

MASTER PROGRAM PUBLIC INTERNATIONAL LAW
FACULTY OF LAW, ECONOMICS & GOVERNANCE
UTRECHT UNIVERSITY

Myanmar's Unaccompanied Child Asylum-Seekers in Thailand: Protection from *Refoulement* under International Law



Adinda Ceelen
Supervised by Dr. A. J. Th. Woltjer
January 2010

Pictures on cover page obtained from

<http://www.asiasociety.org>

<http://www.khrg.org>

<http://www.travelblog.org/Photos/Popped/4031852>

Acknowledgements

I would like to thank Menno Gibson from Terre des Hommes Nederland for his assistance in the process of finding interesting research topics and especially for suggesting the subject of Myanmar's unaccompanied minor asylum-seekers in Thailand. I also want to express my gratitude to my supervisor Dr. Aleidus Woltjer for his guidance and constructive and thought-provoking feedback. I'm also very grateful to Mr. Harm Dotinga for his suggestions and continuous support.

I would also like to express my appreciation to my parents Johan and Endang, my brother Oky, and my aunt and uncle Lidy and Theo, for their love, support and faith in me. Special thanks to Oky for always being there and believing in me. Last but not least, many thanks to Linda, Jolande and Sander for their patience and all the support and energy they have given me.

Table of Contents

Selected Abbreviations	iii
Chapter 1. Introduction	1
1.1 Introduction	1
1.2 Research Question	2
1.3 Definitions: Refugees, Asylum-Seekers and Migrants.....	4
Chapter 2. Myanmar’s History and the Flight of Asylum-Seekers	7
2.1 History of Myanmar	7
2.2 Ethnic Conflict in Myanmar	7
2.3 Human Rights in Myanmar and Mass Population Displacement	8
Chapter 3. International Refugee Law	13
3.1 Introduction	13
3.2 Conventional Law: the Refugee Convention and 1967 Protocol	13
3.3 Customary Law	15
3.3.1 <i>Non-refoulement</i> in Customary International Law: the Refugee Context	15
3.3.2 <i>Non-refoulement</i> in Cases of Mass Influx	18
3.4 Soft Law	21
3.4.1 Introduction	21
3.4.2 International Soft Law Instruments for Refugee Protection.....	22
3.4.3 Regional Soft Law Instruments for Refugee Protection.....	23
3.5 Summary of Thailand’s Obligations under International Refugee Law	26
Chapter 4. International Human Rights Law	27
4.1 Introduction	27
4.2 Universal Declaration of Human Rights.....	28
4.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.....	32
4.4 International Covenant on Civil and Political Rights	36
4.4.1 <i>Non-refoulement</i>	36
4.4.2 <i>Non-refoulement</i> in Customary International Law: the Human Rights Context	39
4.4.3 <i>Non-refoulement</i> as a Principle of Customary International Law	41
4.4.4 The Right to Asylum and the Right to Leave a Country	41
4.5 Convention on the Rights of the Child	42
4.5.1 Introduction	42

4.5.2 The Fundamental Principles	43
4.5.3 <i>Non-refoulement</i>	44
4.5.4 Other Provisions Related to <i>Non-refoulement</i>	45
4.6 Non-discrimination	48
4.7 Summary of Thailand’s Obligations under International Human Rights Law	50
Chapter 5. Asylum-Seekers in Thailand.....	52
5.1 The Thai Legal Framework for the Protection of Asylum-seekers	52
5.2 Thai Policy and Practice Towards Asylum-seekers	53
5.2.1 Response of the Royal Thai Government to Asylum Situations	53
5.2.2 The Attenuation of the Laws	54
5.2.3 Policy in the Camps.....	56
5.2.4 Changing Policies and New Solutions	57
Chapter 6. Thailand’s Compliance with <i>Non-refoulement</i>	58
6.1 The Protection of UCAS through <i>Non-refoulement</i>	58
6.2 Obligations and Compliance by the Royal Thai Government.....	62
6.2.1 <i>Non-refoulement</i>	62
6.2.2 Assessment Procedures	63
6.2.3 Absence of a Legal Framework.....	64
6.2.4 The Status of Beneficiaries of Complementary Protection	65
Chapter 7. Conclusion.....	69
Sources.....	75

Selected Abbreviations

BSSP	Burma Socialist Programme Party
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EU	European Union
ExCom	Executive Committee of the United Nations High Commissioner for Refugees
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IHRL	International human rights law
ILO	International Labor Organization
IRL	International refugee law
KNLA	Karen National Liberation Army
KNPP	Karenni National Progressive Party
KNU	Karen National Union
MoI	Ministry of the Interior
NGO	Non-governmental Organization
NLD	National League for Democracy
OAS	Organization of American States

OAU	Organization of African Unity (now AU – African Union)
OHCHR	Office of the High Commissioner for Human Rights
PAB	Provincial Admission Board
PoCs	Persons of Concern
RSD	Refugee Status Determination
RTG	Royal Thai Government
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
SSA-S	Shan State Army – South
TBBC	Thailand-Burma Border Consortium
UCAS	Unaccompanied Child Asylum-seekers
UDHR	Universal Declaration of Human Rights
UMR	Unaccompanied Minor Refugees
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
USCRI	United States Committee for Refugees and Immigrants
UWSA	United Wa State Army

Chapter 1 Introduction

“The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty”¹

1.1 Introduction

At the end of 2008 there were some 42 million forcibly displaced people worldwide. This includes 15.2 million refugees, 827,000 asylum-seekers (pending cases) and 26 million internally displaced persons. Forty-four percent of refugees and asylum-seekers are children below 18 years of age. Meanwhile, developing countries are host to four fifths of the world's refugees.² As Loescher aptly puts it, ‘refugees are everywhere – a by-product of every crisis’.³ For several decades Thailand has been a destination for asylum-seekers from its neighbouring countries, both East and West. ‘After the Second World War, the country became a buffer between different ideologies, and the region surrounding the country was embroiled in various conflicts. This led to a variety of influxes’.⁴ The Royal Thai Government (hereafter RTG) provided assistance and furthermore found a solution in cooperation with United Nations High Commissioner for Refugees (hereafter UNHCR) and other countries for some 1.3 million Indochinese asylum-seekers who fled Laos, Cambodia and Vietnam.⁵ Today, one of Thailand's main challenges are the hundreds of thousands of asylum-seekers who have fled to Thailand from Eastern Myanmar, an area which has served as a battlefield between the Myanmar army (*tatmadaw*) and ethnic insurgent groups since the 1980s. Conflict and violence accompanied with widespread violations of international humanitarian and human rights law has driven thousands of Myanmar civilians across the border, making this one of the most protracted refugee situations in the world. An entire generation knows no life beyond the confines of the camps where these asylum-seekers reside. As recent as January 2009, the General Assembly again expressed grave concerns at ‘the major and repeated violations of international humanitarian law committed against civilians’ and at ‘the continuing discrimination and violations suffered by persons belonging to ethnic nationalities of Myanmar, attacks by military forces and non-State armed groups on villages in Karen state and other ethnic states in Myanmar, leading to extensive forced displacement and serious violations and other abuses of the human rights of the affected populations’.⁶ Indeed, the situation has persisted and recently even worsened: in June 2009, fighting between the Democratic Karen Buddhist Army (affiliated with the *tatmadaw*) and the Karen National Liberation Army (an ethnic insurgent group) in the border area drew an additional estimated

¹ G. S. Goodwin-Gill and J McAdam, *The Refugee in International Law*, 2007, at p. 1.

² UNHCR, ‘2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced Persons and Stateless Persons’, 16 June 2008, at p. 2.

³ G. Loescher, in G. Loescher and L. Monahan (eds), *Refugees and International Relations*, 1990, at p. 1.

⁴ V. Muntarbhorn, ‘Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study’, UNHCR Research Paper, 2004, at p. 5.

⁵ International Law Association of Thailand, ‘National Forum Report on Refugees and Displaced Persons in Thailand: Assistance and Durable Solutions’, 11-12 December, 2001, available at <<http://www.refugees.org>>, at p. 17.

⁶ United Nations General Assembly, ‘Resolution on the Situation of Human Rights in Myanmar’, 23 January 2009, UN Doc A/Res/63/245, at paras 2(c) and (d).

3,500 asylum-seekers into Thailand.⁷ Today, there are approximately 150,000 asylum-seekers located in nine official camps along the Thai-Myanmar border, another 200,000 asylum-seekers outside the camps, and more than 2,000,000 migrant workers.⁸ Meanwhile, there are 6,600 registered unaccompanied and separated minor asylum-seekers in the camps.⁹ Of this figure, at least 3,000 are unaccompanied child asylum-seekers (hereafter UCAS).¹⁰ UCAS can be defined as ‘children, as defined in article 1 of the Convention [on the Rights of the Child], who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.’¹¹ These UCAS can be distinguished from separated children who ‘are children, as defined in article 1 of the Convention [on the Rights of the Child], who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.’¹² Indeed, many children from Myanmar are found in Thailand without their parents. Frequently they have lost their parents in flight. Other causes include abduction, being sent by parents who remain behind, having lost parents, military recruitment and detention of parents.¹³ The Executive Committee of the UNHCR (hereafter ExCom) has frequently reiterated the ‘widely-recognized principle that children must be among the first to receive protection and assistance’¹⁴. Certainly children in general and UCAS in particular are extremely vulnerable to abuse, sexual violence, trafficking, (forced) child labor and military recruitment. ‘Their vulnerability is exacerbated by the fact that many children are already in a traumatized state, having been victims or witnesses of atrocities.’¹⁵ The core subject of the present paper is the protection of UCAS in Thailand.

1.2 Research Question

One of the cardinal principles of international refugee law is that of *non-refoulement*. This principle is contained in article 33 of the *1951 Convention Relating to the Status of Refugees* (hereafter the Refugee Convention) and provides that ‘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.’¹⁶ However, Thailand has treaded cautiously in the field of refugee protection and fearing that it will become overburdened by an influx of

⁷ Thailand-Burma Border Consortium, ‘Border Situation Update: July 2nd 2009’, available at <<http://www.tbcc.org>>. T. O. Quintano, ‘Situation of Human Rights in Myanmar’, 24 August 2009, UN Doc A/64/318, at p. 13.

⁸ Thailand-Burma Border Consortium, ‘Programme Report July to December 2008’, available at <<http://www.tbcc.org>>, at p. ix.

⁹ UNHCR, ‘Analysis of Gaps in Refugee Protection Capacity: Thailand’, November 2006, at p. 22.

¹⁰ It must be noted that international governmental and non-governmental organizations employ the term Unaccompanied Minor Refugees (UMR). However, as a result of Thai domestic legislation and the absence of any legislation related to asylum including refugee status determination procedures (as will be extensively discussed in Chapter 5), in the present paper the term Unaccompanied Minor Refugees will be substituted with Unaccompanied Child Asylum Seekers. See section 1.3 for the definitions of ‘refugees’ and ‘asylum seekers’ and the differences between the two categories.

¹¹ Committee on the Rights of the Child, ‘General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin’, 2 September 2005, UN Doc CRC.GC.2005/6, at para. 7.

¹² *Ibid.*, at para. 8.

¹³ Goodwin-Gill and McAdam, *supra* note 1, at p. 477.

¹⁴ UNHCR ExCom, Conclusion no. 47 (1987), at para. C.

¹⁵ C. Bierwirth, ‘The Protection of Refugee and Asylum-Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child’, *Refugee Survey Quarterly* (2005), Volume: 24, issue: 2, pp. 98-124, at p. 99.

¹⁶ Article 33(1) of the *1951 Convention Relating to the Status of Refugees*.

asylum seekers and refugees from neighbouring countries, it has not signed nor ratified the Refugee Convention even though this treaty forms the foundation for the international refugee protection regime and constitutes its most important instrument. As Thailand is not a party to this instrument, it is not bound by the conventional principle of *non-refoulement* as contained therein. Yet, it may be questioned whether Thailand is under the obligation to comply with *non-refoulement* by virtue of other sources or instruments of international law. The subject of Thailand's *non-refoulement* obligations towards UCAS is particularly interesting for two reasons. Firstly, as Thailand is not party to the Refugee Convention, the study will have to examine customary law and other streams of international law, notably international human rights law, in order to establish whether Thailand has *non-refoulement* obligations towards UCAS. Secondly, another interest facet of the present study is whether there are any differences in terms of Thailand's *non-refoulement* obligations between adults and children. Children in general and particularly those who are unaccompanied are extremely vulnerable to exploitation and abuse. An interesting notion is thus whether the position of children under international law with respect to *non-refoulement* differs from that of adults.

The core issue of the present study is whether Thailand has *non-refoulement* obligations towards UCAS. The paper will first extensively explore the background and context of the situation along the Thai-Myanmar border. The human rights situation in Myanmar will be extensively discussed to illustrate the deplorable conditions and the causes of flight. Subsequently, the study will examine two domains of international law, namely international refugee law and international human rights law, to determine whether they contain obligations of *non-refoulement* and if so, what the parameters of these obligations are. Both conventional and customary law will be considered. Lastly, if it is established that Thailand is bound by the principle of *non-refoulement* towards UCAS, the study will briefly examine the Thai domestic legal framework and policies to assess Thailand's compliance with this obligation.

A brief comment must be made concerning the scope of the paper. Thailand is a destination for a multitude of asylum-seekers and refugees, ranging from the prototypical Refugee Convention refugee¹⁷ to civilians fleeing armed conflict and violence. This paper is exclusively concerned with UCAS who are fleeing from persecution or generalized violence and armed conflict. Meanwhile, Myanmar is notorious for a wide array of human rights violations, ranging from political oppression, to ethnic discrimination, persecution, and violations of international humanitarian and human rights law in the various conflict zones. Various ethnic groups in Myanmar are subjected to discrimination and persecution, and the levels of severity and the context in which this occurs differ significantly. For instance, the Muslim Rohingya of Northern Arakan State is an ethnic group that suffers from discrimination, persecution and human rights violations.¹⁸ As will be extensively discussed below, the Myanmar army (*tatmadaw*) is also fighting numerous ethnic insurgents in various

¹⁷ As will be discussed more extensively later in the study, the Refugee Convention defines a refugee as a person who is outside his or her country of nationality or habitual residence, and who is unable or unwilling to seek or take advantage of the protection of that country or to return there as a result of a well-founded fear of persecution because of their race, religion, nationality or membership of a particular group or political opinion. This definition intimates individual 'targeting' and a corollary assessment on a case-by case basis. It is therefore frequently associated with political refugees. This definition can be contrasted with the definition of refugees employed by other entities such as the UNHCR, which contains less individualistic and more group/categorical components, such as civilians who have fled from armed conflict and general violence. For further discussion on the different definitions of refugees see Section 1.3 on definitions below. Also see Goodwin-Gill and McAdam, *supra* note 1, at pp. 15-50.

¹⁸ Rohingyas are not recognized as Myanmarese and are denied citizenship. They are subjected to a wide array of human rights violations, ranging from restricted movement, to forced labor and to forced statelessness.

regions including Chin, Kachin, Shan, Karenni, Karen and Mon states. In these regions, most of the human rights violations are occurring within the context of counter-insurgency measures of the *tatmadaw* against various ethnic insurgent groups. The present paper focuses on UCAS who have escaped persecution and armed conflict within the context of counter-insurgency operations. As such, the paper is mostly concerned with the Karen, Karenni and Mon UCAS located in and outside the official camps established along the Thai-Myanmar border. Lastly, although the UNHCR also has a mandate for the protection of UCAS, given the research question, the study will focus on the RTG. This approach is also appropriate as a result of the fact that the UNHCR's scope of operations is determined by the mandate that it is granted by the RTG. This is attributable to the fact that Thailand is not party to the Refugee Convention and thus has more discretion in terms of cooperation with UNHCR. As such, the paper will focus on the *non-refoulement* obligations of the Royal Thai Government and where relevant address the role of the UNHCR in upholding compliance with this principle.

1.3 Definitions: Refugees, Asylum-Seekers and Migrants

The terms refugee, asylum-seeker and migrant are often used interchangeably and erroneously. However, under international law their statuses and corollary treatment differ. This section will therefore provide the legal definition of each. In ordinary usage, the term refugee has

*a broader looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances to be intolerable. The destination is not relevant; the flight is to freedom, to safety. Likewise the reason for flight may be many... Implicit in the ordinary meaning of the word 'refugee' lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight.*¹⁹

The Refugee Convention is generally considered the foundation of international refugee law. It 'describes refugees as people who are outside their country of nationality or habitual residence, and have a well-founded fear of persecution because of their race, religion, nationality, membership of a particular social group or political opinion.'²⁰ These are the so-called 'statutory refugees'. However, under other mechanisms such as the UNHCR statute, people fleeing conflicts or generalized violence are also generally considered as refugees. These refugees are often referred to as 'persons of concern'.²¹ In international law, a refugee is a person who has been granted asylum by a host state and is therefore recognized as a refugee. 'As a matter of international law, a person is a refugee as soon as the criteria contained in the definition are fulfilled. Recognition of a refugee is declaratory, that is, it states the fact that the person is a refugee. A person does not become a refugee because of recognition, but is recognized because he/she is a refugee'.²² Refugees must be distinguished from internally displaced persons, who might have fled their homes for the same reasons as

¹⁹ Goodwin-Gill and McAdam, *supra* note 1, at p. 15.

²⁰ UNHCR, 'Protecting Refugees & the Role of the UNHCR, 2007-2008', 1 September 2008, at p. 10.

²¹ The discrepancy between the refugee definition under the Refugee Convention and the UNHCR Mandate is attributable to the fact that the UNHCR's scope of operations has significantly expanded over the years without a corollary expansion of the definition of refugee under the Refugee Convention. Indeed, as Goodwin-Gill and McAdam explain, 'the field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established. [...] The class of beneficiaries has moved from those defined in the Statute, through those outside competence assisted on a good offices basis, those defined in relevant resolutions of the General Assembly and directives of the Executive Committee, arriving finally at the generic class of refugees, displaced and other persons of concern to UNHCR'. Goodwin-Gill and McAdam, *supra* note 1, at p. 29.

²² UNHCR, 'Refugee Protection: A Guide to International Refugee Law', 1 December 2001, at p. 48.

refugees, but who have not crossed an international border and therefore remain under the protection of their own government.

Meanwhile, 'asylum seeker is a general term for a person who has not yet received a decision on his/her claim for refugee status. It could refer to someone who has not yet submitted an application or someone who is waiting for an answer. Not every asylum-seeker will ultimately be recognized as a refugee.'²³ Although asylum-seekers may not attain refugee status, nevertheless they may be entitled to some protection (e.g. in the form of temporary refuge) based on other sources, such as international human rights law²⁴ or other regional and domestic instruments providing assistance to persons in need of international protection. For instance, in the European Union some asylum-seekers may benefit from 'subsidiary protection'.²⁵ The 2004 Qualification Directive defines a person who is entitled to such protection as 'a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of serious harm²⁶ [...] and is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country'.²⁷ Beneficiaries are accorded a special subsidiary protection status which has a number of entitlements attached.²⁸ In other situations moral considerations may induce host States to provide for temporary refuge. In both cases asylum-seekers may be accorded a status in between that of a refugee and an asylum-seeker. The corollary rights that may attach to such a status depend on the source or mechanism that is offering the protection.

Lastly, 'migrant' constitutes a 'wide-ranging term that covers most people who move to a foreign country for a variety of reasons and for a certain length of time (usually a minimum of a year, so as not to include very temporary visitors such as tourists, people on business visits, etc.). Different from 'immigrant', which means someone who takes up permanent residence in a country other than his or her original homeland.'²⁹ 'Economic migrants are persons who leave their country of origin purely for economic reasons, to seek material improvements in their lives.'³⁰ A main difference between migrants on the one hand and refugees and asylum-seekers on the other hand, is that generally the latter do not enjoy the protection of their country of origin. There are presently nearly 2 million migrant workers from Myanmar in

²³ *Ibid.*

²⁴ Chapter 4 will discuss the principle of *non-refoulement* as derived from international human rights law instruments. While asylum-seekers benefiting from *non-refoulement* as derived from international human rights law may not be recognized as refugees, they nevertheless are entitled to some protection (for instance in the form of temporary refuge).

²⁵ Other examples of such status include 'B-status', de facto status and humanitarian status. ExCom, 'Complementary Forms of Protection Their Nature and Relationship to the International Refugee Protection Regime', 9 June 2000, UN Doc. EC/50/SC/CRP.18, at para. 2.

²⁶ Harm is defined in Article 15 of the 2004 Qualification Directive which provides that 'serious harm consists of (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

²⁷ 2004 EU Qualification Directive. EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

²⁸ Entitlements for beneficiaries of subsidiary protection include temporary residence permits (article 24), issuance of travelling documents (article 25), access to employment-related education (article 26), access to education (article 27), social assistance (article 28) and access to healthcare (article 29). See 2004 EU Qualification Directive, *supra*, at paras. 24-34.

²⁹ UNHCR, 'Protecting Refugees & the Role of the UNHCR', *supra* note 20, at p. 10.

³⁰ UNHCR, 'A Guide to International Refugee Law', *supra*, note 22, at p. 48.

Thailand, the equivalent of 80% of the total migrant workforce.³¹ The present study is concerned with asylum-seekers and refugees and the terms will be used in accordance with the definitions provided above.

³¹ Amnesty International, 'Leaving Home', 7 September 2005, at p. 4.

Chapter 2

Myanmar's History and the Flight of Asylum-Seekers

2.1 History of Myanmar

Ethnic strife and political oppression have been recurrent themes in Myanmar's history since its independence. The diverse ethnicities and their interaction have played a determinant role in the country's history and development. Prior to its independence, Myanmar consisted of traditional kingdoms and other forms of traditional local governments. 'The isolation enforced by Burma's numerous mountains and hills helped nurture these culturally discrete groups.'³² Nevertheless, 'enmities between certain ethnic groups go back hundreds of years, dating from the times that Burman, Mon-Khmer, and Rakhine kingdoms fought each other, while more peaceable peoples were driven into remote areas'.³³ After the British conquest in the 19th century, in 1948 the Union of Burma gained independence and established itself as a republic. Despite ethnic insurgencies demanding autonomy and independence, the republic survived until the 1962 army coup d'état, after which Myanmar was ruled by a military regime led by the Burma Socialist Programme Party (BSPP) of General Ne Win. Ethnic strife with opposition groups continued, particularly along the country's Eastern borders, resulting in numerous costly guerilla wars. Economic mismanagement resulted in widespread poverty, including severe rice shortages. After the August 8th, 1988 pro-democracy protest in which thousands of unarmed protestors were killed by soldiers, in September 1988 General Saw Maung staged a coup d'état and formed the State Law and Order Restoration Council, which changed the country's name from the Union of Burma to the Union of Myanmar and the capital name from Rangoon to Yangon in 1989. Elections were held in May 1990 and won by the National League for Democracy (NLD). A substantial number of parliamentary seats were also won by various ethnic groups opposing the SLORC (renamed the State Peace and Development Council – SPDC – in 1997). However, the results of the 1990 election have not been acknowledged by the SPDC which rules Myanmar to date. Meanwhile, ethnic insurgencies, particularly in the Eastern regions, are still prevalent.

2.2 Ethnic Conflict in Myanmar

Myanmar has a very ethnically diverse population. While the majority is Burman (68%), the remaining non-Burman population consists of 135 different ethnic groups, the largest being the Shan (9%), Karen (7%), Rakhine (4%), Chinese (3%), Indian (2%) and Mon (2%).³⁴ The ethnic minorities are spread over Myanmar, but mostly live in the seven states and divisions named after the minority groups: Karen, Kachin, Kayah, Mon, Chin, Shan, and Rakhine. As previously mentioned, ethnic strife is a significant element of Myanmar's history, and today the relationship between various ethnic groups and the military regime continues to be contentious. Although since 1989 the regime has signed a number of cease-fire agreements with various insurgent groups, a handful of insurgents are still in active opposition. The biggest and oldest of the remaining ethnic insurgents is the KNLA, the armed wing of the Karen National Union, which has been in insurrection since 1949. Fighting has also continued with the Karenni National Progressive Party, the Shan State Army South and various other

³² H. Beech, 'A Closer Look at Burma's Ethnic Minorities', 30 January 2009, Time Magazine Online, available at <<http://www.time.com/time/world/article/0,8599,1874981,00.html>>.

³³ Human Rights Watch, 'Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma', October 2007, at p. 24.

³⁴ J. Bajoria, 'Understanding Myanmar', Council on Foreign Relations, updated 29 September 2009, available at <<http://www.cfr.org>>.

smaller groups in Chin and Arakan States.³⁵ Meanwhile, even where ceasefire agreements have been established, 'occasional flashpoints of fighting still occur',³⁶ particularly as the *tatmadaw* seeks to consolidate newly attained areas. In addition, clashes with the *tatmadaw* also still occur as a result of splintering within ethnic groups.

2.3 Human Rights in Myanmar and Mass Population Displacement

'International refugee law defines a refugee on the basis of the reasons for flight.'³⁷ Indeed, the causes of flight and asylum-seeking have a central position in international refugee law. This section will therefore provide a vivid description of the human rights situation which constitutes the main cause of population flight in Myanmar. Human rights violations in Myanmar have been a serious concern of the international community for several decades already and have formed the subject of a multitude of studies. Since 1992 Myanmar has been subjected to investigation of its human rights violations by a country-specific Special Rapporteur appointed by the Human Rights Council (previously the Human Rights Commission). Certainly the lack of political freedom has been extensively reported on and calls have been made for more political dialogue, the release of political prisoners, the lifting of restrictions on political parties, freedom of information and expression, and reform of the administration of justice.³⁸ The recent trial and extended house arrest of Daw Aung San Suu Kyi has brought new fervor to calls to the Myanmar *junta* to respect its people's civil and political rights. Other human rights violations that have gained much international attention recently are related to the limited access to victims of cyclone Nargis, as well as human rights violations in relation to the development of oil and gas projects throughout the country. However, most relevant to the present study are the widespread human rights violations in the form of oppression and discrimination of ethnic minorities, including the Rohingya³⁹, Chin⁴⁰, Karen, Karenni, Shan and Mon.⁴¹ While oppression and discrimination of ethnic minorities exist as such, it also occurs within the context of counter-insurgency measures of the *junta*.

The counter-insurgency measures of the Myanmar government are notorious for their relentlessness. Numerous reports have been produced on humanitarian and human rights law violations committed in such counter-insurgencies against ethnic insurgents as well as civilians.⁴² 'The SPDC and its predecessors have based their counter-insurgency strategy on targeting the civilian population'.⁴³ The SPDC's Four Cuts Policy 'aims to undermine the armed opposition's access to recruits, information, supplies and finances by forcibly relocating villagers from contested areas into government controlled areas'.⁴⁴ Those who do not follow the relocation orders of the *tatmadaw* are considered sympathetic to the armed opposition and are subjected to dire, if not fatal, consequences. Villages are often made

³⁵ N. Ganesan & K. Y. Hliang (eds), 'Myanmar: State, Society and Ethnicity', 2007. H. Beech, *supra* note 32.

³⁶ *Ibid.*

³⁷ I. Brees, 'Refugee Business: Strategies of Work on the Thai-Burma Border', *Journal of Refugee Studies* (2008), vol: 21, no: 3, at pp. 380-397, at p. 380.

³⁸ United Nations General Assembly, 'Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar', UN Doc. A/57/280, at 2-3.

³⁹ Amnesty International, 'Myanmar: The Rohingya Minority: Fundamental Rights Denied', 18 May 2004.

⁴⁰ Human Rights Watch, 'We Are Like Forgotten People. The Chin People of Burma: Unsafe in Burma, Unprotected in India', 27 January 2009.

⁴¹ Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', 31 October 2008.

⁴² See for example Amnesty International, 'Myanmar: Crimes Against Humanity in Eastern Myanmar', 5 June 2008, at p. 3

⁴³ Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', *supra* note 41, at p. 8.

⁴⁴ *Ibid.*

inaccessible by the *tatmadaw* through the placement of landmines.⁴⁵ Resources are confiscated, and villages are often completely burned down or otherwise destroyed. In eastern Myanmar alone, 'field surveys conducted by local humanitarian and human rights groups have previously indicated that more than 3,200 villages were destroyed, forcibly relocated or otherwise abandoned [...] between 1996 and 2007. Such field reports have recently been corroborated by high resolution commercial satellite imagery of villages before and after the displacement occurred.'⁴⁶ Where villages or crops are not destroyed, the inhabitants are often forbidden to return. Various sources have reported witnesses saying that those who returned and were found by the *tatmadaw* were instantly killed under the *tatmadaw's* shoot-on-sight policy.⁴⁷ Another element of the *tatmadaw's* offensive is the 'systematic destruction, looting and excessive confiscation of crops, livestock, agricultural areas, water supplies, and personal possessions'.⁴⁸ Civilians are also often subjected to arbitrary taxes. Through the self-reliance policy, the *tatmadaw* obtains all required resources from the local population, thereby diminishing their livelihoods and disabling them from meeting their own basic needs.

Other human rights violations in Myanmar exist in the form of slavery and forced labor of ethnic minorities.⁴⁹ 'The burden of forced labour appears to be particularly great for non-Burman ethnic groups, especially in areas where there is a strong military presence'.⁵⁰ Civilians are often forced to porter and tasks include 'carrying munitions, food, water, and firewood, and acting as minesweepers, sentries, or military guides'.⁵¹ The forced laborers often suffer from beatings, and furthermore include women and children.⁵² Myanmar is also believed to have the world's largest number of child soldiers.⁵³ In 2002 there were approximately 70,000 child soldiers, some as young as eleven, recruited into the Myanmar army.⁵⁴ Most children are forcibly recruited through intimidation, harassment and abuse, or otherwise simply kidnapped. Meanwhile, it has been estimated that 6,000-7,000 child soldiers are fighting for various armed opposition groups.⁵⁵

⁴⁵ Amnesty International, 'Myanmar: Crimes Against Humanity in Eastern Myanmar', *supra* note 42, at p. 26.

⁴⁶ Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', *supra* note 41, at p. 18.

⁴⁷ United Nations General Assembly, 'Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar', *supra* note 38, at para. 17 and Amnesty International, 'Myanmar: Crimes Against Humanity in Eastern Myanmar', *supra* note 42, at p. 26.

⁴⁸ Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', *supra* note 41, at p. 22.

⁴⁹ The International Labour Organization has concluded that these forced labor activities do not fall under the list of exceptions provided for under article 2(2)(d) of the International Labour Organization's *Convention concerning Forced or Compulsory Labour* of 1930 (No. 29) which was ratified by the government of Myanmar in 1955, and should therefore immediately be halted.

⁵⁰ International Labour Organization cited in Amnesty International, 'Myanmar: Crimes Against Humanity in Eastern Myanmar', *supra* note 42, at p. 21.

⁵¹ *Ibid*, at p. 22.

⁵² Amnesty International, 'Leaving Home', *supra* note 31. The issue of children and forced labor was addressed in Committee of the Rights of the Child, 'Concluding Observations Myanmar', 24 January 1997, UN Doc CRC/C/15/Add.69, at paras. 21-22.

⁵³ T. O. Quintano, 'Report of the Special Rapporteur on the Human Rights Situation in Myanmar', 11 March 2009, UN Doc A/HRC/10/10. See also Committee of the Rights of the Child, 'Concluding Observations Myanmar', *ibid*, at paras. 21-22.

⁵⁴ Boys younger than eleven have also been recruited, but were generally subjected to other smaller tasks to allow their bodies to further develop first. See Human Rights Watch, *My Gun Was as Tall as Me: Child Soldiers in Burma*, 2002, at p. 2-3.

⁵⁵ General Assembly-Security Council, 'Report of the Secretary General on Children and Armed Conflict to the UN Security Council', 21 December 2007, UN Doc. A/62/609-S/2007/757, at paras. 66-69. See also Human Rights Watch, *My Gun Was as Tall as Me: Child Soldiers in Burma*, *ibid*, at p 7.

In addition to the *tatmadaw*, various armed opposition groups are also engaged in gross violations of international humanitarian and human rights law. The United Wa State Army, Democratic Karen Buddhist army and Karenni National People's Liberation Front have allegedly all engaged in forced relocations and other human rights violations.⁵⁶ The ethnic groups have also used forced labor and committed atrocities against civilians, including retaliatory killings and rapes. They can furthermore also be held responsible for other outbursts of violence for instance through ambushes and the planting of landmines. Both the *tatmadaw* and the ethnic groups have reportedly committed extrajudicial killings, torture, beatings, abuse, and sexual violence against civilians.⁵⁷

The conduct extensively discussed above violates various provisions of international law, including international humanitarian law⁵⁸ and international human rights law⁵⁹. The severity of the numerous human rights and humanitarian law violations resulted in stern and widespread criticism of the Myanmar government in the international community.

*The General Assembly... strongly calls upon the Government of Myanmar... to take urgent measures to put an end to the military operations targeting civilians in the ethnic areas, and the associated violations of human rights and humanitarian law against persons belonging to ethnic nationalities, ... to end the systematic forced displacement of large numbers of persons and other causes of refugee flows to neighbouring countries, (and) to provide the necessary protection and assistance to internally displaced persons, in cooperation with the international community.*⁶⁰

The situation is so horrific and alarming that the International Committee of the Red Cross, renowned for its neutrality and silent diplomacy, issued a public statement in which it 'strongly denounced violations of international humanitarian law committed against civilians and detainees by the government of Myanmar and demanded that the government take urgent

⁵⁶ Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', *supra* note 41, at p. 23.

⁵⁷ See 'Burma' in Human Rights Watch, *World Report 2009*, 2009, at pp. 223-229.

⁵⁸ For instance, a fundamental principle is that civilians and non-combatants cannot form targets in hostilities and shall be treated humanely. Article 3 common to the four Geneva Conventions (ratified by Myanmar in August 1992) which has now become part of customary international law and furthermore applies to non-international armed conflicts (see *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986) prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture', 'outrages upon personal dignity, in particular humiliating and degrading treatment', and 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court'. See Common Article 3 to the Geneva Conventions of 12 August 1949.

⁵⁹ For instance, the right to life, liberty and security of person, the right to non-discrimination and equality, freedom from slavery or servitude, freedom from torture or cruel, inhuman or degrading treatment or punishment, the right of freedom of movement and residence, the right to own property, and the right to an adequate standard of living, as provided for in the Universal Declaration of Human Rights, many provisions of which are regarded as customary international law. There are also clear violations of numerous provisions of the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights, though Myanmar is party to neither international instrument. Meanwhile, the forced recruitment and subsequent deployment of child soldiers contravenes Myanmar's obligations under the Convention on the Rights of the Child (accessed to by Myanmar on 15 July 1991), notably article 38, as well as its obligation under international law to refrain from acts or conducts which would defeat the object and purpose of a treaty that it has signed, in the present case the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (signed by Myanmar on 12 November, 2001).

⁶⁰ United Nations General Assembly, 'Resolution 61/232 on the Situation of Human Rights in Myanmar', 13 March 2008, UN Doc. A.HRC.7/18, at para. 89.

action to end these violations and prevent them from recurring'.⁶¹ Since 1991, at least 29 resolutions have been passed on Myanmar by the General Assembly and the Human Rights Commission.⁶²

The violence and conflict has resulted in mass civilian movement, both within Myanmar and cross-border. In terms of internal displacement, Refugees International⁶³ and the Thailand-Burma Border Consortium estimate that there are more than half a million internally displaced persons (hereafter IDPs) in Eastern Myanmar.⁶⁴ In 2008 in Eastern Myanmar alone, 'an estimated 66,000 people were forced to leave their homes as a result of, or in order to avoid, the effects of armed conflict and human rights abuses'.⁶⁵ Overall, estimates for the number of IDPs in the whole of Myanmar have ranged between at least 1 million to approximately 3 million.⁶⁶ Meanwhile, with respect to cross-border population movement, it has been estimated that over a million Burmese, the majority comprising ethnic minorities, have fled from Myanmar to Thailand, Bangladesh, India, China and Malaysia for economic or political reasons. According to UNHCR statistics from 2006, there are over 295,800 refugees from Myanmar in neighbouring countries, the majority being Karen, Karenni and Rohingya.⁶⁷

With respect to Thailand, the presence of Myanmar asylum-seekers dates back to the beginning of the conflict between the *junta* and the ethnic insurgents. During dry season offensives of the *tatmadaw*, ethnic minorities used to temporarily seek refuge in Thailand and return in the wet season. However in 1984 the *tatmadaw* broke through the defenses of the Karen separatist movement's front lines, driving ten thousand Myanmar asylum-seekers into Thailand. Having lost their territory to the *tatmadaw*, these asylum-seekers stayed. In subsequent years, *tatmadaw* offensives and consolidations in various regions of eastern Myanmar forced an ever increasing number of asylum-seekers from various ethnic minorities into Thailand. Meanwhile, the crushing of the 8888 uprising drew another 10,000 'student' activists. Overall, asylum-seekers from Myanmar can be divided into two categories; ethnic minorities who have fled armed conflict and persecution in Myanmar and who may end up at one of the nine camps along the border; and other asylum-seekers – generally students and political activists - who manage to reach Bangkok to apply for refuge at the UNHCR (frequently referred to as the 'urban cases').⁶⁸ As previously indicated, the present study deals with the former category of asylum-seekers.

To summarize, violations of international humanitarian law and human rights law are occurring on a wide scale in eastern Myanmar and constitute the core cause of population

⁶¹ International Committee of the Red Cross, 'Myanmar: ICRC denounces major and repeated violations of international humanitarian law', 29 June, 2007, available at <<http://www.icrc.org>>.

⁶² UNHCR, 'Myanmar Homepage', available at <<http://www.ohchr.org>>.

⁶³ K. Shukla, 'Ending the Waiting Game: Strategies for Responding to Internally Displaced People in Burma', 1 June 2006, Refugees International, at p. i.

⁶⁴ Of the total number of IDPs, an estimated 224,000 are in temporary settlements of ceasefire areas administered by ethnic nationalities, 101,000 are hiding in areas most affected by military skirmishes and 126,000 have followed *tatmadaw* orders by moving into designated relocation sites. See Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', *supra* note 41, at p. 20.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, at p. 8.

⁶⁷ Breaking down this figure, 'approximately 150,000 Burmese live in nine refugee camps in Thailand along the border with Burma and approximately 28,000 are living in two camps in Bangladesh. Roughly 40,000 Burmese (mostly Chin and Rohingya) are registered people of concern by the UNHCR in Malaysia.' UNHCR, 'Myanmar Refugees in South East Asia – April 2006', 1 April 2006.

⁶⁸ Note must be made that there are also tens of thousands of asylum-seekers from Myanmar outside the established camps.

flight. More importantly however, it has become apparent that the violations of humanitarian and human rights law are not occurring indiscriminately. Indeed, ethnic minorities are targeted and suffer disproportionately from the violence.⁶⁹ This targeting is based on their ethnicity or membership of a particular social group. It can therefore be said that a significant number of people belonging to ethnic minorities have fled out of fear for persecution. Overall however, in light of the *tatmadaw's* Four Cuts Policy as well as the violence committed by both the *tatmadaw* and the ethnic insurgents, most of Myanmar's asylum-seekers have fled out of fear caused by widespread violations of international humanitarian and human rights law in the context of generalized violence and armed conflict. The extensive description of the situation in Myanmar is not only relevant in assessing the causes of flight, the need for protection and the asylum claims, but it furthermore also illustrates what conditions a person would be returned to should Thailand decide to reject or expel asylum-seekers. This is highly relevant in terms of potential *non-refoulement* obligations under international refugee and human rights law, as will be further elaborated upon later in the study.

⁶⁹ United Nations General Assembly, 'Resolution on the Situation of Human Rights in Myanmar', *supra* note 6, at para 2(c).

Chapter 3

International Refugee Law

'Everyone has the right to seek and to enjoy in other countries asylum from persecution'
Universal Declaration of Human Rights, Article 14(1)

3.1 Introduction

The plight of asylum-seekers and refugees commonly falls within three domains of international law: international refugee, humanitarian and human rights law. These three domains of law were incepted individually and have further developed along their own paths but nevertheless share a common objective: the protection of individuals and their most basic human rights. The three strands of international law are highly interrelated. For one, violations of human rights law and humanitarian law (in armed conflict) frequently constitute the main cause of refugee situations throughout the world. Meanwhile, international refugee law is essentially about the protection of the most basic human rights of refugees, as can be deduced, *inter alia*, from the preambular reference of the Refugee Convention to the *1948 Universal Declaration of Human Rights* (hereafter UDHR). Although the State of origin remains the primary addressee in terms of the obligations imposed by international human rights law, it is recognized that States may fail to realize this obligation, particularly in certain grave situations. This failure subsequently may result in persons being unable or unwilling to avail themselves of the protection of that State and fleeing to another State. International refugee law serves as an international protection mechanism for these persons. Indeed, 'international refugee law is part of a larger mosaic of international human rights law and international humanitarian law.'⁷⁰ As such, there is a certain level of inevitable overlap between the three domains. In the present case, international refugee and human rights law will be examined to determine whether there are *non-refoulement* obligations for Thailand with respect to UCAS. International refugee law evidently applies by virtue of the cross-border movement and asylum-seeking, while the potential relevance of human rights law derives from its universality and inalienability. As international refugee law is the foundation for the protection of refugees and asylum-seekers, the study will first examine this domain before exploring whether there are any *non-refoulement* obligations deriving from international human rights law.

3.2 Conventional Law: The Refugee Convention and 1967 Protocol

The norms of the international refugee protection regime can be found in numerous sources of international law, including conventional law, customary law as well as soft law. The international legal framework for the protection of refugees and asylum-seekers also consists of universal as well as regional instruments. The foundation of international refugee law is the Refugee Convention and its 1967 Protocol.⁷¹ A large number of States have ratified the Refugee Convention and the Protocol⁷² and a number of the Refugee Convention's provisions have furthermore been incorporated into multiple regional instruments. The Refugee Convention defines refugees, and establishes a number of rights and duties for refugees on the one hand and obligations for States on the other hand. Article 1A(2) of the Refugee

⁷⁰ UNHCR, 'Refugee Protection: A Guide to International Refugee Law', *supra* note 22, at p. 18.

⁷¹ The Protocol exists independently of the Convention and some states are only party to the Protocol. However, on the basis of Article 1(1) of the Protocol, parties are bound to apply articles 2 to 34 of the Convention as well.

⁷² There are 19 signatories and 144 States Parties to the 1951 Convention, and 144 States Parties to the 1967 Protocol.

Convention, as amended by Article 1(2) of the 1967 Protocol, defines a refugee as someone who

'owing to a 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, is unable or, owing to such fear, is unwilling to return to it'

The definition of a refugee in the Refugee Convention is generally regarded as being of a 'universal' nature.⁷³ However, discussion is ongoing regarding its compatibility with contemporary refugee realities, particularly in terms of refugees fleeing armed conflict. In this regard it is generally commented that the definition provided in the Refugee Convention is too restrictive because it intimates at and has been interpreted by States Parties as requiring individual persecution (i.e. the person must be targeted). Certainly, there appears to be international agreement that a person conforming to the restrictive Refugee Convention definition constitutes a refugee. Disagreement pertains to a more expanded definition of a refugee to include someone who is fleeing generalized violence, armed conflict or other circumstances causing the breakdown of public order.⁷⁴ There is clearly a lack of uniform State practice with respect to an established definition of a refugee. Furthermore, although the Refugee Convention is widely ratified, there undoubtedly exists a geographical imbalance in its ratification. These factors combined compel Sztucki to conclude that the refugee definition as embedded in the Refugee Convention cannot be considered a principle of customary international law.⁷⁵ Indeed, States establish their own definitions of who constitutes a refugee, though these definitions must be in accordance with their international obligations emanating from for instance the Refugee Convention or other instruments, such as regional instruments for refugee protection. States that do not have any international legal obligations enjoy wide discretion in this regard.

⁷³ J. Sztucki, 'Who is a Refugee? The Convention Definition: Universal or Obsolete', in F. Nicholson and P. Twomey (eds), 'Refugee Rights and Realities: Evolving International Concepts and Regimes', 1999, at p. 55. However, from Sztucki's perspective the definition is merely universal in the formal sense of the word as it 'is arguable that the substance of the Convention definition is less universal now than it was when the Convention entered into force'. *Ibid.*, at p. 75.

⁷⁴ With 144 parties to the 1967 Protocol (and as such the acceptance of 144 States of the definition as included in the Refugee Convention) it can be said that there is widespread agreement that at least a person meeting the criteria of the 1951 Refugee Convention constitutes a refugee. Article 42 of the Refugee Convention prohibits reservations to the definition as included in Article 1, and as such this definition has been accepted by at least 144 domestic legal systems. Meanwhile, the definition as contained in the Refugee Convention has also been duplicated in various other instruments, including regional instruments such as the 1984 Cartagena Declaration, the 1969 Organisation of African Unity (OAU) Convention governing the Specific Aspects of the Refugee Problem in Africa, and the Bangkok Principles. Indeed, disagreement appears to exist in terms of a more expanded definition of refugees to include for instance persons fleeing armed conflict. This disagreement can be observed on an international level (e.g. the 1951 Refugee Convention versus the regional instruments) as well as by means of comparing domestic definitions (i.e. with some states strictly applying the Refugee Convention and others employing broader definitions). For instance with respect to the disagreement on an international level, both the 1984 Cartagena Declaration and the 1969 OAU Convention provide that the definition of a refugee shall also include persons who have fled generalized violence, external aggression, occupation, internal conflict, massive violations of human rights, or other circumstances which have seriously disturbed public order, as embedded in Article III(3) and Article 1(2) of the two instruments respectively. Also see J. Sztucki, *ibid.*, at p. 77.

⁷⁵ *Ibid.*

Meanwhile, one of the central tenets of the Refugee Convention ‘upon which the whole thrust of international refugee law rests’⁷⁶ is the principle of *non-refoulement* in Article 33 which provides that

*‘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’.*⁷⁷

This principle is so fundamental to international refugee law that the Refugee Convention prohibits any reservations to Article 33.⁷⁸ Although the Refugee Convention forms the foundation for international refugee law and has furthermore been ratified by the majority of the world’s countries, there are still more than forty States not party to this instrument. In particular very few Asian countries, including Thailand, have ratified the Convention.⁷⁹ Consequently, the only relevant provisions of the Refugee Convention for present purposes are those that have attained a status of customary international law and are therefore binding upon all States regardless of ratification.

3.3 Customary Law

3.3.1. Non-Refoulement in Customary International Law: the Refugee Context

Customary international law plays a significant role in the field of refugee protection. For one, despite the Refugee Convention and the various regional instruments, ‘there remain some aspects of relations between States on the subject of refugees and *non-refoulement* that are not covered by such treaties’.⁸⁰ Moreover, customary international law is especially significant with respect to the forty-plus States that are not party to the Refugee Convention, but are nevertheless bound by those provisions which have become part of customary international law. As was affirmed in the *North Sea Continental Shelf Case*, a principle can exist in nearly identical form both in treaty and in customary law.⁸¹

In the *North Sea Continental Shelf Case* the Court noted that for a rule to have attained the status of customary international law, there are three elements which must be taken into consideration: the rule should be of a fundamentally norm-creating character, there must be widespread and representative support including from those whose interests are specially affected, and there needs to be consistent practice and general recognition of the rule.

⁷⁶ P. C. W. Chan, ‘The Protection of Refugees and Internally Displaced Persons: *Non-Refoulement* Under Customary International Law?’, *The International Journal of Human Rights* (2006), vol: 10, no: 3, pp. 231-239, at p. 232.

⁷⁷ Article 33(1) of the Refugee Convention. Paragraph 2 contains a number of exceptions and provides that ‘the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.’

⁷⁸ Article 41(1) of the Refugee Convention

⁷⁹ One of the main reasons for this phenomenon is the Eurocentric origin of the Convention. Although the 1967 Protocol amended the Convention and removed the temporal and geographic limitations, nevertheless many countries still refuse to sign the convention because they feel that it fails to correspond to the contemporary realities of refugee situations. For more reasons regarding the low Asian participation in the 1951 Convention, See C. R. Abrar, ‘Legal Protection of Refugees in South Asia’, *Forced Migration Review* (2001), volume: 10, pp. 21-23. For an extensive review of the ‘Asian rejection’ of the 1951 Convention, see S. Davies, ‘The Asian Rejection?: International Refugee Law in Asia’, *Australian Journal of Politics and History* (2006), Vol: 52, Issue: 4, at pp. 562-575.

⁸⁰ E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in E. Feller, V. Turk and F. Nicholson (eds), ‘Refugee Protection in International Law: UNHCR’s global Consultations on International Protection’, 2003, pp. 140-164, at p. 140.

⁸¹ Cited in Lauterpacht and Bethlehem, *supra* note 80, at p. 142.

Lauterpacht and Betlehem's extensive study on the scope and content of the principle of *non-refoulement* demonstrates that these three elements certainly apply to the principle of *non-refoulement*.⁸² Similarly, Chan's examination of state practice and *opinio juris* also led him to conclude that the principle of *non-refoulement* has attained customary status. In both studies, reference is made to the widespread ratification of the Refugee Convention, the non-derogability of Article 33 of the Refugee Convention, the inclusion of the principle of *non-refoulement* in various regional instruments of refugee protection, the vast number of resolutions and declarations supporting the principle of *non-refoulement*, and the general observance of the principle by non-State parties, as reflections of the customary nature of the principle of *non-refoulement*. Goodwin-Gill and McAdam also noted that State practice since 1951 'is persuasive evidence of the concretization of a customary rule, even in the absence of any formal judicial pronouncement.'⁸³ Moreover, as will be further discussed in section 3.4 below, the customary status of the principle of *non-refoulement* has been reaffirmed in a number of soft law instruments. Indeed, the principle of *non-refoulement* has become part of customary international law and constitutes the cornerstone of international refugee protection.⁸⁴ ExCom and various legal scholars⁸⁵ even contend that the principle constitutes a peremptory norm, or *jus cogens*.⁸⁶ As a customary principle of international law, *non-refoulement* is binding on all States and State responsibility will arise where violations are attributable to its conduct.⁸⁷ It must be noted however that the principle of *non-refoulement* has developed into customary international law in two distinct contexts, namely within the framework of international refugee law and within the framework of international human rights law.⁸⁸ In the context of international refugee law, the customary principle of *non-refoulement* corresponds largely to the principle as contained in article 33 of the Refugee Convention.

Reduced to its essentials, the content of the customary principle of non-refoulement in a refugee context may be expressed as follows:

- 1. No person seeking asylum may be rejected, returned, or expelled in any manner whatever [sic] where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or to life, physical integrity, or liberty. Save as provided in paragraph 2, this principle allows of no limitation or exception.*
- 2. Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of*

⁸² Lauterpacht and Betlehem, *supra* note 80, at pp. 141-149.

⁸³ Goodwin-Gill and McAdam, *supra* note 1, p. 346.

⁸⁴ *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, UN Doc. HCR/MMSP/2001/09, at para. 4. For an extensive discussion of *non-refoulement* in customary international law, see Lauterpacht and Bethlemen, *supra* note 80, at pp. 140-164. See also P. Chan, *supra* note 76. Other authors who contend that *non-refoulement* is a principle of customary international law include Goodwin-Gill, McAdam, Allain and Hailbronner.

⁸⁵ See for instance J. Allain, 'The *jus cogens* nature of *non-refoulement*', *The International Journal of Refugee Law* (2001): vol: 13, no: 4, pp. 535-558.

⁸⁶ See P. Chan, *supra* note 76, at p. 235; J. Allain, *ibid*, and ExCom, Conclusion no. 25 (XXXIII) of 1982. In the view of the author, examination of *opinio juris* and state practice suggests that it may be premature to contend that *non-refoulement* has gained the status of *jus cogens*.

⁸⁷ Lauterpacht and Betlehem, *supra* note 80, at p. 149.

⁸⁸ *Non-refoulement* as a principle of customary international law in the human rights context will be discussed in Chapter 4.

*human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.*⁸⁹

Thus, the principle of *non-refoulement* entails a prohibition to return or to expel as well as a prohibition of non-admission where an asylum-seeker faces a threat of persecution or to life, physical integrity or liberty.⁹⁰ 'Although *non-refoulement* is not synonymous with a right to admission, the principle of non-rejection at the frontier implies at least temporary admission to determine an individual's status.'⁹¹ Moreover, the principle of *non-refoulement* applies to all asylum-seekers, 'irrespective of whether or not the individuals have been formally recognized as refugees'.⁹² If an asylum-seeker has been denied asylum and faces expulsion, the host State may only do so where the asylum-seeker does not face a threat of persecution or to life, physical integrity or liberty (i.e. direct *refoulement*). In such cases international refugee law however does permit sending the asylum-seeker to a third country provided that the third country is safe and the asylum-seeker will not be faced with the abovementioned threats. However, the sending State must be sure that the asylum-seeker will not be subsequently removed to another potentially unsafe country, such as the state of origin (i.e. chain *refoulement*). States are also prohibited from conducting indirect *refoulement*, which involves action 'taken beyond a state's borders or carried out by individuals or bodies acting on behalf of a state or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc.' which also in effect amount to expulsion or non-admission of asylum-seekers.⁹³ Meanwhile, a particularly noteworthy component of the customary principle of *non-refoulement* in the refugee context is that it allows for derogations in public emergency where the threat faced by the asylum-seeker does not amount to a threat of torture or other cruel, inhuman or degrading treatment or the threat of violations of other non-derogable human rights. However, in such cases non-admission or expulsion is 'conditional on strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a third country.'⁹⁴

As mentioned above, *non-refoulement* entails non-rejection and temporary admission to examine an asylum-seeker's claims. Indeed, by virtue of the principle of *non-refoulement* States under the duty conduct on a case-by-case basis an assessment of whether there is a threat to life or to physical integrity should an asylum-seeker be returned. This is the only way for a State to ensure that it does not violate its *non-refoulement* obligation. The Refugee Convention, though establishing the criteria for refugee-status and providing for a number of

⁸⁹ Lauterpacht and Betlehem, *supra* note 80, at p. 150.

⁹⁰ Lauterpacht and Betlehem base the scope of the principle of *non-refoulement* as applicable to risks of cruel, inhuman or degrading treatment or punishment on the widespread ratification of various instruments containing such principles. Clearly the principle of non-refoulement under customary international law, even within the refugee context, is closely linked with international human rights law. *Non-refoulement* within the context of international human rights will be further discussed in chapter 4.

⁹¹ Goodwin-Gill and McAdam, *supra* note 1, at p. 205. For a description of the development of the principle of non-refoulement and past discussion surrounding the issue of whether an asylum-seeker had to be present within a State's territory for the principle of non-refoulement to be triggered, see Goodwin-Gill and McAdam, *supra*, at p. 206.

⁹² Executive Committee Conclusion No. 6 (1977), para (c). See also Executive Committee Conclusion No. 79 (1996), at para (j); Conclusion No. 81 (1997), at para (i); Conclusion No. 82 (1997), at para (d)(i).

⁹³ V. Turk and F. Nicholson, 'Refugee Protection in International Law: An Overall Perspective', in E. Feller, V. Turk and F. Nicholson (eds), 'Refugee Protection in International Law: UNHCR's global Consultations on International Protection', 2003, at p.10.

⁹⁴ *Ibid.*

key principles such as *non-refoulement*, does not provide for specific procedures for the determination of refugee status. It is up to the State Parties, with assistance and guidance from UNHCR, to set up such procedures. In a similar manner, the customary principle of *non-refoulement* does not provide for a specific assessment procedure either. It is thus up to each State to establish a risk-assessment mechanism which determines whether the return of an asylum-seeker would entail a threat of persecution, or a risk to the life or physical integrity of the individual concerned. In the event that such a procedure establishes that the return of an asylum-seeker does entail a threat or risk of the abovementioned harms, a host State is prohibited from returning or expelling the asylum-seeker.

3.3.2. Non-Refoulement in Cases of Mass Influx

The applicability of the principle of *non-refoulement* to situations of mass influx is an issue that has received much attention in the domain of international refugee protection. Although there is no common definition for mass influx, it can generally be defined as the arrival of ‘a large number of displaced persons, who come from a specific country or geographical area.’⁹⁵ Mass influx situations may include the following characteristics: ‘i) considerable numbers of people arriving over an international border; ii) a rapid rate of arrival, iii) inadequate absorption or response capacity in host States, particularly during the emergency, iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.’⁹⁶ The applicability of the principle of *non-refoulement* in situations of mass influx has been subjected to frequent and recurrent discourse. An examination of academic oeuvres as well as international dialogue, including documents produced by ExCom, suggests that despite potential impracticalities, the principle of *non-refoulement* applies even in cases of mass influx. As stated by Goodwin-Gill and McAdam, ‘as a matter of international law, *refoulement* is not justifiable no matter how debilitating a sudden influx of refugees might be on a State’s institutions and resources. Nothing in article 33 of the 1951 Convention suggests its inapplicability to mass influx situations.’⁹⁷ Moreover, Lauterpacht and Bethlehem contend that ‘read in the light of the humanitarian object of the treaty and the fundamental character of the principle, the principle must apply unless its application is expressly excluded.’⁹⁸ The applicability of the principle of *non-refoulement* in cases of mass influx has also been affirmed by the UNHCR⁹⁹, in Executive Committee Conclusions, as well as in numerous regional instruments such as the OAU Convention, the Cartagena Declaration and the EU Temporary Protection Directive.¹⁰⁰ The principle of *non-refoulement* also seems to apply to situations of mass influx under customary international law. Essentially, as is the case under conventional law and as argued by Goodwin-Gill and McAdam, *refoulement* cannot be justifiable even under customary international law. The alleged need for protection, the potential threats, as well as the right to have one’s asylum claims assessed remain the same, whether an asylum-seeker comes individually or as part of a larger group. In this regard, ExCom has stated that even in cases of mass influx, asylum-seekers should at least receive temporary refuge.¹⁰¹ Indeed, it noted that essential aspects of protection in mass influx are the prohibition of *non-refoulement* (including non-admission at the frontier) and

⁹⁵ EU Temporary Protection Directive. Cited in Goodwin-Gill and McAdam, *supra* note 1, p. 335.

⁹⁶ Executive Committee Conclusion No. 100 (LV) (2004), para. (a), cited in *ibid.*

⁹⁷ Goodwin-Gill and McAdam, *ibid.*

⁹⁸ Lauterpacht and Bethlehem, *supra* note 80, at p. 119.

⁹⁹ ‘UNHCR has reiterated that even in large-scale influxes of asylum-seekers, there must be proper procedures for assessing status.’ Goodwin-Gill and McAdam, *supra* note 1, at p. 232.

¹⁰⁰ See Goodwin-Gill and McAdam, *supra* note 1, at p. 336.

¹⁰¹ ExCom, ‘The Scope of International Protection in Mass Influx’, 2 June 1995, UN Doc. EC/1995/SCP/CRP.3, at para. 15.

admission.¹⁰² In addition, under the customary principle of *non-refoulement* in the refugee context, exceptions may only be made for reasons of public security and national emergency and only where the threat faced by the asylum-seeker does not amount to a threat of torture or other cruel, inhuman or degrading treatment or threats of the violations of other non-derogable human rights. In a situation where these conditions are not met, the host State remains bound by the obligation of *non-refoulement*.¹⁰³ At first sight, under customary international law, the principle of *non-refoulement* thus appears to apply even in cases of mass influx and entails non-rejection, admission and the granting of temporary asylum.¹⁰⁴

An examination of State practice suggests that States generally do comply with the principle of *non-refoulement* in cases of mass influx. 'Despite concerns about providing protection to a large number of refugees, most States faced with a mass influx will respect the principle of *non-refoulement*, if nothing else. [...] The element of contingency tends to relate to what other rights are granted apart from *non-refoulement*, and these may depend on the level of international assistance offered.'¹⁰⁵ Indeed, Goodwin-Gill and McAdam contend that States do respect the customary principle of *non-refoulement* in mass influx situations, but that this 'comes at a price: the trade-off for accepting the obligation to admit large numbers is a *de facto* suspension of all but the most immediate and compelling protections provided by the [Refugee] Convention.' Initially, the notion of mass influx was established to describe situations in which sudden mass population displacement overwhelm national asylum mechanisms and render individual status determination procedures impractical. States developed two basic mechanisms to respond to such circumstances, namely temporary protection and group status determination procedures. Temporary protection is a European concept founded in the 1990s, when mass population displacement led European governments 'in effect to suspend status determination under their existing individualized asylum systems, and offered instead temporary protection.'¹⁰⁶ Another 'traditional response has been to use *prima facie* determination or acceptance on a group basis because of the obvious refugee character of the individuals concerned, without going into any formal, individual determinations.'¹⁰⁷ This mechanism is frequently employed in Africa and Latin America, and has furthermore been utilized in response to large-scale flows by countries that do not have a

¹⁰² *Ibid*, at para. 21.

¹⁰³ After affirming the principle of *non-refoulement* in article 3(1), the following paragraph of the UN Declaration on Territorial Asylum provides that 'exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.' The UNHCR has commented in this regard that 'paragraph 2 is formulated in very strict terms. An exception to the principle of *non-refoulement* is only permissible 'for overriding reasons of national security or in order to safeguard the population'. It is believed that the words 'as in the case of a mass influx' must be read in relation to this condition. That is to say, a 'mass influx' or the arrival of a large number of asylum-seekers is not in itself sufficient to justify an exception unless such an exception is necessary to 'safeguard the population''. See UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994.

¹⁰⁴ Generalized violence and armed conflict frequently constitutes a main cause of mass population displacement. In this regard, in Conclusion No. 99 (LV), ExCom 'expresses concern at the persecution, generalized violence and violations of human rights which continue to cause and perpetuate displacement within and beyond national borders and which increase the challenges faced by States in effecting durable solutions; and calls on States to address these challenges while *ensuring full respect for the fundamental principle of non-refoulement, including non-rejection at the frontiers without access to fair and effective procedures for determining status and protection needs.*' (emphasis added) ExCom, Conclusion No. 99 (LV), 2004, at para. (1).

¹⁰⁵ Goodwin-Gill and McAdam, *supra* note 1, at p. 339.

¹⁰⁶ UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', Global Consultations on International Protection EC/GC/01/4, 19 February 2001, at para. 12

¹⁰⁷ *Ibid*, at para. 4.

legal framework for dealing with refugees.¹⁰⁸ Both mechanisms are characterized by the acceptance of a large number of asylum-seekers into the host State's territory and the granting of temporary asylum. However, as mentioned, the trade-off for this acceptance is the provision of only the most basic protection. Asylum-seekers are frequently placed in mass shelters and provided only with the most basic necessities. Meanwhile, they are usually granted an unclear status, if any status at all. Still, these two mechanisms suggest that States do frequently comply with the principle of *non-refoulement* in cases of mass influx. Indeed, the mechanisms uphold the principle of *non-refoulement* to the extent that they entail non-rejection and admission into a State's territory. On the other hand, a problematic issue is that these mechanisms may suspend or annul altogether individual status determination procedures, a vital element of the principle of *non-refoulement*. Moreover, States generally base the granting of temporary asylum in situations of mass influx on humanitarian grounds, without reference to specific international legal obligations.¹⁰⁹ Asylum is temporary, and when conditions are conducive for return States frequently engage in widespread repatriation. However, as highlighted by ExCom, mass influxes are generally of a mixed nature and include asylum-seekers who are entitled to longer-term protection as a result of the fact that they face a threat to their lives or a real risk to their physical integrity if returned. For this reason, UNHCR has stated that 'refugees do not lose their protection needs and entitlements just because they are part of a mixed flow'¹¹⁰ and as such 'places considerable importance on the availability to asylum-seekers of fair status determination procedures'.¹¹¹ Thus, while State Practice indicates that States (parties to the Refugee Convention as well as non-States Parties¹¹²) generally do comply with the principle of *non-refoulement* in cases of mass influx, this is only to the extent that they allow for admission and provide temporary asylum. Rather than referring to international legal obligations as such, this protection is generally granted on the basis of humanitarian grounds.

Simultaneously it cannot be denied that States have violated the principle of *non-refoulement* in situations of mass influx. Goodwin-Gill and McAdam contend that these breaches simply 'indicate an uncertain dimension to the principle of *non-refoulement*, particularly in cases of mass influx'.¹¹³ The fact that the principle of *non-refoulement* has been violated in certain cases of mass influx does not necessarily imply that States perceive the principle as lacking legal force in such situations. In fact, in cases of intended *refoulement* States generally provide explanations or justifications, intimating acceptance of the pertinence of the principle.¹¹⁴ As such, 'State practice in cases of mass influx offers some support for the view that *non-refoulement* applies both to the individual refugee with a well-founded fear of persecution, and to the frequently large group of persons who do not in fact enjoy the protection of the government of their country of origin in certain fairly well-defined circumstances'.¹¹⁵ To conclude, while as discussed above it theoretically can be argued that the customary principle of *non-refoulement* applies to cases of mass influx, an examination of

¹⁰⁸ *Ibid*, at para. 7.

¹⁰⁹ *Ibid*, at para. 8.

¹¹⁰ UNHCR, 'Note on International Protection', UN Doc. A/AC.96/989 (7 July 2004), at para. 25.

¹¹¹ *Ibid*, at para. 12.

¹¹² UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007, at p. 7.

¹¹³ Goodwin-Gill and McAdam, *supra* note 1, at p. 336.

¹¹⁴ UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations', *supra* note 112. The ICJ has stated that such conduct (i.e. the provision of justification) essentially affirms the existence of a rule. This issue will be returned to in Chapter 4 within the framework of the customary status of *non-refoulement* in the human rights context.

¹¹⁵ Goodwin-Gill and McAdam, *supra* note 1, at p. 205.

State Practice renders such a contention questionable. This is attributable to the fact that firstly there is uncertainty regarding the parameters of the principle in cases of mass influx and secondly to the fact that although on the one hand States seem to affirm the existence of a customary principle of *non-refoulement* in cases of mass influx by providing explanations or justifications for intended *refoulement*, on the other hand, when complying with the principle of *non-refoulement* in cases of mass influx, they do so on humanitarian grounds rather than out of legal obligation. This inconsistency, and particularly the fact that compliance with the principle of *non-refoulement* has been based on humanitarian grounds - raises the question of whether there is in fact *opinio juris* - an element required for the establishment of a customary rule. At present it therefore seems safest to say that it is uncertain whether the customary principle of *non-refoulement* applies in cases of mass influx.

3.4 Soft Law

3.4.1. Introduction

International refugee protection in general and the corollary State obligations in particular constitute highly sensitive issues. This is primarily attributable to the fact that obligations deriving from international refugee law are perceived to encroach upon State sovereignty and privilege. In addition, States are keen to attain equal burden sharing in resolving the world's refugee situations. Against this background it is unsurprising that a significant number of norms of international refugee protection are contained in myriad soft law instruments, such as international declarations and ExCom Conclusions. Soft law instruments are not legally binding. 'This terminology is meant to indicate that the instrument or provision in question is not of itself 'law', but its importance within the general framework of international legal development is such that particular attention requires to be paid to it'.¹¹⁶ Indeed, soft law possesses a number of advantageous aspects that renders it a significant mechanism in the international legal domain.¹¹⁷ Moreover, an instrument 'does not need to constitute a binding treaty before it can exercise influence in international politics.'¹¹⁸ Hence, while soft law instruments may legally be non-binding, nevertheless they frequently have political ramifications. Certainly, signature of a non-binding instrument indicates a certain intention which can be regarded as politically binding. As a result of its non-binding character, soft law is not subject to international treaty law or to the general principle of *pacta sunt servanda*. However, 'it has been maintained that a special system of rules separate from international law exists to deal with non-treaty agreements, in the form of *courtoisie*.'¹¹⁹ Accordingly, the concept of good faith may still play a significant role. While indisputably there are clear differences as regards the legal consequences of treaties on the one hand and non-binding agreements on the other, nevertheless as Hilggenberg comments, 'in the final analysis [...] their political function resembles that of treaties.'¹²⁰ Another important function of soft law is

¹¹⁶ M. N. Shaw, *International Law*, 2007, at p. 117.

¹¹⁷ For instance, soft law allows for 'the creation of a preliminary, flexible regime possibly providing for its development in stages'. Furthermore, 'it may be necessary to conclude a non-treaty agreement simply to reach an agreement at all'. H. Hillgenberg, 'A Fresh Look at Soft Law', *European Journal of International Law* (1999), vol: 10, no: 3, pp. 499-515, at p. 501.

¹¹⁸ *Ibid.*

¹¹⁹ H. Hillgenberg, *ibid*, at p. 510. On the issue of *courtoisie*, Oppenheim stated that 'in their intercourse with one another, States do observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience and goodwill. Such rules of international conduct are not rules of law, but of comity. The Comity of Nations is certainly not a source of International Law, as it is distinctly in contrast to the Law of Nations. But there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law.' See L. Oppenheim, *International Law: A Treatise Volume 1* (3rd edition, R. F. Roxburgh, ed), 1920, at p. 24.

¹²⁰ H. Hillgenberg, *ibid*, p. 515.

the fact that it can be employed for the interpretation of hard law.¹²¹ Lastly, soft law can also play an important role in the development of customary international law. In the present case various soft law instruments, notably ExCom Conclusions and various non-binding declarations, merit closer inspection firstly because they reaffirm the customary principle of *non-refoulement* and have contributed to elucidating the scope of the principle under customary law. Secondly and more importantly, soft law is particularly significant when studying refugee protection in Asia where few States are party to the Refugee Convention.¹²² For these States, soft law instruments serve a vital function in that they constitute a significant source of potential commitments of these States in the field of refugee protection. An examination of these soft law instruments may reveal Thailand's position on international refugee protection, including the principle of *non-refoulement*. Again, while legally non-binding, these instruments do entail a certain level of political commitment and thus cannot be summarily dismissed.

3.4.2. International Soft Law Instruments for Refugee Protection

The principle of *non-refoulement* has been reiterated and reaffirmed in a wide array of instruments, including the 1967 UN General Assembly Declaration on Territorial Asylum.¹²³ Likewise, numerous ExCom Conclusions adopted since 1977 have reaffirmed the fundamental and non-derogable character of the principle of *non-refoulement*.¹²⁴ The General Assembly has also referred to the principle in various declarations and has furthermore called upon States 'to respect the fundamental principle of *non-refoulement*, which is not subject to

¹²¹ In accordance with Article 31, in particular paragraphs (2) and (3) of the 1969 Vienna Convention on the Law of Treaties. Indeed, soft law instruments can be employed to interpret and clarify hard law obligations. In the refugee context, soft law mechanisms such as UNHCR guidelines and ExCom Conclusions are instrumental in filling the current gaps in the international refugee protection regime. After all, in over half a century, the Refugee Convention has not undergone any amendments (except the 1967 Protocol) nor have any new universal treaties been adopted within the field of international refugee law. Meanwhile, the world's refugee situations have acquired new dimensions that were beyond consideration during negotiations for the 1951 Refugee Convention. The cardinal importance of such soft law instruments is that they serve to bridge the gap between the Refugee Convention, some provisions of which have become part of customary international law, and contemporary refugee realities and needs.

¹²² In East and South-East Asia, only Cambodia, China, Japan, the Philippines and South Korea are Party to one or both of these instruments.

¹²³ A/RES/2312 (XXII), 14 December 1967, at article 3.

¹²⁴ See, for example, Executive Committee, Conclusion No. 6 (XXVIII), para. (c) (reaffirming "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."); Conclusion No. 17 (XXXI) "*Problems of extradition affecting refugees*" (1980), at para (b) (reaffirming "the fundamental character of the generally recognized principle of *non-refoulement*."); Conclusion No. 25 (XXXIII) "*General*" (1982), para. (b) (reaffirming "the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law."); Conclusion No. 65 (XLII) "*General*" (1981), para. (c) (emphasizing "the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection..."); Conclusion No. 68 (XLIII) "*General*" (1982), para. (f) (reaffirming "the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection); No. 79 (XLVIII) "*General*" (1996), para. (j) (reaffirming "the fundamental importance of the principle of *non-refoulement*"); No. 81 (XLVIII), para. (i) (recognizing "the fundamental importance of the principle of *non-refoulement*"); No. 103 (LVI) "*Provision of International Protection Including Through Complementary Forms of Protection*" (2005), at (m) (calling upon States "to respect the fundamental principle of *non-refoulement*"). Cited in UNHCR, 'Advisory Opinion on Non-Refoulement Obligations', *supra* note 112, at p. 5. See also Executive Committee, Conclusion No. 77 (XLVI), 1995, para. (a) which 'reaffirms that respect for fundamental humanitarian principles, including safeguarding the right to seek and enjoy in other countries asylum from persecution, and full regard for the principle of *non-refoulement*, is incumbent on all members of the international community' (emphasis added).

derogation.¹²⁵ Likewise, a Declaration adopted by the Ministerial Meeting of States Parties to the Refugee Convention and/or 1967 Protocol in December 2001 and which was subsequently endorsed by the General Assembly, made reference to the 'the principle of *non-refoulement*, whose applicability is embedded in customary international law.'¹²⁶ These soft law instruments have contributed to establishing the existence of *opinio juris*, allowing for the transformation of *non-refoulement* from a cardinal principle of international refugee law to a principle of customary international law binding on all States. Meanwhile, international soft law instruments also play an important role in the interpretation of hard law obligations. In this regard, ExCom Conclusions and UNHCR documents have contributed in elucidating the scope of the principle of *non-refoulement*, for instance that it entails the admission of refugees and asylum-seekers and that it includes non-rejection at frontiers without having had access to fair and effective status determination procedures.¹²⁷ Likewise, these instruments have been instrumental in affirming the applicability of the principle of *non-refoulement* to situations of mass influx.

ExCom Conclusions have furthermore played a significant role in shedding light on Thailand's political commitment to the protection of refugees and asylum-seekers. Although Thailand is not party to the Refugee Convention or its 1967 Protocol, it is a member of ExCom and therefore engaged in the development of ExCom Conclusions. These conclusions 'represent the agreement of more than 50 countries that have great interest in and experience with refugee protection.'¹²⁸ They are adopted by consensus and 'constitute expressions of opinion which are broadly representative of the views of the international community.'¹²⁹ Thailand's membership to ExCom certainly reflects a certain level of political commitment to the issues addressed in the respective conclusions, including the cardinal principle of *non-refoulement*.¹³⁰

3.4.3. Regional Soft Law Instruments for Refugee Protection

Although Thailand is not a party to the Refugee Convention or its Protocol, it is a member of the Asian-African Legal Consultative Committee (AALCO), an intergovernmental organization which serves as an advisory board and forum in the field of international law and which adopted the *1966 Bangkok Principles on Status and Treatment of Refugees* (hereafter Bangkok Principles)¹³¹ on 24 June 2001. Although the Bangkok Principles are legally non-binding¹³², it constitutes the only regional instrument related to refugee protection in Asia. By

¹²⁵ See United Nations General Assembly, 'Resolution adopted by the General Assembly, 12 February 1997, UN Doc. A/RES/51/75, at para. 3 and United Nations General Assembly, 'Resolution adopted by the General Assembly', 12 December 1997, UN Doc. A/RES/52/132, at preambular para. 12.

¹²⁶ Cited in UNHCR, 'Advisory Opinion on Extraterritorial Application', *supra* note 112, at p. 8.

¹²⁷ See for example ExCom Conclusion No. 85 (XLIX), 1998, at para. Q. ExCom, Conclusion No. 81 (XLVIII), 1997, at para. H.

¹²⁸ UNHCR, 'Refugee Protection: A Guide to International Refugee Law, *supra* note 22, at p. 64.

¹²⁹ UNHCR, 'ExCom Conclusions on International Protection', available at www.unhcr.org.

¹³⁰ Both ExCom Conclusions and the UNHCR have adopted a number of instruments related to the protection of child refugees and asylum-seekers, as well as UCAS. These will be discussed, where relevant, in the context of *non-refoulement* obligations of Thailand towards UCAS in Chapters 4 and 5 below.

¹³¹ Asian-African Legal Consultative Organization (AALCO), *Principles Concerning Treatment of Refugees, Asian-African Legal Consultative Committee ("Bangkok Principles")*, 31 December 1966, available at: <http://www.unhcr.org/refworld/docid/3de5f2d52.html> [accessed 29 July 2009]

¹³² As stated in the integral 'Notes, Comments and Reservations made by the Member States of AALCO', the Bangkok principles are declaratory and non-binding in character and serve *inter alia* as a guide for States to deal with refugee problems. The principles furthermore aim to inspire Member States to enact national legislation for the Status and Treatment of Refugees. Bangkok Principles: 'Notes, Comments and Reservations made by the Member States of AALCO', at para. 2.

virtue of this instrument, Thailand has made a number of significant commitments in relation to the protection of asylum-seekers.

First and foremost, the Bangkok Principles reaffirm the principle of *non-refoulement* in Article III(I) which provides that ‘no one seeking asylum... shall... be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.’ Exceptions may only be made with respect to persons whose presence ‘is a danger to the national security or public order of the country... [or] constitutes a danger to the community.’ Article III(2) provides that where a State does decide to apply such ‘measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.’ Meanwhile, Article V(1) which is concerned with exportation and deportation provides that refugees and asylum-seekers shall not be expelled ‘save in the national or public interest or in order to safeguard the population.’ Where a State does expel a refugee or an asylum-seeker, this shall ‘only be in pursuance of a decision reached in accordance with due process of law’ and the refugee must be able to appeal.¹³³ Furthermore, the individual concerned may not be deported or returned to a country where he or she would face persecution and other threats to his life or liberty for reasons of race, colour, nationality, ethnic origin, religion, political opinion, or membership of a particular social group.¹³⁴ Taken as a whole, the provisions of the Bangkok Principles related to *non-refoulement* are essentially analogous to the customary principle of *non-refoulement* as extensively discussed above.

The second important facet of the Bangkok Principles is its definition of refugees and its acknowledgement of the right to seek and to enjoy asylum.¹³⁵ The Bangkok Principles employ a definition of refugees which expands on the definition provided in the Refugee Convention. Thus, in addition to persons fleeing persecution¹³⁶, ‘the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order in either part or the whole of his country of origin or nationality*, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’¹³⁷ (emphasis added) Additionally, ‘a person who was outside of the State of which he is a national or the Country of his nationality, or if he has no nationality, the State of which he is a habitual resident, at the time of the events mentioned above and is unable or unwilling due to well founded fear thereof to return or to avail himself of its protection shall be considered a refugee.’¹³⁸ As such, the AALCO definition of a refugee

¹³³ Article V(4) of the Bangkok Principles.

¹³⁴ Article V(3) of the Bangkok Principles.

¹³⁵ Article II(1) of the Bangkok Principles. However, the Bangkok Principles also provide that the granting of asylum remains an act of State sovereignty. As stated in Article II(2), ‘a State has the sovereign right to grant or to refuse asylum in its territory to a refugee in accordance with its international obligations and national legislation.’

¹³⁶ Article I(1) of the Bangkok Principles provides that ‘a refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group: a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State of Country of which he is a habitual resident; or, b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.’

¹³⁷ Article I(2) of the Bangkok Principles. As such, like the OAU Convention and the Cartagena Declaration, the Bangkok Principles employ a definition of refugee broader than the one contained in the Refugee Convention.

¹³⁸ Article I(3) of the Bangkok Principles.

is broader than the definition contained in the Refugee Convention.¹³⁹ As a signatory of the Bangkok Principles, Thailand thus acknowledges the notion of refugees and furthermore accepts that refugees are defined not only as persons fleeing persecution, but also as persons fleeing their country of origin due to events seriously disturbing public order, such as armed conflict.

Lastly, the Bangkok Principles contain a political commitment especially relevant for the protection of UCAS. Article IV(7) provides that ‘States shall take appropriate measures to ensure that *a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance* in the enjoyment of applicable rights set forth in the present Principles and in other international human rights instruments to which the said States are Parties.’¹⁴⁰ (emphasis added).

While the abovementioned provisions seem to indicate a significant level of commitment to the protection of asylum-seekers and refugees, nevertheless there are a number of important caveats. The Bangkok Principles contain ‘Notes, Comments and Reservations made by the Member States of AALCO’ which constitute an integral part of the main document of the Revised Bangkok Principles.¹⁴¹ In this section, with respect to the Article III(1) which provides that no one seeking asylum shall be subjected to *refoulement*, Thailand proposed the substitution of the words ‘seeking asylum’ with ‘after asylum is granted’. In relation to Article V(4) on expulsion and deportation, the Thai government suggested the deletion of the phrase ‘the expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law.’¹⁴² As previously discussed, despite its legally non-binding character, soft law is nevertheless of political significance. In the present case Thailand submitted two reservations to the Bangkok Principles. From a legal perspective these reservations do not alter anything since the Bangkok Principles are non-binding in the first place. However, from a political perspective these reservations may be important in that they reflect Thailand’s desire to maintain a certain level of discretion in the field of refugee protection, specifically with respect to *non-refoulement*, expulsion and deportation. Yet the acceptability of these reservations is questionable given that Thailand’s proposal in relation to Article III on *refoulement* is in contravention of the customary principle of *non-refoulement*, which provides that all persons seeking asylum are entitled to protection in the form of *non-refoulement* regardless of their status (i.e. whether they have been granted asylum or not). Interestingly, Thailand did not submit any reservations or declarations in relation to Article IV(7) on the treatment of children seeking asylum.

As the Bangkok Principles are legally non-binding, meant to serve as guidelines, and furthermore have no monitoring procedure, they have had little discernible impact on national legislation and practice in the region. Nevertheless, the signature of the Bangkok Principles by

¹³⁹ However, like the Refugee Convention, the Bangkok principles contain exceptions as to who is applicable for refugee status. Similar to Article 1(f) of the 1951 Refugee Convention, Article I(7) provides that, ‘a person who, prior to his admission into the Country of refuge, has committed a crime against peace, a war crime, or a crime against humanity as defined in international instruments drawn up to make provisions in respect of such crimes or a serious non-political crime outside his country of refuge prior to his admission to that country as a refugee, or has committed acts contrary to the purposes and principles of the United Nations, shall not be a refugee.’

¹⁴⁰ Note must be made that the wording of this provision is identical to article 22 of the Convention on the Rights of the Child which will be further discussed in Chapter 5.

¹⁴¹ Bangkok Principles: ‘Comments and Reservations by the Member Governments’, at para. 5.

¹⁴² *Ibid*, at para. 7.

various States does carry political weight and can potentially be regarded as a reflection of future intent. On the other hand, whatever political implications the Bangkok Principles may have created for Thailand have been somewhat counteracted by the reservations that it submitted which clearly indicate Thailand's desire to maintain discretion with respect to its obligations in terms of international refugee protection. Again however, the acceptability of these reservations is questionable when bearing in mind Thailand's hard law obligations under the customary principle of *non-refoulement*. To conclude this section, the Bangkok Principles reaffirm the right to seek and to enjoy asylum as well as the principle of *non-refoulement*. Its definition of refugees also includes people who are compelled to leave their country of origin due to events seriously disturbing public order, such as generalized violence and armed conflict. Through its signature of the Bangkok Principles, Thailand has also made a political commitment with respect to the provision of assistance and protection to UCAS.

3.5 Summary of Thailand's Obligations under International Refugee Law

To summarize, the norms of international refugee protection are contained in various sources of international law, including international conventional, customary as well as soft law. Although Thailand is not a party to the Refugee Convention, the core of the international refugee protection regime, nevertheless it is bound by its cardinal principle of *non-refoulement* as a result of the fact that *non-refoulement* constitutes a principle of customary international law. As such, Thailand is prohibited from rejecting or forcibly returning an asylum-seeker in any manner whatsoever to a territory where he or she will face a real risk of persecution or threats to life, physical integrity or liberty. *Non-refoulement* is now firmly entrenched in customary international law and Thailand is unequivocally bound by this principle. In addition, the principle of *non-refoulement* has also been reaffirmed in numerous instruments of soft law, including ExCom Conclusions and the Bangkok Principles. These instruments and reaffirmations are significant particularly from a political perspective given that Thailand is a member of ExCom and a signatory of the Bangkok Principles. With respect to the Bangkok Principles, although Thailand made a reservation in relation to *non-refoulement*, nevertheless it continues to be bound by the customary principle of *non-refoulement*. As regards compliance with the principle of *non-refoulement*, Thailand must establish an assessment procedure to examine an asylum-seeker's claims in an effective and fair manner to ensure that it does not forcibly return an individual to a territory where he or she faces a threat of persecution, to life or to physical integrity. At present, the principle under customary international law does not have an established procedure with pre-determined criteria. It is thus up to Thailand to set up an assessment procedure, including the criteria establishing the existence of a risk triggering the application of the principle of *non-refoulement*.

Meanwhile, by virtue of various soft law instruments, Thailand has also made a number of other political commitments related to the protection of asylum-seekers and refugees. In particular, through its signature of the Bangkok Principles Thailand acknowledges that persons fleeing generalized violence and armed conflict constitute refugees that are furthermore entitled to a certain standard of treatment. In the same instrument it has also made a political commitment to provide children seeking asylum with protection and assistance. *Non-refoulement* can certainly be regarded as falling within the ambit of such protection.

Chapter 4

International Human Rights Law

*'The inclusion of 'the right to seek and to enjoy asylum from persecution' in article 14 of the Universal Declaration of Human Rights alongside unanimously agreed human rights and fundamental freedoms squarely places international refugee law within the human rights paradigm.'*¹⁴³

4.1 Introduction

Refugees are entitled to rights under refugee law by virtue of their status as refugees. Simultaneously, they are entitled to human rights by virtue of being human. 'Universal human rights law provides extensive rights for all individuals, irrespective of their legal status.'¹⁴⁴ As previously discussed, international refugee law and human rights law are highly interrelated. Indeed, the roots of international refugee law lie in the general principles of international human rights law and the former can be regarded as an integral part of the latter. Some academics, including McAdam, contend that the relationship between international refugee law and international human rights law can be categorized by the concept of *lex specialis-lex generalis*.¹⁴⁵ Given the above, it is not surprising that international human rights law is frequently employed to fill the gaps and grey areas of international refugee law and protection.¹⁴⁶

Goodwin-Gill and McAdam, alongside numerous other academics and practitioners, observed that there is general State practice of offering protection to people even if these people do not fall within the ambit of the Refugee Convention. They note that 'States have consistently recognized a right of refuge in cases of grave and urgent necessity (even if at times they have resisted formally classifying such people as refugees when outside the terms of the 1951 Refugee Convention/1967 Protocol). Crucially, no State has formally denied that such a right exists.'¹⁴⁷ This practice embodies the concept of complementary protection or subsidiary protection.¹⁴⁸ Although, complementary protection, like refugee, constitutes a term of art and is subjected to various usages,

¹⁴³ A. Edwards, 'Human Rights, Refugees, and the Right to 'Enjoy Asylum'', *International Journal of Refugee Law* (2005), vol: 17, no: 2, pp. 293-330, at p. 297.

¹⁴⁴ J. McAdam, *Complementary Protection in International Refugee Law*, 2007, at p. 12.

¹⁴⁵ See for instance McAdam, *supra* note 144.

¹⁴⁶ 'Human rights doctrine has frequently been resorted to in order to fill in the 'grey areas' of refugee protection, in particular, in giving fuller meaning to the terms 'persecution' and 'social group' within the refugee definition, in determining appropriate asylum procedures, and in ensuring protection to those who fail the narrow definition of a 'refugee' in the 1951 Convention and/or 1967 Protocol but who nonetheless need protection against *refoulement*'. See Edwards, *supra* note 143, at p. 295.

¹⁴⁷ Goodwin-Gill and McAdam, *supra* note 1, at p. 289.

¹⁴⁸ The term 'complementary protection' intimates that there are protection obligations that are complementary to another core set of protection obligations which in the present case are contained in the Refugee Convention. However, as Thailand is not a State Party to this Convention and its provisions therefore do not apply, the term complementary protection may be somewhat misleading in the present context. The European connotation of the concept, namely 'subsidiary protection' may appear more suitable. It aptly intimates that the protection deriving from international human rights law is subsidiary to protection deriving from international refugee law, which constitutes the foundation for international refugee protection. Moreover the term also seems to imply that protection under this mechanism is less significant, indeed, secondary. This certainly seems to apply in the case of State Parties to the Refugee Convention, where although international human rights law constitutes an important source of protection for asylum-seekers and refugees, it nevertheless remains an *additional* source of protection which furthermore cannot be compared to the far-reaching protection offered by the main instrument

'as a technical legal term, however, complementary protection denotes protection granted on the basis of a legal obligation other than the principle refugee treaty. In contemporary practice, it describes the engagement of States' legal protection obligations that are complementary to those assumed under the 1951 Refugee Convention (as supplemented by its 1967 Protocol), whether derived from treaty or customary international law. Importantly, it stems from legal obligations preventing return to serious harm, rather than from compassionate reasons or practical obstacles to removal'.¹⁴⁹

It is now generally accepted that international human rights law can 'support, reinforce or supplement refugee law.'¹⁵⁰ For State Parties of the Refugee Convention, international human rights law may impose complementary or subsidiary obligations of protection. However, as a body of rules that exists independently of international refugee law and which applies to all human beings, 'international human rights law is especially relevant with respect to non-State-Parties to the 1951 Refugee Convention and/or the 1967 Protocol that are otherwise parties to various human rights instruments.'¹⁵¹ In such non-State parties, international human rights law can serve as a significant source of protection for asylum-seekers and refugees. Additionally important is the role of international human rights law 'in developing international customary rules [related to asylum-seekers and refugees] that apply to all States.'¹⁵² This chapter will examine international human rights law in order to determine whether it contains any obligations of *non-refoulement*. In the affirmative, the chapter will address the parameters of such obligations.¹⁵³

4.2 Universal Declaration of Human Rights

The *1948 Universal Declaration of Human Rights* (hereafter the UDHR) constitutes the foundation of international human rights law. Although essentially a non-binding declaration, the general position is that a number of the UDHR's provisions have attained the status of customary law.¹⁵⁴ Meanwhile, article 14(1) UDHR can be regarded as the 'springboard for the

of international refugee protection, namely the Refugee Convention. However, as is the case with the term 'complementary protection', since Thailand is not a party to the Refugee Convention, 'subsidiary protection', too, can seem misleading. The term is also misleading when one bears in mind that for non-States Parties, international human rights law may serve as the only conventional source of protection for refugees and asylum-seekers. Meanwhile, academics and practitioners make use of both terms. For these reasons the present study will employ the terms 'complementary protection' and 'subsidiary protection' interchangeably.

¹⁴⁹ McAdam, *supra* note 144, at p. 3.

¹⁵⁰ Edwards, *supra* note 143, at p. 296.

¹⁵¹ Edwards, *ibid*, at p. 299.

¹⁵² Edwards, *ibid*, at p. 299.

¹⁵³ Note must be made that the chapter is primarily concerned with the principle of *non-refoulement* as a right and obligation derived from international human rights law. Issues related to the monitoring and enforcement mechanisms of these international treaties are essentially beyond the scope of this paper, but will be touched upon where relevant. For more on the role of the monitoring bodies of various international human rights treaties and their influence on international refugee protection see McAdam, *supra* note 144 and B. Gorlick, 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law', *Nordic Journal of International Law* (2000), Vol: 69, no: 2, pp. 117-177.

¹⁵⁴ See for instance Lauterpacht and Bethlehem, *supra* note 80, at p. 152 who refer to the ICJ's implicit acknowledgment of the customary status of the UDHR in the *Tehran Hostages Case (United States Diplomatic and Consular Staff in Tehran)*, ICJ Reports 1980, at para. 9 and to T Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at pp. 82-4. For an extensive discussion regarding whether the UDHR has become customary law (*in toto* or only a number of its provisions) see P. R. Ghandi, 'The Universal Declaration of Human Rights at 50 years', *German Yearbook of International Law* (1998), Vol: 41, pp: 205-250.

subsequently concluded 1951 Convention.’¹⁵⁵ Indeed, the institution of asylum, which is among the most basic mechanisms for the international protection of refugees and asylum-seekers, derives directly from article 14(1) UDHR.¹⁵⁶ ‘The word asylum is not defined in international law, but it has become an umbrella term for the sum of total protection provided by a country to refugees on its territory’.¹⁵⁷ Additionally, another provision of the UDHR relevant to refugees and asylum-seekers is article 13(2) which provides that ‘everyone has the right to leave any country, including his own, and to return to his country’. Given the significance of the institution of asylum in the international refugee protection regime and its close relationship to the principle of *non-refoulement*, this section will discuss the right to asylum as contained in article 14 UDHR and briefly touch upon the right to leave one’s country as provided for in article 13(2).

The ‘right to asylum’ has formed a subject of significant controversy in international dialogue. As Goodwin-Gill and McAdam aptly state, ‘the refusal of States to accept an obligation to grant asylum, in the sense of admission to residence and lasting protection against the jurisdiction of another State, is amply evidenced by the history of international conventions and other instruments.’¹⁵⁸ Certainly the controversial nature of the subject was palpable in the *travaux préparatoires* of the UDHR.¹⁵⁹ The initial proposed wording that ‘everyone has the right to seek *and be granted* [...] asylum’ was replaced with the vaguer ‘*and to enjoy asylum*’. After the adoption of the UDHR, discussion regarding the establishment of a ‘right to asylum’ abounded within the context of negotiations for the 1966 Covenants and proposals to establish a separate convention containing such a right. However, both proposals were rejected on the grounds that

*there was no fundamental right of the individual to be granted asylum but only a right of the State to extend its protection to him; that it was at once impracticable and undesirable to impose on States the obligation in advance of opening their territory to an unascertainable number of persons [...] and that experience [...] had shown that States were unwilling to surrender their prerogative of deciding in each instance which aliens they would admit to their territory.*¹⁶⁰

Indeed, the general position is that decisions regarding admission and the granting of asylum remain core expressions of State sovereignty. This is affirmed *inter alia* in the 1967 *Declaration on Territorial Asylum*, article 1 of which describes the granting of asylum as an ‘exercise of [State] sovereignty’ limited only by the obligation of *non-refoulement*.

Article 14 UDHR provides that everyone has the right to seek and to enjoy asylum. According to Goodwin-Gill and McAdam,

the right to seek asylum is certainly restricted, and State practice to date has not recognized directly correlative duties obliging States to adjust visa or immigration policies accordingly. [...] Thus, while some have argued that the Universal Declaration on Human Rights, in whole or in part, has acquired the status of customary international law, there remains insufficient State practice or opinio

¹⁵⁵ Edwards, *supra* note 143, at p. 296.

¹⁵⁶ UNHCR, ‘Refugee Protection: A Guide to International Refugee Law’, *supra* note 22, at p. 44.

¹⁵⁷ UNHCR, ‘Refugee Protection: A Guide to International Refugee Law’, *ibid*, at 15.

¹⁵⁸ Goodwin-Gill and McAdam, *supra* note 1, at p. 358.

¹⁵⁹ For an extensive discussion on international dialogue and debate regarding the establishment of a ‘right to asylum’, see Goodwin-Gill and McAdam, *supra* note 1, at p. 358-366.

¹⁶⁰ Goodwin-Gill and McAdam, *supra* note 1, at p. 361.

*juris to support a concomitant duty on the State to grant asylum to those seeking it.*¹⁶¹

Nevertheless, they also provide that 'while individuals may not be able to claim a 'right to asylum', States have a duty under international law not to obstruct the individual's right to seek asylum.'¹⁶² They base this argument on the basic principle of international law that States have a duty to implement treaty obligations in good faith.¹⁶³

*This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfillment of treaty obligations obsolete, or defeat the object and purpose of a treaty. [...] In the context of the right to seek asylum, measures which have the effect of blocking access to procedures or to territory may not only breach express obligations under international human rights and refugee law, but may also violate the principle of good faith.*¹⁶⁴

The right to asylum is closely related to the legally-binding principle of *non-refoulement*. Thus, the obligation on States to act in good faith - in the context of the right to asylum in conjunction with the principle of *non-refoulement* - suggests that an asylum-seeker must at the very least have access to a fair and efficient determination procedure to assess his or her asylum claims and protection needs. In other words, while the right to asylum 'falls short of imposing an obligation on States to grant asylum to anyone seeking it, the operation of the principle of international refugee and human rights law, in particular the principle of *non-refoulement*, requires states to consider asylum-claims and provide protection to persons with a demonstrated international protection need.'¹⁶⁵

Closely related to the right to seek asylum is the right to leave one's country contained in article 13(2) UDHR. As the granting of access to a State's territory remains a crucial act of state sovereignty, the UDHR does not include a right to enter a country and neither does any other international instrument. Edwards argues that such a right to entry must be implied if the right to leave one's country is to have any substantial meaning. Yet it is erroneous to argue that there is a right to entry implied within the right to leave one's country, especially given the fact that it is frequently affirmed by States and international organizations alike that granting aliens access to one's territory and granting asylum remain core exercises of State sovereignty. These are clearly two separate matters and the right to entry has not been established in any international legal instrument. On the other hand, it may be said that a certain 'entitlement' to entry can be found within the context of asylum-seeking by virtue of the right to seek asylum and the principle of *non-refoulement*. However, this applies only in so far as 'entry' is allowed for the purposes of assessment of asylum claims. Essentially it is therefore not about a right to entry as part of the right to seek asylum, but rather about entry as embedded within principle of *non-refoulement*.

Article 14 UDHR also provides that all individuals have the right to enjoy asylum. As mentioned above, the granting of asylum is an act of State sovereignty and there is no obligation to grant asylum as such. Edwards contends that 'in contrast to the right to seek

¹⁶¹ Goodwin-Gill and McAdam, *supra* note 1, at p. 371.

¹⁶² Goodwin-Gill and McAdam, *supra* note 1, at p. 358. The issue of the duty not to obstruct a person from exercising their right to seek asylum is often raised in relation to stowaways, asylum-seekers arriving by boat, asylum-seeking at diplomatic missions, international zones as well as non-arrival and non-admission policies. For more on these issues see Goodwin-Gill and McAdam, *supra* note 1, at p. 250 and pp. 244-284 more generally. See also G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law', *International Journal of Refugee Law* (2005), Vol: 17, No: 3, pp. 542-573.

¹⁶³ Article 26 *Vienna Convention on the Law of Treaties*.

¹⁶⁴ Goodwin-Gill and McAdam, *supra* note 1, at p. 387-388.

¹⁶⁵ Goodwin-Gill and McAdam, *supra* note 1, at p. 384.

asylum, the right *to enjoy* asylum suggests at a minimum a right 'to benefit from' asylum. While a state is not obligated to grant asylum, an individual, once admitted to the territory, is entitled 'to enjoy' it'.¹⁶⁶ Plender and Mole also contend that 'the right to seek and to enjoy asylum is not an empty phrase. For instance, a state may violate the right to seek asylum when it returns an applicant to the country whence he or she came without giving him or her an adequate opportunity to present his or her case and it may violate the right to enjoy asylum when it accepts an individual as a refugee but imposes upon him or her excessive restraints such as unreasonable conditions of detention.'¹⁶⁷ Though not defined, the right to enjoy asylum was reaffirmed in the *1993 Vienna Declaration on Human Rights and Programme of Action*.¹⁶⁸ A UN report has stated that asylum consists of several elements: 'to admit a person to the territory of a State, to allow the person to remain there, to refuse to expel, to refuse to extradite and not to prosecute, punish or otherwise restrict the person's liberty'.¹⁶⁹ In view of the fact that article 14 of the UDHR is the 'springboard' of the Refugee Convention, perhaps the most suitable interpretation of the 'right to enjoy asylum' is that where persons exercising their *right to seek* asylum have been accepted by States exercising their sovereign *right to grant* asylum, these individuals are entitled to *enjoy* asylum by means of certain benefits or privileges. These privileges can be derived from the Refugee Convention or other international instruments stipulating rights for refugees and asylum-seekers (e.g. regional instruments), as well as (supplementary) domestic legislation. However, the right 'to enjoy asylum' remains contentious and 'state practice permits only one conclusion: the individual still has no right to be granted asylum. The right itself is in the form of a discretionary power – the State has discretion whether to exercise its right, as to whom it will favour, and consistently with its obligations generally under international law, as to the form and content of the asylum to be granted.'¹⁷⁰

To conclude this section, while the UDHR and other international instruments¹⁷¹ refer to the 'right to seek asylum', 'the right to enjoy asylum' or the right to asylum, 'skepticism has been voiced on their character as obligations.'¹⁷² Indeed, with respect to asylum, 'it will be seen that the argument for obligation fails, both on account of the vagueness of the institution and of the continuing reluctance of States formally to accept such obligation and to accord a right

¹⁶⁶ Edwards, *supra* note 143, at p. 302.

¹⁶⁷ R. Plender and N. Mole, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments', in F. Nicholson & P. Twomey (eds), 'Refugee Rights and Realities: Evolving International Concepts and Regimes', 1999, at p. 82.

¹⁶⁸ Vienna Declaration on Human Rights and Programme of Action of 1993, at para. 23.

¹⁶⁹ Cited in Edwards, *supra* note 143, at p. 302.

¹⁷⁰ Goodwin-Gill and McAdam, *supra* note 1, at p. 414.

¹⁷¹ ExCom has frequently stressed the importance of the right to seek asylum. See *inter alia* ExCom Conclusion No. 52 (1998), No. 71 (1993), No. 75 (1994), No. 77 (1995), No. 82 (1997), No. 85 (1998), No. 94 (2002), No. 97 (2003), No. 101 (2004), No. 103 (2005). The right to seek and enjoy asylum was also reaffirmed in the 1993 Vienna Declaration on Human Rights and Programme of Action. However, the right to asylum has not been repeated in any other international treaty with a universal scope. 'On a regional level, a right similar to, but not identical with, art. 14 UDHR can be found in art. 22 (7) of the American Convention on Human Rights ('Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes.').', in art. XXVII of the American Declaration on Human Rights ('Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.'). and art. 12 (3) of the African Charter on Human and Peoples' Rights ('Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.').' Cited in Noll, *supra* note 162, at p. 546 note 19.

¹⁷² Noll, *ibid*, at p. 545.

of asylum enforceable at the instance of the individual.’¹⁷³ Nevertheless, the right to asylum is not entirely void or without legal force when one takes into consideration the obligation on States to act in good faith. Bearing in mind the principle of *non-refoulement*, States are thus prohibited from obstructing an individual from exercising their right to seek asylum. Moreover, individuals should be provided with access to status determination procedures to assess their claims. Indeed, ‘the right to leave, the right to seek and to enjoy asylum, and the principle of *non-refoulement* share a delicate but significant relationship.’¹⁷⁴ In this regard,

*States are obliged to respect the right to leave to seek and enjoy asylum, and ought not to exercise their own rights to control the movement of people in such a way as to frustrate attempts to find effective protection. This argument is supported by the principle of non-rejection at the frontier and prohibitions on removal under human rights law.*¹⁷⁵

In short, the right to seek and to enjoy asylum does not constitute a principle of customary international law binding on all States. Nevertheless, the right to seek and to enjoy asylum remains significant as it constitutes a basic notion in international refugee protection and furthermore is closely related to the principle of *non-refoulement*. Yet, it must be reiterated again that any obligation relevant to the right to seek and to enjoy asylum, such as the obligation on State Parties not to obstruct a person from exercising their right to seek asylum and the obligation of entry and access to status determination procedures, derive solely from the *non-refoulement* as a binding principle of customary and conventional international law.

4.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The 1984 United Nations Convention against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment (hereafter CAT)¹⁷⁶ seeks to prevent and punish torture around the world. With respect to the international protection of refugees, CAT may serve as a mechanism of protection for asylum-seekers and refugees at risk of torture. CAT is generally recognized as one of the least controversial sources of subsidiary protection by virtue of article 3(1) which explicitly states that ‘no State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ Meanwhile, torture is defined in Article 1 as

*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*¹⁷⁷

¹⁷³ Goodwin-Gill and McAdam, *supra* note 1, at p. 358.

¹⁷⁴ Goodwin-Gill and McAdam, *supra* note 1, at p. 382. This is furthermore reflected in a number of UNHCR instruments, such as ExCom Conclusion No. 82, in which it noted as a particular aspect of asylum ‘the importance of the principle of *non-refoulement*, irrespective of whether persons have been formally granted refugee status.’ ExCom, Conclusion 82 (XLVIII) of 1997, at para. (d).

¹⁷⁵ Goodwin-Gill and McAdam, *supra* note 1, at p. 383.

¹⁷⁶ Adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987. Thailand acceded to CAT on 2 October, 2007. Upon accession Thailand made an interpretative declaration regarding articles 1, 4 and 5. Furthermore, in accordance with article 39(2) Thailand submitted a reservation to article 30(1) in relation to dispute settlement.

¹⁷⁷ CAT thus employs a strict definition of torture, which must be distinguished from other cruel, inhuman or degrading treatment or punishment. With respect to the latter, article 16 CAT provides that ‘each State Party

As clearly stated, no State Party is allowed to return (*refouler*) a person to a country if he/she will be faced with the risk of torture. Unlike under the Refugee Convention, this prohibition applies to *all persons*, regardless of their status (e.g. refugee) or their past conduct (i.e. criminals).¹⁷⁸ Under CAT the prohibition of *non-refoulement* contains no exceptions and is absolute.¹⁷⁹ While State Parties are prohibited from returning an individual to a territory (country of origin or otherwise) where he or she is likely to be subjected to torture, they are not prohibited from sending a person to a third safe country provided that the individual will not face a risk of torture there or be subsequently deported to another state where such a risk exists.¹⁸⁰

The principle of *non-refoulement* under CAT has a very narrow scope of application. Firstly, the principle is limited to the prohibition of *refoulement* to torture, as defined in article 1. This definition of torture contains clear requirements of intent or purpose, as well as a significant public element of engagement (i.e. it must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'). This criterion is quite restrictive and certainly not all asylum-seekers and refugees would be able to demonstrate the risk of torture as such.¹⁸¹ Secondly, with respect to the threshold of application, as noted by the Committee Against Torture (hereafter CAT Committee)

the aim [...] is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to

shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'

¹⁷⁸ The CAT Committee noted that it '*considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged [before he or she sought protection] cannot be a material consideration when making a determination under article 3 of the Convention.*' (emphasis added) *Tapia Paez v Sweden*, UN Doc CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997, at para. 14.5. The absoluteness and non-derogability of *non-refoulement* under CAT can be contrasted with the principle under customary international law in the refugee context (see Chapter 3) which allows for derogations in certain specified circumstances, as well as the principle under the Refugee Convention, Article 1(f) of which enlists a number of exceptions for people allowed to receive refugee status and Article 33(2) of which provides that 'the benefit of the present provision [of non-refoulement] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

¹⁷⁹ *Seid Mortesa Aemei v. Switzerland*, CAT/C/18/D/34/1995, UN Committee Against Torture (CAT), 29 May 1997, *Tapia Paez v Sweden*, *supra* note 178, at para. 14.5.

¹⁸⁰ 'Another state' has been interpreted by the Committee Against Torture to refer to 'the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.' See Committee Against Torture, 'General Comment No. 1: Implementation of Article 3 of the Convention in context of Article 22', 21 November 1997, UN Doc A/53/44, at para. 2. See also *Seid Mortesa Aemei v. Switzerland*, *supra* note 179, at para. 11.

¹⁸¹ For an extensive discussion on the limitations of *non-refoulement* under CAT for the protection of asylum-seekers and refugees, see McAdam, 'An Alternative Asylum Mechanism: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in McAdam, *supra* note 144.

*torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk.*¹⁸²

Though the risk to torture doesn't need to be 'highly probable', it must however go 'beyond mere theory or suspicion' and furthermore be 'foreseeable, real and personal'.¹⁸³ This constitutes a significantly high threshold that is not easy to meet, as will be further elaborated upon below.

The principle of *non-refoulement* under CAT entails an obligation on State parties 'to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he or she to be expelled, returned or extradited.'¹⁸⁴ As provided in article 3(2), 'for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern or gross, flagrant or mass violations of human rights.'¹⁸⁵ General Comment No. 1 lists a number of issues that may be relevant in the determination of the existence of a risk of torture, including evidence of a consistent pattern of gross, flagrant or mass violations of human rights, past torture or maltreatment suffered by the applicant, as well as engagement of the applicant in political or other activities that render him or her particularly vulnerable to the risk of torture.¹⁸⁶

The individual petition system established through article 22 CAT has been employed by asylum-seekers and refugees seeking protection under article 3 CAT.¹⁸⁷ Such cases have allowed for the development of jurisprudence in terms of the scope of *non-refoulement* under CAT. 'In a number of cases where the Committee has been called upon to decide on petitions from asylum-seekers, it has been able to make a positive contribution to the legal framework of refugee protection.'¹⁸⁸ Indeed, the CAT Committee has prohibited the forcible removal of multiple asylum seekers and refugees, for instance in *Mutombo v. Switzerland*, *Ismail Alan v. Switzerland*, *Tahir Hussein Khan v. Canada* and *Aemei v. Switzerland*.¹⁸⁹ However, in these

¹⁸² See *inter alia*, *X v. Australia*, CAT/C/42/D/324/2007, UN Committee Against Torture (CAT), 5 May 2009, at paras. 7.2-7.3, *M. X. v. Switzerland*, CAT/C/40/D/311/2007, 15 May 2008, at paras. 9.2-9.3, *T.A. v. Sweden*, CAT/C/34/D/226/2003, UN Committee Against Torture (CAT), 27 May 2005, at paras. 8.2-8.3, *C.A.R.M. v. Canada*, CAT/C/38/D/298/2006, UN Committee Against Torture (CAT), 24 May 2007, at paras. 8.6-8.7, *Gamal El Rgeig v. Switzerland*, CAT/C/37/D/280/2005, UN Committee Against Torture (CAT), 15 November 2006, at paras. 7.2-7.3, *C.T. and K.M. v. Sweden*, CAT/C/37/D/279/2005, UN Committee Against Torture (CAT), 17 November 2006, at paras. 7.2-7.3, *Asim Elmansoub v. Switzerland*, CAT/C/36/D/278/2005, UN Committee Against Torture (CAT), 17 May 2006, at paras. 6.2-6.3 and *N. Z. S. v. Sweden*, CAT/C/37/D/277/2005, UN Committee Against Torture (CAT), 29 November 2006, at paras. 8.2-8.3.

¹⁸³ *Ibid.*

¹⁸⁴ Committee Against Torture, 'General Comment No. 1, *supra* note 180, at para. 6.

¹⁸⁵ However, note must be made that 'a consistent pattern or gross, flagrant or mass violations of human rights refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. *Ibid.*, at para. 3.

¹⁸⁶ *Ibid.*, at para. 8.

¹⁸⁷ Article 22(1) provides that 'a State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.' Thailand has not made such a declaration meaning that individuals cannot submit communications against Thailand. However, the CAT Committee has dealt with numerous individual petitions regarding violations of article 3 CAT by other State Parties. See Gorlick, *supra* note 153, at p. 155.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Mutombo v. Switzerland*, CAT/C/12/D/13/1993, UN Committee Against Torture (CAT), 27 April 1994; *E.A. v. Switzerland*, CAT/C/19/D/028/1995, UN Committee Against Torture (CAT), 10 November 1997; *Tahir Hussain Khan v. Canada*, CAT C/13/D/15/1994, UN Committee Against Torture (CAT), 15 November 1994,

applications, the applicants fled out of fear for political persecution and were able to illustrate the existence of a 'foreseeable, real and personal' risk to torture if returned. In particular, they provided evidence demonstrating their personal targeting. Indeed, the application threshold for *non-refoulement* under CAT is relatively high and few asylum-seekers and refugees would be able to meet it. In fact, the CAT Committee purposely seeks to prevent the improper invocation of article 3 by asylum-seekers and refugees. In this respect, in its jurisprudence, the CAT Committee has noted that it does 'not take lightly concern on the part of the State party that article 3 of the Convention might improperly be invoked by asylum seekers.'¹⁹⁰

While at the end of the 1990s Gorlick identified positive developments as regards protection from *refoulement* for asylum-seekers and refugees under CAT, Doerfel has correctly observed that since 2000 the CAT Committee has been much more stringent in assessing claims of article 3 CAT violations. To illustrate, in the period 2000-2005, the CAT Committee found only one violation of article 3 and its jurisprudence indicates very strict interpretation of the existence of a risk to torture.¹⁹¹ For one, 'in recent years [...] the Committee has presupposed political activity as the sole or predominant reason for seeking protection against torture and, except in a very few cases, to the exclusion of all other reasons advanced by the authors.'¹⁹² Particularly relevant for asylum-seekers and refugees fleeing generalized violence and armed conflict is the fact that in numerous cases the CAT Committee rejected a claim because it considered that the applicant had failed to establish the existence of a personal risk of torture. For instance, in *S.S. and S.A v. the Netherlands*, the CAT Committee considered that the applicant failed to prove a risk of torture because it considered 'that the respective detentions suffered by the authors do not distinguish the authors' cases from those of many other Tamils having undergone similar experiences.'¹⁹³ Likewise, in *Y. H. A. v. Australia*, the CAT Committee rejected a violation of article 3 and seemed to accept the respondent State's claim that the alleged 'attacks were more likely to have occurred as a part of the general climate of violence in Mogadishu at the time rather than as a deliberate attempt to target the petitioner for reasons outlined by him'.¹⁹⁴ Even where the CAT Committee did find that a (personal) risk of torture existed, 'it referred to an accumulation of indicators, including previous subjection to torture, long stretches of arbitrary detention of a recent nature, outstanding criminal proceedings and attacks on the petitioner's family. Especially in recent years, the Committee has used the absence of any one of these indicators as a reason for not making a finding of a risk of torture.'¹⁹⁵ In short, *non-refoulement* under CAT has a narrow scope of application and is therefore only relevant for asylum-seekers and refugees who can substantiate a foreseeable, real and personal risk of being subjected to torture. As such, CAT is not a significant source of protection for those asylum-seekers who are unable demonstrate the existence of such a risk - such as asylum-seekers and refugees who have fled armed conflict and generalized violence - in which case despite the widespread and frequent occurrence of torture, the personal risk may be difficult to establish.

and *Seid Mortesa Aemei v. Switzerland*, *supra* note 179. Note must be made that while the views of the CAT Committee are legally non-binding, they nevertheless carry authoritative force.

¹⁹⁰ *Seid Mortesa Aemei v. Switzerland*, *ibid*, at para. 9.6.

¹⁹¹ J. Doerfel, 'The Convention Against Torture and the Protection of Refugees', *Refugee Survey Quarterly* (2005), Vol: 24, No: 2, at pp. 83-97, at p. 92.

¹⁹² Doerfel, *ibid*, at p. 86.

¹⁹³ *S.S. and S.A. v. Netherlands*, CAT/C/26/D/142/1999, UN Committee Against Torture (CAT), 11 May 2001, at para. 6.7.

¹⁹⁴ *Y.H.A. v. Australia*, CAT/C/27/D/162/2000, UN Committee Against Torture (CAT), 27 March 2002, at para. 7.3.

¹⁹⁵ Doerfel, *supra* note 191, at p. 87.

4.4 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (hereafter ICCPR) is one of the two foundational international human rights treaties and expands on the civil and political rights enlisted in the UDHR.¹⁹⁶ It may serve as a significant source of protection for asylum-seekers and refugees as a result of the fact that it contains the principle of *non-refoulement*. Particularly important in this regard is that the principle under the ICCPR has a wide scope of eligibility.

4.4.1. Non-Refoulement

The ICCPR contains several provisions which serve as a basis of protection for asylum-seekers and refugees from *refoulement*. The non-derogable article 7¹⁹⁷ provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Meanwhile, article 2(1) of the ICCPR provides that ‘each State Party to the present Covenant undertakes to respect and *to ensure to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind.’ (emphasis added) This article in conjunction with articles 6¹⁹⁸ and 7 has been interpreted by the Human Rights Committee (hereafter HRC) to include the prohibition of expelling or returning (‘refouler’) a person to a state where he/she faces a threat to his or her life or the risk of being subjected to cruel, inhuman or degrading treatment or punishment. Thus, in addition to the prohibition of violations of the right to life and of torture and other cruel, inhuman or degrading treatment within the jurisdiction of a State Party, state responsibility will also arise when a State Party removes a person to a certain place where it was foreseeable that he or she would face a real risk of threats to his or her life or ill-treatment.¹⁹⁹ As stated by the HRC in General Comment No. 31,

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6

¹⁹⁶ Thailand acceded to the covenant on 29 October 1996. However, Thailand has not ratified the *1994 Optional Protocol to the International Covenant on Civil and Political Rights* recognizing the competence of the Human Rights Committee to receive and consider individual communications.

¹⁹⁷ Article 4(2) ICCPR provides that ‘no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.’ Meanwhile, the Human Rights Committee has also noted that ‘The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provision must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.’ Human Rights Committee, ‘General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)’, 28 July 1994, UN Doc. HRI/HEN/1/Rev.1, at para. 3.

¹⁹⁸ Article 6(1) provides that ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ As provided in article 4(2) ICCPR (see previous note), article 6 is also non-derogable.

¹⁹⁹ ‘The Committee recalls that if a State party removes a person within its jurisdiction to another jurisdiction and there are substantial grounds for believing that there is a real risk of irreparable harm in the other jurisdiction, such as that contemplated by articles 6 and 7 of the Covenant, the State party itself may be in violation of the Covenant.’ *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan*, CCPR/C/93/D/1461,1462,1476& 1477/2006, UN Human Rights Committee (HRC), 31 July 2008, at para. 12.6

*and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.*²⁰⁰

As can be derived from article 2(1) and as reaffirmed in General Comment No. 31²⁰¹, this obligation is absolute and applies to all people, regardless of status (i.e. asylum-seekers and refugees) and conduct (i.e. criminals).²⁰² While the principle of *non-refoulement* does not prohibit removal of an asylum-seeker to a third country, such removal can only occur if the third country is safe and there is no significant risk of the third country subsequently removing the person to an unsafe country (i.e. chain *refoulement*).

The scope of the principle of *non-refoulement* under ICCPR is broader than under CAT. In addition to prohibiting removal where this entails real risks of torture, it also prohibits removal which involves a real risk of violations to the right to life (article 6 ICCPR) and freedom from cruel, inhuman or degrading treatment or punishment (article 7 ICCPR). Some even argue that the interpretation 'presented in General Comment No. 31 leaves room for an extension of *non-refoulement* obligations, since violations of rights 'such as' – but not exclusively – those in Articles 6 and 7 are covered.'²⁰³ In other words, the ICCPR may even allow for protection in the form of *non-refoulement* on the basis of potential violations of other human rights contained in the ICCPR as long as any such violation entails a 'real risk of irreparable harm' (see excerpt from General Comment No. 31 above). Consequently, in the future the scope of *non-refoulement* may be even wider under the ICCPR as a result of more human rights violations triggering the activation of the principle. This may allow for extended protection for individuals, including asylum-seekers and refugees.

The principle of *non-refoulement* under the ICCPR prohibits the removal of a person from a territory to another territory where there are substantial grounds for believing that there is a real risk of violations of articles 6 and/or 7 ICCPR. Before rejecting or removing a person, States have the duty to ensure that he or she would not be exposed to a real risk of threat to

²⁰⁰ Human Rights Committee, 'General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN. Doc. CCPR/C/21/Rev.1/Add.13, at para. 12. Similarly, the Human Rights Committee has stated that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.' See Human Rights Committee, 'General Comment No. 20', *supra* note 197, at para. 9. See *inter alia* *Dawood Khan v. Canada*, CCPR/C/87/D/1302/2004, UN Human Rights Committee (HRC), 10 August 2006, at para 5.4, *Moses Solo Tarlue v. Canada*, CCPR/C/95/D/1551/2007, UN Human Rights Committee (HRC), 28 April 2009, at para. 7.4, *Jonny Rubin Byahuranga v. Denmark*, CCPR/C/82/D/1222/2003, UN Human Rights Committee (HRC), 9 December 2004, at para 11.2 and *Daljit Singh v. Canada*, CCPR/C/86/D/1315/2004, UN Human Rights Committee (HRC), 28 April 2006, at para 6.3. In all cases the HRC 'recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.'

²⁰¹ The 'enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.' Human Rights Committee, 'General Comment No. 31', *supra* note 200, at para. 10.

²⁰² In this regard, the HRC has stated that the 'principle should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual [may be] accused or suspected of.' *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan*, *supra* note 199, at para 12.4.

²⁰³ S. Persaud, 'Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights', November 2006, Research Paper No. 132, New Issues in Refugee Research. See also R. Ball, V. Edwards and P. Lynch, 'The Right to Protection and the Obligation of Non-Refoulement: Submission to the Senate Legal and Constitutional Affairs Committee regarding the *Migration Amendment (Complementary Protection) Bill 2009*', Human Rights Law Resources Center ltd, 2009, at p. 5.

life, torture, or other cruel, inhuman or degrading treatment or punishment. States must thus examine on a case-by-case basis whether there exists a 'real risk' of the abovementioned harms. This is the only way for a State to ensure that it does not violate its *non-refoulement* obligation. If such a risk exists, the State is prohibited from forcibly removing the individual. In other words, regardless of whether an asylum-seeker has been granted or denied asylum, where a real risk of irreparable harm has been established, the individual concerned may not be forcibly removed. In contrast to CAT, under the ICCPR there is little jurisprudence related protection from *refoulement*. With respect to the application threshold, in determining the existence of such a risk, consideration must be taken of the general situation of human rights in the receiving State.²⁰⁴ In addition, in communications involving claims of violations of articles 6 and 7 as a result of expulsion or deportation, the HRC refers to 'substantial grounds' for believing that 'as a necessary and foreseeable consequence' of a person's removal, there is 'a real risk' that a person would be subjected to treatment prohibited by Articles 6 and 7.²⁰⁵ This intimates a strict interpretation, particularly as regards the notion that a 'real risk' is to emerge as a 'necessary consequence' of a person's removal. However, the cases dealt with by the HRC thus far all involved applicants who had (allegedly) engaged in political activities, frequently as dissidents of governments in office. None of the cases exclusively dealt with applicants seeking protection from torture or other ill-treatment in the context of generalized violence and armed conflict. While the HRC used the abovementioned criteria to determine whether the return of an individual, as decided upon by the respondent State, would involve a risk to treatment prohibited under articles 6 and/or 7 ICCPR, the HRC has frequently commented that it is the duty of States Parties to create mechanisms for the protection from *refoulement*, including the establishment of criteria determining the existence of a 'real risk' of violations of articles 6 and 7. Indeed, the HRC has explicitly stated that 'it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is apparent that the evaluation was clearly arbitrary or amounted to a denial of justice.'²⁰⁶ From the HRC's perspective, 'expert bodies can only ensure that procedural safeguards have been followed and that the rights guaranteed by the relevant international instrument have not been violated.'²⁰⁷ Accordingly, States presently employ their own standards in determining whether a person faces a real risk to their life or to torture or other ill-treatment. In that sense, the scope of the principle of *non-refoulement* under the ICCPR, particularly as regards the determination of the existence of a 'real risk', remains unsettled and is determined individually by State Parties.

With respect to the scope of obligations *rationae loci*, the obligation of *non-refoulement* clearly applies within, but also beyond a State's territory. The extraterritorial application of the ICCPR has been affirmed *inter alia* in Concluding Observations on the State Reports and reflect the HRC's position that States can 'be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it' and that in certain circumstances, 'persons may fall under the subject-matter of a State Party [to the ICCPR]

²⁰⁴ *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), 10 November 2006, at para 11.3.

²⁰⁵ *Dawood Khan v. Canada*, *supra* note 200, at para. 5.4.

²⁰⁶ *Moses Solo Tarlue v. Canada*, *supra* note 200, at para. 7.4 and *Mahmoud Walid Nakrash and Liu Qifen v. Sweden*, CCPR/C/94/D/1540/2007, UN Human Rights Committee (HRC), 19 October 2008, at para. 7.3.

²⁰⁷ O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures', *International Journal of Refugee Law* (1997), Vol: 9, No: 3, pp. 392-414, at p. 407.

even when outside that State's territory.'²⁰⁸ Thus, States are prohibited from rejecting or expelling an asylum-seeker in any manner whatsoever, whether within a State's territory or outside it.

By now it has become evident that the principle of *non-refoulement* is contained in international treaties both in the field of international refugee law and international human rights law. There are however a number of noteworthy differences. Firstly, within the refugee context, the principle is focused on refugees and asylum-seekers. However, in the human rights framework the status of the individual at risk bears no relevance. Another significant point of distinction 'arises in respect of the nature of the risk. Whereas *non-refoulement* in a refugee context is predicated on a threat of persecution, the essential element of *non-refoulement* in a human rights context is a risk of torture or other cruel, inhuman or degrading treatment or punishment.'²⁰⁹ The most important issue to note is that under international human rights law eligibility for *non-refoulement* is much more extensive than under international refugee law, both in terms of *who* can apply for protection (all human beings and regardless of past conduct as opposed to refugees with a number of exceptions) and on what *basis* (risk of torture or other cruel, inhuman or degrading treatment, as well as potentially other human rights violations which entail a 'real risk of irreparable harm', as opposed to the threat of persecution). In addition, *non-refoulement* under international human rights law is absolute, whereas derogations are permitted under the principle of *non-refoulement* under international refugee law. International human rights law can thus serve as an essential source of protection for many asylum-seekers who either do not fall within the ambit of the Refugee Convention or who are seeking protection in States that are not party to the Refugee Convention or the 1967 Protocol.

4.4.2. Non-Refoulement in Customary International Law: the Human Rights Context

As briefly touched upon in the previous chapter, the principle of *non-refoulement* has crystallized into a norm of customary international law in two distinct contexts, namely international refugee law and international human rights law. This section will address the customary principle of *non-refoulement* in the human rights context. *Non-refoulement* within the human rights context essentially derives from the prohibition of torture and other cruel, inhuman or degrading treatment, since 'the expulsion or return of a person to a country where there are substantial grounds for believing that they would face a real risk of torture or inhuman or degrading treatment or punishment comes within the purview of such acts.'²¹⁰ The prohibition to torture and other cruel, inhuman or degrading treatment or punishment is presently contained, *inter alia*, in article 5 UDHR, article 3 CAT, article 7 ICCPR, article 3 of *European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 5(2) of the *American Convention on Human Rights* and article 5 of the *African (Banjul) Charter of Human Rights*. The prohibition of torture is not only part of customary international law, but is so fundamental that it constitutes a peremptory norm of international law (*jus cogens*).²¹¹ Thus, '*non-refoulement* is a fundamental component of the customary international law prohibition of torture, cruel, inhuman or degrading treatment or

²⁰⁸ Human Rights Committee, 'General Comment No. 31', *supra* note 200, at para. 10. See UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations', *supra* note 112, at para. 36 for a list of jurisprudence referring to this issue.

²⁰⁹ Lauterpacht and Bethlehem, *supra* note 80, at p. 160.

²¹⁰ Lauterpacht and Bethlehem, *supra* note 80, at p. 156.

²¹¹ Human Rights Committee, 'General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, in relation to declarations under article 41 of the Covenant', 4 November 1994, UN. Doc. HRI/GEN/1/Rev.6, at para. 10.

punishment.²¹² As noted above, the obligation of *non-refoulement* is more restrictive under CAT (which prohibits *refoulement* to torture) than under the ICCPR (which prohibits *refoulement* to torture and other cruel, inhuman or degrading treatment or punishment, or where there exists a threat to life). It is generally accepted that the broader formulation of the prohibition has attained customary status since the prohibition of cruel, inhuman or degrading treatment or punishment exists as a customary norm independently of the customary prohibition of torture.²¹³ The prohibition of *non-refoulement*, as inherent in the customary law prohibition to torture and other cruel, inhuman or degrading treatment or punishment, is thus also absolute. Various scholars, institutions and human rights experts even contend that the ‘the prohibition against *refoulement*, derivative of the absolute ban on torture and from which no derogation is permitted, shares its *jus cogens* character’,²¹⁴ though an examination of current international dialogue and State practice renders this questionable.

Within the international human rights law framework, the customary principle of *non-refoulement* is not predicated on status and thus concerns all individuals. As with *non-refoulement* in the refugee context, it prohibits extradition, expulsion, *refoulement* or any other act which results in an individual being removed to a territory where he or she faces a threat to life or a real risk of torture or other cruel, inhuman or degrading treatment. Similarly to the principle in the conventional framework, *non-refoulement* as a customary principle requires States to conduct a ‘real risk’ assessment of the individual’s (asylum) claims. Although somewhat similar standards are applied by the HRC, the CAT Committee as well as the European Court of Human Rights, these thresholds standards cannot be said to have attained the status of customary law. Instead, the application threshold with respect to *non-refoulement* in a human rights context ‘may best be described as *circumstances in which substantial grounds* can be shown for believing that the individual would face a *real risk* of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This reflects the fullest formulation of the threshold articulated in international practice.’²¹⁵ (emphasis added) Meanwhile, it is up to States to define what constitutes a ‘real risk’ and whether a person is eligible for protection in the form of *non-refoulement*. Unlike in the refugee context, no exceptions are permitted in the conventional form and ‘there is nothing to suggest that the principle in its customary form would differ from the principle in its conventional form.’²¹⁶ Meanwhile, the core purpose of *non-refoulement* is the prohibition of returning or expelling an individual in any manner to a territory where he or she would face a real risk of torture or other cruel, inhuman or degrading treatment or punishment. The

²¹² Lauterpacht and Bethlehem, *supra* note 80, at p. 162. This has also been stated by a number of judicial and quasi-judicial bodies. For instance, the European Court of Human Rights employed such an interpretation *inter alia* in *Soering v. United Kingdom* (1989) 11 EHRR 439, judgement of 7 July 1989; *Chahal v. United Kingdom* (1996), ECHR 54, judgement of 15 November 1996; and *Ahmed v. Austria* (1996), 24 EHRR 278, judgement of 17 December 1996. The Human Rights Committee referred to this interpretation *inter alia* in General Comment No. 20. Meanwhile, as noted by Lauterpacht and Bethlehem, ‘while the matter has not so far been addressed directly in the context and application of either Article 5(2) of the American Convention on Human Rights or Article 5 of the Banjul Charter, there is no reason to believe that the organs responsible for interpreting these instruments will adopt a different approach.’ Lauterpacht and Bethlehem, *supra* note 80, pp. 155-158.

²¹³ For a discussion on this issue, see Goodwin-Gill and McAdam, *supra* note 1, at pp. 345-354. See also Lauterpacht and Bethlehem, *ibid.*

²¹⁴ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations’, *supra* note 112, at p. 22.

²¹⁵ Lauterpacht and Bethlehem, *supra* note 80, p. 162.

²¹⁶ *Ibid.* Moreover, as previously mentioned, *non-refoulement* as a customary principle in the human rights context must also be absolute as a result of the fact that it derives from the absolute customary prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

principle applies to any act attributable to the State 'wherever it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.'²¹⁷

As already partially addressed in chapter 3, State Practice reflects acceptance of *non-refoulement* as a binding principle of customary international law. As discussed, the principle is reaffirmed in a wide array of international universal and regional instruments. States also comply with the principle of *non-refoulement*, and in cases of intended *refoulement* States generally provide explanations or justifications.²¹⁸ As stated by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US),

*'[in] order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained in 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.'*²¹⁹

The principle of *non-refoulement* is thus firmly entrenched in customary international law.

4.4.3. Non-Refoulement as a Principle of Customary International Law

To summarize, *non-refoulement* as a principle of customary international law 'encompasses non-refoulement to persecution, based on article 33 of the 1951 Convention, and also to [a threat to life or to] torture or other cruel, inhuman or degrading treatment or punishment' based on international human rights law.²²⁰ *Non-refoulement* entails a duty of admission to conduct an assessment of the individual's (asylum) claims to ensure that rejection or expulsion would not expose an individual to real threats of persecution, to threats to life, or to risks of torture or other cruel, inhuman or degrading treatment or punishment. Moreover, it obliges States to admit into their territory and provide temporary stay to an individual if rejection or expulsion of the individual concerned entails risks of the abovementioned harms. In other words, in addition to a prohibition to reject or expel, *non-refoulement* in effect may also entail temporary asylum. This is attributable to the fact that persons seeking protection or asylum cannot be returned to their country of origin until they no longer face a threat of the abovementioned harms. Such individuals must be granted a form of temporary asylum pending the arrangement for alternative solutions such as removal to a safe third country, which is not prohibited by the principle of *non-refoulement*.

4.4.4. The Right to Asylum and the Right to Leave a Country

While article 14 of the UDHR proclaims the right to seek and to enjoy asylum, States were adamant about the exclusion of such a right in the ICCPR. Indeed, the ICCPR contains no right to asylum, again reflecting the view that the granting of access and asylum to aliens remains a quintessential act of state sovereignty. This was affirmed by the Human Rights Committee in a decision concerning a Salvadorian asylum seeker in Canada, where the

²¹⁷ Goodwin-Gill and McAdam, *supra* note 1, p. 248. See also Lauterpacht and Bethlehem, *supra* note 80, p. 160.

²¹⁸ UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations', *supra* note 112.

²¹⁹ *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 58, at para. 186.

²²⁰ Goodwin-Gill and McAdam, *supra* note 1, at 354. This is also the position of Lauterpacht and Bethlehem on the crystallization of the principle of *non-refoulement* into a norm of customary international law. See Goodwin-Gill and McAdam, *ibid*, at 347.

Committee noted *in obiter* that ‘a right of asylum is not protected by the Covenant’.²²¹ However, the ICCPR does contain another provision related to asylum and *non-refoulement* which may allow for some protection of asylum-seekers and refugees. Article 12(2) of the ICCPR provides that ‘everyone has the right to leave any country, including his own’.²²² As is the case with the UDHR, the ICCPR contains no corollary right to entry. However, as extensively discussed above, the ICCPR does provide for the principle of *non-refoulement*. As such, it indirectly acknowledges a limited entitlement to entry and potentially temporary stay as these are embedded within the principle of *non-refoulement*. This can be substantiated by General Comment No. 15, in which the HRC noted that while it is up to a state to allow entry of aliens, ‘in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect of family life arise.’²²³ This intimates that the HRC, while recognizing that the granting of entry, asylum and residence are exercises of state sovereignty, nevertheless does not regard these powers as being entirely of a limitless nature. The Committee’s reference to the prohibition of inhuman treatment as a circumstance in which an alien may enjoy the protection of the Covenant in terms of entry or residence further confirms the principle of *non-refoulement*, particularly with respect to non-rejection and temporary stay.

4.5 Convention on the Rights of the Child

*‘The attributes that define children are immutable characteristics, whereas refugee definitions may change or develop time. If a line is to be drawn, a child is foremost a child before he or she is a refugee, and protection needs must be assessed accordingly.’*²²⁴

4.5.1. Introduction

The Convention on the Rights of the Child (hereafter CRC)²²⁵ constitutes a milestone in the international legal protection of children. It is a highly comprehensive instrument containing various child rights, including rights to protection, education, health care and other socio-economic rights. Of all international human rights treaties, the CRC constitutes the most important instrument for the protection of child asylum-seekers and refugees firstly because it is especially concerned with children (as *lex specialis*) and secondly because it applies to all children. As stated in Article 2(1), ‘States Parties shall respect and *ensure* the rights set forth in the present Convention to *each child within their jurisdiction without discrimination of any kind*, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property,

²²¹ Gorlick, *supra* note 153, at p. 174.

²²² It must be noted however that this is not an absolute right. ICCPR restricts the right to leave where ‘necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others’. Article 12(3) ICCPR.

²²³ Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant’, 11 April 1986, UN. Doc. HRI/GEN/1/Rev.6, at para 5. Essentially, the same reasoning to a limited entitlement to entry discussed in the context of the UDHR applies to the ICCPR. Again, a duty to admit individuals into a State’s territory does not derive from the right to seek and to enjoy asylum (UDHR) or the right to leave one’s country (UDHR and ICCPR), but rather from the principle of *non-refoulement* as a customary principle of international law and as a principle contained in the ICCPR.

²²⁴ McAdam, *supra* note 144, at p. 196.

²²⁵ The Convention was opened for signature on 20 November 1989 and today enjoys near universal ratification with 140 signatories and 193 parties. Thailand acceded to the CRC on 27 March 1992. Upon accession to the CRC, Thailand submitted a reservation which provides that ‘the application of articles 7, 22... of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand.’ Its initial reservation with respect to article 29 CRC was withdrawn on 11 April 1997.

disability, birth or *other status*.' (emphasis added) As clarified by the Committee of the Rights of the Child (hereafter CRC Committee), 'the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – *including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness*.'²²⁶ (emphasis added) No derogations are permitted under the CRC. For these reasons the CRC forms the crux of protection for child asylum-seekers and refugees. Indeed, it is generally claimed that the CRC provides the most comprehensive and extensive framework for the protection and treatment of asylum-seeking and refugee children throughout the child's displacement cycle.²²⁷ The CRC creates both negative and positive obligations, 'requiring States not only to refrain from measures infringing on such children's rights, but also to take measures to ensure the enjoyment of these rights without discrimination.'²²⁸ This section will discuss Thailand's protection obligations towards UCAS, particularly as regards *non-refoulement*, derived from the CRC.

4.5.2. The Fundamental Principles

The principle of *non-refoulement* cannot directly be found in any provision of the CRC but rather derives from its fundamental principles as well as a number of its provisions. As such, this section will briefly address the fundamental principles of the CRC before addressing *non-refoulement* as ingrained in this instrument. The CRC is based on three fundamental principles; non-discrimination; the best interests of the child and participation of the child in decisions regarding his or her welfare. With respect to the first principle of non-discrimination, article 2 provides that the rights enumerated in the CRC are to be applied to all children within a State Party's jurisdiction without any discrimination. In particular, it prohibits discrimination *inter alia* 'on the basis of a status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.'²²⁹ As such, child asylum-seekers and refugees must have equal access as nationals to the rights provided by the CRC, including the established protection mechanisms. With respect to UCAS in particular, it should be noted that in fact the principle 'may indeed call for differentiation on the basis of different protection needs.'²³⁰ The second fundamental principle of 'best interest' is contained in article 3 which stipulates that '*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*'. (emphasis added) It essentially functions as 'an umbrella provision that prescribes the approach to be taken in all actions concerning children.'²³¹ This principle is of primary importance for UCAS as it allows for suitable protection of these children in host States. As a primary consideration, the best interest principle applies during all phases of a child's displacement cycle and is thus highly relevant in the establishment of short and long-term solutions. In the context of UCAS, the CRC Committee has clarified that 'a determination of what is in the best interest of the child requires a clear and comprehensive assessment of the child's identity, including his or her nationality, upbringing, ethnic and cultural and linguistic background, particular vulnerabilities and protection needs.'²³² The last fundamental principle of the CRC is the

²²⁶ Committee on the Rights of the Child, 'General Comment No. 6', *supra* note 11, at para. 12.

²²⁷ While the Refugee Convention applies to all refugees, including children, it nevertheless contains no child-specific provisions. See for instance J. Bierwirth, *supra* note 15.

²²⁸ Committee on the Rights of the Child, 'General Comment No. 6', *supra* note 11, at para. 13.

²²⁹ Committee on the Rights of the Child, 'General Comment No. 6', *ibid*, at para. 18.

²³⁰ *Ibid*.

²³¹ McAdam, *supra* note 144, at p. 177.

²³² Committee on the Rights of the Child, 'General Comment No. 6', *supra* note 11, at para. 20.

participation of the child in decisions affecting his or her welfare. This principle is contained in article 12 on the right of the child to express his or her views and to be heard.

4.5.3. Non-refoulement

Like CAT and ICCPR, the CRC imposes upon State Parties an obligation of *non-refoulement*. The principle as contained in the CRC is particularly significant for UCAS as the CRC is concerned especially with children. While the CRC does not contain any direct provisions on *non-refoulement*, nevertheless the principle is embedded in its fundamental principles and in a number of its provisions. Firstly, the principle of *non-refoulement* derives from the right to life contained in article 6 and freedom from torture and other cruel, inhuman or degrading treatment contained in article 37(a). As regards the former, article 6 of the CRC provides that 'States Parties shall ensure to the maximum extent possible the survival and development of the child.'²³³ The CRC Committee has further clarified that 'the obligation of the State party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardize a child's right to life, survival and development.'²³⁴ This element of obligation is significant for UCAS who have fled generalized violence and armed conflict and are furthermore particularly vulnerable to trafficking, (sexual) exploitation and military recruitment. Meanwhile, under article 37(a) of the CRC State Parties are under the obligation to ensure that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.' The combination of these provisions has been interpreted by the CRC Committee to produce an obligation of *non-refoulement*:

*in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.*²³⁵

The principle of *non-refoulement* can also be triggered by other conduct, as can be deduced from the reference to 'irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37.' Consequently, the principle of *non-refoulement* can also apply where the rejection or return of a child entails a real risk to other conduct which would result in 'irreparable harm' to the child, and which would be contravention of the State's general obligation to ensure the survival and development of the child under article 6. Meanwhile, the CRC Committee further provided that 'the assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.'²³⁶

Secondly, the principle of *non-refoulement* is contained in article 38, the provision related to armed conflict. In the words of the CRC Committee,

State obligation deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the Optional Protocol²³⁷ to the Convention on the Rights of the

²³³ Convention on the Rights of the Child, Article 6(2).

²³⁴ Committee of the Rights of the Child, General Comment No. 6, *supra* note 11, at para. 23.

²³⁵ Committee of the Rights of the Child, 'General Comment No. 6, *ibid*, at para. 27.

²³⁶ *Ibid*.

²³⁷ Thailand acceded to the Optional Protocol on 27 February 2006.

*Child on the involvement of children in armed conflict, entail extraterritorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a state where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.*²³⁸

State Parties are thus forbidden to return a child to a border area where he or she faces a real risk of recruitment into armed forces or participation (direct or indirect) in armed conflict.

Lastly, the principle of *non-refoulement* can be derived from the best interest principle. When an UCAS is found or reports to the authorities, the authorities must conduct a determination of what is in the best interest of the child. 'Allowing the child access to the territory is a prerequisite to this initial assessment process.'²³⁹ *Non-refoulement* inherent in the best interest principle in this context thus entails non-rejection and entry into a State Party's territory. It furthermore entails non-expulsion while the child's (asylum) claim is being assessed and while a best interest determination is conducted and corollary solution is drawn up. As McAdam stated, 'by imposing an additional layer of consideration in cases involving children, [the best interest principle] may also constitute a complementary ground of protection in its own right' and 'in particular it may provide a ground for protection for children fleeing generalized violence.'²⁴⁰

4.5.4. Other Provisions Related to Non-refoulement

The principle of *non-refoulement*, particularly in terms of its applicability to UCAS, can be further derived from and buffered by a number of other provisions of the CRC. Article 20(1) CRC provides that 'a *child temporarily or permanently deprived of his or her family environment* [...] shall be entitled to *special protection and assistance* as provided by the state.' (emphasis added). As children deprived of their family environment, by virtue of article 20, UCAS are thus entitled to special protection and assistance.²⁴¹ In other words, while it has been established already that a principle of *non-refoulement* is contained in the CRC, it can be said that it applies in particular to UCAS by virtue of the fact that they are entitled to special protection. *Non-refoulement* can certainly be regarded as falling within the ambit of such protection.²⁴² Meanwhile, article 2(1) CRC prohibits the Thai government from discriminating in this regard. As such, UCAS are entitled to the same protection as Thai children temporarily or permanently deprived of their family environment. That UCAS - as children deprived of family life and entitled to special protection - should not be expelled or returned can also be deduced from the remainder of article 20 which stipulates that State Parties are under the obligation to ensure alternative care for a child temporarily or permanently deprived of his or her family environment in accordance with national laws.²⁴³ As stated in the article, such care could include '*inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary

²³⁸ Committee of the Rights of the Child, 'General Comment No. 6', *supra* note 11, at para. 28.

²³⁹ Committee of the Rights of the Child, 'General Comment No. 6', *ibid.* at para. 20.

²⁴⁰ McAdam, *supra* note 144, at p. 174.

²⁴¹ Committee of the Rights of the Child, 'General Comment No. 6', *supra* note 11, at para. 39.

²⁴² The Committee on the Rights of the Child has even noted that in the application of Article 4 of the CRC (which obliges State parties to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present convention', and to take measures to the maximum extent of their available resources for economic, social and cultural rights), 'the particular vulnerability of unaccompanied and separated children, explicitly recognized in article 20 of the convention, must be taken into account and will result in making the assignment of available resources to such children a priority.' See Committee of the Rights of the Child, 'General Comment No. 6', *ibid.* para. 16.

²⁴³ Convention on the Rights of the Child, Article 20(2).

placement in suitable institutions for the care of children.²⁴⁴ From these provisions it can be inferred that a State is under the obligation to provide alternative care to UCAS. This has also been affirmed by the CRC Committee in General Comment No. 6.²⁴⁵ Meanwhile, article 39 of the CRC provides that 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of [...] torture or any other form or cruel, inhuman or degrading treatment or punishment; or armed conflicts.' Though this article does not relate directly to *non-refoulement* as such, it does provide that children that have been victims of the abovementioned harms are entitled to special attention particularly in the form of recovery. As UCAS are frequently victims of armed conflict and in some cases of torture or other ill-treatment, this provision could reasonably be said to apply to them. *Refoulement* of UCAS would be contradictory to the provisions of this article.

Lastly, article 22 of the CRC is specifically concerned with child refugees and asylum-seekers. It provides *inter alia* that a child seeking asylum or a child refugee, whether accompanied or not, shall receive 'appropriate protection and humanitarian assistance' in the enjoyment of the rights provided for by the Convention and other international human rights instruments to which the State is a party. It also provides that with respect to such children, State Parties shall provide cooperation to protect and assist such a child, and to trace the parents or other members of the family. In addition, 'in cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in this Convention.'²⁴⁶ It thus appears that *non-refoulement* is also embedded within this provision. Article 22 applies to any child seeking asylum in a host state, regardless of whether their presence is legal. 'Read in conjunction with other Articles of the Convention, [article 22] provides a framework for dealing with child asylum-seekers and accords them certain minimum standards of treatment.'²⁴⁷ However, upon accession to the CRC, in accordance with article 51(1) CRC and article 19 of the *1969 Vienna Convention on the Law of Treaties*²⁴⁸, Thailand submitted a reservation which provided that 'the application of articles 7, 22... of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand.'²⁴⁹ Yet the issue of reservations to international human rights instruments is controversial. Indeed, it has been frequently questioned whether States should be able to make reservations to human rights treaties since human rights treaties are not concerned with inter-State obligations but rather with rights of individuals and corollary State obligations to respect and guarantee these rights.²⁵⁰ The legal

²⁴⁴ Convention on the Rights of the Child, Article 20(3).

²⁴⁵ Committee of the Rights of the Child, 'General Comment No. 6', *supra*, at paras. 39-40.

²⁴⁶ Article 22(2) Convention on the Rights of the Child.

²⁴⁷ J. Kunder and B. V. Nylund, 'Protecting the Rights of Displaced Children: Some Suggestions for Enhanced Monitoring and Reporting', in A. Bayefsky and J. Fitzpatrick (eds), *Human Rights and Forced Displacement*, 2000, at p. 91.

²⁴⁸ By virtue of this article, a State may formulate a reservation to a treaty unless the treaty specifically prohibits the making of reservations or only allows for certain specified reservations. Such a reservation must not, however, be incompatible with the object and purpose of the treaty. In this regard, the Human Rights Committee has stated that the task of assessing the validity of reservations and its compatibility with the object and purpose of the Covenant falls necessarily upon itself given that it requires an objective examination of the reservation by reference to legal principles, a task inappropriate for State Parties but one that the Committee is 'well-placed to perform'.

²⁴⁹ United Nations Treaty Collection.

< http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>

²⁵⁰ This issue, amongst others, was addressed by the Human Rights Committee in General Comment 24. While recognizing that the *1969 Vienna Convention on the Law of Treaties* constitutes the source of rules governing reservations, it also noted that it did not regard these provisions as appropriate for international human rights law

effect of reservations to human rights provisions also remains contentious.²⁵¹ Regardless of the controversy surrounding these issues, the fact remains that Thailand submitted a reservation to article 22 out of fear for 'possible influxes of refugee and illegal immigration from neighbouring countries' and though national efforts are being undertaken with a view to withdrawing the reservations, as of date this has not yet occurred.²⁵² Meanwhile, the Committee has not made any comments regarding the validity of the reservations, but it has urged Thailand to withdraw them.²⁵³

Despite its reservation to article 22, it seems that Thailand is still under the obligation to ensure the rights contained in the CRC to child refugees and asylum-seekers by virtue of article 2. As mentioned, this article specifically provides that the rights contained in the CRC must be ensured to *all children within a State's jurisdiction*. Indeed, child asylum seekers and refugees, whether recognized as a refugee or a beneficiary of complementary protection, are entitled to the enjoyment of all human rights granted to children in the State's jurisdiction, including those requiring lawful stay in the territory. As stated by the CRC Committee, even a child that is not recognized as a refugee nor as a beneficiary of complementary protection 'will still enjoy protection under all norms of the Convention as long as they remain de facto within the States' territories and/or subject to its jurisdiction.'²⁵⁴ In a similar manner, regardless of the reservation to article 22, Thailand is under the obligation to provide protection (including *non-refoulement*) and assistance to UCAS by virtue of article 20. Systematically denying all the rights embedded within the CRC to all child refugees and asylum seekers would unequivocally constitute a violation of the CRC's cardinal principle of non-discrimination contained in article 2. It would also violate non-discrimination as a peremptory norm of international law.²⁵⁵ Indeed, while the CRC permits the making of reservations by virtue of article 51(1), it nevertheless also provides in article 51(2) that 'a reservation incompatible with the object and purpose of the present Convention shall not be permitted.' A reservation to article 22 which would amount to the systematic denial of all rights contained in the CRC to all child asylum-seekers and refugees would thus have to be regarded as impermissible in that it would be in contravention of two of the CRC's

due to the latter's unique nature of conferring basic rights and entitlements to individuals. Nevertheless, the Committee also recognized that the ability to make reservations arguably serves an important function in that it encourages State Parties to ratify human rights instruments. See Human Rights Committee, 'General Comment No. 24', *supra* note 211.

²⁵¹ On this issue the HRC noted that 'the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.' Human Rights Committee, 'General Comment No. 24', *supra* note 211, at para. 18.

²⁵² Committee on the Rights of the Child, 'Written Replies by the Government of Thailand Concerning the List of Issues received by the Committee on the Rights of the Child relating to the Consideration of the Second Periodic Report of Thailand (CRC/C/83/Add.15)', 29 December 2005, UN Doc CRC/C/THA/Q/2/Add.1, at para 1.1.

²⁵³ 'The Committee reiterates its previous recommendation and again draws the State party's attention to articles 2 and 24 of the International Covenant on Civil and Political Rights, which the State party ratified without reservations. In this regard, the Committee urges the State Party to withdraw its reservations to article 7 and 22 of the Convention in accordance with the 1993 *Vienna Declaration and Plan of Action of the World Conference on Human Rights of 1993 (A/CONF.157/23)*'. See Committee on the Rights of the Child, 'Concluding Observations Thailand', 17 March 2006, UN. Doc. CRC/C/THA/CO/2, at para. 9. For the Committee's position regarding reservations made to UMR in general, see Committee of the Rights of the Child, 'General Comment No. 6', *supra*, at para 17.

²⁵⁴ See Committee on the Rights of the Child, 'General Comment No. 6', *supra*, at paras. 76-78.

²⁵⁵ Shaw, *supra* note 116, at 275. The prohibition of non-discrimination as a peremptory norm of international law will be further in section 4.6 below.

fundamental principles, namely non-discrimination and the best interest of the child (which must be taken as a primary consideration in all actions concerning children).

To recapitulate, under the CRC *non-refoulement* derives from the principle of best interest, the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and article 38 related to children in armed conflict. It may also be triggered by violations of other provisions contained in the CRC provided there is a 'real risk of irreparable harm to the child'. *Non-refoulement* under the CRC entails non-rejection and non-expulsion to a territory where this would entail a threat to life or a risk of torture or other cruel, inhuman or degrading treatment. It also prohibits chain *refoulement*. *Non-refoulement* under the CRC is however more expansive than under CAT and ICCPR as a result of the fact that it also prohibits *refoulement* where there is a real risk of recruitment into the armed forces or direct or indirect participation in armed hostilities. This added component is particularly significant for UCAS fleeing armed conflict and generalized violence. In addition, the principle of *non-refoulement* can also be derived from, or buffered by, a number of other provisions of the CRC, notably articles 20, 39 and 22. Particularly article 20 CRC is significant source of protection from *refoulement* for UCAS. While State Parties of the CRC are clearly bound by the principle of *non-refoulement* as contained in the CRC, the CRC Committee has also noted that State Parties must respect the principle of *non-refoulement* as derived in general from international human rights, humanitarian and refugee law.²⁵⁶ Lastly, with respect to implementation, the principle of *non-refoulement* (in conjunction with the best interest principle which requires best interest determinations) entails that States Parties are under a duty to conduct assessments of the 'real risk' of the abovementioned harms should a child be returned.²⁵⁷

4.6 Non-Discrimination

Article 55(3) of the Charter of the United Nations provides that the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all *without distinction as to race, sex, language, or religion.*' The principle of non-discrimination is a general principle of international law. It constitutes one of the fundamental cornerstones of international human rights law and is embedded *inter alia* in the UDHR (articles 1, 2 and 7)²⁵⁸, ICCPR (articles 2 and 26), CRC (article 2) and the International Covenant for Economic and Social Rights (ICESCR, article 2). It also forms the subject of various special instruments, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*²⁵⁹ and the *Convention on the Elimination of All Forms of*

²⁵⁶ Committee of the Rights of the Child, 'General Comment No. 6', *supra*, at para. 26

²⁵⁷ Unlike CAT and ICCPR, the CRC does not provide for an individual communications mechanism. As such, the CRC Committee does not handle individual cases. Meanwhile, the CRC Committee has not provided any clarification of what constitutes a 'real risk'. As such, it is unclear what a 'real risk' exactly constitutes under the CRC and this is presently subject to individual determinations by States Parties.

²⁵⁸ Article 1 UDHR provides that 'all human beings are born *free and equal* in dignity and rights [...]' (emphasis added) Article 2 UDHR provides that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]' (emphasis added) Article 7 UDHR provides that '*all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*' (emphasis added)

²⁵⁹ The *International Convention on the Elimination of all forms of Racial Discrimination* entered into force on 4 January, 1969 and Thailand acceded to the treaty on 28 January 2003. The main purpose of the treaty is the elimination of all forms racial discrimination. Under article 2(1)(a), 'each State Party undertakes to engage in no act or practice of racial discrimination', where racial discrimination is defined in article 1(1) as 'any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the

Discrimination Against Women. Today it is widely recognized that non-discrimination constitutes a principle of *jus cogens*.²⁶⁰

The principle of non-discrimination has already been addressed in the context of various human rights law instruments, such as ICCPR (article 2) and CRC (article 2). So far, reference to the principle of non-discrimination has been limited to discussions regarding the applicability of the rights contained in various legal instruments - and from which *non-refoulement* derives - to refugees and asylum-seekers. The study illustrated how by virtue of non-discrimination and the corollary applicability of the provisions containing elements of *non-refoulement*, asylum-seekers and refugees are entitled to protection from *refoulement*.

In a similar manner, the principle of non-discrimination prohibits States from discriminating in the application of rights and obligations emanating from the various instruments, such as the principle of *non-refoulement*. In complying with this obligation, States may thus not discriminate on the basis of the various grounds referred to in the respective instruments. In addition to the abovementioned treaty-specific provisions, a general prohibition on discrimination can be found in Article 26 of the ICCPR, which provides that

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 is significant in that its non-discrimination clause is not limited to the allocation of rights contained in the ICCPR or any other particular instrument. 'Article 26 rather governs the allocation of all public goods, including rights not stipulated by the Covenant itself.'²⁶¹ This vital feature distinguishes it from the other 'dependent' non-discrimination clauses, such as article 2 ICCPR, which are limited to non-discrimination in the application of rights provided by respective instrument. As explained by the HRC in General Comment No. 18,

*[A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 [ICCPR] but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.*²⁶²

In the view of the HRC, any measure involving a distinction, exclusion, restriction or preference based on any ground 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and

purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' By virtue of article 2(1)(d) States must prohibit and prevent racial discrimination committed 'by any person, group or organization.'

²⁶⁰ Shaw, *supra* note 116, at 275.

²⁶¹ J. Hathaway, *The Rights of Refugees Under International Law*, 2005, at p. 125.

²⁶² Human Rights Committee, 'General Comment No. 18: Non-discrimination', 10 November 1989, UN. Doc. HRI/GEN/1/Rev.6, at para. 12.

freedoms' constitutes discrimination.²⁶³ The implication of non-discrimination in the present context is that all peoples, regardless of race, national origin, age, gender or any other status, must enjoy from the protection of *non-refoulement* and the right to seek asylum. In complying with this obligation, Thailand is prohibited from discriminating by all methods and means.

4.7 Summary of Thailand's Obligations under International Human Rights Law

To summarize, this chapter illustrated how international human rights law can serve as a source of protection for refugees and asylum-seekers around the world and particularly those situated in host countries that are not party to the Refugee Convention or the 1967 Protocol. Indeed, the various international human rights law instruments impose a number of obligations on the Thai Government with respect to refugees and asylum-seekers.

Firstly, one of the foundations of international refugee law, namely the right to seek asylum, derives from international human rights law. While it does not constitute a principle of customary international law, it nevertheless remains significant in the international refugee protection regime, and is furthermore of import when read in conjunction with the principle of *non-refoulement*. Secondly and more importantly, international human rights law can provide protection for asylum-seekers and refugees by virtue of the principle of *non-refoulement* as contained in myriad forms in CAT, ICCPR and CRC. While a more restrictive version is embedded in the CAT, the ICCPR provides for a broader form of the principle and covers prohibition of *refoulement* to threats of life, torture, as well as to other cruel, inhuman or degrading treatment or punishment. As previously mentioned, the scope of this principle may even extend to potential violations of other human rights. Particularly relevant for UCAS is the principle of *non-refoulement* as contained in the CRC. Under this treaty, *non-refoulement* is not only prohibited where there exists a real risk of a threat to life or to torture or other cruel, inhuman or degrading treatment or punishment, but also where a child faces a real risk of direct or indirect participation in hostilities. Moreover it can also be triggered if the *refoulement* of a child entails exposure to other conduct resulting in 'irreparable harm to the child'. In addition, *non-refoulement* as a principle of customary international law in the human rights context prohibits rejection, extradition, expulsion, or any other act which results in an individual being removed to a territory where he or she faces a threat to life or a real risk of torture or other cruel, inhuman or degrading treatment. As discussed, it may also entail temporary refuge or the sending of the individual concerned to a safe third country if the conditions in the State of origin are not yet conducive for return. Lastly, unlike the principle of *non-refoulement* in the refugee context, in the human rights context, *non-refoulement* is absolute and no derogations are permitted. These *non-refoulement* obligations as derived from various sources of international law exist parallel to each other and Thailand must comply with each individual obligation.

International human rights instruments generally do not dictate how a State is to implement its provisions and State Parties are under the obligation to adopt appropriate legislative, administrative and other measures to give effect to the rights contained in the various instruments.²⁶⁴ With respect to the principle of *non-refoulement* this implies that States must establish mechanisms that ensure that people will be protected against *refoulement*. This is affirmed by the HRC in its Concluding Observations on Thailand, in which it noted that 'the State party should establish a mechanism to prohibit the extradition, expulsion, deportation or

²⁶³ *Ibid*, at para. 7.

²⁶⁴ Article 2(2) ICCPR, article 2(1) ICESCR and article 4 CRC.

forcible return of aliens to a country where they would be at risk of torture or ill-treatment, including the right to judicial review with suspensive effect.²⁶⁵ The same applies with respect to the principle of *non-refoulement* as derived from the provisions of CAT and CRC. Thus, in order to comply with the principle of *non-refoulement* under the various human rights instruments as well as under customary international law, State Parties must establish fair and effective mechanisms to ensure protection from *refoulement*. Meanwhile, each individual asylum-seeker is entitled to an individual assessment of his or her claim and States are not allowed to make decisions on the basis of generalized categories of people. Both the CAT Committee and the HRC have found that non-individualized determinations are not acceptable because they are not in accordance with the provisions of article 3 CAT and article 7 ICCPR.²⁶⁶ With respect to the CRC, what is in the best interest of a child depends on the circumstances. Consequently, given that the best interest principle is circumstantial, the CRC, too, requires an individual assessment procedure. As was already indicated in the HRC's Concluding Observations on Thailand, the mechanism must also include a right to judicial review. 'The [Human Rights] Committee recalls that by the nature of *refoulement*, effective review of an extradition decision must have an opportunity to take place prior to extradition, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.'²⁶⁷

Lastly, in addition to the establishment of mechanisms to ensure compliance with *non-refoulement*, protection from *refoulement* must also be guaranteed by law. In this regard the CAT Committee commented in its Concluding Observations on Australia that 'the State party should explicitly incorporate into domestic legislation [...] the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (non-refoulement).'²⁶⁸ Similarly, in its Concluding Observations for Australia the HRC recommended Australia 'take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being torture or subjected to other cruel, inhuman or degrading treatment or punishment.' (emphasis added)²⁶⁹ Likewise, CRC Committee noted that 'obligations deriving from the Convention vis-à-vis unaccompanied and separated children apply to all branches of government (executive, legislative and judicial) [and] include the obligation to establish national legislation; administrative structures; and the necessary research, information, data compilation and comprehensive training activities to support such measures.'²⁷⁰ (emphasis added) Indeed States have the duty to adopt the appropriate legislative measures to give effect to the rights and obligations contained in the various instruments. Under CAT, ICCPR and CRC, Thailand is thus under the obligation to adopt appropriate legislative measures for the implementation of the principle of *non-refoulement*.

²⁶⁵ Human Rights Committee, 'Concluding Observations Thailand', 8 July 2005, UN Doc. CCPR/CO/84/THA, at para. 17.

²⁶⁶ Committee against Torture, 'Concluding Observations on Finland', 1997, UN Doc A/51/44, at para. 62 and Human Rights Committee, 'Concluding Observations Estonia', 15 April 2003, UN Doc. CCPR/CO/77/EST, at para. 13.

²⁶⁷ *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan*, *supra*, at para 12.7 and *Mohammed Alzery v. Sweden*, *supra* note 199, at para. 11.8.

²⁶⁸ Committee Against Torture, 'Concluding Observations Australia', 22 May 2008, UN. Doc CAT/C/AUS/CO/3, at para. 15.

²⁶⁹ Human Rights Committee, 'Concluding Observations Australia', 7 May 2009, UN. Doc CCPR/C/AUS/CO/5, at para. 19.

²⁷⁰ Committee of the Rights of the Child, 'General Comment No. 6', *supra*, at para. 13.

Chapter 5

Asylum-Seekers in Thailand

*'The pressures created by the presence of refugees in receiving countries, particularly those in the Third World, can be enormous. Governments walk a tightrope in trying to balance economic, national security, and humanitarian interests. Most are extremely reluctant to accord legal status to refugees from neighbouring countries for fear of damaging political relations, encouraging a mass influx of people seeking refuge, or offering protection to an ideologically incompatible group of persons.'*²⁷¹

5.1 The Thai Legal Framework for the Protection of Asylum-Seekers

'The framing of law on refugee protection can be done in three ways: by acceding to international refugee instruments, by developing a regional instrument [...] and/or by framing national legislation.'²⁷² Thailand is not a party to the Refugee Convention, the main instrument of the international refugee protection regime. Aside from the politically-binding Bangkok Principles, there are no legally binding regional instruments for refugee protection in Asia. Meanwhile, with respect to domestic legislation, Thailand has no asylum law addressing the plight of refugees and asylum-seekers. In fact, the term 'refugee' can't be found in any piece of Thai legislation or policy and its usage is expressly avoided. Instead, various other terms are employed, such as 'displaced persons', 'evacuees', 'illegal entrants', 'illegal immigrants' and particularly with respect to refugees from Myanmar, 'those fleeing fighting' or 'those fleeing fighting and the consequences of civil war'.²⁷³ In short, there is no legal framework in Thailand that deals with asylum, refugee status and determination, or refugee protection.

Nevertheless, there are several Thai laws which influence the plight of asylum-seekers. First and foremost is the 1979 Immigration Act which establishes the legal position of immigrants in Thailand.²⁷⁴ According to its provisions, foreigners in Thailand that have entered without the relevant papers such as passports and visas are classified as illegal immigrants and subject to arrest, detention and deportation. Given that most asylum-seekers are unlikely to have brought such papers this means that most are classified as 'illegal immigrants', potentially at risk of deportation. Refugees and asylum-seekers are not acknowledged as such nor are they provided any special status. No legal distinction is made between refugees and asylum-seekers on the one hand and economic migrants on the other.²⁷⁵ Consequently, 'the concept of the immigration law does not correspond with the international concept on the provision of protection to refugees.'²⁷⁶ However, under Section 17 of the Immigration Act the Minister of the Interior with the consent of the cabinet can allow people to enter and remain in Thailand. While this has permitted the admittance and temporary stay of various groups of people, there have been few cabinet decisions recently, particularly in relation to asylum-seekers from

²⁷¹ G. Loescher, in G. Loescher and L. Monahan, *supra* note 3, at p. 3.

²⁷² C. R. Abrar, *supra* note 79.

²⁷³ V. Muntarbhorn, *supra* note 4, at p. 18.

²⁷⁴ Immigration Act, B.E. 2522 (1979) (Thailand) Section 4: 11-12; 22; 57.

²⁷⁵ For example, in its submission to the CRC Committee, Thailand stated that 'there are a large number of displaced persons from neighbouring countries living in Thailand. They can be divided into two groups. The first are those who have fled their own country due to internal unrest, fighting or political threat. The second group are those who have come to Thailand for economic reasons. Under Thai law, both groups are considered illegal immigrants.' See Committee on the Rights of the Child, 'Second Periodic Report of States parties due in 1999: Thailand', 31 May 2005, UN Doc CRC/C/83/Add.15, at para 167.

²⁷⁶ International Law Association of Thailand, *supra* note 5, at p. 18.

Myanmar. Indeed, this mechanism is 'considered to be an exception to the rule, and not the rule itself.'²⁷⁷ The last domestic legal instrument relevant to asylum-seekers in Thailand is the 2007 Constitution of the Kingdom of Thailand. Chapter 1 Section 4 provides that the provisions of the Constitution shall be upheld with due regard to human dignity, rights, freedoms and equality before the law.²⁷⁸ However, Chapter 1 Section 5 ensures equal protection under the Constitution for all *Thai* people. Likewise, Chapter 3 of the Constitution on rights and freedoms is entitled 'rights and liberties of *Thai* people' (emphasis added). These provisions intimate a restricted scope of application. However, a few parts of the Thai Constitution apply indiscriminately, including Chapter X on the Courts.

5.2 Thai Policy and Practice towards Asylum-Seekers

5.2.1. Response of the Royal Thai Government to Asylum Situations

Because there is no domestic legislation on the protection of asylum-seekers and refugees, the response of the Thai Government to the various refugee situations occurs on a case-by-case basis and is grounded in the Minister of the Interior's discretionary powers and cabinet resolutions. Inevitably this has resulted in differing and inconsistent policies. This was particularly evident in the 1970s and 1980s in the Thai Government's response to the Indochinese influx (prior to the establishment of the Comprehensive Action Plan of 1989). Tolerant policies adhering to the principles of *non-refoulement* and non-expulsion were haphazardly replaced with a policy of 'humane deterrence' which involved closure of the border to Cambodians, Vietnamese and Laotian refugees and asylum-seekers and subjecting illegal entrants to austere holding conditions.²⁷⁹ Today the Thai Government continues to employ inconsistent policies towards asylum-seekers and refugees for instance by allowing temporary stay for the Karen and Karenni, but not for the Shan group, which it does not recognize as displaced. Thailand argues that due to the lack of legal obligations, its response derives from a moral obligation at the international level. As such, it claims that it 'purports to act in accordance with humanitarian principles, but [that] the degree of implementation of these principles may be nuanced, depending upon national policy.'²⁸⁰ As indicated these national policies vary between more tolerant and more restrictive stances and are ultimately driven by a number of other factors, including international engagement and pressure, as well as political relations with the country of origin. Meanwhile, Thailand's turbulent political environment further hampers consistency. As Muntarbhorn aptly puts it, 'the context facing many of those seeking refuge here, there or anywhere is often highly convoluted, and the law does not always provide the answer; it bends with policies and politics.'²⁸¹

Accordingly, the response of the Thai Government to the situation of asylum-seekers from Myanmar has also varied. After the arrival of the first group of Karen refugees in 1984, the Ministry of the Interior requested the Coordination of Services to Displaced Persons in Thailand (CCSDPT)²⁸² to provide basic humanitarian assistance to the asylum-seekers. In fact, 'before 1989 Burmese asylum-seekers were liberally permitted to stay temporarily in Thailand' and 'in November of that year the Government even stated explicitly a policy of

²⁷⁷ International Law Association of Thailand, *supra* note 5, at p. 33.

²⁷⁸ Constitution of the Kingdom of Thailand (enacted 24 August 2007), B.E. 2550 (2007)

²⁷⁹ For an extensive description of the origins of humane deterrence, see D. McNamara, 'Humane Deterrence in South-east Asia', in G. Loescher and L. Monahan (eds), *supra* note 3, pp. 123-134.

²⁸⁰ V. Muntarbhorn, *supra* note 4, at p. 15.

²⁸¹ V. Muntarbhorn, *ibid*, at p. 13.

²⁸² The CCSDPT was set up in 1975 in response to the Indochinese influx following the Vietnam war. It is a communications network for the non-governmental organizations involved in specific refugee situations, such as the one along the Thai-Myanmar border. It allows the various NGOs to meet, discuss their work and coordinate as appropriate.

temporary refuge for the Burmese.²⁸³ However this changed in 1990 when the Thai Government arrested and sent back asylum-seekers and implemented a number of other restrictive measures. While the response of the Thai Government has been both accepting and restrictive, overall the government has focused on providing the most basic assistance with a view to avoiding the creation of 'draw-factors' and to discouraging refugees from coming or staying longer than necessary.²⁸⁴ The RTG has also consistently avoided the 'internationalization' of the Thai-Myanmar border situation in order to maintain wider discretion to respond. It thus sought to avoid the engagement of international agencies such as the UNHCR. Only when faced with a number of significant complexities in 1998 did the RTG allow UNHCR to be more involved in the Thai-Myanmar border. The most important actors in the border region are the various NGOs who have been mandated by the RTG to provide basic care and maintenance to the asylum-seekers in the camps, including food, primary health care, shelter and basic non-food items.

5.2.2. The Attenuation of the Laws

With respect to asylum-seekers, in reality the Thai Government is not strictly applying its national laws. 'The country has attenuated the strictures of various national laws, such as its immigrant law, by adopting policies which offer temporary refuge in many cases, thus preventing negative impact on those who seek refuge and who deserve protection.'²⁸⁵ The Cabinet's decision of 11 March 1978 (B.E.2521) provides that 'for those displaced civilians [from Myanmar] who are scattered at the border area, the government shall grant leniency to them so that they can live in the Thai territory provisionally in the specified areas along the Thai-Burmese border.'²⁸⁶ As such, at present recognized Myanmar asylum-seekers that respect Thai law and order are provided temporary shelter and are placed in camps along the Thai-Myanmar border. Overall, there are approximately 150,000 asylum-seekers located in the nine official camps along the Thai-Myanmar border, another 200,000 asylum-seekers outside of the camps²⁸⁷, and more than 2,000,000 migrant workers.²⁸⁸ With respect to UCAS, there are over 6,600 separated children in the camps along the Thai-Myanmar border.²⁸⁹ Of this figure, at least 3,000 are unaccompanied child asylum-seekers. With respect to the state of origin of the asylum-seekers in the camps, the divisions are as follows: Karen (61%), Karenni (17%), Tenasserim (7%), Pegu (6%), Mon (5%), Irrawaddy (1%), Rangoon (1%) and other (2%).²⁹⁰

²⁸³ V. Muntarbhorn, *supra* note 4, at p. 27.

²⁸⁴ Again it must be noted that the RTG's response to refugee situations varies greatly. Thus while it has granted limited assistance to Myanmar asylum-seekers at the most basic level, on the other hand it has granted some descendents of the post World-War asylum-seekers and refugees more extensive rights and privileges, including access to education and employment, as well as nationality. See V. Muntarbhorn, *supra* note 4, at p. 5.

²⁸⁵ It ought to be noted that this has not occurred on a systematic basis and furthermore lacks clarity and certainty. See *ibid*, at p. 1.

²⁸⁶ Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Initial Report: Thailand', 2 August 2004, UN Doc. CCPR/C/THA/2004/1, at para 685. This cabinet decision is based on Section 17 of the Immigration Act referred to above.

²⁸⁷ This includes people of the Shan ethnic group, which the Thai government does not actually recognize as 'displaced persons'.

²⁸⁸ Thailand-Burma Border Consortium, 'Programme Report July to December 2008', *supra* note 8, at p. ix.

²⁸⁹ There is a relatively equal ratio of male to female, and twelve percent of the unaccompanied children are aged five to nine. The majority of the separated children live with relatives, while approximately thirty percent are in residential care and one percent lives without any adult support in child-headed households. UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 22.

²⁹⁰ UNHCR, 'Burmese border refugee sites with population figures: July 2009', available at < <http://www.tbcc.org> >

Due to the absence of national laws in relation to asylum, Thailand has no national refugee status determination procedures. Under the Comprehensive Plan of Action a temporary mechanism was established for the 1.3 million Indochinese asylum-seekers. Meanwhile, for the Thai-Myanmar border situation, in the 1990s the RTG created a system of Provincial Admission Boards (hereafter PABs) to regulate admission of asylum-seekers to the camps. These PABs consist of representatives of the Thai Ministry of the Interior at the provincial level and determine whether an asylum-seeker from Myanmar is in need of protection and should thus be granted permission to temporarily remain in one of the Thai camps. The criterion initially employed for admission into the camps was 'persons fleeing fighting and the consequences of civil war'. As such, those who had fled human rights abuses such as forced labour, portering, or other abuses mentioned above, were not accepted. Indeed, a large proportion of the asylum-seekers in Thailand were rejected by the PABs and deported.²⁹¹ Meanwhile, the asylum-seekers who were recognized as 'temporarily displaced persons' were admitted into one of the camps. However, the PABs worked on an *ad hoc* basis resulting in variation in their practices and policies. For instance, some of the PABs were stricter than others, resulting in what may be considered as inappropriate and unfair rejections. In 1998 RTG allowed UNHCR access to the Status Determination Procedures as an observer. Yet, access was inconsistent and in 2002 the PABs had ceased to meet consistently. 'The absence of a functioning procedure to process the admission of those seeking refuge from Myanmar meant that at the end of 2002 and 2003, there were some 17,000 and 19,000 non-registered cases respectively with limbo status living unofficially ('illegally') in the border camps.'²⁹² The PAB system was however improved and reactivated in 2004. One significant development was the expansion of the criterion for admission from persons 'fleeing fighting' to persons 'fleeing persecution or for other reasons'.²⁹³ Additionally, the establishment of two handbooks was an 'important step towards the establishment of a national asylum/admission (the latter reflects the terminology used by RTG) structure in a non-Convention environment.'²⁹⁴

Since then, the PAB procedure has undergone further significant improvement. 'Under the new system, Myanmar nationals are pre-screened by authorities responsible for border security, informed of the Provincial Admissions Board process and admitted to a Reception Centre where their bio-data is taken. From there they are sent to Holding Centres in the camp along with those who are apprehended after entering Thailand and who have registration slips issued by UNHCR.'²⁹⁵ An initial interview is conducted in the camp and the results are forwarded to the PAB for further determination.²⁹⁶ Meanwhile, the system employs 2 different statuses for persons recognized to be in need of protection. 'Applicants deemed to be fleeing from fighting receive fleeing from fighting status and applicants deemed to be fleeing from persecution are granted displaced person status.'²⁹⁷ After the admission procedure, recognized asylum-seekers are transferred to one of the camps (also referred to as 'temporary shelters' by the RTG) and registered. This registration is conducted jointly by the RTG and UNHCR. However, the RTG considers those fleeing fighting as temporarily displaced persons and consequently these asylum-seekers may be required to return when circumstances in

²⁹¹ International Law Association of Thailand, *supra* note 5, at p. 44.

²⁹² V. Muntarbhorn, *supra* note 4, at p. 8.

²⁹³ UNHCR, Country Operations Plan Thailand 2006, available at <www.unhcr.org>, at p. 2.

²⁹⁴ *Ibid.*

²⁹⁵ UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 15.

²⁹⁶ The PABs consists of 8 members and at least half must be present for there to be quorum. Decisions are by majority vote. Each PAB includes a UNHCR representative with observer status. *Ibid.*

²⁹⁷ *Ibid.*

Myanmar permit this. On the other hand, those who have been recognized as fleeing persecution are eligible for third country resettlement.²⁹⁸ Another important component of the new system is the appeal procedure. Where rejected, applicants are notified²⁹⁹ and informed of their right to appeal within seven days of the PAB decision. The UNHCR provides the documentation for further consideration and files the appeal with the Bangkok-based Appeals Board.³⁰⁰ Successful applicants are admitted into one of the camps, while unsuccessful applicants are placed in the waiting area until they can be returned. The decision of the Appeals Board is final.

5.2.3. Policy in the Camps

Those who are admitted to the camps are referred to as 'temporarily displaced persons', reflecting the temporariness of their stay in Thailand.³⁰¹ In May 1998, the RTG and the UNHCR set up guidelines for cooperation for the Thai-Myanmar border area which consisted of 7 issues: provision of asylum; registration by the Ministry of the Interior in cooperation with UNHCR; permission for field visits to restricted areas by the UN; repatriation with Thailand providing a safe channel and UNHCR overseeing the security of the journey home and providing assistance in assimilation; support from the UN in moving and renovating some of the sites for the purposes of improved security; provision of basic necessities of life to the camp inhabitants to deter newcomers, and long-term negotiation with the Myanmar government for the repatriation of over 100,000 persons. Meanwhile assistance is provided in four main areas: provision of safe sites; guaranteed safety and protection; registration of identity; and NGO assistance in terms of food, commodities, medical treatment, health, education, shelter, sanitation and environment.³⁰²

The asylum-seekers in the camp undergo registration so that they have evidence of individual identity. Through NGOs working together with the Thai government, they receive basic assistance in the form of food, shelter, health services, and other basic non-food items. They have no freedom of movement and can only leave and enter the camp with prior permission. If found outside the camps without permission they risk arrest, detention and/or deportation for acting in violation of the immigration law.³⁰³ As no opportunities for self-reliance are provided the asylum-seekers are highly dependent on humanitarian assistance. As mentioned, the Thai-Myanmar border situation is one of the most protracted refugee situations in the world. Some of the camp residents have lived there for decades and an entire generation only knows life inside the camps. The restricted opportunities for movement and employment have led to frustration, and rape, domestic violence and substance abuse are chronic problems in the camps.³⁰⁴ Meanwhile, even though the RTG provides security for the camps, nevertheless

²⁹⁸ *Ibid.*

²⁹⁹ Rejections are notified by means of notice-boards in the Holding Centres. No individual reasons are provided for rejections.

³⁰⁰ The Appeals Board is represented by various Thai agencies, including the Ministry of the Interior, the Ministry of Foreign Affairs, and the National Security Council. UNHCR has no position on the Appeals Board.

³⁰¹ I. Brees, *supra* note 37, at p. 384.

³⁰² An interesting rule that reflects the temporariness of the stay of the asylum-seekers is that concrete floors or power supplies are forbidden in the camps. United States Committee for Refugees and Immigrants, '2009 Country Report Thailand', available at <www.refugees.org> Also see International Law Association of Thailand, *supra* note 5, at p. 39.

³⁰³ V. Muntarbhorn, *supra* note 4, at p. 19.

³⁰⁴ UNHCR, 'Thailand', available at <<http://www.unhcr.org>>

several camps, particularly those closer to the border, continue to be targeted by the *tatmadaw* and the DKBA.³⁰⁵

5.2.4. Changing Policies and New Solutions

The Thai Government ‘maintains ultimate authority over the refugee camps while the Ministry of the Interior, through provincial and district authorities, enforces refugee policy and controls the day-to-day running of the camps in collaboration with refugee and camp committees.’³⁰⁶ Initially the RTG did not allow for the establishment of long-term solutions. For instance, the RTG did not allow for resettlement except in highly exceptional case, such as medical need and/or family reunification.³⁰⁷ However, in recent years the Thai Government has been more accepting of long-term solutions. To illustrate, in January 2005 one of the largest resettlement programmes commenced and more than 30,000 Myanmar refugees have left Thailand for resettlement in other countries since then. Indeed, by 2006 the RTG has accepted resettlement as an acceptable solution to the refugee problem.³⁰⁸ The trend is increasing with the UNHCR expecting a total of 18,000 departures in 2009.³⁰⁹ Meanwhile the Thai Government is also considering more lenient regulations in terms of residence within the camps. ‘For those left behind, the Thai government has expressed a willingness to allow expanded vocational training and the possibility of increased self-reliance within the camps.’³¹⁰ Additionally the RTG is involved in examining the possibilities for asylum-seekers to find employment outside the camps.

³⁰⁵ For instance, in May 1995 DKBA invaded and set fire in Tha Song Yang District of Tak Province and in the villages of Mae Ta Who (Huay Ma Noke) and Ka Moh Loe Koh, thereby trying to force the asylum-seekers back to Myanmar. The DKBA has also engaged in the cross-shelling of the camps.

³⁰⁶ Thailand-Burma Border Consortium, ‘About Us’, available at <www.tbcc.org>

³⁰⁷ UNHCR, ‘Analysis of Gaps in Refugee Protection Capacity: Thailand’, *supra* note 9, at p. 40.

³⁰⁸ UNHCR, Country Operations Plan 2006, *supra* note 293, at p. 1.

³⁰⁹ UNHCR, ‘Thailand’, *supra* note 304.

³¹⁰ *Ibid.*

Chapter 6

Thailand's Compliance with *Non-refoulement*

*Thailand's record in responding to the numerous influxes of asylum-seekers has been largely commendable throughout the years. The country has abided to a considerable extent by international law interrelated with refugees and their protection, while a number of key challenges remain to be addressed*³¹¹

6.1 The Protection of UCAS through *Non-refoulement*

The previous chapters have outlined the *non-refoulement* obligations of Thailand towards UCAS under international refugee law and international human rights law, both conventional and customary. This section will provide a brief review of Thailand's compliance with its *non-refoulement* obligations. Before doing so, it will first seek to establish whether UCAS are entitled to protection in the form of *non-refoulement* under the various instruments of international law. As has been extensively discussed, under international conventional (CAT, ICCPR and CRC) and customary law, Thailand is prohibited from returning an individual or asylum-seeker where there is a threat of persecution, to life, or a real risk of torture, or other cruel, inhuman or degrading treatment or punishment. With respect to children specifically, *refoulement* is also prohibited where this entails a real risk of participation in hostilities. Chapter 2 provided a vivid description of the situation in Myanmar. It is clear that eastern Myanmar is plagued by armed conflict and generalized violence which furthermore involves widespread violations of international humanitarian and human rights law. The ethnic minorities have become targeted victims of violence committed both by the *tatmadaw* and the armed opposition groups. Indeed, the *junta* does not protect its civilians and even allows the *tatmadaw* to engage in gross violations of international humanitarian and human rights law as part the counter-insurgency strategy. This section will examine whether UCAS are entitled to benefit from any of the *non-refoulement* obligations derived from the various sources and instruments of international law.

Non-refoulement as a principle of customary international law prohibits the rejection, return or expulsion of an individual in any manner whatsoever where this entails a threat of persecution or to life, physical integrity or liberty. However, as discussed in chapter 3, while the principle is accepted as customary international law, nevertheless the precise content of the principle, other than the obligation to allow asylum-seekers entry into the host State's territory and the obligation to conduct a risk assessment, remains unsettled. States presently conduct their own assessment procedures with their own standards in determining the existence of a 'threat' and 'risk' for the application of the principle.

As regards *non-refoulement* under conventional international human rights law, it has been determined that *non-refoulement* as contained in CAT has a narrow scope of application as a result of the fact that it is limited to *non-refoulement* to torture and furthermore employs a high threshold through its requirement that there be a 'foreseeable, real and personal risk.' As such, UCAS are unlikely to be able to benefit from the protection of *non-refoulement* under CAT.³¹² With respect to the ICCPR and the CRC, under both instruments the principle of *non-refoulement* prohibits the rejection or return of an individual where this entails a threat to life

³¹¹ V. Muntharbhorn, *supra* note 4, at p. 1.

³¹² An exception can be made in some cases of child soldiers who have deserted the *tatmadaw* or armed opposition groups as they may be specifically sought after by the *tatmadaw* for deserting them or for having fought alongside the armed opposition groups.

or a real risk of torture or other cruel, inhuman or degrading treatment or punishment. With respect to the first issue, civilians in Eastern Myanmar, particularly those from the various ethnic groups, frequently face a real threat to their lives. Extrajudicial killing is common and has been reported on by a variety of organizations, both intergovernmental and non-governmental. Similarly, torture and other cruel, inhuman or degrading treatment are also widespread in Eastern Myanmar. Civilians have been subjected to torture committed by both the *tatmadaw* and the armed opposition groups as punishment or for the purposes of gaining information. With respect to *non-refoulement* where an individual faces a real risk of other cruel, inhuman or degrading treatment, neither article 7 ICCPR nor article 37(a) CRC provide any further clarification of what such ill-treatment consists of. Presently, civilians in Myanmar amongst others suffer from forced displacement, looting and destruction of villages, confiscation of resources, prohibition of access to crops and the placing of landmines around villages and crop fields. In *Dzemajl et al v. Yugoslavia*³¹³, the CAT Committee took the view that the burning and destruction of the houses and possessions of the applicants can be understood as constituting acts of cruel, inhuman or degrading treatment. It furthermore noted that 'the nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, and the particular vulnerability of the alleged victims and the fact that the acts were also committed with a significant level of racial motivation.'³¹⁴ It also stated that as the police knew of the risk and watched the events unfold, they had acquiesced in the perpetration of the ill-treatment. The situation in Myanmar is comparable, if not more extreme, than that endured by the applicants in *Dzemajl et al v. Yugoslavia*. In addition to the civilians being targeted as members of ethnic minorities, as opposed to acquiescing, the *tatmadaw* itself actually engages in the ill-treatment of civilians. Such conduct is furthermore committed systematically and forms part of the *tatmadaw's* counter-insurgency strategy. Based on the CAT Committee's jurisprudence, the forced displacement, looting and destruction of villages, confiscation of resources, blocking of access to crops and the placement of landmines around villages and crop fields in Eastern Myanmar can be regarded as cruel, inhuman or degrading treatment. Meanwhile, with respect to the 'real risk' threshold, the frequent and widespread occurrence of such incidents³¹⁵ intimates that in this regard, at first face, the threshold may be met. Meanwhile, civilians in Eastern Myanmar are also subjected to other appalling acts of violence, such as beatings, rapes, forced labor (including mine-sweeping) and slavery. In *Salah Sheekh v. the Netherlands*, the European Court of Human Rights found that the treatment that the applicant had been subjected to – which included living in primitive conditions, being robbed of remaining possessions and the murder, beatings and rape of the applicant's father, brothers and sister respectively – can be understood as cruel, inhuman or degrading treatment under article 3 of the European Convention of Human Rights. It also referred to the fact that the vulnerability to such human rights abuses as endured by members of the applicant's minority group had been well-documented on. The same situation essentially applies to ethnic minorities in Eastern Myanmar who are specifically targeted and frequently subjected to such abhorrent conduct. It can thus be argued that the common and frequently occurring beatings, rapes, forced labor and slavery in Eastern Myanmar also constitute cruel, inhuman or other degrading treatment or punishment. However, as discussed in chapter 4, the criteria in determining what constitutes a 'real risk' under the ICCPR remain somewhat unclear. Jurisprudence thus far has been limited to cases involving political

³¹³ *Hajrizi Dzemajl et al. v. Yugoslavia*, CAT/C/29/D/161/2000, UN Committee Against Torture (CAT), 2 December 2002.

³¹⁴ *Dzemajl et al v. Yugoslavia, ibid*, at para. 9.2.

³¹⁵ As mentioned in Chapter 2, field surveys revealed that in the period of 1996-2007, more than 3,200 villages have been destroyed, forcibly relocated or otherwise abandoned.

refugees and furthermore indicates a strict interpretation in the determination of the existence of a 'real risk' by requiring *inter alia* that such a risk is a 'necessary consequence' of a person's removal. The HRC has furthermore noted that it is the task of national courts of State parties to determine what constitutes a 'real risk'. Meanwhile, the 'real risk' threshold under the CRC has not been subject of any further clarification at all. While given the situation in Eastern Myanmar it is highly likely that nearly all asylum-seekers face a threat to life or a risk to torture or other cruel, inhuman or degrading treatment if returned, it is more difficult to establish the existence of a personal risk. These factors combined with the general ambiguity regarding the application of the 'real risk' criterion in the context of generalized violence and armed conflict makes it difficult to establish with certainty whether UCAS would be entitled to protection in the form of *non-refoulement* under the provisions related to the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under the ICCPR and the CRC. At present, an examination of jurisprudence suggests that it is unlikely that UCAS would be able to benefit from *non-refoulement* as derived from these provisions.

Under the CRC States Parties are also prohibited from rejecting or returning a child where there is a real risk of him or her participating directly or indirectly in hostilities. As regards direct participation, the Special Rapporteur on the Human Rights Situation in Myanmar has stated that Myanmar is believed to have the world's largest number of child soldiers³¹⁶, with an estimated 70,000 child soldiers in the Myanmar army in 2002³¹⁷ and an estimated 6,000-7,000 children fighting for various armed opposition groups.³¹⁸ Meanwhile, various reports have indicated that children are indirectly involved in hostilities in numerous ways, including as porters, minesweepers and for the provision of sexual labor. Essentially, the recruitment of children for direct or indirect participation in hostilities can be regarded as a form of persecution as children are specifically targeted. Thus, children in Myanmar do face a very real risk of direct as well as indirect participation in hostilities. Nevertheless, again, what constitutes a 'real risk' under the CRC remains unclear and is presently subject to determinations conducted individually by States Parties.

Consequently, perhaps the most important source of protection for UCAS is *non-refoulement* as derived from the best interest principle in conjunction with article 20 CRC which imposes on State Parties an obligation to provide special protection and assistance to children deprived of their family environment.³¹⁹ The best interest principle requires States Parties to conduct best interest determinations in every decision involving a child. As McAdam thus aptly noted, the best interest principle serves as an important ground for the protection of children who have fled generalized violence and armed conflict.³²⁰ Given the situation in Myanmar, the *refoulement* of an unaccompanied child to that territory undoubtedly jeopardizes the child's well-being, in contravention of article 6 and the child's best interest. As stated by the UNHCR, 'for the vast majority of refugees in Thailand, *repatriation in conditions of safety and dignity* is not likely in the foreseeable future due to the insecurity and violence that

³¹⁶ T. O. Quintano, 'Report of the Special Rapporteur on the Human Rights Situation in Myanmar', *supra* note 53. See also Committee of the Rights of the Child, 'Concluding Observations Myanmar', *supra* note 52.

³¹⁷ Human Rights Watch, 'My Gun Was as Tall as Me: Child Soldiers in Burma', *supra* note 54.

³¹⁸ General Assembly-Security Council, 'Report of the Secretary General on Children and Armed Conflict to the UN Security Council', *supra* note 55, at paras. 66-69. See also Human Rights Watch, 'My Gun Was as Tall as Me: Child Soldiers in Burma', *ibid*, at p. 7.

³¹⁹ As well as, to a certain extent, in conjunction with article 6 obliging states to ensure to the maximum extent possible the survival and development of the child.

³²⁰ McAdam, *supra* note 144, at p. 174.

continues within Myanmar.’ (emphasis added)³²¹ Overall, the state of affairs in Eastern Myanmar is incredibly dire and the ICRC’s exceptional public statement on the situation serves as a reflection of the gravity of the situation. It seems highly unlikely that the *refoulement* of an accompanied child to such conditions would be in the child’s best interest. This is even more so when one takes into consideration the widespread occurrence of torture and ill-treatment and the prevalent participation of children in armed conflict. Meanwhile, article 20 CRC entitles children deprived of their family environment to special protection and assistance. This article is not subject to any further conditions. As extensively discussed in Chapter 4, this article imposes the obligation on Thailand to provide special protection and care, including alternative care, to children deprived of their family environment. *Non-refoulement* certainly falls within the ambit of such protection. The obligations derived from the best interest principle and article 20 - and bearing in mind States Parties’ obligation under article 6 to ensure to the maximum extent possible the survival and development of the child - leads one to the practical conclusion that Thailand is prohibited from engaging in the *refoulement* of UCAS. To summarize, it can reasonably be said that UCAS returned to Myanmar will face real risks of a threat to life, risks of torture or other cruel, inhuman or degrading treatment or punishment, and particularly a risk of direct or indirect participation in hostilities, and should thus be entitled to protection in the form of *non-refoulement*. However, as a result of the uncertainty surrounding the ‘real risk’ threshold contained in articles 6, 37(a) and 38, it appears that the most important source of protection of UCAS from *refoulement* is the best interest principle in conjunction with article 20 CRC.

Such a conclusion can also be substantiated by reference to various soft law instruments. In its conclusions, ExCom frequently reaffirms that all actions taken in relation to child asylum-seekers and refugees, including UCAS, should be guided by the best interest principle.³²² In particular it refers to the protection of child asylum-seekers and refugees, and *inter alia* provides that such protection entails family tracing as well as the provision of alternative care. It has for instance urged States ‘to take all possible measures to protect child and adolescent refugees, *inter alia*, by [...] promoting care, protection, tracing and family reunification for unaccompanied minors.’³²³ (emphasis added). It has also stressed that ‘particular attention needs to be given to ensure that unaccompanied or separated children are not returned prior to successful tracing of family members or without specific and adequate reception and care arrangements having been put in place in the country of origin.’³²⁴ The conclusion above is also in accordance with the Bangkok Principles, by virtue of which Thailand has made a political commitment to ‘take appropriate measures to ensure that *a child who is seeking refugee status* or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, *receive appropriate protection and humanitarian assistance* in the enjoyment of applicable rights set forth in the present Principles and in other international human rights instruments to which the said States are Parties.’³²⁵ (emphasis added)

³²¹ UNHCR, ‘Analysis of Gaps in Refugee Protection Capacity: Thailand’, *supra* note 9, at p. 6.

³²² See for example, ExCom, Conclusion No. 47 (XXXVIII) of 1987 on Refugee Children, at para. D; ExCom Conclusion No. 84 (XLVIII) of 1997 on Refugee Children and Adolescents, at para. A(i); ExCom Conclusion No. 103 (LVI) of 2005 on Provision on International Protection Including Through Complementary Forms of Protection, at para. N and ExCom Conclusion No. 107 (LVIII) of 2007 on Children at Risk, at para b(v).

³²³ ExCom Conclusion No. 83, *supra*, at para. B(i). See also ExCom Conclusion No. 107, *supra*, at para. H(4).

³²⁴ ExCom Conclusion No. 101 (LV) of 2004, at para. P.

³²⁵ Article IV(7) Bangkok Principles.

6.2 Obligations and Compliance by the Royal Thai Government

6.2.1. Non-refoulement

Having established that Thailand has obligations of *non-refoulement* under international refugee, human rights and customary law and that UCAS from Myanmar are entitled to such protection, particularly by virtue of the CRC, this section will provide a brief assessment of Thailand's compliance. Despite having no asylum law, Thailand states that it 'gives assistance for humanitarian reasons to those seeking asylum. Temporary refuge is provided, along with assistance in terms of food and shelter, as well as basic health care and protection for their property and personal safety.' In addition, it provides that 'once the situation has stabilized enough to allow for a safe passage home, these people are repatriated to their own country under the supervision of the Office of the United Nations High Commissioner for Refugees and NGOs under a joint agreement.'³²⁶ The presence of approximately 150,000 Myanmar asylum-seekers in the border camps indicates that Thailand is complying with its *non-refoulement* obligations to a considerable extent. Indeed, a Thai representative expressed the understanding that 'in line with the principle of *non-refoulement*, asylum countries are under an obligation to allow all refugees and displaced persons to enter their territory notwithstanding their limited resources and underdeveloped infrastructure.'³²⁷

Nevertheless, there are a number of problematic issues that need to be addressed. Firstly, with respect to non-rejection, it has been reported that some asylum-seekers at the border, including asylum-seekers from Myanmar, were returned to their country of origin without having had access to any screening mechanism. This is in violation of *non-refoulement* as the Thai government failed to assess the asylum-seekers claim, a critical component of the principle of *non-refoulement*. Secondly, regarding non-expulsion, despite the government granting temporary asylum in various cases, numerous sources have reported on the Thai Government engaging in formal and informal deportations. For asylum-seekers from Myanmar the formal procedure is based on a Memorandum of Understanding between the Thai Government and the Myanmar military government. A list of deportees is provided to the UNHCR beforehand, who scans the list to ensure that none of the returnees will face persecution upon return. For those who do face such a risk the UNHCR can intervene. However, the formal process is reportedly now rarely used, and the Thai government has instead engaged in informal deportations whereby the Thai Government hands over deportees to the Democratic Karen Buddhist Army. Reportedly a 400 person-per-month quota has been employed and the deportations take place on Mondays on either side of agreed upon locations.³²⁸ In addition, the Thai government also engages in other informal deportations whereby it takes asylum-seekers to the border and leaves them there or obliges them to cross. UNHCR has estimated that such deportations to Myanmar can be as high as 10,000 people a month.³²⁹ Concerns about these deportations were raised by the HRC, which noted in its Concluding Observations that 'the State Party should observe its obligation to respect a fundamental principle of international law, the principle of non-refoulement'.³³⁰

³²⁶ Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Second Periodic Report of States Parties due in 1999: Thailand', 31 May 2005, UN Doc. CRC/C/83/Add.15, at para. 167.

³²⁷ ExCom, 'Summary Record of the 554th Meeting', 8 October 2001, UN Doc. A/AC/96/SR.664, at para. 60.

³²⁸ United States Committee for Refugees and Immigrants, '2009 Country Report Thailand', *supra* note 302.

³²⁹ UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 12. Although UNHCR noted that in many cases such deportations do not constitute *refoulement* (for instance such deportations may involve economic migrants not necessarily in need of protection), nevertheless it is concerned with the absence of any return and monitoring system to ensure that actual asylum-seekers in need of protection are safeguarded from *refoulement*.

³³⁰ Human Rights Committee, 'Concluding Observations Thailand', *supra* note 265, at para. 17.

According to the UNHCR, child refugees are generally not detained.³³¹ UCAS from Myanmar who are found are placed in boarding houses in the various camps. A computer tracking and monitoring system is employed in order to identify, assist and monitor separated children and risk.³³² Nevertheless, it has been reported that the RTG has forcibly sent back child asylum-seekers from various countries, including Myanmar³³³ and Laos³³⁴. It is however unclear whether the RTG has also engaged in the rejection or forced return of UCAS. It has however been ascertained that the RTG rejects and forcibly returns UCAS known to be former child soldiers, as well as children who are found outside the confines of the camps. The issue of the forcible return of former child soldiers is particularly worrisome. Given that these child soldiers are regarded as deserters of the *tatmadaw* or the armed opposition groups, they face serious risks of persecution upon return. As such, these former child soldiers are particularly in need of protection. In this regard, the CRC Committee in its Concluding Observations urged Thailand to ensure that the principle of *non-refoulement* is respected in decisions involving asylum-seeking children, including UCAS and in particular former child soldiers.

Additionally problematic is the fact that the Thai Government discriminates in the granting of protection of *non-refoulement*. Not only are asylum-seekers from different countries subjected to differing policies³³⁵, even amongst asylum-seekers from the same country of origin different policies and practices are applied. Thus, while the Thai Government does generally provide temporary asylum for most Karen and Karenni asylum-seekers, it does not officially recognize the Shan people as asylum-seekers in need of protection.³³⁶ The conditions of the Shan strongly resemble that of the Karen and Karenni peoples. This differentiation is unjustifiable and constitutes a violation of non-discrimination (extensively discussed in chapter 4) as a principle of *jus cogens* and furthermore embedded in the UDHR, the ICCPR, the CRC and CERD.

6.2.2. Assessment Procedures

The principle of *non-refoulement* entails an obligation to assess the claims made by an individual. As discussed, the HRC has noted that Thailand should establish a mechanism to prohibit the extradition, expulsion, deportation or forcible return of asylum-seekers to a territory where they face a threat to life or a real risk of torture or other ill-treatment. It further

³³¹ UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 18.

³³² This system is employed by UNHCR and the Catholic Office for Emergency Relief and Refugees (COERR).

³³³ Amnesty International has reported on various cases of forced repatriation of women and children. See Amnesty International, 'Myanmar/Thailand: Fear for Safety / Fear for Refoulement: Thousands of Refugees from Myanmar', 26 February 1997.

³³⁴ United States Committee for Refugees and Immigrants, '2009 Country Report Thailand', available at <www.refugees.org>.

³³⁵ I.e. asylum-seekers and refugees from Laos and Vietnam are subjected to different policies than asylum-seekers and refugees from Myanmar. To illustrate, the RTG has frequently engaged in the detention and deportation of Hmong asylum-seekers from Laos. As referred to in the Human Rights Committee's Concluding Observations for Thailand, the RTG does not recognize the Lao Hmong people as refugees or asylum-seekers. Despite their fear of persecution upon return, the RTG has deported many Lao Hmong asylum-seekers, including 27 children. See Human Rights Committee, 'Concluding Observations Thailand', *supra* note 265, at para. 17. See also UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 12. Meanwhile, a recent example is the deportation on 28 December 2009 of some 450 Hmong asylum-seekers from Thailand to Laos. The Thai Government plans to evict another 3,900 Hmong from a settlement camp in northern Thailand.

³³⁶ Presently there are about 600 Shan people living in a camp in Chiang Mai province. Though not recognized as asylum-seekers by the RTG, humanitarian access is allowed. Similarly, the RTG also doesn't acknowledge the Rohingya as asylum-seekers. Reliefweb. 'Facts about Myanmar Refugees in Thailand', 1 October 2007, available at <<http://www.reliefweb.int>>.

provided that such a mechanism must include the right to judicial review with suspensive effect. Thailand has fulfilled this obligation to the extent that it established the PABs. Certainly it must be acknowledged that the PABs have undergone much improvement in the past few years. The procedure has become much more effective with an initial interview conducted in the Holding Centres in the camp and further determinations conducted by the PABs. Moreover, the procedure, in accordance with the HRC's comments, now also includes the possibility for appeal. Another positive development with respect to the PABs is the clarification of criteria for entitlement to protection. The PABs now employ 2 different statuses for asylum-seekers in need of protection, namely persons fleeing from fighting and persons fleeing from persecution. Yet, one problematic aspect of the PABs is the fact that they generally cater to Karen and Karenni asylum-seekers only. With a few exceptions, the PABs are not accessible to asylum-seekers from other ethnic groups, such as the Shan. Thailand needs to establish a fair and effective assessment mechanism that is accessible to all asylum-seekers.

6.2.3. Absence of a Legal Framework

Issues and concerns regarding Thailand's compliance with the principle of *non-refoulement* essentially derive from a single critical problem, which is the absence of a legal framework for the implementation of the principle of *non-refoulement*. Thailand contends that it has no obligations towards asylum-seekers and refugees as a result of the fact that it is not a party to the Refugee Convention and furthermore submitted reservations to Article 22 of the CRC. For instance in its submission to the HRC, on the issue of asylum-seekers from Myanmar who have fled armed conflict, the Thai government noted that it 'has provided them with temporary shelter along the border and has given them primary assistance *under humanitarian principles*.'³³⁷ (emphasis added) Similarly, in its submission to CRC it said that 'Thailand is not a party to the Convention relating to the Status of refugees and has no other domestic laws related to refugees. As Thailand made reservations to articles 7 and 22 of the Convention, the *protection for displaced children is not officially or legally covered by this international law in the country*.'³³⁸ (emphasis added) Thailand has no domestic legal framework dealing with asylum-seekers and refugees. As previously mentioned, this issue was raised by the HRC which urged Thailand to establish a mechanism for the prohibition of *non-refoulement*. It was raised by the CRC Committee which was 'deeply concerned at the *absence of a legal framework* for the protection of children of refugees and asylum seekers in Thailand as well as the potential for *refoulement*' and urged Thailand to immediately 'adopt and implement legislation for the protection of asylum-seeking and refugee children' and 'to ensure that the principle of *non-refoulement* is respected in decisions with respect to these children, in particular former child soldiers.'³³⁹

At present the fate of asylum-seekers and refugees depend on what policies are adopted by the Thai government in office. These policies are *ad hoc* and can change swiftly. To illustrate, the seizing of the Myanmar embassy and the Ratchaburi Hospital by Myanmar political dissidents and students in 1999 and 2000 respectively led to the RTG retaliating through

³³⁷ Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Initial Report: Thailand', *supra* note 286, at para. 682(3).

³³⁸ Committee of the Rights of the Child, 'Written Replies by the Government of Thailand Concerning the List of Issues received by the Committee on the Rights of the Child relating to the Consideration of the Second Periodic Report of Thailand', *supra* note 252, at para. 494.

³³⁹ Committee on the Rights of the Child, 'Concluding Observations Thailand', *supra* note 253, at paras 66-67.

amongst others suspending PAB activities and prohibiting new admissions to the camps.³⁴⁰ As the ExCom aptly noted,

*there is a tendency, in states that are not parties to any international refugee instrument for refugees from certain countries to be accepted on a prima facie basis, while others are, at best, merely tolerated at the request of UNHCR, based on recognition by the office under its mandate. Moreover the inapplicability of any binding international instrument means that the protection of refugees is dependent on the policy and goodwill of particular governments, with the attendant uncertainty and the risk of a changed policy if a new government has less respect for the High Commissioner's international protection function and for international norms for the protection of refugees.*³⁴¹

Moreover, the UNHCR noted that in Thailand's case, 'policies that impact on refugees are formulated by different executive bodies concerned with national security such as the National Security Council (NSC), the Ministry of the Interior (MOI) and the military. These policies tend to be adopted in an ad hoc manner in response to specific circumstances.'³⁴² Due to the absence of a legal framework and the reliance on ad hoc policies, asylum-seekers are faced with uncertainty and the risk of unforeseeable changes. Indeed, the principle of *non-refoulement* should not depend on the discretionary powers of executive entities and as addressed in chapter 4, international human rights law imposes an obligation on Thailand to adopt appropriate legislative measures for the implementation of the principle.³⁴³

6.2.4. The Status of Beneficiaries of Complementary Protection

Still, even if Thailand establishes a legal framework for the protection of asylum-seekers and refugees, nevertheless a number of problems persist, particularly with respect to the issue of standards of treatment. These problems derive from complexities in the notion of complementary protection itself. The previous sections have extensively discussed how international human rights law can serve as sources of protection for asylum seekers and refugees by virtue of the principle of *non-refoulement* as contained therein. The importance of international human rights instruments in this regard has been acknowledged by the UNHCR *inter alia* in its 1994 Note on International Protection.³⁴⁴ As was touched upon above, the principle of *non-refoulement*, in addition to non-rejection and non-expulsion, may also essentially entail temporary asylum. This is as a result of the fact that asylum seekers, even if they do not meet the criteria for eligibility for asylum in the host State, cannot be returned to their country of origin until they no longer face a risk of torture or other cruel, inhuman or degrading treatment or punishment. Indeed, complementary protection is not 'an emergency or provisional device, but a response by States to individual asylum seekers who cannot be removed by virtue of the extended principle of *non-refoulement* under international law.'³⁴⁵

Although international human rights law serves as a basis of protection by virtue of the principle of *non-refoulement*, one fundamental problem is that unlike the Refugee

³⁴⁰ UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 10.

³⁴¹ ExCom, 'Note on international protection', 7 September 1994, A/AC.96/830, at para. 38.

³⁴² UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', *supra* note 9, at p. 8.

³⁴³ In this regard, the CAT Committee recommended Australia 'to adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister's discretionary powers to meet its *non-refoulement* obligations under the Convention.' UN Committee Against Torture (CAT), *Concluding Observations Australia*, *supra* note 268, at para. 15. The same can be said to apply to Thailand, where *non-refoulement* derives from the discretionary powers of the Minister of the Interior under Section 17 of the 1979 Immigration Act.

³⁴⁴ ExCom, 'Note on international protection', *supra* note 341.

³⁴⁵ McAdam, *supra* note 144, at p. 3.

Convention, it does not expand on the status and corollary rights of beneficiaries of such protection. Neither CAT, ICCPR, nor any other international human rights law instrument regulates the legal status of beneficiaries of *non-refoulement*. As McAdam aptly puts it, 'a state may have an obligation not to deport, but the question remains as to what extent it is then responsible to take measures allowing the individual to exist and subsist. [...] Crucially, the extent of protection provided by these treaties is safety from *refoulement*.'³⁴⁶ The issue of the lack of legal status for beneficiaries of subsidiary protection also remains unsolved in State practice. 'While international law standards mandates that their treatment by the host State must not itself be inhuman or degrading, its actual content remains ill-defined and unresolved.'³⁴⁷

With respect to States Parties to the Refugee Convention and/or the 1967 Protocol, McAdam argues that beneficiaries of complementary protection should be accorded a status identical to a Refugee Convention refugee.³⁴⁸ Yet what status should beneficiaries of subsidiary protection be accorded in a non-State Party which furthermore does not enforce its own asylum law, such as Thailand? The reality is that if an individual does not conform to the established refugee definition - be that international or domestic - and there is no other legislation to determine the status of beneficiaries of subsidiary protection, he or she is subjected to a legal limbo. Even if a status is granted by virtue of national legislation or policies, these are based on state discretion since there is no international legal obligation requiring and regulating the granting of the status. In short, beneficiaries of subsidiary protection may be allowed to remain in a State within the framework of a certain protection need, but are not accorded any formal status and are therefore subjected to a legal limbo.

As there is no international framework regulating the status of beneficiaries of subsidiary protection it is difficult to draw up minimum standards of treatment. One commonsensical response is to allow international human rights law to dictate the rights of beneficiaries of subsidiary protection. Human rights are universal and inalienable and thus principally apply to all persons within the State's jurisdiction.³⁴⁹ In the case of the ICCPR this can be deduced from article 2(1) and 26. Meanwhile, through the application of the maxim *expression unius est exclusion alterius*, the fact that international human rights law does not differentiate between nationals and non-nationals except in a few specific instances, implies that aliens are included in all other provisions.³⁵⁰ Consequently, the rights of for instance the ICCPR are to be applied indiscriminately to citizens as well as aliens, as reaffirmed in the HRC's General Comment No. 15.³⁵¹ However, the Human Rights Committee subsequently notes that '[its] experience in examining reports shows that in a number of countries other rights that aliens

³⁴⁶ McAdam, *supra* note 144, at p. 17.

³⁴⁷ McAdam, *ibid*, at p. 23.

³⁴⁸ She bases this argument firstly on the fact that there is no legal justification for discriminating between different people with similar needs but deriving protection from different sources. She further refines this argument by 'contending that beneficiaries of complementary protection are entitled to the same legal status as Convention refugees, given their analogous circumstances and the Convention's function as a form of *lex specialis* for persons protected by the norm of *non-refoulement*'. McAdam, *supra* note 144, at p. 197.

³⁴⁹ See for instance article 2(1) ICCPR, article 2(1) CAT and article 2(1) CRC.

³⁵⁰ Edwards, *supra* note 143, at p. 305.

³⁵¹ 'In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and *irrespective of his or her nationality or statelessness*. The general rule is that each one of the rights of the Covenant must be *guaranteed without discrimination between citizens and aliens*. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. (emphasis added) Human Rights Committee, 'General Comment No. 15', *supra* note 223, at para 2.

should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.³⁵² (emphasis added) As McAdam explains,

*human rights law alone does not provide a sufficient status for beneficiaries of complementary protection. Despite the theoretical universality of human rights law, in reality characteristics such as nationality or formal legal status can significantly affect the rights an individual is accorded. In practice, states do differentiate between the rights of citizens and aliens (and even between different categories of aliens), premising this on their sovereign right to determine the conditions on and in which non-nationals may remain in their territories.*³⁵³

The formal legal status of asylum-seekers is a particularly problematic case in point. Indeed, despite the theoretical universality of human rights, in many States it is required that an alien is legally resident in order to benefit from the rights set forth in the Convention. Although the various conditions and limitations are frequently based on unsound grounds and lack proper justification (as noted by the HRC), they are nevertheless implemented by States. To sum up, while international human rights law can serve as a significant source of protection for asylum-seekers and refugees, particularly by virtue of the principle of *non-refoulement*, nevertheless 'it does not provide an adequate basis on its own for crafting a clear set of entitlements recognized at the national level for persons with a complementary protection need.'³⁵⁴ The absence of an international legal framework regulating the legal status of beneficiaries of complementary protection and the corollary widespread systematic denial of human rights by host States renders it difficult to establish an appropriate standard of treatment. Consequently, beyond *non-refoulement* itself, the protection of asylum-seekers and refugees based on international human rights law remains unsettled.

Problems related to protection derived from international human rights law can be said to reflect the problems encountered in the field of international human rights law more generally. Firstly, protection on the basis of international human rights law is problematic because human rights need to be implemented individually by the respective State Parties. Thus while legally international human rights law offers protection to asylum-seekers, in reality such protection depends on a State's legislation and policies that implement such obligations. In the present case Thailand's legislation is not on par with its international obligations, as illustrated for instance by the absence of a legal framework guaranteeing protection from *non-refoulement*. Another problematic issue raised by Clark is 'the lack of interpretation of human rights treaties as these apply to persons protected from expulsion.'³⁵⁵ For instance, as discussed, the specific content of the principle of *non-refoulement* under the ICCPR and CRC remains somewhat unsettled *inter alia* due to the lack of clarity in relation to what constitutes a 'real risk', particularly in the context of generalized violence and armed conflict. This leads Clark to argue that there is a need for authoritative interpretation of human rights treaties to

³⁵² *Ibid.* See also Hathaway, *supra* note 261, at p. 149 who refers to the Weisbrodt study, which 'catalogs the numerous ways in which non-citizens are explicitly excluded from many core treaty-based guarantees of human rights.'

³⁵³ McAdam, *supra* note 144, at p. 12.

³⁵⁴ *Ibid.* Moreover, even where ICCPR rights are realized for refugees and asylum-seekers, Hathaway has noted that 'because the Covenant on Civil and Political Rights is addressed primarily to persons who reside in their state of citizenship, it does not deal with refugee-specific concerns, including recognition of personal status, access to naturalization, immunity from penalization for illegal entry, the need for travel and other identity documents [...]'. Furthermore, states can also derogate from their obligations under international human rights law in cases of public emergency. See Hathaway, *supra* note 261, at p. 121.

³⁵⁵ T. Clark, 'Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation', *International Journal of Refugee Law* (2004), vol: 16, no: 4, pp. 584-608, at p. 586.

clarify what he terms rights-based asylum and refuge.³⁵⁶ Meanwhile, with respect to standards of treatment, the faulty transposition of international human rights obligations into domestic law, particularly through the establishment of certain conditions for the enjoyment of various human rights, obstructs asylum-seekers from enjoying rights that they are entitled to under international human rights law. Though the standards of treatment of asylum-seekers is beyond the scope of this paper, it did merit a brief discussion as it served to illustrate that asylum-seekers are essentially only entitled to *non-refoulement* through time.³⁵⁷ Lastly, complexities related to enforcement and sanctions that can be found in international human rights law can also be observed with respect to *non-refoulement* and other obligations of protection towards asylum-seekers and refugees. McAdam notes that 'it is this that makes reliance on human rights law, either alone or in combination with *non-refoulement* under customary international law, a dangerous option.'³⁵⁸ However, for countries that are not party to the Refugee Convention, like Thailand, these are the only instruments that apply. As such, the focus should be on ensuring compliance to those obligations that are clearly entrenched in international law, such as the obligation of *non-refoulement*.

³⁵⁶ Clark, *ibid*.

³⁵⁷ Again, international human rights law needs to be implemented by States by means of appropriate measures giving effect to the rights and obligations established in the respective instruments. While international human rights instruments provide for monitoring bodies, not all of these bodies are competent to assess individual claims. For instance, Thailand has not ratified the *Optional Protocol to the International Covenant on Civil and Political Rights* of 19 December 1966 which allows the Human Rights Committee to receive and consider communications from individuals claiming alleged violations of their rights provided by the ICCPR. Additionally, such claims procedures are meant to serve as a last resort and all available domestic remedies must be exhausted first.

³⁵⁸ McAdam, *supra* note 144, at p. 202.

Chapter 7 Conclusion

In the present study, international refugee and human rights law, both conventional and customary, have been examined in order to determine whether Thailand is under an obligation to afford protection in the form of *non-refoulement* to UCAS from Eastern Myanmar. In chapter 3 it was determined that in the context of international refugee law, Thailand is bound by *non-refoulement* as a principle of customary international law, though it is uncertain whether the principle applies in situations of mass influx. Chapter 4 demonstrated that Thailand is also bound by the principle of *non-refoulement* in the context of international human rights law by virtue of CAT, ICCPR and CRC. Meanwhile, in addition to constituting a hard law obligation, *non-refoulement* can also be found in a number of soft law instruments: General Assembly resolutions and declarations, ExCom Conclusions, as well as UNHCR instruments all reaffirm the customary and conventional principle of *non-refoulement*. Lastly, *non-refoulement* is also contained in various regional instruments for the protection of refugees, including the Bangkok Principles.

Merging the obligations imposed by the principle of *non-refoulement* as derived from the various sources and instruments of international law, Thailand is prohibited from engaging in the rejection, expulsion or forcible removal of individuals - regardless of status or past conduct - if upon return the individual will face a threat of persecution, or a real risk to their life or to torture or other cruel, inhuman or degrading treatment or punishment. This obligation is non-derogable and absolute. Furthermore, Thailand is prohibited from returning a child to a territory where he or she will face a real risk of direct or indirect participation in hostilities. The various *non-refoulement* obligations *in toto* entail non-rejection at the frontier and acceptance into a host State's territory for the purposes of assessing the (asylum) claims; the establishment of an assessment mechanism to examine an individual's (asylum) claims in a fair and effective manner, including the establishment of criteria determining the existence of a 'threat' or 'real risk'; the possibility to appeal decisions reached through the aforementioned assessment procedures; and non-expulsion or forcible removal where it has been determined that a person will face a threat or real risk of the abovementioned harms. States are not prohibited from sending an individual to a third country provided that the third country is safe and there is no risk of subsequent removal to a territory where the individual will face a real risk of the abovementioned harms (i.e. chain *refoulement*).

The crux of the present study was to examine whether Thailand is bound by the principle of *non-refoulement* with respect to UCAS from Myanmar. As extensively discussed in chapter 6 it is uncertain whether *non-refoulement* as a principle of customary international law applies to UCAS as a result of the fact that presently States employ their own status determination procedures and criteria. It was also determined that UCAS are unlikely to benefit from *non-refoulement* under CAT since *non-refoulement* therein is limited to real risks of torture and CAT furthermore employs a high threshold which requires an individual to demonstrate the existence of a 'personal risk'. Meanwhile, due to the lack of clarity regarding what constitutes a 'real risk', the strict interpretation of 'real risk' in the jurisprudence of the CAT Committee and HRC, and the lack of jurisprudence on the application of *non-refoulement* to asylum-seekers who have fled generalized violence and armed conflict, it seems improbable that UCAS are entitled to protection from *refoulement* as derived from ICCPR (articles 6 and 7) and CRC (articles 6 and 37). On the other hand, UCAS are entitled to *non-refoulement* by virtue of other provisions of the CRC, notably articles 3 (best interest principle) and 20 (the

right of children deprived of their family environmental to special protection and assistance). These provisions³⁵⁹ can be said to prohibit Thailand from forcibly rejecting or returning UCAS to a territory where they will face a threat to their lives, a real risk of torture or other cruel, inhuman or degrading treatment or punishment, a real risk of participation in hostilities or other conduct entailing a real risk of irreparable harm. Such a conclusion can be further substantiated by reference to various soft law instruments, notably the CRC Committee's General Comment No. 6, as well as the Bangkok Principles, by virtue of which Thailand has made a political commitment to provide children who are seeking refugee status or who are considered refugees in accordance with applicable international law with appropriate protection.³⁶⁰

As regards Thailand's compliance with its *non-refoulement* obligations, Thailand does comply to the extent that it admits asylum-seekers, has set up border camps and employs the PABs. Simultaneously Thailand is still violating its *non-refoulement* obligations, first and most importantly by still engaging in the forcible rejection or return of asylum-seekers, including children. Additionally, while the RTG has established the PABs to screen asylum-seekers, this procedure needs to be made accessible to all asylum-seekers regardless of ethnic origin. Lastly, *non-refoulement* may not solely be based on discretionary powers of an executive entity and Thailand must establish a legal framework guaranteeing the principle of *non-refoulement* as derived from the various instruments respectively.

In the process of determining whether Thailand is under the obligation to comply with the principle of *non-refoulement* towards UCAS from Myanmar, a number of interesting matters have surfaced. Firstly, returning to an issue addressed in the introduction, an interesting aspect of examining the existence of *non-refoulement* obligations for Thailand is whether there are any differences with respect to children and adults. Certainly one can reasonably presuppose that children, as a result of their vulnerability, may more likely benefit from protection than adults. However, in terms of the customary principle of *non-refoulement* and the principle of *non-refoulement* as derived from CAT, there appear to be no differences. Meanwhile, with respect to *non-refoulement* as contained in ICCPR and CRC, the study found that both adults and children are unlikely to find protection based on the prohibition of *refoulement* where there exists a 'real risk' to their life or to torture or other cruel, inhuman or degrading treatment or punishment as a result of ambiguity regarding the interpretation of 'real risk' (particularly in the context of generalized violence or armed conflict) and the strict interpretation of 'real risk' in CAT and HRC jurisprudence thus far. Nevertheless, children are in a more advantageous position by virtue of the best interest principle. This provision functions as an overarching layer of protection for children and can therefore be regarded as a complementary ground of protection in its own right. Thus interestingly, when comparing the applicability of *non-refoulement* to children on the one hand and adults on the other hand, one finds that there is no difference between adults and children who face a real risk to their life or to torture or other cruel, inhuman or degrading treatment or punishment. Instead, the protection of children from *refoulement* derives from the best interest principle as an overarching concept for the protection of children, rather than from those provisions of the CRC which have been interpreted to contain an obligation of *non-refoulement*. Meanwhile, a comparison of the applicability of *non-refoulement* to children generally and to unaccompanied children also leads to a number of interesting conclusions. Although all children may benefit from *non-refoulement* by virtue of the best interest principle, children

³⁵⁹ Further buffered by article 6 CRC.

³⁶⁰ Article IV(7) Bangkok Principles.

who are deprived of their family environment are even more likely to benefit from protection from *refoulement* by virtue of article 20 which affords children deprived of their family environment with the right to special protection and assistance, including protection from *refoulement*. UCAS benefit from *non-refoulement* not necessarily by virtue of being children (being vulnerable and in need of protection), but more so by virtue of being children who are *unaccompanied*. As is the case with children gaining protection from *refoulement* in general, rather than benefiting from *non-refoulement* by virtue of those articles which have been interpreted to contain such an obligation (i.e. articles 6, 37(a) and 38), UCAS are most likely to benefit from *non-refoulement* by virtue of an entirely different article which is not directly concerned with *non-refoulement* but rather with the treatment of children deprived of their family environment. This may raise the question of whether existing instruments of international law adequately address the plight of UCAS. Yet the problem does not appear to be a lack of legal obligation as such. The obligation of *non-refoulement* potentially applicable to UCAS is presently embedded in international human rights law in the ICCPR³⁶¹ and in the CRC³⁶². Meanwhile, with respect to subsequent protection and alternative care for child asylum-seekers, this is provided for by article 22 CRC, article 20 CRC as well as the CRC's General Comment No. 6. Instead, the problem is the lack of authoritative interpretation and State implementation. The 'real risk' threshold contained in the CRC provisions related to *non-refoulement* needs to be subject to authoritative interpretation to ensure that States implement the principle in accordance with the overall object and purpose of the CRC. Rather than the establishment of another instrument for the protection of UCAS, the focus should be on clarification of international obligations by means of authoritative interpretations and corollary examinations of States' implementation of their international obligations.

Indeed, in determining whether Thailand is bound by any *non-refoulement* obligations a number of general and overarching concerns related to complementary protection have become apparent. Firstly, although international refugee law remains the bedrock and most important source of protection for asylum-seekers and refugees around the world, international human rights law can also serve as an important source of protection for asylum-seekers and refugees by virtue of the principle of *non-refoulement*. Particularly significant is that *non-refoulement* under international human rights law has a wider scope of application than under international refugee law as a result of the fact that all individuals are eligible for protection and no derogations are permitted. Indeed, complementary protection is essentially 'a shorthand term for the widened scope of *non-refoulement* under international law.'³⁶³ Yet, while international human rights law seems to allow for extended protection by virtue of the principle of *non-refoulement* with a widened range of eligibility, protection under this principle for asylum-seekers and refugees - especially those fleeing generalized violence and armed conflict - remains limited. This is due to uncertainty regarding the scope of the principle (e.g. ambiguity regarding what constitutes a 'real risk', particularly in the context of generalized violence and armed conflict) as well as the strict interpretation of 'real risk' in CAT's and HRC's jurisprudence thus far. As such, international human rights law as a source of 'complementary protection' seems to cater more to those refugees and asylum-seekers who have only narrowly fallen outside the ambit of the Refugee Convention. Though it is certainly of import in non-States Parties of the Refugee Convention who may have no international legal obligations in the refugee context, overall, few asylum-seekers and refugees can benefit from *non-refoulement* as derived from international human rights law. Due to the strict interpretation of *non-refoulement*, international human right law thus has little to offer to

³⁶¹ By virtue of articles 6 and 7.

³⁶² As *lex specialis*, by virtue of articles 3, 6, 37(a), 38 as well as article 20.

³⁶³ Goodwin-Gill and McAdam, *supra* note 1, at p. 285.

asylum-seekers and refugees fleeing generalized violence and armed conflict who can seemingly only benefit from temporary protection or other comparable mechanisms. Such mechanisms are undeniably pertinent to masses of asylum-seekers fleeing generalized violence whose government is failing to protect them and who are in need of protection. However, the granting of temporary asylum remains an exercise of State sovereignty. Moreover, such protection is not based on legal obligations but rather on humanitarian grounds. In short, while international human rights law at first face appears to provide for extended protection as a result of its widened scope of eligibility, in practice, very few asylum-seekers and refugees may be able to benefit from *non-refoulement* as contained in the various human rights instruments.

It has also emerged in the present study that protection from *refoulement* under international human rights law is wrought with complexities. While the principle can be derived from customary international law, CAT, ICCPR and CRC, the exact content of the principle remains ambiguous. This is amongst others attributable to the fact that it depends on the individual implementation by States Parties. Meanwhile, in chapter 6 it was illustrated how a number of the issues that arise with respect to *non-refoulement* as derived from international human rights law reflect problems encountered in the field of international human rights law in general. As stated by McAdam, 'beyond providing a widened threshold for claiming protection, international human rights law is an inadequate alternative source of substantive protection. Although the universal human rights instruments guarantee a comprehensive set of rights to all persons within a State's jurisdiction, international human rights law is strong on principle but weak on delivery.'³⁶⁴

Ultimately, under both international refugee and human rights law, States continue to enjoy wide discretion in the protection of asylum-seekers and refugees. The right to seek and to enjoy asylum, contained in article 14 UDHR and the springboard for the Refugee Convention, does not constitute a principle of customary international law. While by virtue of the principle of *non-refoulement* States have a duty not to obstruct individuals from exercising their right to seek asylum, there is no corollary obligation on States to grant asylum and this remains a vital exercise of State sovereignty. Similarly, States also retain ample discretion with respect to the principle of *non-refoulement*. Under both conventional and customary international law States are to establish their own assessment mechanisms and relevant criteria to determine the existence of a 'threat' or 'risk' which in turn triggers the applicability of the principle of *non-refoulement*. Indeed, the individual has no right to asylum. 'The right itself is in the form of a discretionary power – the State has discretion whether to exercise its right, as to whom it will favour, and, consistently with its obligations generally under international law, as to the form and content of the asylum to be granted.'³⁶⁵

Yet, this wide State discretion may in fact contribute to the numerous problems behind complementary protection. As extensively discussed, protection in the form of *non-refoulement* under international human rights law is presently wrought with a number of complexities *inter alia* due to the fact that the principle ought to be implemented by States through the adoption of appropriate legislative and administrative measures. However, presently complementary protection is shaded with ambiguity. It is not entirely clear what the

³⁶⁴ McAdam, *supra* note 144, at p. 202.

³⁶⁵ 'It is likewise free to prescribe the conditions under which asylum is to be enjoyed. It may thus accord the refugee the right to permanent or temporary residence, it may permit or decline the right to work, or confine refugees to camps, dependent on international assistance pending some future solution, such as repatriation or resettlement.' Goodwin-Gill and McAdam, *supra* note 1, at p. 414.

aim of *non-refoulement* as a principle of international human rights law is and who it is meant to cater to. Is it intended to protect asylum-seekers and refugees in host States who have only narrowly fallen outside the scope of the Refugee Convention? Is it supposed to protect asylum-seekers and refugees who would be eligible for protection under the Refugee Convention but who are located in non-States Parties? Or is it meant to protect larger groups of asylum-seekers and refugees who have for instance fled situations of generalized violence and armed conflict? Current jurisprudence indicates that the principle applies to the first two categories. Either way, it has become apparent that there is a need for authoritative interpretation. This is vital if international human rights law is to serve as a significant source of protection for refugees and asylum-seekers around the world. *Non-refoulement* as a principle of international human rights law needs to be clarified with a view to elucidating the rationale of the principle and its scope, particularly in terms of which asylum-seekers and refugees are eligible for protection. This entails, *inter alia*, the need for authoritative interpretation on the threshold of application of *non-refoulement* under the various instruments. For instance, it must be clarified what constitutes a 'real risk', and whether the same threshold applies under the different instruments. Likewise, it must also be clarified what complementary protection entails other than *non-refoulement*.³⁶⁶ For instance, what status are beneficiaries of complementary protection afforded and what standard of treatment are they entitled to? Uncertainties regarding complementary protection are closely entwined with uncertainties in relation to *non-refoulement* as an open and ambiguous concept.³⁶⁷ As Clark aptly states, '*non-refoulement*, and the form of protection it brings, affects 10-15 million refugees. Although it is now recognized that *non-refoulement* has been reinforced by other human rights treaties, such as the Convention Against Torture, the full impact has not been grasped.'³⁶⁸ A revisit of *non-refoulement* as a principle of international refugee and human rights law thus seems appropriate. Similarly, authoritative interpretations are also well in place for *non-refoulement* to be able to achieve to the fullest extent possible its most basic objective: the protection of individuals from being returned to territories where their lives and freedoms are threatened.

³⁶⁶ As observed by Goodwin-Gill and McAdam, 'in attaining its present universal and peremptory character, *non-refoulement* has separated itself from asylum in the sense of a lasting solution.' Goodwin-Gill and McAdam, *supra* note 1, at p. 344.

³⁶⁷ As explained by Pirjola, 'the principle of *non-refoulement* contains a paradox. While states have committed to respecting the principle by joining the 1951 Refugee Convention and key human rights conventions, its content is not established in international law.' Moreover, 'the meaning of *non-refoulement* for an individual depends on the content the authorities and courts give these concepts in particular cases.' Meanwhile, 'finding an objective interpretation is difficult, however, because there is no agreement on the content of *non-refoulement* prohibitions.' J. Pirjola, 'Shadows in Paradise – Exploring *Non-refoulement* as an Open Concept', *International Journal of Refugee Law*, Vol: 19, No: 4 (2008), pp. 639-660, at pp 639, 644, 648.

³⁶⁸ Clark, *supra* note 355, at p. 584.

*Myanmar's Unaccompanied Child Asylum-Seekers in Thailand:
Protection from Refoulement under International Law*

Sources

Books

A. Bayefsky and J. Fitzpatrick (eds), *Human Rights and Forced Displacement*, 2000.

E. Feller, V. Turk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's global Consultations on International Protection*, 2003.

N. Ganesan & K. Y. Hliang (eds), 'Myanmar: State, Society and Ethnicity', 2007.

G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 2007.

J. Hathaway, *The Rights of Refugees Under International Law*, 2005.

Human Rights Watch, *My Gun Was as Tall as Me: Child Soldiers in Burma*, 2002.

G. Loescher and L. Monahan (eds), *Refugees and International Relations*, 1990.

J. McAdam, *Complementary Protection in International Refugee Law*, 2007.

F. Nicholson & P. Twomey (eds), 'Refugee Rights and Realities: Evolving International Concepts and Regimes', 1999.

L. Oppenheim, *International Law: A Treatise Volume 1* (3rd edition, R. F. Roxburgh, ed), 1920.

M. N. Shaw, *International Law*, 2007.

Articles from Academic Journals

C. R. Abrar, 'Legal Protection of Refugees in South Asia', *Forced Migration Review* (2001), volume: 10, pp. 21-23.

J. Allain, 'The *jus cogens* nature of *non-refoulement*', *The International Journal of Refugee Law* (2001): volume: 13, issue: 4, pp. 535-558.

O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures', *International Journal of Refugee Law* (1997), Vol: 9, No: 3, pp. 392-414.

C. Bierwirth, 'The Protection of Refugee and Asylum-Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child', *Refugee Survey Quarterly* (2005), Volume: 24, issue: 2, pp. 98-124.

I. Brees, 'Refugee Business: Strategies of Work on the Thai-Burma Border', *Journal of Refugee Studies* (2008), Volume: 21, issue: 3, at pp. 380-397.

P.C. W. Chan, 'The Protection of Refugees and Internally Displaced Persons: Non-Refoulement under Customary International Law?', *The International Journal of Human Rights*, volume 10, issue: 3 (2006), pp. 231-239.

T. Clark, 'Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation', *International Journal of Refugee Law* (2004), vol: 16, no: 4, pp. 584-608.

S. Davies, 'The Asian Rejection?: International Refugee Law in Asia', *Australian Journal of Politics and History* (2006), Vol: 52, No: 4, pp. 562-575.

J. Doerfel, 'The Convention Against Torture and the Protection of Refugees', *Refugee Survey Quarterly* (2005), Vol: 24, No: 2, at pp. 83-97.

A. Duffy, 'Expulsion to Face Torture? Non-Refoulement in International Law', *International Journal of Refugee Law* (2008), Vol: 20, No: 3, pp. 373-390.

A. Edwards, 'Human Rights, Refugees, and the Right to 'Enjoy Asylum'', *International Journal of Refugee Law* (2005), Vol: 17, No: 2, pp. 293-330.

P. R. Ghandi, 'The Universal Declaration of Human Rights at 50 years', *German Yearbook of International Law* (1998) , Vol: 41, pp: 205-250.

B. Gorlick, 'The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees', *International Journal of Refugee Law* (1999), Vol: 11, No: 3, pp. 479-495.

H. Hillgenberg, 'A Fresh Look at Soft Law', *European Journal of International Law* (1999), Vol: 10, No: 3, pp. 499-515.

G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law', *International Journal of Refugee Law* (2005), Vol: 17, No: 3, pp. 542-573.

S. Persaud, 'Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights', November 2006, Research Paper No. 132, New Issues in Refugee Research.

J. Pirjola, 'Shadows in Paradise – Exploring *Non-refoulement* as an Open Concept', *International Journal of Refugee Law* (2008), Vol: 19, No: 4, pp. 639-660.

Other Articles and Reports

Amnesty International. 'Myanmar: Amnesty International Report 2008', available at <<http://www.amnesty.org>>.

Amnesty International, 'Myanmar: Crimes Against Humanity in Eastern Myanmar', 5 June 2008.

Amnesty International, 'Myanmar/Thailand: Fear for Safety / Fear for Refoulement: Thousands of Refugees from Myanmar', 26 February 1997.

Amnesty International, 'Myanmar: The Rohingya Minority: Fundamental Rights Denied', 18 May 2004.

Amnesty International, 'Leaving Home', 7 September 2005.

J. Bajoria, 'Understanding Myanmar', Council on Foreign Relations, updated 29 September 2009, available at <<http://www.cfr.org>>.

R. Ball, V. Edwards and P. Lynch, 'The Right to Protection and the Obligation of Non-Refoulement: Submission to the Senate Legal and Constitutional Affairs Committee regarding the *Migration Amendment (Complementary Protection) Bill 2009*', Human Rights Law Resources Center Ltd, 2009.

BBC, 'Burma's Karen Flee Army Offensive', 8 June 2009, BBC Website, available at <<http://news.bbc.co.uk/2/hi/asia-pacific/8088947.stm>>.

H. Beech, 'A Closer Look at Burma's Ethnic Minorities', 30 January 2009, Time Magazine Online, 30 Jan 2009, available at <<http://www.time.com/time/world/article/0,8599,1874981,00.html>>.

Human Rights Watch, 'Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma', October 2007.

Human Rights Watch, 'We Are Like Forgotten People. The Chin People of Burma: Unsafe in Burma, Unprotected in India', 27 January 2009.

Human Rights Watch, *World Report 2009*, 2009.

International Committee of the Red Cross, 'Myanmar: ICRC denounces major and repeated violations of international humanitarian law', News release 29 June 2007, available at <<http://www.icrc.org>>.

International Labour Organization, 'Special sitting to examine the developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention 1930: Conclusions', June 2008, available at <<http://www.ilo.org>>.

International Law Association of Thailand, 'National Forum Report on Refugees and Displaced Persons in Thailand: Assistance and Durable Solutions', 11-12 December, 2001, available at <<http://www.refugees.org>>.

Minority Rights Group International, 'State of the World's Minorities 2008', 11 March 2008.

V. Muntarbhorn, 'Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study', UNHCR Research Paper, 2004.

Reliefweb. 'Facts about Myanmar Refugees in Thailand', 1 October 2007, available at <<http://www.reliefweb.int>>.

K. Shukla, 'Ending the Waiting Game: Strategies for Responding to Internally Displaced People in Burma', 1 June 2006, Refugees International.

Thailand-Burma Border Consortium, 'Border Situation Update: July 2nd 2009', available at <<http://www.tbbsc.org>>.

Thailand-Burma Border Consortium, 'Border Situation Update: July 23rd 2009', available at <<http://www.tbbsc.org>>.

Thailand-Burma Border Consortium, 'Internal Displacement and International Law in Eastern Burma', 31 October 2008.

Thailand-Burma Border Consortium, 'Programme Report July to December 2008', available at <<http://www.tbbsc.org>>.

United States Committee for Refugees and Immigrants, '2009 Country Report Thailand', available at <www.refugees.org>.

UN Human Rights Treaties Monitoring Bodies: Concluding Observations, State Reports and General Comments

Committee Against Torture, 'Concluding Observations Australia', 22 May 2008, UN. Doc CAT/C/AUS/CO/3.

Committee Against Torture, 'Concluding Observations Finland', 1997, UN Doc A/51/44.

Committee Against Torture, 'General Comment No. 1: Implementation of Article 3 of the Convention in context of Article 22', 21 November 1997, UN Doc A/53/44.

Committee on the Rights of the Child, 'Concluding Observations Myanmar', 24 January 1997, UN Doc CRC/C/15/Add.69.

Committee on the Rights of the Child, 'Concluding Observations Thailand', 17 March 2006, UN. Doc. CRC/C/THA/CO/2.

Committee on the Rights of the Child, 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin', 2 September 2005, UN Doc CRC.GC.2005/6.

Committee on the Rights of the Child, 'Second Periodic Report of States parties due in 1999: Thailand', 31 May 2005, UN Doc CRC/C/83/Add.15.

Committee on the Rights of the Child, 'Written Replies by the Government of Thailand Concerning the List of Issues received by the Committee on the Rights of the Child relating to the Consideration of the Second Periodic Report of Thailand (CRC/C/83/Add.15)', 29 December 2005, UN Doc CRC/C/THA/Q/2/Add.

Human Rights Committee, 'Concluding Observations Australia', 7 May 2009, UN. Doc CCPR/C/AUS/CO/5.

Human Rights Committee, 'Concluding Observations Estonia', 15 April 2003, UN Doc. CCPR/CO/77/EST.

Human Rights Committee, 'Concluding Observations Thailand', 8 July 2005, UN Doc. CCPR/CO/84/THA.

Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Initial Report Thailand', 2 August 2004, UN Doc. CCPR/C/THA/2004/1.

Human Rights Committee, 'General Comment No. 15: The position of aliens under the Covenant', 11 April 1986, UN. Doc. HRI/GEN/1/Rev.6.

Human Rights Committee, 'General Comment No. 18: Non-discrimination', 10 November 1989, UN. Doc. HRI/GEN/1/Rev.6.

Human Rights Committee, 'General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)', 28 July 1994, UN Doc. HRI/HEN/1/Rev.1.

Human Rights Committee, 'General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, in relation to declarations under article 41 of the Covenant', 4 November 1994, UN. Doc. HRI/GEN/1/Rev.6.

Human Rights Committee, 'General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN. Doc. CCPR/C/21/Rev.1/Add.13.

UNHCR and OHCHR Documents

OHCHR, 'Myanmar Homepage', available at <<http://www.ohchr.org>>

UNHCR, '2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced Persons and Stateless Persons', 16 June 2008.

UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007.

UNHCR, 'Analysis of Gaps in Refugee Protection Capacity: Thailand', November 2006.

UNHCR, 'Burmese border refugee sites with population figures: July 2009', available at <<http://www.tbcc.org>>.

UNHCR, Country Operations Plan Thailand 2006, available at <www.unhcr.org>.

UNHCR, 'Myanmar Refugees in South East Asia – April 2006', 1 April 2006.

UNHCR, 'Thailand', available at <<http://www.unhcr.org>>.

UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994.

UNHCR, 'Protecting Refugees and the Role of the UNHCR: 2008-2009', 1 September 2008.

UNHCR, 'Refugee Protection: A Guide to International Refugee Law', 1 December 2001.

United Nations General Assembly Documents

T. O. Quintano, 'Situation of Human Rights in Myanmar', 24 August 2009, UN Doc A/64/318.

T. O. Quintano, 'Report of the Special Rapporteur on the Human Rights Situation in Myanmar', 11 March 2009, UN Doc A/HRC/10/10.

United Nations General Assembly, 'Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar', UN Doc. A/57/280.

United Nations General Assembly, 'Resolution on the Situation of Human Rights in Myanmar', 23 January 2009, UN Doc A/Res/63/245.

United Nations General Assembly, 'Resolution adopted by the General Assembly, (12 February 1997), UN Doc. A/RES/51/75.

United Nations General Assembly, 'Resolution adopted by the General Assembly' (12 December 1997) UN Doc. A/RES/52/132.

United Nations General Assembly-Security Council, 'Report of the Secretary General on Children and Armed Conflict to the UN Security Council', 21 December 2007, UN Doc. A/62/609-S/2007/757.

United Nations General Assembly, Resolution 61/232, Situation of Human Rights in Myanmar, 13 March 2008, A.HRC.7/18.

Executive Committee of the United Nations High Commissioner for Refugees

Executive Committee, 'Complementary Forms of Protection Their Nature and Relationship to the International Refugee Protection Regime', UN Doc. EC/50/SC/CRP.18, 9 June 2000.

Executive Committee, Conclusion No. 6 (1977)

Executive Committee, Conclusion No. 17 (1980)

Executive Committee, Conclusion No. 25 (1982)

Executive Committee, Conclusion No. 47 (1987)

Executive Committee, Conclusion No. 52 (1998)

Executive Committee, Conclusion No. 65 (1981)

Executive Committee, Conclusion No. 68 (1982)

Executive Committee, Conclusion No. 71 (1993)

Executive Committee, Conclusion No. 75 (1994)

Executive Committee, Conclusion No. 77 (1995)

Executive Committee, Conclusion No. 79 (1996)

Executive Committee, Conclusion No. 81 (1997)

Executive Committee, Conclusion No. 82 (1997)

Executive Committee, Conclusion No. 85 (1998)

Executive Committee, Conclusion No. 94 (2002)

Executive Committee, Conclusion No. 97 (2003)

Executive Committee, Conclusion No. 99 (2004)

Executive Committee, Conclusion No. 100 (2004)

Executive Committee, Conclusion No. 101 (2004)

Executive Committee, Conclusion No. 103 (2005)

Executive Committee, 'Note on International Protection', 7 September 1994, UN Doc. A/AC.96/830.

Executive Committee, 'Note on International Protection', 7 July 2004, UN Doc. A/AC.96/989.

Executive Committee, 'Summary Record of the 554th Meeting', 8 October 2001, UN Doc. A/AC/96/SR.664.

Executive Committee, 'The Scope of International Protection in Mass Influx', 2 June 1995, UN Doc. EC/1995/SCP/CRP.3.

Jurisprudence

CAT Committee

Mutombo v. Switzerland, CAT/C/12/D/13/1993, UN Committee Against Torture (CAT), 27 April 1994.

Tahir Hussain Khan v. Canada, CAT C/13/D/15/1994, UN Committee Against Torture (CAT), 15 November 1994.

Tapia Paez v Sweden, UN Doc CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997.

Seid Mortesa Aemei v. Switzerland, CAT/C/18/D/34/1995, UN Committee Against Torture (CAT), 29 May 1997.

E.A. v. Switzerland, CAT/C/19/D/028/1995, UN Committee Against Torture (CAT), 10 November 1997.

S.S. and S.A. v. Netherlands, CAT/C/26/D/142/1999, UN Committee Against Torture (CAT), 11 May 2001.

Y.H.A. v. Australia, CAT/C/27/D/162/2000, UN Committee Against Torture (CAT), 27 March 2002.

Hajrizi Dzemajl et al. v. Yugoslavia, CAT/C/29/D/161/2000, UN Committee Against Torture (CAT), 2 December 2002.

T.A. v. Sweden, CAT/C/34/D/226/2003, UN Committee Against Torture (CAT), 27 May 2005.

Asim Elmansoub v. Switzerland, CAT/C/36/D/278/2005, UN Committee Against Torture (CAT), 17 May 2006.

Gamal El Rgeig v. Switzerland, CAT/C/37/D/280/2005, UN Committee Against Torture (CAT), 15 November 2006.

N. Z. S. v. Sweden, CAT/C/37/D/277/2005, UN Committee Against Torture (CAT), 29 November 2006.

C.T. and K.M. v. Sweden, CAT/C/37/D/279/2005, UN Committee Against Torture (CAT), 17 November 2006.

C.A.R.M. v. Canada, CAT/C/38/D/298/2006, UN Committee Against Torture (CAT), 24 May 2007.

M. X. v. Switzerland, CAT/C/40/D/311/2007, 15 May 2008.

X v. Australia, CAT/C/42/D/324/2007, UN Committee Against Torture (CAT), 5 May 2009.

Human Rights Committee

Jonny Rubin Byahuranga v. Denmark, CCPR/C/82/D/1222/2003, UN Human Rights Committee (HRC), 9 December 2004.

Daljit Singh v. Canada, CCPR/C/86/D/1315/2004, UN Human Rights Committee (HRC), 28 April 2006.

Dawood Khan v. Canada, CCPR/C/87/D/1302/2004, UN Human Rights Committee (HRC), 10 August 2006.

Mohammed Alzery v. Sweden, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), 10 November 2006.

Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan, CCPR/C/93/D/1461,1462,1476& 1477/2006, UN Human Rights Committee (HRC), 31 July 2008.

Mahmoud Walid Nakrash and Liu Qifen v. Sweden, CCPR/C/94/D/1540/2007, UN Human Rights Committee (HRC), 19 October 2008.

Moses Solo Tarlue v. Canada, CCPR/C/95/D/1551/2007, UN Human Rights Committee (HRC), 28 April 2009.

European Court of Human Rights

Soering v. United Kingdom (1989), 11 EHRR 439, judgment of 7 July 1989.

Chahal v. United Kingdom (1996), ECHR 54, judgment of 15 November 1996.

Ahmed v. Austria (1996), 24 EHRR 278, judgment of 17 December 1996.

International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986.

