Why Comply? The Politics of the International Refugee Regime in Non-Party Southeast Asian States

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ABBREVIATIONS

1979 Conference	1979 Geneva Meeting on Refugees and Displaced Persons in South-East Asia
1989 Conference	1989 International Conference on Indochinese Refugees
ASEAN	Association of Southeast Asian Nations
CBCP	Catholic Bishops Conference of the Philippines
Convention	1951 Convention relating to the Status of Refugees
CPA	Declaration and Comprehensive Plan of Action (1989)
DoJ	Department of Justice
ExCom	UNHCR Executive Committee
HC	UNHCR High Commissioner
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
IOM	International Organisation for Migration
MFA	Ministry of Foreign Affairs
MOI	Ministry of Interior
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
NSC	National Security Council
PAB	Provincial Assessment Boards
Protocol	1967 Protocol Relating to the Status of Refugees
Regime	International Refugee Regime
RPU	Refugee Processing Unit
RSD	Refugee Status Determination
RSPPU	Refugee and Stateless Persons Processing Unit
SRV	Soviet Republic of Vietnam
SUHAKAM	National Human Rights Commission
TFIRAA	Task Force on International Refugee Assistance and Administration
UMNO	United Malays National Organisation
UNHCR	United Nations High Commissioner for Refugees

CHAPTER 1: INTRODUCTION

The international refugee regime ("the regime") is primarily constituted by two multilateral treaties: the 1951 Convention relating to the Status of Refugees ("the Convention"), and the 1967 Protocol Relating to the Status of Refugees ("the Protocol").[1] These are joined by the United Nations High Commissioner for Refugees (UNHCR), an intergovernmental organisation (IGO) tasked with supervising the regime.[2] The regime comprises a number of norms relating to the rights of refugees and asylum seekers, perhaps most well-known of which is *non-refoulement*: that States should not return (*refouler)* a refugee to a situation in which s/he would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. To date, 148 States are party to the regime. [3]

A cursory survey reveals variations in regime compliance, regardless of States' treaty commitments: some are party to the regime, yet lack formal domestic frameworks for refugee and asylum seekers, in turn translating to low levels of regime compliance. Still others may have implementing frameworks, but may derogate from regime norms under certain circumstances; one recent example is Western Europe's contemporary response to a mass-influx of refugees and asylum seekers.[4]

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[1] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 2012; United Nations (UN), *Convention relating to the Status of Refugees*, 1951, 189 U.N.T.S. 150; United Nations (UN), *Protocol Relating to the Status of Refugees*, 1967, 606 U.N.T.S. 267. The latter removes geographic (European) and temporal (pre-1951) restrictions in defining refugees.

[2] Alexander Betts, James Milner, and Gil Loescher, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection* (New York: Routledge, 2012).

[3] UNHCR, "States Parties to the 1951 Convention and Its 1967 Protocol," April 2015, http://www.unhcr.org/3b73b0d63.html. 148 States are Party to either the Convention or Protocol; Both: 142; Convention: 145; Protocol: 146.

[4] Amnesty International, "EU-Turkey Refugee Deal a Historic Blow to Rights," March 18, 2016, https://www.amnesty.org/en/press-releases/2016/03/eu-turkey-refugee-deal-a-historic-blow-to-rights/.

Arguably more interesting, however, is the finding there are States are ***not*** party to the regime, yet are still observed to comply with some of its norms: absent formal commitments, States such as Malaysia, Thailand and Indonesia nevertheless demonstrate noticeable – indeed, at times, improved – shifts in regime compliance. During the Indochinese refugee crisis, many Southeast Asian states varied their compliance with *non-refoulement*, both as regarded Indochinese refugees and asylum seekers as well as those from other countries of origin. In the contemporary period, variations in compliance continue: Malaysia has displayed fitful declarations to improve its refugee policy, in turn bringing it further into compliance, yet frequently policymakers stop short of substantive, sustained changes in procedures: it is only in the rare case international opprobrium appears able to moderate regime compliance. Indonesia has shifted from comparatively laissez-faire policies indicative of relative compliance with *non-refoulement* in the early part of the contemporary period, to increasingly hard-line policies of detention and a higher likelihood of *refoulement*; this despite rhetorical pronouncements that suggest an interest in further adopting the regime norms in its legal and administrative framework. Here, the role of external pressure from Australia is crucial. Finally, Thailand has assumed responsibility for refugee status determination (RSD) for a subset of refugees from Burma, through its Provincial Admissions Boards (PABs), even as its compliance regarding refugees and asylum seekers from other countries of origin remains considerably less systematized. The Philippines, a State which became a signatory during the Indochinese period, has by contrast demonstrated relatively – and yet, its compliance, improved in the contemporary period seems less rooted in the regime's influence, but instead a longstanding tradition of hospitality. Furthermore, in all countries, including the

Philippines, there remains a concerted effort to avoid becoming countries of resettlement, with reception of refugees and asylum seekers often tied to guarantees by third States.

The puzzle under investigation is thus as follows: *why* do such non-Party States exhibit compliance with the regime? What factor(s) are more or less important accounting for this behaviour, as well as changes in such behaviour?

Scholars note a majority of States in Southeast Asia are not party to the regime, frequently lack domestic asylum frameworks, and thus have spotty levels of compliance. [5] Owing to Southeast Asia's experience with the Indochinese refugee crisis, a period of mass-exodus of persons from Vietnam, Cambodia and Laos from the mid-1970s through the early 1990s, Davies suggests the experience left an indelible mark on the region, 'legitimizing' States' rejection of the regime, in turn, shaping contemporary policy.[6] However, as discussed in the following chapter, Davies' judicious study fails to examine the contemporary period in-depth, leaving this an empirical question to be further explored.

Against this backdrop, such cases of "non-Party compliers" are germane for understanding the drivers of compliance in the absence of formal commitment—a phenomenon rarely the focus of empirical work in the literature to this point.[7]

[5] Ademola Abass and Francesca Ippolito, "Introduction - Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective," in *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*, ed. Ademola Abaas and Francesca Ippolito (Farnham: Ashgate, 2014), 14.
[6] Sara Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Leiden: Martinus Nijhoff, 2008).
[7] While not compliance-driven, Risse-Kappen, Ropp and Sikkink's *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 1999) remains perhaps the notable empirical exception broaching the pathway of compliance prior to commitment. Goodman and Jinks' 'acculturation' also represents a *theoretical* perspective by which a disjuncture between formal commitment and practice could be explored; however, this treatment does not yet appear empirically applied to non-Party

This thesis thus addresses this gap, inductively probing explanations for compliance behaviour in three States where compliance is not otherwise obliged, and one which became a signatory during the Indochinese period, with an eye to situating these States compliance behaviour in the broader political framework in which the regime is embedded.

RATIONALE & LITERATURE REVIEW

Even for States party to the regime, owing to its problem structure, compliance is far from assured. Regionally, States face a collective action problem, whereby provisioning refugee protection resembles a classic prisoner's dilemma: while one might expect concerns of security and stability to promote long-term interests in compliance, the regime's status as a public good militates against this; indeed, free-riding States can unilaterally violate regime norms (i.e. refuse to offer asylum), even as they potentially benefit from other States shouldering the burden. Yet it also makes little sense for all States to reciprocally violate their commitments, as doing so undermines the regime's status at significant cost to *all* States. [8] A strictly retaliatory posture (i.e. via trade sanctions), may only prove effective if states can credibly extract future compliance from violators.[9] Finally, the regime's lack of formal enforcement mechanisms, coupled with the fact the modern regime emerged in a European context (making it susceptible to

States to a regime. *see* Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54, no. 3 (2004): 621–703.

[8] Astri Suhrke, "Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action," *Journal of Refugee Studies* 11, no. 4 (1998): 396–415.

[9] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008), 45–47.

charges of "Northern bias"), further counsels caution in expecting compliance with regime norms.[10]

Given this baseline propensity toward non-compliance even when formal commitments exist, it stands to reason we should expect low-levels of compliance to be even more the case in the three non-Party cases under examination. And yet, as this thesis elucidates, there are significant examples of compliance, and even improvements in compliance, suggesting an important puzzle heretofore understudied.

This in mind, I now review existing paradigmatic perspectives that, while individually insufficient explanations of compliance absent commitment, taken together can provide an initial, first-cut explanation for how we might understand the dynamics of non-Party States' compliance.

On the rationalist side of the equation, a realist understanding of international law and its relationship to compliance suggests States comply as a result of a cost-benefit analysis: any behaviour of compliance as either a coincidence of interest, the product of coordination, cooperation, or, indeed, coercion.[11] Respectively, a coincidence of interest occurs when behaviour results is a function of States acting out of individual self-interest, whereas coordination occurs when two or more States receive higher payoffs by engaging in shared actions, while cooperation occurs when States put aside short-term interests in

[10] Alexander Betts, *Forced Migration and Global Politics* (Chichester: Wiley-Blackwell, 2009), 112–113.
[11] Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2007).

order to benefit from mid- to long-term benefits. The coercive explanation suggests that powerful States can force weaker States to comply, contrary to the latter's interest.[12]

On the most extreme, realist reading, compliance with the regime is thus a function of geopolitical interest, regime norms are at best "cheap talk", if not epiphenomenal. [13] States comply not because they acknowledge the regime's legitimacy, but because it is in their rational self-interest to do so. In the context of the refugee regime, perhaps it is in a State's interest to shore up support for regime change in the country of origin, for example, allowing refugees to straddle the border as a staging ground, as was the case with Cambodian refugees in Thailand during the Indochinese period.[14]

However, caution should be exercised in taking this narrative for granted: first, during the Indochinese period, many Southeast Asian States, ostensibly weaker, were instead able to extract concessions from Northern States, flipping the standard compliance narrative on its head (see below). As another example, the coercive aspect may be plausibly mapped onto Australia's influence on Indonesia's contemporary policymaking; however, instead of coercion providing impetus for *improved* regime compliance, Australian coercion appears to have encouraged *regression* in Indonesia's compliance.

Still within the rationalist umbrella, the neoliberal institutionalist strand further picks up on the idea that cooperation in the medium- to long-term is in fact possible under the

[12] Ibid., 10–13.
[13] Hans Morgenthau, *Politics Among Nations* (New York: Knopf, 1978); John Mearsheimer, "The False Promise of International Institutions," *International Security* 19, no. 3 (December 1, 1994): 5–49.
[14] Myron Weiner, "Security, Stability, and International Migration," *International Security* 17, no. 3 (1992): 107.

regime. [15] Betts refines this understanding, suggesting States' relationship in the regime often matches a Suasion Game, rather than a Prisoner's Dilemma: one player is stronger, but has little interest in cooperating, while the other is weaker and appears faced with the only choice but to cooperate.[16] In the context of the regime, cooperation represents burden-sharing on the part of the Northern State; the Southern State's cooperation is equivalent to provisioning asylum. [17] The sole equilibrium outcome predicted, Betts suggests, is unrequited cooperation from the Southern State, while the Northern State chooses to defect (upper-right quadrant of *Figure 1*).[18] The only other option available to Southern States is to pursue a strategy of defection, resulting in the least-optimal outcome D, D.

		Northern Donor State	
		C (burden-sharing)	**D** (no burden-sharing)
Southern State of First Asylum	**C** (asylum)	4, 3	3, 4*
	D (no asylum)	2, 2	1, 1

Figure 1: *Suasion Game, adapted from Betts, 2011. 4=best, 1= worst outcome, * = equilibrium.*

Although Betts notes 'few host countries have chosen to move to box DD' as a short-run means to enhance long-run bargaining, in fact, Southeast Asian States' response during

[15] see, *e.g.* Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).
[16] Alexander Betts, "International Cooperation in the Refugee Regime," in *Refugees in International Relations*, ed. Gil Loescher and Alexander Betts (Oxford: Oxford University Press, 2011), 59–60.
[17] "Burden-sharing" relates to provisioning protection for refugees in another state, either through resettlement or financial contributions; "asylum" represents providing protection on the territory of a given state. Ibid., 57.
[18] Ibid., 59–60.

the Indochinese crisis provides at least two significant instances (the run up to the 1979 Conference, and later, the 1989 Conference) in which, after two sustained periods of boat pushbacks, these States extracted higher resettlement places from Northern States, in exchange for temporary provisioning of asylum. Indeed, while Betts' landmark study focuses on the extraction of issue-linkages such that Northern States were convinced of the need to burden-share, less emphasised in his analysis is the crucial agency exercised by Southern States in extracting those concessions.[19]

However, there are significant problems with pinning the roots of compliance behaviour entirely on this understanding: first, it does not necessarily explain why individual, comparatively weaker States, such as the Philippines, may in fact pursue cooperation *absent* increased levels of burden sharing by other States in the region. Indeed, whether it is coordination or a question of suasion, this liberal institutionalist strand is unable to account for the bevy of ideational factors, such as cultural kinship, which may lead to increased levels of asylum, as was particularly on display in Malaysia's variable compliance during the Indochinese crisis.

Liberal theory, in the vein of Moravcsik, suggests domestic politics, including on the part of interests groups, are a crucial determinant of States international decisions.[20] As regards interest groups in particular, the Philippine case, in relation to the role played by the Catholic Church in, appears the only significant, direct example to date in which a domestic interest group has helped put the thumb on the scale on a State's refugee

[19] Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009).
[20] Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51, no. 4 (1997): 513–53.

policies; it may well be the case that in other States, similary interest groups, including NGOs, have influenced policymaking on the margins; however a direct link, in the way that the Philippines shows, has to date been unclear clear. Broader domestic political concerns are also revealed in the Malaysian case, suggesting that compliance becomes collateral in the face of threats to domestic political legitimacy.[21]

Finally, a constructivist lens suggests the independent importance of norms in influencing State behaviour. For one, this could suggest that States could be, either through a process of persuasion or acculturation, socialised into accepting the norms of a regime.[22] As regards the refugee regime, especially given the absence of a defined enforcement mechanism, a constructivist perspective suggests the costs of derogation from regime norms could exert an independent check against States. However, in the Southeast Asian context, given the dearth of States Party to the regime, if anything, the suggested mechanisms of acculturation – such as mimicry and identification – suggest a socialisation process toward *lower* levels of compliance.

The idea of cultural kinship, especially as regards shared Islamic traditions, also falls under the broad constructivist banner, in line with Wendt's notion of the social construction of State identities.[23] As a prominent migration scholar notes, in determining State responses to migration more broadly, 'volume can matter, but…it depends upon *who* is at the door'.[24] The extent to which refugees and asylum seekers are seen as a threat

[21] Karen Jacobsen, "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes," *International Migration Review* 30, no. 3 (1996): 670–671.
[22] Goodman and Jinks, "How to Influence States."
[23] Alexander Wendt, *Social Theory of International Politics*, Cambridge Studies in International Relations (Cambridge: Cambridge : Cambridge University Press, 1999).
[24] Emphasis added. Weiner, "Security, Stability, and International Migration," 105.

to the existing community identity, then while notoriously thorny to pin down, may also have an important role to play in understanding non-Parties' compliance.[25]

Finally, the constructivist lens also alerts us to the possibility of norms operating via international shaming, by both State and non-State actors.[26] On this view, shaming identifies gaps in States' compliance behaviour, and States' desire to identify with a community of "civilized states".[27] Despite a lack of formal commitments, States are nevertheless thought to be subject to a 'compliance pull', as compliance confers a degree of legitimacy on the state.[28]

Yet on this last point, the rationalist lens reminds us reputation's role is typically not as a primary explanatory factor, but can, under certain cost-benefit circumstances, 'put the thumb on the scale' in tipping states' behaviour in favour of compliance.[29] For example, Malaysia's experience with the United States' Trafficking in Persons reports, and all three non-Party States response to the 2015 crisis in the Andaman Sea, suggests some room for this shaming validity. Yet, one expects treaty membership provides the simplest of reputational benefits with respect to membership in the community of legitimate states. Therefore, absent this commitment, the weighing of reputational considerations likely

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[25] Ibid., 110–114; Jacobsen, "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes," 668–670.
[26] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (October 1, 1998): 887–917; James Lebovic and Erik Voeten, "The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR," *International Studies Quarterly* 50, no. 4 (2006): 861–88; Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).
[27] Thomas Risse-Kappen and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices," in *The Power of Human Rights: International Norms and Domestic Change*, ed. Steven Ropp, Kathryn Sikkink, and Thomas Risse (New York: Cambridge University Press, 1999), 15.
[28] Thomas Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); Finnemore and Sikkink, "International Norm Dynamics and Political Change," 902–903.
[29] Guzman, *How International Law Works*, 15.

differs for non-Party states – and may not prove as effective in extracting sustained compliance through time.

Regarding existing literature in international relations and studies of forced migration, Betts studies how States' definition of who meets the criteria for refugees expands or contracts relative to external and internal incentives.[30] This thesis takes this treatment as an important work in the field, departing in a number of ways: First, contra Betts' focus on Africa, it focuses on Southeast Asia, which features an absence of regional agreements regarding refugees and asylum seekers; Southeast Asia also features a limited number of States party to the regime: untangling the dynamics at the intersection of compliance and non-Party states remains very much an empirical task yet to be taken on. Second, whereas Betts uses an overarching explanation of 'incentives', this project attempts to understand these under a broader period of time: incentives likely matter, but, if they vary in form and efficacy within and across cases, this is important to elucidate. Indeed, speaking to both Betts and Davies, who have each provided studies of the international refugee regime during the 1989 Comprehensive Plan of Action (CPA), this thesis covers the contemporary period as well – a period in which States have not been subject to the same pressure from the Indochinese crisis, and have pursued dissimilar paths of compliance. In providing a perspective informed by a greater range of temporal variation, this may have important bearing in relation to our understanding of the "stickiness" of regime compliance by non-Parties.

[30] Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Ithaca: Cornell University Press, 2013), 4–6.

Finally, and most importantly, speaking both to Betts and the broader literature on compliance, this thesis returns to the fact that *empirical* studies of compliance often solely focus on cases in which states are *already* party to a regime at the level of international legal obligation.[31] This despite the fact that it is already well-established that commitment itself is not sufficient for compliance; indeed, it may mask underlying factors influencing both commitment and compliance behaviour.[32] This thesis thus addresses this lacuna, in a framework amenable to IR, asking if these states alter their compliance with the regime, what explains this behaviour?

METHODOLOGY

This thesis employs a qualitative methodology, analysing the policy practices of four States, by observing their compliance over two broad periods in time, as elaborated in the case selection section. It takes account that a significant amount of scholarship in the compliance literature has increasingly shifted to one that is more quantitatively oriented.[33] The rationale for retaining a qualitative approach, however, is threefold: first, as a practical matter, the absence of an existing database of compliance data for the refugee regime counsels against building a robust dataset that is as deep as it is comprehensive in terms of country cases. Second, as this thesis aims less to test individual explanations but instead inductively generate a composite understanding that privileges analytic

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[31] See *e.g.* Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).
[32] Guzman, *How International Law Works*, 18; Jana Von Stein, "Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance," *American Political Science Review* 99, no. 04 (2005): 611–22; Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," *Yale Law Journal* 111, no. 8 (2002): 1935–2042; Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110, no. 5 (2005): 1373–1411; Linda Camp Keith, "The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?," *Journal of Peace Research* 36, no. 1 (1999): 95–118.
[33] See, *e.g.* , Keith, "The United Nations International Covenant on Civil and Political Rights"; Simmons, *Mobilizing for Human Rights*.

eclecticism, a qualitative approach more naturally lends itself to this. Finally, in order to understand not merely the correlations but delve into the causal mechanisms by which compliance behaviour can be observed, to the extent possible, this behoves a more qualitatively-informed approach, especially so as to better account for the possibility of equifinality in compliance outcomes and combinations of factors, which, in the interest of theory-building, is important to consider.[34]

Therefore, rather than shackling itself to a particular paradigmatic approach, as the aim of the project, within the scope of this thesis, remains one of inductive theory-building, analytic eclecticism, filtered by way of narratives in the broad spheres of domestic context and external relations, governs the manner in which each case study proceeds.

CASE SELECTION

Within and cross-case comparative approaches are employed, producing a comparative historical account amenable to an analysis of broad regime compliance patterns over a period that spans approximately forty-five years.[35] All cases are in the same region; three States, Malaysia, Indonesia and Thailand, are non-Parties; they are joined by the Philippines, which became a party during 1981, to provide a comparison case from the same region that controls for the influence of regime membership on compliance behaviour. [36]

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[34] Gary Goertz and James Mahoney, *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences* (Princeton: Princeton University Press, 2012), 58.
[35] John Gerring, "What Is a Case Study and What Is It Good For?," *American Political Science Review* 98, no. 2 (2004): 343.
[36] Apart from the Philippines, the only other ASEAN states that have become a party to the regime are Cambodia and East-Timor. These are not included in part because each was either the State was materially involved in the Indochinese refugee crisis (Cambodia) or only recently became an independent state (East-Timor, 2001).

The two periods under examination are the Indochinese period, from the mid-1970s into the early 1990s, and the more contemporary period, which for each State begins at the close of the CPA in 1996 and extends to 2016.

While the contemporary period is more variable for each country, it is worth providing a broad overview of the Indochinese refugee crisis, and the responses. The Indochinese refugee crisis saw a sustained exodus of over three million persons from Vietnam, Cambodia and Laos.[37] With the escalation of war between China and Vietnam in February 1979, this resulted in a greater number of departures, precipitating the 1979 Geneva Meeting on Refugees and Displaced Persons in South-East Asia ("1979 Conference"), held in coordination with the United Nations. At the meeting, in exchange for Southeast Asian States respecting the right of asylum and *non-refoulement*, Northern States like the United States, Australia, France and 30 other nations agreed to increase their resettlement commitments.[38] When this proved inadequate – and with refoulement once again rising – States again met in 1989 to produce the CPA. Signed in June of 1989, this was a multilateral agreement, similar to the 1979 agreement, between the SRV, ASEAN, and resettlement states including the United States; in total, 70 States were party to the agreement. In return for resettlement, ASEAN states agreed (on paper) to end pushbacks, temporarily housing asylum seekers and screening them for refugee status, while the SRV would accept the voluntary returns of those not determined to be refugees.[39] By June of

[37] Courtland Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (London; New York; New York: Zed Books, 1998), 2.
[38] Gil Loescher and John A. Scanlan, *Calculated Kindness* (New York: The Free Press, 1998), 139.
[39] Betts, "International Cooperation in the Refugee Regime," 70–71. The terminology "screened-in" and "screened-out" represents those determined to have legitimate refugee status, and those deemed ineligible.

1996, the CPA formally came to a close, with the last departures leaving the region in April, save for the Philippines, as discussed in its chapter.[40]

The contemporary period is then the post-1996 experience of each State, with various flows of refugees and asylum seekers, as described in each case study, albeit at a relatively lower magnitude than was sustained in the Indochinese period, affecting each state.

Temporal variation is an important indicator, for, if the narrative suggested by Davies thesis is accurate, there should be comparatively little variation in compliance behaviour from State behaviours during the Indochinese refugee crisis, and the contemporary period. As further elaborated in the next chapter, this assumption is problematic for two reasons: first, the contemporary period exhibits significant changes in regime compliance behaviours that necessitates further investigation; suggesting that a simplified, path-dependent argument that the Indochinese experience irrevocably set the tone for the contemporary period, is much too essentialist, papering over significant empirical variation. Second, that even during the Indochinese crisis, through both the 1979 Conference and 1989 CPA, as is documented in this thesis and elsewhere, despite the formalised, if temporary agreements on the part of Southeast Asian countries to provide first asylum, not only was this temporally and situation-specific – but, for non-Party States in particular, this did not necessarily result in outright compliance with regime norms, from *non-refoulement* to detention. Indeed, despite the fact that even the CPA paid homage to the normative language of the Convention in defining the criteria for identifying a refugee, it was critical that this was based on a process depending on

[40] Robinson, *Terms of Refuge*, 221.

'national legislation and internationally accepted practice'.[41] Indeed, it was none too surprising that over the course of the CPA, significant variation was exhibited in the application of these criteria, often deviating from stated practices across the ASEAN countries involved. [42]

DATA COLLECTION

The data reviewed consists of a variety of primary and secondary sources: primary source information includes the archival record of UNHCR in Geneva, which maintains the most recently accessible records covering for the period 1985-1995. Supplementary evidence in the contemporary period was found in US diplomatic cables unearthed by the Wikileaks project, covering the period 2005-2010.[43] These are consulted insofar as the provide both confidential perspectives from policymakers from the States in question, which, especially as regards non-Parties, are notoriously tight-lipped in their public discussions of such sensitive matters. Reviews of particular documents of immigration legislation were also undertaken, where applicable and accessible in English. Finally, interviews were sought with representatives of each State, UNHCR, and other inter- and non-governmental organization, to further corroborate and fill in gaps in the narrative; a total of 8 interviews, via Skype or via email, were conducted. Secondary literature consists of a mixture of scholarly works and grey literature produced by UNHCR and non-governmental.

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[41] "International Conference on Indo-Chinese Refugees (Geneva, 13 and 14 June 1989): Declaration and Comprehensive Plan of Action," *International Journal of Refugee Law* 5, no. 4 (January 1, 1993): Article 6, p.620–621; Vitit Muntarbhorn, *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992), 50.
[42] Arthur C. Helton, "Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment," *International Journal of Refugee Law* 5, no. 4 (January 1, 1993): 544–58.
[43] Database available at https://wikileaks.org/cablegate.html. It contains classified cables dispatched from United States diplomatic missions; see Appendix A for further details.

LIMITATIONS & SUMMARY

Owing to the fact that a number of these regimes continue to not have formalised refugee procedures and generally ration their commentary on these issues, there is a chance that the record presented here leaves out events or actions out of step with the regime that these States have more successfully covered up. Further, as it was infeasible to travel to all countries in the region, there is a reliance on the existing secondary literature and gray literature produced by IGOs and NGOs. To address this, I use a variety of sources, including archival records and the limited interviews possible, to best triangulate evidence. Finally, because it would require too broad a scope, the thesis limits itself to the idea of compliance with the 1951 Convention and 1967 Protocol: it cannot explicitly address issues of stateless, internally displaced, nor the equally-specific nature of smuggled and trafficked persons though each is a logical future avenue of interest.

This thesis adds to our understanding of why States might be observed to comply in the absence of formal international commitments to an international legal regime, namely, the refugee regime. It proceeds as follows: first, it further outlines the operationalization of compliance. It then dives into an inductive study of four States – three non-Parties (Malaysia, Thailand and Indonesia) and one that became a party (the Philippines, 1981) – to underscore that in understanding the compliance of we must embed this narrative in the domestic and external political contexts, in order to understand the very tenuous nature of their negotiation. It attempts to integrate the implications of rationalist and constructivist explanations, through the case analysis, thus contributing to both the discipline's literature on compliance in the absence of a formalised international legal commitments, and that on forced migration.

CHAPTER 2: UNPACKING & OPERATIONALISING COMPLIANCE

Central to this thesis is the concept of regime compliance. Compliance is here defined as a state of conformity in behaviour and the specified rule.[44] While compliance is measured as a state of conformity, compliance with a norm at a prior point in time may not be indicative of future compliance.[45] Additionally, compliance need not be a binary construction; indeed this is included in the puzzle what explains changes in these states' relative compliance with the regime's norms, over two discrete periods of time. Given that there are levels of non-conformity, it is best to think of compliance on a continuum, with more and less deviant behaviour from a regime's prescriptions.[46]

Compliance is frequently thought to be associated with some form of commitment, usually via institutionalization, the latter of which can occur at both the international level (i.e. treaty signing, ratification), as well as domestically (through passage of implementing legislation and administrative frameworks).[47] Despite this common association, it is worth underscoring the two are conceptually distinct: the latter may be neither sufficient nor necessary for producing compliance. Indeed, it is possible to comply

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[44] Anne-Marie Slaughter and Kal Raustiala, "International Law, International Relations and Compliance," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse-Kappen, and Beth Simmons (London: SAGE Publications, 2005), 539. Other definitions require"***sustained*** *behavior and domestic practices that conform to the…norms",* see Thomas Risse, Stephen Ropp, and Kathryn Sikkink, eds., *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013), 10. Owing to the variable nature of the compliance observed in the cases, however, I choose not to enforce the same, strict criteria, instead leaving this an area that will be empirically tested.

[45] Guzman, *How International Law Works*, 56.
[46] Hathaway, "Do Human Rights Treaties Make a Difference?," 1964–1965.
[47] For a detailed treatment of the difference between levels of institutionalisation, see Alexander Betts and Phil Orchard, *Implementation and World Politics: How International Norms Change Practice* (Oxford: Oxford University Press, 2014).

with a regime norm—i.e. *non-refoulement*—without formally committing to the regime at the international level; compliance behaviour *may* correlate with commitment at either the international or domestic levels, but, crucially, does not *depend* on it.[48]

At a basic level, this is reinforced in *Figure 2*, which provides a basic topology of potential cases that one can inquire into when assessing regime compliance:

	Compliance	**Non-Compliance**
Party	P, C	P, NC
Non-Party	***NP, C***	NP, NC

Figure 2: *Regime Commitment and Compliance Behaviours*

This thesis is particularly interested in cases in the lower-left hand corner: those in which States which compliance appears more ad hoc, which necessitates an inductive examination of what influences these states' changes in compliance. Notwithstanding the statement by some that 'explaining state commitment to international human rights does not seem to be particularly interesting,' the fact remains that explaining compliance in the absence of commitment is an area bereft of existing scholarship.[49]

Compliance is operationalised in reference to conformity in actions with the norms contained in the Convention and Protocol. The predominant focus in the case studies is states' adherence to *non-refoulement* (Article 33), which is observed in whether States

[48] Slaughter and Raustiala, "International Law, International Relations and Compliance," 539.
[49] Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights*, 9.

actively *refouler* refugees and asylum seekers, either through the turning back of boats (common in the Indochinese period) or various processes of deportation.

The Convention provides other normative considerations, including those granting refugees various substantive rights, such as freedom from arbitrary detention (Article 26), as well as those pertaining to gainful employment (Articles 17-19), and welfare (Articles 20-24), comprising practices like access to housing, public education and public relief. The Convention also provides the option of naturalisation (Article 34), as a particularly important norm to observe, insofar as States are instructed to 'facilitate the assimilation and naturalization of refugees.' The regime also stipulates that States may not discriminate with regard to a refugee's race, religion or country of origin, in the processes of refugee determination (Article 3). Compliance also relates to which parties conduct the refugee status determinations ("RSDs"): although the Convention does not outline *how* to conduct RSDs, it stipulates it is the responsibility of States, and not UNHCR itself.[50] Finally, pursuant to Articles 35 and 36 of the Convention, shifts in the degree and manner states co-operate with UNHCR, providing information regarding refugees' conditions and the laws and regulations adopted, is another key metric of compliance.

[50] Sam Blay, "Regional Developments: Asia," in *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (New York: Oxford University Press, 2010), 151.

CHAPTER 3: MALAYSIA

COINCIDENCES OF INTEREST, DEFECTION, AND MUSLIM AFFINITY

1. INTRODUCTION

Next to Thailand, the Malaysia case is most illustrative of an ad hoc approach to refugee policymaking. It is an approach less a product of the regime, than it is the State's interests. In its immediate years post-independence, Malaysia was the site of internal movements of ethnic Chinese, the result of an armed insurgency by the Malayan Communist Party; the modern independent Malaysian State's experience with refugee flows began with the Indochinese crisis.[51]

During the Indochinese refugee crisis, Malaysia functioned as a country of first asylum, initially willing to shoulder the burden of Indochinese refugees, if begrudgingly. However, it remained ready to derogate from regime norms, particularly *non-refoulement*, in the face of marked increases in arrivals; like others, this was frequently underlined as linked to its insistence for increased numbers of resettlement places. Malaysia was a party to the CPA, and like Thailand and Indonesia, did not become a signatory to the Convention or Protocol. During this time, Malaysia served as a point of asylum for more than 250,000 refugees from Vietnam.[52] It also provided asylum to a number of Cambodian, Philippine, Burmese and Bosnian refugees in this time, amounting to 10,000, between 70 and 150,000, 2,500 350, in size, respectively.[53]

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[51] Graeme Hugo, "Postwar Refugee Migration in Southeast Asia: Patterns, Problems, and Policies," in *Refugees, a Third World Dilemma*, ed. John Rogge (Totowa, N.J.: Rowman & Littlefield, 1987), 246.
[52] Robinson, *Terms of Refuge*, 190.
[53] Valerie O'Connor Sutter, *The Indochinese Refugee Dilemma* (Baton Rouge: Louisiana State University Press, 1990), 134.

In the contemporary period, Malaysia has continued on a path of ambiguous regime compliance. Although occasional moves have been in line with regime compliance, including the reduction of large-scale *refoulement* in 2009, as well as pronouncements of the desire to allow and provide documentation and the possibility, the predominant practice suggests a continuing normative rejection of many of the formal principles of the regime, and a mixture of coincidence of interests. The threat of international opprobrium regarding *refoulement* and the country's detention practices, first in 2009 and later in a widely-publicised situation of boat pushbacks in the summer of 2015, does suggest limited room for compliance to operate at the normative level, through concerns of legitimacy and reputation. However, disentangling these from the coercive or coincidental mechanisms remains far from straightforward. Ultimately, like Thailand and Indonesia, Malaysia remains steadfast considering itself a place of first asylum. In the contemporary period, the most recent UNHCR estimates put the number of refugees and asylum seekers in the Malaysia at 151, 973 persons.[54]

Overall, the Malaysian case is the first of three important illustrations that suggest signing onto the instruments of the regime remains far from the most important metric when assessing potential compliance behaviour: rather, how refugees are conceived in the State's own interests, whether they coincide, whether resettlement spaces are adequately provisioned, and the impact this has on the domestic political landscape, are all highlighted by this case. The possibility of shaming, in the contemporary period, also

[54] This calculation is a lower-bound, comprising refugees and asylum seekers, excluding other documented 'persons of concern'. The same applies for other country statistics in further chapters. UNHCR, "Malaysia," June 2015, http://www.unhcr.org/pages/49e4884c6.html.

suggests a limited applicability of normative arguments in explaining compliance modulation.

2. MALAYSIAN REFUGEE POLICY DURING THE INDOCHINESE REFUGEE CRISIS

Although Malaysia joined other ASEAN States as a party to the CPA, at times adhering to the principles of *non-refoulement*, the overall narrative is one of policy contingent on number of refugees being "manageable": this is seen in the decisions to *refoule* boats of Indochinese refugees, most notably in periods of increased arrivals before the two annual conferences in 1979 and 1989–subsequent to which, resettlement places were increased. The comparatively favourable acceptance of Cambodian, Philippine, Bosnian and Burmese refugees suggests the importance of religious kinship in conditioning policymaking, even as these populations were also not subject to uniform policy provisions.

A. DOMESTIC CONTEXT

At the outset, Malaysia was unconvinced of the merits of the Convention, and like all other ASEAN nations, chose not to become a party. Like the Philippines, Malaysia opined the Convention's requirements were not commensurate with the capacities of a developing State.[55] When told by UNHCR its accession would serve as an example to other States in the region, as grounds for its refusal, Malaysia cited its absence from the drafting process, going on to note that its temporal and geographic limitations limited its

[55] Sara Davies, "The Asian Rejection?: International Refugee Law in Asia*," *Australian Journal of Politics & History* 52, no. 4 (2006): 565.

applicability in the Asian context.[56] Malaysian representatives would then claim no knowledge of the content of the 1967 Protocol content, claiming again that they were not a party to the instrument's drafting – despite the fact that it was, in fact, at the General Assembly vote in question.[57]

At the time, the immigration law was the Immigration Act 1959, revised in 1975. This did not recognise the concept of a refugee, punishing illegal entry by.[58]

Beyond this formal modality, policy toward refugees and asylum seekers was strongly associated with a bid to maintain domestic political stability. The contentious relationship between ethnic Malays and ethnic Chinese dates to Malaysia's struggles with an armed Chinese Communist insurgency, in addition to ethnic riots in the aftermath of a contentious election in 1969. These and other events thus produced a carefully negotiated consociational governance, a crucial element of Malaysia's political landscape.[59] Thus, in addressing the Indochinese crisis, Malay policymakers feared that if Chinese refugees from Vietnam were allowed to land in Malaysia – much less resettle – they would upset this carefully negotiated ethnic balance. [60] Indeed, the State had only earlier that decade begun a major plan of restructuring the economic position of Malays vis-à-vis other ethnicities, particularly ethnic Chinese.[61] And, as refugees in the early period were arriving on the eastern coast of Malaysia—a bastion of Malay conservatism—

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[56] Ibid., 572.
[57] Davies, *Legitimising Rejection*, 81; ibid., 569.
[58] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 117.
[59] Amarjit Kaur, "Refugees and Refugee Policy in Malaysia," *UNEAC Asia Papers* 18, no. 1 (2007): 80; Astri Suhrke, "The 'High Politics' of Population Movements: Migration, State and Civil Society in Southeast Asia," in *International Migration and Security*, ed. Myron Weiner (Boulder, Colorado: Westview, 1993), 187.
[60] Astri Suhrke, "Indochinese Refugees: The Impact on First Asylum Countries and Implications for American Policy" (Washington: U.S. G.P.O., November 25, 1980), 19.
[61] Edmund Terence Gomez and Jomo Kwame Sundaram, *Malaysia's Political Economy: Politics, Patronage and Profits* (Cambridge University Press, 1999), 24.

policymakers voiced concern these arrivals could upend the Malaysia's still-nascent development programs.[62] In private meetings with US officials, officials expressed continuing worry about the potential association of Vietnamese refugees with the Vietcong, explicitly drawing upon the negative associations of ethnic Chinese with the Malayan Communist Party and critical race riots of 1969.[63]

Thus, few could be surprised in 1979, when the Home Minister stated that '[t]he government is responsible first and foremost to the people of this country': there simply was little appetite, given Malaysia's current political-economic dynamic, for any extended provision of asylum to predominantly ethnic Chinese from Vietnam. [64]

As landings gradually increased, the Government worked with UNHCR to establish a policy of relocating arrivals to the uninhabited Pulau Bidong, even as it simultaneously toughened its posture, adopting a policy of restocking and towing out to sea boats that would otherwise have landed.[65] Growing dissatisfaction with both the impingement of refugee flows on domestic politics, and the sense that resettlement States were comparatively benefitting, led the the Education Minister to note that not only were refugees placing an increasing strain on domestic social services (in one anecdote, residents noted difficulties obtaining bread, matches and canned goods), he further opined

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[62] Sutter, *The Indochinese Refugee Dilemma*, 138; Gomez and Sundaram, *Malaysia's Political Economy: Politics, Patronage and Profits*, 24.
[63] Sutter, *The Indochinese Refugee Dilemma*, 135.
[64] Ibid., 53–54.
[65] Amarjit Kaur, "Migration and the Refugee Regime in Malaysia: Implications for a Regional Solution," in *Protection of Refugees and Displaced Persons in the Asia Pacific Region: Shifting Powers*, ed. Angus Francis and Rowena Maguire (Surrey: Ashgate, 2013), 104; S. Sothi Rachagan, "Refugees and Illegal Immigrants: The Malaysian Experience with Filipino and Vietnamese Refugees," in *Refugees, a Third World Dilemma*, ed. John Rogge (Totowa, N.J.: Rowman & Littlefield, 1987), 261.

that those resettled Western States were more highly skilled and trained, leaving a residual population – 'scum'— for Malaysian authorities to manage. [66]

Arrivals soon rose, from 6,000 in 1977, to 63,000, to more than 50,000 arrivals in the first half of 1979; over 75,000 individuals remained in Malaysia by June of 1979, awaiting resettlement.[67] In response, Malaysia began an even more strident policy of pushbacks, with estimates suggesting that from an estimate of 1 in 4 boats being pushed back, by mid-1979, up to 80% of boats were pushed off from Malaysia.[68]

Against this, it is significant that after the 1979 Conference, Malaysia, at least insofar as *non-refoulement* was concerned, performed rather exemplary until at least 1987, when the numbers rose again, and the caseload for refugees exceeded 20,000.[69]

Nevertheless, in 1987 meetings with the Foreign Ministry, when UNHCR pressed officials on ratifying the Convention (arguing UNHCR felt Malaysia was fulfilling parts of its criteria anyway, and further, that it was in line with Koranic principles) the minister and staff merely noted the request would be taken 'under study' but would require time.[70] Even as officials agreed that the once-again growing landings of refugees required more internal policy coordination, and at times appeared to display a willingness to do more, when considered against the practical record, the ambiguity in policymaking continued.

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[66] Rachagan, "Refugees and Illegal Immigrants: The Malaysian Experience with Filipino and Vietnamese Refugees," 261.
[67] Davies, *Legitimising Rejection*, 104.
[68] Gil Loescher, *The UNHCR and World Politics : A Perilous Path* (Oxford : Oxford University Press, 2001), 207.
[69] Davies, *Legitimising Rejection*, 147; Robinson, *Terms of Refuge*, 190.
[70] UNHCR Kuala Lumpur to HICOMREF Geneva, "Note for the File," February 24, 1987, Folio 7, 010.MLS Series 3, Classified Subject Files; Fonds 11, Records of the Central Registry; Archives of the United Nations High Commissioner for Refugees (hereafter Series 3, Fonds UNHCR 11).

If anything, domestic priorities continued to pressure policymakers: in reference to the camp at Bidong, later that year the Malaysian Permanent Representative in Geneva expressed to the High Commissioner (HC) the concern that elections for top posts in the United Malays National Party (UMNO) influenced the Government's desire to obtain its upcoming closure.[71] As UMNO was threatened by the Malay opposition's attempts to chip away at its parliamentary position, this in turn pushed State officials to "prove" their credentials as the legitimate providers and defenders of Malay rights in the country. To be seen as working in the interests of Vietnamese refugees, rather than local villagers, was to thus risk losing critical votes.[72]

As with much of ASEAN, in the late 80s, arrivals once again increased: by April 1988, Malaysia hosted upwards of 20,000 refugees, a level not seen since 1979. This prompted renewed consideration of Indochinese refugees as 'illegal immigrants', and, beginning in May, boats began to be turned back.[73] Strikingly, even *at* the 1989 Conference, Malaysia was still engaging in *refoulement*; by year's end, at least 3,200 individuals were pushed back.[74] Later in the 1990s, after the Prime Minister first disputed reports of pushbacks, the Deputy Prime Minister was observed arguing that those on the boats did not actually want to stay, suggesting officials would permit them to stop to replenish supplies, but that

[71] UNHCR Kuala Lumpur to HICOMREF Geneva, "Meeting with Ambassador to Geneva," March 23, 1987, Folio 4, 010.MLS Series 3, Fonds UNHCR 11.
[72] Suhrke, "Indochinese Refugees: The Impact on First Asylum Countries and Implications for American Policy," 19; Sutter, *The Indochinese Refugee Dilemma*, 138.
[73] Robinson, *Terms of Refuge*, 190.
[74] Ibid.

they 'leave of their own choice'; this despite testimony from NGO and asylum seekers to the contrary. [75]

When the CPA formally came to a close, with UNHCR funding officially ending in mid-1996, this weighed heavily on the Malaysian government policy; the Government then began a policy of forcibly sending refugees back either by ship or by air. [76]

In this narrative, Davies underscores two points: first, how little *race*, in and of itself, necessarily accounts for this hospitality: For example, Malaysia *did* accept the most number of boats – second only to Thailand. Furthermore, many were in fact ethnic Chinese, despite the considerations for domestic political ramifications.[77]

Nevertheless, what remains equally true, and is underscored by these policies, is the emphatic emphasis on resettlement places, which was rather consistent once policymakers realized the scope of the influx; also produced significant *refoulement*, and ultimately suggests a pragmatic desire to rid the country of as much of the issue as possible.

Furthermore, this policy which tied asylum to resettlement, should further be in considered light of Malaysia's reception of refugees and asylum seekers from other countries of origin: this an estimated 70-200,000 Pilipino refugees, approximately 10,000 Cambodian refugees by 1990, approximately 350 Bosnians and 3,000 Burmese refugees.

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[75] Ibid., 191.
[76] Kaur, "Migration and the Refugee Regime in Malaysia: Implications for a Regional Solution," 105.
[77] Davies, *Legitimising Rejection*, 143.

[78] Of the two larger groups, the former fled Southern Philippines due to religiously-motivated armed conflict, the latter felt fallout from the Soviet Republic of Vietnam's (SRV) invasion of Cambodia and were accepted for permanent resettlement. Like the Bosnian and Burmese populations, these arrivals shared the Muslim identity with ethnic Malays.

For the Filipinos, the state Government in Sabah (on the island of Borneo) considered those who had entered Malaysia from 1972-1976 "real" refugees whereas those who had entered subsequently were considered illegal migrants. Combined with the fact that the local State Government even created a "resettlement division", this suggested a degree of regime compliance.[79]

To explain this, the UNHCR representative surmised role of Islam was critical in explaining the relative hospitality, opining that insofar as the role of domestic Islamic activists – including members of the Cabinet – linked repression of Muslims in Philippines to a consequent duty to care for them, this influenced the actions taken. When pressed that the relationship between their persecution in the early 1970s and current arrivals in Malaysia Malaysian officials were wont to suggest something similar could be said of the current crop of Indochinese refugees; and in so doing, UNHCR was open to being accused of favouring interests and refugee 'priorities' of the North, while ignoring that of the South. It didn't help that UNHCR was, for operational constraints, pulling out

[78] Robinson, *Terms of Refuge*, 42.
[79] Rachagan, "Refugees and Illegal Immigrants: The Malaysian Experience with Filipino and Vietnamese Refugees," 257.

of Sabah while maintaining a presence in the Peninsular. [80] Certainly, in initial period of receptivity, the Sabah State Governor had taken it upon himself to commit to spread Islam across Sabah, to both Muslims and non-Muslims alike; it was, however, also speculated labour shortages in the State's rubber estates and timber camps may have helped coincide with this receptivity.[81] On this, it is notable that after elections in 1985 brought power to a Christian sympathetic government, in the words of one government official, the goal of a now-stagnating registration process was 'to make them feel not wanted. This government will not do anything to make them feel welcome.' [82]

As regards the population of Cambodian Cham, in striking contrast to even the Filipino refugees, these were received and accorded permanent residence and the freedom of movement, with the ultimate goal of assimilating them into Malaysia. [83]

This applied also to the extension of solidarity to the token 350 Bosnian Muslims that Malaysia offered asylum in 1994, also in this period, as well as the roughly 3,000 Burmese refugees. The former were explicitly granted asylum in view to the disintegrating situation in Yugoslavia, with the Prime Minster taking occasion to remind Malaysians that these were fellow Muslims; the latter were granted asylum as well albeit in a considerably less structured manner.[84] Ultimately, the Malaysian Government neither

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[80] UNHCR Kuala Lumpur to HICOMREF Geneva, "SABAH," May 1, 1988, 88/KL/HQ.005; Folio 13, 010.MLS Series 3, Fonds UNHCR 11.
[81] Rachagan, "Refugees and Illegal Immigrants: The Malaysian Experience with Filipino and Vietnamese Refugees," 258–259.
[82] UNHCR Kuala Lumpur to HICOMREF Geneva, "SABAH"; Vitit Muntarbhorn, *The Status of Refugees in Asia*.
[83] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 115.
[84] Matthew Seet, "Can Islam and Islamization Be a Force for Refugee Rights in Malaysia," *UCLA Pacific Basin Law Journal* 31, no. 1 (2013): 77; Alice Nah, "Legitimising Violence: The Impact of Public 'Crackdowns' on Migrant Workers and Refugees in Malaysia," *Australian Journal of Human Rights* 17, no. 2 (2011): 135.

deported nor treated these such arrivals as illegals, instead dealing with them on a case-by-case basis, often quite favourably by regime standards.[85] Still, it is important to note that in part as a function of labour patterns and the country's (see the contemporary period as regards Burmese and Filipino refugees), their ability to be free of arrest, detention or, indeed, protection from *refoulement,* never entirely secure. [86]

Davies speculates Malaysia' main reason for remaining a non-Party State stemmed from an absence of straightforward benefits from signing onto the Convention or Protocol: instead, could derive more benefits from maintaining an ad-hoc approach.[87] Indeed, in event, in terming refugees 'scum, garbage and residue', systematically pushing back and towing away boats at sea –even reportedly threatening to shoot refugees on sight – any acceptance of refugees was tenuous, and far from rooted in domestic principles. [88] Perhaps the only inclination of a desire for regime compliance, came by way of the acceptance of various Muslim populations; however, this was not an ironclad position, but also seemed bound up in part in the

B. EXTERNAL RELATIONS

Throughout this period, Malaysia expressed concern that any positive reception of refugees could a) result in its being overwhelmed by flows of refugees, as well as the related implication that b) it would provide asylum without limit.[89]

[85] Robinson, *Terms of Refuge*, 238.
[86] Davies, *Legitimising Rejection*, 149–150.
[87] Ibid., 143.
[88] Loescher, *The UNHCR and World Politics : A Perilous Path*, 207.
[89] Davies, *Legitimising Rejection*, 148.

Thus, when in 1978 the *Hai Hong*, a ship filled with about 2,500 asylum seekers attempted to land, officials begun with a firm policy of rejection. Despite the ship having already been pushed back by other States (Hong Kong, Indonesia), the Malaysian government officials were strident, going only as far as to deliver foodstuffs before ordering the ship out of Malaysian waters. Not only did officials not believe the persons to require asylum; in any event, officials feared the possibility of similar boats, filled with thousands arriving and thus acting as a pull factor. [90]After a protracted effort that saw UNHCR declaring the passengers refugees, requesting asylum from the Malaysian government – only to continue to be rebuffed – Malaysian officials relented only when UNHCR had secured resettlement offers from Western States.[91]

As described above, in 1979, with rising amounts of refugees still to be resettled, Malaysia began a policy of actively pushing back refugees.[92] Especially as regarded arrivals from Vietnam, Malaysia was only cooperative insofar as it could strictly pursue the principle of first asylum, contingent heavily on assistance continuing to come from Western States. [93] In its observer capacity at a 1978 UNHCR Executive Committee (ExCom) meeting, the Malaysian representative stressed that, in the absence of Southeast Asian states with permanent representation at ExCom – which would allow the international community to better understand the position of Malaysia and other ASEAN states – the international community needed to improve efforts to resettle refugees, within the region but in Malaysia in particular.[94]

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[90] Ibid., 101.
[91] Ibid., 102.
[92] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 114.
[93] Sutter, *The Indochinese Refugee Dilemma*, 142.
[94] Davies, *Legitimising Rejection*, 98.

Subsequently, when in 1989 the refugee caseload exceeded 20,000 individuals, Malaysia started to consider new arrivals illegal immigrants, with the Deputy Prime Minister stating that only 'on humanitarian grounds' would officials allow boats to land—and even then, only to re-provision, before being towed back out. [95] When the last camp at Sungei Besi finally closed in 1996, it was in part a function of the fact that Malaysia had, in one observer's wording 'never restored asylum', since it continued to *refoule* refugees even after the CPA's coming into force. [96] Indeed, by 1990, at least 6,000 persons were turned away.[97]

Regarding Malaysia's relations with Vietnam, government officials voiced concerns that accepting refugees could promote the establishment of a fifth column, given the country's prior history with Communism and ethnic tensions noted earlier.[98] Concerned that some of these individuals were possibly associated with the Vietcong, some policymakers went on to express concern the effort may have even been an attempt by Vietnam to destabilise ASEAN: Vietnam was believed to be pushing out people to at once control its population, but also ridding itself of a Chinese minority, which would then upset the ethnic balance in Malaysia. Although this was not borne out in practice, insofar as Vietnam came to the table at both the 1979 and 1989 Conferences to help manage the outflows, it nevertheless remained a persistent fear on the Malaysian side.[99]

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[95] Robinson, *Terms of Refuge*, 190.
[96] Jeff Crisp, Naoko Obi, and Liz Umlas, "But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia" (UNHCR, May 2012), 10, http://www.unhcr.org/4faa1e6e9.html.
[97] Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, 121.
[98] Suhrke, "The 'High Politics' of Population Movements: Migration, State and Civil Society in Southeast Asia," 193.
[99] Ibid.; Sutter, *The Indochinese Refugee Dilemma*, 135–6.

Regarding Cambodian Cham refugees, when they started arriving as early as 1975, the Malaysian government relied on UNHCR-funded assistance to manage these individuals. With pressure exerted by the OIC Community, as well as the support of the Islamic Development bank, which donated funds, this group of individuals were periodically resettled, receiving integration assistance in Malaysia. [100] By 1992, an estimated 10,000 such refugees were resettled in Malaysia.[101] As discussed earlier, it appeared the Islamic ties were most salient in influencing the comparatively welcoming policy.

As regards the sizeable population of Filipino refugees, it is notable that Malaysia prevented the Philippines from being on the agenda at an OIC meeting, against the wishes of Libya. This may suggest that Malaysia cared more about adherence to the principle of *non-interference* often associated with the 'ASEAN Way' and the maintenance of positive relations with the Philippines, than it was about internationalising the issue. [102] Indeed, discussions with UNHCR suggested that, Malaysia, in the interest of the Philippines dropping its territorial claim to Sabah and normalisation of relations between the two countries, viewed the maintenance of these refugees on its soil as tenable: given the ongoing nature of conflict in the Southern Philippines, and the Malaysian view that the Philippines simply could 'not afford to absorb these people', this seemed an interest Malaysia was willing to shoulder, so long as the broader modalities of compromise could be achieved.[103]

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[100] UNHCR Kuala Lumpur to HICOMREF Geneva, "Brief Note on Refugee Assistance Programs in Malaysia," October 9, 1987, Folio 8, 010.MLS Series 3, Fonds UNHCR 11.
[101] Davies, *Legitimising Rejection*, 146; Vitit Muntarbhorn, *The Status of Refugees in Asia*, 115.
[102] Davies, *Legitimising Rejection*, 146.
[103] UNHCR Kuala Lumpur to HICOMREF Geneva, "SABAH."

The reception of Bosnian and Burmese persons at this time received considerably less documentation during this time, perhaps in part owing to their relatively smaller numbers. What can be said is that the Bosnian decision appeared a token act that related to Islamic solidarity, as discussed above. It was noted that in 1992 the first influx of Burmese refugees came, UNHCR issued these persons letters, and, as is detailed in the next section, appeared to be able to provision subsistence assistance to these refugees, before they would become higher on the radar for Malaysian political considerations; Myanmar's accession to ASEAN in 1997 may also have influenced part of the calculus on this front.[104]

Overall, the predominant consideration for Vietnamese refugees was linked to third state resettlement. For the two largest populations of Muslim refugees, exceptions were certainly made, in part on the grounds that they were more easily integrated into Islamic the fabric of the country that policymakers were eager to champion, but also to the extent that this coincided with Malaysia's foreign policy priorities with the respective countries of origin.

C. CONCLUSION

Malaysian policy in this period suggests a lack of binding commitment to regime provided it a great deal of flexibility, both in the management of Vietnamese refugees as well as those arriving from other countries of origin. Had it acceded to the convention, it could have found its tied. Instead, policymakers found the existing arrangement allowed

[104] The Equal Rights Trust, "Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia," January 2010, 9, http://www.equalrightstrust.org/view-subdocument/index.htm?id=639; Davies, *Legitimising Rejection*, 146.

carefully modulate their reception of refugees and asylum seekers, pursuing a policy that was in part a function of one's country of origin, and, in the case of those from Vietnam, heavily conditioned deepening on the numbers of refugees and resettlement spaces provided. In the case of Cambodian, Philippine, Bosnian and Burmese refugees, while in varying degrees afforded some degrees of naturalisation and legitimacy, with the appeal to Islamic solidarity occasionally made in both public and private for a, it should be underscored that such welcoming policy was far and away not uniformly applied, both among and within groups—suggesting that the weight of explanation, between coincidence of largest, rationally-driven interests as against any normative, cultural affinity, often lay with the former. This is all the more so when considered against the broader domestic political framework in the country, and the desire to shore up Malay-Muslim credentials against upstart political competition.

3. MALAYSIAN REFUGEE POLICY IN THE CONTEMPORARY PERIOD

In the contemporary period, Malaysia's regime compliance has largely tracked its behaviour during the crisis: it remains largely ad-hoc, with no implementing legislation or processes. In this period, the majority of refugees are with over 90% of registered refugees from Myanmar, while refugees and asylum seekers from other countries of origin. [105] Responsibility is often pushed onto UNHCR, and *refoulement*, while not always well publicised, has been problematic for much of the period as well. The roles of resettlement space and provision continues to be important, but so to do, in limited nature; that of the Australian and United States, combined with the 2015 experience with Rohingya from Burma, suggest that questions of legitimacy and international reputation

[105] Crisp, Obi, and Umlas, "But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia," 9.

are important, but their degree of influencing policymaking remains unclear at best. On the whole, however, Malaysia continues underlines its desire to remain a country of first asylum, pushing for those who arrive to be resettled elsewhere, to the degree possible.

A. DOMESTIC CONTEXT

In this period, the Malaysian government has made little formal progress indicative of growing regime commitment. The same Immigration Act 1959/1963 governs the treatment of refugees and asylum seekers, deeming them 'illegal migrants', and thus continues to subjects them to the possibility of detention and/or deportation; the Act was amended in 2002 to include the punishment of whipping.[106] Absent a formal agreement with the Government, UNHCR's activities thus remain subject to gentleman's agreements, subject to change at the discretion of the Government.[107]

Although Malaysia no longer sanctions official refugee camps, there are at least 47 known detention camps.[108] Of note, the intervention of UNHCR *can* help in either freeing refugees from detention, or objecting.[109] Further, as discussed below, access has improved so some degree over time, however, it is important to bear in mind that since no framework exists for Government recognition of refugees and asylum seekers, those

[106] Jesuit Refugee Service, "The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines," June 2012, 12, https://www.jrs.net/Assets/Regions/APR/media/files/The_Search.pdf.
[107] UNHCR, "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia," March 2013, 4, http://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=630&file=EnglishTranslation.
[108] Kaur, "Refugees and Refugee Policy in Malaysia," 82.
[109] Alice Nah, "Struggling with (Il)Legality: The Indeterminate Functioning of Malaysia's Borders for Asylum Seekers, Refugees, and Stateless Persons," in *Borderscapes: Hidden Geographies and Politics at Territory's Edge*, ed. Prem Kumar Rajaram and Carl Grundy-Warr (Minneapolis: University of Minnesota Press, 2007), 44.

not already carrying UNHCR documentation at the time of detention are less likely to benefit from this.[110]

On the one hand, seemingly fitful, if often incomplete, movement has been made to improve regime compliance. For example, when Malaysia first formed its Human Rights Commission, (SUHAKAM) in 2000, this coincided with its initial donor contributions to UNHCR to the tune of $220,000. This quickly, however, tapered in the three years following; since 2004 it has registered at $0 annually.[111]

Furthermore, while refugees have historically not been allowed to work in any formal sense, there have been apparent attempts from the State to change this practice: for example, in October of 2004 the Government stated a willingness to provide official documentation to the thousands of Burmese Rohingya Muslims in the country. Despite the Deputy Prime Minister's noting that it was a 'way to a way to resolve a human rights issue and resolve the labour crunch in the country', implementation was halted after corruption allegations were lodged in the process. [112] After this botched process, UNHCR resumed its process of registration in 2009, deciding that the Government's failure to manage this process should not preclude it from continuing with RSD and the issuance of refugee cards nor the issuance. [113]

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[110] Ibid.
[111] Kaur, "Refugees and Refugee Policy in Malaysia," 85.
[112] ACHR Review, "Malaysia: Truly Asian Police State," December 29, 2004, EM-45.4 ACHR, University of Oxford Refugee Studies Centre Cardbox; Nah, "Struggling with (Il)Legality: The Indeterminate Functioning of Malaysia's Borders for Asylum Seekers, Refugees, and Stateless Persons," 94.
[113] The Equal Rights Trust, "Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia," 10.

In 2007, the Secretary of the Foreign Ministry Foreign Ministry expressed that the Government continued to worry about Malaysia's refugee population becoming a pull factor. To add, he harkened back to the considerations first broached during the Indochinese crisis, when he expressed concern that the historically special rights of Malays would be threatened by any regime accession as this, he suggested, would slowdown any process of ratification.[114]

In 2010, the government hinted at the introduction of refugee identify cards it would issue (to date, they have only been issued by UNHCR) albeit without the provision to work; and as recently as 2013 and 2016, the Government had even suggested it would pursue the idea of officially-respected work permits.[115] However, these pronouncements have, again, amounted to little in practice: the 2010 effort was soon scrapped, and as regards the pushes for legalisation and naturalisation UNHCR professes no knowledge of these efforts, despite the fact that the Government has televised these plans.[116] Later in 2011, the government attempted to institute a broad amnesty program for undocumented migrants in the country entitled "6P", indicative of a process of registration, legalisation, deportation, monitoring, enforcement, and amnesty, however, this too was once again plagued by similar problems of corruption. [117] This process itself was, however, botched

[114] Kaur, "Refugees and Refugee Policy in Malaysia," 84.
[115] Amnesty International, "Abused and Abandoned: Refugees Denied Rights in Malaysia," June 2010, 12, http://www.amnesty.org.au/images/uploads/ref/abused_and_abandoned-refugees_denied_rights_in_malaysia.pdf; "Suhakam Welcomes the Government's Move to Allow Refugees to Work in Malaysia," *SUHAKAM*, July 12, 2013, http://www.suhakam.org.my/wp-content/uploads/2013/11/Press-Statement_SUHAKAM-WELCOMES-THE-GOVERNMENT-MOVE-TO-ALLOW-REFUGEES-TO-WORK-IN-MALAYSIA_12-July-2013.pdf; Tasnim Lokman, "Job Prospects for Refugees," *New Straits Times Online*, March 18, 2016, http://www.nst.com.my/node/133453.
[116] Cheung, " 'Migration Control and the Solutions Impasse in South and Southeast Asia," 55; Interview with Nurul Hasanah, Deputy Secretary for Policy, Law and Complaints and Shahizad Sulaiman, Principal Assistant Secretary, Policy, Law and Complaints, SUHAKAM (National Human Rights Commission), April 7, 2016.
[117] Kaur, "Migration and the Refugee Regime in Malaysia: Implications for a Regional Solution," 112.

when thousands of refugees and asylum seekers were erroneously issued documents indicating they were to return to their home country – yet another sign of the Malaysian state's inability to distinguish between refugees, asylum seekers, and other types of migrants. [118]

In a telling statement, the Government recently reminded observers that not only is it *not* intending to set up a refugee registration centre, but as it continues to fear the encouragement of more refugees and asylum seekers, it has asked that UNHCR speed up the process of repatriation and/or resettlement of refugees, with the Minister in the Prime Minister's Department urging parties to the regime to 'take in refugees in line with *their commitment as member states.*'[119] In private conversations with SUHAKAM, when pressed as to the relevance of *non-refoulement* – even in terms of Customary International Law, never mind as a principle of the regime – officials from the Attorney General's office 'just debunk the concept [of refoulement]…they won't buy it,' instead asking officials at SUHAKAM, "'[w]hose custom is it?' concluding '"we are doing nothing wrong"[120]

These findings are contrasted with some indications of regime compliance, such as the cessation of large-scale *refoulement* in 2009.[121] In addition, since 2006, refugees have been allowed a 50% discount on Government medical services; the Government also

[118] Jesuit Refugee Service, "The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines," 15.
[119] Emphasis added. "Government Has No Plans To Set Up Refugee Registration Centre - Shahidan," *Bernama*, March 21, 2016, http://www.bernama.com/bernama/v8/ge/newsgeneral.php?id=1227042.
[120] Interview with Hasanah and Sulaiman.
[121] The Equal Rights Trust, "Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia," 36. This is further elaborated on in the section on external relations.

reportedly issues birth certificates for children of registered refugees.[122] Beginning in 2005, the Attorney General's office agreed to waive prosecution for immigration offences for refugees recognised by UNHCR; if they are charged, UNHCR has the theoretical ability to intervene to get charges dropped. This has led to a higher *likelihood* refugees would be able to retain freedom of movement, though it should be underscored that this remains contingent on UNHCR being aware of the persons of concern—which the Government does not go out of its way to communicate.[123] There have been minor cases in which the High Court, for example, set aside the whipping sentence for an asylum seeker who had entered the country irregularly under the Immigration Act.[124]

As noted in other country chapters, Malaysia's response to the influx of Burmese asylum seekers in May 2015 stands in contrast to these seeming improvements: although initially joining, Malaysia eventually chose to allow the remaining boats, albeit on the condition that their asylum would be contingent on resettlement places from other States.[125]

More recently, in late 2015 Malaysia agreed to resettle 3,000 Syrian refugees. However, the Deputy Home Minister, in acknowledging that they would be provided with temporary shelter, jobs and educational opportunities, in terming them 'migrants' rather than 'refugees', this on his account justified their separate treatment from those already

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122 UNHCR, "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia," 2–3.
123 Alice Nah, "Seeking Refuge in Kuala Lumpur: Self-Help Strategies to Reduce Vulnerability amongst Refugees," in *The Other Kuala Lumpur: Living in the Shadows of a Globalising Southeast Asian City*, ed. S.G. Yeoh (London: Routledge, 2014), 151–152; Nah, "Legitimising Violence: The Impact of Public 'Crackdowns' on Migrant Workers and Refugees in Malaysia," 145–6.
124 Migration Working Group Malaysia, "Joint UPR Submission," October 2013, 4, http://wao.org.my/file/file/Migration%20Working%20Group%20Joint%20UPR%202013%20Submission.pdf.
125 "Asia Migrants: Malaysia Orders Search and Rescue for Boats," *BBC News*, May 21, 2015, http://www.bbc.co.uk/news/world-asia-32822508.

in the country documented as refugees and asylum seekers. Subsequently, the Government underlined that even for this population, their stay was only temporary until any future plans for repatriation[126] When queried as to the status of this procedure, the Government remains as of this writing unable to share its procedures even with the domestic national human rights council.[127]

On balance, then, the Malaysian State continues to exhibit curious behaviour: on the one hand, it continues to not take responsibility for RSD, which remains left to UNHCR.[128] The contradictory behaviour is further evidenced by a classified National Security Council circular, which provides that although the Government will not itself support refugee and asylum seeker populations, neither will it actively seek to stop NGOs from supporting setting up schools for refugee children. [129] Cooperation between UNHCR, the Inspector General of Police, and the Attorney General's office, on one UNHCR official's reading, is reasonable, if adhoc – but is necessarily kept quiet and out of the public view, suggesting a continuing desire to minimise whatever domestic fallout or retribution might be incurred.[130]

[126] "Malaysia Says Syrian Refugees Not Welcome for Long Term," *Anadolu Agency*, March 31, 2016, http://aa.com.tr/en/world/malaysia-says-syrian-refugees-not-welcome-for-long-term/546991.
[127] Interview with Hasanah and Sulaiman..
[128] Jesuit Refugee Service, "The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines," 35.
[129] Interview with Hasanah and Sulaiman..
[130] US Embassy Kuala Lumpur, "UNHCR Overview Of Refugee Operations In Malaysia," September 5, 2007, 07KUALALUMPUR1362, https://www.wikileaks.org/plusd/cables/07KUALALUMPUR1362.html.

B. EXTERNAL RELATIONS

Malaysia's external relations continue to have influenced its regime compliance, particularly the provision of resettlement spaces, with limited, if important, influence of reputational concerns.

In the case of the Burmese refugees, diplomatic observers suggest that by giving refugees legal status, this could upset the careful investments the Malaysian industries have made in oil and gas.[131] Thus, although Malaysian officials have often met with Burmese officials, when their counterparts claimed in particular that ethnic Rohingya were not Burmese individuals, as intimated by the Ministry of Foreign Affairs (MFA) Undersecretary for Burmese issues, this in turn has at times influenced the Malaysian government's inability to for them to *refoule* them; indeed, the Government has often tacitly resigned itself to letting Burmese refugees stay in Malaysia.[132] However, it has often found recourse to this by deporting them to Thailand – which, as discussed below, has maintained the ability to potentially further expel them to Burma, should circumstances permit. [133]

In May 2011, Malaysia and Australia announced a preliminary agreement by which Australia proposed to resettle 4,000 UNHCR-registered refugees from Malaysia, in exchange for sending 800 asylum seekers to Malaysia for eventual resettlement

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131 US Embassy Kuala Lumpur, "BURMA: UMNO YOUTH PARTCIPATE IN RALLY; POLITICIANS SPEAK OUT," October 1, 2007, 07KUALALUMPUR1476, https://www.wikileaks.org/plusd/cables/07KUALALUMPUR1476.html.
132 US Embassy Kuala Lumpur, "Malaysia: Rohingya Situation Status Quo," February 6, 2009, 09KUALALUMPUR79, https://www.wikileaks.org/plusd/cables/09KUALALUMPUR79.html.
133 Kaur, "Refugees and Refugee Policy in Malaysia," 87.

elsewhere.[134] Although this agreement was ultimately struck down as invalid by the Australia's High Court (given Malaysia's inability to offer adequate protection to refugees and asylums seekers) the botched agreement does signify an influence that Australia has had on exacting concessions from Malaysia's reception of asylum seekers; in comparison to the Indonesian case, however, this does not appear to have been as influential (directly or otherwise) in exacting policy shifts, whether more or less in line with regime norms.

By contrast, the United States appears to have, on limited occasion, positively influenced Malaysia's regime compliance. For example, in July of 2009, in the face of the release of both a scathing Senate report on the both Malaysia and Thailand's state of human trafficking, as well as a related downgrade in the country's ranking on the United States annual 'Trafficking in Persons' report, Malaysia was observed to have stopped all deportations to Thailand over the land border, thus improving its compliance with the norm of *non-refoulement*.[135]

Behind closed doors, when prompted in advance of the report's release, Malaysian officials drew attention to the broader question of the "pull factors" created by housing refugee, as reasons for their critical actions.[136] Nevertheless, once the report was released,

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[134] Peter Billings, Anthony Cassimatis, and Marissa Dooris, "Irregular Migration, Refugee Protection and the 'Malaysian Solution,'" in *Protection of Refugees and Displaced Persons in the Asia Pacific Region: Shifting Powers*, ed. Angus Francis and Rowena Maguire (Surrey: Ashgate, 2013), 145.
[135] U.S. Senate Committee on Foreign Relations, "Trafficking and Extortion of Burmese Migrants in Malaysia and Southern Thailand" (US G.P.O., April 3, 2009), http://www.gpo.gov/fdsys/pkg/CPRT-111SPRT48323/pdf/CPRT-111SPRT48323.pdf; Crisp, Obi, and Umlas, "But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia," 14.
[136] US Embassy Kuala Lumpur, "STAFFDEL LUSE DISCUSSES TRAFFICKING OF BURMESE," September 10, 2008, 08KUALALUMPUR799, https://www.wikileaks.org/plusd/cables/08KUALALUMPUR799.html.

not only was the Director General of Immigration 'furious' about its contents; the Minister of Home Affairs assured US officials that Malaysia would 'do whatever it would take' to improve its ranking and reputation on these issues.[137] Earlier in 2006, the Malaysian Government announced new anti-trafficking in persons measure, which included the setting up of a new interagency coordinating committee; this was also a response to a then-decline in Malaysia's Trafficking in Persons Ranking.[138] Certainly, the continued assurance of resettlement places has been key, including an informal agreement among the United States, UNHCR, and Malaysian Government to resettle Chin refugees from Malaysia in exchange for issuing temporary residence permits to Rohingya; both groups of refugees originating from Burma.[139]

Of the residual Filipine population in Sabah from the Indochinese period, an estimated 61,000 remained in 2006.[140] After UNHCR closed its office in 1987, not all of those present were able to obtain residence permits; others have had issues renewing them, and many children remain undocumented.[141] The 1997-1998 financial crisis appeared to put strain Malaysia's hospitality, as a legalisation drive was instituted during this period. A 2000 kidnapping by Moro separatists led to a clamping down of relations, including a

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137 US Embassy Kuala Lumpur, "MALAYSIA'S INITIAL REACTION TO TIP REPORT, TIER 3 DESIGNATION," June 17, 2009, 09KUALALUMPUR491, https://www.wikileaks.org/plusd/cables/09KUALALUMPUR491.html.
138 US Embassy Kuala Lumpur, "MALAYSIA ANNOUNCES NEW ANTI-TIP MEASURES DURING VISIT BY A/S SAUERBREY," September 6, 2006, 06KUALALUMPUR1661, https://www.wikileaks.org/plusd/cables/06KUALALUMPUR1661.html; Interview with Hasanah and Sulaiman.
139 US Embassy Kuala Lumpur, "UNHCR In Malaysia: The Honeymoon Is Over," March 9, 2007, 07KUALALUMPUR448, https://www.wikileaks.org/plusd/cables/07KUALALUMPUR448.html.
140 Nah, "Seeking Refuge in Kuala Lumpur," 150.
141 UNHCR, "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia."

revocation of status in 2001, stating that the Filipinos continued status was conditional on securing work permits.[142]

Policy differed yet again for Acehnese refugees and asylum seekers. In 2003, thousands of Acehnese fled hostilities between the Acehnese Independence Movement and the Indonesian Government, arriving in Malaysia; at one point almost 700 Acehnese approached UNHCR per day such that a particular date was designated for them.[143] The Minister of Foreign Affairs stated that Malaysia stood with the Government of Indonesia to prevent more from coming – that they were not refugees –while the Indonesian Security Minister Yudhoyono called on Malaysia on that same day to reject Acehnese asylum seekers, in order to reject Indonesian territorial integrity and not support the Free Aceh Movement. After a meeting with the then President, Prime Minister Mahathir reaffirmed that Malaysia would not grant them asylum, noting 'they are not refugees.'[144] When in 2005 following cessation of hostilities, the Malaysian government felt comfortable enough to grant up to 35,000 work permits to Acehnese asylum seekers for up to two years, to stay and work.[145] It seems that with the spectre of political recriminations diminished, the Malaysian government felt that with the signing a peace agreement in Aceh, it was no longer open to accusation of interfering in Indonesia – and thus could include Acehnese refugees in the process of documenting them for work permits.[146]

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[142] Kaur, "Refugees and Refugee Policy in Malaysia," 87.
[143] Nah, "Struggling with (Il)Legality: The Indeterminate Functioning of Malaysia's Borders for Asylum Seekers, Refugees, and Stateless Persons," 45.
[144] Ibid., 45–47.
[145] Kaur, "Refugees and Refugee Policy in Malaysia," 88.
[146] Nah, "Struggling with (Il)Legality: The Indeterminate Functioning of Malaysia's Borders for Asylum Seekers, Refugees, and Stateless Persons," 52.

With regard to Uighurs from China, the Government has shown a strong proclivity to violate *non-refoulement*; it appears the 2009 report has no influence here, as the Government later deporting 11 and then six individuals in 2011 and 2012, respectively. [147] An official from the National Human Rights Commission made note of the sizeable economic and diplomatic ties between the two countries, suggesting this might materially influence Malaysian propensity to *refoule* individuals of these group: in the choice of regime compliance and potential economic and diplomatic recrimination, from a partner as important as China, then, it hardly seems a choice at all. [148]

C. **CONCLUSION**

Ultimately, there is a remarkable degree of continuity in Malaysian policy in the contemporary era: While there have been limited attempts at improving compliance, they have more often been on the side of rhetoric, rather than actual policy practice. Refugees continue to be considered largely through the lens of national security first and foremost, particularly in cases that are more likely to rise to the level of inter-governmental disputes.[149]

[147] UNHCR, "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia," 5.
[148] Nurul Hasanah, Deputy Secretary for Policy, Law and Complaints and Shahizad Sulaiman, Principal Assistant Secretary, Policy, Law and Complaints, SUHAKAM (National Human Rights Commission), interview.
[149] Crisp, Obi, and Umlas, "But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia," 10.

4. CONCLUSION: MALAYSIA AND ITS LACK OF REGIME MEMBERSHIP

When queried earlier this year, the Malaysian Ministry of Foreign Affairs tersely noted Malaysia does not have a policy on refugees and asylum seekers, considering them illegal migrants. Only on a case-by-case basis, and on 'humanitarian grounds', does it cooperate with UNHCR to resettle them. This was the extent to which the Government was willing to formally allow that regime norms might, formally, bind its acceptance of refugees[150] Indeed, in the absence of formalised institutionalisation of any refugee or asylum seeker processes, regime compliance remains ad-hoc and carefully negotiated in both periods. During the Indochinese crisis, the dynamics of the Suasion game help underscore, as in other country cases, the importance of continuing compliance being contingent on resettlement spaces – and Malaysia's willingness to defect in such short-term instances, in order to extract more sustained co-operation on the part of resettlement States. Generally, it appears that the bulk of compliance behaviour is more a feature of coincidence of interest; the fact that Malaysia has made appeals to attempt to regularise and legalise refugee populations (if fitful), suggests more a pragmatic attempt to address a festering issue. This is reinforced by the continuing insistence that the regime norms are not Malaysian custom. Perhaps the only continuing normative element of both the Indochinese and contemporary periods is that the propensity toward hospitality toward those of religious kin (Islam), appears to have a countervailing impact on compliance . Less certain is the role of reputation and international legitimacy, which, while appearing to have influenced actions in 2009 and 2015, remains hard to directly trace.

[150] E-mail correspondence, Sarah Albakri Devadason, Undersecretary, Human Rights and Humanities, Ministry of Foreign Affairs Malaysia, February 19, 2016.

CHAPTER 4: THAILAND
FROM RELUCTANCE TO PRAGMATISM

1. INTRODUCTION

Thailand has, like other non-Parties examined, provided sanctuary to refugees and asylum seekers, also on a temporary basis, conditioned strongly by what it often refers to as 'humanitarian conditions'.[151]

During the Indochinese refugee crisis, Thailand functioned primarily as a point of transit for Vietnamese asylum seekers, differentiating its treatment of Laotian and Cambodian asylum seekers, in part a function of its. During this time, Thailand served as a place of asylum for approximately 500,000 persons.[152]

In the contemporary period, Thailand's policy has made strides toward improved compliance: In instituting the PABs for refugees and asylum seekers from Burma, the country has moved toward greater relative compliance as regards RSDs; however, UNHCR remains responsible for those outside the camps and from other countries of origin. As in the past, a willingness to work with foreign officials, particularly the United States, suggests both that Thailand's policy is governed first and foremost by a level of political pragmatism, while secondarily suggesting some recognition that non-compliance's consequences for Thailand's reputation are not inconsequential. The most recent UNHCR estimates put the number of refugees and asylum seekers in the Thailand at 118,538 persons.[153]

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[151] Sutter, *The Indochinese Refugee Dilemma*, 130.
[152] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 126.
[153] UNHCR, "Thailand," June 2015, http://www.unhcr.org/pages/49e489646.html.

On balance, the Thai case provides a further cautious illustration of the fact that withholding formal commitment to the regime allows a State a degree of policy flexibility. Certain policy choices have been made in line with regime norms, such as the provision of temporary refuge and assistance to Indochinese, Burmese and other populations. Yet these are joined by a laundry list of actions running afoul of the regime, as in the Malaysian case. Compared to Malaysia, Thailand does seem more acutely aware of its international reputation; this is a finding that emerged in both periods under examination, as officials often expressed willingness to pursue pragmatic solutions alongside UNHCR, provided this took place out of sight of the general public.

2. THAI REFUGEE POLICY DURING THE INDOCHINESE REFUGEE CRISIS

In this period, Thailand received the most number of refugees and asylum seekers from the region, predominantly from the constituent Indochinese countries: Vietnam, Cambodia and Laos. [154] Its treatment of these populations varied, in part as a function of resettlement spaces, but also, as regarded the Cambodian and Laotian populations, in relation to its foreign policy objectives for the former, and the perceived shared heritage with the latter.

[154] Hazel J Lang, *Fear and Sanctuary: Burmese Refugees in Thailand* (Ithaca: Cornell University Press, 2002), 86.

A. DOMESTIC CONTEXT

Thailand signed its first agreement with UNHCR in July 1975, responding to an initial influx of refugees camped along the Lao and Cambodian borders.[155] Thailand pledged to provide *temporary* assistance, consisting of food, shelter, and other subsistence provisions; for its part, UNHCR pledged to seek out solutions either via voluntary repatriation or resettlement to third countries. Significantly, there was no agreement to provide asylum or protection; at best, there was an emphasis on voluntary repatriation, should it become feasible at a future date.[156]

That same month, the Thai Cabinet established it was simultaneously undesirable to allow such displaced persons to stay; stating '[t]hose that come should be pushed out again as soon as possible. When this cannot be done, they must be confined in a displaced persons' camp.'[157] In early 1979, responding to a rising influx of Indochinese refugees – camp populations rose from 25,000 persons in 1977 to over 173,000 in June 1979; 50,000 of which had arrived within the first six months. Thai Government joined other Southeast Asian States beginning to push back refugees, with Royal Navy Officials candidly admitting that aircraft flew missions thrice daily, and, if boats were spotted, they then instructed patrols to intercept them. [158]

[155] Davies, *Legitimising Rejection*, 92.
[156] Involuntary repatriation would be tantamount to *refoulement*. Robinson, *Terms of Refuge*, 20; Lang, *Fear and Sanctuary*, 93.
[157] Robinson, *Terms of Refuge*, 43.
[158] Davies, *Legitimising Rejection*, 95; 105; Robinson, *Terms of Refuge*, 43.

Thailand joined the other States at the 1979 Conference, in trading dramatically increased resettlement spaces from developed states for, on paper, agreeing to respect the principles of asylum and *non-refoulement*.[159]

Despite this qui-pro-quo agreement, it should be underscored Thai policy remained rooted in broad-based policy known as 'humane deterrence', introduced in 1980, and consisting of four main principles: closure of the border to new arrivals, keeping illegal entrants in camps as austere as possible, the general denial of resettlement, and minimal subsistence-level treatment and provision.[160] While this policy was to be modified, particularly as regards the question of resettlement, in the years prior the CPA's implementation, Thailand's tenuous negotiation of refugee policy was already clear, and strongly predicated on the continued availability of resettlement places.

Reluctance by Thailand to ratify the Convention was later noted 1986, when internal UNHCR communications suggested non-accession was in part due concerns ratification would only exacerbate concerns about national security and resource scarcity; significantly, given Thailand's fraught relationship with the International Court of Justice (ICJ), which had ruled against Thailand in a sovereignty dispute over a Temple, concern was also expressed over Article 38 of the Convention, which allows the ICJ to resolve all Convention disputes. At the time, the Bangkok office thus suggested a gradual, low-key approach to the winning over the Thai government was most likely to prove successful.[161]

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[159] Davies, *Legitimising Rejection*, 86; Arthur C. Helton, "Asylum and Refugee Protection in Thailand," *International Journal of Refugee Law* 1, no. 1 (1989): 23–24.
[160] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 129.
[161] UNHCR, UNHCR Bangkok to HICOMREF Geneva, "Cable," February 5, 1986, 671.1 THA, THA/HCR/0605, Series 3, Fonds UNHCR 11. Regarding the Temple of Preah Vihear case, see *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992), 132.

While boat arrivals decreased between 1983 and 1987, the tentativeness of the 1979 agreement became clear in 1987.[162] Early that year, in a letter to the HC, the Thai MFA underscored its intention to uphold Thai sovereignty. Referring to two groups of Laotian Hmong refugees, Minister Savestila highlighted Thailand's sovereign prerogative, declaring matter-of-factly that 'Thailand will brook no interference in these, her internal affairs'. In the same note, however, referring to one group of several hundred Hmong, the Minister assured the HC he was '[m]indful' that as these resistance fighters may well have 'well-founded fears of persecution in Laos', Thailand was on that basis, willing to grant them 'temporary refuge'. However, in light of what the Minister termed Thailand's continued acceptance of this 'humanitarian burden', he pressed for the 'international community's fully honouring its own promises to share the burden of refugee and asylum seekers in the region.'[163]

This letter exemplifies a hypocrisy, in rhetoric and practice, in Thai refugee policy: not only were norms of the regime—if only temporarily—acknowledged, but, reference was made to language ('well-founded fear of persecution') strongly echoing the Convention criteria for refugee status. At the time, it was also documented that the government allowed limited educational opportunities, as well as permitted the employment of some asylum-seekers, though the precise manner in which this was practiced remains unclear.[164]

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[162] Davies, *Legitimising Rejection*, 170; 191.
[163] Thailand Ministry of Foreign Affairs, "Letter from Minister to High Commissioner Hocke," April 14, 1987, Folio 17, 010.THA, Series 3, Fonds UNHCR 11.
[164] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 133.

In any event, the appeal to Thailand's authority as final arbiter of its sovereignty vis-à-vis its border and refugees left little doubt as to the where the balance lay in dictating refugee policy: when in late 1987 Minister of Interior Suntrangkooon visited a camp faced with overcrowding and concerns of smuggling, he stated no more boat people would be permitted to land; by year's end, an estimated 1,000 refugees and asylum seekers had been pushed back, despite attempts by UNHCR to intercede on their behalf.[165] As the number of landings surged region-wide, Thailand was not spared, with camp sizes growing from 6,500 to 15,000 persons – at a rate of more than 500 arrivals a week – by January 1988.[166] In the following year, pushbacks continued, with at least 1,500 boats pushed back in the first six weeks, resulting in the deaths of at least 150 refugees. [167]

In February meetings with MFA Director General for International Organisations Khun Pracha, UNHCR pressed for answers regarding the continuing push backs of boats—in violation of the 1979 agreement. Pracha again referenced the delicate need to balance national security and humanitarian principles, stressing the National Security Council (NSC) was under pressure from hardening public opinion, and that continued inflows would in turn only prompt a harsher lines from conservative parliamentarians, further forcing policymakers' hands. Lamenting the sense Thailand's position was shifting from one of temporary asylum to one of final refuge, he was nevertheless willing to acknowledge the seeming hypocrisy in saying one thing, and doing another, cognisant that this could implicated Thailand's international credibility.[168]

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165 Helton, "Asylum and Refugee Protection in Thailand," 27–28.
166 Ibid., 26–27.
167 Ibid., 27–8; Robinson, *Terms of Refuge*, 182.
168 UNHCR Bangkok to HICOMREF Geneva, "For Homann-Herimberg," September 2, 1988, 1, THA/HCR/0219; Folio 24, 010.THA, Series 3, Fonds UNHCR 11; UNHCR Bangkok to HICOMREF Geneva, "For Homann-Herimberg."

A month later, a Memorandum of Understanding (MoU) between the Thai Government and UNHCR was signed, acknowledging Thailand's provision of shelter to boat people landing in Thailand.[169] In negotiations, Thai officials stressed continuing concern with internal political pressure, at one point dramatically emphasising, in reference to potential *public* correspondence from the HC, 'if you push us against a wall, it may jeopardize our future relationship [with UNHCR].'[170]

While at this point in 1988 the Government claimed to have stopped pushbacks, as late as June of that year, an internal directive leaked from the Ministry of Interior revealed otherwise: interdiction and redirection of boats was current policy; only when it proved impossible to push them off would they be allowed to proceed to camps, and even then, as "illegal immigrants"" Vietnamese were subject to prosecution and deportation.[171]

As pressure mounted to resolve the region's pushbacks, ahead of the 1989 Conference, UNHCR's Asia Bureau Head met with MFA representatives. When he floated the possibility of UNHCR's being more vocal in its public disapproval of ASEAN states behaviour, Thai representatives counselled caution once again, stressing that further public pressure could be perceived as undue external pressure; and, were this to happen,

[169] Helton, "Asylum and Refugee Protection in Thailand," 29.
[170] UNHCR Bangkok to HICOMREF Geneva, "Meeting with Khun Pracha," March 28, 1988, THA/HCR/0518; Folio 25, 010.THA, Series 3, Fonds UNHCR 11.
[171] Davies, *Legitimising Rejection*, 192; UNHCR Bangkok to HICOMREF Geneva, "ATTENTION: VIERRA DE MELLO/MOUCHET," April 7, 1988, THA/HCR/1051; Folio 28, 010.THA, Series 3, Fonds UNHCR 11.

this would spur the Thai government to take unilateral actions, so as to not lose face at home.[172]

At a November ExCom meeting, Thailand noted it was becoming 'increasingly apparent that the norms and principles formulated at an earlier time in one part of the world and under a particular set of circumstances…' were not longer relevant, hence, a new conference was necessary to produce to 'deal in a realistic yet humanitarian manner'.[173]

With the CPA agreed in June of 1989, as if to underscore the quid-pro-quo nature of the agreement, Thailand successfully pushed for inclusion of a sentence in the final draft that noted the necessity of co-operation and burden-sharing, in a set of 'mutually re-enforcing humanitarian undertakings...*in its totality rather than selectivity*.' [174] Remarkably, with the CPA's signing in 1989, documented pushbacks all but abated in much of the region, save for Malaysia (as above)[175] While isolated cases of push-backs continued, with UNHCR raised these in private, records reveal Thai officials generally abided by the terms of the agreement. [176]

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[172] UNHCR Bangkok to HICOMREF Geneva, "Note for the File: Meeting of Mr. S. Vieira de Mello with Representatives of ASEAN Working Group and RTG Ministry of Foreign Affairs," September 29, 1988, THA/HCR/1504; Folio 28, 010.THA, Series 3, Fonds UNHCR 11.
[173] Davies, *Legitimising Rejection*, 190–191.
[174] Emphasis added. UNHCR USA to HICOMREF Geneva, "Draft Declaration and Comprehensive Plan of Action Comments/Amendments," February 8, 1990, USA/HCR/0091; 391.89, Series 3, Fonds UNHCR 11.
[175] Robinson, *Terms of Refuge*, 191.
[176] UNHCR Bangkok to HICOMREF Geneva, "Note for the File: Meeting with Ministry of Interior," February 8, 1990, THA/HCR/1184; Folio 46, 010.THA, Series 3, Fonds UNHCR 11; Robinson, *Terms of Refuge*, 221.

However, while this overall narrative held predominantly for Vietnamese asylum seekers, particularly those of Laotian and Cambodian origin, was remarkably different; this is further discussed at length below.

B. EXTERNAL RELATIONS

In the Indochinese period, the most important elements in Thailand's external relations that shaped its regime compliance remained the provision of resettlement places. Thus Thailand argued, along with Indonesia, in advance of the rise in migrants in the late 1970s, Indonesia that the reception of boat people would only presage a greater influx – and that, in fact the problem was not one for ASEAN itself to deal with alone.[177]

As discussed earlier, while much of the policy was contingent on resettlement for Vietnamese refugees, first in 1979 and again towards 1989, Thailand also was host to at least 62,000 Laotians, held in four camps along the Thai-Lao border.[178] While also largely considered 'illegal immigrants' and subject to pushbacks corresponding to the rise in flows documented in 1979 and 1989, owing in part to existing domestic kin in Thailand – as well as considerations that Laos was neither in a position to use them instrumentally nor intervene on their behalf, treatment of this population was viewed as better. [179] Significantly, and, unlike Cambodian or Burmese individuals, Thailand established a screening procedure for Laotians July 1985, by which 'genuine refugees' would be differentiated from 'economic migrants'; UNHCR was allowed to observe this process,

[177] Davies, *Legitimising Rejection*, 93.
[178] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 127; Helton, "Asylum and Refugee Protection in Thailand," 30.
[179] Helton, "Asylum and Refugee Protection in Thailand," 31–32; Suhrke, "The 'High Politics' of Population Movements: Migration, State and Civil Society in Southeast Asia," 193–94.

and contra the policy of humane deterrence, the aim with this population was also to resettle them.[180] Until the CPA, the criteria for screening was based less on the notion of persecution (in line with regime norms) but instead four specific examples relating to one's professions or, participation in activities antagonistic toward the Laotian Communist government, or ties to foreign embassies, organisations, or relatives in foreign countries: this was a criteria more in line with United States resettlement criteria, than Convention principles.[181] Furthermore, this population was not immune to pushbacks; in just one example in July 1987 Thailand clamped down on its hospitality, citing the reduction of resettlement on the part of Western states.[182]

Owing to long-standing Thai-Vietnamese rivalries, over 300,000 individuals from Cambodia were also permitted to straddle the Thai-Cambodia border. [183] Many of these were direct and indirect supporters of the Khmer Rouge and anti-Democratic Kampuchean forces; both the United States and other ASEAN nations funnelled support to the anti-Democratic Kampuchean forces, while China shored up the Khmer Rouge; they were thus perceived by the Thai state as an effective buffer against the SRV-installed People's Republic of Kampuchea. [184] This was especially the case as, in the words of one observer, Thailand felt the outcome in Cambodia could still be materially influenced as compared to Vietnam.[185]

[180] Helton, "Asylum and Refugee Protection in Thailand," 31.
[181] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 130.
[182] Helton, "Asylum and Refugee Protection in Thailand," 32; Sutter, *The Indochinese Refugee Dilemma*, 114–115.
[183] Sutter, *The Indochinese Refugee Dilemma*, 77.
[184] Lang, *Fear and Sanctuary*, 88.
[185] Suhrke, "The 'High Politics' of Population Movements: Migration, State and Civil Society in Southeast Asia," 193.

Finally, at least 7,400 Burmese dissidents, who fled the State en masse following a 1988 crackdown on student demonstrators, were also considered differently: owing to a special relationship and a sensitivity to Burma, its immediate neighbour, Thailand permitted students temporary residence, promising that any repatriations would be voluntary, with the Thai Foreign Minister explaining, 'If we push them back now, they will be killed.'[186] Yet even this was not a stable situation, as in 1990 a change of policy resulted in *refoulement*, in addition to arrests taking place and the establishment of a camp.[187] It was speculated Thailand did not want the issue to be further internationalised beyond the relations between the two countries; hence, UNHCR and other I(N)GOS were not permitted to access this population at this time, even if those UNHCR designated as persons of concern were permitted to stay in the country. [188]

C. CONCLUSION

In the Indochinese period, Thai policy was largely. Although reference was made to the regime criteria regarding Laotian asylum seekers, the same could not be said for Vietnamese refugees, for whom Thailand was more than willing to *refouled* once arrivals began to outstrip resettlement, as a means of extracting further concessions from Northern States Thailand was adamant, on more than one occasion, bore a direct responsibility to manage these outflows. The allowance of Cambodians to straddle the Thai-Cambodian border reminds us that, in the first instance, Thailand's relative compliance was a function of its coinciding with its self-interest.

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[186] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 127; UNHCR Bangkok to HICOMREF Geneva, "Note for the File: Meeting with Kasit Piromya," November 25, 1988, THA/HCR/1862; Folio 31, 010.THA, Series 3, Fonds UNHCR 11; The Nation, "Government Grants Burmese Students Temporary Refuge," November 23, 1988, 001.Vierra De Mello, Series 3, Fonds UNHCR 11.
[187] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 130.
[188] Ibid., 131, 140.

3. THAI REFUGEE POLICY IN THE CONTEMPORARY PERIOD

In the contemporary period, Thailand has, absent a mass-influx of refugees, retained its unilateral reservation to determine refugee policy as it sees fit. Often, this has been weighted more toward the coincidence of interest, especially as relates to the provision of refuge itself. Occasional influence by the United States, a key resettlement partner, suggests the role of external relations also has a role to play in explaining regime compliance. Generally speaking, however, Thailand's posture and compliance seems as much contingent on the need to balance its relative interests, as it is the provision and compliance with the norms of the regime.

A. DOMESTIC CONTEXT

This is seen particularly as regards Thailand's complicated use, disuse and continued revision its Provincial Assessment Boards ("PABs"), a mechanism established in the early 1990s to screen Burmese refugees into one of nine camps along the Burmese border. It should be underscored that unlike the Indochinese period, during which the CPA and screening mechanism for Laotian asylum-seekers were put into place, apart from the PABs, Thailand does not maintain a legal framework to manage the presence of refugees and asylum seekers outside of the camps. Indeed, UNHCR is held responsible for all RSDs otherwise.[189] Thus, as regards the prospects of arrest and detention, either at the point of entry or if their stay exceeds the designated period allotted, this remains a persistent worry. This is also the case with the provision of work permits, which are

[189] UNHCR, "Thailand," *Global Focus*, 2016, http://reporting.unhcr.org/node/2552.

strictly not allowed for those outside camps, who as of this writing number at least 300 recognised by UNHCR. [190]

With regard to the PABs, the mechanism is illustrative of the gradual shifts depending on how various external events have influenced domestic thinking. For example, when in 1996 ceasefires were concluded among rebel groups and the State in Burma, the Thai government used this as a pretext to involuntarily repatriate refugees, in direct contravention of *non-refoulement.* [191] In November 1997, the government further engaged in *refoulement* of ethnic Karen minorities to Burma; when criticised, the government went to great lengths to characterise this as not an action qualifying as *refoulement*—even as it promised to further improve in future instances. [192]

A year later, Thailand formally permitted UNHCR to assist its management of Burmese refugees on a more permanent, systematic basis. This was attributed in part to a deteriorating security situation on the border, but also a desire to address the protracted situation of Burmese refugees in Thailand – and a sense that with the conflict in Burma continuing, repatriation was no longer a likely solution in the near future. [193]

During this time, UNHCR's role was largely advisory, assisting in the re-construction of the PABs, which had to this point fallen into disuse. At this juncture, the Government-imposed criteria for admission covered "people fleeing fighting." [194] While not exactly

[190] E-mail correspondence, Jennifer Bose, Associate Reporting Officer, UNHCR Thailand, April 7, 2016.
[191] Sebastien Moretti, "The Challenge of Durable Solutions for Refugees at the Thai–Myanmar Border," *Refugee Survey Quarterly* 34, no. 3 (September 2015): 81.
[192] Lang, *Fear and Sanctuary*, 123.
[193] Ibid., 94–5.
[194] Moretti, "The Challenge of Durable Solutions for Refugees at the Thai–Myanmar Border," 73–4.

the language of the Convention, which speaks of a well-founded fear of persecution, it is notable that such criteria was adopted at all, suggesting the Thai government required a pragmatic means by which to address a process that was otherwise continuing to fester.

While in 2004 changes in the Burmese regime create hope that repatriation was an imminent possibility, in light of subsequent failures for reform to take place in Burma, by 2005 Thai officials privately conceded that alternate solutions to a now-protracted situation were in order.[195] If it seemed Thai officials were now making provisions for, again, this was the case only because other, preferred avenues were, in the eyes of the government, not sustainable solutions. And, indeed, in 2009, the Ministry of Interior reconstituted the PABs, beginning a new, piloted program of registration. Yet, as these registrations were never formally approved by authorities, arrivals post-2005 have been left unregistered, leaving this population in procedural limbo.[196]

Furthermore, it should be noted that ethnic Rohingya, a particularly persecuted Burmese minority, were pushed back on several occasions in 2009 and 2010, before Thai policy shifted in 2011 to handing them over to smugglers—or redirecting them elsewhere, including Malaysia.[197] In a public statement, Prime Minister Abhisit noted though often 'portrayed as refugees…they are in fact very much like economic migrants...[a]nd every country has a right to turn people away.'[198]

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[195] Gil Loescher et al., *Protracted Refugee Situations Political, Human Rights and Security Implications* (New York: United Nations University Press, 2008), 318.
[196] Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers," September 2012, 21–22, http://www.hrw.org/sites/default/files/reports/thailand0912.pdf.
[197] Ibid., 21.
[198] Ibid., 21; 75.

More recently, despite the fact most recent UNHCR assessment suggests that the principle of non-refoulement has been upheld since 2015, at least as regards those populations in the camps, it should be noted that Thailand, joined by Malaysia and Indonesia, in turning back boats of an estimated 6,000 asylum seekers in the Andaman Sea.[199] While all three states eventually relented, it was notable that Thailand joined the latter two only belatedly in stating that it would not longer push back boats and continue to assist in the provision of humanitarian assistance.[200]

It should also be noted that while much of the contemporary narrative is dominated by persons of Burmese origin, those from other countries of origin, while never completely safe from detention and deportation, receive comparatively fairer treatment, both while awaiting adjudication of their asylum claims, and thereafter: execution of deportation orders is simply not as swift. [201] Thus, for populations that makeup more peripheral, minor components of the refugee and asylum seeking populations—so long as they don't intrude on the high politics of Thai Foreign policy, while far from ideal, receive qualitatively different treatment.

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[199] UNHCR, "Thailand," 2016; Simon Tisdall, "South-East Asia Faces Its Own Migrant Crisis as States Play 'Human Ping-Pong,'" *The Guardian*, May 14, 2015, http://www.theguardian.com/world/2015/may/14/migrant-crisis-south-east-asia-rohingya-malaysia-thailand.

[200] "Missing Migrant Boat Found as Countries Offer Shelter," *BBC News*, May 20, 2015, http://www.bbc.co.uk/news/world-asia-32806972.

[201] Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers," 7; Benjamin Zawacki, *Unseen Thailand: The Policies, Practices, and Conditions Governing the Detention of Asylum-Seekers and Refugees in Thailand, 1996-2004* (Bangkok, Thailand: Jesuit Refugee Service Asia Pacific, 2004), 87–102.

B. EXTERNAL RELATIONS

In mid-2003, in the context of the Government's pursuit of "constructive engagement" that sought improved ties with Burma, a decision was made to finally relocate urban Burmese refugees to the border camps, so as to better manage and circumscribe their activities. [202] This was after a number of other flashpoints domestically that included a siege-cum-hostage taking at the Burmese embassy by refugees in 1999, and a hostage situation that took place in early 2000—the sum of which inflamed relations between the Thai and Burmese governments.[203]

Nevertheless, in 2005, Thai policy changed once again, as the Government allowed the additional criteria that if individuals were found to be 'fleeing persecution', they were thus. At this point, it also formally permitted UNHCR a voting place on the PABs. [204]

The role of the United States in influencing policy in this period is instructive, both as it underscores the importance of resettlement to any putative compliance, but also as it reveals the potential ability to extract compliance: Behind closed doors, in approving a multi-year agreement to resettle Burmese refugees to the US, NSC chief Winai took the opportunity to emphasise the need for discreetness in US-Thai co-operation: in part, he said, to forestall unrest in the camps, but also, and more importantly, as Thailand felt it

[202] Human Rights Watch, "Out of Sight, Out of Mind: Thai Policy toward Burmese Refugees," February 24, 2004, 20, https://www.hrw.org/report/2004/02/24/out-sight-out-mind/thai-policy-towards-burmese-refugees-and-migrants.
[203] Gil Loescher and James Milner, "Refugees from Myanmar in Thailand," in *Protracted Refugee Situations: Domestic and International Security Implications* (Abingdon: Routledge, 2005), 58.
[204] Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers," 19.

could not afford to be seen in a public light to be. [205] As the Minister of Interior intimated separately, Thailand was already concerned with international perceptions about the treatment of existing camps, prompting its renewed efforts to improve refugee education.[206]

In late 2009, Thailand repatriated a number of Lao Hmong refugees. After US diplomatic officials published an opinion piece in the Bangkok Post, deploring the Act, the offices of both the Thai Prime Minister and MFA reacted strongly, immediately calling upon the Deputy Chief of Mission and Ambassador. Of note, Thai officials appeared considerably more concerned with the *public* nature of this act – than the content of the message, suggesting on the one hand the willingness to work through this issue – but also a consideration of the negative costs to its reputation.[207]

Early in February of 2010, US officials conveyed that the Administration and Congress would 'react strongly to involuntary Karen returns in the wake of the December Hmong repatriation.' [208]To this, the MFA Deputy Secretary General first expressed concern that refugee policies could potentially damage broader US-Thai relations, going on to note that Thailand's actions were based on the feeling that Thailand had an obligation to work with the Laotian authorities on what was, in principle, an issue of concern between these two States. As regarded the Karen population from Burma, he expressed the sentiment

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[205] US Embassy Bangkok, "Thai Give Approval To Prm Das Ryan For Burma Border Camp Refugee Resettlement Program," May 9, 2005, 05BANGKOK3073_a, https://www.wikileaks.org/plusd/cables/05BANGKOK3073_a.html.
[206] Ibid.
[207] US Embassy Bangkok, "Thailand: Mfa Reacts Strongly To Ambassador's Op-Ed On Hmong Pushback," January 14, 2010, 10BANGKOK411_a, https://www.wikileaks.org/plusd/cables/10BANGKOK114_a.
[208] US Embassy Bangkok, "Das Marciel Engages Thai Leaders On Bilateral Issues, Cambodia, Refugee Policy, Regional Architecture, And Burma," February 12, 2010, 10BANGKOK381_a, https://www.wikileaks.org/plusd/cables/10BANGKOK381_a.html.

that all repatriation would be voluntary (i.e. not running afoul of *non-refoulement*) though not explicitly mentioned). [209]

In a subsequent 2010 meeting of the US Ambassador and Commander of the U.S. Pacific Command, and Defence Minister Wongsuan, US officials again pressed their counterparts that speedy repatriation of the Karen to Burma—rumoured to be taking place that same day—would only 'exacerbate international concern', emphasising the 'right thing to do' was to provide UNHCR the requisite time to continue screening this population. After lamenting that Thailand's geographic location predisposed it to receive many 'displaced persons' from its neighbours, the Thai Defense Minister committed to discussing the possibility of halting the repatriation with his NSC counterparts. [210] Shortly thereafter, the Bangkok Post reported the deportation was called off, after local authorities received a call from the Defence Ministry. The newspaper's defence ministry sources concurred the suspension was a result of the US request, strongly suggesting this pressure indeed had an impact. [211]

Finally, the 2015 pushbacks of the Burmese Rohingya, as discussed earlier and in other chapters, further underscores the importance of resettlement spaces in conditioning Thailand's provision of asylum.

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[209] Ibid.
[210] US Embassy Bangkok, "Admiral Willard's Visit To Thailand: Importance Of Bilateral Ties Highlighted," February 18, 2010, 10BANGKOK411_a, https://www.wikileaks.org/plusd/cables/10BANGKOK411_a.html; "REFUGEES - Karen Deportations Put on Hold," *Bangkok Post*, February 6, 2010.
[211] "REFUGEES - Karen Deportations Put on Hold."

4. CONCLUSION

Thailand serves as a cautionary tale of ascribing the compliance behaviour of the State as a function of its being party to formal obligations of the regime. Despite never becoming a party to the regime, throughout the Indochinese and into the contemporary period, Thailand has shown signs of. During the Indochinese crisis, in comparison to other countries in the region, Thailand's record was decidedly mixed: It did provide temporary first asylum, especially so for those that were in its coincidental interest, such as the sizeable population of, or, indeed, fit the criteria. This is largely mimicked today.

Ultimately, the Thai case then serves as a cautious reminder as to why a State may comply, but refuse to become a signatory: Thailand's treatment of refugees remains something in the ambit of the government of the day, subject to. Although Thailand has also exhibited consideration for its international reputation and has at times been compelled to call off planned refoulement, it remains that the Thai narrative seems more a question of growing resignation, and a consequent pragmatism, than one of outright acceptance of regime norms. The representative from UNHCR notes Thailand has regularly stated its goal of meeting international responsibilities, either through existing law or minor policy updates so as to address its national security concerns and redress the legal gap that exists. Yet this is also, in the more recent period, compounded by the uncertainty forged by the fact that the military government took over – suggesting any behaviours observed today remain far from entrenched.[212]

[212]E-mail correspondence, Bose.

CHAPTER 5: INDONESIA
FROM BURDEN-SHARING TO SEEMINGLY EMPTY RHETORIC— AND AUSTRALIAN COERCION

1. INTRODUCTION

Like Malaysia and Thailand, Indonesia has not become a Party to the regime, and serves as the third such window into the compliance behaviours of a non-Party State.

During the Indochinese refugee crisis, Indonesia functioned as a country of first asylum, initially receptive to flows of refugees, but, like Malaysia and Thailand, quick to derogate from regime norms, notably *non-refoulement*, in the face of marked increases in arrivals. Like the other ASEAN States, Indonesia was party to the 1979 Conference and the CPA. Like the Philippines, it also set-up a camp to host refugees from other States in the region after the 1979 Conference; however, like Thailand and Malaysia, in this time it would not become a signatory to the Convention or Protocol. During this time, Indonesia served as a place of first asylum for over 122,000 refugees.[213]

In the contemporary period, Indonesia's compliance with the regime has continued on a path of ambiguity, at times displaying a stated willingness to potentially improve its compliance. In more recent years, however, a comparatively laissez-faire policy towards refugees and asylum seekers has given way to one that is increasingly more hard-line. To this end, the role of Australia, beginning in 2000, appears to have acutely influenced both Indonesia's willingness to receive refugees – and, in the more recent period, the further securitization of refugees and asylum seekers in Indonesia. The most recent

[213] Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia* (Baltimore, MD: ISEAS–Yusof Ishak Institute, 2015), 36.

UNHCR estimates put the number of refugees and asylum seekers in the Indonesia at 13,188 persons.[214]

Indonesia is perhaps the most indicative of a mix of the importance of coercion and acculturation: although in rhetoric, particularly in the contemporary period, there has been increased appetite for paying homage to regime norms, this has not always been matched by administrative and policy implementation. Furthermore, the role of Australia in colouring its contemporary policymaking also further suggests that, if anything, a significant animus to adoption of policy in line with the regime may remains a function of the Indonesian-Australian bilateral ties. In terms of compliance, however, given Australian policy has pushed Indonesia toward policy more favourable to detention and similarly regressive behaviour, this raises the spectre that coercion has actually had a regressive, rather than beneficial, influence on the State's regime compliance.

[214] UNHCR, "Indonesia," June 2015, http://www.unhcr.org/pages/49e488116.html.

A. DOMESTIC CONTEXT

Like Malaysia and Thailand, Indonesia refused to become a party to the regime, both in 1951 and later in 1967. First claiming ignorance of the regime's instruments, when later presented by UNHCR the details of the Convention and Protocol, Indonesia questioned its applicability to the Asian context.[215]

Nevertheless, Indonesia appeared to respect the principle of *non-refoulement*, both on paper and in practice: the first reported Indochinese refugees arrived in Indonesia the middle 1975, when a boat of 92 people passed through Indonesian waters; from then, a daily stream would arrive on Indonesia's various islands. [216] Entry at this point was ostensibly governed in part by existing immigration legislation, which precluded the arrival of aliens without passports or who were uncertain if they could return home, as well as a specific policy directive issued in 1975, which noted refugees entering through unrecognised channels could be 'considered on humanitarian grounds' in order to 'guarantee their safety', noting that it was against 'international practice' return them when facing danger – while also acknowledging the desire for them to stay in Indonesia only on a temporary basis. [217]

However, a survey of the practical application of this directive reveals a different narrative; indeed, most provisions were not invoked for asylum seekers, out of fear of creating the impression that local assimilation was a viable option. [218] Thus, as the number of boat arrivals rose, from 900 in 1977, to 3,700 in 1978, to over 48,600 in

[215] Davies, "The Asian Rejection?: International Refugee Law in Asia*," 572–3.
[216] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 31.
[217] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 108; 104.
[218] Ibid., 109.

1979, adherence to these provisions was severely undercut: by the second half of 1978, authorities launched 'Operation Lightning', a naval operation seeking to force new arrivals back out to sea, stemming the tide of what authorities worried was a situation fast growing out of control.[219] A directive issued in July of that year would further state refugees were now considered 'illegal immigrants.' [220] The case of the *Hai Hong,* a ship with 2, 240 asylum seekers from Vietnam – which was eventually dealt with by Malaysia (see *Ch. 3)* – proved a particularly poignant reminder that, Indonesia, too, had reservations about continuing to receive asylum seekers; the Indonesian Navy expelled the boat into international waters. [221]

This pattern of inconsistency continued. On the one hand, at the 1979 Conference, Indonesia agreed, along with the Philippines, to host a regional processing centre at Galang.[222] While a seemingly positive gesture – especially as Indonesia expressed a desire to lessen the burden on other Southeast Asian States – it is imperative to note Indonesia insisted any camps formed had to be funded, and administered by, UNHCR.[223] It is also worth noting that given Galang had only 200 Indonesians residing there prior to the camp's establishment: in the eyes of the Government, this could help mitigate the probability of tension among the domestic population.[224]

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[219] Davies, *Legitimising Rejection*, 104; Sutter, *The Indochinese Refugee Dilemma*, 148; Hugo, "Postwar Refugee Migration in Southeast Asia: Patterns, Problems, and Policies," 265.
[220] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 104.
[221] Davies, *Legitimising Rejection*, 100.
[222] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 31.
[223] Davies, *Legitimising Rejection*, 107; 119; Hugo, "Postwar Refugee Migration in Southeast Asia: Patterns, Problems, and Policies," 248.
[224] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 32.

Furthermore, in its capacity of an observer at a follow-up meeting of the ExCom, Indonesia underscored that countries needed to step-up efforts to, and numbers of refugees, resettled.[225] Indeed, in the remaining months of 1979, Indonesia was still observed pushing back refugees, arguing in private with UNHCR that the burden had become 'too heavy', unsettled local villagers, and thereby constituted a threat to national—and potentially regional political and economic stability.[226]

Thus, even as it established a Management Committee for Vietnamese Refugees, the Government continued to underscore its allowance remained not one permanent resettlement, but rather, was rooted in 'humanitarian' principles, and at that, was a gesture to host these Indochinese asylum seekers for – at most – three to five years.[227]

Efforts to get to get Indonesia to sign onto the regime were stalled in 1982, with UNHCR noting scepticism at all policymaking levels, including the President, meant the likelihood continued to be small.[228] In further engagements, it was noted Indonesia was worried by the burden that would come if it signed on, hoping to avoid what it had perceived to have taken place in the Philippines: upon accession, it perceived further international pressure came to bear on the Philippines to both rescue, and be more generous, in provisioning asylum.[229]

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[225] Davies, *Legitimising Rejection*, 120.
[226] Ibid., 120; 123.
[227] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 33.
[228] Davies, *Legitimising Rejection*, 134.
[229] Ibid., 138.

Indeed, authorities displayed a continuing reluctance to receive boat people from Vietnam, with the Foreign Minister claiming in 1986 that as Galang now counted over 10,000 residents, those now arriving were no longer refugees but instead were in pursuit of improved economic opportunities; this conclusion coincided with the decision to reduced to reduce Indonesia's burden sharing transfers from other States in the region.[230]

Thus, in 1988, Indonesia continued to stress that the international community needed to take responsibility for Indochinese boatpeople; by April pushbacks were once again observed, with at least 600 turned away from Indonesia arriving in Malaysia.[231] Meeting with the HC, the Indonesian Foreign Minister expressed displeasure with the rising arrivals, underscoring growing internal political unease.[232]

Like other ASEAN States, Indonesia was a party to the CPA. Yet as the CPA came into force, Malaysia was pushing back boats and, owing to proximity, many boats were towed by the Malaysian Navy to Indonesia, contributing to the tenfold increase in number of arrivals! [233] Having established 17 March 1989 as Indonesia's own cut-off date, after which arrivals would be subject to the CPA-mandated screening procedures, the Indonesian Government nevertheless held fast to a new policy of refusing to rescue any further boats at sea, also going as far as to also prevent UNHCR access to new

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230 UNHCR Indonesia to HICOMREF GENEVA, "Cable," January 6, 1986, INS/HCR/0005; Folio 3, 010.INS, Series 3, Fonds UNHCR 11; UNHCR Indonesia to HICOMREF GENEVA, "Reporting on UNHCR Activities in 1985-86 and Programming for 1986-87 (Chapter I) - General Information," January 6, 1986, 86/INS/HQ0055; Folio 5a, 010.INS, Series 3, Fonds UNHCR 11.
231 Davies, *Legitimising Rejection*, 191; Sutter, *The Indochinese Refugee Dilemma*, 150.
232 UNHCR Indonesia to HICOMREF GENEVA, "Note for the File: The High Commissioner's Meeting with the Indonesian Foreign Minister, Mr. Ali Al Attas," June 16, 1988, Folio 17, 010.INS, Series 3, Fonds UNHCR 11.
233 Davies, *Legitimising Rejection*, 204–205.

arrivals at Galang.[234] This despite numerous demarche attempts by UNHCR to reverse this policy. Without question, Indonesia was not far from adhering to the letter, much less the spirit, of the CPA.[235]

In 1992, Indonesia adopted Immigration Law No. 9, the effect of which was rather unclear: although it prescribed means by which foreign nationals in violation of regulations (i.e. lacking appropriate permits, awaiting deportation, or even awaiting repatriation), could be subject to immigration detention, in practice, it remained unclear as to how, or even if, it was formally applied to asylum seekers.[236] Furthermore, in 1993 Indonesia concluded an agreement with Vietnam to conduct an 'orderly repatriation of refugees deemed ineligible under the CPA procedures (so-called "screened-out" individuals). Finally, despite the fact that an additional agreement for 'cooperation' was noted in UNHCR in August 1996 year, this did not stop Indonesia from stepping up its policy of involuntary repatriations in the end of 1996, in line with the end of UNHCR funding region-wide for the CPA – a clear violation of *non-refoulement*.[237]

It should be noted that while the bulk of the refugees and asylum seekers during this period were Indochinese in origin, those from other countries of origin, were addressed on a case-by-case basis and not subjected to the same camps, like Galang, that Indochinese were subjected to. For this population, owing to their relatively small

[234] UNHCR Indonesia to HICOMREF GENEVA, "GOI Policy on Disembarkation of Rescue at Sea Cases," March 28, 1989, 89/INS/HQ/0078; Folio 20, 010.INS, Series 3, Fonds UNHCR 11.
[235] Davies, *Legitimising Rejection*, 199; UNHCR Indonesia to HICOMREF GENEVA, "Letter to Colonel Said," May 1, 1989, 89/INS/MISC/0095; Folio 21, 010.INS, Series 3, Fonds UNHCR 11.
[236] A. Nethery, B. Rafferty-Brown, and S. Taylor, "Exporting Detention: Australia-Funded Immigration Detention in Indonesia," *Journal of Refugee Studies* 26, no. 1 (March 1, 2013): 94.
[237] Davies, *Legitimising Rejection*, 40; Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 121.

amount, they generally were not, and thus are infrequently mentioned in the literature and archival record accessed by the author.[238]

Overall, the domestic environment, both as regards the more rationalist and constructivist perspectives, suggests less a triumph of regime norms, but instead a

B. EXTERNAL RELATIONS

Like Malaysia, Thailand and the Philippines, Indonesia's receptivity in this period, as regards *non-refoulement* and any other regime norms, was strongly tied to the availability of resettlement places provided by other States.

In advance of the rise in migrants in the late 1970s, Indonesia joined Thailand in arguing reception of boat people would only presage a greater influx – and that, in fact the problem was not one for ASEAN itself to deal with alone.[239] At a 1980 meeting with UNHCR, Indonesian officials spoke of the right to repatriate displaced persons, refuse entry, insisting that the case-by-case basis by which *non-refoulement* was practiced was in line with their understanding of humanitarian principles.[240] Further, they argued that since it was a humanitarian problem to be faced by world community, and that already burdensome to care for own, officials maintained the line that Indonesia could only provide temporary protection – and again, that this was contingent on UNHCR offers of assistance, resettlement. This was officials stressed, given that the

[238] For one, brief exception, see Vitit Muntarbhorn, *The Status of Refugees in Asia*, 111.
[239] Davies, *Legitimising Rejection*, 93.
[240] Ibid., 127.

solution was in the country of origin – not the host countries, which were just taking refugees out of the same goodwill and humanitarianism. [241]

At the same time, however, it was also noted that as Malaysia adopted a policy of redirection Indonesia worked to privately accept the ones Malaysia turned away, in an effort to help helping to diffuse the issue. It was speculated that its receptivity at Galang was part of Indonesia's bid to improve international standing, and in particular, President Suharto's desire to improve relations with US, as it was a significant partner; for the United States part, Indonesia was seen as a critical hedge against its oil dependence on the Middle East.[242] And yet, responsibility was initially attributed to the United States, as officials cited its initial involvement in Vietnam as the principal explanation for the exodus in first instance. [243]

C. CONCLUSION

Compared to Thailand and Malaysia, in this period Indonesia received fewer refugees. It also helped that asylum seekers tended to land on relatively remote island communities; that Galang itself was relatively underpopulated in part influenced the Government's ability to manage the influx.[244] The de facto temporary asylum that Indochinese asylum seekers were provided in this period was based on broader considerations of humanitarian assistance, rather than invocation of particular policy circulars – much less

[241] Ibid., 129–130.
[242] Suhrke, "Indochinese Refugees: The Impact on First Asylum Countries and Implications for American Policy," 21; Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, 122; 133.
[243] Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, 134.
[244] Sutter, *The Indochinese Refugee Dilemma*, 148.

the language of the Convention or Protocol norms. [245] The role of resettlement places underscored Indonesia's preference for being a state of first asylum, and was a trend that continued throughout the period, and as with other States, revealed the contingency of any asylum offered.

5. INDONESIAN REFUGEE POLICY IN THE CONTEMPORARY PERIOD

In the contemporary period, Indonesia's compliance with the regime has been largely consistent with the past. There have been rhetorical attempts at improving substantive administrative frameworks, but they appear mired in bureaucratic process—indicative of the relative stasis. Indeed, if anything, in recent years, on the back of bilateral cooperation with Australia, it appears that Indonesian policy has only hardened, representing something of a negative trend in regime compliance.

A. DOMESTIC CONTEXT

At the outset, the aforementioned 1992 Immigration Law was operative, until the passage of a 1999 Law on Foreign Relations. The latter not only mentioned the right to asylum, but further called for a presidential decree to regular asylum seekers and refugees; however, the implementation of procedures for granting asylum, in regard to international practice, have never been implemented: NGO staff intimate that although they have progressively worked with the Government on drafts of this—although a more 'humane' and 'realistic' policy is necessary—it remains not a priority.[246] This

[245] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 109; Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 157.

[246] E-mail correspondence, Lars Stenger, National Information & Advocacy Officer, Jesuit Refugee Service Indonesia, April 12, 2016; E-mail correspondence, Febionesta, Chair, & Trish Cameron, Legal Aid Coordinator, SUAKA (Indonesian Civil Society for Refugee Rights Protection), February 29, 2016; "Review Of States' Procedures And Practices Relating To Detention Of Asylum Seekers" (Lawyers Committee for Human Rights, September 2002), 46, www.rcusa.org/uploads/pdfs/Full_countryreview.pdf.

intransigence is all the more curious, given that a 2002 directive appeared to also implicitly recognised the norm of *non-refoulement,* in addition to stating that those applying for or seeking asylum or refugee status are to be referred to UNHCR for RSD, and that the status and presence of those containing UNHCR documentation was to be respected.[247] This was further echoed in a 2010 Immigration Directive, which recognised again the need to respect those carrying UNHCR documentation as well as the role of UNHCR and the Government, via a MOU.[248]

Observers note, however, that in large part, and until 2011, these directives were more formalities that acknowledged *already* existing administrative practices: in this time, indeed, detention seemed to be a rare, and, generally speaking Indonesian authorities complied with requests to stay deportations. [249]

Nevertheless, responsibility for asylum seekers remains the purview of UNHCR, which continues to perform RSDs.[250] This ambiguity was seen when 77 Burmese refugees landed on the coast of Aceh, on their way to Malaysia: Indonesia preferred the refugees would proceed to their destination – but feared the embarrassment, should something ill-fated occur. Eventually, a confidential gentleman's agreement with Indonesian

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[247] Directorate General of Immigration, "Directive From the Director General of Immigration No.: F-IL.01.10-1297 RE: Procedures Regarding Aliens Expressing Their Desire to Seek Asylum or Refugee Status," September 30, 2002, http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/84430/93867/F1603327642/IDN84430.pdf; Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 158.

[248] Directorate General of Immigration, "Regulation of the Director General of Immigration No. IMI.1489.UM.08.05 Year 2010 Regarding Handling of Irregular Migrants," September 17, 2010, http://www.refworld.org/docid/3ed8eb5d4.html.

[249] Lars Stenger, National Information & Advocacy Officer, Jesuit Refugee Service Indonesia, April 12, 2016; Taylor Savitri and Brynna Rafferty-Brown, "Difficult Journeys: Accessing Refugee Protection in Indonesia," *Monash University Law Review* 36, no. 3 (2011): 148.

[250] Jesuit Refugee Service, "The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines," 25.

immigration authorities and UNHCR was struck, with the agreement that transfer these individuals to. In this interaction, the UNHCR head intimated to his US interlocutors that if resettlement states did not do more, it was unlikely such receptivity was to continue.[251] A similar treatment took place, in 2009: over the course of a month, authorities in Jakarta decried Rohingya arrivals as economic migrants, held up the assistance and access on the part of both the IOM and UNHCR, before finally relenting when it was agreed that a package of material assistance from Australia, the United States, and a consortium of NGOs agreed to take care of their well-being.[252]

What is striking is the degree to which conditions and treatment of asylum seekers, both in detention and as to whether they are provided asylum at all, are region dependent. [253] Similar also is the variability on freedom of movement.[254] Given the Indonesian government has yet to implement a framework for RSD, much less standardized methods of treating, this is unsurprising as a matter of practice, yet it underscores the continued distance between pronouncements and the reality on the ground. [255]

These developments are to be contrasted with developments of 2011, which saw the introduction of a new immigration law, superseding the 1992 law. This law was explicitly harsher in its treatment of refugees, with an effective removal of discretion of

[251] US Embassy Jakarta, "Burmese Refugees Put GOI In Tough Spot," May 1, 2006, 06JAKARTA5484, https://www.wikileaks.org/plusd/cables/06JAKARTA5484.html; US Embassy Jakarta, "UNHCR To Adjudicate Burmese Cases," May 9, 2006, 06JAKARTA5853, https://www.wikileaks.org/plusd/cables/06JAKARTA5853.html.
[252] US Embassy Jakarta, "Rohingya Situation Breakthrough – UNHCR Promised Access," 04-Feb-09, 09JAKARTA194, https://www.wikileaks.org/plusd/cables/09JAKARTA194.html.
[253] Nethery, Rafferty-Brown, and Taylor, "Exporting Detention," 93.
[254] Ibid., 99.
[255] Davies, *Legitimising Rejection*, 25.

immigration officials ability to deny (using *shall* rather than *may*).[256] It was also significant in explicitly identifying only a specific subset of individuals eligible to be accommodated outside of detention – children, those sickly, expecting mothers and victims of trafficking of smuggling.[257] As discussed below, the role of Australia is pivotal to understanding this development.

The plight of ethnic Rohingya, a Muslim minority from Burma, proves an interesting area for understanding the limits of Australia's role: in 2015, like Thailand and Malaysia, Indonesia engaged in a series of pushbacks of an estimated 8,000 refugees in the Andaman Sea.[258] After a number of weeks, Indonesia, joined by Malaysia, relented, allowing that some boats would be able to land. [259] While on this there may be some further movement, potentially related to the shared Muslim-identity of the Rohingya and native Indonesians, another NGO observer suggests policy toward refugees and asylum seekers suggest remains mired in bureaucratic problems: for example, the pledges from several international nations to provide material support Indonesia remain mired in bureaucratic uncertainty, as the Government of Indonesia still lacks both a particular set of institutions mandated with managing this funding, to say nothing of a distribution mechanism. [260] Indeed, it may well be that Rohingya Muslims are considered, yet even this asylum is for a shorter term: it should be underscored that the tripartite decision to accept Rohingya in 2015 was on the condition that they would be

[256] Nethery, Rafferty-Brown, and Taylor, "Exporting Detention," 97.
[257] Ibid.
[258] "Indonesia to 'Turn Back Rohingya' Boats," *Al-Jazeera English*, May 12, 2015, http://www.aljazeera.com/news/2015/05/150512045951738.html.
[259] Joe Cochrane, "Indonesia and Malaysia Agree to Care for Stranded Migrants," *The New York Times*, May 20, 2015, http://www.nytimes.com/2015/05/21/world/asia/indonesia-malaysia-rohingya-bangladeshi-migrants-agreement.html.
[260] E-mail correspondence, Febionesta and Cameron; E-mail correspondence, Stenger.

resettled to other countries or repatriated – continuing to refer to them as irregular migrants, and not refugees. [261]

These developments thus have to be viewed against the broader policy framework. As above, although the 1999 order called for a presidential decree, implementation has been non-existent. It is also to be noted that Indonesia has twice included its intention to accede to the regime in its National Human Rights plans, first in 2005 and later in 2011, suggesting an intention to improve compliance, and yet the fact that this has yet to take place, suggests, at a minimum[262]

Further straddling the question of domestic context and external relations, in addition to the notion of the burden sharing, it should be underscored that *if* a formal asylum system were implemented, this could put Indonesia 'at risk' of being considered a safe country of return on the part of Australia—potentially presaging a more aggressive policy on the part of Australia immigration authorities to send refugees back to Indonesia.[263]

Ultimately, the rejection of Western interventions and norms are still perceived among parts of the elite and security forces to be a rallying point. [264] At this juncture, it thus remains crucial to find a more domestically oriented argument as to why refugee norms

[261] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 105; Government of Indonesia, Government of Malaysia, and Government of Thailand, "Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia," Text, *ReliefWeb*, (May 21, 2015), http://reliefweb.int/report/myanmar/joint-statement-ministerial-meeting-irregular-movement-people-southeast-asia.
[262] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 122; Lars Stenger, National Information & Advocacy Officer, Jesuit Refugee Service Indonesia, April 12, 2016.
[263] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 122.
[264] Lars Stenger, National Information & Advocacy Officer, Jesuit Refugee Service Indonesia, April 12, 2016.

need to be implemented both in formal policy and administrative practices, as well as a matter of consistent, uniform practice.

B. EXTERNAL RELATIONS

In the contemporary period, Indonesia's relations with other States appears to have been dominated by Indonesia's relations with Australia. While emphasis has also come often by way of interactions with the United States, indeed, more important is the outsize role that Australia has played in Indonesia's polices.

For example, Australia has supported the development of Indonesia's detention centres, in an effort to create a kind of 'buffer zone' between refugees from regional countries of origin and Australia.[265] While such policy has been quietly underway since the early 1990s, this cooperation culminated in the establishment of the Regional Cooperation Agreement ("RCA") between the two, in cooperation with IOM.[266] In 2007, a further agreement was struck—funded entirely by Australia—to provide for the development of standard operating procedures for use in detention houses and border checkpoints, with the cooperation of Indonesian Immigration Officials and IOM.[267] Despite the tensions that were raised first with the incident regarding the MV Tampa This also was despite the fact that in 2006 Australia initially granted asylum to 42 Papuans, for which Indonesia initially condemned the act, withdrawing its ambassador – yet, in light of the ongoing agreements, appeared relatively supine in relation to the detention.

[265] Nethery, Rafferty-Brown, and Taylor, "Exporting Detention," 89.
[266] Ibid., 95.
[267] Ibid., 96.

In this sense, Indonesia's relationship with Australia has provided incentives for the Indonesian policymakers to continue a pursuit of increasingly *restrictive*, less regime-compliant practices, discouraging efforts to move toward what would be considered more compliant behaviour. This is observed when in October 2009 Indonesia and Australia failed to agree on the responsibility for a boat of 78 Sri Lankan asylum seekers: initially redirected to Indonesia by an Australian customs ship, they were eventually processed by Australian authorities and resettled in Australia, Canada, the United States and other developed States.[268] A similar incident took place 2013, when disagreements about reception and disembarkation laid bare Indonesia's willingness to engage in effective *refoulement*, pushing the responsibility onto Australia's shoulders; Australia has also on at least five further occasions pushed boats back into Indonesian waters, further enflaming tensions. [269] Thus, despite the fact that Australia is itself a signatory to the Convention, it appears not only willing to ensure the building and upkeep of detention facilities and staff, taking fewer responsibilities for the conditions of these;

Furthermore, to the extent Indonesia *has* been pliant to Australian policies, it has to be further underscored that those successfully deemed refugees by UNHCR stay at accommodation funded by Australia and operated by IOM; while those that fall outside the scope of existing agreements are largely the responsibility of UNHCR, with the Government of Indonesia contributing negligible amounts to these. [270]

[268] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 52–53.
[269] Ibid., 171; 194.
[270] Nethery, Rafferty-Brown, and Taylor, "Exporting Detention," 98.

Thus, even with the presence of Australian pressure, Indonesian policy harkens back to the procedures and arrangements during the Indochinese period, by which asylum and any semblance of regime compliance was very much tied to the provision of assistance on the part of UNHCR and other, non-Indonesian entities, as well as the ultimate desire to see refugees resettled elsewhere.

C. **CONCLUSION**

The fact that refugees are often seen as receivers of services, rather than individuals with rights, by Indonesian policymakers and laymen, speaks volumes.[271] Officials continue to argue since Indonesia is not party to regime, Indonesia simply is not not bound to fulfil any supposed obligation to refugees. Thus, not only do refugees remain referred to as 'illegal immigrants' under operative law; the government also continues to state since Indonesia is a transit country only, refugees are not the responsibility of the government.[272] In one observers' opinion, the situation from the Indonesian government's perspective lies between one of not being ready to ratify the convention, perhaps owing to capacity issues, and the feeling that it is doing 'enough'. [273]

Certainly, since 2011, Indonesia has shifted toward a tougher approach, at the cost of reduced regime compliance. Australia's role, in both the sizeable involvement in funding detention facilities and pressuring Indonesian Government policymaking, is an influence that is more relevant in the contemporary period than the past. Here we should underscore the sense that for both parties – Australia and Indonesia – less important, if

[271] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 120.
[272] E-mail correspondence, Febionesta & Cameron.
[273] E-mail correspondence, Stenger.

not almost irrelevant, are regime norms, as such. Rather, the immediate consideration is stemming the tide, and, for Indonesia's part, retaining its status as a transit state but little more.

6. CONCLUSION: INDONESIA AND ITS REGIME MEMBERSHIP

On the whole, the Indonesian case presents initially puzzling behaviour: like Malaysia, Thailand and the Philippines, it has consistently maintained the concern that it does not desire to become any more than a point of transit for refugees, to the extent it has to at all.

Notwithstanding the fitful attempts in the contemporary period to achieve regime accession, one has to acknowledge that certain elements of the regime, such as the norm of *non-refoulement* and the right to asylum are—at least formally—acknowledged by the regime.

Yet, despite this, not only has practice often deviated; indeed, the more recent shifts toward more strident application of detention procedures – apparently the result of Australia's own policymaking interventions – have underscored that any potential gains or stickiness in Indonesia's moves towards regime compliance are tenuous at best. Certainly, Indonesia does not have the same appetite for repeating the kinds of management as envisaged at Galang during the Indochinese crisis, with a Foreign Ministry spokesman underscoring that in this 'different period', to open a reception

centre would be tantamount to creating a 'pull factor': something officials would truly like to avoid[274]

In assessing the importance of the domestic and external, then, it appears the Indonesia functions much like its colleagues Malaysia and Thailand, particularly in the Indochinese period. While these fitful attempts toward improvement have been made in the contemporary period, at this writing, the continual languishing of practical policy is instead contrasted with the strident shift in detention policy and *refoulement*. If anything, it appears the coercive influence of Australia will continue to have an outsize impact on Indonesian policy; the instruments of the regime, as such, are comparatively minimal in their influence, and as such do not represent the primary considerations in understanding any modulations in Indonesia's compliance. And yet, unlike in other contexts, in which coercion has promoted, it may well be that this coercion has promoted more regressive behaviour, to the detriment of current and future compliance.

[274] Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, 199.

CHAPTER 6: THE PHILIPPINES
PRE-EXISTING VALUES, STABLE TRANSIT, AND DOMESTIC FAITH-BASED PRESSURE

1. INTRODUCTION

The Philippines has a history of providing sanctuary to refugees and asylum seekers, stretching beyond the modern refugee regime's creation: in the early and late 1940s, Presidents Quezon and Laurel granted asylum first to persons of Jewish origin fleeing the Nazi persecution, before later doing the same for White Russian refugees fleeing persecution from the Communist army in China.[275]

During the Indochinese refugee crisis, the Philippines functioned as a country of first asylum, acting as a significant transit centre for Indochinese refugees and asylum seekers. A number of mechanisms and camps were set up in conjunction with UNHCR, to manage the mixture of arrivals and those transiting from other parts of the region, all of which were destined for resettlement or repatriation. Unlike the other cases examined, however, not only was the Philippines a party to the CPA, it also became a signatory to the Convention and Protocol during this period (1981). During this time, the Philippines served as a place of first asylum for almost 51,000 asylum seekers, acting as a transit station for at least a further 290,000 individuals, predominantly from Indochina.[276]

[275] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 81.
[276] UNHCR, "High Commissioner's Visit: Statistics," June 21, 1990, 001.HC.PHI, Series 3, Fonds UNHCR 11.

In the contemporary era, the Philippines has continued on a trajectory of increasing compliance with the refugee regime, formally instituting, and more recently revising, a legal framework for RSD. This has also seen the extension of the right to work to those determined to be refugees. However, two cautionary notes are worth emphasising in this period: first, relative to other country cases under examination, the number of refugee and asylum seekers arriving in the Philippines remains comparatively low: the most recent UNHCR estimates put the number of refugees and asylum seekers in the Philippines at 417 persons. Equivalent numbers in Thailand, Malaysia and Indonesia are 118,538; 151,973, and 13,188 respectively).[277] Second and arguably more important, the Philippines continues to remain steadfast in identifying itself as a country for *transit*, rather than asylum, much less potentially for naturalisation.

As the only case under examination that *has* acceded to the instruments of the regime, the Philippines case allows us to ask if and how being party to the regime influences compliance, as against the three non-Party States.

On first glance, the answer appears yes – particularly so in the contemporary period, with the increasing institutionalisation of practices in line with the regime, such as the implementation of refugee travel documents and the gradual progression from the RPU to the RSPPU.

Yet by examining the domestic context and role of external actors, the Philippines desire to provide only transit to refugees continues to be a calling-card in negotiating its

[277] UNHCR, "Philippines," June 2015, http://www.unhcr.org/pages/49e489296.html.

relationship to refugee populations. Indeed, its continued insistence on guarantees of resettlement places highlights not so much improvement, but a relative limitation its adoption of regime norms through both periods under examination, and in that sense represents something of a continuity. Finally, the fact that, short of implementing frameworks and the same basic behaviour held true for Philippine practices during the Indochinese period – even in advance of becoming party to the Convention and Protocol – counsels caution in understanding its compliance has improved as a *function* of its becoming party to the regime, rather than as a result of pre-existing normative dispositions that extend beyond the contemporary and Indochinese experiences.

Overall, the Philippines thus represents a cautious illustration that signing onto the instruments of the regime remain neither a necessary nor sufficient guarantor regime compliance.[278] Rather, with an eye to both the country's history prior to the Indochinese crisis, the unique role of the Church as a domestic political check – particularly during the Indochinese crisis – and the country's continued emphasis on its role as a transit state cognizant of negotiating asylum in a manner that allows it to be relatively selective in accepting flows of refugees, it reminds us we must look beyond the formal components of the regime to understand the extra-legal elements influencing States compliance with the regime.

A further suggestion might be made that, compared to some of its peers in the region, when navigating the conflict between its identity as a developing State, and its desire to be seen as an upstanding member of international society, this conflict has influenced its

[278] Von Stein, "Do Treaties Constrain or Screen?"

ultimate decision to largely side with the latter, as borne out in practice. However, this conclusion remains considerably more tentative; it is further reviewed in the conclusion.

2. PHILIPPINE REFUGEE POLICY: THE INDOCHINESE REFUGEE CRISIS

Although the Philippines became a party to the regime in this period, not only did it delay in following-through on implementing a framework; in reality it remains rather unclear whether the signing of the Convention and Protocol influenced its policy. This is evidenced not only in the fact that practice prior to its accession largely mirrored practice thereafter, but that the intercession of the Catholic Church seemed to be more salient in influencing marginal decisions in specific situations. Compared to other States considered in this thesis, the Philippines was both less significantly impacted by the crisis and, perhaps as a consequence, perceived as more permissive & compliant with regime norms, particularly that of *non-refoulement.*

A. DOMESTIC CONTEXT

Eleven years prior to the Convention's signing, the Philippines adopted the Philippine Immigration Act (1940), allowing the President to admit for 'humanitarian reasons and when not opposed to the public interest'…'aliens who are refugees for religious, political, or racial reasons.'[279] This came a few years after a 1938 request from the German Consul in Manila, to provide Jewish refugees fleeing imperial Japanese; this was look upon favourably, 'on the condition that they would not become a public burden.' As the Philippines was then a colony of the United States, the role of the US

[279] Francis Temprosa, "Statelessness in Philippine Law: Expanding Horizons of the International Stateless Person Protection Regime," *Ateneo Law Journal* 58, no. 29 (2013): 63.

High Commissioner and State Department in authorizing the admission, was noted as pivotal in both pushing for and allowing this agreement to come to fruition.[280]

Despite this recent history, in the actual process of signing and debating the Convention, the Philippines was far from convinced of its merits, and like other ASEAN states, did not initially become a party. Just five years after the Convention's signing, the Philippines publicly expressed reservations on the financial burden it would place on developing States. [281] On early encouragement by UNHCR that it sign the treaty, the Philippines arguing in 1956 that its constitutional process could not accommodate such a foreign treaty.[282] Even when regarding the Protocol, while expressing support for the spirit of the Protocol – in that it felt there should be no objective discrimination between refugees in terms of date or geographic origin– it nevertheless noted it would have preferred a more detailed accounting of all articles of the Protocol in the Committee; future international instruments needed to be considered in such detail, it noted, prior to voting upon them.[283] Needless to say, it did not sign on at this point.

At a 1980 roundtable organised by UNHCR on international refugees, the Minister of Justice noted that norm of *non-refoulement* was qualitatively different from the provision of asylum itself: *non-refoulement,* he opined, required a person to already be within a territory. Thus, on his reading this did *not* relate to a duty to admit persons seeking asylum; never mind the fact that the Philippines was not party to the

[280] Republic of the Philippines, "The Philippines as Haven for Refugees," *Presidential Museum and Library*, accessed February 2, 2016, http://malacanang.gov.ph/75632-historical-ph-haven-for-refugees/.
[281] Davies, "The Asian Rejection?: International Refugee Law in Asia*," 565.
[282] Ibid., 569. This claim seems rather specious, however, given the operative 1943 Constitution granted the President authority to sign foreign treaties, provided all members of the assembly approved.
[283] Ibid., 573.

Convention or Protocol and thus had no formal obligations to be shirked.[284] Indeed, in the years prior to the Philippines accession, it argued that international refugee protection should be based 'not on treaty obligations, but on elementary considerations of humanity,' going on to note that, 'international protection is *based merely upon the goodwill* of the host country.'[285] Along with Indonesia and Singapore, it also argued that as a developing State, there could be no expectation that it *could* do more than they were already doing.[286]

The above considerations in mind, the Philippines nevertheless accede to both the Convention and Protocol in June 1981. Other concerns expressed close to this time included the fear that this would attract further Indochinese refugees to the Philippines; indeed, initial accounts immediately following accession showed a quantitative rise from 1981 to 1982, even as other States in the region did not see similar increases.[287] Concern was also expressed the United States had not yet become a party to the regime, potentially holding up the Philippines' action; even after this took place[288] While one perspective suggests the absence of domestic implementing legislation 'rendered the Convention practically useless.'[289], with this brief sketch in mind, it is indeed instructive to observe Philippine behaviour toward Indochinese refugees—even in advance of its accession—manifest. For on balance, this reveals remarkable stability in Philippine policy – irrespective of its Convention and Protocol commitments.

[284] Davies, *Legitimising Rejection*, 126.
[285] Emphasis added. Ibid., 129.
[286] Ibid., 131.
[287] Ibid., 136–138.
[288] Ibid., 136.
[289] Ibid., 138.

In 1979, the landings of Indochinese refugees increased throughout ASEAN, and in the Philippines, this meant a relative shift from the arrival of 1,200 asylum seekers in 1978, to 5,200.[290] Responding to this, the Marcos regime in 1980 issued Executive Order 554, establishing the Task Force on International Refugee Assistance and Administration (TFIRAA). This was notable in that, rhetorically, in the absence of any formal regime obligation, it declared that it was undertaking these activities 'for the purpose of complying with the Philippines *duty to humanity* and its commitment to assist legitimate projects…of the United Nations.'[291] In spelling out the responsibilities of the Philippines to refugees, this included cooperation and coordination with the UNHCR; the order also recognised the principle of *non-refoulement*.[292] The regulation was further updated in 1988, when the Task Force was reconstituted under the Aquino administration, providing it further direction to coordinate and cooperate with UNHCR efforts and refugee assistance measures.[293]

Generally, The Philippines was quite compliant throughout the Indochinese refugee crisis, irrespective of its Convention accession and subsequent lack of implementing legislation. This was the case even as regarded the minority of non-Indochinese arrivals: as long as they were considered under UNHCR's mandate, they were unlikely to be *refouled*.[294] As with the Indochinese population, but even more so for these individuals,

[290] Ibid., 104.
[291] Emphasis added. UNHCR Manila to HICOMREF Geneva, "Executive Order No. 554," February 27, 1986, MNL/5320; Folio 4, 010.PHI, Series 3, Fonds UNHCR 11.
[292] Ibid., 554.
[293] Sedfrey M. Candelaria, "The Practice of Refugee Law in the Philippines," in *The Rights of Refugees and Asylum-Seekers: Focus on the Philippines*, ed. Corazon B. Gaite (Quezon City, Philippines: U.P. Law Center, 1996), 33.
[294] Vitit Muntarbhorn, *The Status of Refugees in Asia*, 82.

who fell into an even more unclear practical standing from the perspective of the State, there was never an extension beyond that of 'temporary asylum', however.[295]

Of course, there were exceptions to this relative compliance with *non-refoulement*: Among these, in 1990, the Philippine government responded to the attempted disembarkation of 177 Vietnamese boatpeople by refusing to let it land, citing its dissatisfaction for what it viewed as a lack of 'reciprocity' in humanitarian action: Manila felt it was receiving insufficient support from UNHCR for Philippine refugees in the Middle East. [296] Furthermore, although in August of 1987 the President issued an Executive Order authorising the issuance of identification and travel documents to refugees in the Philippines, the Government would only follow-up in implementing these in 1991.[297]

Furthermore, occasion for observing high profile cases of potential derogation from *non-refoulement*, is found in the efforts of the Catholic Church, which often played a tempering force in influencing policy. As early as August 1975, when a boat of 84 Indochinese asylum seekers landed, President Marcos initially ordered the boat resupplied and redirected to Hawaii.[298] This would have occurred, but for the intercession of the Catholic Bishops Conference of the Philippines (CBCP), whose efforts successfully resulted in the rescinding of the order; from that point, *any outright* turning away of boats did not continue.[299]A similar dynamic played out in 1978, when a

[295] Ibid., 82–84; Sutter, *The Indochinese Refugee Dilemma*, 152.
[296] UNHCR Manila to HICOMREF Geneva, "Personal Attention of Anwar/HC from Wijaratne," October 11, 1988, PHI/HCR/0637; Folio 32, 010.PHI, Series 3, Fonds UNHCR 11.
[297] Candelaria, "The Practice of Refugee Law in the Philippines," 36.
[298] Robinson, *Terms of Refuge*, 23.
[299] Ibid.

Panamanian ship arrived carrying 2,300 Vietnamese asylum seekers: despite the security considerations expressed by the Marcos government, upon paying the Cardinal a birthday visit, President Marcos eventually relented, letting its passengers disembark.[300]

This trend continued well into the post-Marcos period: in 1990, after originally rejecting the pleas of the Cardinal to let 101 Vietnamese rescued by American warship land, after 3 weeks, the Aquino government relented – in part at the urging of the UNHCR (contingent on the assurance that these refugees would be duly resettled in due course) but also due to the Cardinal's continued urging.[301] Later in February 1996, when worries flared that a remaining 1400 screened-out Vietnamese boatpeople were scheduled to be repatriated to Vietnam the following day (the Philippines, Vietnam and UNHCR had agreed to a MoU to this effect, upon the closure of the CPA and the end of the conflict) the CBCP once again intervened. This time, it agreed to accept responsibility, along with other NGOs, for administering services in the Philippine First Asylum Camp (PFAC), to this residual population. Combined with further action in the Philippine House and Senate to extend the deadline beyond June – during which Senators themselves made argued not only for humanitarian reasons or as a function of the Philippines' international commitments, but also that '[t]he most Christian thing that we can do is to grant permanent residence to these refugees' – the Catholic influence

[300] Ibid., 31.
[301] Philippine Daily Inquirer, "Gov't Rejects Plea for Refugees," June 10, 1990, MNL 1186; 001.HC.PHI, Series 3, Fonds UNHCR 11; The Manila Times, "Refugee Situation Tackled in Manila," June 20, 1990, MNL 1186; 001.HC.PHI, Series 3, Fonds UNHCR 11; Philippine Daily Inquirer, "ASEAN Countries Taking Tougher Stance on Refugees," June 20, 1990, MNL 1186; 001.HC.PHI, Series 3, Fonds UNHCR 11.

appeared strong [302] Ultimately, this agreement stuck: the Catholic Assistance for Displaced Persons, a component NGO of the Church, took over for the care, establishing a town for this residual population, agreeing to help financially support their care.[303]

B. EXTERNAL RELATIONS

Compared to the other countries under examination, the Philippines was geographically isolated from Indochina; it was arguably least *directly* impacted by the Indochinese refugee crisis. [304] Nevertheless, the chief role of external relations came by way of the continued extension of resettlement, for both asylum seekers first arriving and those transiting in the Philippines, and in particular, its relationship with the United States, was pivotal to influencing its policy toward, and compliance with the regime.

Early on in the crisis, the Philippines joined Thailand and Indonesia to insist continued reception of refugees would only be provided on the assumption that international assistance would be provisioned.[305] It is true the Philippines would open a transit centre as a means of relieving pressure on other States in ASEAN: first through the creation of a Regional Processing Centre (PRPC) in Bataan in 1980, and later, the Regional Transit Centre (RTC), established as a result of the promise made at the 1989 Conference.[306] The former was agreed to at the 1979 Conference– and, was, crucially contingent on it

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[302] Corazon B. Gaite, "The Indochinese Refugees and Asylum Seekers in the Philippines: A Situationer," in *The Rights of Refugees and Asylum-Seekers: Focus on the Philippines*, ed. Corazon B. Gaite (Quezon City, Philippines: U.P. Law Center, 1996), 12.
[303] US Committee for Refugees and Immigrants, "World Refugee Survey 1997 - Philippines," January 1, 1997, http://www.refworld.org/docid/3ae6a8b04c.html.
[304] Sutter, *The Indochinese Refugee Dilemma*, 151; Agence France-Presse, "Senators Back Refugees" (Manila Bulletin, February 18, 1996), EV/EP 46 GEI, RSC Cardbox.
[305] Davies, *Legitimising Rejection*, 95.
[306] Sutter, *The Indochinese Refugee Dilemma*, 152.

being entirely funded, and administered by, UNHCR.[307] This came on the heels of Malaysia's decision earlier in the year to essentially take 'burden-sharing' into its own hands, forcefully redirecting Indochinese boats to other States.[308] The latter was an extension of the former, also on the island of Bataan, funded by a United Kingdom contribution.[309] In both cases, the emphasis was on these as *transit* mechanisms, rather than allowing for the possibility of resettlement in the Philippines.[310] Ahead of of the 1989 Conference, the Philippines once again expressed support for provision 'first asylum', but noted it was inextricably tied to continued provision for repatriating those that were screened out. In other words, like the other countries under examination, the Philippines would not commit itself to hosting refugees for indeterminate periods of time, much less make provisions for their eventual naturalisation, preferring instead that they be moved out as quickly as possible.[311]

Owing to its colonial history and continuing special relationship, the Philippines relationship to the United States was thought to give the latter leverage in both convincing it to maintain its comparatively open door to Indochinese refugees.[312] For the U.S. part, resettlement assistance was seen as part of a broader effort to enhance its strategic relationship with ASEAN, its fifth largest trading partner; in the Philippines, it maintained a strong military presence in the country, including bases.[313]

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[307] Davies, *Legitimising Rejection*, 119.
[308] Robinson, *Terms of Refuge*, 55.
[309] UNHCR, "High Commissioner's Visit: Programme," June 21, 1990, 001.HC.PHI, Series 3, Fonds UNHCR 11.
[310] The distinction between "transit" and "first asylum", for the purposes of this discussion, is this: transit generally suggests that, whereas "first asylum"
[311] UNHCR, Vieira de Mello to HICOMREF Geneva, "Summary (Records) of Discussions," October 11, 1988, AO/700/88; 391.89; Series 3, Fonds UNHCR 11.
[312] Suhrke, "Indochinese Refugees: The Impact on First Asylum Countries and Implications for American Policy," 24; Davies, *Legitimising Rejection*, 138.
[313] Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, 133.

So while it would be noted that UNHCR considered Philippine government officials 'cognizant' of the moral obligations on them, and willing to help fulfil their obligations as best they could, it is hardly surprising that Indochinese refugees rescued at sea were generally only able to disembark provided advance, written guarantees of resettlement to third countries were obtained, in addition to guarantees UNHCR would assist them in its camps and in resettlement. [314]

C. CONCLUSION

On the whole, while the Philippines was more cooperative and, certainly as regards *non-refoulement,* relatively compliant compared to the three other cases during the Indochinese refugee crisis, there are some important caveats: first, at the end of this period, despite having acceded to the Refugee Convention, with the CPA's expiry, the Philippines had yet to establish a *permanent* body and framework for refugee status determination Indochinese or otherwise. Indeed, if anything, the Philippines in some ways saw the Convention as a means by which to limit the freedoms of refugees, and the 'humanitarian' nature of assistance provided a wide latitude to policymakers, should they feel the need to exercise it.[315] Thus, despite the seeming importance of its accession in this period, it should not be overstated. Second, as underlined early on, even before signing onto the Convention, the Philippines maintained a relative permissiveness in both avoiding large-scale pushbacks of boats, and providing sanctuary, suggesting the importance of the Catholic Church and a broader continuity in domestic norms that

[314] UNHCR Manila to MFA, "Status Report on UNHCR Activities in the Philippines," February 7, 1986, MNL/6750; Folio 14, 010.PHI, Series 3, Fonds UNHCR 11.
[315] Candelaria, "The Practice of Refugee Law in the Philippines," 43, 50.

went beyond the regime. Finally, one underscores that the Philippines, even with its relatively lighter burden, was just as steadfast as its ASEAN neighbours in its desire to remain a country of first asylum, and at that, one that would come to be known for its status as a point of transit, for almost all Indochinese refugees at this time.

3. PHILIPPINE REFUGEE POLICY IN THE CONTEMPORARY PERIOD

In the contemporary period, the Philippines compliance with the regime appears to have improved, with implementing legislation and processes appear to have entrenched the framework that originally pioneered during the Indochinese period. However, it should be noted that this is almost certainly is helped by the fact that inflows into the country, relative to its neighbours in the region, continue to be relatively low. It is also important to note that the notion of the Philippines as a country of *transit* – rather than one of local, if only temporary, asylum – continues through this period.

A. DOMESTIC CONTEXT

Initially after 1996, it remained unclear as to how the Philippines would make good on implementing formal frameworks in line with its regime obligations. A few years later, a March 1998 a Presidential decree formed the Refugee Processing Unit (RPU), which transferred power to decide on refugee issues from the comparatively ad hoc Immigration Department's procedures to the Department of Justice (DoJ). Building on the CPA, the decree explicitly included references to the principle of *non-refoulement*, as well as formal requirements for determining refugee status.[316] Unlike under the CPA, when officials let UNHCR shoulder the lion's share of both RSD and practical care of

[316] Jesuit Refugee Service, "The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines," 26.

refugees, in 1998, the Philippine State took the RSD process into its own hands. In addition, aforementioned issues during the Indochinese period regarding documentation and legibility for permanent residence were further improved, as Alien Certificates of Residence, renewable on an annualised basis, were introduced at this time. [317] It was speculated that this was in part a function of years of capacity building internally, in addition to an increasingly collegial relationship between UNHCR and its DoJ counterparts.[318]

Fourteen years later, a 2012 order updated the RPU to the RPSU, coming on the heels of the country's adoption of the 1954 Statelessness Convention. [319] This included explicit recognition that refugees are not only entitled to appropriate status determination procedures, but also explicitly acknowledgement that refugees have the right to work, and could potentially obtain citizenship in the same conditions as other categories of non-nationals.[320] It is telling that, in presenting the move, the DoJ Secretary nodded to the the 'universality of human rights', and that their respect required treatment that was 'not only tolerant but accepting and inclusive.'[321]

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317 US Committee for Refugees and Immigrants, "World Refugee Survey 2001 Philippines," June 20, 2001, http://www.refworld.org/docid/3b31e16720.html.
318 Interview with Francis Temprosa, Head Legal Counsel for Human Rights Commission, March 28, 2016.
319 Temprosa, "Statelessness in Philippine Law: Expanding Horizons of the International Stateless Person Protection Regime."
320 UNHCR, "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: The Philippines," December 2011, 2, http://www.refworld.org/docid/4ee07aa22.html.
321 "DOJ Formalizes Rules And Mechanisms For The Protection Of Refugees And Stateless Persons," *Republic of the Philippines, Department of Justice*, October 22, 2012, http://www.doj.gov.ph/news.html?title=DOJ+FORMALIZES+RULES+AND+MECHANISMS+FOR+THE+PROTECTION+OF+REFUGEES+AND+STATELESS+PERSONS&newsid=138.

More recently, the spectre was raised that the Philippines might permanently resettle up to 1,000 refugees from Papua New Guinea, in an agreement with Australia.[322] Yet in a subsequent public forum, President Aquino hesitated, stating, in view to the Philippines still being a developing country, the country could only provide temporary asylum to any such refugees: the Philippine government was not 'in a capacity' to afford permanent residency to such refugees.[323] In staking out this position, President Aquino made reference to the Indochinese crisis, suggesting the current policymaking atmosphere remains imbued with a negative relationship to its experience with a residual caseload of screened-out asylum seekers, given the country's initial intention had been to *avoid* a long-staying population of refugees.[324]

B. EXTERNAL RELATIONS

In the contemporary period, the role of external relations appears to have influenced Philippine policy in a similar way to that of the Indochinese period: refugee policy has improved, but remains contingent on the assurance that the Philippines will primarily remain a country of *temporary* first asylum – and ideally, one of *transit* – rather than receiving refugees for undefined periods of time, either for naturalisation or eventual repatriation.

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[322] Austin Ramzy, "Australia Negotiating to Send Refugees to Philippines," *The New York Times*, October 9, 2015, http://www.nytimes.com/2015/10/10/world/australia/australia-migrants-refugees-resettlement-philippines.html.
[323] Q&A with President Benigno S. Aquino III, interview by Annual Presidential Forum of the Foreign Correspondents Association of the Philippines, October 27, 2015, http://www.gov.ph/2015/10/27/2015-focap-presidential-forum/.
[324] Ibid.

Thus, in 2005, when the last remaining refugees from the Indochinese period were finally resettled to the United States, this was the result of the the culmination of work with the US, along with IOM, after a prolonged effort that begun in 2000.[325] This came after the closure of the Refugee Transit Centre in April 1998, which had left a residual caseload of approximately 1,500 screened out refugees. [326]

Other important developments in this period included a 2009 agreement between the Philippines, UNHCR and IOM to provide transit facilities for refugees in the region and further afield, particularly those at risk of *refoulement*, via an Emergency Transit Mechanism.[327] While scant public details exist of the workings of the mechanism – for reasons of protection of the refugees – reminiscent of Philippine policy during the Indochinese period, before a potential refugee is considered eligible for the transit mechanism, a guarantee from resettlement country must be in hand. [328] To date, the mechanism has benefitted over 316 refugees, from areas as diverse as Myanmar, Iraq, Palestine, Syria, and Vietnam; in the past two years, 60 and 7 such persons, respectively, have benefitted from the mechanism. [329]

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[325] US Embassy Manila, "Philippines: Vietnamese Refugees Leave Limbo At Last," January 29, 2005, 05MANILA4669, https://www.wikileaks.org/plusd/cables/05MANILA4669.html; US Committee for Refugees and Immigrants, "World Refugee Survey 2001 Philippines."
[326] US Committee for Refugees and Immigrants, "World Refugee Survey 1999 - Philippines," January 1, 1999, http://www.refworld.org/docid/3ae6a8cf10.html.
[327] "Philippine Government, IOM, UNHCR Sign Refugee Transit Agreement," *International Organization for Migration*, August 28, 2009, https://www.iom.int/news/philippine-government-iom-unhcr-sign-refugee-transit-agreement.
[328] Jesuit Refugee Service, "The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines," 27.
[329] Interview with Romina D. Sta. Clara, National Programme Coordinator, IOM Philippines, April 13, 2016; UNHCR, "Philippines Fact Sheet," August 2015, http://www.unhcr.org/50001d879.html.

The role of the CBCP has continued its advocacy work in this period, with a representative noting that UNHCR had in early 2016 met with the Cardinal, to assist its lobbying efforts for the Government to approve the reception of Syrian refugees. [330] In addition, in line with the Pope's recent call, Observers note that other faith based organisations, including Protestant and Muslim organisations, have also joined what appears to be broader efforts to argue on behalf of continued openness to migrant reception. [331]

As noted earlier, the botched 2015 agreement between the Philippines and Australia was itself framed against a partnership agreement with Australia, aimed at cementing broader ties on trade and defence relations.[332] In line with what has now become a familiar refrain, this agreement was, however, conditioned on the final resettlement of these refugees elsewhere. Similar decisions to share the burden of Bangladeshi and Rohingya Burmese refugees, and Syrians, occurred in 2015, with the spokesperson for the Department of Foreign Affairs underlining the Philippines could serve only as a *temporary* shelter. [333]

[330] E-mail correspondence, Fr. Restituto Ogsimer, Catholic Bishops' Conference of the Philippines, April 14, 2016.
[331] Interview with Sta. Clara.
[332] "Philippines Latest Asian Nation to Stand in for Australia on Refugees," *UCANews.com*, October 9, 2015, http://www.ucanews.com/news/philippines-latest-asian-nation-to-stand-in-for-australia-on-refugees/74403.
[333] "Philippines to Take in Syrian Refugees," *The Philippine Star*, September 9, 2015, http://www.philstar.com/headlines/2015/09/09/1497665/philippines-take-syrian-refugees.

C. **CONCLUSION**

Overall, the contemporary narrative of Philippine compliance with the regime appears an extension of practices in the Indochinese period. In terms of formal policy frameworks, work has been done to formalise and standardise the RSD procedure, ostensibly deepening the provisions and rights accorded to refugees in the Philippines. As recently as March of this year, at a meeting with UNHCR and the existing RSPPU, it was agreed that the Government would transform the latter into a bureau, created by the President of Congress, in order to 'strengthen its mandate, secure the needed assistance of private and public stakeholders.'[334]

And yet, external relations continue to play a role in determining the nature of Philippine compliance with the regime: even in response to a relatively small refugee burden vis-à-vis the region, the Philippines has made a concerted attempt to not merely maintain a quiet posture regarding these procedures; it has sought the guarantee that it will remain, in principle, a country of transit over and above provisioning any extended semblance of asylum. This is clear not only in the provision of the Emergency Transit Mechanism—which bears similarities to the two separate camps at Bataan provisioned in 1980 and 1989 to help offset regional burden issues—but also in the negotiating tactics in agreements that have not come to fruition. Ultimately, as one observer notes, the decision to become a settlement State is one that has to be made; there is certainly a reason for the Philippines 'not to take on the challenges of being a resettlement State'.[335] Thus, in assessing the Philippines future behaviour, the enduring tension

[334] E-mail correspondence, Reuben Fondevilla, Assistant Chief State Counsel, Philippine Department of Justice, April 12, 2016.
[335] Interview with Temprosa.

between its identity as a still-developing State, and its desire to be seen as part of the community of nations, the narrative continues to be mixed.

4. CONCLUSION: THE PHILIPPINES AND ITS REGIME MEMBERSHIP

The Philippines provides a cautionary tale of ascribing the compliance behaviour of the State as a function of being party to formal obligations contained in the international refugee regime's instruments. Despite becoming a party to the regime in 1981, throughout the Indochinese refugee crisis and into the contemporary period, the Philippines government has stressed its desire to remain a point of transit for refugees, known colloquially as a State of "first asylum". It remains true that in comparison to the other countries in both periods, the Philippines has remained a relative model of refugee policy, improving in the contemporary period such that it provides the functionary role of *temporary* first asylum, as well as serving as country that can help relieve regional resettlement pressures from other States, such as Thailand and Malaysia. Nevertheless, its role of first asylum and transit remains as much a positive note, vis-à-vis the region, as it is a *continuity* in policy.

Indeed, the Philippines comparative ability to 'choose' refugees, given its relative geographic isolation, suggests that understanding the Philippines policy in relation to its Convention compliance has to account for this difference in numbers and, in future research, geography as well.[336]

[336] Ibid.

The fact that even at the onset of the Indochinese crisis, President Marcos saw fit to provide an extensive photographic display at the Bataan reception centre[337], is noted as but one of many examples of the importance of prestige which endures to today: the Government not only maintains online historical paraphernalia documenting, but regularly trots this out at annual anniversaries and other PR opportunities; indeed, it is the most forthcoming of States examined, in its willingness to consider discussing its refugee policies. Thus, the Philippine state remains proud of its history of providing humanitarian assistance to refugees; yet in a sense, if the regime influences modern, as one observer puts it, 'in a sense, it's [refugee protection] is already inculcated…[the regime] influences…but in another sense, it's not the main reason for the way that the Government has responded to refugees and asylum seekers.'[338]

[337] Sutter, *The Indochinese Refugee Dilemma*, 152–3.
[338] Interview with Sta. Clara.

CHAPTER 7: CONCLUSION

This thesis adds to our understanding of why States are observed to comply with international law, absent formal commitments to an international legal regime. It inductively studied the policies of four states in Southeast Asia, Malaysia, Indonesia, Thailand and the Philippines, assessing their policy toward refugees and asylum seekers measured against the norms of the Convention and Protocol.

It set out to inductively probe the applicability of common explanatory theories of compliance in the literature – namely, those that hew more to the rationalist school, with elements of realism, neoliberal institutionalist, as well as more liberal, and constructivist strands – through broad investigations of domestic contextual and external relations with other States, in first the Indochinese period and then the contemporary period.

It contributes to the discipline's literature on compliance, in the first instance by drawing attention to fact that the behaviour of non-Party States can be an important area of study, shedding further light on the dynamics influencing regime compliance. It finds that compliance by non-Party States is the product of a composite of extra-regime considerations, providing an important confirmation that being a party to the regime is neither a necessary nor sufficient condition for regime compliance. The narratives of both the domestic and external lenses serve highlight the degree regime compliance is embedded in a broader framework of political considerations.

Although the mechanisms examined straddle the disciplinary paradigms, the weight of the explanatory factors is almost certainly grounded in rationalist, cost-benefit

calculations that often suggest a coincidence of behaviour rather than substantive identification with the norms of the regime. This is seen perhaps most clearly in the persistent tying of asylum spaces by almost all States involved, in rhetoric and in practice, to the condition that refugees and asylum seekers should be considered only in transit, either to be resettled in third States or repatriated to their countries of origin. It should be said that this is the case even for the Philippines, particularly during the Indochinese period but also, as at least one expert admitted private, remains the case today. Similarly, across both time periods and, with the exception of the Philippines in the modern day and Thailand as regards Burmese refugees, responsibility for the protection and management of refugees and asylum seekers largely remains the purview of UNHCR and other, non-State organisations. While some – notably, Indonesia – have made what appear to be fitful attempts to bring its stated policy and practice, in line with the regime, suggesting the potential for improvement, the influence of Australian coercion suggests caution, and, in fact, that coercion may in this instance diminish overall compliance. Malaysia and Thailand are comparatively more ambiguous, though it should be said they have both at times exhibited limited behaviour suggesting that their normative identification with international society, or at the very least, their concern over their international reputation, can influence marginal decisions regarding *refoulement* and treatment of refugees and asylum seekers in the country.

The Philippines represents something of an outlier, not simply because it is the only of the four to have become a Party to the regime (1981), but also, in that its propensity to comply was perhaps over-determined from the outset: even prior to the Convention and Protocol's writing, much less its becoming Party to the regime in 1981, it displayed a

type of hospitality toward White Russian and Jewish migrants that suggests an even further, underlying prior propensity to welcome refugees and asylum seekers that is. In discussions with multiple individuals familiar with the situation on the ground, this was corroborated.

Perhaps the most telling example of the overall dynamic is seen in the recent boat pushbacks that took place in 2015, as documented in each of the cases. To review, Malaysia, Thailand and Indonesia all initially pushed the boats back, in a situation one observer termed 'human ping pong'.[339] While few were able to make it to the Philippines, in the subsequent agreement that resulted, the Philippines was among the States offering to help ease the burden of hosting these refugees.[340] Meanwhile, as discussed, it was only after a number of weeks without resolution—and on the condition that arrivals would be resettled—that each of the three non-Party States agreed to stop pushbacks.

Various constraints review in the introductory chapter make it such that the findings of this thesis represent tip of the iceberg; future studies could thus improve upon these findings in some of the following ways: extending the timeframe to that prior to the Indochinese crisis, to include colonial experiences as substantive cases in-and-of-themselves, which may help fill in the baseline normative understanding; including more non-Party States to the regime, within and beyond ASEAN, which could help clarify whether and how the dynamics observed are more or less relevant in other

[339] "Southeast Asia: End Rohingya Boat Pushbacks," *Human Rights Watch*, May 14, 2015, https://www.hrw.org/news/2015/05/14/southeast-asia-end-rohingya-boat-pushbacks.
[340] Interview with Sta. Clara.

regional contexts; whether certain factors are more or less salient to Southeast Asia and the refugee regime.[341] In addition, the importance of geography and proximity to refugee outflows — noted by Philippine observers — suggests that a future study incorporating rigorous quantitative methods could more include a geospatial variable, testing its impact on regime compliance.

[341] The Middle East also has few States Party; it also lacks a regional agreement on refugees and asylum seekers.

APPENDIX: WIKILEAKS QUERIES

The following queries were performed for each country office (i.e. US Embassy Manila) against the Cablegate database:

1. refuge*
2. asylum*

The focus was the contemporary, post-1996 period. For each country this produced results in between 2006-2010 (Malaysia, Indonesia, the Philippines), or 2005-2010 (Thailand).

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   - **INTERVIEWS**
   - **E-MAIL CORRESPONDENCE**

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