63</sup> *Ibid.*, at 9-10.

<sup>64</sup> There is no explicit mention of the right to return or right to compensation in the 1951 Refugee Convention.

the Bangkok Principles provides that refugee status ceases where a refugee “has voluntarily re-availed himself [or herself] of the protection of the State or Country of his [or her] nationality”. Thailand expressed the opinion that the loss of status as a refugee under this provision will “take place only when the refugee has successfully re-availed himself or herself of the protection of the State of his (or her) nationality because the right of protection was that of his (or her) country and not that of the individual”.<sup>65</sup> More importantly, the AALCC included a right to return and compensation in the event that return was not possible that are not included in 1951 Refugee Convention.

The right to return to the country of origin or former habitual residence is in Article IV of the Bangkok Principles. In drafting this provision, the Committee:

recognised that to make this right effective and capable of practical implementation, the return had to be voluntary, which would necessarily depend on the change in conditions in the state of origin as well as possible steps for facilitating repatriation and a degree of co-operation between the asylum state and state of origin. The voluntary nature of repatriation was emphasised during the deliberations.<sup>66</sup>

At the time the AALCC drafted these provisions, Thailand was implementing a policy of voluntary repatriation for Vietnamese refugees, in which it emphasised the element of voluntariness, examined further below.

Moreover, the AALCC included in the Bangkok Principles a right to compensation in the event that return was not possible (Article V) and Southeast Asian member states attending the meeting, notably Thailand and Indonesia, supported and shaped the text. Article V(2) provides:

the compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of dependants of the refugee or of the person whose dependant the refugee was and destruction of or damage to property and assets, caused by the authorities of the State or Country, public officials or mob violence.<sup>67</sup>

Thailand expressed a view that the words “in the circumstances in which the State would incur state responsibility for such treatment to aliens under international law” should be added at the end of paragraph 2.<sup>68</sup> Indonesia expressed that paragraph 2 should specify that compensation should be linked to the reasons that the refugee fled.<sup>69</sup> Far from taking exception to international human rights law, they expressed the view that states should be held responsible for violating it. While there are few precedents in relation to compensation for refugees who are not able to return, this can be attributed to complexity of applying the law in this area.<sup>70</sup> Moreover, it may be applied in the future.

The Bangkok Principles extended the refugee definition beyond the 1951 Refugee Convention, reflecting the broader definition that would be adopted in the 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“OAU

<sup>65</sup> AALCC Eighth Session Report, *supra* note 56 at 214.

<sup>66</sup> B. SEN, “Protection of Refugees: Bangkok Principles and After” (1992) 34(2) *Journal of the Indian Law Institute* 187 at 207.

<sup>67</sup> AALCC Eighth Session Report, *supra* note 56 at 215.

<sup>68</sup> *Ibid.*, at 216.

<sup>69</sup> *Ibid.*

<sup>70</sup> Hannah R GARRY, “The Right to Compensation and Refugee Flows: A ‘Preventative Mechanism’ in International Law?” (1998) 10(1) *International Journal of Refugee Law* 97.

Convention”).<sup>71</sup> There were lengthy debates and, with considerable difficulty, the Committee agreed to a common definition of a refugee in the Bangkok Principles of 1966.<sup>72</sup> The AALCC extended the narrow definition of a refugee in Article 1A(2) of the 1951 Refugee Convention,<sup>73</sup> adding the grounds of “colour” and “gender”.<sup>74</sup> Moreover, the AALCC incorporated a broader definition of a refugee to include:

every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality.<sup>75</sup>

The extended refugee definition emerging from this South-South alliance allows for greater inclusion of refugees than the 1951 Refugee Convention.

In setting out the rights of refugees, the Bangkok Principles provided a “minimum standard of treatment” (Article IV). There is explicit mention of groups in need of protection that are not included in the 1951 Refugee Convention. The Bangkok Principles require states to take “effective” and “additional” measures in order to meet the needs of women,<sup>76</sup> children,<sup>77</sup> and elderly persons.<sup>78</sup> Southeast Asian states in cooperation with other post-colonial states in the AALCC demonstrated a willingness to protect particular groups of refugees that were not explicitly included in the 1951 Refugee Convention.

The Bangkok Principles have been criticised by some refugee law scholars because they do not provide strong rights guarantees and have not been implemented in national refugee laws but this does not reflect the full historical picture of refugee protection. The AALCC, in its Final Report on the Status and Treatment of Refugees at its Eighth Session in Bangkok, emphasised that it was the role of the government of each participating state to decide how it could give effect to their recommendations, whether by entering into multilateral or bilateral arrangements or recognising the principles formulated by it in their domestic laws.<sup>79</sup> Sara Davies argues that “[c]ompliance with the Principles is neither enforced nor monitored. As a result, they have had little discernible effect on Asian state practice in relation to refugees”.<sup>80</sup> This position required nuance, since the AALCC drafters took into account key state practice in Southeast Asia at the time of drafting the Bangkok Principles. While they may not have been incorporated fully into domestic laws, they were re-affirmed by states in 2001 and may be adopted in laws in the future, reflecting the non-linear path of refugee protection. They expanded the protection of the 1951 Refugee Convention, in particular extending the refugee definition and including the right to return and compensation in

<sup>71</sup> 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974), online: Refworld <[https://www.refworld.org/publisher,OAU,,,3ae6b36018,0.html](https://www.refworld.org/publisher/OAU,,,3ae6b36018,0.html)> [OAU Convention].

<sup>72</sup> Note that the Bangkok Principles were again revised and adopted on 24 June 2001 at the 45th Session in New Delhi.

<sup>73</sup> Article 1A(2) of the 1951 Refugee Convention defines as a refugee a person who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

<sup>74</sup> Article I of the *Bangkok Principles*, *supra* note 11.

<sup>75</sup> *Ibid.*, at Article II.

<sup>76</sup> *Ibid.*, at Article 1V(6).

<sup>77</sup> *Ibid.*, at Article 1V(7).

<sup>78</sup> *Ibid.*, at Article 1V(8).

<sup>79</sup> AALCC *Eighth Session Report*, *supra* note 56.

<sup>80</sup> Davies, *supra* note 2 at 4.

the event of non-return.<sup>81</sup> Rather than taking exception to international law, Southeast Asian states as part of the AALCC engaged with it to produce standards for protecting refugees.

Moreover, the Bangkok Principles emerged from the experiences of states in Southeast Asia hosting refugees. The participating member countries, Thailand and Indonesia, together with the observer states, Malaysia and the Philippines, hosted some of the largest refugee populations in the region. State practice reinforces the standards for refugee protection. Moretti argues that “Southeast Asian States have long recognized that refugees... need protection... evidenced by their *de facto* different treatment of refugees compared to other irregular migrants”.<sup>82</sup> In particular, states showed respect for the customary principle of non-*refoulement* enshrined in Article 33(1) of the 1951 Refugee Convention, which provides that states should not return a refugee “to the frontiers of territories where his [or her] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>83</sup> This principle of non-*refoulement* was also included in regional standards within Article IX(3) of the Bangkok Principles.<sup>84</sup> The next section draws on archival material and literature to demonstrate an example of state practice in the key refugee-hosting state, Thailand.

### III. NATIONAL PRACTICE: VIETNAMESE REFUGEES IN THAILAND

In the post-WWII period, refugees were on the move within Southeast Asia due to independence wars against colonial powers and the rise of Communism.<sup>85</sup> It is estimated that one million people moved from the north to the south of Vietnam between 1954 and 1956 alone.<sup>86</sup> It is unrealistic to capture all laws, policy and practice to protect refugees in Southeast Asia during this time, especially given the diverse legal and political systems. It is illustrative to focus on the details of national practice of one refugee group to show an example of Thailand’s treatment of Vietnamese refugees that points to a longer history of refugee protection than the CPA. Further, it facilitates a comparison of national practice against regional and international standards applicable in the post-WWII period, while demonstrating the value of further research into historical refugee protection practice.

<sup>81</sup> The Committee drew on General Assembly resolutions that emphasised the right of refugees to return to their homelands and reaffirm the right of those who do not wish to return to receive adequate compensation. It should be noted that these rights have not acquired the status of customary international law. Garry, *supra* note 70.

<sup>82</sup> Sébastien MORETTI, “Southeast Asia and the 1951 Convention relating to the Status of Refugees: Substance without Form?” (2021) 33(2) *International Journal of Refugee Law* 214 at 214.

<sup>83</sup> *Ibid.*, at 229.

<sup>84</sup> Article IX(3) Bangkok Principles: “A refugee shall not be deported or returned to a State or Country where his [or her] life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.” In this formulation, the exceptions of “national security” or “safeguarding the populations” are left open to broad interpretation and potential breach of the international law prohibition of *refoulement*. However, Moretti points out that this does not make any difference in practice: *ibid.*

<sup>85</sup> For example, some 700,000 Chinese nationals fled China in 1949 following the Communist take-over, many hosted by Southeast Asian states. Davies, *supra* note 2 at 1. Note that the total numbers of Chinese refugees fleeing China during the Cold War was much higher, with an estimated 1.5 million Chinese people fleeing to Hong Kong in the 1950s alone, cited in Laura MADOKORO, *Elusive Refuge: Chinese Migrants in the Cold War* (Harvard: Harvard University Press, 2016).

<sup>86</sup> The first Indochina war concluded after the defeat of the French in May 1954 with the establishment of a communist state in the north (the Democratic Republic of Vietnam) and a separate state in the south (the Republic of Vietnam). With the founding of a communist government in the north, more than a million people moved south between 1954 and 1956. See: UNHCR, *supra* note 12 at 80.

A review of archival material from the National Archives of Australia and the United Nations were drawn upon to analyse the national laws, policies and practices of refugee-hosting states in Southeast Asia in the post-WWII period. This included: Thailand, regarding refugees from Vietnam as well as Burma and China.<sup>87</sup> Each group of refugees had its own history of displacement and connection with Thailand and were offered protection, and there is a focus on Vietnamese refugees to enable sufficient detail of policy and practice at the time.

This paper draws on the information from the archives in relation to Vietnamese refugees in Thailand. Vietnamese people sought asylum from harm in Thailand for at least two centuries prior to WWII.<sup>88</sup> Throughout the history of the Bangkok period,<sup>89</sup> starting in 1782, Vietnamese refugees fled to Thailand in several waves.<sup>90</sup> The archives are a rich source of information on the nature of protection afforded to Vietnamese refugees who arrived in 1946, including copies of Thai local regulations, Thai newspaper clippings, declassified Australian government meeting notes with Thai officials. The Thai Gazette from 1947–1960 was also reviewed for references to refugees.<sup>91</sup>

In using archives as a source, Lustig cautions against a “statist bias” in international legal history methodology and this is acknowledged.<sup>92</sup> Archives of governments and the United Nations create a narrative about refugee protection historically from a state perspective, which represents the perspective of the ruling elite and is overwhelmingly male. The limits of the archives are balanced against information in literature and other sources. It is further acknowledged that protection of refugees extends far beyond the state to the community level protection, as Thai communities welcomed and assisted Vietnamese refugees,<sup>93</sup> although this is beyond the scope of the present study.

<sup>87</sup> A review of over 6,000 pages in these archives uncovered material about the approach to refugee protection in Thailand (regarding individuals fleeing Vietnam, Burma and Cambodia); Malaysia (regarding persons fleeing the Philippines and China); and Indonesia (regarding persons fleeing from India and China). The present paper focuses on refugees from Vietnam in Thailand.

<sup>88</sup> Muntarbhorn explains that Thailand hosted Vietnamese refugees from two centuries ago. Mon people sought refuge in Thailand and were able to integrate, owing to common characteristics with Thai people. Under King Rama IV, one century ago, they acquired Thai nationality; see: VITIT MUNTARBHORN, “Refugees: Law and National Policy Concerning Displaced Persons and Illegal Immigrants in Thailand” (1986) 1 *Thammasat Law Journal*.

<sup>89</sup> Bangkok was a small trading post during the Ayutthaya Kingdom in the 15th century, which eventually grew and became the site of two capital cities: Thonburi in 1768 and Rattanakosin in 1782. The ‘Bangkok period’ is that from 1782 until the present, a time when political power in Thailand has been centralised in Bangkok, *ibid.*, at 233–4.

<sup>90</sup> Kusol VAROPHAS, “The Vietnamese Refugees in Thailand” (1966) 128(4) *World Affairs* 233.

<sup>91</sup> All copies of the Thai Gazette (official English translation) at the National Archives of Australia from 1945 to 1970 were reviewed in preparation of this article.

<sup>92</sup> Doreen LUSTIG, “Governance Histories of International Law” in Markus D. DUBBER and Christopher L. TOMLINS, eds., *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018) 850, at 863–864.

<sup>93</sup> Nguyen Anh Tai undertook interviews with Vietnamese refugees who fled in 1946 as well as Thai officials in charge of managing them. Several interviews with refugees highlight the welcome received initially from the Thai government and people. For example:

Dang Bang, a 79 year old Viet Kieu, from Nakhon Phanom. He still showed his gratitude towards the help from Thai people when he fled from Laos to the northeast of Thailand. At that time, the locals and soldiers went to the Mekong river bank to welcome Viet Kieu and carried food with them to give to Viet Kieu. Thai people were so kind to help Viet Kieu by using small boats to pick up Viet Kieu swimming across the Mekong to avoid French slaughter. Moreover, the locals helped the new comers to stabilize their lives by providing food, accommodation and also their sympathy.

### A. Vietnamese Refugees in Thailand

Situated between Indochina (Vietnam, Cambodia, Laos) and Burma, Thailand hosted refugees from both the east and the west in the post-WWII period.<sup>94</sup> This section presents archival information on laws, policy and practice adopted by Thailand for Vietnamese refugees who sought refuge in 1946.<sup>95</sup> Following the French attempt to re-colonise Indochina in 1945, some 46,700 Vietnamese nationals fled over the Mekong River from Laos to northern Thailand. The Government of Thailand provided refugee status as a group, thus protecting them from being sent back to persecution in Vietnam and afforded them rights on Thai territory until a durable solution was found. The Thai government negotiated a return agreement, and eventually enabled those who remained to naturalise. This section provides the details of the national standards of protection in Thailand for Vietnamese refugees, comparing it with the protection adopted in the region during the CPA and thereafter to demonstrate the nonlinear continuum of refugee protection.

### B. Legal Status and Freedom of Movement

Refugees were given legal status and freedom of movement in Thailand in the decades preceding the CPA. Vietnamese refugees who arrived in 1946 were legally allowed to remain in Thailand on a group basis, with the status of “refugee” or “displaced person”.<sup>96</sup> Whilst there was no national law setting out the status and rights of refugees in Thailand at the end of WWII, a limited number Vietnamese refugees were able to obtain status as aliens under the *Thailand: Alien Registration Act B.E. 2493* (14 December 1950).<sup>97</sup> Varophas explains that from 1938 onwards, the Thai and French Indochinese government concluded a treaty that Vietnamese who went to Thailand would retain their status as French subjects.<sup>98</sup> This meant that Vietnamese refugees entering Thailand were considered to be “aliens” under the law, and required to register as such.<sup>99</sup> Those who were not able to register as aliens were nonetheless afforded status as refugees on a group basis by the state pursuant to local government “Rules for the Control of Vietnamese Refugees” of 1951.<sup>100</sup>

The group of Vietnamese people who fled to Thailand in 1946, regardless of their registration under the Alien Registration Act, were treated differently from other non-nationals. The Thai government referred to the group as “refugees” in official documents from at least the early 1950s onwards. For example, the Ministry of Interior issued local “Rules for the Control of Vietnamese Refugees” in 1951 to institute reporting

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See: Nguyen Anh TAI, “Thai-Vietnamese Relations During the First Indochina War (1946-1954)”, Masters’ Thesis, Chulalongkorn University, 2009, at 70.

<sup>94</sup> While Thailand allowed significant number of refugees from China and Burma refuge in the country, the approach to their protection was different and is beyond the scope of this study.

<sup>95</sup> Peter A. POOLE, “Thailand’s Vietnamese Refugees: Can They Be Assimilated?” (1967) 40 *Pacific Affairs* 324, at 329.

<sup>96</sup> Police Major-General Chan ANSUCHOTE, “The Vietnamese Refugees in Thailand: A Case Study in Decision-Making”, Master’s thesis, Thammasat University, Bangkok, 1960, Appendix. Cited in: Peter A. POOLE, “Thailand’s Vietnamese Minority” (1967) 7(12) *Asian Survey*, University of California Press 886, at 889.

<sup>97</sup> Some refugees obtained legal status as ‘registered aliens’, although not many. By 1963 only 2,008 men and 1,152 women had managed to obtain this status. *Statistical Yearbook, Thailand*, No. 26 (Bangkok: National Statistical Office 1967). Quoted in Poole, *ibid.*, at 887.

<sup>98</sup> Kusol Varophas notes that more than 3,000 alien registration cards had been given to Vietnamese in the “latest figures” in 1966; Varophas, *supra* note 90 at 234.

<sup>99</sup> Kusol Varophas notes that more than 3,000 alien registration cards had been given to Vietnamese in the “latest figures” in 1966. *Ibid.*, at 234.

<sup>100</sup> Ansuchote, *supra* note 96 at 889.

requirements for refugees who wished to move outside of their villages of residence.<sup>101</sup> There was no procedure to undertake individual refugee status determination at the time. Rather, Thailand provided the protection to Vietnamese refugees as a group.

Further, in 1954 Thailand defined “displaced persons” in clause 3 of the Regulation Concerning Displaced Persons from Neighbouring States as “he who escapes from dangers due to an uprising, fighting or war, and enters in breach of the Immigration Act.”<sup>102</sup> Thailand provided protection to individuals meeting this definition on a group or “prima facie” basis without individual determinations.<sup>103</sup> A registration process for individuals did not take place until the repatriation exercise began in 1959.

Immigration restrictions for foreign nationals entering “illegally” during this time were in direct response to the large number of Chinese nationals entering the country.<sup>104</sup> As Muntarbhorn explains, while immigration law applied to displaced persons, they were exempt from it as a matter of policy: “because they [were] less politically sensitive to the Thai authorities.”<sup>105</sup> Local government rules allowed for freedom of movement for Vietnamese refugees, according to “Rules for the Control of Vietnamese Refugees” of 1951.<sup>106</sup> However, in reality, refugees could travel on Thai territory with appropriate permits.<sup>107</sup> This aligned with international refugee law as per Article 26 of the 1951 Refugee Convention according to which states should “accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.” Thailand’s approach to legal status and freedom of movement for these refugees is thus contrary to the dominant narrative of exceptionalism in the literature.

### C. Economic, Social and Cultural Rights

Thailand provided economic, social and cultural rights to Vietnamese refugees including the right to work, own businesses and access education in the first years of displacement. During this time, such policies were more generous than under the CPA. The archives reveal that refugees were given plots of land to work, and were allowed to own businesses and seek employment. The Vietnamese Lawyers Association, an advocacy group for Vietnamese in Thailand after WWII, explained that:

The Thai government not only allowed these refugees to enter the country, but also instructed local authorities to help refugees in setting themselves up in a normal life on Thai soil. Loans and other assistance were granted by the Thai government to the Vietnamese nationals for clearing land to found what are now densely populated villages in [North East] Thailand ...<sup>108</sup>

<sup>101</sup> *Ibid.*

<sup>102</sup> Muntarbhorn, *supra* note 1 at 7.

<sup>103</sup> For an examination of the refugee definition in group contexts, see: Ivor C. JACKSON, *The Refugee Concept in Group Situations* (the Hague; Boston: Martinus Nijhoff Publishers, 1999).

<sup>104</sup> While the majority of Chinese nationals entering Thailand in the Bangkok period, since 1782, had been seeking work, some Chinese nationalists fled to eastern Thailand opposing the formation of the People’s Republic of China in the late 1940s. Many of the latter were perceived to be part of an armed resistance and not treated as refugees.

<sup>105</sup> Muntarbhorn, *supra* note 1 at 129.

<sup>106</sup> Ansuchote, *supra* note 96 at 889.

<sup>107</sup> The Vietnamese Lawyers Association explained that: “the Vietnamese nationals from 16 years of age upwards were granted passes to move through Thai territory and were recognised as legal political refugees”. *Lawyers Against Continued Repression of Vietnamese in Thailand*, finalized by the Vietnamese Lawyers Association, National Archives of Australia: A1838, 3010/2/5/3 (1959).

<sup>108</sup> *Ibid.*



Additionally, Poole observed that refugees were able to resume their previous occupations as shopkeepers and skilled workpeople such as carpenters, masons, mechanics, tailors, and electricians.<sup>109</sup>

The Thai government's provision of land to refugees for cultivation and to run businesses aligns with Article 17(1) of the 1951 Refugee Convention, which calls on member states to enable "wage-earning employment" in accordance with the "most favourable treatment accorded to nationals of a foreign country."

The Thai government also allowed Vietnamese children to enter schools. Vietnamese refugee children were encouraged by their communities to go to local Thai schools, and the Thai government also allowed informal Vietnamese schools to continue to operate.<sup>110</sup> The admission of Vietnamese children into Thai schools was in conformity with Article 19 (1) of the 1951 Refugee Convention requirement to "accord to refugees the same treatment as is accorded to nationals with respect to elementary education", and the tolerance of Vietnamese-run schools went beyond this requirement. Thailand's approach to economic, social, and cultural rights for Vietnamese refugees is thus contrary to the narrative of exceptionalism to international refugee law and the practice that emerged after the 1970s.

#### *D. Durable Solutions – 'Voluntary Repatriation' and Local Integration*

Refugees in the post-WWII period were afforded protection and durable solutions by asylum states in Southeast Asia. The official Thai policy to end the plight of Vietnamese refugees was the expectation that they would return to Indochina when the fighting between France and Vietnam ended. However, many were eventually allowed to integrate locally in Thailand, as former waves of Vietnamese refugees had done in the past.<sup>111</sup> By the mid-1950s, the conflict with France had ended and Thailand was becoming increasingly concerned about the presence of "a potentially subversive minority group on Thai soil" and thus planned for them to repatriate.<sup>112</sup> The International Committee of the Red Cross ("ICRC") brought Thai and North Vietnamese representatives together to agree on a repatriation arrangement, which resulted in an agreement on 14 August 1959.<sup>113</sup> Through this agreement, renewed in 1962, some 35,000 refugees returned to Vietnam between January 1960 and July 1964.<sup>114</sup> The Australian Embassy reported that the

<sup>109</sup> Poole, *supra* note 95 at 326.

<sup>110</sup> Children were encouraged by their communities to enter Thai pagoda schools, where they often formed a large percentage of the school population. This provided an opportunity for the children to "learn respect for the Thai monarchy and Buddhism". *Ibid.*, at 330.

<sup>111</sup> Between 1912 and 1945, there were Vietnamese refugees trickling into Thailand from Central Vietnam, mostly as a result of their opposition to the French authorities. They fled via Laos to Thailand and settled in Nakhorn Phanom province on the bank of the Mekong. Interestingly, Varophas observed that the majority of these refugees automatically acquired Thai citizenship between 1912 and 1937 "due to the absence of immigration law". Varophas, *supra* note 90 at 234.

<sup>112</sup> Australian diplomats advised, in de-classified reports from 1958, that at the Bandung Conference in April 1955, Thai Prince Wan discussed the issue of repatriation with the Viet Minh Foreign Minister. However, the return could not be carried out since the Thai government did not want to recognise the Viet Minh government and Laos would not allow repatriation through its territory. Moreover, the report indicated that Thai police were also taking money from the Vietnamese and possibly did not want to lose this income; *Thailand Migration Policy - Repatriation of Refugees*, Memo 538/58 to the Secretary of the Department of External Affairs (Canberra) from the Australian Embassy in Bangkok, National Archives of Australia: A1838, 3010/1/4 Part 1, *Thailand Migration Policy* (1958), at para. 3 [*Thailand - Repatriation of Refugees*].

<sup>113</sup> *The Problem of the Vietnamese Refugees in Thailand*, Confidential report from P.I.B. No. 20, National Archives of Australia: A1838, 2498/4, *Vietnamese in Thailand - Manila Treaty* (1959).

<sup>114</sup> Poole, *supra* note 95 at 325.

agreement had provisions to prevent forcible repatriation, which was to take place “according to their own will”<sup>115</sup> However, by 1964, North Vietnam refused to take more refugees, and informal solutions were found.

While repatriation remained the official policy of the Thai government, “local integration” became an unofficial practice whereby many Vietnamese refugees were naturalised in processes tolerated by the local authorities. For example, official figures show that 22,000 people waiting to be repatriated in 1964 were children under age 18, suggesting that many of them had been born in Thailand. Although not eligible for Thai nationality by virtue of birth on the territory, a majority were able to obtain birth certificates by having a Thai national “recognise” them as their own.<sup>116</sup> According to one scholar who also worked on refugee protection in the region, this was known and tolerated by Thai officials.<sup>117</sup>

Thailand’s return agreement with Vietnam had provisions to protect against *refoulement*, as per Article 33(1) of the 1951 Refugee Convention,<sup>118</sup> requiring states not to send refugees to a territory where they fear persecution. Moreover, the eventual naturalisation of Vietnamese refugees aligns with Article 34 of the 1951 Refugee Convention that requires that states “shall as far as possible facilitate the assimilation and naturalization of refugees” (emphasis added). In this sense, Thailand’s local integration of refugees and its approach to durable solutions is contrary to the narrative of exceptionalism to international refugee law.

### E. Reflections on National Practice in Thailand

The protection of Vietnamese refugees by Thailand, as a key refugee-hosting country between Burma and Indochina in the post-WWII period, is an important example of state practice. Rather than human rights “exceptionalism”, it provides an example of state practice reflecting international refugee law, including the principle of non-*refoulement*, the right to work and to education. Although this section focused on the protection afforded to Vietnamese refugees in Thailand, these standards were reflected more broadly in state practice. Moretti explains that other Southeast Asian States provided asylum to groups of people fleeing conflict and generalised violence over time.<sup>119</sup> In addition to providing protection to significant numbers of refugees at the national level, key refugee-hosting states in Southeast Asia engaged with international refugee law in the 1960s to develop regional refugee protection standards, the Bangkok Principles, as seen above. Non-accession to the 1951 Refugee Convention did not evidence “legitimising the rejection”<sup>120</sup> of refugees historically. Rather, states in Southeast Asia, from at least the end of WWII onwards, provided protection to refugees. A large-scale refugee flow in the 1970s, which attracted the world’s attention, represented in many ways a departure from the years of refugee protection preceding it and cannot be conflated with the history of protection in the region.

<sup>115</sup> *Inward Savingram from the Australian Embassy Bangkok to the Department of External Affairs Canberra*, prepared by the Department of External Affairs, National Archives of Australia: A1838, 3006/6/3 Part 1, *Thailand relations with North Vietnam* (1959), at [p. 42].

<sup>116</sup> Poole, *supra* note 95 at 325.

<sup>117</sup> Poole, *supra* note 96 at 887.

<sup>118</sup> See also, Article VII of the *Bangkok Principles*, *supra* note 11.

<sup>119</sup> Sébastien Moretti, “Keeping up Appearances: State Sovereignty and the Protection of Refugees in Southeast Asia” (2018) 17(1) *European Journal of East Asian Studies* 3 at 12–6. See also Vitit MUNTARBHORN, “Discourses and Sources” in Vitit MUNTARBHORN, ed., *Challenges of International Law in the Asian Region* (Singapore: Springer, 2021) 1.

<sup>120</sup> Davies, *supra* note 2.

#### IV. RE-THINKING HISTORY AND RELEVANCE OF THE CPA

The CPA was an important moment in time for refugee protection for Southeast Asia.<sup>121</sup> An over-emphasis of this period may skew the understanding of refugee protection in the region, which requires a longer lens on history. The CPA was situation-specific, given the large-scale flow of people as well as the fact that Global North states were politically invested in finding durable solutions for refugees. In this sense, it represents an exception rather than a rule. This section explores the importance of the CPA and places it in an historical context of a non-linear continuum of refugee protection in Southeast Asia.

In 1975, significant numbers of Vietnamese, Laotian and Cambodian refugees fled eastward, and the response of asylum states in Southeast Asia varied from welcoming them to turning them back.<sup>122</sup> However by 1979, several asylum states refused to allow boats of asylum-seekers to land on their territory and pushed them back to sea, where they consequently starved or drowned. Robinson explains the deterioration of refugee protection standards:

[By] the summer of 1979, more than 350,000 Vietnamese and Laotian refugees were scattered in camps from Thailand to Hong Kong, and another half a million Cambodians were massed at the Thai border. Local promises of temporary asylum collapsed. Vietnamese boats were pushed back by the hundreds, and thousands of Cambodians were forced back at gunpoint into their country. Sea pirates raided helpless refugee boats, raping and plundering at will. Camps were filled to bursting and still they came, with untold numbers perishing along the way.<sup>123</sup>

In this context, the UN Secretary General called a conference from 20 to 21 July 1979, attended by sixty-five states as well as inter-governmental and non-governmental organizations. States outside the region were seen as “primarily responsible for eventual resettlement”<sup>124</sup> and pledges of support were made:

Worldwide resettlement pledges increased from 125,000 to 260,000. Vietnam agreed to try to halt illegal departures and, instead, to promote orderly and direct departures from Vietnam. Indonesia and the Philippines pledged to establish regional processing centres to speed resettlement and new pledges to UNHCR totalled about \$160 million in cash and in kind, more than doubling the totals of the previous four years.<sup>125</sup>

Asylum states in Southeast Asia “formalized a *quid pro quo*—temporary or “first” asylum in the region for permanent resettlement elsewhere.”<sup>126</sup> The countries of first asylum—Hong Kong, Malaysia, the Philippines, Singapore and Thailand—were concerned to stop arrivals and find solutions other than local integration owing to “concerns about internal security, being overwhelmed by the sheer number of people arriving, intolerance in their own communities, and a wish to signal to other states that their compassion and

<sup>121</sup> *Ibid.*

<sup>122</sup> For example, Helton explained that Thailand, for example, initially reacted at times with ‘apparent compassion’, and at other times with ‘callousness’. See: Arthur C. HELTON, “Asylum and Refugee Protection in Thailand” (1989) 1(1) *International Journal of Refugee Law* 20, at 21.

<sup>123</sup> Robinson, *supra* note 13 at 319.

<sup>124</sup> Helton, *supra* note 122 at 24.

<sup>125</sup> Robinson, *supra* note 12 at 319.

<sup>126</sup> *Ibid.*, at 320.

tolerance should not be taken for granted”.<sup>127</sup> In the short term, these states allowed refugees to stay in camps and detention centres in exchange for resettlement elsewhere.

By 1988, the number of people seeking asylum increased and resettlement places in Western states reduced.<sup>128</sup> In June 1989, another meeting was held in Geneva with 70 governments in attendance which saw the adoption of the CPA. Some of the commitments in the CPA resembled the 1979 Agreement such as the commitment to preserve first asylum, to “reduce clandestine departures and promote legal migration”, and to resettle refugees in third states.<sup>129</sup> The “radically new ingredients”, according to Robinson, were regional screening and repatriation,<sup>130</sup> and “technical innovations”<sup>131</sup> were, *inter alia*, refugee status determination, family reunification, resettlement screening, and monitoring of returns.<sup>132</sup> In fact, only some of these developments were radically new in the region and others were not. For example, as demonstrated above, Thailand had negotiated a repatriation arrangement for Vietnamese refugees in 1950s that included guarantees of voluntariness.

While refugee protection was not new to the region, the CPA was seen to have “brought a regional dynamic to the international refugee system in Southeast Asia.”<sup>133</sup> It was seen as only a “qualified success” in promoting asylum and solutions for the duration of the Indochinese exodus.<sup>134</sup> On one hand, it represented an unprecedented level of cooperation between Southeast Asia and States outside the region,<sup>135</sup> described by Türk and Garlick as “arguably the most successful international refugee responsibility-sharing initiative.”<sup>136</sup> What made the CPA noteworthy was the scale of solutions provided by the Global North, with one million Vietnamese refugees eventually being resettled.<sup>137</sup>

<sup>127</sup> Richard TOWLE, ‘Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?’ (2006) 18 *International Journal of Refugee Law* 537 at 540.

<sup>128</sup> Robinson explains the change:

Western states, faced with a rising tide of asylum-seekers at their own doors and persuaded that the Indochinese arrivals no longer warranted automatic refugee status, gradually had been reducing resettlement numbers and introducing more selective criteria. The agreement of 1979—first asylum for third-country resettlement—no longer held. Indeed, it seemed to some that open-ended resettlement, at least in part, was perpetuating an open-ended need for asylum.

Robinson, *supra* note 13 at 320.

<sup>129</sup> The language surrounding “clandestine departures” shows the approach of states to refugees seeking asylum by sea had changed and was hardening.

<sup>130</sup> Robinson, *supra* note 13 at 320.

<sup>131</sup> Betts, *supra* note 16 at 86.

<sup>132</sup> The involuntary and voluntary return of some 80,000 Vietnamese under the CPA, in which UNHCR was involved, has been described to be “problematic at best” for refugee protection; Robinson, *supra* note 13 at 331.

<sup>133</sup> Alistair D. B. COOK, “Search for Responsibility: The Search for Solutions to Irregular Migration in Southeast Asia” (2016) 5 *Middle East Institute* 1

<sup>134</sup> Robinson, *supra* note 13 at 324.

<sup>135</sup> The level of engagement of Global North states, such as the United States, in resettling refugees from Vietnam was motivated as much by humanitarian concerns as it was political interests. It can be attributed to the responsibility for causing the displacement, following the United States’ involvement in the Vietnam War.

<sup>136</sup> Volker TÜRK and Madeline GARLICK, “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees” (2016) 28(4) *International Journal of Refugee Law* 656 at 667.

<sup>137</sup> *Office of the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees: Report of the Secretary-General*, United Nations General Assembly, A/44/523, 22 September 1989. However, not all solutions were ideal. Voluntary and involuntary repatriation of some 80,000 Vietnamese under the CPA involved force, and for refugee protection was “problematic at best”. See Robinson, *supra* note 13 at 331.

On the other hand, it has been widely criticised for creating a legacy of diminished standards of refugee protection in individual states in Southeast Asia,<sup>138</sup> whereby states provide temporary asylum contingent solutions outside the region.<sup>139</sup> Davies criticised that “Southeast Asian states conducted a form of “refugee manipulation” because their persistent refusal to sign the instruments compelled Western states (the United States in particular) to provide material assistance to the refugees and offer resettlement places.”<sup>140</sup> This criticism does not sufficiently recognise the role of states in the Global North in causing displacement, including the impact of neo-colonial imperialism,<sup>141</sup> and the need for these states to share responsibility in the spirit of the “international cooperation” set out in Article VIII(2) of the Bangkok Principles.<sup>142</sup> Moreover, it fails to sufficiently acknowledge the rich history of refugee protection that did not start or end with Global North engagement in the CPA. The historical perspective of refugee protection in the post-WWII period suggests that a longer view of history demonstrates a continuum of refugee protection in the region that pre-dates colonialism.<sup>143</sup> State practice in the decades prior to the CPA yields important lessons, examined in the next section.

## V. COUNTERING ‘HUMAN RIGHTS EXCEPTIONALISM’: LESSONS FROM HISTORY OF REFUGEE PROTECTION IN POST WWII SOUTHEAST ASIA

Whilst few states in Southeast Asia signed the 1951 Refugee Convention, this cannot be conflated with a failure to protect refugees in state practice or to reject international refugee law. Examples of state practice show that refugees have found protection in the region over time. The history of refugee protection historically has been non-linear, with some liberal practices and others that have been more restrictive. Many lessons can be drawn from national state practice, regional cooperation, and international and regional refugee protection standards of Southeast Asian states in the post-WWII decades.

State practice from the post-WWII period provides important insights in relation to Thailand’s treatment of Vietnamese refugees which extended to refugees from other countries. Archival material drawn on in this article showed Thailand’s practice in protecting Vietnamese refugees included legal status, provision of plots of land to work and access to education. There is evidence that Thailand protected refugees from other

<sup>138</sup> For example, Hathaway states that the CPA not only ended a presumption of refugee status for Vietnamese but “implicitly stigmatized Vietnamese asylum-seekers as economic by calling for departure procedures and migration programmes...with a view to making such programs the primary and event”; See: James C. HATHAWAY, “Labelling the ‘Boat People’: The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees” (1993) 15(4) *Human Rights Quarterly* 686 at 689.

<sup>139</sup> Robinson, *supra* note 13 at 319. See also: R. TOWLE, “Processes and critiques of the Indo-Chinese Comprehensive Plan of Action: an instrument of international burden-sharing?” (2006) 18 *International Journal of Refugee Law* 537, at 568; Sara E. DAVIES, “Saving refugees or saving borders? Southeast Asian States and the Indochinese refugee crisis” (2006) 18(1) *Global Change, Peace & Security* 3; Antje KLUG, “Enhancing Refugee Protection in the Asia-Pacific Region” (2013) 107 *Proceedings of the Annual American Society of International Law Meeting* 358.

<sup>140</sup> Davies, *ibid.*, at 3.

<sup>141</sup> Tendayi E. ACHIUME “Migration as Decolonization” (2019) 71 *Stanford Law Review* 1509, at 1542.

<sup>142</sup> Article VIII(2) states: “States shall promote comprehensive approaches, including a mix of solutions involving all concerned States and relevant international organizations in the search for and implementation of durable solutions to refugee problems”.

<sup>143</sup> It is outside the scope of this paper to look at refugee protection practices in Southeast Asia for centuries prior to WWII. For an interesting analysis of this more distant history, see: Muntarhorn, *supra* note 119.

countries in the period, including from Burma.<sup>144</sup> In fact: “In the period between the Second World War and 1975 Thailand witnessed various influxes of asylum-seekers... and by comparison with those who arrived after 1975, these asylum-seekers have been treated with liberality”.<sup>145</sup>

Beyond national state practice, there are examples of regional cooperation to protect refugees. The example provided above was the multilateral arrangement between Thailand, North Vietnam and the ICRC for the voluntary repatriation of Vietnamese refugees.<sup>146</sup> This South-South cooperation to provide durable solutions for refugees predates the CPA, and represented demonstrated asylum practices in Southeast Asia post-WWII that conformed with key principles of international refugee law.<sup>147</sup> Regional practices to protect refugees are part of a continuum of centuries-old history of asylum, an examination of which is outside the scope of the present article.<sup>148</sup>

Southeast Asian states engaged in setting standards for refugee protection in the 1950s and 1960s in international and regional fora. Their contribution to the 1951 Refugee Convention drafting process asserted the universality of human rights and stood against colonial power. Regional standards prepared through South-South cooperation with states in Africa and the Middle East emerging from colonialism expanded the refugee definition and included important protection of refugee rights, in particular in the context of return. The Bangkok Principles offered progressive standards in conformity with international law.<sup>149</sup>

Beyond this, regional practice “contributes to the strengthening of international refugee law”.<sup>150</sup> Thailand’s representative at the Committee from 1962 onward, Sucharitkul, stated that the AALCC helped, in general, to formulate and articulate evolving norms and practice rules of international law in the post-WWII era to the “benefit of mankind and the global community beyond Asia and Africa”.<sup>151</sup> He notes that African and Asian states were preoccupied with the issues surrounding refugees and displaced people as well as “their humanitarian treatment consistent with the evolving rules of international law” throughout the 1960s.<sup>152</sup> Reflecting on the impact of the Bangkok Principles after two decades, Sen considered how the “principles have taken shape as well as to review the development of new norms and practices in the field of refugee law”.<sup>153</sup> Further work is required to document the impact of the Bangkok Principles globally but this does not diminish their importance as a South-South cooperation among states emerging from colonialism, not restricted to the 1960s, since they were re-affirmed in 2001.

Further research into the history of refugee protection in Southeast Asia prior to the CPA is needed, since: “[r]eceived understandings of the 1970s crisis as a starting point for the Indochina refugee crisis have led to institutional and public amnesia on pre Indochina

<sup>144</sup> In relation to informal refugee status for Burmese refugees, see: Muntarbhorn, *supra* note 88. See also Memo – Burmese Relations in Thailand, National Archives of Australia: A1838, 3006/1/5 Part 1, *South East Asia - Intra-Regional - Burma - Thailand Relations*, at 37.

<sup>145</sup> Muntarbhorn, *supra* note 1 at 126.

<sup>146</sup> See *Thailand – Repatriation of Refugees*, *supra* note 112.

<sup>147</sup> Helton, *supra* note 120 at 20. See also Muntarbhorn, *supra* note 88, referred to in Muntarbhorn, *supra* note 1 at 126.

<sup>148</sup> Muntarbhorn, *supra* note 1.

<sup>149</sup> Muntarbhorn, *supra* note 119.

<sup>150</sup> Moretti, *supra* note 82 at 202.

<sup>151</sup> Sompong SUCHARITKUL, “Contribution of the Asian-African Legal Consultative Organization to the Codification and Progressive Development of International Law” in AALCO, *Essays in International Law*, (Asian African Legal Consultative Organization, 2007) 8, at 20.

<sup>152</sup> *Ibid.*, at 16.

<sup>153</sup> Sen, *supra* note 67.

refugee movements and earlier incorporations of displaced and moving communities into local populations”.<sup>154</sup> The regional standards and examples of national practice did not start in the decades following WWII in Southeast Asia. There is much to gain from an even wider historical lens on refugee protection in the region, which includes practices at all levels of society.<sup>155</sup> There is much to be gained from greater understanding of the origins of asylum in practices grounded in Confucianism, Buddhism and other historical influences.

The lessons drawn from the history of refugee protection in the post-WWII decades are many. Refugee protection in Southeast Asia did not start with the Indochinese refugee exodus in 1975. Non-accession of Southeast Asian states to the 1951 Refugee Convention in the post-WWII period does not mean that international refugee law was rejected. Post-colonial states in Southeast Asia asserted human rights in the drafting process of the 1951 Refugee Convention. Drafting regional refugee law standards with states emerging from colonialism elsewhere under the auspices of the AALCC, Southeast Asian states included rights that were more progressive than those in the 1951 Refugee Convention, notably a right to compensation for individuals unable to return to their country of origin. Some of these standards were grounded in state practice at the time, with the example of Vietnamese refugees in Thailand showing domestic legal and policy standards to allow refugees to remain on the territory and access basic social and rights. “Human rights exceptionalism” is relevant, “exceptionalism” insofar as some regional standards and national practice exceeded the protection afforded by the 1951 Refugee Convention.

This article has addresses a gap in the literature about refugee law prior to the CPA. It has challenged the narrative about “human rights exceptionalism” in non-signatory states to the 1951 Refugee Convention in Southeast Asia by re-thinking the history of refugee protection to include the decades following WWII. Southeast Asian states played a role in drafting this Convention, challenging colonial powers and asserting the universality of human rights. Key refugee-hosting states in Southeast Asia joined with post-colonial states in other regions to draft the AALCC legal standards for refugee protection, the Aliens Principles and Bangkok Principles. These standards were more than aspirational, as the example of Thailand’s protection of Vietnamese refugees demonstrated. The approach of key refugee-hosting states in Southeast Asia in these post-WWII years from 1945 to 1979 points to an extended history of engaging in refugee protection and important lessons in refugee protection from the Global South.

**Acknowledgements.** The author would like to thank Tristan HARLEY, Riona MOODLEY, Jane MCADAM and Christine FORSTER for their comments on earlier drafts.

**Funding Statement.** None.

**Competing interests.** The author is on leave from the United Nations High Commissioner for Refugees (UNHCR). The perspectives in the article are those of the author, and do not represent the views UNHCR.

<sup>154</sup> Itty ABRAHAM, “Host Communities and Refugees in Southeast Asia: Report on a Workshop held at the National University of Singapore (NUS), 10-11 May 2019” 35 *Journal of Social Issues in Southeast Asia*, No 1 (2020) 178.

<sup>155</sup> Although outside the scope of this paper, the longer lens of history should include community-level protection. See the important work exploring “diverse modes of South-South connection, exchange and support (including South-South aid, transnational activism, and migration), and responses to displacement, violence and conflict (including Southern-led humanitarianism, peace-building and conflict resolution)”: Elena FIDDIAN-QASMIYEH and Patricia DALEY, eds., *Routledge Handbook of South-South Relations* (Abingdon: Routledge, 2019).



**Natasha YACOUB** is an Affiliate of the Andrew & Renata Centre for International Refugee Law, at the University of New South Wales, Sydney, Australia.

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**Cite this article:** YACOUB NE (2023). A New History of Refugee Protection in Post-World War Two Southeast Asia: Lessons from the Global South. *Asian Journal of International Law* **13**, 220–243. <https://doi.org/10.1017/S2044251322000510>