

Beyond Asian exceptionalism: refugee protection in non-signatory States

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Few Asian States have acceded to the Refugee Convention yet they may have laws, policies, practices or systems that can be of use in responding to refugees' protection needs.

The number of refugees in the Asia Pacific is consistently high, with nearly 4.2 million cited in UNHCR's most recent *Global Trends*.¹ Statistics show only part of the picture, however, because of large numbers of unregistered populations and because of unreliable reporting by States. Despite the numbers and magnitude of needs, Asia has few States Parties to the 1951 Refugee Convention and even fewer that have passed specific legislation on refugee protection. Where refugee law exists, it is often not implemented, or is characterised by unfettered discretion in how it is applied and by a lack of transparency.

This context is well documented by practitioners and academics alike. Much of the scholarly literature recognises a lack of Asian State participation in international refugee protection and human rights regimes – what some refer to as 'Asian exceptionalism'. Reasons cited for this include the Euro-centric origins of the Convention, political expediency, the non-interference principle of ASEAN

(Association of Southeast Asian Nations), and economic and security-related factors.

There is also regional scholarship, however, that challenges the notion of Asian exceptionalism, attempting to find a different starting point for the analysis. Third World Approaches to International Law (TWAIL²) scholars highlight the impact that centuries of colonialism have had and continue to have for the countries of Asia. BS Chimni argues that Asian States should refuse to accede to the Refugee Convention as long as there is a "strategy of containment which seeks to shift the burden of caring for refugees to the poor world."³ He suggests that the focus should first be on national systems before seeking a regional declaration, and calls for careful study of the needs and experiences of the countries in the region.

If we look more closely at any specific context in Asia, we can see that States have often committed to various legal obligations under international law, and often have human rights provisions in domestic law. In practice, they may have laws, policies,

July 2021

www.fmreview.org/issue67

practices or systems that can be used to respond to protection needs. States also recognise and permit international institutions like UNHCR – often through a Memorandum of Understanding – to register, assist and refer persons of mutual concern. Moreover, civil society actors in every jurisdiction have developed substantial infrastructure and capacity for providing protection, and refugees are coping and/or contributing to the provision of protection for themselves, their fellow refugees and/or for host communities in every context. Three broad trends among the jurisdictions of Asia are discussed below.

Policies and practices

Firstly, some States (such as Thailand, Indonesia and Bangladesh) are not party to the Refugee Convention but are developing policies or practices to address the needs of displaced persons.

In Thailand, where no specific legislation is in place, there is hope that a new regulation establishing a “screening mechanism” will regularise stay and provide rights for those in need of protection.⁴ Although the regulation was due to come into force in June 2020, it has yet to be implemented. There are a number of concerns, however, including: the word refugee does not appear in the regulation, a 16-member Inter-Ministerial Committee will determine who becomes a “protected person” in accordance with criteria they establish, pre-screening will allow immigration officers to serve a gate-keeping function, and the first instance decision is final with no appeal. Meanwhile, civil society actors and lawyers are strengthening their own capacity to support the government screening mechanism, networking through a number of collaborative endeavours including the Coalition for the Rights of Refugees and Stateless Persons (CRSP) and a Refugee Rights Litigation Project.

In Indonesia, a Presidential Regulation on the Handling of Refugees was passed in 2016; this includes provisions for (among other matters) inter-agency coordination and responsibility for search and rescue of refugees found on boats in distress.⁵

Although the Presidential Regulation had been in preparation for years, the Andaman Sea Crisis in 2015 and negotiations with the Acehese leadership and communities provided the real impetus for change. It was the fishermen of Aceh who, in accordance with centuries-old customary law, pulled to safety stateless Rohingya refugees in distress at sea in 2015 and 2020 in defiance of the Indonesian military. With civil society calls for action growing stronger, there has been more strategising between national and local civil society actors in Aceh and Jakarta, with greater potential to influence policy-level discussions based on concrete information about the protection context and operational needs.

In Bangladesh, both the State and local civil society have developed substantial humanitarian capacity in response to the 2017 movements of stateless Rohingya refugees. Rohingya refugees are confined to large and overcrowded camps, while Bangladeshi and international NGOs are supporting the Government of Bangladesh and the UN in a massive humanitarian response. Access to justice in Bangladesh is not strong but the legal infrastructure does exist, with a Constitution with a strong rights base, a judiciary that provides judicial review, and lawyers and legal aid organisations with national-level coverage. There is precedent relating to refugees, perhaps most notably the case of *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*.⁶ The court found the continued detention of five Rohingya who had served their sentences to be a violation of article 31 of the Constitution which prohibits deprivation of liberty without the authority of law, and found that *non-refoulement* obligations under customary international law and the UN Convention against Torture both prevented expulsion. The engagement of the legal infrastructure in Bangladesh is important and is increasing within and outside formal litigation.

Alternative protection schemes

Secondly, among States that are not party to the Refugee Convention there are



Cox's Bazar in Bangladesh is home to nearly 900,000 displaced people, mostly from neighbouring Myanmar.

also jurisdictions that have developed a status determination procedure outside the Refugee Convention context. These include India, Hong Kong and Taiwan.

In India, refugee protection is divided between the government and UNHCR, with those arriving from neighbouring countries (with the exception of Myanmar) handled by the Ministry of Home Affairs. There is differential treatment between populations and a lack of clear, publicly accessible procedures and criteria. India has been praised for its long history of refugee protection but recent developments are concerning. Along with increasing xenophobia across the country, in 2017 an advisory was issued by the Ministry of Home Affairs ordering the “detection and deportation of ... illegal immigrants from Rakhine State, also known as Rohingyas... expeditiously and without delay.” In the case *Mohammad Salimullah v Union of India*, currently pending before the Supreme Court, two Rohingya claimants are challenging this advisory. They argue that deportation would violate fundamental rights provided

in the Indian Constitution, that India has obligations under customary international law to respect the principle of *non-refoulement*, and that there is a de facto refugee protection regime in India which includes a long history of refugee protection and that India is therefore under an obligation to implement existing policy fairly.⁷ On 8 April 2021, the court rejected an application for interim relief that was made on behalf of hundreds of Rohingya who were arrested and detained in Jammu and were under immediate threat of deportation while the case was pending.

This argument about a ‘de facto refugee protection regime’ was in fact the winning argument in a case in Hong Kong that resulted in the establishment of a Unified Screening Mechanism (USM). In *C & Ors v the Director of Immigration and Another*,⁸ the Court of Final Appeal noted that although not bound by the Convention, the Hong Kong government nonetheless voluntarily complies with its requirements, and held that therefore “the Director must observe high standards of fairness”. The USM considers torture claims under the Convention Against Torture, *non-*

July 2021

www.fmreview.org/issue67

refoulement under the Hong Kong Bill of Rights, and considers the risk of persecution with reference to the principle of *non-refoulement* as a matter of government policy.

Taiwan is not a member of the UN. This prevents Taiwan from officially acceding to international conventions, and yet Taiwan has already acceded to international human rights conventions through domestic legislation. The country's Executive has ordered the National Immigration Agency to develop regulations to implement human rights obligations, including *non-refoulement* obligations under Article 7 of the International Covenant on Civil and Political Rights. Taiwan also has a draft refugee law, and civil society actors and lawyers have progressively taken on refugee cases, drawing on external partners for technical support.

States Parties

Finally, there are some States in Asia that are party to the Refugee Convention. The Philippines was the first State to sign the Refugee Convention and Protocol in Asia and is one of the few countries in the world with a joint refugee and stateless status determination procedure.⁹ The system is now operational. It was established through a Department of Justice Regulation and, while no legislation is yet in place, there are a few draft bills currently before the House and Senate to formalise it. Civil society actors and UNHCR collaborate with the State and with each other and are well networked. Korea is the only country in Asia to have developed a comprehensive refugee law independent of its immigration law; Korea has also built an open immigration reception centre with programmes for reception, residence, and cultural introduction and integration. Japan and Korea both offer small resettlement schemes alongside their asylum systems. Civil society is well networked and collaborative in both countries, and the legal community is heavily involved in legal support to refugee cases. In Japan, the Ministry of Justice, the Forum for Refugees Japan and the Japan Federation of Bar Associations have signed a tripartite Memorandum of Understanding. One initiative under

the MOU is a pilot project for airport arrivals to establish a support mechanism involving local NGOs and UNHCR in order to assist newly arriving refugees.

Beyond Asian exceptionalism

The above policies and practices should not be interpreted as implying that the trajectory is always a progressive one. There are a number of negative trends, from encampment and border closures to growing xenophobia. Protection is hard work, and its success is measured by its ability to resolve situations for people in need. Scholarly research has made important contributions to our understanding of the Asian context but it is time now to go beyond Asian exceptionalism. Research and practice should investigate and support the development and sustainability of laws, policies and practices that can contribute to refugee protection in Asia, whether through treaty ratification, domestic legislation or ground-level practices that improve protection outcomes for the many refugees in the region.

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