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The Limits of Refugee Protection in Urban Southeast Asia

A View from Above and Below

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Introduction

The unwillingness of major refugee-hosting states in the Asia-Pacific region to sign either the 1951 Refugee Convention or the 1967 Refugee Protocol is a singular puzzle. The 1951 Refugee Convention is the dominant international legal instrument for the protection of persons who have a ‘well-founded fear of being persecuted’, are outside of their country of nationality and are unable or unwilling to return to it (Article 1(2) of the 1951 Refugee Convention, as amended by the 1967 Refugee Protocol). Nearly 150 countries from around the world have signed the 1951 Refugee Convention and/or the 1967 Refugee Protocol, including countries located in Sub-Saharan Africa and Central America – regions that host some of the greatest numbers of refugees. However, notably absent from this list of signatories are the majority of countries in the Asia-Pacific region, the Middle East and North Africa, including Jordan, which hosts the highest number of refugees per capita globally. Why would countries carrying the extremely heavy burden of hosting refugees for decades not want to join and benefit from this international legal order?

There is no single answer to this question; moreover, there are different reasons in each region. For Southeast Asian countries, which are the focus of this chapter, the origin of this unwillingness lies in the history of the 1951 Refugee Convention, compounded and reinforced by lessons learnt from events that have taken place since 1951. The first section of this chapter will outline this history, focusing on three moments: the drafting of the 1951 Refugee Convention; the creation of the Bangkok Principles (Bangkok Principles on the Status and Treatment of Refugees 1966, revised 2001); and the Indochina refugee crisis. In the region, these events have been narratively sutured together to convince regional policy makers that maintaining political sovereignty demands distance from the 1951 Refugee Convention and the 1967 Refugee Protocol, and that Southeast Asia is a region of refugee *transit*, not settlement. The second section will shift from the international scale to consider more directly the problem of urban refugees and asylum seekers who are living precariously in Southeast Asia's megacities, alongside economic migrants and undocumented workers. This 'political society', to use Partha Chatterjee's term, is a community that lacks formal rights in practice; its members survive by negotiating a moral economy of indifference and tacit acceptance with state and other powerful private actors (Chatterjee 2004). However, granting asylum seekers formal rights risks alienating them from their informal sector networks and creating a hierarchy of political entitlement among the most marginal of urban populations. Understood together, these two factors – the historical and the political – go a long way towards explaining the limits of refugee protection in Southeast Asia.

Faultlines of Refugee Discourse

Recent revisionist interpretations of the drafting of the 1951 Refugee Convention have shown how exclusions based on race, ideology and geolocation shaped the final treaty text (Davies 2007a; Peterson 2012; Glynn 2012; Krause 2021). Critical scholars have identified two shadow discourses (Liu 2014) that, read together, engender a discursive system that shapes the dominant public image of how refugees are represented and understood. Their conjoined effect produces two essentialized tropes: first, the belief that refugee problems in the Global North are inherently different from those in the Global South; and, second, that a distinction exists between two kinds of border crossers: 'genuine' political refugees and illegal or illicit 'economic migrants' (van Schendel and Abraham 2005).

On the first trope, international legal scholar B.S. Chimni formulated the 'myth of difference' in an effort to expose the structural faultlines of the international refugee regime (Chimni 1998). These faultlines date back to

the first international efforts to protect refugees and are neatly captured by a statement issued by the French delegation at the 1951 conference: ‘only Europe “was ripe for the treatment of the refugee problem on an international scale”’ (Glynn 2012: 139). In short, refugee crises in Europe are fundamentally different from their counterpart emergencies in the Global South. This exclusionary logic justified the 1951 Refugee Convention restricting the breadth of its application by only applying to European refugees who had been displaced before 1951. This logic eventually morphed into the idea of ‘old’ and ‘new’ refugees. Chimni summarized the result: ‘Thereby, an image of a “normal” refugee was constructed – white, male and anti-Communist – which clashed sharply with individuals fleeing the Third World’ (Chimni 1998: 352). The claim of European difference effectively converted – and thereby merged – a geospatial distinction (the West versus the rest) with a problem of racial and cultural difference (us versus them).

The second shadow discourse reinforces this difference by representing the *complementary* humanitarian objectives of material assistance and legal protection as *competing* ends in practice. While the US was overtly concerned with not being trapped into providing financial support for refugees indefinitely, legal advisers to the 1951 conference felt certain that the international community’s main contribution to resolving refugee problems should be by addressing the inherently political problem of statelessness. For international lawyers, the core problem of displacement was the lack of state protection; everything else was secondary to this issue. Hence, there was no systematic international response to offer humanitarian assistance in situations of internal displacement in Asia, although, for example, ‘the true number of [Chinese] killed, displaced and uprooted by warfare may never be known; estimates vary from 30 million to over 100 million’ (Amrith 2011: 97), South Korea had to deal with over 5.5 million refugees between the end of the Pacific War and the onset of civil conflict (Vernant 1953), and newly independent India and Pakistan were trying to cope with between 10 and 15 million displaced persons. Convention delegates’ dismissal of India and Pakistan’s plea for international support for their massive displaced populations was justified by noting that, international sympathy aside, the problem of displacement in South Asia was not a legal concern, as the displaced persons were still under the protection of one state or another (Oberoi 2006).

These two imperatives – the political and the economic dimensions of refugee crises – melded through the myth of difference to create a novel discursive order. This order produced the agonistic categories of economic migrants and political refugees, with only the latter (and much smaller) subset designated as deserving international protection (Long 2013). The Global North was determined to be the natural home for ‘genuine’ political refugees, who were identified as individuals seeking to escape persecution

for their political beliefs, whereas the Global South was represented as overpopulated by economic migrants, who were families and groups escaping the harsh economic conditions of their underdeveloped homelands (Chimni 1998). Political refugees required and would receive legal protections. Economic migrants needed nothing but material assistance, translating their displacement distress into a developmental idiom and placing the burden of redress on their states of origin. Racially marked difference (economic versus political migrants) now stabilized geospatial separation (the rest versus the West).

Once this discourse had solidified into distinct and opposing ideal-type categories (consolidating three binaries: political and economic refugees; the Global North and the Global South; and political protection and material assistance), the work of refugee governance began by using techniques that distinguished between different kinds of forced migrants. In addition, as the uneven pace of economic development began to stratify the countries of the Global South, relatively well-to-do countries came to internalize this discourse and treated the alleged difference between political refugees and economic migrants as an essential distinction. Over time, practically all illicit and illegal border crossers came to be categorized as economic migrants, even within the Global South and regardless of the conditions of their flight, which made them undeserving of legal protections (Wong 2005). It is a singular irony that while the reach of the 1951 Refugee Convention may not be universal, the discursive conditions that shape and define the refugee condition have become hegemonic across the world.

The First Moment: The 1951 Refugee Convention

The 1951 Refugee Convention was negotiated while much of Asia was still under colonial rule. The Second World War may have come to an end, but violent conflict still raged across Asia, driven by the upheavals of decolonization and exacerbated by the nascent Cold War. It took the colonial powers many years and much bloodshed before they realized that their imperial presence in Asia was no longer tenable. Indeed, it would take stunning reversals – the inglorious British exit from India and Ceylon (1947–48), the Dutch expulsion from Indonesia (1945–49) and the calamitous military losses in French Indochina (1945–54) – before it became evident to even the most recalcitrant imperialist that the historical tide had shifted irrevocably against colonialism (Bayly and Harper 2010).

During the 1950s, as decolonization picked up steam, independent Asian countries saw their only hope for a different future in charting a new path in international relations (Ewing 2019). The desire to break away from the subordinations of the past took shape in novel groupings of countries, such as

the Colombo Powers, and unique events, such as the Bandung Conference of 1955. A decade later, a loose coalition of countries from across Asia, Africa and Latin America came together under the umbrella of the non-aligned movement. While there is no clear line that connects these events, they are unified by a common and well-founded dissatisfaction with the prevailing international order (Abraham 2008). Given this bitter history, it is hardly a surprise that international treaties (such as the 1951 Refugee Convention) that explicitly excluded Asian countries from their remit were seen as an overt reminder that, formal independence and the achievement of national sovereignty notwithstanding, the struggle for equality in the international system was far from over.

Further evidence of the discriminatory international order was identified in the contrasting treatment of persons escaping to Hong Kong after the Chinese revolution in 1949 and those fleeing communist-controlled Hungary in 1956 (Loescher 2001). Strictly speaking, neither of these displaced populations was eligible to become refugees, according to the 1951 Refugee Convention's standards at that time. Yet, through what Sara E. Davies calls 'legal gymnastics', Hungarians who had reached Western Europe were promptly granted 'prima facie' refugee status, given aid and resettled around the world (Davies 2007b: 713). Displaced Chinese people in Hong Kong were not granted the same privileges, even though '[they] might have seemed ideal candidates' for assistance. This is the result of what Glen Peterson describes as persistent 'colonial mentalities' at the United Nations High Commission for Refugees (Peterson 2012: 327). It would take until 1957 before the UNHCR was permitted to use its 'good offices' to aid the Hong Kong refugees; even then, formal political protections were not offered and material assistance only supplemented what refugees were already receiving from local charities, churches, individuals and social organizations (Hambro 1955). Not for the first time, it seemed obvious that this differential treatment was a consequence of racial difference.

Choosing to remain aloof from explicitly exclusionary treaties such as the 1951 Refugee Convention did not mean that Asian countries were immune to refugee problems. Excluded from international assistance, postcolonial states had to find piecemeal and local solutions for the millions of displaced persons and families that accompanied their political freedom. The lesson learned was that if Asian countries were going to manage their collective refugee problems, they were going to have to handle it themselves.

The Second Moment: The Bangkok Principles

Beginning at its Cairo meeting in 1964, the Asian-African Legal Consultative Committee (AALCC), an intergovernmental organization

that was founded in the aftermath of the Bandung Conference, initiated a discussion on the 'rights of refugees' (AALCC 1964). Egypt had raised the issue for collective deliberation with Palestinian refugees in mind. AALCC member states spent their next two sessions discussing what standards and protections should be applied to managing and protecting refugees. Eventually, in 1966, a set of nonbinding recommendations governing refugee matters was issued, which came to be called the Bangkok Principles after the city in which the meeting was held (AALCC 1966).

During these two years of discussion and debate, UNHCR officials lobbied forcefully to ensure that the 1951 Refugee Convention would be enshrined as the universal baseline for dealing with refugee matters. Concerns raised by member states about the relevance of the UN treaty to their domestic conditions were dismissed, as were their proposals for new refugee definitions, burden sharing and resolving the dilemmas of bilateral relations and internal security. Archival documents show that although the UNHCR was able to shape most discussions to its liking, they were unable to convince AALCC states to sign the 1951 Refugee Convention (Abraham 2023).

Even as the AALCC discussions were underway, the newly independent African states were engaged in their own discussions about a regional refugee convention (Abuya 2007). These talks led in 1969 to the uniquely progressive Organisation of African Unity's (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), which laid down, among other things, a much wider array of factors than individual political persecution leading to forced displacement as the basis of refugee protection (see Kneebone and Rawlings-Sanaei 2007). OAU member states were also extensively lobbied by UNHCR officials to ensure that the African treaty would acknowledge the UN's 1951 Refugee Convention as the universal legal standard, which they did (while effectively rewriting key provisions, especially with regard to the reasons that individuals become refugees). Faced with the tacit but real threat of being exposed as nothing more than a European regional convention, the 1951 Refugee Convention was swiftly revised through an additional protocol, the 1967 Refugee Protocol, which dropped the geographical and temporal limitations of the original treaty. Hence, the 1967 Refugee Protocol should be seen 'as a choice made by UNHCR to avoid the creation of a larger, more nuanced Convention' in favour of a workaround mechanism that 'simply removed the Convention's time and geographical constraints that were preventing its universal application' (Davies 2007a: 62).

The addition of the 1967 Refugee Protocol was not sufficient to convince Asian states that they should now sign the 1951 Refugee Convention. Their experience of the last two decades suggested that there was little to be gained from this action. Although a number of Southeast Asian countries,

particularly Thailand, continued to receive cross-border flows of refugees, they preferred to remain outside of the scope of the treaty.

The Third Moment: The Indochina Crisis

The unification of Vietnam in 1975 ended one conflict and started another. In 1967, the noncommunist states of Southeast Asia (Thailand, the Philippines, Singapore, Malaysia and Indonesia) had created the Association for Southeast Asian Nations (ASEAN) in an effort to gain international standing and in response to the unsettling effects of the Cold War in the region (Acharya 2009). ASEAN member states saw the unification of Vietnam under a communist government as a grave regional military and political threat, an anxiety seemingly confirmed when Vietnam invaded neighbouring Kampuchea in 1978 (as Cambodia was called under Pol Pot) (Ang 2013). Further, unification came with a growing outflow of Vietnamese refugees from the south of the country, many of whom were Catholic and of Chinese heritage, as well as Hmong, Cambodians and Laotians fleeing to Thailand, both before and following the Vietnamese invasion. Some South Vietnamese fled as they feared for their lives due to their religious and ethnic orientation, others because of their proximity to the old regime, while some individuals left due to the uncertainties generated by socialist policies and imagined futures under a communist regime (Frost 1980).

Between 1975 and 1979, hundreds of overloaded boats filled with refugee families were launched from southern Vietnam. Not surprisingly, the combination of bad weather, pirates, lack of marine expertise and unseaworthy vessels led to tragic results in many cases (Robinson 1998). Stung by the American defeat and withdrawal from Saigon, international news media covered the tragic story of the 'boat people' extensively, ensuring that this humanitarian crisis remained on the front pages of Western newspapers (Lavoie and Knock 1990). Public demands that something be done to help the hundreds of thousands of Vietnamese refugees became more strident, especially in the United States, Australia and Canada, even as the United Kingdom sought to restrict the numbers of refugees who entered Hong Kong. While international aid began to pour into the region and the UNHCR became increasingly involved, these actions were too slow and limited to resolve the humanitarian crisis effectively. From 1978, ASEAN states began to take a more active role in shaping a collective response to the crisis. Among the reasons to act included the increasing tensions within the regional organization, especially between Indonesia and Malaysia, which were the countries bearing the greatest burden of hosting the seaborne refugees (Frost 1980).

A greater level of coordination among ASEAN states allowed them to present a unified face to the international community, while also working collectively at the regional level to share the burden of refugee inflows more equitably (Schier 1982). Frank Frost identified three regional responses to the Indochina refugee crisis: first, to deal with the pressing humanitarian emergency, Malaysia, Indonesia and the Philippines responded by creating relief camps on offshore islands as a temporary haven; second, Vietnam was actively pressured to restrict the outflow of refugees; and third, and most importantly, ASEAN demanded that the Western countries that were responsible for the root cause of refugee outflows relieve the burden on countries of first asylum. The unified message from ASEAN was that the West needed to resettle Vietnamese refugees in their own countries.

This strategy was eventually successful. Even as the relief camps began to operate, a much more forceful policy of marine interdiction by Malaysia and Indonesia made clear to both Vietnam and the international community that they were not going to be passive hosts for endless flows of refugees. These actions were reinforced by Thailand as it announced that it would no longer accept Vietnamese or Cambodian refugees who were seeking to cross into the kingdom by land. This high-risk approach paid off for ASEAN countries, albeit at no small cost to the many refugees whose boats were turned away from their shores.

A turning point in the crisis came at an international conference held in Geneva in July 1979, which was chaired by the UN Secretary-General (Ang 2013). The ASEAN position set the terms of international agreement. The developed states of the Global North agreed to take in more refugees and relieve Southeast Asian host nations of their responsibility for refugee populations, while Vietnam agreed to take greater steps to prevent further outflows of refugees. Although no ASEAN country had signed the 1951 Refugee Convention at this time (the Philippines would sign it in 1981), through concerted action, they were able to resolve, from their standpoint, the Indochina refugee crisis.

Lessons from History

A number of lessons were learnt from these three moments. From the standpoint of this chapter, the most important lesson was that the international refugee regime did not treat forced displacement around the world equally. Southeast Asia's first encounter with the regime was exclusion, from the moment when the 1951 Refugee Convention was first negotiated. Its second encounter, through the creation of the Bangkok Principles, was an endeavour to do it alone, albeit in the form of a nonbinding agreement between member states. The pressure placed on AALCC delegations by

the UNHCR to reduce the scope of new refugee principles and conform to the 1951 Refugee Convention norms reinforced the power of the established order. The Indochina refugee crisis was the third key learning experience. While the initial response of the Western powers was to encourage local assimilation, this was not a solution that was acceptable to ASEAN countries. Repatriation to Vietnam was also ruled out as official policy, particularly due to the unwillingness of refugees to return, although some refugees were in fact sent back (Kneebone and Rawlings-Sanaei 2007: 15–16). In a successful (and, for the time, novel) effort at concerted action, Southeast Asian host countries imposed third-country resettlement of Indochina refugees on the international community in return for hosting and providing temporary asylum. It cannot be emphasized enough that this unusual outcome was only successful for very contingent reasons, notably Vietnam's identity as a communist state and the geopolitical conjunctures during and after its unification.

Nonetheless, over time, the message that was adopted as common sense among regional policy makers was that their version of 'history' had proved that the countries of Southeast Asia could ignore the 1951 Refugee Convention and fashion their own solutions to refugee inflows; thus, to sign the Convention would be a diminution of hard-won postcolonial sovereignty. While the international order was inevitably biased against the Global South, concerted collective action could work in their favour. These lessons have led to the widely held belief, better considered a policy of denial, that the relatively well-to-do states of Southeast Asia do not host refugees on a permanent basis.¹ At best, they should be thought of as temporary hosts and/or transit countries for refugees who will be resettled elsewhere (Cheung 2012; Abraham 2020). When they do permit refugee resettlement, such as Malaysia's recent resettlement of Syrian refugees, it is always considered an exception to the general rule.

Southeast Asian Difference

Southeast Asian states have long been criticized for not signing the 1951 Refugee Convention. In trying to explain how this decision is understood in the region, this chapter outlines three historical moments of alienation from the refugee regime. Alienation began with the exclusionary text of the 1951 Refugee Convention, which was followed by a stillborn effort at developing an expansive set of regional principles and, finally and most critically, was reinforced by the conclusions drawn from the Indochina refugee crisis. It is not in question that other lessons could have been learnt from these episodes, particularly the ethics of using the existential vulnerabilities of boat people as a bargaining chip in a geopolitical standoff.

The fact that other, more humanitarian lessons were *not* learnt from these episodes is deeply unfortunate, even tragic; however, from an analytic standpoint, it is important to understand how this nonaction continues to be justified and explained at the regional level. The net takeaway is that applying external pressure to gain signatories to an international treaty is not likely to succeed; protection must be ensured by other means.

This historical outline does not exhaust the reasons for the relative lack of formal refugee protection in Southeast Asia (Kneebone 2016). In response to a factor cited by some regional actors – namely, that the 1951 Refugee Convention imposes an undue material and political burden on member states – other critiques turn this reason around to argue that the real issue is the illiberal and authoritarian character of most regional states (Muntarbhorn 1992). Vitit Muntarbhon argues that the lack of legal protection statuses for refugees is a consequence of the desire to avoid signing international legal instruments that would allow international agencies to expose the poor state of human rights in the region. In short, nonsignatory status is a reflection of the weak quality of citizenship under illiberal regimes. While some Southeast Asian states have been moving towards a higher quality of democracy since the beginning of the twenty-first century, this is by no means an irreversible path. In recent years, Thailand, Myanmar and the Philippines have reverted to authoritarian polities after making important steps towards political openness.

Indeed, some observers even celebrate, however tacitly, the illiberal character of regional states by arguing that a non-Western social contract applies in Southeast Asia (Chua 2017). State provision of other social goods, such as economic growth and development, is taken to outweigh any perceived lack of political freedoms. This argument is reinforced by critics who see the ASEAN principle of noninterference in another's internal affairs as a collective *carte blanche* to act illiberally at home, secure in the knowledge that there will be no criticism from neighbouring countries (Haacke 2002). This is not a trivial concern; the ongoing crisis in Myanmar shows this all too clearly. In spite of illiberally governed states being the greatest source of refugee outflows in the region for decades, a project that continues unabated today, the prevailing 'ASEAN Way' norms of decision making by consensus and noninterference in the affairs of other member states (Katsumata 2003; Kneebone 2016) have effectively restrained regional neighbours from naming this characteristic as a major source of regional unrest, let alone applying severer sanctions.

Marie McAuliffe takes a different approach by focusing on the logic of 'pull factors' in cross-border migration. She argues that Southeast Asian states downplay 'protection issues because [the region] does not currently have well-developed asylum policies, procedures, and process systems – nor does it seem to want to develop them, lest this provides incentives for

people to move' (McAuliffe 2017: 227). While the logic of the first part of her statement is circular, the latter point is important. McAuliffe is correct in pointing to the contradictions of labour flows in Southeast Asia, in contrast to the movement of capital, insofar as they affect the protection of refugees. The movement of labour, especially of unskilled workers, is governed by strict regulatory controls on paper, but, barring Singapore, most labour-receiving countries lack the infrastructural capacity to fully enforce these regimes. ASEAN rules permit visa-free travel for short stays within the region, but not the right to work in other countries without official permission. As a result, many employment-seeking migrants from poorer countries simply overstay their visas, which adds to the pool of 'irregular' international migrants, especially in mainland Southeast Asia (Wong 2005).

Cross-border asylum seekers find themselves faced with the following conundrum: they are not formally recognized by governments that are not signatories to the 1951 Refugee Convention and/or do not have domestic legislation that establishes protected categories of asylum seekers or refugees. Their status, from the point of view of the government in question, is indistinguishable from the irregular and illegible migrants who populate the urban informal economy.² This position highlights a foundational binary opposition, namely, the shadow discourse of economic migrants and political refugees – a division in migration categories that carries an assumed distinction between voluntary and involuntary movement (van Hear, Brubaker and Bessa 2009). This 'mixing' of migrant and refugee populations in the informal economies of urban Southeast Asia complicates the quality of refugee protection (Cheung 2012).

Urban Refugees in Southeast Asia

Urban areas³ now host 60% of the world's refugees (UNHCR 2009).⁴ While the traditional image of refugees as camp dwellers continues to hold sway in the public imagination, this is increasingly less accurate on the ground, whether or not host countries are bound by the terms of the 1951 Refugee Convention. What complicates matters in nonsignatory countries is asylum seekers' lack of formal status and recognition and, hence, a lack of the corresponding rights and protections that are owed to them. These 'lacks' leave asylum seekers vulnerable to both state law enforcement agencies and other hostile social actors in varieties of ways (Anwar 2013; Azis 2014; Johnson and Gilligan 2021). It seems obvious that under these conditions, refugee protection in urban settings must go beyond basic protections (such as the pre-eminence of nonrefoulement) to include forms of material assistance in order to compensate for the lack of formal recognition. Yet, this seemingly logical solution is not without its own problems.

Refugees and asylum seekers increasingly gravitate towards urban megacities for a number of reasons (Koizumi and Hoffstaedter 2015). These include relative ease of access to the city due to the density and variety of communications networks; the presence of UNHCR offices, as well as refugee-supporting international, religious and civil society organizations; the increase in opportunities for employment, schooling and housing options; and, perhaps most importantly, the array of information media centred on the city, which gives rise to networks that link asylum seekers with family and kin, other community members and common language speakers who have preceded them.

Once in the city, many (but not all) asylum seekers register with the UNHCR and begin the lengthy process of being recognized by the international community as a refugee. Across Southeast Asia, this process can take years and does not offer any guarantee of being granted the desired status of refugee. In the meantime, and typically in the absence or because of the inadequacy of official support, asylum seekers and their families must find a way to make a living. This is often not just for themselves but also to generate resources for remittances to their places of origin. Even after receiving refugee status, the wait is not over. Refugees hoping for a resolution to the uncertainty of their position through one of the three so-called durable solutions can find themselves waiting for years for the next stage of the process for achieving legal and ontological security. These outcomes are, in turn, dependent on community and national origin, age, gender, sexuality and religion, among other factors. For those whom the UNCHR fails to grant refugee status yet who have genuine fears about returning to their place of origin ('false negatives'), the situation is even worse – they can go neither forward nor backwards.

For refugees, individuals seeking refugee status, and asylum seekers who have been mistakenly rejected, the informal urban sector is often the only setting for obtaining schooling, housing and employment. Given refugees' structural similarity to their informal sector neighbours, their position is increasingly described as 'precarious', a relatively new term in the refugee studies lexicon (Chacko and Price 2021).

Refugee Precarity

Ethnographic accounts of the informal sectors in Southeast Asian cities, such as Kuala Lumpur, blur the line between the everyday lives and experiences of refugees and those of other marginal and undocumented migrant communities. To begin with, the routes and means that asylum seekers use to reach their preferred safe havens are often no different from the channels used by economic migrants who cross borders in search of

work. To give one well-known example, Rohingya asylum seekers escaping Rakhine State in Myanmar and Bangladeshis seeking undocumented work rely on the same networks of human smugglers and are placed on the same boats in their seaborne journeys to Malaysia. These boats travel to the southern Thai coastline, from which migrants and refugees cross overland to the porous border with northern Malaysia, with the help of smuggling networks, which also may include local state actors (Hoffstaedter 2017; Hasan 2019). These modes of illegal international passage are often confused with trafficking networks; however, human smuggling is probably the more accurate term in most cases (Wong 2005).

Once in the city, refugees live alongside undocumented migrants in what has been called the ‘nonspectacular’ city. This includes informally segregated areas that can range from residence in the urban physical margins to slums on the edges of middle-class neighbourhoods, yet the lives of people in these locations always remain intimately connected to the urban infrastructure and economy (Aceska, Heer and Kaiser-Grolimund 2019). Given their insecure and irregular legal status, urban asylum seekers and undocumented migrant labourers both experience the stress of competing for scarce resources and the simultaneous pressure of visibility and invisibility in their daily lives. The need to earn a livelihood forces undocumented migrants out from their marginal enclaves into central areas of the city to find work, which can only be achieved by making themselves visible to potential employers. Employment options can range from garbage and scrap metal collection and construction and food preparation, to daily wage work that involves ‘cutting grass, painting houses and sweeping the streets’ (Azis 2014: 844). At the same time, they must remain invisible to the state and civil society agents who see them as unwelcome reminders of the uneven and unequal spatial development of the modern Asian city, while still requiring their labour for menial and ‘3D’ work. The constant movement between invisibility and visibility is even expressed in bodily comportment: while in public, undocumented migrants keep their heads down and do not look passers-by in the eye for fear of attracting the wrong kind of attention. Dressing in clothing that neither stands out nor features culturally specific indicators of nationality (such as using *thanaka*, a natural cosmetic used widely by Burmese women) becomes part of the everyday strategy for fitting in or, at least, not attracting unwanted attention (Franck 2016).

Given their irregular status, fear ranks highly among the emotions felt by asylum seekers and other migrants, including low-skilled migrants with official papers. As one scholar put it, ‘many live a life in fear of being arrested and detained, a prison of another sort, largely created in their minds’ (Hoffstaedter 2014: 897). The most obvious sources of fear are the police and national immigration officials, followed by local criminals and gangsters (Azis 2014). A recent survey conducted in Malaysia revealed that 70%

of the refugees polled were questioned by state officials, on average, once a year and paid an average of 500 ringgit to be released from official custody (Nungsari, Flanders and Chuah 2020). There are numerous accounts of migrants who lack official documentation being used as ‘ATMs’ by police or harassed into providing ‘coffee’ money for authoritative figures (Franck 2016; Chacko and Price 2021; Johnson and Gilligan 2021). The amounts extorted from vulnerable migrants can vary depending on the setting. Public and visible settings such as the street, bus stops and peri-urban shopping areas usually generate lower ‘taxes’, with demands rising in urban centres and closer to police stations and migrant detention centres. On occasion, extortion demands may include valuable objects, such as mobile phones, which refugees rely on in order to remain connected to each other and to hear the outcomes of refugee status determinations or resettlement decisions (Azis 2014: 845).

Living in a constant state of fear has other effects as well: it impacts and leads to feelings of ‘hopelessness, physical pains, exhaustion, and despair’ (Johnson and Gilligan 2021: 145). Scholars have demonstrated that this constant fear maps onto an urban geography of relatively safer and more risky spaces, from a greater sense of security closer to home, to increased fear during the journey to and from work (Franck 2016). Thus, in parallel with the constant fearful shuttle between visibility and invisibility comes the intertwined imperatives of mobility (the need to find work in order to survive) and immobility (the need to stay safe and protected). However, studies do note high levels of resilience among youthful respondents who refuse to allow their status to become an alibi for passivity and exhibit a remarkable ability to rise above their abject conditions as they endeavour to shape a better future for themselves and their families (Banki 2013; Hoffstaedter 2014; Franck 2016; Nungsari, Flanders and Chuah 2020).

It is clear that a large urban informal sector offers considerable economic benefits for the host community. Beyond the financial circuits of rent and consumption, employers grow accustomed to having access to workers who are unable to complain about working conditions and have no choice but to accept lower wages due to their precarious situation (Azis 2014). In some instances, this has led to what Peter Andreas has termed ‘border games’ in his analysis of US–Mexico cross-border flows; an apt characterization of the complex choreography of threat, detention, work and movement, which is mediated by arrest quotas and depressed wages that bring together immigration enforcement authorities, employers and irregular workers in a violent and unstable equilibrium (Andreas 2000). The net effect of this complex set of relations is to produce a state of ‘*permanent temporariness* which allows urban localities to meet their labour demands while ceding minimal rights to the migrants themselves’ (Chacko and Price 2021: 4598, emphasis in original).

Protection Reconsidered

The first section of this chapter argued that, given the lessons gained from decades of interaction with the international refugee regime, Southeast Asian states are unlikely to be pressured into signing the 1951 Refugee Convention or the 1967 Refugee Protocol. Protection rights for refugees will have to come from a source other than international law and are more likely to be provided as discretionary humanitarian or state responses. Equally, regional arrangements, such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crimes (Bali Process), are unlikely to significantly improve protection conditions, as they tend to eschew rights-based agreements for better migration governance and control (McAuliffe 2017).

Next, this chapter examined the living conditions and everyday experiences of urban refugees in Southeast Asia. After summarizing an extensive literature, it concluded that urban refugees are most likely to be found living in the informal sectors of major urban areas, cheek by jowl alongside undocumented labour migrants and other marginal communities. All categories of ‘irregular’ persons face multiple sources of insecurity, beginning with their lack of official recognition as legitimate urban denizens. This strengthens the similarities, rather than differences, between refugees and irregular migrants, their personal life histories notwithstanding. The contradictions of their social existence are most visible at the intersection of simultaneous and competing forces, here described as visibility/invisibility and mobility/immobility. These forces engender a deeply precarious existence, a palpable sense of fear and lack of agency, and an impeded sense of time. Yet, in spite of this precarity, marginal lives in the informal urban sector do not entirely lack agency and volition. The residents collectively produce and rely on informal mechanisms of mutual assistance, which AbdouMaliq Simone has called ‘people as infrastructure’, that lie outside of state control and mandates (Simone 2004; Elyachar 2010).

Any credible discussion of urban refugee protection must begin by addressing refugees’ social and economic proximity and interconnection with marginal communities and migrant lives. Yet, the starting point for protection has always been the identification of the refugee as a special category of moving person. This understanding is predicated on the assumption of the foundational necessity of a political existence, if any existence is to be possible at all. To reference Hannah Arendt, what comes first is ‘the right to have rights’ (Arendt 1968). Hence, while the starting point for international refugee law – namely, international protection – is a necessary substitute for an absent or unwilling state, it may not be the answer in all cases.

The informal sector of ‘mixed’ migrants, as described through these urban ethnographies, closely follows the contours of what Chatterjee has

called ‘political society’ (Chatterjee 2004). For Chatterjee, political society is a space of association ‘where governmental agencies [deal] not with citizens but with *populations* to deliver specific benefits or services through a process of political negotiation’. The population that constitutes political society stands outside of and is to be distinguished from civil society, ‘where *citizens* relate to the state through mutual recognition of legally enforceable rights’ (Chatterjee 2004: 38, emphasis added). In the unequal political systems of Southeast Asia, where access to political, economic and social rights directly correlates with material and ethnic endowments, citizenship is not a uniform and homogeneous category. The quality of citizenship for those included in civil society is measured by access to rights and entitlements. In contrast, informal sector populations, which constitute the political society described by Chatterjee, lack rights in any meaningful sense. Although they may be formal citizens on paper, they are in that sense no different from the unprotected asylum seekers and refugees whom they live alongside.

In these conditions, if protection begins with the identification of the refugee as a special category of moving person, it can only generate further problems. The moment that the refugee is separated from political society and the informal sector by giving them the status of a rights-bearing individual (if only in name), they become alienated from their existing lifeworlds and supportive social infrastructure. Following the application of the entitlement to protection for some within this marginal space, political society becomes reconstituted through an internal segregation that creates two classes of subjects. The informal sector is remade as a community that is composed of two parts: a domestic population without substantive rights and a grouping of external origin who have access to greater political and economic endowments. Rights-bearing foreign refugees are now closer to civil society than political society, and thus become the object of resentment for a marginal domestic population, who are equally lacking in basic state protections and entitlements. In a political environment where rights are unequally distributed, protection entails the spatial separation of the foreign rights-bearing refugee from the domestic, informal sector subject. At its most extreme, this separation implies a perverse return to the state of exception or a camp, as is described in Giorgio Agamben’s well-known formulation (Agamben 1998). In the Global North, host community resentments are typically represented in a language of ostensible cultural and racial difference; in the Global South, the alienation of the informal sector host community and the urban refugee outsider begins from the granting of international protection, which offers some rights to the latter, but not to the former, although they are equally bereft of state protections.

Conclusion

First, this chapter has argued that international and regional paths to refugee protection in Southeast Asia are unlikely to be successful, due to lessons learnt from historical events. Second, it has argued that a rights-based approach to refugee protection raises complicated questions of sustainability when access to rights is unevenly distributed across domestic populations. These positions have immediate and structural implications.

In the short term, advocates for the creation and improvement of protection mandates and legislation would be better served by: (a) applying *domestic* political pressure to law makers and executive agencies, supplemented by international support, but only when and where it is appropriate. To do otherwise would only reinforce pre-existing and well-established assumptions about an unequal world order that seeks to undermine national sovereignty. Advocates would also improve their chances by: (b) seeking to improve material wellbeing across the entire informal sector, without dividing communities along the tenuous distinction of forced displacement or voluntary internal migration. Material improvements include: greater investment in public goods, including physical infrastructure and schools, well-enforced minimum wage provisions and greater housing security for renters. That said, it must be recognized that not all states in Southeast Asia have the administrative capacity to systematically penetrate the informal sector, nor can many afford such universal provisions for very long. The inadequate state of current protection mechanisms is further exacerbated by uneven international burden sharing: calls for refugee protection by the international community are in unequal proportion to the provision of financial assistance commensurate to the scale of the problem. Finally, it must be noted that resistance to change from powerful interests who are most likely to be injured financially – notably, employers and landlords – will be bitter. The prospects for greater protection for refugees in Southeast Asia are not promising.

Looking beyond the region, the issue of protection is under great strain, not only from recalcitrant nation states that are not living up to their treaty obligations, but also because of conceptual faultlines that are built into the international refugee regime. As this chapter has argued, these begin from the contested boundaries of difference – North–South, political–economic and assistance–protection – and go on to include the so-called ‘durable solutions’ for refugees. Of the three ‘traditional’ durable solutions – repatriation, local assimilation and resettlement in a third country – the global default has long been the second option: local assimilation. As the bulk of forced migration takes place in the Global South, the greatest burden of hosting refugees falls squarely on those least able to afford it. This condition was recognized as early as the 1960s, in OAU debates over the 1969 OAU

Refugee Convention, but has remained a local concern. Any international refugee agreement that does not recognize a much wider array of causes of forced movement and the need for burden sharing among states is not financially, politically or ethically sustainable. Distinguishing between informal sector urban migrants, based on the false dichotomy of voluntary and involuntary movements, only makes matters worse.

The current status quo is not sustainable. As the human-created dangers of climate change and ‘natural’ disasters continue to grow around the world, they will inevitably be accompanied by flows of forced and unwilling displacement on a scale that shows no sign of diminishing. Under these conditions, the prevalent conception of ‘protection’ is not fit for purpose. A rethinking is required, beginning from the ground up, of the root causes of human displacement. Of these causes, there are two that are most immediate: illiberal and authoritarian state actions that target vulnerable populations as state policy, such as the expulsion of the Rohingya in ethnocratic Myanmar, and the ‘slow violence’ and ecological destruction associated with the everyday workings of global capitalist forces that reinforce the unequal and uneven distribution of wealth and power within countries and around the world (Nixon 2013). Rather than seeing the Southeast Asian region as the perpetual exception and global outlier on refugee matters, it may be more productive to see the region as a necessary starting point for rethinking what refugee protection should be – not just in the region, but also beyond.

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Notes

1. This has begun to change in recent years, most notably in Indonesia, which in 2016 passed Presidential Regulation concerning the Treatment of Refugees (PR 125), which protects refugees as a special class of cross-border migrants. However, the continuing lack of adequate refugee protection legislation in Indonesia, Thailand and Malaysia reinforces the point that the political elites in these countries do not consider themselves to be permanent refugee hosting states.

2. The idea of 'legibility' is taken from James Scott's discussion of efforts by states to make their populations transparent to them. It draws on Michel Foucault's conception of biopower (see Scott 1998; Foucault 2003).
3. The following section draws heavily on the asylum seeker experience in Malaysia. Not all of these conditions are reproduced in Thailand and Indonesia, which are the other major refugee hosting countries of the region.
4. The figure for internally displaced persons is 80% according to the UNHCR (Park 2016).

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