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Legal Respite for Refugees in Southeast Asia: The Rohingya Quandary

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Tiivistelmä – Referat – Abstract

In August 2017, the decades-long tension between Myanmar and its most vulnerable stateless ethnic minority group, the Rohingya, came to a head after a small faction of Rohingya militants attacked 30 police barracks along the Myanmar-Bangladesh border. In response, the Myanmar army retaliated with unmatched ferocity, systematically organising and executing a pogrom against the Rohingya and their villages. It has been estimated that within a year, approximately 1.1 million Rohingya were forced out of Northern Rakhine State to seek refuge in other countries in the region, primarily in Bangladesh, where the vast majority of whom remain to this day in squalid, under-resourced, and overpopulated refugee camps. Meanwhile, the international refugee law regime is made up of a multitude of constituent elements, ranging from international and regional instruments and organisations to bilateral agreements between states. This thesis is concerned with the extent to which the international refugee law regime is able to protect the Rohingya. The Rohingya are stranded as refugees in a region that has historically rejected the cornerstone protectionary instrument of the regime, namely, the 1951 Refugee Convention. None of the states that are currently hosting the Rohingya subscribe to the Convention. In such a stark legal vacuum, this thesis tests the reach of the regime in providing protection to the Rohingya.

This thesis first studies the development of the international refugee law regime at large, underscoring the main organisations and instruments responsible for the management of refugee crises. In particular, the thesis highlights the politically motivated resettlement programmes coordinated by refugee management organisations during the latter half of its evolution, just before the establishment of the UNHCR. Here, the thesis also introduces the principle of *non-refoulement* as a pivotal feature of the regime, both as codified in treaty law as well as the customary international law status it enjoys generally.
Next, the thesis turns to contextualising the origins of the Rohingya refugee crisis. The Rohingya share an especially volatile relationship with Burma. Thus, the thesis provides an overview of the political history of Burma, particularly emphasising the Rohingya's steady descent into statelessness. Over the past three decades, the Rohingya's claim to Burmese citizenship (or lack thereof) has been leveraged by Burma to justify increasingly brutal pogroms against them. Finally, the thesis examines the application of *non-refoulement* in the context of the 2017 Rohingya crisis. First, the thesis considers the customary law status of the principle in greater detail, and establishes the fulfilment of state practice and *opinio juris*. Then, the thesis examines the form and extent to which *non-refoulement* is applied in the context of the 2017 Rohingya refugee crisis. Having established that there is indeed a customary law of *non-refoulement*, the thesis confirms that the rule is binding the states in Southeast Asia, even though they are not party to any refugee convention. Finally, the thesis turns to examining scholarly contributions on the topic of refugee protection in Southeast Asia. Majority of legal scholarship tends to emphasise the availability of alternative regulatory frameworks that extend some degree of protection to refugees. However, this thesis concludes by arguing that although these alternatives offer complementary protection as part of the international refugee law regime, it is necessary to develop a bespoke regional instrument that addresses a broad spectrum of rights that protect vulnerable refugees.

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I dedicate this thesis to the Rohingya community, who continue to await justice.

ABBREVIATIONS

AALCO	Asian-African Legal Consultative Organisation
AFPFL	Anti-Fascist People's Freedom League
APRRN	Asia Pacific Refugee Rights Network
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
BMA	British Military Administration
BNA	Burma National Army
CAT	Convention against Torture
CIA	Central Intelligence Agency
CRC	Convention on the Right of the Child
ECOSOC	United Nations Economic and Social Council
FDMN	Forcibly Displaced Myanmar Nationals
FRC	Foreign Registration Card
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
IOM	International Organization for Migration
IRL	International Refugee Law
IRO	International Refugee Organisations
JRP	Joint Response Plan
LoI	Letter of Intent
LoN	League of Nations
MoU	Memorandum of Understanding
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organization
NLD	National League for Democracy
NRC	National Registration Card
OAU	Organisation of African Unity
RSD	Refugee Status Determination
SAARC	South Asian Association for Regional Cooperation
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNRRA	United Nations Relief and Rehabilitation Administration
USDP	Union Solidarity and Development Party
VCLT	Vienna Convention on the Law of Treaties

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Introduction

"I had to come out of Burma to save my life and my family members' lives."
Arfat Hossain (Kutupalong Refugee Camp, Bangladesh)[1]

"Our identity is changed so frequently that nobody can find out who we actually are."
Hannah Arendt[2]

Arendt rued the identity crisis of the Jewish refugees - no one could agree on who they were. Arfat is certain of one thing - they had to flee for their lives. Between them, the statements effectively capture the crux of the ongoing Rohingya refugee crisis. On the one hand, their identity and claim to Burmese[3] citizenship has been contested by everyone (but the Rohingya themselves) for decades. On the other hand, the dispute has sparked a chain of events forcing their displacement on several occasions, most recently in 2017. Complicating matters further is the fact that the Rohingya happen to be seeking refuge in a region that has consistently distanced itself from the broader international refugee law regime. Domestic and regional actors are persistent, and often purposeful, when it comes to mislabelling the Rohingya. The international community has generally condemned the Burmese state, even touting the Rohingya as 'the world's most persecuted minority'[4] on more than one occasion. Regionally, in a rare show of departure from the rule of non-interference, states have 'expressed concern over the atrocities committed against the Rohingya'.[5] Unfortunately, the

[1] Afrat Hossain's quote was highlighted in the study by Mabrur Uddin Ahmed, Dilraj Singh Tiwana, and Rahima Begum, 'The Genocide of the Ignored Rohingya' *Restless Beings* (London, 7 February 2018)
[2] Hannah Arendt, 'We Refugees' (1943) 31 Menorah Journal 69
[3] In 1989, the State Law and Order Restoration Council officially changed the name of 'Burma' to 'Myanmar'. Politically, adoption or rejection of the new nomenclature has come to symbolise either solidarity or dissent for the Burmese national identity's association with the junta's rule. Linguistically, and particularly in academia, both versions are accepted and often used interchangeably. In this thesis, the author chooses to use 'Burma' throughout the paper for coherence and consistency. See: Lowell Dittmer, 'Burma vs. Myanmar: What's in a Name?' in Lowell Dittmer (ed.) *Burma or Myanmar? The Struggle for National Identity* (World Scientific Publishing Co., 2010)
[4] Press Release, The United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar' (5 December 2017) Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E accessed 10 October 2020
[5] Bernama, 'Malaysia voices concern over Rohingya situation in Myanmar' *New Straits Times* (New York, 26 September 2018) Available at https://www.nst.com.my/news/nation/2018/09/415202/malaysia-voices-concern-over-rohingya-situation-myanmar accessed 8 October 2020

state-sanctioned atrocities continued to devastate the community, while creating yet another protracted refugee crisis in the world.

Most simply, International Refugee Law (IRL) is the chapter of international law that protects the rights of refugees. More accurately, according to Goodwin-Gill and McAdam, however, it is an 'incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception'.[6] Either way, at the heart of IRL lies the notion that refugees are a specialised group of individuals whose rights require particular attention. Over the years, the plethora of international institutions, treaties, and customs, for the most part have kept the refugee's protectionary needs in mind. The post-Westphalian state and the ensuing system of international order has consistently treated the refugee as a subject in need of temporary protection upon the suspension of 'the normal bond between citizen and state'.[7] In the absence of an international legal regime, refugees in the 20th century 'were treated in accordance with national laws concerning aliens'.[8] This remains the case across Southeast Asia[9] today, as most of the states in the region have not committed to any binding legal instrument protecting the rights of refugees. Circumstances grew increasingly complicated and burdensome after every surge of refugees following the First World War. Eventually, states looked to the League of Nations to coordinate the displacement of individuals *en masse*. At this point, refugees were dealt with on an *ad hoc* basis, tackling one refugee crisis at a time. Temporary agencies were formed and armed with specialised mandates that applied to specific groups of refugees. After the Second World War, it became apparent that the refugee problem was here to stay, and the office of the United Nations High Commissioner for Refugees (UNHCR) was formed. Cold War politics also played a significant role in the development of the regime. While the needs of the refugees themselves were at the core of the operations, as noted by Feller, 'their intake reinforced strategic objectives',[10] with states being

[6] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 1
[7] Jean-Francois Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' (2014) 45 Netherlands Yearbook of International Law 221
[8] Dieter Kugelmann, 'Refugees' *Max Planck Encyclopedia of Public International Law* (OPIL, 2010) Available at: http://opil.ouplaw.com/home/EPIL accessed 10 October 2020
[9] At the time of writing, UNHCR identifies the sub-regions in Asia as 'Southwest Asia', 'Central Asia', 'South Asia', 'Southeast Asia', and 'East Asia and the Pacific'. While referencing the literature, I will use the nomenclature according to the author's preferences, however, for the purposes of my own research, I am narrowing the focus specifically to the states in 'Southeast Asia' according to UNHCR, namely: Bangladesh, Brunei Darussalam, Cambodia, Lao People's Democratic Republic, Indonesia, Malaysia, Mongolia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, and Vietnam.
[10] Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5 Washington University Journal of Law and Policy 129

extremely selective about where to resettle the refugees. Subsequently, the drafting and adoption of the 1951 Refugee Convention[11] and as more states in the global South gained independence, the eventual 1967 Protocol[12] (hereafter 1951 Refugee Convention) came into force, thereby expanding the geographic and temporal mandates of the original convention. The 1951 Refugee Convention and UNHCR became the central instrument and institution of the international refugee regime, while regional and parallel developments continued to take place. However, the Convention is only binding upon states that are party to the treaty. Meanwhile, large-scale refugee crises continue to confront us, and it does not bode well for humanity that states remain 'content to resist the obvious - that refugees were not a temporary phenomenon'.[13] As of 2020, we stand at 26 million refugees globally, with developing countries hosting 85% of the world's refugee population.[14] This thesis is concerned with the refugees that are hosted in one of the developing regions which does not subscribe to one of the main tenets of the international refugee regime, namely, the 1951 Refugee Convention.

Prior to the most recent exodus of 2017, the Rakhine state in Western Burma was home to between 1 and 1.5 million ethnic Rohingyas,[15] most of them Sunni Muslims, with a minority of Hindus. Historically, there is evidence to suggest that the Rohingya have existed as an ethnically distinct Muslim population long before the arrival of the British,[16] a fact that the modern-day Burmese government frequently avoids addressing. The pro-Rohingya faction posit that the present-day Rohingya settled in Burma in the ninth century, and are the result of centuries of organic amalgamation with various ethnicities, including Bengalis, Pathans, Turks, and Moghuls.[17] Meanwhile, in spite of recent democratic reform, the contrarian Myanmar government (the *anti*-Rohingya bloc) insists that the Rakhine Muslims are nothing more than illegal Chittagongian Bengali immigrants, serving as an unpleasant reminder of the

[11] Convention Relating to Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
[12] Protocol Relating to Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
[13] Guy S Goodwin-Gill, '2017: The Year in Review' (2018) 30(1) International Journal of Refugee Law 1
[14] UNHCR, 'Figures at a Glance' Available at: http://www.unhcr.org/figures-at-a-glance.html accessed 11 October 2020
[15] AKM Ahsan Ullah, 'Rohingya Crisis in Myanmar: Seeking Justice for the "Stateless"' 32(3) (2016) Journal of Contemporary Criminal Justice 285
[16] Ibid, 286
[17] Ibid

British colonial legacy.[18]

Burma's relationship with the Rohingya was not always toxic. Even after gaining independence from the British, the Rohingya were a robust and involved minority group, and very much considered legal citizens by three successive post-independence Burmese governments.[19] While xenophobic tendencies had already been inherited from the British, things took a sharp left turn for the Rohingya once General Ne Win assumed power following a successful coup in 1962.[20] Over the following two decades, the Rohingya's legal status within Burma slowly disintegrated, culminating in their exclusion from the list of 135 recognised ethnic groups in the1982 Burmese Citizenship Act.[21] This was the final push, rendering the Rohingya stateless and vulnerable to persecution.

Whether or not the Rohingya have resided in Burma since the ninth century or the twentieth, one thing is certain - the systematic persecution and human rights violations facing the Rohingya within Burmese borders has resulted in one of the most worrying refugee crises in the world. The tinder for the current state of affairs was sparked in May 2012, when the alleged rape and murder of a Buddhist Rakhine woman by three Muslim men, resulted in an angry mob attack on a bus and the deaths of ten non-Rohingya Muslim men.[22] What ensued were a series of clashes between the Buddhists and Muslims. As far as the authorities were concerned, Burmese military officials either ignored at best, or actively participated at worst, in the rampant and arbitrary killings, rape, arrests. A state-sanctioned campaign of violence was waged against civilian Rohingyas across the country. In 2017, the world observed while the Burmese military renewed their efforts to completely eradicate the Rohingya from their land, burning, pillaging, and ransacking village after village, resulting in Rohingyas fleeing by the hundreds of thousands into Bangladesh overnight.[23] Most recent statistics illustrate that nearly one million refugees live across 34 camps in Bangladesh, across two Upazilas (an

[18] Maung Zarni and Alice Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya' 23(3) (2014) Pacific Rim Law & Policy Journal 681
[19] ibid
[20] Nyi Nyi Kyaw, 'Unpacking the Presumed Statelessness of Rohingyas' 15(3) (2017) Journal of Immigrant and Refugee Studies 269
[21] Natalie Brinham, 'The conveniently forgotten human rights of the Rohingya' 41 (2012) Forced Migration Review 40
[22] Minority Rights Group International, 'World Directory of Minorities and Indigenous Peoples - Myanmar/Burma: Muslims and Rohingya' (2017) Available at: https://www.refworld.org/docid/49749cdcc.html accessed 10 October 2020
[23] ibid

administrative rung below 'district').[24] As Bangladesh is not a party to the 1951 Refugee Convention, concerns arise over the rights of the Rohingya as refugees. Moreover, Bangladesh's tenuous relationship with Burma accounts for a large proportion of her reluctance to extend too much assistance *vis-a-vis* the Rohingya.[25] After all, the 2017 exodus was the third major flight in thirty years. Further, Bangladesh is already in a fairly precarious position economically, and the additional responsibility of nearly one million Rohingyas does not help. The rest of Southeast Asia, some of whom also house substantial numbers of Rohingya refugees in a legal vacuum lack the geopolitical will to assert any real pressure upon Burma. There are no mincing words: the situation is dire. Professor Goodwin-Gill summarises it appropriately:

> The case of the Rohingya, in turn, reminds us of the complex world in which we live. At the root is the issue of statelessness, not just in the formal sense of being denied nationality in law, but in the day-to-day sense of being denied an identity in the land of one's birth and upbringing. But that "root", too, is contested, and religious difference joins with the politics of exclusion. In supporting Myanmar's 'democratic transition' while calling for accountability for atrocities, clearly more than top-down diplomacy will be required.[26]

The need for action is more urgent than ever. That includes reinvigorated academic inquiry, for it 'can strengthen understanding of the law and therefore its interpretation and application'[27] such that academics and practitioners alike are better-informed whilst attempting to change the status quo for the better.

1.1 Research Questions

This thesis examines the extent to which the international refugee law regime is able to protect the rights of refugees in a region that does not subscribe to the main tenets of the

[24] UNOCHA, 'Rohingya Refugee Crisis' Available at: https://www.unocha.org/rohingya-refugee-crisis accessed 18 April 2019
[25] K. A. Naqshbandi, 'The Stateless People' *SouthAsia* (28 February 2017) Available at: https://www.pressreader.com/pakistan/southasia/20170228/281625305058564 accessed 11 October 2020
[26] Guy S Goodwin-Gill, '2017: The Year in Review' (n 13), 3
[27] Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2014) 25(4) International Journal of Refugee Law 651

regime, and the forms that the available legal protection takes. To achieve that end, I analyse the 2017 Rohingya crisis in light of the role of the international refugee law regime as it applies in Southeast Asia. I argue that the only available form of legal protection for refugees in the region is the customary international law application of *non-refoulement*. The principle of *non-refoulement* has achieved customary status and is legally binding upon all states whether or not they are party to the 1951 Refugee Convention. Specifically, the thesis examines how *opinio juris* and state practice has been established. Additionally, the thesis also investigates scholarly engagement on the topic of refugee protection in Southeast Asia. This is in order to demonstrate the claim that alternative regulatory frameworks, such as human rights or humanitarian mechanisms are insufficient placeholders for a specialised regime of protection of refugees in the long term. The thesis does not purport to prescribe solutions for the legal discrepancies in the region. Rather, it seeks to understand and identify the efficacy of the international refugee law regime as it applies to states that are not bound by treaty obligations towards refugees.

The thesis considers the application of the law within a political context through a combination of literature review and legal analysis of treaty law and customary international law. It is mainly an exploratory study, with the intention to problematise the applicability of the international refugee law regime in Southeast Asia. To achieve these aims, the research was conducted based on primary and secondary sources and additional academic material gathered from the collection of databases available through the University of Helsinki's library, both on site and virtually.

1.2 Structure

The thesis consists of an Introduction, three main Chapters, and a Conclusion. The structure of the study is as follows: Chapter I will provide a comprehensive background to the international refugee regime. The chapter follows the development of the main institutions and instruments under the regime. It also sets out the premise of the 1951 Refugee Convention and Protocol. Chapter I also introduces the principle of *non-refoulement* and its status as customary international law generally. Next, Chapter II will elaborate on the historical relationship between Burma and the Rohingya. First, the chapter details the political history of Burma, prior to British colonisation, and its transition into Myanmar and the

position of the current regime. It discusses the status of the Rohingya people before, during, and after British colonisation. In particular, the chapter highlights the Rohingya's various waves of departure from Burma over the past three decades. Chapter II also addresses the Rohingya's statelessness, and considers how it has contributed to their refugeehood. Chapters I and II are primarily descriptive. Next, Chapter III analyses the relationship between international refugee law and the Rohingya. The chapter focuses on the 2017 refugee crisis. First, the chapter develops on the status of refugee protection in Southeast Asia generally, and provides an overview of the 2017 crisis. Then, the chapter turns to studying the application of *non-refoulement* in the region, considering the fulfilment of state practice and *opinio juris* generally. Then, the chapter studies the scholarly discourse on the alternative protectionary frameworks applicable in the region, and examines whether these purported options suffice in protecting refugees. Finally, the thesis concludes that while these alternative frameworks offer complementary protection for refugees, there is a pressing need to develop a holistic and comprehensive legal framework in the region specifically aimed at the protection of refugees.

Chapter I: The International Refugee Law Regime

This chapter provides a historical overview of the contemporary international refugee regime. The first section describes and delimits the scope of the international refugee law regime that will be relevant for discussions in the ensuing chapters on the Rohingya crisis. It provides a condensed background to the international refugee institutions from the end of the First World War, until the creation of the UNHCR. The UNHCR is the cornerstone UN agency responsible for the development, governance, and advocacy of refugee protection today. The next section provides the status of the refugee according to the 1951 Refugee Convention and 1967 Optional Protocol. Finally, the chapter establishes the principle of *non-refoulement* under international law generally: firstly, pursuant to Article 33 of the said convention, and secondly, the customary status it enjoys.

1.0 A Brief History of the International Refugee Law Regime

Seeking refuge across jurisdictions is not a new phenomenon. In his (admittedly Eurocentric) historiography of the international refugee protection, Orchard provides evidence of coordinated efforts to offer protection to refugees fleeing religious persecution tracing back to the flight of the Huegenots, from as early as 1685.[28] However, this thesis is concerned with the contemporary international refugee law regime and its applicability during current refugee crises. It is therefore useful to borrow Glen Peterson's definition, which describes the international refugee law regime as:

> [T]he collective ensemble of international agreements, conventions, and protocols as well as the institutions, policies, and practices that have appeared since the 1920s to define, address, and ultimately, it is hoped by their creators, to resolve the problem of human displacement across national borders.[29]

More specifically, this thesis intends to study the applicability of the regime in a region that largely distances itself from committing to legal obligations towards the protection of

[28] Phil Orchard, 'The Dawn of International Refugee Protection: States, Tacit Cooperation and Non-Extradition' (2016) 30 (2) Journal of Refugee Studies 282
[29] Glen Peterson, 'Sovereignty, International Law, and the Uneven Development of the International Refugee Regime' (2015) 49 Modern Asian Studies 439

refugees. Thus, it is first necessary to understand the development of the regime itself, how it works, and what it avails for the refugee under public international law generally.

1.1 Pre-UNHCR: Who Managed the Refugees?

Prior to World War I, states dealt with refugees in accordance with domestic legislation concerning aliens or outsiders.[30] In the years between 1920 and 1951, international refugee protection agencies went through several changes before eventually developing into the UNHCR. This plants the seed of the agency under the auspices of the League of Nations.[31] Sharfman identifies the three consistently recognised norms throughout the evolution of the regime as 'asylum, assistance, and burden-sharing'.[32] Noteworthy during this metamorphosis are a few key stages: the inception of international refugee protection following World War I (1921), the development of the first international convention on the status of the refugee (1933), the birth of the International Refugee Organisation (IRO) (1946), the effects of the Cold War on refugee resettlement and finally, the formation of the UNHCR and its Statute (1950). Notably, comprehensive developments in the legal protection of refugees predate the Universal Declaration of Human Rights (UDHR). Combined with the precarious political and economic contexts of Europe at the time, proper forms of legal protection for refugees were 'difficult to secure'.[33]

Mass movements of people in need of refuge under the current regime have been associated with the Ottoman Empire's now-defining treatment of the Armenians. This is in tandem with several other conflicts surrounding the First World War (including, but not limited to the Balkans Wars and the Greco-Turkish War).[34] Ultimately, it was after the culmination of the Bolshevik revolution, which left the international community with approximately 800,000 Russian refugees dispersed across Europe,[35] that the unprotected refugee became a truly international problem in need of an international solution. In 1921,

[30] Kugelmann, (n 8) para.18
[31] Gilbert Jaegar, 'On the History of the International Protection of Refugees' (2001) 83 (843) International Review of the Red Cross 727
[32] Daphna Sharfman, *Refugees, Human Rights and Realpolitik: The Clandestine Immigration of Jewish Refugees from Italy to Palestine, 1945-1948* (Routledge 2019) 9
[33] Ibid 10
[34] Jaegar, (n 31) 727
[35] Guy S. Goodwin-Gill and Jane McAdam, (n 6) 421

Gustave Ador, then-President of the International Committee of the Red Cross (ICRC), addressed the Council of the League of Nations (LoN) and brought the insecurity of the Russian refugees to the fore. The Russian refugees included former prisoners of war, civilians fleeing the Revolution, as well as former revolutionaries,[36] many of whom were stateless and had no identity documents.[37] The Council listened, and decided to appoint a temporary High Commissioner for Russian Refugees, eventually entrusting Dr. Fridtojf Nansen with the task.[38] Initially, the agency's mandate was limited to assisting Russian refugees only, on issues ranging from defining the legal status of the Russian refugees, to organising resettlements to potential host countries, or repatriations, as well as providing needs-based relief in cooperation with private humanitarian organisations.[39] Slowly, the mandate and protection radius increased to cover other interest groups, as more and more refugees trickled out from inhospitable environments. Beginning with the Armenians, followed by the Assyrians, Assyro-Chaldeans, and Turks, who were classified as assimilated refugees.[40] An Arrangement[41] which came into force between 10 states in 1928 addressed some aspects of the role of the High Commissioner's agency, as well as the legal status of the applicable refugees. The expanding mandate was indicative that refugees were not the temporary result of a crisis, but a nebulous reality which was increasingly in need of clarity to ensure their effective management. Yielding to public pressure from resettled refugees and international agencies,[42] for the first time, states undertook actual international legal obligations in 1933 by ratifying the Convention relating to the International Status of Refugees.[43] The Convention would prove to be seminal in the development of international refugee law, a large extent due to its service as a model for the eventual 1951 Convention,[44] as well as being the first instance of codification of the principle of *non-refoulement*, enshrined in its Article 3. However, the treaty was still limited in its applicability, only protecting 'those refugees already recognized in the previous Arrangements'.[45]

[36] ibid
[37] Sharfman, (n 32) 10
[38] Gill and McAdam, (n 6) 421
[39] Ibid, 422
[40] Jaegar, (n 31) 730
[41] Arrangement Relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928: 89 LNTS No. 2005
[42] Sharfman, (n 32) 11
[43] Convention Relating to the International Status of Refugees, 28 October 1933:89 LNTS No. 2005 ('1933 Refugee Status Convention')
[44] Jaegar, (n 31) 729
[45] Sharfman (n 32) 11

Throughout the interwar period, coordinated efforts by way of creating and dissolving several bespoke institutions to handle European refugee waves continued: upon Nansen's death, came the Nansen International Office for Refugees (1931), followed by the High Commissioner's Office for Refugees Coming From Germany (1933), the Office of the High Commissioner of the League of Nations for Refugees (1938), and the Intergovernmental Committee on Refugees (1938).

These formations, while at times politically motivated, fulfilled the critical humanitarian and protective needs of the European refugees at the time. Additionally, they paved the way for the next crucial juncture in the development of the international refugee law regime in a post-UN global community: the IRO. This was a follow-up from its immediate predecessor, the Allies-led United Nations Relief and Rehabilitation Administration (UNRRA), which was designed to provide humanitarian relief particularly to those willing to repatriate.[46] Interestingly, although up until this point, the international refugee regime had been quite restricted to European waters, the UNRRA did do its part to assist Chinese refugees during their tenure.[47] Granted, as the Chinese refugees in question were fleeing a communist regime, combined with the fact that the United States was the frontrunner of the UNRRA, it is not difficult to piece together the motivation behind the special attention received by the Chinese refugees from the UNRRA. Peterson points out the politics behind the regime:

> Throughout the Cold War, conventional wisdom in the West was that communist states produced refugees and Western states provided sanctuary to those fleeing communist persecution; some have even suggested that the persecution-centred definition of refugee status in the 1951 UN Convention Relating to the Status of Refugees was crafted specifically to stigmatize communist states.[48]

In fact, even the cornerstone notion of *non-refoulement* and the emphasis on voluntary repatriation were included in the 1951 Convention in response to the Allied powers forcibly repatriating 'Soviet citizens who had fought alongside the Germans' to Communist Russia.[49]

[46] Goodwin-Gill and McAdam, (n 6) 423
[47] Peterson (n 29) 459
[48] ibid 444
[49] Jeff Crisp and Katy Long, 'Safe and Voluntary Refugee Repatriation: From Principle to Practice' (2016) 4 Journal on Migration and Human Security 141

Their inclusion was intended to curb the repatriation of refugees into communist states without their consent.[50] As Loescher notes, 'at the height of the Cold War, refugee policy was simply considered too important by American leaders to permit the United Nations to control'.[51]

Indeed, World War II had left upwards of a million refugees in need of protection in Europe. Concurrently, however, the partition of India and Pakistan alone resulted in approximately fifteen million people similarly uprooted and in need of international protection,[52] not to mention the refugee outflows generated from the Burmese independence six months later. In those instances, the impetus to organise a concerted effort to provide protection there seemed to be lacking both within the UNRRA, as well as the IRO. This thesis will not delve into the discussion on the colonialism and the origins of refugee protection in Southeast Asia beyond its role in the political history of Burma (See Chapter II). However, I do acknowledge that colonial undertones are a cogent part of the international refugee regime narrative, and has informed many former colonies' decisions against signing the 1951 Refugee Convention. Regarding the lack of assistance afforded to non-European, non-Communist refugees under the auspices of the UNRRA, the void in protection was addressed by Peterson, who notes that 'Colonial states, whatever they did, did not produce "refugees" in international law'.[53]

Nevertheless, the IRO was initially established as a Preparatory Commission in December 1946 through Resolution 62(I) of the UN General Assembly (UNGA), and became fully functional as the IRO from August 1948.[54] Unlike many of its preceding agencies, it was not known for its work as a humanitarian relief agency, or even rehabilitation and repatriation, in spite of being defined as part of its functions in its Constitution.[55] Instead, during its lifetime, it gained notoriety for the strategic resettlement[56] of mainly Central European refugees in 'the United States, Australia, Western Europe, Israel, Canada, and Latin

[50] ibid
[51] Gil Loescher, 'The UNHCR and World Politics: State Interests vs. Institutional Autonomy' (2001) 35 International Migration Review 33
[52] Peter Gatrell, *The Making of the Modern Refugee,* (1st edn, OUP 2013) 152
[53] Peterson, (n 29) 463
[54] Jaegar (n 31) 731
[55] Goodwin-Gill and McAdam, (n 6) 424
[56] Dennis Gallagher, 'The Evolution of the International Refugee System' (1989) 23 International Migration Review 579

America'.[57] While resettlement is not inherently a cause for concern, Goodwin-Gill and McAdam draw attention to the fact that the UN itself was wary and often critical of the IRO's activities which were 'designed to meet labour demands and to provide shelter for expatriate organizations hatching plots and threatening world peace'.[58] In essence, the UN was concerned that resettlement efforts were being calculated to serve state interests in light of mounting East-West tensions, thereby becoming too overtly political in nature. Hence, although in theory the IRO was meeting the protectionary needs of European refugees, the General Assembly had already begun toying with the idea of establishing a successor agency[59], with a more clearly defined mandate.

As the IRO was put to rest, in its 1950 session[60] the UNGA formally adopted the proposal to establish the UNHCR, from 1 January 1951 at the same time also calling upon states to cooperate with the new agency.[61] The US had already been brewing negative Cold War sentiments with the Soviet Union at the time as the central hegemonic power within NATO and the Allies. As a result, the UNHCR's orientation remained distinctly Western.[62] The UNHCR's primary roles have been to 'protect the safety and welfare of people who have been uprooted or threatened by persecution, armed conflicts, and human rights violations'[63], as well as 'to find permanent solutions for their plight'.[64] Over the years, the activities through which it purports to fulfil its objectives has evolved to suit bespoke global challenges that have, and will, continue to produce new waves of people in need of international protection.

The first key instruments from the UNHCR were its Statute and the 1951 Convention. Initially granted a mandate of three years,[65] the Statute firstly defines a refugee under its auspices, and elaborates on the functions of the office, including 'providing international

[57] Jaegar (n 31) 732
[58] Goodwin-Gill and McAdam, (n 6) 425
[59] ibid
[60] Gallagher, (n 56)
[61] Goodwin-Gill and McAdam, (n 6) 426
[62] Gil Loescher, 'UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy' (2017) 33(1) Refuge: Canada's Journal on Refugees 77
[63] Geoff Gilbert, 'Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order' (1998) 10 International Journal of Refugee Law 349
[64] Tor Krever, 'Mopping-Up: UNHCR, Neutrality and Non-Refoulement since the Cold War' (2011) 10 Chinese Journal of International Law 587
[65] Gallagher, (n 56) 580

protection' and 'seeking permanent solutions'[66] for the problem of refugees. In particular, it singles out voluntary repatriation, assimilation and naturalisation, as well as resettlement as the long-term solutions that the UNHCR ought to be advocating.[67] Another noteworthy feature of the UNHCR Statute was Article 2: the work of the office was to be entirely non-political in nature.[68] Further, the Statute was key in prescribing the formal authority of the UNGA and the UN Economic and Social Council (ECOSOC) over the UNHCR. This concurrently legitimised its relationship with both components and established a mechanism of accountability for the office, besides leaving room for growth and development.[69] For instance, the Statute empowers the General Assembly to expand the ambit of the High Commissioner's activities, albeit not in violation of its own mandate.[70] This has proven over time to be an extremely important feature. Hence, while there are complementary regimes (such as human rights, or international human rights law) coexisting within the same legal and political space, the UNHCR undoubtedly remains at the foreground of international refugee protection and management.

As important as it is to understand *what* the role of international refugee institutions have been in protecting refugees over the years, it is even more pertinent to address *whom* it aims to protect, to be better equipped to analyse the extent to which it succeeds.

2.0 The Status of the Refugee under the International Refugee Law Regime

There is no one universally accepted legal definition of refugees under customary international law,[71] which necessarily means turning to treaty definitions for legal analysis. The caveat is that the treaty definitions are only binding upon state parties. In addition to defining a refugee, the Refugee Convention and its Protocol establishes a series of rights and corresponding duties upon Member States on the protection of refugees which cover a wide range of basic human rights. This was intended to ensure a minimum degree of

[66] UNGA, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950 Res 428 (V) ('UNHCR Statute')
[67] ibid
[68] ibid
[69] Loescher, 'UNHCR's Origins' (n 62) 78
[70] Gilbert, (n 63) 357
[71] Kugelmann, (n 8), para. 1

protection to both refugees and asylum seekers.[72] States are not obliged to necessarily *grant* asylum, nor does the Refugee Convention dictate any one system to do so, however, the rights and duties enshrined do apply 'regardless of a given state's migration policy'.[73]

2.1 The Refugee under the 1951 Convention and Protocol

The 1951 Refugee Convention and Protocol includes refugees as previously defined under international conventions and agreements, and further stipulates under Article 1(A)(2) that a refugee is someone who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[74]

The key identifiers of refugees under the 1951 Convention are (i) a causal link with political events occurring before 1 January 1951, an individual has a (ii) well-founded fear of persecution based on (iii) race, religion, nationality, political or social membership, due to which they are (iv) unable or unwilling to seek protection in said country of origin, and are therefore (v) outside of their home countries. The legal definition provided applies insofar as the Convention itself does. In practice, it is recognised for humanitarian purposes worldwide, besides being emulated with slight changes in various other regional instruments as the core descriptor of recognisable refugee status.[75] Notably, the definition of a refugee is of a declaratory nature. This means that as long as an individual meets the criteria, they qualify as a refugee. Whether or not the state whose frontiers the refugee reaches chooses to implement a formal refugee identification system according to their domestic laws does not preclude the

[72] Jeannie Rose C. Field, 'Bridging the Gap Between Refugee Rights and Reality: A Proposal for Developing International Duties in the Refugee Context' (2010) 22 International Journal of Refugee Law 525
[73] ibid
[74] UNGA Convention Relating to the Status of Refugees, 28 July 1951 UNTS 189:137
[75] Kugelmann, (n 8), para. 5

refugeehood of an individual under the Convention. Another key provision of the 1951 Refugee Convention is Article 33(1), which codifies the principle of *non-refoulement*. As *non-refoulement* is a central theme of this thesis, it will be explained in greater detail in a separate section in this chapter. Further, the application of the principle in the Southeast Asian context will follow in Chapter III. At the time of its drafting, ratifying States had the option of limiting the applicability of the Convention to refugees produced as a result of events that took place in Europe alone, in addition to the temporal limitation.[76] This option would prove to be significant in the decades to follow. Essentially, states were wary of overcommitting to indeterminate numbers of refugees in the future,[77] and the limitations served as an insurance against it. The Convention remained limited in scope until the 1960s. Then, rampant decolonisation throughout the developing world and across the African continent in particular increasingly needed to rely on international law as many newly-formed states found themselves grappling with huge numbers of refugees. At this stage, the UNGA called upon the UNHCR to aid these newer influxes. A Colloquium on the Legal Aspects of Refugee Problems was organised in Italy to address the growing concerns over the different mass refugee crises cropping up in developing regions.[78] Eventually in 1967, the General Assembly officially adopted the Protocol Relating to the Status of Refugees,[79] which effectively removed both limitations.[80] Those states which had chosen to apply the limitations prior to the adoption of the protocol were given the option of retaining them. Presently, out of 148 parties to either the Convention, Protocol, or both, only 4 states chose to do so, with Turkey expressly maintaining the geographic limitation.[81]

In the past, there was a tendency for legal instruments to define refugees in terms of persons fleeing persecution *en masse*. James Hathaway categorises three distinct phases of definition approaches between 1920 - 1950: in *juridical* terms, where the refugees as a group

[76] Goodwin-Gill and McAdam, (n 6) 36
[77] Guy S. Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, & Nando Sigona (eds.) *The Oxford Handbook of Refugee & Forced Migration Studies* (OUP 2014)
[78] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003)
[79] UNGA Protocol Relating to the Status of Refugees, 4 October 1967 UNTS 267 ('the Protocol')
[80] Andrew I Schoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century' (2015) 16 Chicago Journal of International Law 81
[81] UNHCR, 'State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (UNHCR Website, April 2015) https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html Accessed 10 October 2020

were deprived of their own states' protection, in *social* terms, whereby the refugees are a hapless consequence of the social and political occurrences, and finally in terms of the *individual*, whereby a refugee is a person seeking protection elsewhere due to a 'perceived injustice or fundamental incompatibility' with their country of origin.[82] The 1951 definition falls squarely within the third phase. The refugee status under the present convention is determined as it applies to individuals, as opposed to groups of people who cross into the territory of a state party. Of late, the Convention definition has been criticised as being outmoded and incapable of handling contemporary refugee crises. However, I would argue that the Refugee Convention is a living instrument that was drafted with the intention to stand the test of time. That it was developed under the auspices of the United Nations and entered into force at a time when the international community was optimistic and determined not to repeat the human rights catastrophes of both World Wars is crucial. Additionally, Susan Kneebone describes the establishment of the UNHCR and the Convention as 'part of a package of far-reaching human rights instruments'.[83] Indeed, as noted earlier in this Chapter, the concept of refugee protection predates the development of human rights as a regulatory framework under international law. Thus, it is only logical that since the International Bill of Rights is accepted as relevant today, so should the Refugee Convention. This is definitely not to say that the Convention definition is watertight, or could not be amended to strengthen the protection it affords refugees. Additionally, it is true that the nature and form of most refugee influxes have reverted to mostly group exoduses. Indeed, it is based on the individualistic approach that states, mostly in the global North, have been increasingly stringent in their interpretation of the definition of a refugee in response to larger influxes of refugee flows, particularly from the South.[84] However, in order to ensure the posterity of such treaties, it is prudent to advocate for a flexible and evolutionary approach in treaty interpretation.[85]

Furthermore, declaring the Convention and Protocol as obsolete is unlikely to encourage states to commit to a broader mandate under a new instrument, if such an accomplishment was even plausible. After all, attempts have already been made. While promoting the 1967 Protocol, the UNHCR championed for the Protocol to also 'enable it to

[82] James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33(2) International and Comparative Law Quarterly 348
[83] Susan Kneebone, 'Introduction: Refugees and Asylum Seekers in the International Context - Rights and Realities' in Susan Kneebone (ed.) *Refugees, Asylum Seekers, and the Rule of Law: Comparative Perspectives* (CUP 2009)
[84] Schoenholtz, (n 80) 86
[85] Field, (n 72) 512

deal with new situations of refugees *en masse'*.[86] Efforts were made to highlight the differences between individual persecution and refugee influxes as a result of generalised violence, but to no avail. However, it definitely provides for the basic tenets of defining a refugee for the purposes of international refugee law, an avenue which has since been explored regionally.

Significantly, in 1969, the Organisation of African Unity (OAU) adopted the Convention on the Specific Aspects of Refugee Problems in Africa.[87] While Article 1(1), defining who qualifies as a refugee, is identical to that of the 1951 Refugee Convention, the present treaty extends the term to include every person who, 'owing to external aggression, occupation, foreign domination, or events seriously disturbing public order'[88] is compelled to leave their home country. The addition of external forces and serious public disturbance broadens the scope of the refugee definition well beyond generalised violence and conflict.[89] The OAU Convention was contextualised to suit the needs of the African continent. As several African states were undergoing formal decolonisation at the time, the expansive legal framework reflected its political needs.[90] Additionally, the OAU Convention was progressive, as Feller points out, owing to 'it's more specific focus on solutions' as well as 'its promotion of a burden-sharing approach to refugee assistance and protection'.[91] It was an important marker for the international refugee law regime generally, as it implied two possibilities. First, the possibility to commit to a more inclusive definition of a refugee, strengthening the degree of protection available to them. Secondly, the possibility that parallel regional refugee protection mechanisms may emerge in other, developing parts of the world. However, it could also be argued that the *need* to develop alternative protection regimes indicates that international refugee law is not truly international at all. In any event, it mobilised the OAU to take control of the refugee situation across the continent, while aspiring to meet the standards of rights within the 1951 Convention.

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[86] Kneebone, (n 83) 15
[87] OAU, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 ('OAU Convention') available at https://www.refworld.org/docid/3ae6b36018.html accessed 10 October 2020
[88] Ibid, Article 1(2)
[89] Feller, (n 10) 133
[90] Ademola Abbas and Dominique Mystris, 'The African Union Legal Framework for Protecting Asylum Seekers' in Ademola Abbas and Francesca Ippolito (eds.) *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate, 2014)
[91] Feller, (n 10) 133

Inspired by the OAU Convention, and in response to mass influxes of refugees escaping protracted political and military instability,[92] the Cartagena Declaration[93] was adopted at a Colloquium in Cartagena, Colombia, in 1984. The Declaration reflected a similar approach to the OAU Convention, in that it included in its definition of a refugee the possible root causes for such exoduses, along with affirmations to end them. Effectively, this meant casting a wider net for the protection of Central American refugees. It emphasises the humanitarian aspect of refugee protection along with impressing upon States the principle of *non-refoulement*, while aspiring to adhere to international standards of protection with the 1951 Convention as a frame of reference. Additionally, it bolsters the efforts of the Inter-American human rights system in championing for the fundamental human right to seek asylum.[94] While the Declaration is not legally binding on States, in practice it has been applied by several Latin American States, as well as being incorporated into some domestic legislation.[95]

There remains a discrepancy in Asia *vis-a-vis* legally binding commitments to refugee protection, particularly within the Association of Southeast Asian Nations (ASEAN) states. Because this thesis aims to decipher the protection of Rohingya refugees under the international refugee law regime, this discussion will be tackled in more detail in Chapter III. For the purposes of this section, it is pertinent to identify the Asian equivalent to the OAU or the Cartagena Declaration. The 1966 Bangkok Principles,[96] adopted in New Delhi during the Asian-African Legal Consultative Organisation (AALCO)'s 40th Session does at least encompass the broader terms of the refugee definition in accordance with the OAU and Cartagena documents. However, they are self-described as 'declaratory and non-binding', and thereby have produced little legal effect over the years.

3.0 The Principle of Non-Refoulement

[92] Kneebone, (n 83) 16
[93] Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Cartagena Declaration on Refugees, ('Cartagena Declaration') 22 November 1984, OAS/Ser.L/V/II.66, doc.10, rev. 1 available at https://www.refworld.org/docid/3ae6b36ec.html Accessed 10 October 2020
[94] Goodwin-Gill and McAdam, (n 6) 38
[95] Kugelmann, (n 8) para. 21
[96] Asian-African Legal Consultative Organisation (AALCO), Bangkok Principles on the Status and Treatment of Refugees ('Bangkok Principles'), 31 December 1966, available at https://www.refworld.org/docid/3de5f2d52.html Accessed 10 October 2020

Although designed to protect the vulnerable, international refugee law still operates within the sphere of public international law, and is therefore subject to the same fundamental challenges. Namely, the balancing of state sovereignty and individual human rights. In the context of international refugee law, the principle of *non-refoulement* arguably impedes on state sovereignty like none other under the regime. Equally, however, it also provides the most fundamental of protections to refugees unlike any other principle under international refugee law. The highly protective stance of *non-refoulement* has prompted its inclusion in a variety of human rights treaties besides the Refugee Convention and Protocol, including under Article 3 of the Convention Against Torture (CAT)[97] and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[98]

3.1 Non-Refoulement and the 1951 Refugee Convention

> Article 33 of the 1951 Refugee Convention stipulates the following:
> No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[99]

Immediately, it is apparent why this article in particular has proven to be a source of discomfort for States time and again. The Article is binding on all States party to the 1951 Refugee Convention, and is also one of the provisions of the Convention to which no reservations are allowed.[100] Generally, the 'fundamental humanitarian character and primary importance'[101] of *non-refoulement* in the field of refugee protection is undisputed. Under the Convention and Protocol, it is understood that *non-refoulement* confers a positive obligation upon States[102] against *refoulement*. Broadly, ratifying States have never quite outright denied the existence of such a duty. Rather, States' views on *non-refoulement* over the decades have

[97] UNGA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Vol. 1465 p.85, available at https://www.refworld.org/docid/3ae6b3a94.html Accessed 15 July 2019
[98] UNGA, International Covenant on Civil and Political Rights, 16 December 1966, UNTS Vol. 999 p.171, available at https://www.refworld.org/docid/3ae6b3aa0.html Accessed 15 July 2019
[99] Article 33(1), 1951 Refugee Convention
[100] Ibid, Article 42(1)
[101] Lauterpacht and Bethlehem, (n 78) 107
[102] Christopher D. Boom, 'Beyond Persecution: A Moral Defence of Expanding Refugee Status' (2018) 30(3) International Journal of Refugee Law 512

been categorised by Goodwin-Gill and McAdam into two groups: first, general endorsements of the principle, with negligible commentary on the nature and scope of the provision, and secondly, a more particularised approach, by which States raise specific concerns and seek to present their own interpretations of the nature and limits of their duties.[103] In spite of fairly consistent rhetorical support for *non-refoulement,* States in general do shy from openly condemning other governments which are in violation of the principle.[104] Part of this reluctance may be ascribed to the fact that the Convention and Protocol does not clarify whether a ratifying State's duties extend to ensuring that refugees are not *refouled* from non-ratifying States.[105] Effectively, this blurs the lines between protection of refugees and state intervention. Further, ratifying States are unlikely to commit to or set any particular interpretation, lest they be held to the same standards in future.

However, in its second paragraph, the article does provide an exception to the principle on either the 'reasonable grounds' that the individual may pose a threat to the national security of the receiving state, or, if they have been convicted of a serious crime in their home country.[106] The exception differs from extradition, deportation, or expulsion,[107] which are formal processes involving pre-residing foreign nationals within another state's territory. Furthermore, neither international refugee law more generally, nor *non-refoulement* and the 1951 Refugee Convention in particular, can be construed to give rise to a 'right *to* asylum'.[108]

According to the rules of treaty interpretation, codified in the Vienna Convention on the Law of Treaties (VCLT):

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[109]

[103] Goodwin-Gill and McAdam, (n 6) 218
[104] Ibid, 227
[105] Field, (n 72) 532
[106] 1951 Refugee Convention, 33(2)
[107] Goodwin-Gill and McAdam (n 6) 202
[108] Lauterpacht and Bethlehem, (n 78) 112
[109] UN, Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, p 331, available at https://www.refworld.org/docid/3ae6b3a10.html Accessed 18 July 2019

A key issue pertaining to the interpretation of Article 33 is whether or not *non-refoulement* protects asylum-seekers as well as refugees. The provision itself clarifies that it applies to refugees as defined under Article 1 of the Convention. As mentioned in the first section, the implementation of a formal asylum-seeking process *is* within the receiving States' prerogative. An inclusive interpretation supports the idea that the phrase prohibiting *refoulement* 'in any manner whatsoever' is indicative of the intent of the drafters. Likely, the phrasing was selected to include those who legally present themselves to the authorities at the border. Lauterpacht and Bethlehem confirm this:

> As regards rejection or non-admittance at the frontier, the 1951 Convention and international law generally do not contain a right to asylum. This does not mean, however, that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge. No other analysis, in our view, is consistent with the terms of Article 33(1).[110]

Indeed, *non-refoulement* means that States are obliged not to turn away people who arrive at their territorial borders in order to *seek* asylum. That process begins later, and in accordance with the domestic systems in place, if applicable. Even if the recipient State is unprepared to grant asylum to refugees, their subsequent conduct cannot amount to *refoulement.* Interpreted restrictively, on the other hand, Article 33 would only apply to refugees who have somehow managed to cross into the territory of the recipient State, and excludes those who are attempting to do so. States have generally supported this interpretation, often seeking to work around it, including by taking to interdicting refugee boats outside of territorial waters to deter entry.[111] However, it is established since that the status of the refugee is declaratory, and abiding by the restrictive interpretation would be inharmonious to the object and purpose of the treaty itself. Further, it does not follow logically that refugees who have managed to elude border control officers are more protected than those who enter the territories legally.[112] Goodwin-Gill and McAdam confirm this:

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[110] Lauterpacht and Bethlehem, (n 78) 113
[111] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011)
[112] Ibid, 45

> If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is *refoulement* contrary to international law.[113]

Suffice to say, then, that *non-refoulement* lies at the core of the Convention and Protocol, and in theory, it could be perceived as the bare minimum guarantee of protection for refugees: they are not to be rejected at the border. This basic form of protection, in spite of the individualistic definition of a Convention refugee, also extends to situations of mass influx before refugee status determination is possible.[114]

3.2 *Non-refoulement* and Customary International Law

In terms of treaty law, then, there is a definite obligation upon States against *refoulement*. The area under customary international law and state practice, on the other hand, is more contested. The majority of scholars agree that *non-refoulement* is 'solidly grounded'[115] in international refugee law, including as custom. The customary nature of *non-refoulement* is especially ripe for analysis particularly within the Rohingya context, as the majority of the States within reach of the Rohingya are not bound by the Convention or Protocol. Hence, non-ratifying States' obligations under customary international law have been the first line of protection for the displaced Rohingya. For now, an overview will be provided on the custom of *non-refoulement,* and a contextual analysis following in Chapter III.

Article 38 of the International Court of Justice's Statute (ICJ) defines international custom as 'evidence of a general practice accepted as law'[116] as one of the four sources of international law. The two elements, (i) widespread state practice, and (ii) *opinio juris*, were identified by the ICJ in the *North Sea Continental Shelf Cases,*[117] where the Court stated that

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[113] Goodwin-Gill & McAdam, (n 6) 233
[114] ibid
[115] Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23(3) International Journal of Refugee Law 443
[116] United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38(1)(b), available at https://www.refworld.org/docid/3deb4b9c0.html Accessed 10 October 2020
[117] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* ICJ Reports 1969 p.3

actions by States must not only amount to a settled practice, but also that the practice must stem from a belief that such a legal obligation exists. In terms of *non-refoulement*, States have tended to exhibit a duality in rhetoric and action. While maintaining 'a position of respect and commitment'[118] for the principle, States, more often than not, channel their energies into classifying the removal or return of refugees from their territories as anything but *refoulement*.[119] A recurring example in Southeast Asia in particular is Thailand. Over the years, Thailand's military government has pledged their commitment to the principle of *non-refoulement,* even reaffirming their stance at the United Nations Leaders' Summit on Refugees in 2016.[120] However, during the 2017 Rohingya exodus, Thailand's Internal Security Operations Command, led by the Prime Minister, Prayut Chan-o-Cha, promptly announced a three-step action plan, which would begin with intercepting Rohingya boats 'that come too close to the Thai coast'.[121] Regardless of whether or not interception at sea classifies as *refoulement*, it can be reasonably noted that Thailand's *behaviour* seems to be at odds with its rhetoric. The nature of interception at sea will not be discussed in this thesis, as it is a dispute that has been studied on its own merits by many scholars at length. A deeper look into state practice in the Southeast region will be addressed in Chapter III. Assuming for argument's sake interception at sea can be seen as *refoulement*, or at the very least as hostile to the main humanitarian undercurrents of the principle. The Thai example suffices to show that inconsistent State behaviour does not, however, preclude the fact that the same States believe that there is such a custom, indeed, it proves the ICJ's reasoning in *Nicaragua*:

> If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [122]

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[118] Goodwin-Gill and McAdam, (n 6) 228
[119] ibid
[120] Amnesty International, 'Thailand: Act on commitments to prevent refoulement' (Public Statement, 13 November 2017) available at https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5a0d4bc26&skip=0&query=refoulement&coi=THA&searchin=fulltext&sort=date Accessed 10 October 2020
[121] Sunai Phasuk, 'Thailand Needs to Stop Inhumane Navy 'Push-Backs'' *Bangkok Post*, (22 September 2017) Available at https://www.hrw.org/news/2017/09/22/thailand-needs-stop-inhumane-navy-push-backs Accessed 10 October 2020
[122] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) ICJ Reports 1986 p.14, Gen. List 70

Additionally, it has been noted in scholarship that because a majority of Southeast Asian states, even ones not party to the 1951 Refugee Convention, have ratified either CAT or ICCPR. Since both of these instruments contain some form of *non-refoulement* provisions, the principle has established a 'normative status under international law'.[123] There are several versions of the principle that have been articulated in different treaties, according to the specialised vernacular of each treaty regime. Lauterpacht and Bethlehem confirm that states that are not party to the Refugee Convention are not exempted from applying this principle: 'All states will be bound by such customary international legal obligations as exist in respect of refugees'.[124]

It appears that when it comes to the customary status of *non-refoulement,* the custom itself seems to be ingrained in the international psyche. State practice, however, leaves a lot to be desired when it comes to adhering to the rule they all somewhat agree exists. Sceptics may posit that if the development of custom amongst States may stem, even partially, 'on what they say to do',[125] as opposed to observing actual conduct upholding the rule, then the rule in question may lose its efficacy. Particularly, in terms of the protection of Rohingya refugees within the ASEAN context, *non-refoulement* plays a crucial role in holding non-ratifying States accountable to fundamental international refugee protection standards.

[123] Dabiru Sridhar Patnaik and Nizamuddin Ahmad Siddiqui, 'Problems of Refugee Protection in International Law: An Assessment Through the Rohingya Refugee Crisis in India' (2018) 14(1) Socio-Legal Review 1
[124] Lauterpacht and Bethlehem (n 78) 140
[125] Jan Klabbers, *International Law* (CUP 2013) 32

Chapter II: Between Burma to Myanmar, and the Flight of the Rohingya

In this chapter, I will attempt to detail the political history of Burma. The primary aim of the chapter is to contextualise the declining status of the Rohingya community in their home country, and the multiple waves of forced displacement as a result. Additionally, identifying the brutal oppression of the Rohingya community is an important step in recognising the gravity of their vulnerability as refugees in Southeast Asia. It ought to be noted that the politics of Burma as a whole is extremely complex with highly contested narratives. Hence, the version submitted in this thesis is necessarily simplified, but without sacrificing key episodes which have had a causal impact on the state today, particularly for the Rohingya. An auxiliary aim of this chapter is to show that Burmese antagonism of the Rohingya is not new, rather, that it has roots deep in Burma's colonial past.

Section 1.0 provides a general account of Burma's political transition from clusters of independent kingdoms, follows its journey to independence from colonial powers, its deluge into an authoritarian regime, and finally, to its current form: a democratically elected government. In the next section, I will offer a background to the Rohingya ethnic group by outlining the two prevalent and competing narratives commonly posited by pro- and anti-Rohingya factions. Section 3.0 in turn will account the different waves of violence and forced displacement of the Rohingya and maps the Rohingya's descend into statelessness following the first major exodus in 1978. The section then highlights the mass movements of 1992, 2012, and most recently, the ongoing crisis of 2017.

1.0 The Political Backdrop of Burma

Burma is situated in Southeast Asia, bordering India and Bangladesh to the West, China to the North, and Thailand and Laos to the East.[126] It is one of the most ethnically diverse countries in the world, with 135 indigenous ethnic groups recognised by the state.[127] The Burmans (Bamar) make up the largest ethnic nationality group at 68% of the approximately 55 million-strong population, with groups such as the Shan, Karen, Rakhine, Chin, Kachin,

[126] The Central Intelligence Agency (CIA), 'Burma' *The CIA World Factbook*, available at https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html Accessed 10 October 2020
[127] ibid

Mon, and others making up the rest.[128] Despite being extremely resource-rich, both in terms of land and human capital, ages of British colonialism and Japanese occupation, along with constant upheavals under an unscrupulous military regime marred with prolonged allegations of corruption and human rights abuses left the economy in serious decline.[129] Burma's politics resulted in its inclusion in the United Nations Least Developed Country category in 1987, albeit promisingly, it has since fulfilled the graduation criteria for the first time in 2018.[130] In any event, Burma's political history, along with its relationship with the Rohingya must be walked through to provide a holistic background for this thesis.

1.1 Before, During, and the End of Colonisation (1886 -1948)

In the centuries preceding British annexation, the general region surrounding Burma was made up of various ethnically diverse village societies[131] which were considered independent kingdoms, or 'city-states'[132] with fairly porous borders. At the peak of its pre-colonial expansion in the 16th Century, the Burmese Buddhist kingdom, which included the areas surrounding Pagan, Ava, Amarapura, Mingun, Saggaing, and Mandalay[133] took over the neighbouring Mon and Shan kingdoms, thereby establishing the ethnic Burmese stronghold in the region.[134] For the next two centuries, Burma, in part attributable to relatively limited interactions with the West, maintained its 'quasi-feudal'[135] regime in relative harmony. Eventually, however, following a bloody campaign to conquer the Arakan region by the Burmese Konbaung Dynasty[136] in 1785,[137] a great number of Arakan (now Rakhine) refugees, both Buddhists and Muslims, fled to neighbouring Chittagong, which by then was already a

[128] Justin Bell, 'The Burma Crisis: Civilian Targets Without Recourse' (2014) 1 The Indonesian Journal of International & Comparative Law 768
[129] Rachel Schairer-Vertannes, 'The Politics of Human Rights: How the World Has Failed Burma' (2001) 2(1) Asia-Pacific Journal on Human Rights and the Law 77
[130] UN Department of Economic and Social Affairs (UNDESA), 'Least Developed Country Category: Myanmar Profile' available at https://www.un.org/development/desa/dpad/least-developed-country-category-myanmar.html Accessed 10 October 2020
[131] Schairer-Vertannes, (n 129), 80
[132] CIA, (n 126), Introduction
[133] Maung Zarni and Natalie Brinham, 'Reworking the Colonial-Era Indian Peril: Myanmar's State-Directed Persecution of Rohingyas and Other Muslims' (2017) 24 Brown Journal of World Affairs 53
[134] Schairer-Vertannes, (n 129), 80
[135] ibid
[136] Jacques P. Leider, 'Politics of integration and cultures of resistance: A study of Burma's conquest and administration of Arakan (1785-1825)' in Geoff Wade (ed.) *Asian Expansions: The Historical Experiences of Polity Expansion in Asia* (Routledge 2014)
[137] Zarni and Brinham, (n 133) 56

British protectorate.[138] This conquest would prove to be the tinder for the first of the three ensuing Anglo-Burmese Wars in 1824,[139] which saw Britain take over the regions of Assam, Manipur, Arakan, and Tennasserim.[140] The second British victory in 1852 engulfed even more of the coast, and despite numerous attempts to retain its autonomy,[141] the Burmese King Thibaw's surrender and exile ultimately sealed the former Empire's fate, and Burma was officially subsumed into British India in 1886.[142]

Significantly, Britain made some unexpected decisions upon taking control of Burma. Instead of governing Burma as another Indian protectorate by establishing a different Burmese ruler on the throne, British rule was established through what has been described as 'nothing less than a complete dismantling of existing institutions of political authority'.[143] Effectively, this processed stripped the region of its Buddhist Burmese identity.[144] The potency of the colonial enterprise in Burma completely disintegrated the traditional social orders of Burmese society. Charney notes that the colonial project seriously disrupted the 'reciprocal relationships between the landed gentry and the peasants'.[145] All forms of pre-existing legal norms were replaced with British administrative laws.[146] Conventional notion of borders with the rest of the empire no longer applied. The effects of the intrusion reached far and wide, affecting not just locals in the cities, but in rural Burma as well, introducing new systems which were far more invasive than any of Burma's pre-colonial central political bodies.[147] Consequently, decades of colonial rule resulted in large waves of South Asian immigration. These migratory efforts were often subsidised by the British to fulfil their administrative and labour needs throughout the region, particularly due to the growing agricultural industry after the opening of the Suez Canal in 1869.[148] The prolific influx of Indians - both Hindus and Muslims - was grating the sentiments of the indigenous Burmese population. Particularly, unfettered immigration from the west of Burma was a frequent topic of discussion amongst the Burmese intelligentsia and political elite, whose newfound

[138] ibid
[139] Ibid, 57
[140] Thant Myint-U, *The Making of Modern Burma*, (CUP, 2001)
[141] ibid
[142] Zarni and Brinham, (n 133) 56
[143] Myint-U, (n 140) 3
[144] Schairer-Vertannes, (n 129) 81
[145] Michael W. Charney, *A History of Modern Burma*, (CUP 2009)
[146] ibid
[147] Ibid, 7
[148] Zarni and Brinham (n 133) 56

nationalism had been brewing.[149] Additionally, throughout the late 19th Century, much to their chagrin, rural Burmese folk increasingly lost agricultural land to Chettyar and other foreign moneylenders often by means of unconscionable agreements. Meanwhile, the colonial authorities took their time to respond to local complaints.[150] By the Great Depression, further economic hardships hit the native communities the hardest, thereby bolstering their distrust towards all manners of foreigners at large.[151] In addition, an increasingly common phenomenon at the time were inter-racial marriages, particularly between Buddhist women and foreign men, which was perceived as a serious threat to the posterity of Buddhism and its proposed way of life.[152] In commercial centres such as Rangoon, the Burmese felt progressively alien.[153] As a result, although by 1923 the British Empire was finally willing to concede a 'dyarchy or dual government'[154] system to the Burmese, a militant fervor for nationalism had already gripped them. This was pioneered by the *hsaya* San rebellion in late 1930; which inspired scattered uprisings throughout the region.[155]

Burmese political factions were now divided on the issue of Indian separation, some favoured the notion and others remained staunchly anti-separatist, forming alliances in opposition.[156] As the dispute did not seem likely to be resolved by the Burmese, it was determined in Parliament that the British government would intervene.[157] Accordingly, the Government of India Act 1935[158] (separately enacted for Burma as the Government of Burma Act 1935[159]) which finally established a separate constitution for Burma was approved, to be effective from 1937.[160] The new government, with its two houses of parliament and a Burmese Prime Minister equipped with his chosen cabinet would communicate directly with the separate Burma Office in London. With no Indian interloper, this development placed the Burmese in charge once again.[161] Although local nationalist movements calling for complete independence were routinely shut down by the British, particularly under the premiership of Winston Churchill, Burma's separation from India was relatively straightforward.[162]

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[149] ibid
[150] Charney, (n 145) 11
[151] Zarni and Brinham, (n 134) 57
[152] ibid
[153] Charney, (n 145) 22
[154] Schairer-Vertannes, (n 129) 81
[155] Charney, (n 145) 15
[156] Ibid, 40
[157] ibid
[158] Government of India Act 1935 (26 Geo 5 Ch 2)
[159] Government of Burma Act 1935 (26 Geo 5 Ch 3)
[160] Schairer-Vertannes, (n 129) 81
[161] ibid
[162] Charney (n 145) 47

Throughout this period young, dynamic, and Western-educated student leaders were burgeoning with Rangoon University's Student Union at the fore. Amongst them was Ko Aung San, the future father of Burmese independence.[163] Meanwhile, Japan had been gaining admiration in Southeast Asia for its chutzpah since its victory in the Russo-Japanese War of 1905, as an example of an Asian state 'that could not only adopt the best that Europe had to offer, but also use Western weaponry with success'.[164] Aung San, who realised his struggle for independence was getting little notice from the British eventually accepted Japanese patronage. To a large extent due to Britain's neglect in favour of India, Burma was rather quickly taken over by the Japanese albeit not without its share of damage, particularly in Rangoon.[165]

For all intents and purposes, the era of Japanese occupation (1942-1945) did not confer any more or less political independence than Burma's separation from India. Rather, it has been observed that between 1937-1947, 'the Burmese experienced different political arrangements under the British and the Japanese that allowed for limited self-rule, but never complete independence'.[166] What the Japanese occupation did do, however, was that 'it destroyed the illusion of Western and British invulnerability',[167] surging nationalistic ideals amongst the masses. Essentially, the British were reluctant to surrender lucrative Burmese resources and economy, and Japan, Burma's geopolitical value.[168] Adversely, Japanese presence in Burma escalated inter-ethnic tensions in Burma, as many non-Burmese minorities (including the Rohingya) sided with the Allies, sometimes even forming guerilla forces and acting in support of the British and resulting in substantial carnage.[169] Under the Japanese-controlled government, Aung San was appointed minister of defence, with Ne Win as the chief military commander of the Burma National Army (BNA), an individual who would go on to be a key player in Burmese politics.[170] Soon enough, it was apparent to the Burmese leaders that they were being used by the Japanese.[171] For instance, despite the fact that during Japanese occupation a Burmese dictator was installed as Head of State, at one point, the entirety of the Burma Executive Administration fell under the authority of the Japanese

[163] Ibid, 42
[164] Ibid, 50
[165] ibid
[166] Ibid, 46
[167] David I. Steinberg, *Burma/Myanmar: What Everyone Needs to Know* (OUP, 2013)
[168] Charney, (n 145) 46
[169] Steinberg, (n 167) 37
[170] Ibid 38
[171] Ibid

Commander-in-Chief. Meanwhile, civil liberties were severely restricted and Japanese promises of fundamental freedoms were reneged. [172] Eventually, Aung San and his followers decided to turn once again to the British, and along with Allied assistance, the Anti-Fascist People's Freedom League (AFPFL) was established to get rid of the Japanese.[173] Once that materialised in 1945, Burma, which hitherto had been ravaged by Japanese and then British campaigns, once again fell under British rule.[174] While the British Military Administration (BMA) was quickly tasked with reconstructing much of the lost infrastructure, it was increasingly evident that the British were hesitant to genuinely move towards granting independence.[175] Aung San then launched a 'constitutional struggle'[176] for freedom, temporarily bringing together Burmans and other disgruntled minorities under his leadership.[177] This eventually resulted in him leading the delegation to negotiate the 1947 Anglo-Burmese Agreement.[178] In part, India's promised independence was a useful pressure point for the Burmese leaders in their call for the same.[179] Furthermore, Aung San and several of his associates' assassinations in July 1947 by a dissatisfied Burmese politician also accelerated the process.[180] Finally, on 4 January 1948, Burma declared its independence from the British Empire.[181]

1.2 "Free" Burma to the Present (1948 - Present)

Unfortunately for the country, Burma's euphoria from finally gaining its independence was short-lived. Within a year, the country descended into 'a three-way civil war between Burmese communists, non-Burmese ethnic minorities, and the first ethnically Burmese-controlled government in Rangoon'.[182] Since Aung San's assassination, civilian politics had taken a turn for the chaotic in Burma, as various Communist insurrections struggled to square their ideologies with multiethnic political factions.[183] Tension continued to

[172] Charney, (n 145) 53
[173] Ibid 58
[174] Ibid 58
[175] Ibid 61
[176] Ibid
[177] Steinberg, (n 167) 42
[178] Charney, (n 145) 64
[179] Steinberg, (n 167) 42
[180] Ibid 43
[181] Ibid 42
[182] Zarni and Brinham, (n 133) 58
[183] Schairer-Vertannes, (n 129) 82

mount between the democratic Burmese government, made up primarily of the AFPFL[184] and the Communist Party of Burma.[185] Thus, in spite of the fact that a representative parliamentary democratic government was formed under the 1947 constitution, civilian government would only last for a little over a decade.[186] By 1958, violent outbreaks between ethnic groups engaging in armed conflict with the Burmese Armed Forces (known as the '*Tatmadaw*') were recurring throughout the country.[187] These outbreaks resulted in the formation of a temporary caretaker government to restore order in the country.[188] However, even after civilian rule was technically reinstated in 1960, General Ne Win and many key personnel continued to influence the government, until 1962. Finally, Ne Win successfully staged a *coup d'etat* and overthrew the civilian government, seizing total control of the country.[189]

As tumultuous as the periods of post-independence civilian politics were, they undoubtedly conferred a significantly higher degree of freedom and protection than any establishment since.[190] Almost immediately, the 1947 Constitution was dismantled, along with 'all elements of institutional and personal power that could invalidate or threaten the military'.[191] Instead, a Revolutionary Council with Ne Win as Chairman was set up, comprising mostly of hand-picked military officials, all vested with judicial, legislative, and executive powers.[192] The military junta's control permeated throughout every aspect of the state, including in matters of foreign affairs by way of its 'self-imposed isolation'.[193] Democracy was replaced with a hybrid military-socialist economic regime.[194] Although a misnomer, the "Burmese Way to Socialism" was marketed by the Council to be an amalgamation of so-called socialist economic policies, rooted in Marxism and 'based on popular participation, ownership, and economic planning',[195] as well as distorted Buddhist

[184] Jeremy Sarkin and Marek Pietschmann, 'Legitimate Humanitarian Intervention Under International Law in the Context of the Current Human Rights and Humanitarian Crisis in Burma (Myanmar)'' (2003) 33 Hong Kong Law Journal 371
[185] Bell, (n 128) 771
[186] Steinberg, (n 167) 41
[187] Bell, (n 128) 771
[188] Schairer-Vertannes, (n 129) 82
[189] ibid
[190] Steinberg, (n 167) 61
[191] Ibid 63
[192] Schairer-Vertannes, (n 129) 82
[193] Audrey Tan, 'Myanmar's Transitional Justice: Addressing a Country's Past in a Time of Change' (2012) 85 Southern California Law Review 1643
[194] Sarkin and Pietschmann, (n 184) 375
[195] Tan, (n 193) 1646

ideals. While in office, Ne Win also took to instituting the 'Four Cuts' policy which officially claimed to target armed ethnic rebel groups by cutting off access to food, currency, intelligence, and recruitment opportunities.[196] In reality, the draconian policy resulted in masses of civilian casualties, and even more so in property and agricultural damage.[197] In a similar vein, all political parties were outlawed save for the Burmese Socialist Programme Party (BSPP), which he helmed with the help of select military officers.[198] During this time, the freedom of expression and assembly were heavily restricted, and any inkling of dissent was labelled anti-national and aggressively suppressed.[199] Initial promises to uphold the basic tenets of human rights unravelled: The junta decided what the press was allowed to publish, what was taught at universities, and how the people of Burma, predominantly Buddhist, practiced their faith.[200]

Eventually, however, all of Burma's natural bounty and human potential could not compete with the junta's myopic policies coupled with sheer resource mismanagement as well as the corruption embedded within the regime. Consequently, the economy took a drastic hit.[201] Resentment made way for a popular student-led uprising in 1988, following two unprecedented announcements by General Ne Win: firstly, of his resignation, and secondly, of his proposal for a referendum on the return to a multi-party system.[202] The scale of the August demonstrations were huge - hundreds of thousands of people peacefully took to the streets of Rangoon in protest.[203] The military responded with unmatched brutality, and over the course of the next few days, thousands, including children, were killed at the hands of the authorities, while approximately just as many female protestors were subjected to grave sexual violence.[204] An emerging unifying voice in the cacophony was that of Aung San Suu Kyi, the enigmatic daughter of the father of Burmese independence. Although she had spent most of her adult life outside Burma, Aung San Suu Kyi had inherited 'an aura of legitimacy'[205] from her father in the eyes of the Burmese people. Amidst growing demands for accountability from the public, the military then announced a *coup* and under General Saw

[196] Bell, (n 128) 772
[197] ibid
[198] Schairer-Vertannes, (n 129) 83
[199] Ibid 83
[200] Tan, (n 193) 1646
[201] Ibid
[202] Schairer-Vertannes, (n 129) 83
[203] Bell, (n 128) 773
[204] Charney, (n 145) 149
[205] Ibid, 154

Maung, reorganised itself into the State Law and Order Restoration Council (SLORC) - later renamed the State Peace and Development Council (SPDC) in 1997 - and committed itself to completely shutting down the resistance movement.[206] The death toll by the end of September was an estimated 10,000.[207] The SLORC promised to restore peace in the country, beginning with holding national elections. The quality of the process, however, was severely compromised. The army did everything in their power to beleaguer voters across the country, and to stymie and discredit pre-election campaigns by civilian political parties, targeting the National League for Democracy (NLD) led by Aung San Suu Kyi in particular.[208] She was famously placed under house arrest by the junta in 1989, which did not hinder the NLD's landslide victory in the elections since they won more than 80% of the contested parliamentary seats a year later.[209] The SLORC refused to either acknowledge the results or hand over authority to the democratically-elected government.[210]

Between 1988 and the mid-2000s, the *Tatmadaw* ruled over Burma with an iron fist. Civil and political rights were heavily curtailed, there was no formal constitution in place, and the state's human rights record plummeted, all occurring while the army increased threefold in size.[211] Aung San Suu Kyi remained under house arrest until 1995 (despite winning the Nobel Peace Prize in 1991), and would be placed under custody twice more, between 2000-2002, and finally from 2003-2010.[212] Another major series of demonstrations in 2007 known as the Saffron Revolution, this time led by Buddhist monks were once again violently subdued by the junta.[213] It was not until 2010 that the Myanmar government finally held another round of national elections following a questionable constitutional referendum held in 2008, still rife with coercion, intimidation, and corrupt practices.[214] Notably, the 2008 constitution "reserves a quarter of legislative seats for serving military personnel, mandates direct military appointment to the executive and allocates the *Tatmadaw* a key role in many aspects of national governance".[215] The NLD boycotted these elections, which resulted in the

[206] Schairer-Vertannes, (n 129) 84
[207] ibid
[208] ibid
[209] ibid
[210] Ibid 85
[211] Tan, (n 193) 1647
[212] Elliot Higgins, 'Transitional Justice for the Persecution of the Rohingya' (2018) 42 Fordham International Law Journal 101
[213] Tan (n 193) 1647
[214] Ibid
[215] Adam Simpson, Ian Holliday, & Nicholas Farrelly, 'Myanmar Futures' in Adam Simpson, Ian Holliday, & Nicholas Farrelly (eds.) *Routledge Handbook of Contemporary Myanmar* (Routledge, 2018)

military-backed Union Solidarity and Development Party (USDP) winning three quarters of the contested legislative seats.[216] In spite of its military-heavy composition, the USDP government under President Thein Sein nevertheless began initiating political and economic policy reforms which significantly opened the country to the international community.[217] Eventually, Aung San Suu Kyi and the NLD were even allowed to rejoin civilian politics, culminating in their victory in the 2015 elections, much to the surprise of foreign observers.[218] In an effort to counter a constitutional provision which bars her premiership, the position of State Counsellor was created for Aung San Suu Kyi by the NLD, rendering her the de facto leader of the first democratically-elected civilian government in Myanmar since 1962.[219]

2.0 The Rohingya's Story

In researching this thesis, I have encountered a proliferation of scholars who agree on three identifiers of the Rohingya: a) That they look different, i.e. they are ethnically and culturally distinct from both Myanmar's Burmese majority, as well as Rakhine State's Arakanese majority; b) that they sound different, i.e. they speak what appears to be similar to the Chittagongian dialect of Bengali, as opposed to Burmese or the provincial Rakhine language; and c) that they follow a different faith, i.e. the Rohingya are mostly Muslims instead of Theravada Buddhists or Hindus.[220] Why these distinctions justify their indignity largely remains a mystery. Prior to the 2017 crisis, it is estimated that between 1-1.5 million Rohingya resided in Rakhine State, concentrated mostly within three Northern Rakhine townships - Maungdaw, Buthidang, and Rathedaung.[221] In this section, rather than painstakingly detailing the status of the Rohingya throughout the various epochs of Burmese history, I will instead highlight the two main competing narratives to the Rohingya's claim to Arakan indigeneity as highlighted in legal scholarship. Broadly, the first claim lends credence to the Rohingya's ancient ancestry, while the second ties their arrival to the British Empire. The latter also happens to be Burma's official stance on the origin of the Rohingya.

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[216] Higgins, (n 212) 105
[217] ibid
[218] ibid
[219] Shatti Hoque, 'Myanmar's Democratic Transition: Opportunity for Transitional Justice to Address the Persecution of the Rohingya' (2018) 32 Emory International Law Review 551
[220] Thomas K. Ragland, 'Burma's Rohingya in Crisis: Protection on Humanitarian Refugees under International Law' (1994) 14 Boston College Third World Law Journal 301
[221] AKM Ahsan Ullah, 'Rohingya Crisis in Myanmar: Seeking Justice for the "Stateless"' (2016) 32(3) Journal of Contemporary Criminal Justice 285

2.1 Arakan and the 'Legitimate' Rohingya

The first claim, often backed by scholars critically analysing the treatment of the Rohingya, is that Muslims have existed in Arakan for a very long time. In fact, the Rohingya are not even the only Muslim group in Burma, or indeed, within Rakhine State. They are, however, the largest Muslim community in the country.[222] Islam was introduced to the general area through the arrival of Arab and Persian traders and sailors around the 9th Century, which then organically blossomed into a settled community over the years.[223] The Arakan kingdom has always been geographically separated from the rest of Burma by a range of mountains, resulting in prolific commercial, cultural, and diplomatic relations with the Bengal Sultanate.[224] Compelling primary evidence of the Muslim imprint in Rakhine include their exodus into neighbouring Chittagong following the Burmese conquest of Arakan in 1785.[225] Further corroboration has been found in British documentation from the era, often referring to Western Burmese Muslims as native to Arakan generally.[226] Even more persuasively, Shahabuddin notes that in 'Bengali literature of the medieval period, Arakan was referred to as "Roshang"', which later evolved into "Rohang".[227] Additionally, Francis Buchanan, in his study of the various local languages in 1799, refers to the long-settled Muslims of Arakan as the "Rooinga".[228] Moreover, a consequence of Burma's inclusion into the British Indian Empire was the unfettered immigration into Burma from the rest of British India, which further diversified and blurred the distinction between diasporas. This dilution, however, caused one of the more pressing contestations of their claim in the eyes of Burmese nationalists: During World War 2, the Rohingya pledged their allegiance to the British, while the rest of Arakan and the Burmese sided with the Japanese.[229] Meanwhile, rebellions frequently broke out in Arakan calling for autonomous statehood throughout the Burmese road to independence, and in fact, armed by the British, the Muslims even approached President Muhammad Ali Jinnah to include northern Arakan into East Pakistan (now

[222] Hoque, (n 219) 553
[223] Mohammad Shahabuddin, 'Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 Asian Journal of International Law 334
[224] Ibid 348
[225] Zarni and Brinham, (n 133) 56
[226] Azlan Tajuddin, 'Statelessness and Ethnic Cleansing of the Rohingyas in Myanmar: Time for Serious International Intervention' (2018) 4(4) Journal of Asia Pacific Studies 422
[227] Shahabuddin, (n 223) 347
[228] Maung Zarni and Alice Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya' (2014) 23 Pacific Rim Law & Policy Journal 683
[229] AKM Ahsan Ullah, 'Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalisation' (2011) 9(2) Journal of Immigrant & Refugee Studies 139

Bangladesh).[230] Both of these events were viewed as deeply disloyal by the Burmese and further cemented their distrust of the community at large.

2.2 The *Tatmadaw*, Rakhine State, and the 'Illegitimate' Rohingya

Regardless of their exact origin, there is cogent empirical evidence that the contemporary Rohingya community may claim their ancestry for at least several generations, if not in antiquity.[231] Importantly, they self-identify as Rohingya: a term which the Myanmar state vehemently disavows, insisting on referring to the community as illegal Bengalis from Bangladesh as an unwanted remnant of Burma's colonial heydays.[232] The Rohingya, however, are vindicated by the international community at large, including the United Nations.[233] This is the second competing claim to the community's ancestry; one that has been almost exclusively forwarded by the *Tatmadaw* and subsequent governments, and which the state maintains to this day. Following Burmese independence, questions of race, ethnicity, religion, and different forms of minority political participation became increasingly relevant for the construction of the Burmese national identity.[234] However, for the Burmese government, especially after finally having undergone a democratic transition, to derecognise the term "Rohingya" as an illegitimate, self-referential identifier makes little sense. Especially upon closer reflection on the position of their democratic predecessors. Indeed, the Rohingya were a legitimately recognised ethnic group during the early years of Burma's independence, and were even addressed as such by the then Prime Minister U Nu in his 1954 radio address to the nation.[235] However, as addressed in Section 1.0, Burma's independence did not last long, and the country struggled to cope with rebuilding itself from the ground up. In the years that followed independence, it seems as though all of the Burmans' residual resentment towards "outsiders" intensified. General Ne Win exploited the zeitgeist upon his military takeover, encouraging nationalist and xenophobic sentiments to cement his power structures.[236] For instance, a 1964 census revealed the migration of Rakhine Muslims to other parts of Burma,

[230] Hoque, (n 219) 555
[231] Shahbuddin, (n 223) 348
[232] Nehginpao Kipgen, 'Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum' (2013) 33(2) Journal of Muslim Minority Affairs 298
[233] ibid
[234] Zarni and Cowley, (n 228) 693
[235] Ibid 695
[236] Ibid 698

which the *Tatmadaw* promptly shut down by banning Muslims from the northern Akyab district (bordering Bangladesh) from travelling, and in one township even prohibiting movement between villages.[237] Disturbingly, the military tasked the Rohingyas' non-Muslim Rakhine neighbours with enforcing the travel ban, breeding further animosity between the ethnic groups.[238] Increasingly radical measures resulted in widespread exodus of formerly recognised Burmese citizens of Indian-ancestry in particular, but the Rohingya remained.[239] The military's Islamophobic tendencies may be observed in the fact that the post-independence civilian government consistently hosted at least two Muslim cabinet members, but in the years between 1962-1995, not a single Muslim politician bore office.[240] In truth, ethnic homogeneity was and remains physically implausible in Burma, due to the sheer force of diversity. The *Tatmadaw* instead chose to co-opt Buddhism, the majority religion as the key identifier of the "Burmese" identity, thus rendering the Muslim Rohingya community the most obvious political casualty.[241] The "illegal Bengali immigrant" narrative continued to gain traction, and eventually, rhetoric was turned into law with the 1982 Citizenship Act, resulting in wave after wave of refugee influxes since then.[242]

3.0 The Status (Statelessness) and the Flight of the Rohingya

This section highlights the Rohingya community's most significant waves of departure over the past few decades. After the 1978 exodus, the Rohingya were officially rendered stateless. This section details their fall into statelessness and observes how this status has impacted their lives in Burma since the enactment of the 1982 Citizenship Act. Chickera notes that 'one of the main characteristics of the Rohingya crisis is its repetitive nature, coupled with its increasing intensity'.[243] Thus, it is prudent to recognise the increasing velocity of the crisis confronting the Rohingya within Burma, in order to underscore their need for protection under the international refugee law regime in Chapter III.

[237] Ragland, (n 220) 306
[238] Ibid
[239] Zarni and Cowley, (n 228) 702
[240] Syeda Naushin Parnini, 'The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh' (2013) 33(2) Journal of Muslim Minority Affairs 281
[241] Higgins, (n 212) 107
[242] Hoque, (n 219) 558
[243] Amal de Chickera, 'Statelessness and identity in the Rohingya refugee crisis' (2018) 73 Humanitarian Exchange 7

3.1 The 1978 Exodus and the Stateless Rohingya

The first major state-sponsored expulsion of the Rohingya took place in 1978. Officially, the objective of launching the infamous Operation *Nagamin*, or "Dragon King" campaign was to inspect the legitimacy of every resident in Burma, and to filter out illegal immigrants from bona fide citizens and lawfully documented foreigners.[244] Under the guise of conducting a census, many members of the Rohingya community had their National Registration Cards (NRCs) - a document that would later prove to be imperative in establishing their claim to citizenship - taken away prior to the operation, and never returned.[245] The campaign was one of widespread rape, torture, and murder, targeting the Muslim population at large. The Rohingya community in particular bore the brunt of the *Tatmadaw*'s intentions to drive them "back" to Bangladesh.[246] It is estimated that more than 200,000 Rohingyas fled from the persecution into Bangladesh, but were eventually unwillingly repatriated following a bilateral agreement between the two countries.[247] The 1978 departure is highly significant, because it was upon the Rohingyas' return that the *Tatmadaw* formalised their statelessness.

The 1982 Citizenship Act[248] codifies the three categories of citizenship in Burma: i) Full citizenship; ii) Associate citizenship; and iii) Naturalised citizenship. None of these categories apply to the vast majority of Rohingya.[249] Primarily, this is because the Act also lists the 8 main *recognised* 'national races' that automatically qualify for citizenship under any one of the three classes, which are further broken down into 135 ethnic groups. The Rohingya, however, are not one of the 135 accepted as native to Burma.[250] As non-citizens, the Rohingya are only eligible to hold Foreign Registration Cards (FRCs), which in reality are of no legal value, and are often rejected as proof of identity at most public institutions.[251] Additionally, the Rohingya are also subjected to an unrealistically heavy burden of proof when it comes to establishing their eligibility in order to even apply for citizenship. For

[244] Ibid
[245] Zarni and Cowley, (n 228) 701
[246] Ragland, (n 220) 307
[247] Zarni and Cowley, (n 228) 702
[248] (translated) Burma Citizenship Law, adopted 15 October 1982. Available at https://www.refworld.org/docid/3ae6b4f71b.html Accessed 10 October 2020
[249] Benjamin Zawacki, 'Defining Myanmar's "Rohingya Problem"' (2012) 20 Human Rights Brief 18
[250] Engy Abdelkader, 'The Rohingya Muslims in Myanmar: Past, Present, and Future' (2013) 15 Oregon Review of International Law 393
[251] ibid

instance, Chapter II (3) of the Citizenship Act requires that an individual must possess documents proving their ancestry in Burma prior to 1823 (before the First Anglo-Burmese War).[252] This would be a herculean task for most Rohingyas, considering that many of them have had documentation confiscated by officials over the years - assuming they are privileged enough to be able to obtain knowledge of the law and its requirements in the first place.[253]

It was following the passing of the Citizenship Act that the term Rohingya became especially politically charged,[254] as they are deemed a 'non-indigenous' racial group by the state.[255] Over the years, the Rohingya's statelessness has rendered them extremely vulnerable to arbitrary denial of human rights primarily at the hands of the Burmese army.[256] The denationalisation of the Rohingya has resulted in the Rohingya community being pushed into the northernmost districts of Rakhine State into 'security grids',[257] effectively ghettoising the community. This has allowed the state to plan and enforce extreme restrictions that affect more or less every aspect of their lives on a daily basis.[258] In 2017, the new democratic government introduced a citizenship registration initiative that would allow the 'uncounted populations' to obtain a form of nationally recognised identity documents, only if the Rohingya registered as Bengalis and stated their religion.[259] Effectively, this would curb any possibility to apply for citizenship in the future.

The anchorage of the 1982 Citizenship Act is thoroughly incompatible with international legal norms, as it has compromised the very basic tenets of human rights: The Rohingya are systemically discriminated against. They are subjected to severe travel restrictions, restrictions on marriage and cohabitation rights, often lack access to basic education and healthcare, and remain the only ethnic group in Burma who are banned from having more than two children. In addition, they are exposed to frequent random arrests,

[252] Burma Citizenship Law, (n 248)
[253] Katherine G. Southwick, 'Myanmar's Democratic Transition: Peril or Promise for the Stateless Rohingya' (2014) 19 Tilburg Law Review 261
[254] Rajika L. Shah, 'Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis' (2017) 41 Loyola of Los Angeles International and Comparative Law Review 181
[255] Abdelkader, (n 250) 396
[256] Samuel Cheung, 'Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience' (2011) 25(1) Journal of Refugee Studies 50
[257] Zarni and Cowley, (n 228) 708
[258] Ibid
[259] Nergis Canefe, 'New Faces of Statelessness: The Rohingya Exodus and Remapping of Rights' in Nasreen Chowdhury and Biswajit Mohanty (eds.) *Citizenship, Nationalism and Refugeehood of Rohingyas in Southern Asia* (Springer 2020)

forced labour, rape, religious persecution, land repossession, and extortion.[260] Burma has not signed or ratified either the Convention Relating to the Status of Stateless Persons or the Convention on the Reduction of Statelessness.[261] There is a total void of any form of domestic legal protection for the Rohingya. On the contrary, they are constantly put through extreme duress at the hands of the state, as well as by 'local ultra-nationalist Rakhine Buddhists'.[262] Zawacki describes the vicious circle of maltreatment that the Rohingya is stuck in: The Rohingya are victims of structural discrimination which has rendered them stateless, and it is their statelessness which has been used to justify further persecution by the state and its recognised citizens – in Burma, the Rohingya are lacking "the right to have rights".[263]

3.2 The 1992 and 2012 Departures

Following the second military *coup* of 1988 and NLD's landslide victory in the 1990 elections, the SLORC launched a national militarisation campaign with particular emphasis on ethnic minority and borderland areas, including the Rakhine State. Although the militarisation project affected both the Rakhinese as well as the Rohingya, it disproportionately affected the latter.[264] This time, the *Nay-Sat Kut-Kwey Ye* (NaSaKa) campaign purported to secure the border and quash a burgeoning Rohingya insurgency within Rakhine State, allegedly consisting of a few hundred members.[265] Following persistent onslaughts of violence and terror, where even fleeing Rohingyas were deliberately killed, approximately 260,000 people fled to the Cox's Bazar area in Bangladesh.[266] Plenty left for other countries in the region and beyond, including Thailand, Malaysia, Indonesia, Pakistan, Saudi Arabia, and the United Arab Emirates.[267] Further details on the scale of human rights abuses during the NaSaKa campaign are unavailable due to lack of documentation.[268] Despite the fact that government-run newspapers and information agencies used the exodus to denounce the legitimacy of the Rohingya, Burma still signed a series of agreements with

[260] Zarni and Cowley, (n 228) 708
[261] Zawacki, (n 249) 19
[262] Zarni and Cowley, (n 228) 710
[263] Zawacki, (n 249) 19
[264] Ibid 20
[265] Southwick, (n 253) 265
[266] Nyi Nyi Kyaw, 'Unpacking the Presumed Statelessness of the Rohingya' (2017) 15(3) Journal of Immigrant and Refugee Studies 269
[267] Southwick, (n 253) 265
[268] Zarni and Cowley, (n 228) 711

Bangladesh and planned the Rohingya's repatriation, initially without the UNHCR's involvement.[269] The involuntary and deeply coercive nature of the repatriations meant that Bangladesh was in breach of the *non-refoulement* principle.[270] By 1997, most of the Rohingya that had fled to Bangladesh had been returned to Burma, in spite of the latter's claims that they fled out of fear of being discovered as illegal immigrants.[271] Amidst growing international condemnation, the SLORC decided to implement the issuance of temporary identity cards known as White Cards to the Rohingya from 1995 onwards.[272] On the one hand, possession of White Cards meant that the Rohingya were allowed to participate in political life, which included forming political parties, an outcome which would eventually be declared unconstitutional following massive public outcries by Rakhine and Buddhist nationalists between 2013-2015.[273] Conversely, the state also stopped issuing birth certificates for Rohingya infants around the same time.[274] Meanwhile, the state continued to vehemently understate the scale of the exodus, insisting that the individuals in the Cox's Bazar camps were Bengalis.[275] Overall, the community remained in legal uncertainty throughout the 1990s and 2000s while the military continued to incite the masses against the Rohingya, and maintained their propaganda by urging targeted violence and discrimination with the aim to either destroy or run out the community from Burma.

The events of 2012 were a turning point for the country. Following allegations of the rape and murder of a Rakhine Buddhist woman at the hands of three Rohingya Muslim men in May 2012, hundreds of Rakhinese Buddhists formed a vigilante group and mobbed a bus transporting Muslim pilgrims.[276] Ten non-Rohingya Muslim men were forced off the bus and beaten to death by the angry mob.[277] The conflict spread like wildfire across the state, with both Rohingya and Rakhine Buddhists retaliating in what were some of the most serious sectarian violent attacks observed in decades.[278] People from both communities were killed, along with the torching of homes, mosques, and monasteries.[279] However, there is a clear

[269] Southwick, (n 253) 265
[270] Christopher Faulkner & Samuel Schiffer, 'Unwelcomed? The Effects of Statelessness on Involuntary Refugee Repatriation in Bangladesh' (2019) 108(2) The Commonwealth Journal of International Affairs 145
[271] Southwick, (n 253) 278
[272] Kyaw, (n 266) 279
[273] Ibid 280
[274] Zawacki, (n 249) 20
[275] Zarni and Cowley, (n 228) 713
[276] Hoque, (n 219) 561
[277] Kyaw, (n 266) 281
[278] Southwick, (n 253) 265
[279] Kipgen, (n 232) 300

imbalance of power in the dynamic. Actions against the Rohingya were perpetrated not just by the general public, but later, in tandem with state and military authorities actively participating in a pogrom against the Rohingya.[280] This time, the abuses that took place were the first to be extensively documented by human rights organisations from within Rakhine State, revealing the true extent of their organised persecution.[281] More than 100,000 Rohingyas were forcibly displaced within Rakhine State, and despite promising to bring the situation under control, the state authorities compounded the crisis by obstructing humanitarian aid.[282] For instance, nearly two years after the initial outbreaks, the Myanmar government banned Doctors Without Borders (MSF), which is the main healthcare provider for the Rohingya, after local radical Buddhists raided several humanitarian agencies (including UN aid agencies), claiming they disproportionately favour the Rohingya.[283] Due to such protracted denial of rights in the state, the UNHCR estimates that between 2012-2017 approximately 168,000 Rohingyas fled Burma in search for refuge in other countries.[284]

3.3 The Crisis Going On: 2017 – Present

The most recent and ongoing torrent of displacement confronting the Rohingya, which inspired this thesis, occurred in 2017. After the 2012 attacks, a group of Rohingya militants funded by a collective of Saudi Arabia-based Rohingya, formed the Arakan Rohingya Salvation Army (ARSA); formerly known as the *Harakah al-Yaqin*.[285] In August 2016, as a response to growing international pressure, the newly-elected NLD set up an international advisory opinion helmed by former UN Secretary-General Kofi Annan to propose recommendations 'to surmount the political, socio-economic, and humanitarian challenges'[286] facing Rakhine State. Two months later, ARSA launched armed attacks on three border posts along Northern Rakhine State, killing nine police officers.[287] The *Tatmadaw* then launched a four-month crackdown in the region as part of an anti-insurgency

[280] Zarni and Cowley, (n 228) 715
[281] Ibid
[282] Abdelkader, (n 250) 397
[283] Katherine Southwick, 'Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: A Call for Solutions' (2015) 68(2) Journal of International Affairs 137
[284] Vivian Tan, 'Over 168,000 Rohingya likely fled Myanmar since 2012' *UNHCR* (03 May 2017) Available at https://www.unhcr.org/news/latest/2017/5/590990ff4/168000-rohingya-likely-fled-myanmar-since-2012-unhcr-report.html Accessed 11 October 2020
[285] Hoque, (n 219) 561
[286] Higgins, (n 212) 108
[287] Ibid

campaign.[288] As part of the crackdown, while the military went around Rohingya homes seeking militants, they took it upon themselves to also rape the women, kill hundreds of men, women, and children, and burn down their houses.[289] This first wave of violence forced nearly 90,000 Rohingya to seek refuge in Bangladesh.[290] Nearly a year later, in August 2017, Kofi Annan's advisory committee delivered its final report, comprising in part of comprehensive recommendations to end the conflict in Rakhine State, which the NLD government pledged to fulfil.[291] The next day, ARSA militants launched attacks across thirty police stations and army barracks along the borders of northern Rakhine, resulting in several deaths.[292] Immediately, the army retaliated ferociously, and with the support of Buddhist militia, the Burmese security forces commenced a 'clearance operation' across the Rohingya security grids, forcing upwards of 300,000 people to flee over the span of a few weeks.[293] The scale and gravity of the army's response prompted the UN High Commissioner for Human Rights to describe the situation as "a textbook example of ethnic cleansing".[294]At least 6,700 Rohingya, including around 730 children under the age of five were killed in the first month of the conflict.[295] Further, evidentiary satellite imagery, video recordings on the ground, as well as interviews conducted with the survivors all show that the *Tatmadaw* organised and carried out a mass scorched-earth campaign across 80 of the Rohingya settlements along northern Rakhine.[296] Notably, many of the torchings took place after Aung San Suu Kyi stated that official security operations had ceased.[297]

According to Human Rights Watch, by the end of 2018, almost one million Rohingya refugees precariously remained in squalid, overcrowded and under-resourced camps in Bangladesh.[298] Security forces in Burma continued to commit human rights abuses against the

[288] Hoque, (n 219) 562
[289] Ibid
[290] Ibid
[291] Higgins, (n 212) 109
[292] Ibid
[293] Shah, (n 254) 181
[294] Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, *Opening Statement* 'Darker and more dangerous: High Commissioner updates the Human Rights Council on Human Rights Issues in 40 Countries' (11 September 2017) Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E Accessed 14 October 2019
[295] Higgins, (n 212) 109
[296] Amnesty International, 'Myanmar: scorched-earth campaign fuels ethnic cleansing of Rohingya from Rakhine State' (14 September 2017) Available at https://www.amnesty.org/en/latest/news/2017/09/myanmar-scorched-earth-campaign-fuels-ethnic-cleansing-of-rohingya-from-rakhine-state/ Accessed 11 October 2020
[297] Higgins, (n 212) 110
[298] Human Rights Watch, 'World Report 2019: Myanmar, Events of 2018' Available at https://www.hrw.org/world-report/2019/country-chapters/burma accessed 10 October 2020

few remaining Rohingya over the next two years.[299] Throughout all of the devastation, and in spite of overwhelming evidence to support the allegations, the *Tatmadaw* has been steadfast in maintaining its complete innocence. On the other hand, it has also 'denied access to independent investigators and strictly limits access for aid agencies'.[300] Meanwhile, the lack of strong leadership demonstrated by Aung San Suu Kyi has subjected her to widespread criticism from the international community. Generally, she has been reticent to discuss the situation in detail, and when she has addressed it publicly, she has grossly understated not only the extent of the crisis, but the role of the *Tatmadaw* in the crisis as well.[301]

From this chapter, it can be deduced that there are two distinct crises confronting the Rohingya community. In Burma, their crisis pertains to citizenship, fundamental human rights, and abuse at the hands of the military regime as well as the majoritarian Islamophobia. In response to their prolonged persecution, the Rohingya have, as discussed, fled for their lives on several occasions. Their departures into alien territories in the region exposes the second crisis confronting the community. The Rohingya are frequently caught between a rock and a hard place. Over the decades, in an effort to dissuade the Rohingya from entering their territory, Bangladesh's strategy 'has been literally to fortify its border with Myanmar'.[302] Of course, Burma has responded in kind as a show of strength to the Bangladeshi troops should they attempt to push the Rohingya back.[303] In all of this, the Rohingya suffer greatly. Clearly, they have no rights as residents or citizens of Burma. As refugees, what are the forms of protection that the Rohingya can expect to rely on under the international refugee law regime in Southeast Asia? The discussion will be developed in the next Chapter. Considering the intricacies of the Burmese-Rohingya relationship, this chapter enables the reader to bear in mind how important the role of the international refugee law regime is to ensure the Rohingya's dignity and protection while they await genuine reform to take place in Burma. Regardless, three years later, both crises remain unsolved while nearly 800,000 Rohingya languish in the void between statelessness and refugeehood.[304]

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[299] Ibid
[300] Higgins, (n 212) 110
[301] Meenakshi Ganguly, 'Engaging in "Whataboutery" Instead of Protecting Rights' (2017) 24 Brown Journal of World Affairs 39
[302] Jatswan S. Sidhu and Syeeda Naushin Parnini, 'International Responses to Human Rights Violations in Myanmar: The Case of the Rohingya' (2011) 7 Journal of International Studies 119
[303] Ibid 124
[304] Phil Robertson, 'Two Years On: No Home for the Rohingya' *Asia Times* (28 August 2019) Available at https://www.asiatimes.com/2019/08/opinion/two-years-on-no-home-for-the-rohingya/ accessed 10 October 2020

Chapter III: Legal Protection for the Rohingya in Crisis

Finally, this chapter will turn to a discussion on analysing the form and extent of the legal protection available for the Rohingya refugees. The refugee crisis is ongoing in a region that disavows the pivotal features of the international refugee regime at large. None of the states where the displaced Rohingya are currently in have signed the 1951 Refugee Convention. I submit that the only form of legal protection available to the Rohingya under the refugee regime is the principle of *non-refoulement*. I make this inference primarily based on the customary law status of *non-refoulement*. Further, I examine whether relying on alternative regulatory frameworks (such as human rights law or humanitarian law) and methods confer a comparable degree of protection as a specialised treaty on refugee protection would.

The scope of the chapter is limited to the ongoing 2017 wave of departure. In Section 1.0, the chapter first elucidates further on the status of refugee protection in Southeast Asia from Chapter I. This is followed by an overview of how the Rohingya were managed by Bangladesh after their departure in 2017. In the next section, the chapter isolates the most widely recognised element of the international refugee regime in the region, namely, the principle of *non-refoulement*, and establishes fulfilment of state practice and *opinio juris*. Here, I also examine the scholarly contributions on the topic of refugee protection in Southeast Asia. Specifically, the thesis considers scholarship which propose relying on alternative protectionary mechanisms for refugees in the region. I suggest that the pre-existing human rights and humanitarian instruments that include refugees within the scope of its own mandates offer insufficient protection for refugees in the region. Finally, the chapter concludes by establishing that the binding nature of customary law has rendered *non-refoulement* the only form of positive legal protection afforded to the Rohingya in Southeast Asia.

1.0 The Current Status of Refugee Protection in Southeast Asia

It is no secret that the vast majority of states in Southeast Asia have categorically rejected and refused to partake in the mechanics of the international refugee

regime from the very beginning.[305] Barring the Philippines, Cambodia, and Timor-Leste, none of the states in the region have ratified the 1951 Convention and Protocol.[306] The practical reality, however, remains that as of 2019, Asia and the Pacific is hosting approximately 3.5 million refugees.[307] 1.1 million of them are Rohingya originating from Burma and primarily contained across Bangladesh, Malaysia, and Thailand.[308] Hitherto, positioning itself outside of the international refugee regime has neither stopped the creation of refugee flows, nor has it hindered the refugees from fleeing for their lives to non-ratifying countries.[309] However, as the legal protection of refugees in Southeast Asia is virtually non-existent, this has resulted in completely arbitrary refugee management systems. Usually, these management systems are introduced by states on an *ad hoc* basis and that 'have not been mediated by formal legal obligations'.[310] According to Mutaqin, the lack of a comprehensive regional framework leave 'most of them with a palliative safeguard based on something less powerful and less certain than the law'[311] and certainly at the state's complete discretion. As far as the Rohingya are concerned, apart from non-adherence to the 1951 Convention and Protocol, none of the major recipient states, including Bangladesh,[312] Malaysia, Thailand, and Indonesia have any domestic legislation in place specifically addressing the protection of refugees and asylum-seekers.[313] Additionally, the lack of a regional system has also encumbered the efforts of international and non-profit organisations from effectively carrying out their humanitarian assistance efforts. Often, this means leaving a serious dearth of resources for the already disenfranchised refugees. For instance, the UNHCR is mandated to conduct Refugee Status Determination (RSD) in countries that do not have domestic asylum management processes.[314] However, this can be challenging to execute in practice, as the extent to which states choose to cooperate with the UNHCR is essentially arbitrary. As summarised by Choi:

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[305] Sara E. Davies, 'The Asian Rejection?: International Refugee Law in Asia' (2006) 52(4) Australian Journal of Politics and History 562
[306] Kirsten McConnahie, 'Forced Migration in South-East Asia and East Asia' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds.), *The Oxford Handbook of Forced Migration Studies* (OUP 2014)
[307] UNHCR, 'Asia and the Pacific', available at https://www.unhcr.org/asia-and-the-pacific.html accessed 15 July 2020
[308] UNHCR, 'South East Asia: Year End Report', available at https://reporting.unhcr.org/node/39 accessed 15 July 2020
[309] Guy S. Goodwin-Gill, 'The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region' (2018) 30(4) International Journal of Refugee Law 674
[310] McConnahie, (n 306), p 1.
[311] Zezen Zainal Mutaqin, 'The Rohingya Refugee Crisis and Human Rights: What Should ASEAN Do?' (2018) 19 Asia-Pacific Journal on Human Rights and the Law 1
[312] Goodwin-Gill, 'The Global Compacts' (n 309) 675.
[313] Tamara Tubakovic, 'The failure of regional refugee protection and responsibility sharing: Policy neglect in the EU and ASEAN' (2019) 28(2) Asian and Pacific Migration Journal 183
[314] Francesca Albanese, 'Palestinian Refugees in South East Asia: New Frontiers of a 70-Year Exile' in Ardi Imseis (ed.) *The Palestine Yearbook of International Law* (Brill Nijhoff, 2017)

> In sum, most Asian states have crucially important gaps between the extent of Institutionalization and that of implementation of the international refugee laws because most of them exploit the refugee policy without institutionalization and the remaining signatory states avoid actual implementation despite institutionalization.[315]

Having established the narrative of the events leading up to the initial waves of departure in Chapter II, in this section, I follow up on the Rohingya refugee's journey upon reaching Bangladesh, the state of first contact. In the early months of the crisis, (August 2017 onwards), in spite of its own issues, the Bangladeshi government had received the refugees and allowed them to cross their borders.[316] Granted, Bangladesh explicitly made it known that they were allowing the Rohingya into their territory only on humanitarian grounds.[317] In fact, Bangladesh has taken great efforts to distance the Rohingya ethnic group from Bangladeshis - while it acknowledges the geographic and social overlap between the communities, it identifies the Rohingya 'as "Forcibly Displaced Myanmar Nationals - FDMN" and not as "Rohingya" or "refugees"'.[318]

This is an important distinction. As a concept, there is no single legal definition of 'forcibly displaced' or 'forced displacement' under international law. International organisations, scholars, and states all tend to offer their own definitions of forcibly displaced persons. For instance, the UNHCR includes refugees, internally displaced persons (IDPs) and asylum-seekers within the scope of 'forced displacement'.[319] Meanwhile, scholarship has provided a more expansive definition, categorising the causes of displacement to include conflict-related displacement, development-related displacement, displacement related to systemic human rights violations, environmental-related displacement, and displacement related to other circumstances.[320] By labelling the Rohingya thus, firstly, the Bangladeshi government distinguishes its own population from the Rohingya. Considering, on the other

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[315] Won Geun Choi, 'Asian Civil Society and Reconfiguration of Refugee Protection in Asia' (2019) 20 Human Rights Review 161
[316] Stefan Bepler, 'The Rohingya conflict: Genesis, current situation and geopolitical aspects' (2018) 50 Pacific Geographies 4
[317] Ashish Banik, 'Strengthening complementarity in the humanitarian response to the Rohingya refugee crisis' (2018) 73 Humanitarian Exchange 24
[318] Bepler, (n 316), 7
[319] UNHCR, 'Global Trends: Forced Displacement in 2019' Available at: https://www.unhcr.org/5ee200e37.pdf accessed 10 October 2020
[320] Isabel M. Borges, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge, 2018) 1

hand, Burma's 'illegal Bengali' rhetoric in addressing the same community, it is clearly a political choice to refer to them as displaced Myanmar nationals. A second implication of the label is that Bangladesh also refuses to acknowledge, independent of the identity dispute of the Rohingya, their refugeehood. The Bangladeshi government's position on the refugee status of the Rohingya affected the manner in which it engaged with the international community. Since the Rohingya were not recognised as refugees, the Ministry of Foreign Affairs - as the branch of the government designated to handle the coordination efforts - decided that the 'International Organization for Migration (IOM), rather than the UN High Commissioner for Refugees' was to control the operational processes.[321] This decision prompted Human Rights Watch to write a letter to the Bangladeshi Foreign Minister, as well as the Burmese Union Minister, urging them to involve the UNHCR in the repatriation process.[322] At this stage, Bangladeshi officials were reluctant to accept humanitarian aid from international organisations. Officials were concerned that improving the conditions for the refugees would 'encourage more influx of Rohingyas to the state of Bangladesh'.[323]

Once it did decide to open its borders, the Bangladeshi government began appealing to the international community to exert pressure upon the government of Burma to repatriate the Rohingya.[324] Thus, negotiations to broker an agreement began in September, with both states agreeing to base the process on a previous Memorandum of Understanding (MoU) signed between them following the 1993 exodus.[325] Eventually, Burma and Bangladesh responded to international pressure. Both countries signed a tentative repatriation agreement which was mediated by China,[326] 'with the intention to set up a joint working group'[327] to facilitate the mechanics of the repatriation process in the following months. The Letter of Intent signed at this stage articulated that the repatriation process would be voluntary, ensuring the safety and

[321] Mark Bowden, 'Rohingya refugees in Bangladesh: the humanitarian response' (2018) 73 Humanitarian Exchange 5
[322] Bill Frelick and Brad Adams, 'Myanmar-Bangladesh's "Arrangement" on Rohingya Refugees' *Human Rights Watch* (New York, 11 December 2017) Available at: https://www.hrw.org/sites/default/files/supporting_resources/201712letter_myanmar_bangladesh.pdf accessed 10 October 2020
[323] Nasreen Chowdhory and Biswajit Mohanty, 'Within a Legal Vacuum, Is Repatriation a Way Forward? Some Theoretical Reflections' in Nasreen Chowdhury and Biswajit Mohanty (eds.) *Citizenship, Nationalism and Refugeehood of Rohingyas in Southern Asia* (Springer 2020)
[324] Banik, (n 317) 25
[325] Su-Ann Oh, 'The Rohingya in Bangladesh: Another round in the Cycle of Exodus and Repatriation?' (2017) 90 ISEAS Yusof Ishak Institute Perspective 1
[326] Zoltan Barany, 'The Rohingya Predicament. Why Myanmar's Army gets Away with Ethnic Cleansing' (2019) Istituto Affari Internazionali (IAI) Papers 1
[327] Oh, (n 325) 1

dignity of the displaced Rohingya.[328] Nevertheless, the repatriation agreement was broadly criticised by different stakeholders who were concerned about the prospect of forcible repatriation. Another concern raised was the possibility that the Rohingya would be 'repatriated to unknown locations most likely 'ghettoised' camps and without citizenship'.[329] Additionally, further apprehension arose from the fact that the agreement limited application of the repatriation process to the Rohingya who had fled since October 2016 only. Moreover, it also specified the return of 'eligible' refugees, referring for instance to those who possessed identity documents, which, as discussed in Chapter II, would be an insurmountable task for the vast majority of the Rohingya.[330] During an update of the situation before the United Nations in March 2019, the Bangladeshi Foreign Minister confirmed that no repatriation had taken place, as none of the Rohingya considered the conditions for repatriation to be fulfilled.[331] The agreement stipulates that upon their return, the 'eligible' Rohingya would be housed in 'temporary accommodation and reception centers'.[332] Reportedly, over 300 Rohingya have been housed in cyclone shelters built on Bhasan Char, an isolated island off the coast of Bangladesh that is prone to severe natural disasters. The move has been cited by Bangladesh as a necessary quarantine measure to combat the pandemic. In spite of pledging to do so, Bangladesh is yet to allow humanitarian aid agencies to access the island to provide assistance to those stranded on the island.[333]

Once again, there is no consensus between either side to derive a durable solution for the Rohingya - neither from Burma, where the crisis is generated, nor from Bangladesh or any of the other recipient states, where the Rohingya are situated. Around the second anniversary of the exodus, Bangladesh embarked on an initiative with the UNHCR to 'regulate the modalities for offering the option of return'[334] to a handful of 'eligible' Rohingya. UNHCR's involvement once again raises red flags regarding the coercive undercurrents of the repatriation process. This is because, in spite of the fact that it emphasises on ensuring the voluntariness of the Rohingya's return to Burma, the organisation has maintained that an

[328] Bepler, (n 316) 7
[329] Mabrur Uddin Ahmed, Dilraj Singh Tiwana, and Rahima Begum, 'The Genocide of the Ignored Rohingya' *Restless Beings* (London, 7 February 2018)
[330] Jobair Alam, 'The Status and the Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution' (2020) Journal of Immigrant and Refugee Studies 1
[331] Chowdhory and Mohanty, (n 323), 229
[332] Alam, (n 330), 8
[333] Human Rights Watch, 'Bangladesh: Move Rohingya from Dangerous Silt Island' *Human Rights Watch* (New York, July 9 2020) available at https://www.hrw.org/news/2020/07/09/bangladesh-move-rohingya-dangerous-silt-island accessed18 September 2020
[334] Chowdhury and Mohanty (n 323), 229

individual's desire to return to Burma does not preclude their 'eligibility' insofar as the bilateral agreement goes.[335] The implication of being involved in such a hasty approach to repatriation on UNHCR's part is problematic. It fails to adequately consider that the agreement once again does not secure a decisive and durable solution for the Rohingya's statelessness in Burma. In addition, it is potentially enabling the states in question to continue cobbling together repatriation agreements that fail to address and remedy the root causes of the Rohingya exoduses. Thus, the danger of history repeating itself remains, even if the actual repatriations are carried out successfully. Arguably, the Rohingya's statelessness lies at the core of their repeated expulsions. Therefore, if this time the Rohingya are once again prematurely returned to Burma, it could result in a repetition of the 'mass refugee refoulement'[336] observed by the community in the early1990s.

Three years later, cradled by a global pandemic, the Rohingya repatriation process, much like almost everything else in the public sphere, has come to a screeching halt. In March of this year, Filippo Grandi, the UN High Commissioner for Refugees, speaking on the 2020 Joint Response Plan (JRP) produced by the UN Independent International Fact-Finding Mission on Myanmar, expressed that "The solution continues to be in Myanmar".[337] Grandi, although referring to Burma's role in fulfilling the conditions to expedite the repatriation process, uncloaks a discrepancy in the focus of the international refugee regime. Indeed, although Pillar 1 of the Plan asserts the need to 'secure the identity of Rohingya refugees through registration and documentation', the JRP itself is titled '2020 JRP for Rohingya Humanitarian Crisis', thus ultimately enabling the regional political discord between 'refugees' and their 'refugeehood'. [338] Even if the repatriation process was not hindered by the Covid-19 pandemic, there are still several gaping issues with the repatriation process which have not been addressed. Historically, it has not been enough to secure the Rohingya's protection by concluding a half-hearted repatriation agreement. As argued by Pederson:

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[335] ibid

[336] Christopher Faulkner and Samuel Schiffer, 'Unwelcomed? The Effects of Statelessness on Involuntary Refugee Repatriation in Bangladesh and Myanmar' (2019) 108 The Commonwealth Journal of International Affairs 145

[337] United Nations, 'Greater progress needed to ensure safe return of displaced Rohingya: UN refugee agency chief' *UN News* (3 March 2020) Available at https://news.un.org/en/story/2020/03/1058521, accessed 25 August 2020

[338] UN Independent Fact-Finding Mission on Myanmar, '2020 JRP for Rohingya Humanitarian Crisis' (2020) Available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/jrp_2020_final_in-design_200422_12.2mb.pdf accessed 25 August 2020

> To simply return the refugees is no solution. What is required are fundamental changes in official attitudes, policies and practices, including a firm commitment by the Myanmar state to respect and protect the human rights of all residents of the country, whatever their ethnicity or religion.[339]

Pederson's assertion affirms that there two elements which must be dealt with insofar as the Rohingya are concerned. On the one hand, Burma's responsibilities towards the Rohingya, and on the other, attention must be paid to the *protection* of the Rohingya as refugees, while they await appropriate and lasting action from Burma. This thesis is concerned with the latter. In the race to effectively manage, mitigate, and mediate the outpour of refugees, the plight of the Rohingya shows that the international refugee law regime has been unable to address the active protectionary needs of the refugees themselves. In a region where their very refugeehood is denied by the states accepting them on non-refuge grounds, what forms of legal protection can shelter the Rohingya, or indeed, any refugee in the region? Observing the aftermath of the 2017 exodus, I argue, based on its establishment as customary international law, that *non-refoulement* is realistically the only available form of active protection that the Rohingya can rely on for the time being.

2.0 Recognising *Non-Refoulement*

In Chapter I, I have set out the requirements to establish the customary status of a legal norm under public international law generally, and have provided an overview of *non-refoulement* as customary law. The principle will be tested against the case of the Rohingya and the region here. Even without the impetus to translate knowledge into tangible legal commitments or institutions aimed at their protection, states in Southeast Asia at least acknowledge the existence of refugees and the principle of *non-refoulement.* This implies that on some level, Southeast Asian states are aware of the particularly vulnerable status of a refugee. However, the same states are yet to agree that the refugee's vulnerability means that they are entitled to specific protectionary mechanisms insofar as international law is concerned. Politically, the regional position on refugees can be inferred from the fact that the ASEAN persistently avoids officially using the terms 'asylum' or 'refugee' when discussing

[339] Morten B. Pederson, 'The Roots of the Rohingya Refugee Crisis' (2018) 27 Human Rights Defender 16

forced displacement in the region.[340] Notably, in the month following the first wave of the 2017 exodus, the ASEAN Chairman's official statement referred to the ensuing incident as 'The Humanitarian Situation in Rakhine State'[341], and the noticeably dismissive rhetoric was reiterated during its subsequent annual summit in 2018.[342]

In the past, states' seemingly erratic application of *non-refoulement* in practice has led to a (now) minority of scholars such as Hathaway to argue that there is no custom of *non-refoulement*.[343] On the other hand, Lauterpacht and Bethlehem provide a compelling analysis of the sources of customary international law on *non-refoulement*. In it, they argue that general principles under international law can co-exist as treaty law *and* as customary international law.[344] In the case of *non-refoulement*, they claim that due the principle's inclusion in a variety of treaty regimes is not simply the addition of a formulaic contractual clause, but are of a 'norm-creating character',[345] and have never been disputed by the state parties. Consistent and widespread practice of a legal norm through treaty practice can be considered to be evidence of practice which confirms the customary status of the norm itself:

> Turning to the requirement that there should be widespread and representative participation in the conventions said to embody the putative customary rule, including the participation of States whose interests are specially affected, the extent of State participation in the 1951 Convention, the 1967 Protocol, the Torture Convention, the ICCPR, and other conventions which embody the principle of *non-refoulement* indicates near universal acceptance of the principle.[346]

In other words, states which are not party to the 1951 Refugee Convention but are signatories or parties to other international or regional instruments and declarations that codify some version of the principle suffices as evidence of state practice establishing customary international law. Applying this test to the Southeast Asian context, several states in the

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[340] Mutaqin, (n 311) 5
[341] Association of Southeast Asian Nations (ASEAN), 'ASEAN Chairman's Statement on the Humanitarian Situation in Rakhine State', available at https://asean.org/asean-chairmans-statement-on-the-humanitarian-situation-in-rakhine-state/ Accessed 17 July 2020
[342] Human Rights Watch, 'ASEAN: Don't Whitewash Atrocities Against Rohingya' (19 June 2019) Available at: https://www.hrw.org/news/2019/06/19/asean-dont-whitewash-atrocities-against-rohingya, Accessed 17 July 2020
[343] James Hathaway, 'Leveraging Asylum' (2009) 45 Texas International Law Journal 503
[344] Lauterpacht and Bethlehem, (n 78) 141
[345] Ibid 143
[346] Ibid

region have accepted the customary law status of *non-refoulement*. As noted in Chapter I, many Southeast Asian states have signed or ratified a number of human rights and humanitarian treaties which include the principle. Indeed, even the declaratory and non-binding 1966 Bangkok Principles, which has been signed by most Asian states, contains a provision on *non-refoulement*.[347]

In terms of *opinio juris*, as well, there is compelling evidence to suggest that states retain the belief that there is a binding legal obligation upon them against *refoulement*. Apart from the acceptance of the principle through participation in a variety of treaty regimes, states, including non-party states, are perennially 'justifying their actions by reference to the rule, claiming they have not violated it'.[348] This is as opposed to arguing that they are not legally obliged to adhere to the principle at all. Mayerhofer surmises that across the region, 'there have been a number of cases of refoulement',[349] citing push backs at sea as an example of states not respecting their international obligations. The question of whether or not push backs fall within the gamut of actions taken by states to avoid their obligations towards refugees is not within the scope of this thesis. Rather, the fact that the existence of the obligation itself is not disputed suffices to establish *opinio juris* amongst the non-signatory states in the region.

In the case of the Rohingya as well, there is ample evidence supporting the claim that there is *opinio juris* against *refoulement* among states. For instance, Bangladesh, as a specially-affected state, however problematic their approaches in managing and resettling the community, and despite refusing to even refer to the displaced Rohingya as 'refugees', still did not turn the Rohingya away. Bangladesh has also rescued stranded boats carrying the Rohingya and have allowed them entry into its territory.[350] Interestingly, the boat had previously been intercepted and turned away by Thailand and Malaysia before it could reach their territorial waters. This was in spite of the fact that merely a few months prior, Malaysia,

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[347] Elaine Lynne-Ee Ho and Cabeiri Debergh Robinson, 'Introduction: Force Migration In/Of Asia- Interfaces and Multiplicities' (2018) 31(3) Journal of Refugee Studies 262

[348] Fransesco Messineo, '*Non-refoulement* Obligations in Public International Law: Towards a New Protection Status?' in Satvinder S. Juss (ed.), *The Ashgate Research Companion to Migration Law, Theory, and Policy* (Routledge, 2013).

[349] Julia Mayerhofer, 'Protecting the rights of refugees in South and Southeast Asia' in Fernand de Varennes and Christie M. Gardiner, (eds.), *Routledge Handbook of Human Rights in Asia* (Routledge, 2018).

[350] Hannah Ellis-Petersen and Sheikh Azizur Rahman, 'Bangladesh rescues hundreds of Rohingya drifting at sea for nearly two months' (16 April 2020), *The Guardian*, available at https://www.theguardian.com/world/2020/apr/16/bangladesh-rescues-hundreds-of-rohingya-drifting-at-sea-for-nearly-two-months accessed 2 October 2020

Thailand, Bangladesh, Myanmar, and Indonesia were all participants at a meeting held by the Task Force on Planning and Preparedness of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process), which published a statement that, among other points, affirmed its support of the principle of *non-refoulement*.[351] Hence, it is clear that the contradictory actions taken by non-party states has no bearing on the widespread and consistent 'practice' of accepting that the obligation of *non-refoulement* exists and is binding upon them, thereby establishing the presence of *opinio juris*. In fact, as suggested by Messineo:

> Overall, the *opinio juris* in favour of customary international law status of *non-refoulement* is so overwhelming that one may even argue...that the requirement of state practice should consequently be sensibly reduced.[352]

Messineo's point is that the way states *behave* when they are physically confronted with refugees at their doorsteps should not be the litmus test against which their belief of the legal obligation is measured. They may be violating the law, but that implies that they recognise that there is a law to be breached in the first place. Overall, Lauterpacht and Bethlehem's argument for the existence of *non-refoulement* as a customary law is reinforced through (a) state participation in non-refugee treaty regimes that include *non-refoulement*, and (b) clear evidence of *opinio juris* amongst non-party states.

3.0 Legal Respite for Refugees in Southeast Asia: Too Many Options or Lack Thereof?

Over the years, Southeast Asia's singular approach to the international refugee law regime has invited robust scholarly scrutiny. Sara Davies, in her seminal 2008 book entitled 'Legitimising Rejection: International Refugee Law in Southeast Asia' took the initiative to systematically address and debunk the four most common explanations offered in legal scholarship: Firstly, the apparent commitment to non-interference in each other's 'internal affairs' amongst ASEAN members, particularly on politically sensitive issues, secondly, the

[351] Task Force on Planning and Preparedness of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crimes, 'Co-Chairs' Statement' (Sri Lanka, 12 February 2020) Available at https://www.baliprocess.net/UserFiles/baliprocess/File/TFPP5%20Co-Chairs%27%20Statement.pdf accessed 2 October 2020

[352] Messineo, (n 348) at 143

perceived financial burden on states were they to undertake binding legal obligations, thirdly, that refugees threaten the already delicate regional social structures, and finally, the possibility that the vernacular of human rights is somehow incongruent with Asian values.[353] Davies' main argument is that that most Southeast Asian states never acceded to the Convention simply because they did not feel compelled to: firstly, because Asian states were either ignored or unable to participate in the drafting of the Convention, cementing the belief that the instrument is irrelevant for the region, and secondly, because the international community's willingness to aide and resettle Indochinese refugees and the role of the UNHCR as interlocutor in the process enabled states to manipulate the language of the regime to shift the responsibility of refugee protection off themselves and onto other states.[354] She argues, whilst relying on a critical legal studies approach, that Southeast Asian states have historically legitimised their exceptionalism *vis-a-vis* refugee protection norms *within the framework* of the regime they claim to reject, thereby successfully absolving themselves of any burden of responsibility.[355] This, Davies suggests, indicates that there is no real justification behind the rejection, since 'the formal rejection of international law does not signify a state's departure from the legal framework'.[356] Davies' contribution is noteworthy for several reasons, including the fact that it is one of the few publications which addresses the legal void in the region head on. She argues that it is not enough for Southeast Asian states to simply reject the 1951 Refugee Convention but take no efforts to develop a more fitting framework for the refugees in the region using the 1951 Refugee Convention as a frame of reference. This is the main limitation of Davies' book. It implicitly retains the belief that the standards enshrined in the Convention, or, even the regime at large are for the region to *aspire* to, but fails to explain why it *ought* to. After all, she herself firmly establishes that Southeast Asian states from the outset have decreed the regime itself to be incongruent with their needs and values. If so, why should states aspire to adhere to a system they have categorically rejected?

Meanwhile, scholars such as Mutaqin posit that while 'a permanent regional legal framework' is preferred, for the time being 'ASEAN can craft a solution to the refugee crisis via extra-legal mechanisms, or by creating a legal framework that would be compatible with

[353]Sara E. Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff Publications, 2008)
[354] Ibid
[355] Ibid
[356] Ibid

regional countries' mutual interests'.[357] Although, in his assessment of how ASEAN *can* channel its resources into augmenting protection for refugees, does not address why ASEAN *would*, or why it *has not* done so till date, considering the organisation's adherence to the principle of non-interference.[358] On the other hand, in the absence of political will and legal developments, scholars such as Choi have promoted the efforts of Asian civil society, the Asia Pacific Refugee Rights Network (APRRN) in particular. The APRRN frames the refugee protection narrative in terms of international human rights, as opposed to issues of concern to national security in order to mobilise and secure some semblance of protection for refugees from the ground up.[359] Choi argues that the role of Asian civil society in successfully navigating a political context that is hostile to refugees in order to implement changes on national levels deserves attention. Certainly, the APPRN is a part of the international refugee law regime and contributes to bettering the protection of refugees on the ground. Choi also argues that advocacy on refugee protection in the region should, as the APRRN has, move way from trying to convince Southeast Asian states to accede to the 1951 Refugee Convention. There is merit in arguing that such efforts may be an exercise in futility. After all, as seen from Davies' analysis, considering their vehement opposition to its relevance to their needs, it is highly unlikely that Southeast Asian states are going to commit to the 1951 Convention going forward. However, Choi makes two assumptions about the role of civil society: Firstly, Choi's essay tends to conflate crisis management and advocacy by the APRRN's members as equitable to states in the region finally ratifying the 1951 Refugee Convention. Secondly, that advocating for states to ratify the Convention is the only other option to develop legal protection for refugees in the region.

Ramji-Nogales takes an even stronger position on the available means of protection for refugees in the region. She claims that 'migration governance in Southeast Asia is rich and varied', and posits a cultural relativism argument in support of her claim.[360] She posits that besides the multitude of different regulatory frameworks that protect most of the refugees' needs, the different forms of mixed migration in the region requires the implementation of creative solutions that are 'deeply grounded in local value systems', rather than in international treaties.[361] She distinguishes between forced migration and labour migration in

[357] Mutaqin (n 311), p 14.
[358] Ibid
[359] Choi, (n 315) 161. See also: Zahid Shahab Ahmed, 'Managing the refugee crisis in South Asia: The Role of SAARC' (2019) 28(2) Asia and Pacific Migration Journal 210
[360] Jaya Ramji-Nogales, 'Under the Canopy: Migration Governance in Southeast Asia' (2017) 21 UCLA Journal of International Law and Foreign Affairs 10
[361] Ibid

the region, and argues that for the former, the staggered regional commitments to treaties such as CAT, ICCPR, and the Convention on the Right of the Child (CRC) provide sufficient protectionary coverage for them. She does not, however, provide cogent evidence of Southeast Asian states handling refugee crises in the region on the basis of these alternative treaty obligations. Granted, her article was published before the 2017 Rohingya refugee crisis. However, there has been no indication from any of the specially-affected states that have allowed the Rohingya to enter their territories that they are doing so in fulfilment of any specific treaty obligations.

Ho and Robinson forward the argument that:

> The consolidation of an assemblage of legal frameworks, governmental technologies, agreements, policies, practices and cultural norms that make up a regional refugee regime does not preclude that protection may be experienced in piecemeal ways only.[362]

There is certainly credence to this observation. The overall refugee protection regime is an amalgamation of units working concurrently to protect the vulnerable. However, even if protection is conferred in piecemeal ways, it is important that the pieces meet the needs of the refugees. Simon Behrman's study on the development of refugee law as a means of control (specifically, the development of the 1951 Refugee Convention and the UNHCR's predecessors, see Chapter I) surmises that:

> The operational conclusion is not to reject wholesale the subsidiary benefits of the 1951 Convention and other similar laws, but we must reject the false notion that the *primary* function of refugee law is to extend protection to the refugee.[363]

Behrman argues that at every stage of its evolution, refugee law's aims have pivoted in favour of the state over the refugee. Even if this were an objectively true premise, as he himself notes, the benefits of such specialised laws cannot be discounted. In Southeast Asia, the constituent elements of the overall regime do not altogether provide a degree of protection that is comparable to those available in refugee-specific treaties. There is no evidence to

[362] Ho and Robinson, (n 347) 270
[363] Simon Behrman, 'Refugee Law as a Means of Control' (2018) 32 Journal of Refugee Studies 42

suggest that even an overwhelmingly state-oriented instrument, but with a specialised refugee mandate with duties and obligations towards refugee protection is likely to be developed in the region in the near future. I am not disputing the relevance of the different frameworks brought up by scholars for the international refugee law regime at large. The inclusion of refugees under different human rights treaties, the role of civil society engagement, as well as the promotion of increasing political cooperation are all necessary measures to further strengthen the regime as a whole. These instruments and systems do indeed provide complementary protection to refugees when relied upon. On the whole, however, scholarly engagement on the topic does not seem to mind that there is no regional instrument solely focused on the protection of refugees. The question is, why? Chowdhury and Mohanty point out an additional limitation in most scholarship, that the 'literature does not address the lack of political status of refugees in the countries of asylum and the consequences upon refugees' decisions to repatriate'.[364] A deeper analysis of the scholarship on the topic of refugee protection in Southeast Asia is warranted, but beyond the scope of this thesis.

As noted in Chapter I, the international refugee law regime predates the human rights regime. Although the regime, particularly in the latter half of its evolution was rife with Cold War considerations, at the fore of the 1951 Refugee Convention and the UNHCR's mandates was the intention to maximise the breadth of protection available to refugees. Additionally, as regional equivalents developed to suit the needs of their own contexts, it is difficult to explain on the basis of alternative regimes why Southeast Asia has not done the same. After all, the same frameworks have been available to the African continent as well, yet the OAU Convention has been recognised as an important contribution to the refugee law regime. Moreover, if these alternative frameworks have been available to genuinely protect refugees in Southeast Asia, why has there not been evidence of a concerted effort to invoke these alternative mechanisms by states?

Whatever the deficiencies of the general international refugee law regime when it comes to the needs of specific regions, they do not overwhelmingly justify a regional blackout on the positive protection of refugees. It is, simply put, a disproportionate consequence. As observed in Chapter I, the international refugee law regime has undergone a metamorphosis over the past century. At every juncture, the relevant institutions and instruments have

[364] Chowdhury and Mohanty, (n 323) 223

evolved in response to the needs of refugees, recognising that refugees are a unique category of individuals that are deserving and in need of specialised protection under international law. While the Rohingya are certainly not the only group of refugees in the Southeast Asia, they are exceptionally vulnerable, in part due to their statelessness, as well as the protracted nature of their crisis. As noted in Chapter II, the complexities surrounding their status as Burmese citizens will take a long time to resolve. Unfortunately, it is reasonable to expect the Rohingya to remain refugees for the foreseeable future. Thus, I believe that the role of scholarship in securing increased protection for the Rohingya, and by extension, all refugees in the region begins with investigating the right questions. Expecting states to rely on surrogate frameworks may enable the disturbing narrative that Southeast Asian refugees do not *need* special legal protection, unlike the refugees in the rest of the world. If this becomes the prevailing narrative *vis-à-vis* refugee protection, it will certainly result in the continued neglect of refugee groups such as the Rohingya, while states continue to bicker about the most politically expedient management systems amongst themselves.

For the time being, it is evident that there is not much positive protection under the international refugee law regime that applies to the Rohingya refugees. Considering the analysis above, namely, (a) the customary international law status of *non-refoulement*, and (b) the limited scope of protection for refugees that other elements of the regime can offer, refugees in Southeast Asia are currently protected on the grounds of the principle of *non-refoulement*. This is concerning. *Non-refoulement*, as can be deduced from the analysis above, is of paramount importance to the regime, and more importantly, to the refugees who fall under the scope of its protection. However, it is clearly a far cry from a holistic *system* of rights that treaties such as the 1951 Refugee Convention and its regional counterparts can offer. Behrman confirms this:

> Yet, as customary law, *non-refoulement* alone does not guarantee the right to refugee status, much less any of the subsidiary rights contained in the Convention. At best, it simply prevents return to the country of origin, but does not protect one from detention or other such indignities.[365]

[365] Behrman, (n 363) 43

It is most certainly the absolute bare minimum of protection that is available under the entirety of the international refugee law regime. On the other hand, on a positive note, Goodwin-Gill summarises the importance of *non-refoulement*:

> The principle of *non-refoulement* - the obligation on states not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm - may not immediately correlate with the right of every one to seek asylum, but it does clearly place limits on what states may lawfully do.[366]

Thus, while it is clear that *non-refoulement* alone far from suffices as pragmatic protection for refugees generally, it is at the very least the first line of defence, and in the case of the Rohingya, the only one for the foreseeable future.

[366] Goodwin-Gill, 'The Right to Seek Asylum' (n 115) 444

Conclusion

This thesis has endeavoured to a) study the development of the international refugee law regime as a whole; b) identify the most prominent features of the regime, namely, the 1951 Refugee Convention and Protocol and the UNHCR; c) study the applicability and reach of the regime in a region that does not subscribe to the Convention and limits engagement with the UNHCR; d) under these restrictive conditions, examine what is the degree of protection that the regime is able to extend to the Rohingya refugees, who have been under extreme duress for decades; and e) to examine whether there are sufficiently broad alternatives or placeholders available in the absence of a specialised regime in Southeast Asia. Broadly, the motivation behind this thesis has been to understand the extent to which the international refugee law regime is truly efficacious in *protecting* those who need its protection the most. In the course of examining the reach of the regime, I have shown that the only form of legally binding protection that is available in the region is the principle of *non-refoulement*.

In order to achieve its aims, this thesis first established the origins of the international refugee regime as a whole. In Chapter I, the thesis provides a general historiography of the development of the regime, from the end of the First World War until the establishment of the UNHCR. The UNHCR is a pivotal organisation in the regime, as it remains the primary refugee management and advocacy organisation globally. Its presence is seen across the globe, including in mediating repatriation agreements in the Southeast Asian context. The chapter also addresses the political contexts under which the second half of the regime developed. Cold War politics in particular played a noteworthy role in how states managed post-World War II refugees. Next, the chapter details the status of the refugee under the 1951 Refugee Convention, as the second pillar of the regime as a whole. Although the main issue confronting this thesis is the fact that Southeast Asian states have largely refused to sign the treaty, it is a pertinent starting point for the study of *non-refoulement*, since the Convention codifies the principle in its Article 33. Here, the chapter also identifies the different regional instruments such as the OAU Convention, which was a departure from the 1951 Convention in its more expansive definition of a refugee. It also serves as an important example of regional mobilisation when it comes to securing protection for refugees. Further, it concretises the notion that it is possible for different instruments to co-exist under the

international refugee law regime. Finally, the chapter provides an overview of *non-refoulement*, first, as it is codified in treaty law, and secondly, its status as customary international law generally.

Chapter II is a descriptive study of the historical and political contexts from which the Rohingya crisis has emerged. The origin story of the Rohingya in Burma is highly contested today, and a major source of their later displacements. Present-day Burma has an extremely complex backstory. For most of its history, the borders between the many different kingdoms in the region have been porous. Upon colonisation, all of the known native political and social structures essentially disintegrated. Between colonisation and independence, Burma and its various ethnic communities had undergone massive and tumultuous changes. Unfortunately, the two lasting remnants of modern Burmese history have both been devastating for its human rights record. Firstly, the establishment of a military government, and secondly, intense and lasting communal hostility, targeted specifically towards the Muslim minority generally, but especially towards the Rohingya. Thus, the chapter first guides the reader through an overview of Burma's political history: from British colonisation to its independence in 1948; followed by the emergence of the *Tatmadaw*, and finally, its current and ongoing democratic reform. The political context of the country sets the scene for its declining relationship with the Rohingya. This decline is explored in detail. The chapter first assesses the two competing narratives of the origin of the Rohingya as commonly posited by opposing factions. On the one hand, supporters of the Rohingya's claim that their ancestry in modern-day Burma can be traced back to the ninth century. Meanwhile, the *Tatmadaw* claims that the Rohingya are simply illegal Bengali, or Chittagongian immigrants that have no claim to residence or citizenship in the country. Overall, there is more cogent evidence to support the former claim. In addition, it has been noted in Chapter II that the post-independence, pre-military Burmese governments have in fact acknowledged the Rohingya community as *bona fide* citizens of independent Burma. Besides, there has been no evidence forwarded by the anti-Rohingya factions to substantiate their claims that the Rohingya are an illegitimate ethnic group in the country. Next, the chapter turns to studying the main Rohingya exoduses from 1978 until the most recent and largest one, in 2017. Crucially, this section also highlights the Rohingya's descent into statelessness in Burma. Through the enactment of the 1982 Citizenship Act, Burma effectively wrote the Rohingya out of their history. The Act recognises 8 main ethnic groups which are further broken down into 135 subethnicities. The Rohingya are not listed under any of them. Following this, the subsequent

waves of Rohingya departure have been increasingly antagonistic in nature. Chapter II provides the backgrounds for every round of exodus, showing how the disproportionately aggressive responses by the *Tatmadaw* has consistently plagued the lives of the Rohingya. Thus, this chapter highlights the vulnerability of the community within Burmese borders, rendering the need for increased protection for the Rohingya each time they are forced to flee.

Finally, Chapter III turns to a discussion on the extent and form of protection available for the Rohingya refugees upon their departure from Burma. Having set up the general backdrop to the international refugee law regime and the Rohingya in Chapters I and II respectively, Chapter III examines the extent to which the regime is able to confer protection to vulnerable refugees in practice. It is a well-established fact that most Southeast Asian states are not party to the 1951 Refugee Convention. Automatically, the reach of the regime is considerably stymied. Thus, the chapter explores, using the 2017 Rohingya refugee crisis as its case study, the efficacy of the regime at large in the region. The chapter argues that that the customary international law application of *non-refoulement* is the only element of the international refugee law regime that is applicable and binding upon Southeast Asian states. First, Chapter III elaborates on the status of refugee protection in the region. The chapter notes that non-adherence to the Refugee Convention has never precluded the creation and sustenance of refugee flows, but a lack of a comprehensive legal framework does leave the refugees in a legal void with virtually no protection. Next, the chapter then develops on the aftermath of the 2017 Rohingya exodus. Given that it was the largest mass departure between Burma and Bangladesh to date, Bangladesh's management of the crisis at its doorstep is particularly revealing of the reach of refugee protection in the region. Further, fears over their forced repatriation, as well as the possible ghettoisation of the Rohingya refugees in Bangladesh underlines the need to develop a broader system of rights that can ensure their safety and dignity while they wait for conditions in their home country to improve. Next, the chapter studies in greater detail the customary international law status of *non-refoulement*. Studying the establishment of custom through Lauterpacht and Bethlehem's 'treaty participation as state practice' argument on the one hand, and providing evidence of *opinio juris* amongst states (including Southeast Asian states) on the other, Chapter III confirms that the principle is binding upon all specially-affected states in the region. Finally, the chapter turns to examining scholarly contributions on the topic of refugee protection in Southeast Asia. The chapter posits that there is generally a tendency in legal scholarship to emphasise the role of the alternative human rights or humanitarian elements of the refugee

law regime in conferring protection to refugees in the region. This thesis does not dispute the relevance of alternative treaty regimes such as the CAT, the ICCPR, or the Bali Process for the international refugee law regime as a whole. It accepts that these alternative frameworks provide complementary protection to refugees that fall within the scope of its specialised mandates. Rather, this thesis is interested in understanding why there has not been any regional movement to develop a bespoke legal framework with the protection of refugees at the fore. A deeper study of this discrepancy in legal scholarship will be tackled by this author in the course of her doctoral studies. Overall, this thesis concludes that having broken down the applicable elements of the international refugee law regime, and studying it in the context of the Rohingya refugee crisis in Southeast Asia, the principle of *non-refoulement* serves as the only form of protection that is available for refugees in the region.

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