

Nevertheless, in some theatres serious thought has clearly been given to the necessity for regimes that integrate (initially, in theory; in practice, we shall see) norms, political mechanisms, and programs of action and oversight in scenarios which engage multiple actors, each with its own area of responsibility and obligation. This context poses new and exciting opportunities, in which, as James Brierly once cautioned, international lawyers will need to beware the “tyranny of phrases.” For we must consider that failure to remove blinkers, to think beyond the rule, to kickstart political processes (repeatedly if necessary), can contribute to perpetuating the unresolved, and so leave the refugee and the displaced to the mercy of yet greater catastrophes.

## **ENHANCING REFUGEE PROTECTION IN THE ASIA-PACIFIC REGION**

*By Anja Klug\**

### **LACK OF A NORMATIVE PROTECTION FRAMEWORK**

Refugee protection in the Asia Pacific region presents unique challenges. Apart from the Middle East, this is the only region without much of a normative framework for the protection of refugees. Most countries are not party to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, and there is no regional refugee protection instrument. Accession to international human rights instruments has also been limited, and where countries have accepted treaty obligations, they are often not implemented. The Association of South East Asian Nations (ASEAN) succeeded in adopting an ASEAN Human Rights Declaration in November 2013, but experts have voiced concerns that this instrument, rather than advancing the human rights agenda in the region, is lowering international standards and introducing relativism.

Particularly in South/East Asia, the protection of refugees is based on a system developed during the Indo-China refugee crisis, which is based on voluntary and time-bound *de facto* contributions to refugee protection rather than on binding obligations: countries in the region provide temporary protection to refugees on their territory with the understanding that refugees will either be resettled or returned home by UNHCR. Most states continue to reject any responsibility for refugees beyond the provision of such time-bound protection. Refugees are considered a responsibility of UNHCR, and consequently, the region hosts UNHCR's largest refugee status determination and some of the largest resettlement operations.

The lack of practically any legal protection framework creates serious protection challenges. Due to this lack of predictability, it is not only unclear what rights refugees can claim and what obligations states have toward them, but it also makes it more difficult for UNHCR to work with governments. Each country in the region has different *de facto* protection standards, and access to effective protection is only guaranteed in few states. Prolonged refugee situations and disparate protection standards have provoked irregular secondary movements to middle-income or industrialized countries. These movements often take place under dangerous conditions across the sea at high human costs and are facilitated by thriving smuggling and trafficking networks which exploit the lack of asylum framework in the region for their own benefit. The lack of a regional protection framework is not only problematic from a protection perspective, however. The absence of proper cooperation and burden-sharing has also generated tensions between states.

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Encouraged by some promising developments during the past decade, UNHCR has recently launched another initiative to develop more consistent and predictable protection responses in South/East Asia, but, as will be elaborated below, it has approached the issue in a different manner.

### TIME FOR CHANGE?

The protection environment in many Asia Pacific countries has changed significantly since the Indo-China crisis. Despite their refusal to formally assume protection responsibility, South and East Asia have developed considerable experience in hosting refugees. Several countries (Bangladesh, India, Nepal, and Thailand) have been hosting medium-sized refugee populations for over a period of 20 years.

More important perhaps is the economic growth of countries like Thailand and Malaysia and the resulting growth in size and importance of migration more broadly. Large-scale population movements including a complex mix of push and pull factors have been both a motor of economic growth and expansion but also a challenge to concepts of state sovereignty and national security. The increasing importance of migration for these growing economies has contributed to the development of first bilateral and subsequently regional legal frameworks. An ASEAN Community, consisting of a Security, a Sociocultural, and an Economic Community will be established by 2015. Under the latter, ASEAN members will pilot a free labor market plan by allowing specialists and professionals in seven fields to work anywhere they like across the region.

The desire for greater international prominence also explains the increasing interest of these countries in appearing as good global citizens and in respecting international human rights standards. ASEAN has established a regional human rights institution, the ASEAN Intergovernmental Commission on Human Rights, and while there are huge gaps and continuing and widespread violations of the rights of migrant workers, there is nonetheless growing awareness of the need to respect migrants' rights. Increased scrutiny by media and civil society, given the scale of these irregular movements and the hardship experienced by migrants, has led to enhanced preparedness to address irregular movements more comprehensively, and not solely from a security perspective.

### THE BALI PROCESS: A PLATFORM TO DEVELOP REGIONAL AGREEMENT ON REFUGEE PROTECTION?

The Bali Process on People Smuggling, Trafficking in Persons, and Related Transnational Crime (Bali Process) was created in 2002. More than 40 countries and numerous international agencies, including UNHCR, participate in this voluntary forum. Until very recently, its primary focus has been on border control and crime prevention; raising regional awareness of the consequences of people smuggling, trafficking in persons, and related transnational crime; and developing and implementing strategies and practical cooperation in response.

During the first years of its existence, Bali member states showed little interest in considering protection issues arising in the context of irregular migration, despite UNHCR's advocacy. There seldom was a reference to the needs of the people involved in irregular movements and no acknowledgement of the fact that irregular migratory movements which member states seemed committed to combat, included refugees and other people in need of international protection.

However, given the fact that the restrictive measures did not stop people from arriving and that irregular migration has been growing instead, member states seem increasingly to

acknowledge that disregard for the protection dimension has become a complicating factor. The absence of an agreed protection framework indeed presents a threat in light of the existence of major displacement drivers, the numbers of people at risk, and the strength of transnational criminal networks in the region.

Based on suggestions developed by UNHCR, the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime agreed in March 2011 to the development of an inclusive but non-binding Regional Cooperation Framework (RCF) to address irregular migration in the Asia-Pacific region. The RCF includes practical arrangements aimed at enhancing the region's response to irregular movement through consistent processing of asylum claims, durable solutions for refugees, the sustainable return of those not owed protection, and targeting of people smuggling enterprises.

In September 2012 the Regional Support Office (RSO) was established in Bangkok to facilitate implementation of the RCF. The RSO operates under the oversight and direction of the Bali Process Co-Chairs, the governments of Australia and Indonesia, and in consultation with UNHCR and IOM which have both seconded a senior staff to the RSO. RSO's tasks include information-sharing between states on refugee protection and international migration; capacity-building and exchange of best practices; pooling of common technical resources; and providing logistical, administrative, operational, and coordination support for joint projects between Bali Process members.

The adoption of the RCF and the establishment of the RSO represent a landmark development for the region and for UNHCR. It positioned protection issues and asylum seekers/refugees as one of the important components of Bali Process considerations; it recognized that problems related to refugees/asylum-seekers, if unaddressed, can negatively impact all states; it recognized that issues cannot be dealt with by one country alone; it called for regional cooperation; and it clearly positioned UNHCR as a key partner to assist Bali Process members in identifying practical solutions to problems of irregular migration.

It is too early to assess the impact RCF and RSO will have in practice on the regional protection landscape. The RCF represents nothing more than an opportunity for change. Evidently, the adoption of a framework and a structure as such do not fully address the challenges described above. Changing perceptions and approaches in the region is a longer-term process and will take more time. The initial stages of RCF and RSO and the first projects already show the risk that the RCF and RSO could be dominated by migration management issues, sidelining their primary objective of enhancing the protection space for refugees.

## CONCLUSION

Policy prescriptions that might work in other regions have not easily applied in Asia. UNHCR's recent initiative to enhance the protection space in South East Asia seeks therefore to operationalize international protection standards within the specific South East Asian environment. In concrete terms, this means prioritizing practical cooperation rather than focusing on the adherence to normative standards; and adapting international normative standards to the specific regional and national political environment in which they are to be applied by seeking synergies between state interests and protection prerogatives and by placing the protection of refugees within the broader context of migration management.

Such an approach is located within a field of tensions between opposing poles: regional versus global; practical cooperation versus normative standards; and refugee protection

versus migration management. The challenge is to find a way that reconciles them and avoids conflict. If successful, it can offer important opportunities. But having to work within these opposing poles is not without risks. A focus on regional cooperation may undermine international standards; human security concerns may be pushed aside by state security concerns; and refugee protection may become subsumed under migration management, losing its specificity and eroding its human rights underpinning. It is therefore important that the development of such regional initiative be firmly grounded in international law and based on a vision on how these standards may creatively evolve in that particular regional environment.

### **EUROPEAN ASYLUM POLICY: OSCILLATING BETWEEN SHARED AND INDIVIDUAL RESPONSIBILITY**

*By André Nollkaemper\**

European states have adopted a shared responsibility toward asylum seekers that presents a double-edged sword. Together, they may act more efficiently than alone. But doing things together also leads to a diffusion of responsibility and has allowed individual states to duck their international obligations.

The European courts have recognized that individual obligations cannot be sacrificed in pursuit of a shared policy. However, a fundamental tension continues to exist between the ambition of sharing, on the one hand, and the individual responsibility for performance of international obligations, on the other.

Let me first briefly present the scale of the problem. In the last few years, Europe has hosted about 15% of the world's refugees. Absolute numbers have somewhat decreased. In 2012 just under 300,000 asylum applications were received within the member states of the EU, compared to a 2001–2002 peak of over 420,000 applications. Major countries of origin are Syria, Afghanistan, Iraq, Pakistan, and Somalia. Major recipient countries are Germany (almost 64,000), France (almost 55,000), and Sweden (44,000). But the differences are enormous. At the low end of the spectrum we find Portugal (300), and in particular Latvia (190) and Estonia (80).

In the past decades, European states have decided that they should tackle challenges posed by these refugee flows collectively. Put simply: how Greece, Italy, or Hungary handles an application for asylum is no longer a responsibility of each of these states alone. Rather, it is now a responsibility of European states collectively. By this I mean in part a collective responsibility of the 47 states that are parties to the European Convention on Human Rights (ECHR) and members of the Council of Europe, and that make up Europe at large. Within this group, a more far-reaching form of sharing is pursued by the European Union (EU) and its 27 member states.

By acting jointly rather than individually, European states make use of an option that international law allows. The preamble of the Refugee Convention recognizes the need for international cooperation in achieving a solution for the problem that granting of asylum may place unduly heavy burdens on certain countries. In 1994 the Executive Committee of UNHCR acknowledged the value of regional harmonization of national policies to ensure that persons who are in need of international protection receive it.

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