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Moving beyond Protection Space: Developing a Law of Asylum in South East Asia

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Abstract:

Asia is often referred to as the region that has “rejected” refugee law; its sub-region of South East Asia is the epitome of this proposition with only two of ten states being party to the *Convention Relating to the Status of Refugees* of 1951. As a result, the approach to refugee protection in South East Asia has been to rely upon principles of humanitarianism and to negotiate “protection space” for refugees with the states of the region. This chapter critiques this approach based upon how it privileges international interests, fora, and UNHCR as the negotiator; devalues the normative strength of obligations towards refugees; and, allows the underlying responsibility for the provision of refugee protection to drift from the state to UNHCR. In the alternative, this chapter proposes an approach relying upon a legal foundation and, in particular, through the development of what this chapter terms the “law of asylum”. Such an approach relies upon an assemblage of legal obligations owed by states to refugees. While in South East Asia the assemblage is less well developed than in other regions, it nonetheless encompasses a range of obligations towards refugees that would allow them to live in the region with greater dignity. Although such an approach is not without drawbacks, its advantage is that it provides an increased role for local negotiators, such as the local legal profession and human rights institutions, and domestic fora; reinforces the normative strength of obligations towards refugees; and, underscores the enduring responsibility of states towards refugees. Ultimately, this chapter questions the argument that states in Asia have “rejected” refugee law, upon which existing scholarship is premised and policy decisions are made.

Introduction

This book, and indeed much of the refugee law literature, takes as its starting point that the cornerstone of refugee identity is the legal and normative framework of protection enshrined in the *Convention Relating to the Status of Refugees* of 1951.² As such, it explores “how that identity

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² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954) (*1951 Refugee Convention*).

has been made, remade and given social and political meaning”³ by the institutions and processes which transform the *1951 Refugee Convention* into lived reality. This starting point is deeply problematic when our examination turns to the meaning of refugeehood in South East Asia, a region that has been traditionally understood as having ‘rejected’ the *1951 Refugee Convention*.

This chapter examines the approach of UNHCR and other actors in the international refugee regime to refugee protection in South East Asia and argues that, unlike in other regions, the approach relies less on the legal cornerstone of the *1951 Refugee Convention* and more on a negotiated humanitarian “protection space”.⁴ It argues that such an approach privileges international interests, fora, and the UNHCR as the negotiator, and that it belies a developing bedrock of legal norms that offers protection to refugees in the region. It argues that there is a developing “law of asylum” in the region based on human rights instruments and emerging national and regional institutions. In this way, it can be seen that the identity of refugees in the region is shifting from a person who is the object of the exercise of sovereign discretion as a ‘humanitarian entrant’, to one who is the bearer of rights.

The problem of refugee law in Asia

The Asian region is home to a majority of the world’s refugees.⁵ Notwithstanding the large numbers of refugees in Asia, the “rejection” of refugee law by Asian states has become a touchstone of refugee law scholarship. Asia has been described as “a region not known for its formal adherence to refugee law”⁶ Sub-regions of Asia have been characterized in similar terms: “The whole of South Asia is devoid of any standards and norms on any dimension of refugee reception, determination and protection.”⁷ While it is conceded that the policies of Asian states towards refugees have frequently met international standards, such achievements are seen as being built on an unstable foundation:

Despite the low number of accessions to the Convention and Protocol, Southeast Asia has produced important developments in the treatment of refugees. However, because these developments usually have no basis in

³ This phrase is taken from Roger Zetter’s chapter, ‘Creating Identities – Diminishing Protection’.

⁴ The Middle East is perhaps the exception to this proposition and most analogous to South East Asia. However, even in the Middle East, major states of asylum, including Turkey, Iran, Egypt and, increasingly, Israel, are party to the 1951 Refugee Convention.

⁵ 4.4 million of the world’s 8.8 million refugees live in the UN defined region of “Asia”, a vast region stretching from Turkey eastward but excluding the states of Australia and the Pacific (Oceania). If UNHCR regional bureau are used then 2.7 million refugees live in “Asia and the Pacific” (this time including Oceania, with the remainder of the “Asian” refugees being allocated to the bureau responsible for the Middle East and North Africa).

⁶ Pia Oberoi “Regional Initiatives on Refugee Protection in South Asia” (1999) 11 *International Journal of Refugee Law* 193, 193.

⁷ Prabodh Saxena “Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future” (2007) 19 *International Journal of Refugee Law* 246, 246 (quote taken from abstract). In fairness to Saxena, he follows this absolute observation with an analysis of the progress that India has made in establishing norms and standards.

law and have been formed in response to specific refugee caseloads, the regime for the protection of refugees in Asia remains fragile.⁸

Davies provides the most elaborate exposition of the rejection hypothesis in a collection of work, including two articles,⁹ a book chapter,¹⁰ and, book¹¹ on the topic. As the title of her article and her book – respectively “The Asian Rejection?” and *Legitimizing Rejection* – indicate, her work puts forward the Asian rejection hypothesis. Focusing on the South East Asian sub-region, Davies writes of “the persistent rejection of international refugee law by the large majority of South East Asian states”¹², characterizing Asian states as being reluctant to accept “the promotion of refugee norms as part of becoming law-abiding members of the international community”¹³ and ultimately asks, rhetorically, “why most Southeast Asian states have not acceded to international refugee law?”¹⁴ In a similar vein, Chimni pointedly notes that “it may come as a surprise to some that no country in South Asia is party to the 1951 Refugee Convention.”¹⁵

The so-called “rejection” of refugee law by the states of Asia, and in particular South East Asia, places UNHCR in an exceedingly difficult position. Since its inception, one of the primary roles of UNHCR has been “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”¹⁶ As a result of the perceived “rejection” of refugee law by the states of Asia, the operations of UNHCR in the region are characterized by an appeal to the value of “humanitarianism” and its assumed role as negotiator of “protection space.” Focusing on the sub-region of South East Asia, which in many respects is the archetype for the Asian “rejection”, this chapter seeks to interrogate one of the principal consequences of the rejection proposition: the adoption of a humanitarian approach which relies upon the political negotiation of “protection space.”

This chapter outlines and critiques the protection space approach. It raises three concerns about the approach that are inherent in it: the international fora and international (UNHCR) negotiators that are privileged by it; its devaluation of the normative strength of obligations towards refugees; and, its shifting of the underlying responsibility for the provision of refugee protection

⁸ Fernando Chang-Muy “International Refugee Law in Asia” (1991-1992) 24 *New York University Journal of International Law and Policy* 1171, 1177.

⁹ Sara Davies “The Asian Rejection? International Refugee Law in Asia” (2006) 52 *Australian Journal of Politics and History* 562 (“The Asian Rejection”).

¹⁰ Sara Davies “Seeking Security for Refugees” in Anthony Burke and Matt Macdonald, eds. *Critical Security in the Asia Pacific* (Manchester University Press, 2007), 152 - 166.

¹¹ Sara Davies *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff Publishers, 2008) (“*Legitimising Rejection*”).

¹² *Ibid* 5.

¹³ Sara Davies “Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol” (2007) 19 *International Journal of Refugee Law* 703 at 718.

¹⁴ Davies *Legitimising Rejection* at 5 – 6.

¹⁵ B. S. Chimni “The Birth of a ‘Discipline’: From Refugee to Forced Migration Studies” 22 *Journal of Refugee Studies* 11 (2009) at 16. In the same article, Chimni also critiques the “legal fetishism” of centring refugee protection on legal categories; this is a critique to which we will return below.

¹⁶ Statute of UNHCR at ¶ 8(a). See also the provisions of Article 35 of the 1951 Refugee Convention, which recognizes UNHCR’s role in “supervising the application of the provisions of this Convention.”

from the state to UNHCR. As an alternative, this chapter proposes a reexamination of the legal obligations of states towards refugees notwithstanding that they may not be party to the treaties of international refugee law, including the *1951 Refugee Convention*. Even in a region as relatively deficient in human rights obligations as South East Asia, there is an assemblage of obligations that provides a framework for the development of a “law of asylum”. Such a focus on the legal foundation of refugee protection shifts the fora and actors involved in refugee protection and provides a revitalized role for human rights institutions, the legal profession, and, civil society. A corollary of this shift is that the underlying proposition that refugee law has been rejected is in need of re-examination, and along with it our conceptions of refugee identity.

This chapter proceeds by providing background to refugee protection in South East Asia. It then sets out the elements of the “humanitarian” or “protection space” approach and provides a critique based upon the three reasons outlined above. It then proceeds to set out an alternative legalistic approach and assesses the extent to which a nascent law of asylum exists in the region. After revisiting the utility of the proposition that South East Asia has rejected refugee law, the chapter concludes by trying to set out how a shift from humanitarianism (“protection space”) to legalism (“law of asylum”) might occur – a shift that is, in fact, already occurring.

For reasons of space, throughout this chapter the primary focus within South East Asia will be Malaysia although reference will be made to examples from elsewhere in the region. Malaysia has been selected both because it provides a very explicit example of some of the perils of humanitarianism and because the legal environment of Malaysia is one of the most challenging in the region. Insofar as the argument made in the chapter is true of refugee protection in Malaysia, it is true elsewhere in the region if only to the extent that Malaysia is representative of the region.¹⁷

Background to the South East Asian region

The South East Asian region is conventionally defined as collinear with the ten states of the Association of South East Asian States (ASEAN) regional organisation: Philippines, Vietnam, Laos, Cambodia, Thailand, Malaysia, Brunei, Singapore, Burma, and Indonesia.¹⁸ Although ASEAN

¹⁷ This proposition is not uncontroversial. Malaysia is a democratic, post-colonial, largely common-law jurisdiction with a relatively strong tradition of the rule of law and a well-developed legal profession. At the opposite end of the spectrum of legal and political environments in the region, Viet Nam is an autocratic, communist jurisdiction with no recent tradition of the rule of law and a very weak legal profession. Having said this, the overwhelming majority (>95%) of refugees in the region are hosted by, in addition to Malaysia, the Philippines, Thailand and Indonesia all of which arguably bear more similarity to Malaysia than Viet Nam. The extent to which the legal environments of ASEAN (or other groups of Asian) states can be understood as a “region” – and compared – to each other is well addressed in Penelope Nicholson and Sarah Biddulph, eds. *Examining practice, interrogating theory: comparative legal studies in Asia* (Martinus Nijhoff Publisher, 2008). See also the (at times self-serving) report of ASEAN’s Human Rights Resource Center entitled *Rule of Law for Human Rights in the ASEAN Region* (HRRC, May 2011) which concludes that there is an “increasing” convergence by states in the region with respect to the rule of law and other features of the legal environment relevant to human rights protection.

¹⁸ At least two other states may claim membership in an “expanded” notion of South East Asia: **East Timor** and Papua New Guinea. The former is currently pursuing admission to ASEAN (with

began as a small grouping of geo-politically fractious states, it is increasingly unifying, both politically and economically, an otherwise diverse region.¹⁹

Only two of the states of the region (Cambodia and the Philippines) are party to the *1951 Refugee Convention*. Although Indonesia has declared its **intention to become party to the 1951 Refugee Convention**, it has on several occasions postponed acting on this declaration.²⁰ Only Thailand (since 1979) and the Philippines (since 1991) are members of UNHCR's Executive Committee. The states of the region are also less likely than those of other regions to be party to major international human rights treaties.

Although the exact number of refugees in the region is much contested, it is certainly home to at least 200,000 refugees.²¹ Almost all of these refugees originate from within the region, with Myanmar being the country of origin for the overwhelming majority. The plight of Myanmarese refugees is a protracted refugee situation although such a characterization should not obscure the change over time in the size, composition, and distribution of the population. The most significant extra regional populations are from Afghanistan, Iraq, Sri Lanka, and various African states.²² In the past two years, refugees from the conflict in Syria have also begun to appear in the region. The region is also a transit point for refugees with the most notable example of this being largely extra-regional refugees traveling by boat to Australia. Refugees in transit through the region have increasingly drawn the attention of policy makers within and outside of the region.²³

a formal application filed in March 2011). The latter has at least a geographic claim to being a part of the region, sharing the island of New Guinea with Indonesia (though it has been relegated to an "observer" to ASEAN since 1976).

¹⁹ ASEAN began as a grouping of Malaysia, Singapore, the Philippines, Thailand and Indonesia. At the time of its founding, fears of communist influence in the region were at their peak, border disputes plagued three of its members and there were competing hopes for ASEAN with respect to influencing the status of Indonesia as the region's hegemon. See Rodolfo Severino "ASEAN Beyond Forty: Towards Political and Economic Integration" 29 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 406 (December 2007).

²⁰ Indonesia's *National Plan of Action of Human Rights (2004-2009)* listed the 1951 Refugee Convention and 1967 Protocol Relating to the Status of Refugees as international human rights instruments to which Indonesia would accede.

²¹ Based upon UNHCR statistics, Thailand (with 105,000) and Malaysia (with 94,400) are the principal hosts of refugees in the region. Vietnam has a shrinking number (2,357) of Cambodian refugees and Indonesia has 798 refugees (but a growing number of asylum seekers). The other states in the region have less than 200 recognised refugees each. Many NGOs and refugee CBOs allege that the numbers of refugees recognized by UNHCR in both Thailand and Malaysia grossly underestimate the size of the refugee populations in both states.

²² None of these extra-regional refugees meet UNHCR's threshold of 5,000 refugees from a country of origin in a single state to merit statistical reporting.

²³ Australia **has** recently implemented a policy of expelling refugees who arrive by boat to Malaysia (subsequently challenged successfully in litigation), various Pacific Islands, and Papua New Guinea. The discussion of refugee protection in the region has increasingly been focused on the development of a "regional protection framework" which would, not coincidentally, serve to reduce the number of refugees in transit to Australia (and to allow for easier expulsion back to the region of these refugees by Australia).

There are also significant stateless and internally displaced populations in the region. The former often overlaps with the refugee population and includes the Rohingya of Bangladesh and Myanmar; members of the various hill tribes of the Indochinese peninsula; and, the Filipinos of East Malaysia.²⁴ The latter include the significant populations of internally displaced persons in Myanmar, Indonesia, and the Philippines.²⁵

Many of the refugees and stateless persons reside in border regions or contested territories; their presence in these areas often exacerbates tensions between neighboring states. While refugee camps persist, particularly in Thailand, and remain the archetype to the general public of refugee protection in the region, there are increasingly large numbers of self-settled urban refugees.

Part 1: Refugee protection in South East Asia as the negotiation of “protection space”

The determination of the obligations towards refugees owed by a state is, in a word, complicated. This is nowhere else truer than in South East Asia. As noted earlier, most of the states of the region have not expressed a legally binding commitment to the international treaties protecting refugees. In the absence of such commitments, refugee protection in the region is often understood as negotiated: a politically contested commodity that is expressed as a “humanitarian” gesture towards refugees in need or, more recently and now much more commonly articulated, as creating “protection space” for refugees. This section of this chapter will first set out what is meant by the “protection space” approach and then, in turn, flesh out a critique.

The protection space approach in South East Asia and elsewhere

The “protection space” approach has a contested etymology though there is a general consensus that it derives from the related, though similarly etymologically disputed, term of “humanitarian space”.²⁶ Some trace the roots of the latter to “*espace humanitaire*” coined by Médecins Sans Frontières (MSF) president Rony Brauman, who described it in the mid-1990s as “a space of freedom in which we are free to evaluate needs, free to monitor the distribution and use of relief goods, and free to have a dialogue with the people.”²⁷ Others attribute the term to Latin American activists “who have used their presence to create and gradually expand [humanitarian] ‘space’ in areas previously closed off to agencies, through confidence-building measures which

²⁴ The Rohingya include both *de jure* and *de facto* stateless individuals. The other two populations are largely *de facto* stateless.

²⁵ The number of IDPs in Myanmar and Indonesia is estimated by the Internal Displacement Monitoring Centre as, respectively, about 500,000 and 200,000. There are small IDP populations in Lao and the Philippines.

²⁶ Although not discussed in this chapter for reasons of space, an alternate etymology would derive protection space from the term “asylum space”, a term used from the 1990s onwards mainly in the European context to describe the creation of what would later be termed the Common European Asylum Policy. The term “asylum space” is occasionally used as a synonym for protection space in UNHCR documents discussions of South East Asia (see for example its use in *UNHCR Global Report 2009* (UNHCR, June 2010) q.v. “Thailand” at 239).

²⁷ Anne Evans Barnes “New Issues in Refugee Research, Research Paper 167: Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan and Lebanon” (UNHCR, January 2009) 11.

have involved local authorities, local military commanders and the local population.”²⁸ There is also a legal etymology that can be traced to international humanitarian law and is particular to the activities of the Red Cross movement.²⁹

UNHCR’s early usage of the term “protection space” is most in keeping with the aforementioned operational etymology of the term (linked to MSF and other humanitarian organisations) as opposed to the normative or legal usage.³⁰ One of the earliest usages by UNHCR was in its description of its new “comprehensive approach”³¹ to refugee protection in the early 1990s. It described “humanitarian space” in relation to its then recent successes in Latin America as being the discussion of refugee protection “within a sensitive political dialogue at both the regional and national levels.”³² As the subsequent General Assembly resolution endorsing a comprehensive approach states, the creation of humanitarian space is achieved by “consulting with states” concerning “possibilities for additional measures and initiatives.”³³ More recently, Erica Feller has said the following about humanitarian space, the related concept of “protection space” and UNHCR’s understanding of the terms:

For UNHCR, the concept of humanitarian space is closely linked to the related notion of protection space, which we understand to equate with an environment sympathetic to international protection principles and enabling their implementation to the benefit of all those entitled to protection.³⁴

The use of the term “protection space” is of more recent origin than humanitarian space, with public usage by UNHCR no earlier than the turn of the millennium.³⁵ Notwithstanding its recent

²⁸ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolutions 1993/95 and 1994/68 E/CN.4/1995/50 2 February 1995 at para 231. Erik Abid in his “New Issues in Refugee Research: Research Paper 184: Creating humanitarian space: a case study of Somalia” (UNHCR, December 2009) 2 cites Gil Loescher as authoring the first academic usage of “humanitarian space” in discussion of refugee protection in Latin America in his “Working Paper 86: Humanitarianism and Politics in Central America” (Kellogg Institute for International Studies, University of Notre Dame, 1986).

²⁹ For example, relief action – “which is humanitarian and impartial in character and conducted without any adverse distinction” – may be undertaken pursuant to Article 70(1) of the 1977 Additional Protocol I and Article 18(2) of the 1977 Additional Protocol II.

³⁰ The tension between the operational and normative / legal usage of humanitarian space will be returned to and, it will be suggested, provides hope for its rehabilitation.

³¹ See the October 1993 Excom A/AC.96/821, para. 19 (n) and subsequent General Assembly resolution 48/116

³² UN High Commissioner for Refugees, Comprehensive and regional approaches to refugee problems, UN Document EC/1994/SCP/CRP.3 (3 May 1994).

³³ Para. 15 of UN General Assembly Resolution 48/116.

³⁴ Erika Feller, “Protecting People in Conflict and Crisis – Responding to the Challenges of a Changing World” (Opening Address) at the Humanitarian Space conference at the Refugee Studies Centre, Oxford (October 2009) 5.

³⁵ The earliest usage in describing UNHCR operations is in the 2001 Country Operations Plan for Egypt. The earliest usage in reference to an Asian state is in the 2002 Country Operations Plan for Malaysia (see below).

provenance, the use of protection space as a term is now relatively common – though far from widespread – with its use in more than 100 different UNHCR documents since 2001. It is most prominent in UNHCR’s long awaited “urban policy”, which devotes an entire section to “protection space.”³⁶ What is particularly interesting about its usage is that it occurs most frequently in the country operations plans of UNHCR in states that are not a party to the 1951 Refugee Convention, most notably in South East Asia and also in the Middle East.³⁷

The understanding of UNHCR’s obligations towards refugees as the negotiation of protection space is very explicit in the operational reports and policy evaluations of UNHCR concerning the Asian region. Common usage of the term in describing UNHCR’s operations in Asia dates back to shortly after the term was coined. While there is no institutional definition of the term, from UNHCR’s usage, various components of the meaning of “protection space” can be discerned.³⁸ “Protection space” as employed by UNHCR is a variable, negotiated, and operationally focused state of affairs. The following explanation of the definition provides a brief sketch of the usage of “protection space” in the South East Asian context; each element of the definition will be further elaborated upon in the following critique of its use as an approach to refugee protection in the region.

Firstly, protection space is variable over time and between contexts. Protection space both expands and contracts. Thus, in Malaysia, UNHCR noted that the installation of Najib Abdul Razak as Prime Minister in April 2009 brought with it “[a] sense of openness on the part of the new Government” and “provided an opportunity to expand the boundaries of the protection space in the country.”³⁹ Conversely, more recently in Thailand, UNHCR has been challenged by “a marked erosion of the protection space for all groups of concern over the past two years.”⁴⁰

Secondly, protection space is pragmatic not normative; it does not have “a legal definition” and rather simply describes the ease of UNHCR’s operations on behalf of refugees.⁴¹ Thus, protection space is an environment “within which the prospect of providing protection is optimized”⁴² or, as stated in UNHCR’s urban policy, “it is a concept employed by the Office to denote the extent to which a conducive environment exists”.⁴³

Thirdly, protection space is the result of negotiation. UNHCR’s 2007 plan for Malaysia describes the task as follows:

In terms of the overall implementation strategy, UNHCR will need to maintain a process of interactive participation with the Malaysian Government, at different levels, as well as its implementing, operational and other partners in order to promote a shared vision in addressing the

³⁶ *UNHCR policy on refugee protection and solutions in urban areas* (UNHCR, September 2009) at § II (¶ 14 - 22).

³⁷ This aspect of its usage is noted by Barnes, above n. 27, 11 relying upon email correspondence with the director of UNHCR’s Middle East and North Africa Bureau.

³⁸ The lack of definition is admitted by Barnes, above n. 27, 11.

³⁹ *UNHCR Global Report 2009* (UNHCR, June 2010) q.v. “Malaysia” 245.

⁴⁰ *Ibid.* q.v. “Thailand” at 236.

⁴¹ *UNHCR policy on refugee protection and solutions in urban areas*, above n. 36, ¶ 20.

⁴² Barnes, above n. 27, 12.

⁴³ *UNHCR policy on refugee protection and solutions in urban areas*, above n. 36, ¶ 20.

needs of, and durable solutions for, the various refugee and stateless groups in Malaysia.⁴⁴

Even more recently, similar language can be found in UNHCR's regional plan for South East Asia:

In South-East Asia, UNHCR will engage relevant actors to support policy changes aimed at finding durable solutions for refugees and increasing protection space.⁴⁵

Similar usage of the term "protection space" to describe UNHCR's approach can be found in all the operational plans for the region and in many of the general policy documents originating in the region. Up until very recently, only when UNHCR discusses its work in the Middle East did it show a similarly high level of usage of the protection space approach.⁴⁶

Finally, there is a slightly different usage of the term that bears mentioning. Although much of the usage of the term speaks of the negotiation of protection space as UNHCR's project in a particular state, there is also use of the term to describe the outcomes (read failure) of negotiations. In this respect the term has an insidious usage as a euphemism for the violation of refugee rights. In this sense, "shrinking protection space" is code for refugees suffering violations of their rights, including having been arbitrarily arrested, indefinitely imprisoned, and *refouled* to persecution. For example, in a speech in 2010, the term "shrinking protection space" was used to refer to events in South East Asia – where within the six weeks previously 4,000 Hmong had been *refouled* to Laos and 20 Uigurs had been *refouled* to China.⁴⁷ It is also not a coincidence that the term protection space, as in "the shrinking of protection space in Asia", is usually employed in the passive voice. State accountability – and also UNHCR accountability – can often be lost in the phrasing.

First critique of the protection space approach – Privileging of international actors, fora and interests

The adoption of the language of "protection space" to describe the task to be performed in countries that have not signed the *1951 Refugee Convention* raises concerns based upon how it privileges international interests, fora and UNHCR as the negotiator; devalues the normative strength of obligations towards refugees; and, allows the underlying responsibility for the provision of refugee protection to drift from the state to UNHCR. This is not to say that the negotiation of protection space does not achieve at least short term results; rather it is to suggest that notwithstanding any results which are achieved there are structural concerns which bias the types of short term results which are achieved and which undermine the achievement of long term results.

⁴⁴ *UNHCR Country Operation Plan: Malaysia* (2007) 8.

⁴⁵ *UNHCR Global Appeal 2010-2011* (UNHCR, 2010).

⁴⁶ An often quoted example is from Barnes's report on the protection of Iraqi refugees: "Carving out protection space is not without its obstacles; for in addition to meeting the protection needs of refugees, UNHCR must simultaneously meet the concerns of states." in Barnes, above n. 27, 1.

⁴⁷ Erika Feller "Refugee Protection: Challenges and opportunities in the Australian region and beyond" (Melbourne, 18 February 2010).

The first issue raised by the protection space approach is, as its etymology suggests, that it privileges international actors, including UNHCR, as the negotiators of protection space. This necessarily means that it also privileges the fora in which these actors operate and their interests.

With respect to the privileging of international actors, it is significant that all of UNHCR's usage of the term concerns its own negotiation of protection space. Notwithstanding the early and somewhat dissonant Latin American usage noted earlier, protection space is never negotiated by regional actors, other states, civil society, or refugees themselves. This is not to suggest that in a revised protection space approach that this would be impossible but rather to highlight that in its current usage protection space is the negotiated outcome achieved by the international community, and in particular by UNHCR. Protection space is negotiated with states, involves a political discussion, and results in typically *ad hoc* arrangements. This brokered approach relies upon a broker – entrenching and reinforcing the institutional mandate of UNHCR.

With respect to the privileging of international fora, the negotiation of protection space occurs during UNHCR-state dialogues. These typically occur in dialogues (both formal and informal) between in-country UNHCR international staff and government officials or in discussions on the sidelines of more formalized consultations such as at the meetings of the Executive Committee of the High Commissioner's Programme (ExCom) or during the present year's celebrations of the 60th anniversary of the *1951 Refugee Convention*. The negotiations are often private, privilege actors able to operate in these fora, and are often only tangentially concerned with the protection issues at hand; the accords about protection space can often be only deduced indirectly and confirmed unofficially. Both the processes and the results of negotiations in these fora are opaque.

With respect to the privileging of international interests, it is significant that the early usage of humanitarian space concerned negotiating literal space in which international NGOs such as MSF could operate during times of conflict. Thus when UNHCR speaks of protection space, it speaks of the needs (and the security) of its staff. UNHCR in Malaysia uses it to describe their fear that their office will be closed by the government if it performs various types of activities. As stated in UNHCR's recent "urban policy":

The extent to which 'protection space' exists in a refugee situation can also be assessed in terms of the circumstances in which UNHCR and its humanitarian partners are able to work. In simple terms, the protection space can be regarded as relatively broad in situations where the Office has few restrictions placed upon its movements and activities, is able to make direct contact with refugees, has the freedom to choose its own implementing partners and enjoys a constructive dialogue with both national or municipal authorities.⁴⁸

Not surprisingly, the needs of the negotiators of protection space are prominent: the need for physical space from which to operate, the need for the means of entrance and egress to the

⁴⁸ UNHCR *UNHCR policy on refugee protection and solutions in urban areas* (UNHCR, September 2009) at para. 22.

locations in which assistance is to be offered, and the need for the safety of their staff and the security of their possessions. These needs are neither inconsequential nor are they without foundation in state obligation in the case of the needs of UNHCR. The Charter of the UN, the Statute of UNHCR and the various GA resolutions which authorize its operations all call on – require – states to cooperate with UNHCR in the fulfillment of its mandate. However, while “protection space” for UNHCR is important it is neither a necessary nor a sufficient condition for the enjoyment of rights by refugees. As stated by Abild, drawing upon Foucault’s arguments about discursive power, with respect to humanitarian space, “by characterizing [it] solely as an operating environment for humanitarian agencies, it is these agencies themselves who end up controlling the understanding of this space. Agencies often hold information relating to a given situation and suggest how it should be solved, they do the actual operations and they evaluate them.”⁴⁹ As UNHCR itself points out, ultimately only states can truly redeem the rights of refugees and this aspect of the term shifts the focus away from that singular necessary and sufficient condition.

The protection space approach necessarily privileges institutional interests and, as a direct result, sidelines the rights of refugees. The rights of refugees are not always absent, as for example in the urban refugee policy where protection space is defined in terms of refugees enjoying various rights,⁵⁰ but they are subsidiary to the demands of the institutions through which, and the fora in which, the negotiation occurs.

Second critique of the protection space approach – Undermining of the normative strength of obligations towards refugees of both states and UNHCR

As noted in the first critique, protection space is negotiated. These negotiations also make, implicitly, the granting or the refusal of protection space, a matter of state discretion. As such, the negotiations undermine the normative strength of obligations towards refugees owed by both the states with which UNHCR enters negotiations - and even those owed by UNHCR itself.

As will be further developed later, notwithstanding that most states in the region have not become party to the *1951 Refugee Convention*, they nonetheless have obligations towards refugees. The negotiated approach of UNHCR risks undermining the normative strength of these obligations and makes them contingent upon negotiated benefits. For example, the “strategic” use of resettlement to forestall *refoulement* makes a state’s (arguably peremptory and increasingly accepted as customary⁵¹) obligations not to *refoule* refugees contingent upon the resettlement of refugees from its territory by other states as brokered by UNHCR. The linkage between compliance with obligations and other benefits has been made explicit in the cases of Malaysia and Indonesia. In the former case, the Malaysian response to the recent marine arrival in the region of numerous Rohingya has been met with explicit threats of “push backs” unless resettlement is provided.⁵² Similarly, in a less pointed way, Indonesia’s recent regulation which

⁴⁹Abid, above n. 28, 5.

⁵⁰ See also the usage in Barnes, above n. 27, 1: “Carving out protection space is not without its obstacles; for in addition to meeting the protection needs of refugees, UNHCR must simultaneously meet the concerns of states.”

⁵¹ *C et al. v. Director of Immigration and Secretary for Security* Civil Appeal 132-137/2008 (Hong Kong Court of Appeal, 21 July 2011)

⁵² In an interview with the Bangkok Post, Prime Minister Abdullah Badawi stated: “Well they are very concerned and at times they are critical of actions taken by governments. But if we cannot

legalizes asylum seekers puts a time limit on its obligation of *non-refoulement* – implicitly making it contingent upon resettlement of legalized refugees to other states within a reasonable period.

Arguably the coerced performance of obligations by states will always result in, at least initially, incomplete performance; even the “soft” coercion of negotiated protection space will have this drawback.⁵³ However, it is less the incomplete performance of obligation that is concerning and more the way in which the negotiations legitimize it. Implicit in these negotiations is most often the understanding that UNHCR will not critique the incomplete performance of obligations by the state. In neither of the former examples from Indonesia and Malaysia, has UNHCR publically criticized the shortcomings of the policies adopted by the respective governments.⁵⁴ In this respect, this critique of the protection spaces approach is closely related to the earlier critique that it privileged particular fora, marked by opaque process and not publically known outcomes.

But if the brokering process of negotiations risks undermining state obligation, it poses an even greater risk to the obligations of UNHCR. According to the terms of its Statute and its various operational directives, UNHCR has various legal obligations towards refugees. The process of negotiating protection space risks UNHCR “agreeing” to a negotiated outcome that prevents it from fulfilling these obligations.

An extremely troubling example of the conflict between negotiated agreement and obligation concerns UNHCR’s operations in Malaysia. From 2004 to 2008, UNHCR maintained a count of between 35,000 to 47,000 asylum seekers and refugees in Peninsular Malaysia.⁵⁵

Notwithstanding that refugees in Malaysia benefited (and continue to benefit) from a significant resettlement operation, at the end of every year the number of refugees remained almost completely constant: with the number of refugees being resettled being, over time, equivalent to those newly registered. UNHCR effectively “capped” its recognition of refugees in Malaysia at 47,000.⁵⁶ This decision was reached notwithstanding a plethora of UNHCR internal guidance, public statements by the High Commissioner, and obligations under its Statute to the contrary. Notwithstanding this conflict with obligations, this cap was also consistent with the interests of the local UNHCR office which was grossly under-resourced to deal with the “true” number of refugees in Malaysia and with the hostility of the Malaysian government of the period towards refugees and other “illegal migrants”. Although this policy has been revised after increasingly vocal criticism by local civil society, refugees in Peninsular Malaysia continue to complain that refugee registration (which has now risen to around 100,000⁵⁷) has occurred for only a minority

be firm we cannot deal with this problem. We have to be firm at all borders. We have to turn them back. If they (international groups) help we will be very happy.” Pichai Chuensuksawad “Full text of the interview with Malaysian Prime Minister Abdullah” *Bangkok Post* (27 February 2009).

⁵³ Eric Neumayer “Do International Human Rights Treaties Improve Respect for Human Rights?” 49 *Journal of Conflict Resolution* 925-953 (Dec. 2005).

⁵⁴ Arguably UNHCR’s at first explicit and later more quiet support of the Australia-Malaysia Agreement to swap asylum seekers for resettled refugees is a continuation of this approach.

⁵⁵ In 2004, UNHCR recorded 24,900 recognised refugees and 10,322 asylum seekers. The numbers in subsequent years were 33,693 and 10,838 (2005); 37,170 and 9,186 (2006); 32,243 and 6,851 (2007); and, 36,088 and 9,323 (2008).

⁵⁶ This assertion is based upon discussions with refugee community leaders, civil society activists and both local and international UNHCR staff based in Malaysia during the period in question.

⁵⁷ 94,400 as of May 2011.

of refugees in Malaysia.⁵⁸ The cap represented a tacit and agreed – even if likely never explicitly stated – understanding between the Malaysian government and UNHCR of the limitations on protection in Malaysia for refugees.

During the “capped” period, UNHCR did not dispute the existence of the “true” population of (largely unregistered) refugees; rather, its negotiated cap compelled it to deny or otherwise limit its obligation for the registration of refugees. This is an example of the process of negotiations, and the compromise it entails, undermining the normative strength of obligations.

Third critique of the protection space approach – Shifting of the underlying responsibility for the provision of refugee protection from the state to UNHCR

The third critique of the protection space approach is that it has shifted the underlying responsibility for the protection of refugees from states to UNHCR. As the negotiator for refugee protection, UNHCR implicitly takes on an operational obligation to the provision of various forms of support to refugees, including schooling, health care, and basic subsistence financial support. While all of these obligations directly benefit refugees, none of them are explicitly referenced in UNHCR’s founding statute.⁵⁹

Examples of this problem are more difficult to locate, in part because the shift is much more subtle and in part because UNHCR’s operational role is so well-established.⁶⁰ Civil society advocates in the Asia Pacific region note the reluctance of UNHCR to make more than a *pro forma* push for ratification by the states of South East Asia and its reluctance to push for the transfer of refugee status determination responsibilities to the states of the region.⁶¹

This shift has been noted elsewhere and has not always been seen as a negative development.⁶² However, even such commentators suggest that this is an approach of “last resort.”⁶³

⁵⁸ Refugee community leaders in conversation and public discussions frequently cite the ration “1 in 3” as the proportion of their communities who have been registered with UNHCR.

⁵⁹ The closest reference to such operational tasks comes in ¶ 8(c) of the Statute: “[UNHCR shall provide for the protection of refugees falling under the competence of his Office by] [a]ssisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities.” Arguably the coordination responsibilities of ¶ 8(g), (h) and (i) may include some of these operational obligations (though not necessarily in the form of the direct provision of services).

⁶⁰ To say that UNHCR’s operational role is well-established is not to suggest it has not itself been the subject of much commentary and critique, the latter most notably in the context of its refugee status determination operations.

⁶¹ The former arose as part of discussions between the APPRN civil society network and UNHCR around the commemorations of the 60th anniversary of the 1951 Refugee Convention and an example of the latter most recently occurred in Hong Kong during the tripartite (UNHCR-Hong Kong SAR-Hong Kong Law Society) negotiations surrounding the creation of a domestic Convention Against Torture screening process.

⁶² See, in particular, Mike Kagan’s recent work on UNHCR as a surrogate state based upon his experiences in Egypt and the Middle East. M. Kagan “New Issues in Refugee Research, Research Paper 201: The UN surrogate state and refugee policy in the Middle East” (UNHCR, February 2011).

Part 2: An alternative “legalistic” approach in South East Asia

If the argument is that the protection space approach has problems embedded within it, then the question becomes: what is the alternative? Necessity is the primary defense of negotiated protection space, its proponents would argue. Its utility therefore hinges on the existence of (or lack thereof) an alternative.

The alternative that I will suggest is to shift the debate and analysis from the terrain of negotiated humanitarian space to legal obligations (and access to justice). Now, as previously acknowledged, these are terms not completely absent from some of the usage of “protection space,” nor are they new concepts to advocates for refugee rights. However, by shifting the stated approach to these terms, even in a landscape seen as hostile to both concepts, it will be my argument that refugee protection in regions such as South East Asia becomes disencumbered from the constraints associated with a protection space approach.

A precondition for my argument is the existence of relevant legal obligations in the group of states which are our focus, the states of South East Asia. As noted previously, only two (and possibly soon three) of the states in question have ratified the *1951 Refugee Convention*. While the *1951 Refugee Convention* is often described as the cornerstone of international refugee law, it is not the only source of international legal obligation towards refugees. This part of the chapter will set out an alternate legal framework for the protection of refugees in the region and the preconditions for the relevance of this framework.

An alternate legalistic approach – The framework of a “law of asylum”

There are both international and domestic legal obligations relevant to refugee protection in the region. The former international legal obligations include both treaty obligations under various human rights treaties concerning various subsets of migrants (if not refugees, per se) and customary obligations. The latter domestic legal obligations include constitutional, statutory, and common law or customary obligations. While the assemblage of a law of asylum may be validly criticized as “an inadequate response to the scale of the problem,”⁶⁴ it nonetheless provides a mandatory framework for the protection of refugees even in a region as underdeveloped in terms of human rights obligations as South East Asia.

There is an international legal framework for the protection of refugees in the region notwithstanding that most states are not party to the *1951 Refugee Convention*. While the *1951 Refugee Convention* has been described as the “cornerstone” of international refugee law, it is not the exclusive source of state obligations towards refugees. International human rights law guarantees refugees various rights. In addition, international labour law, customary international law, and recent international developments to combat transnational crime⁶⁵

⁶³ Ibid at 2: “To be clear, I do not argue that state-to-UN responsibility shift is an ideal arrangement. There are some essential components of refugee protection that only a sovereign state may deliver. . . . Responsibility shift, when used, must be limited and defined, so that lines of accountability are clear and expectations realistic.”

⁶⁴ See Betts’s contribution to this book.

⁶⁵ The Palermo Convention and its protocols concerning trafficking and smuggling are the notable recent developments in this regard. This is not to suggest that the framing of the issue as one of combating transnational crime is not without problems insofar as it perpetuates the

supplement international human rights law to provide a collection of rights almost equivalent to those provided by international refugee law. This alternate international legal framework of protection can be understood as a “law of asylum” particularly as it guarantees rights to individuals other than refugees.

International legal obligations towards refugees arise from both other conventional international law provisions and customary international law. With respect to the former, the major human rights treaties guarantee many of the civil and political rights provided in the *1951 Refugee Convention*. Furthermore, most of the civil and political rights provided in the *1951 Refugee Convention* are subject to reservation – a possibility that is frequently acted upon.⁶⁶ Of the rights of the *1951 Refugee Convention*, only a handful are not found explicitly in the other major international human rights treaties. The exceptions include the exemptions from reciprocity and exceptional measures; administrative assistance; identity and travel papers; fiscal charges. The majority of these rights are seldom invoked by refugees. They also include non-punishment for illegal entry; and, non-*refoulement*, which are very significant to the protection of refugees. However, even these rights have support in other human rights treaties. The Human Rights Committee has interpreted the right to life and prohibition on torture to prohibit certain types of *refoulement*.⁶⁷ Furthermore, Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁶⁸ of 1984 prohibits *refoulement* to torture. As the jurisprudence and policy developments in Hong Kong since the case of *Prabakar*⁶⁹ have shown, Article 3 of the *CAT* provides refugees with a significant amount of protection against *refoulement*. Non-punishment for illegal entry is slightly more difficult and will be the subject of further discussion below.

Needless to say, the domestic legal obligations of states towards refugees vary from state to state. In some states of the region, advocates have argued convincingly that nearly all of the obligations of the state towards refugees in the *1951 Refugee Convention* can be found in existing domestic

association of refugees with “criminals” (or, at the very least, somewhat helpless “victims”) and runs the risk of criminalizing (and encouraging the prosecution of) actions in practice necessary to refugee protection (for example the irregular crossing of borders to escape persecution).

⁶⁶ Employment rights, for example, have been noted to be the subject of frequent reservation.

⁶⁷ UN Human Rights Committee “General Comment No. 31” (2004) ¶12. For further discussion of the interpretation of Articles 6 and 7 of the ICCPR see Chapter 4 of Kees Wouters *International Legal Standards for the Protection from Non-Refoulement* (Intersentia, 2009).

⁶⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*CAT*’).

⁶⁹ *Secretary for Security v. Prabakar* Final Appeal No. 16 Of 2003 (Civil) (Hong Kong Court of Final Appeal, 8 June 2004). *Prabakar* established that, *inter alia*, decisions as to whether or not it is safe to return an individual who claims he or she would be subject to torture require high standards of procedural fairness. This has led to the establishment of a state funded system of legal aid for *CAT* claimants and a formal process of application, hearing and appeal. For more information, see Mark Daly “Refugee law in Hong Kong: Building the legal infrastructure” *Hong Kong Lawyer* (September 2009) 14 - 30.

law.⁷⁰ In other states, the lack of constitutional or statutory attention makes the assemblage of the law of asylum much weaker.

As the term assemblage suggests, the strength and extent of the law of asylum in each state of the region will vary and it is beyond the scope of this chapter to exhaustively detail all of the assemblages other than to briefly take the example of punishment for irregular entry and explore the extent to which the substance of the obligation can be mapped to obligations other than that found in the *1951 Refugee Convention*.

The prohibition on punishment for irregular entry is, in many respects, the epitome of Hathaway's note that there is a category of rights in the *1951 Refugee Convention* that are specific to refugees.⁷¹ It is suggested that such a right would arguably be the hardest to locate elsewhere because of this characteristic. However, recent legislation and case law in Malaysia suggests that the principle of non-punishment (if not non-liability) can be found within the principles of local administrative and common-law. With respect to the former, the Attorney General's Chambers has issued a directive that registered refugees should neither be convicted nor punished for irregular entry into Malaysia.⁷² With respect to the latter, recent jurisprudence applied domestic common-law principles that at least some refugees should not be punished for irregular entry:

This court is therefore of the firm opinion that asylum seekers and refugees, if they have not committed acts of violence or brutality or are habitual offenders or have threatened our public order, should not be punished with whipping.⁷³

While this application of common-law principles provides incomplete protection, it nonetheless is remarkable in an environment where refugees are routinely convicted and ordered whipped by lower court (sessions court) judges.

Similar judgments have been issued by Malaysian courts with respect to the other area of refugee rights most incomplete in international human rights instruments and domestic frameworks: the right to work. The Malaysian Court of Appeal in the matter of *Sukatno v. Lee Seng Kee & Anor* recently recognized the ability of an irregular migrant (albeit not a refugee) to claim damages for

⁷⁰ See the submission of LBHI (the national legal aid provider) to the Government of Indonesia on the process required for the ratification of the 1951 Refugee Convention (2010) (unpublished, on file with author).

⁷¹ James Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, 2006) 121.

⁷² It is this directive that makes the above-mentioned debate over (non)registration all the more important. Refugees who are not registered are otherwise technically liable to punishment for irregular entry, including a fine (up to 10,000 RM or more than 2,000 EURO), imprisonment (up to 5 years) and whipping (up to 6 lashes of the rattan), under s. 6 of the Immigration Act 1959/1963.

⁷³ *Tun Naing Oo v. Public Prosecutor* (High Court of Malaya, Shah Alam, Yeoh Wee Siam, JC) (File number 43-9-2009; 24 March 2009) at ¶ 34 (reviewing the decision of a lower court to impose whipping).

the loss of future earnings as a result of a motor vehicle accident, provided his earnings could be legitimized in law.⁷⁴

I have focused the discussion on 'difficult' rights to incorporate into the assemblage of the law of asylum. At the very least, the evidence indicates that there is the potential for an, albeit incomplete, law of asylum even in the relatively hostile to human rights legal environment of South East Asia. In this respect, the focus on Malaysia is apt for the region. It is party to only two international human rights treaties, the Palermo Convention and its protocols, and 14 of the International Labour Organisations conventions.⁷⁵ Constructing a law of asylum to protect refugees in Malaysia is a difficult task that can never be wholly satisfactory.

Notwithstanding this difficulty, the discussion of the law of asylum has both resonances in the situation of and implications for the broader Asian region. Similar developments have been occurring elsewhere in the broader region. As a result of a series of litigation victories by refugee advocates, Hong Kong SAR has introduced a formal administrative screening process for individuals fearing *refoulement* to torture and is moving towards a unified system of risk assessment, including refugee status determination; other litigation has resulted in restrictions on detention and the provision of financial support to indigent asylum seekers. In South Korea and Japan, there is a growing body of jurisprudence that increasingly makes reference to international and comparative legal sources. The turn to an alternate legalistic approach is not to deny the political realities of operationally providing protection to refugees in the region. As Hathaway states, legalism "does not take anything away from the resort to the political process as one mechanism to promote respect for human dignity" rather it simply ensures that "at least in some circumstances a rule based alternative can be invoked in support of human rights."⁷⁶

An alternate legalistic approach - the preconditions for the relevance of this framework

The existence of obligations under the law of asylum approach is insufficient to provide a way forward for the protection of refugees. In addition to the normative basis for argument on behalf of refugees, fora and processes for the enforcement of these obligations is required. The law of asylum approach relies upon a set of largely domestic institutions and understandings concerning the role of legal obligations. In short, the law of asylum approach relies upon the rule of law and access to justice in the states of South East Asia.

The states of ASEAN enjoy the rule of law to varying extent. Myanmar, Vietnam, Laos and Cambodia have all been criticized by local and regional actors and by international human rights institutions for their lack of the rule of law. However, the main hosts of refugees in the region (Malaysia, Thailand and Indonesia) provide a somewhat different picture. Although the rule of law, including principally judicial independence, is under challenge in all three states, as implied previously in the citation of Malaysian jurisprudence, both the courts and the legal professions in

⁷⁴ (Court of Appeal, James Foong, JCA, Abdul Malik Ishak, JCA, and Abu Samah Nordin, JCA) (File number A-04-76-2008; 2 January 2009). The decision itself is quite complicated and not an entirely satisfactory decision. However, it rejected the principle of *ex turpi causa* that precluded irregular migrants from previously recovering lost or unpaid wages.

⁷⁵ Including five of the ILO's eight fundamental conventions. To underscore Malaysia's reluctance to make international commitments, it ratified and subsequently denounced one of the ILO's core Conventions (Convention No. 105 on the Abolition of Forced Labour).

⁷⁶ Hathaway, above n. 70, 33.

all three states have a capacity to argue and adjudicate claims concerning obligations owed to refugees.

Part 3: Developing a law of asylum in South East Asia

The project of shifting the approach to the development of a law of asylum from one in which protection space is negotiated would return UNHCR to a project that has long been part of its mandate. In 1999, Erika Feller encouraged the judges of Asia to get involved in the development of protection in the region:

UNHCR sees an urgent need to revitalise the legal principles and ethical values that underpin asylum and refugee protection. The law in this area cannot remain static if it is to meet the contemporary needs of forcibly displaced people, it must be allowed constantly to evolve. By the same token, this process of evolution must remain principled and true to its real object and purpose – the protection of people. It is here that the Judiciary and Bar in each country will have a key role to play.⁷⁷

Nor would it be a project incompatible with wider trends in the region. In recent years, South East Asia has seen the rapid development of a regional human rights institution. ASEAN now has a working human rights institution: the ASEAN Inter-governmental Commission on Human Rights (AICHR). While the AICHR has a much more narrow mandate and fewer powers than other regional human rights bodies, its very existence marks a milestone in the region. Furthermore, amongst its first charges is the investigation of migration, including asylum seeking populations. Members of the AICHR have also expressed an interest in investigating the issue of statelessness in the region, which as noted earlier has a significant overlap with refugee populations in the region.

Furthermore, at a national level, many of the states of the region have developed national human rights institutions (NHRIs), which meet international standards.⁷⁸ There have also been recent efforts to cooperate in the investigation of issues concerning refugees, including on the topic of the arbitrary arrest and indefinite detention of refugees. Both the growing number of and stronger links between human rights institutions in the region are developments that must be incorporated into strategies for refugee protection. The building of capacity by lawyers and

⁷⁷ UN High Commissioner for Refugees, *Address by Ms Erika Feller, Director of the Department of International Protection, UNHCR, at the South Asia Regional Judicial Symposium on Refugee Protection* (New Delhi, 13-14 November 1999), 14 November 1999, available at: <http://www.unhcr.org/refworld/docid/42a00d932.html> [accessed 30 April 2011].

⁷⁸ While there are still gaps in the NHRI framework, the major hosts of refugees in the region (and also the signatories of the 1951 Refugee Convention) now have strong NHRIs. The development of strong NHRIs has been contentious; the threat by the international community to downgrade the status of Malaysia's NHRI (SUHAKAM) because of, *inter alia*, its lack of institutional independence is a notable example of the struggle that has occurred.

judges on refugee law and by lawyers on the litigation of a law of asylum is a project that has already begun in the region.⁷⁹

Finally, in closing, the larger context of the practice of negotiating protection space cannot be avoided. The difficulties which lead to the negotiation of protection space can be directly attributed to the reality that capacities and obligations with respect to the protection of refugees are not distributed equally; developed nations of the North accept relatively small asylum burdens while most refugees remain in the Global South. As Amy Slaughter and Jeff Crisp explain, host governments in the Global South often argue “that they would only admit and refrain from *refoulement* of refugees if the needs of such populations were fully met by the international community.”⁸⁰

However, the solution to this fundamental problem is not to negotiate (necessarily downward and *ad infinitum*) the protection of refugees. Rather it is to support the development of local standards and capacities that ensure that the refugees in all situations, even in the non-signatory states of South East Asia, are afforded their rights. This new approach does not foreclose a role for UNHCR; indeed, the active participation of UNHCR in developing a law of asylum is needed. Its vast experience gained in developing refugee law provides it with an organizational expertise and experience-base that is unparalleled. Thus, the project for the present and future is to constantly challenge the rejection of refugee law by the states of Asia and to engage them in a manner that develops a law of asylum in the region that offers refugees within the states of the region an opportunity to live their lives with greater dignity.

⁷⁹ With respect to the latter, the Asian Refugee Legal Aid Networks project (of which the author was the co-director) held three regional seminars to build litigation and legal argument capacity in local refugee legal aid organisations.

⁸⁰ A. Slaughter and J. Crisp “A Surrogate State? The role of UNHCR in protracted refugee situations” in G. Loescher, et al., eds. *Protracted Refugee Situations* (United Nations University Press, 2008) 123-140 at 128.

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