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# Thailand and the National Screening Mechanism: A Step Forward for Refugee Protection?

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## ABSTRACT

Like the majority of states in Southeast Asia, Thailand has not ratified the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. At both regional and national levels, a specific regulatory framework on refugees and formal asylum procedure are also lacking, leaving those seeking international protection at risk of human rights violations. On December 24, 2019, Thailand enacted a historic legal instrument: The Prime Minister's Office Regulation on the Screening of Aliens Entering into the Kingdom and Unable to Return to their Country of Origin (B.E. 2562) to cope with this group of forcibly displaced persons. This essay seeks to examine the Regulation through the lens of international law, notably international refugee law and international human rights law, and to share a critical analysis, some observations as well as recommendations. It concludes that, taken as a whole, the legal milestone is a welcome but insufficient move towards the refugee protection.

**Keywords:** Thailand; national screening mechanism; asylum procedure; refugee status determination; aliens; protection status; international refugee law; international human rights law; refugee protection

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# 1. LEGAL FRAMEWORK, REFUGEE CASELOAD AND POLICY RESPONSE

## 1.1 Legal framework: international, regional and national levels

The majority of countries in the Southeast Asian region, with the exception of Cambodia (1992), the Philippines (1981) and Timor-Leste (2003),<sup>1</sup> have not acceded to the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol. Thailand is a case in point. The reasons for non-accession to these instruments are complex and varied, but the main obstacles are the fear that accession would restrict national sovereignty and security, and that it would oblige the country to accept an unlimited number of refugees for long-term settlement.<sup>2</sup> Added to this is Thailand's mistrust of Article 38 of the Refugee Convention, which confers upon the International Court of Justice the power to settle disputes relating to interpretation of the Convention,<sup>3</sup> given Thailand's own bitter experience with the Court in the well-known case of Preah Vihear Temple.<sup>4</sup>

At regional level, the Asian-African Legal Consultative Organisation (AALCO) Principles on Status and Treatment of Refugees are the most relevant – albeit not formally binding – instrument that is specifically dedicated to those in need of protection. The AALCO is a regional consultative group which presently consists of forty-eight member states, including Thailand.<sup>5</sup> The Principles, commonly referred to as the “Bangkok Principles”, were adopted in 1966<sup>6</sup> and reaffirmed in 2001 at the AALCO's 40<sup>th</sup> Session in New Delhi.<sup>7</sup> Key provisions in this instrument include the definition of refugee (Article I), asylum to a refugee (Article II), *non-refoulement* (Article III), minimum standards of treatment (Article IV), right to compensation (Article IX) and burden sharing (Article X). The texts are quite comprehensive and, to a large extent, provide a higher protection for refugees than the UN Refugee Convention. Nonetheless, given its non-binding nature and a lack of political will, the Bangkok Principles have not carried strong persuasive force and have not been incorporated in the national legislations of the concerned states.<sup>8</sup>

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<sup>1</sup> UNHCR, “States Parties, Reservations and Declarations”, Sep. 2019, available at: <https://www.unhcr.org/5d9ed32b4>; <https://www.unhcr.org/5d9ed66a4> (last visited 22 Apr. 2020).

<sup>2</sup> V. Muntarbhorn, *The Status of Refugees in Asia*, Oxford, Clarendon Press, 1992, 33, 132.

<sup>3</sup> *Ibid.*, 132.

<sup>4</sup> Case concerning the Temple of Preah Vihear, *ICJ Rep.* (1962) 6. The Court held that the temple belonged to Cambodia.

<sup>5</sup> AALCO, “About AALCO”, available at: <http://www.aalco.int> (last visited 15 Jul. 2020); AALCO, “List of Member States”, available at: <http://www.aalco.int/listmemberstates> (last visited 15 Jul. 2020).

<sup>6</sup> AALCO Principles on Status and Treatment of Refugees, 31 Dec. 1966.

<sup>7</sup> AALCO, “Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees as adopted on 24 June 2001 at the AALCO's 40<sup>th</sup> Session, New Delhi”, 24 Jun. 2001, available at: <http://www.aalco.int/final%20text%20of%20bangkok%20principles.pdf> (last visited 22 Apr. 2020).

<sup>8</sup> S. Moretti, *UNHCR and the Migration Regime Complex in Asia-Pacific: Between Responsibility Shifting and Responsibility Sharing*, New Issues in Refugee Research: Research Paper No. 283, UNHCR, 2016, 5, available at: <https://www.unhcr.org/research/working/5823489e7/unhcr-migration-regime-complex-asia-pacific-responsibility-shifting-responsibility.html> (last visited 22 Apr. 2020).

At domestic level, a national legal framework on refugees is also absent. In fact, the term “refugee(s)” has been avoided in law and policy. Instead, a variety of terms such as “displaced persons”, “evacuees”, “illegal entrants” and “illegal immigrants” have been used throughout the years to circumvent the term “refugee(s)”.<sup>9</sup> This is to prevent any formal affiliation with the international treaties on refugees to which Thailand has not acceded.<sup>10</sup> In a vacuum of a specific national law on refugees, the only applicable law governing aliens who enter into the Kingdom of Thailand is the Immigration Act B.E. 2522 (1979).<sup>11</sup>

Under the Thai Immigration Act, no distinction between those entering into the country for the purpose of seeking international refuge and other groups of immigrants is made. Accordingly, refugees and asylum seekers who enter and/or stay in Thailand without the relevant legally valid documents are categorised as “illegal immigrants”. Given that Thailand lacks a formal institutional framework on refugee status determination, UNHCR, under its agreement with the government of Thailand, has played a pivotal role in undertaking protection activities for refugees and asylum seekers, including processing asylum claims.<sup>12</sup> Nevertheless, the registered or recognised status by the UN refugee agency neither offers nor guarantees any formal protection for this group of aliens.

## 1.2 Refugee caseload and policy response

Notwithstanding the lack of a specific normative framework on refugees at international, regional and national levels, Thailand has a long history of hosting forcibly displaced persons. This can be dated back to the 1970s during which the country provided temporary refuge and assistance to the Indochinese (Vietnamese, Cambodians, Laotians)<sup>13</sup> and Burmese refugees on humanitarian grounds. Back then, an *ad hoc* mechanism such as the screening procedure under the renowned 1989 Comprehensive Plan of Action was established to collectively respond to the mass influx of the Indochinese.<sup>14</sup>

Decades have passed and until today, Thailand remains the country of first asylum for a relatively large number of displaced persons in need of international protection from neighbouring countries and beyond. According to UNHCR, the country currently hosts 93,333 Myanmar refugee populations in nine refugee camps along the Thai-Myanmar borders,<sup>15</sup> 5,070

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<sup>9</sup> V. Muntarbhorn, *Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study*, 2004, 18.

<sup>10</sup> V. Muntarbhorn, *Human Rights and Human Development: Thailand Country Study*, Human Development Report Background Paper, 2000, available at: [http://hdr.undp.org/sites/default/files/vitit\\_muntarbhorn-thainland.pdf](http://hdr.undp.org/sites/default/files/vitit_muntarbhorn-thainland.pdf) (last visited 22 Apr. 2020).

<sup>11</sup> Immigration Act of Thailand B.E. 2522 (1979), 24 Feb. 1979.

<sup>12</sup> UNHCR, “UNHCR Thailand”, Mar. 2020, available at: <https://www.unhcr.or.th/en/about/thailand> (last visited 17 Jul. 2020); See also: Agreement between the United Nations High Commissioner for Refugees and the Government of the Kingdom of Thailand (1975), 22 Dec. 1975.

<sup>13</sup> See further: A.C. Helton, “Asylum and Refugee Protection in Thailand”, *International Journal of Refugee Law*, 1 (1), 1989, 20-47.

<sup>14</sup> Muntarbhorn, *The Status of Refugees*, 48.

<sup>15</sup> UNHCR, Thailand Border Operation – Information Management Unit, Mae Sot, “RTG/MOI-UNHCR Verified Refugee Population”, 31 Dec. 2019, available at:



urban refugees and asylum seekers from forty different countries,<sup>16</sup> namely Pakistan, Vietnam, Cambodia, China, Sri Lanka, the Syrian Arab Republic, Iraq, Iran and Somalia, as well as 445 Rohingya persons of concern to UNHCR from Rakhine state of Myanmar.<sup>17</sup>

Despite the relatively significant number of those seeking protection in Thailand, the country's policy response to the three contemporary clusters of caseload has been inconsistent and unsystematic. It varies depending upon country of origin, ethnic group, and political dynamics as developed below.

In dealing with the Myanmar refugee camp populations, Thailand has worked in partnership with UNHCR in providing protection and assistance for this group.<sup>18</sup> Since 2013, the Fast Track Provincial Admission Boards (FTPAB) have positively adjudicated over 2,000 individuals based on family reunification/family unit submissions.<sup>19</sup> Forty-eight percent of the refugees registered through this fast-track system departed for resettlement.<sup>20</sup> In 2015, a joint Royal Thai Government–UNHCR Verification Exercise of the Myanmar refugee populations in all nine camps was initiated and undertaken by a mobile team of more than 75 persons in order to increase an effectiveness in dealing with this group.<sup>21</sup> The exercise, which employed UNHCR's new Biometrics Identity Management System (BIMS) was the most comprehensive review of the refugee population since 2005.<sup>22</sup> In that year, 6,154 Myanmar refugees departed for third country resettlement, and 3,257 were submitted for resettlement to six resettlement countries.<sup>23</sup> Later on, due to the significant political security changes in Myanmar, most notably the general election in November 2015 which led to the formation of the new civilian government led by National League for Democracy (NLD), voluntary repatriation has become a viable solution.<sup>24</sup> Voluntary returns first took place in October 2016 following a bilateral meeting between the Thai and Myanmar governments with support from UNHCR and other agencies.<sup>25</sup> In the first half of 2018, the number of Myanmar returnees increased with 103 refugees voluntarily returning to their country of origin.<sup>26</sup> The assessment on possibilities and

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[https://www.unhcr.or.th/sites/default/files/u11/Refugee%20Population%20Overview\\_December%202019\\_0.pdf](https://www.unhcr.or.th/sites/default/files/u11/Refugee%20Population%20Overview_December%202019_0.pdf) (last visited 24 Apr. 2020).

<sup>16</sup> UNHCR, "Thailand: Fact Sheet", 31 Dec. 2019, available at <https://www.unhcr.or.th/en/about/thailand> (last visited 24 Apr. 2020).

<sup>17</sup> UNHCR, "Thailand Factsheet: January 2016", Jan. 2016, available at: <https://www.unhcr.org/50001e019.pdf> (last visited 24 Apr. 2020).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> UNHCR, "Thailand-Myanmar Cross Border Portal: RTG/MOI-UNHCR Verified Refugee Population", 28 Feb. 2019, available at <http://data.unhcr.org/thailand/regional.php> (last visited 24 Apr. 2020).

<sup>25</sup> UNHCR, "Voluntary Repatriation from the Royal Thai Government Temporary Shelters to Myanmar", 11 Nov. 2016, available at: <http://data.unhcr.org/thailand/regional.php> (last visited 24 Apr. 2020).

<sup>26</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand", 4 Sep. 2018, available at: <http://aprrn.info/wp-content/uploads/2018/09/APRRN-Country-Factsheet-Thailand-4-Sept-2018.pdf> (last visited 24 Apr. 2020).

facilitation for voluntary repatriation process of Myanmar refugee camp populations by the relevant stakeholders continues until today.

As for the second cluster, it has been a long-standing procedure that urban refugees seeking asylum with UNHCR are assessed on a case-by-case basis and subjected to the refugee status determination procedure conducted by UNHCR in compliance with the international refugee criteria. Those granted refugee status are allowed to stay temporarily in Thailand pending resettlement in third countries.

For a number of years, desperate Rohingya rely on smugglers who are often part of well-established human trafficking networks.<sup>27</sup> In May 2015, following the discovery of mass graves and camps operated for human trafficking along the border between southern Thailand and northern Malaysia, the two countries tightened their border control, which led to hundreds of Rohingya asylum seekers being abandoned and stranded at sea.<sup>28</sup> Thailand's "push-back" policy towards the Rohingya continued. In early April 2018, it was reported that at least two boats carrying Rohingya populations had arrived in Thailand and the Thai authorities intercepted a boat carrying 56 people in Krabi province.<sup>29</sup> However, according to the report of UNHCR, some Rohingya persons are, at least informally, subject to an as yet unwritten "temporary protection" regime, which tolerates their stay while UNHCR seeks solutions.<sup>30</sup> All Rohingya persons are considered by UNHCR for rapid refugee status determination and resettlement processing.<sup>31</sup>

## 2. PROTECTION CONCERNS

In the absence of a specific legal framework on refugees and due to the inconsistent and unsystematic policy response, refugees and asylum seekers in Thailand on the ground live in a precarious situation and are at sheer risk of various forms of human rights violation. Some major protection concerns are highlighted below.

### 2.1 *Refoulement*

According to the 1979 Immigration Act, aliens who enter Thailand without the relevant valid papers such as passports and/or visas are classified as illegal immigrants, and are in principle, subject to deportation.<sup>32</sup> While, in practice, there is room for Thai authorities to exercise their

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<sup>27</sup> *Ibid.*

<sup>28</sup> Asia Pacific Refugee Rights Network (APRRN), "Thailand", Mar. 2017, available at: [http://aprrn.info/wp-content/uploads/2017/03/Thailand-Factsheet\\_MAR-2017.pdf](http://aprrn.info/wp-content/uploads/2017/03/Thailand-Factsheet_MAR-2017.pdf) (last visited 24 Apr. 2020).

<sup>29</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand".

<sup>30</sup> UNHCR, Human Rights Liaison Unit, Division of International Protection, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights, Compilation Report: Universal Periodic Review: 2<sup>nd</sup> Cycle, 25<sup>th</sup> Session: Thailand*, Sep. 2015, 2.

<sup>31</sup> *Ibid.*

<sup>32</sup> Immigration Act of Thailand B.E. 2522 (1979), 24 Feb. 1979, s. 12: "Aliens falling into any of the following categories are excluded from entering the Kingdom — (1) Having no valid and subsisting passport or travel document or having the same but without a visa stamp by a Royal Thai Embassy or Consulate in a foreign country

discretion on removal, the practice is indeed unpredictable and unpromising for those in need of protection. The following evidence demonstrates poor records of the country's compliance with the principle of *non-refoulement*.

Between 2012 and mid-2015, there have been at least 155 persons subjected to *refoulement* either from within the territory of Thailand or as a result of non-admission.<sup>33</sup> According to the 2016 summary report of joint submissions by stakeholders to the Universal Periodic Review, Thai authorities continue to return refugees and asylum seekers to countries where they are likely to face persecution.<sup>34</sup> It is reported that in December 2013, seven Khmer Krom men, some of whom were asylum seekers, were arrested by Thai police accompanied by Cambodian government personnel and handed over to Cambodian officials at the Thai-Cambodian border.<sup>35</sup> In another case, a well-known Lao Hmong activist was *refouled* to his country of origin in June 2014 by Thai authorities despite his refugee status being recognised by UNHCR.<sup>36</sup> Another case of deportation took place in February 2015, where a Syrian child was denied entry regardless of a specific intervention by UNHCR highlighting both conditions in Syria and the status of the child as a minor.<sup>37</sup>

Further, in a widely reported incident in July 2015, 109 ethnic Uighurs, who had been detained for a year and a half following conviction on illegal entry/stay charges, were forcibly returned to China purportedly on the grounds that a "nationality verification" concluded that they were of Chinese nationality.<sup>38</sup> The *refoulement* was undertaken despite the fear of being returned to their country of origin expressed by these individuals and well-documented human rights violations, discrimination and inhumane and degrading treatment against them.<sup>39</sup>

More recently, on May 26, 2017, Thailand transferred M. Furkan Sökmen, a Turkish national with alleged links to exiled Turkish cleric Fethullah Gülen, to the custody of Turkish

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or from the Ministry of Foreign Affairs, except in a case where a visa stamp is not required for certain types of aliens under special circumstances."

<sup>33</sup> Human Rights Council: Working Group on the Universal Periodic Review (25<sup>th</sup> Session, 2-13 May 2016), *Compilation Prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21*, UN Doc. A/HRC/WG.6/25/THA/2, 7 Mar. 2016, para. 70.

<sup>34</sup> Human Rights Council: Working Group on the Universal Periodic Review (25<sup>th</sup> Session, 2-13 May 2016), *Summary Prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with Paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21*, UN Doc. A/HRC/WG.6/25/THA/3, 23 Feb. 2016, para. 71.

<sup>35</sup> *Ibid.*

<sup>36</sup> UNHCR, "Briefing Note: UNHCR Deplores Deportation of Laotian Refugee from Thailand", 8 Jul. 2014, available at: <https://www.unhcr.org/53bbc65b9.html> (last visited 24 Apr. 2020).

<sup>37</sup> UNHCR, Human Rights Liaison Unit, Division of International Protection, *Submission*, 7.

<sup>38</sup> *Ibid.*, at 7-8.

<sup>39</sup> See further: Radio Free Asia, "Rights Groups Ask Thailand Not to Deport Uyghurs Back to China", 14 Mar. 2014, available at: <https://www.rfa.org/english/news/uyghur/detained-03142014211205.html> (last visited 24 Apr. 2020); T. Karadeniz, "Turkey Says to Keep Doors Open for Uighur 'Brothers', Irking China", *Reuters*, 3 Jul. 2015, available at: <https://www.reuters.com/article/us-china-turkey-uyghur-idUSKCN0PD1UM20150703> (last visited 24 Apr. 2020); Amnesty International, "Between a Rock and a Hard Place: Thailand's Refugee Policies and Violations of the Principle of Non-Refoulement", 2017, 24, available at: <https://www.amnesty.org/en/documents/asa39/7031/2017/en/> (last visited 24 Apr. 2020).

authorities even with warnings by UN agencies that he would face human rights violations if forcibly returned.<sup>40</sup>

On occasion, Thai authorities have summarily deported refugees and asylum seekers based on requests of a foreign government.<sup>41</sup> In practice, refugees and asylum seekers who have been deported in this manner have not had the opportunity to challenge their forcible return, and there appears to be no judicial or legal review of cases prior to deportation.<sup>42</sup>

## 2.2 Arrest, detention and conditions of detention

Closely related to the risk of *refoulement*, forcibly displaced persons seeking refuge in Thailand are also at heightened risk of arbitrary arrest and/or indefinite detention for illegal entry and/or stay.

Arrest incidents vary in practice. Some refugees and asylum seekers are sometimes able to avoid arrest by presenting identification cards issued by UNHCR indicating that they are Persons of Concern to UNHCR to the arresting officers. Others have been arrested, but later released from the custody at the site of arrest after intervention by UNHCR officer or representatives of an NGO serving refugees.<sup>43</sup> In some instances, they are forced to pay a monthly fee to the police, often THB200 or more, to avoid arrest.<sup>44</sup> This protection concern is illustrated by various incidents as follows.

In 2014, 254 individuals including 34 children were arrested in 108 incidents; while in 2013, 125 individuals were arrested in 58 incidents.<sup>45</sup> Of those detained in 2014, 38 asylum seekers and refugees were successfully released after UNHCR intervened.<sup>46</sup> From December 2013 to August 2015, Thai authorities detained 4,569 ethnic Rohingya, 2,598 Bangladeshi migrants and over 240 Uighur asylum seekers in different Immigration Detention Centres (IDCs) nationwide.<sup>47</sup>

The more recent arrest took place in August 2018, where 181 refugees and asylum seekers were arrested, 63 of whom were children from the ages of three months to 17 years old along with two pregnant women.<sup>48</sup> The raid at the residential complex located in Bang Yai district was conducted by the Ministry of Interior security officers (*Or Sor*), police, immigration

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<sup>40</sup> Human Rights Watch, "Thailand: Implementation Commitments to Protect Refugee Rights", 6 Jul. 2017, available at: <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights> (last visited 24 Apr. 2020).

<sup>41</sup> Amnesty International, "Between a Rock", 19.

<sup>42</sup> *Ibid.*

<sup>43</sup> Amnesty International, "Between a Rock", 17.

<sup>44</sup> OHCHR, *Country Overview: Thailand, Universal Periodic Review*, 2015.

<sup>45</sup> Fortify Rights, "Joint Submission by NGOs: Kingdom of Thailand Universal Periodic Review – 2<sup>nd</sup> Cycle", 21 Sep. 2015, 4, available at: [https://www.fortifyrights.org/downloads/Joint\\_Thailand\\_UPR\\_Submission\\_Mar\\_2016.pdf](https://www.fortifyrights.org/downloads/Joint_Thailand_UPR_Submission_Mar_2016.pdf) (last visited 25 Apr. 2020).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand".

police, and army soldiers.<sup>49</sup> Such arrest incident involved mostly people of the Montagnard ethnic minority from Cambodia and Vietnam, who have fled from political and religious persecution.<sup>50</sup>

Conditions in IDCs are appalling. The Human Rights Committee has raised concerns about refugees and asylum seekers being detained for long periods and without contact with their embassies, counsel or civil society organisations.<sup>51</sup> The concerns include overcrowded cells (with up to 150 people detained in cells at any one time),<sup>52</sup> lack of adequate health services, poor sanitation facilities, inadequate food and water, incidents of violence, among others.<sup>53</sup> Similar concerns about harsh conditions prevailing in detention facilities have also been raised by the Committee against Torture as well as the Special Rapporteur on the question of torture and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>54</sup>

### **2.3 Access to education**

Labelled as illegal immigrants by the national immigration law and without a legal basis to formally recognise their legal status, refugees and asylum seekers in Thailand further face an impediment to the right to education in practice.

The Thai National Education Act B.E. 2542 (1999) has expanded compulsory education from 6 years to 9 years and provided all children with 12 years primary education free of charge.<sup>55</sup> As of 2005 Thailand also adopted an “Education for All” policy that allows all children to access schooling, regardless of their nationality or legal status.<sup>56</sup>

In reality, however, this policy has not been implemented in a manner to actualise the right to education for refugee and asylum seeking children. This is due to certain practical obstacles to access education guaranteed by law, including the tuition language which in most public schools is conducted in Thai, a lack of financial resources for other necessary materials and expenses, such as uniforms and transportation fees, discrimination and exclusion from school administrators who are often reluctant to accept and enrol refugee children,<sup>57</sup> and restrictions on freedom of movement.

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Human Rights Committee, *Concluding Observations on the Second Report of Thailand*, UN Doc. CCPR/C/THA/CO/2, 25 Apr. 2017, para. 29.

<sup>52</sup> Asia Pacific Refugee Rights Network (APRRN), “Country Factsheet: Thailand”.

<sup>53</sup> Human Rights Committee, *Concluding Observations*.

<sup>54</sup> See: Committee against Torture, *Concluding Observations on the Initial Report of Thailand*, UN Doc. CAT/C/THA/CO/1, 20 Jun. 2014, para. 22.

<sup>55</sup> National Education Act B.E. 2542 (1999), 14 Aug. 1999, s. 10.

<sup>56</sup> Human Rights Council: Working Group on the Universal Periodic Review (25<sup>th</sup> Session, 2-13 May 2016), *Summary*, para. 73.

<sup>57</sup> Asia Pacific Refugee Rights Network (APRRN), “Country Factsheet: Thailand”.

While classes provided by NGOs and community-based organisations can be an alternative for these marginalised children, they often fall short of children's needs and are not formally recognised by the Ministry of Education.<sup>58</sup> This results in a lack of opportunity to transfer into the public school system or advance to higher education in Thailand.<sup>59</sup> Access to secondary and tertiary education is even more limited for the youth and adolescents.<sup>60</sup>

## **2.4 Access to employment**

Thailand's labour law prohibits refugees and asylum seekers from working legally in the country. This is due partly to the argument that allowing them to seek employment would create a pull factor by leading would-be entrants to believe that they will be able to work in Thailand.<sup>61</sup> As a result, to sustain their livelihood, many refugees and asylum seekers are forced to engage with the informal labour market, such as agricultural work, domestic work, and fishery industry.

Though Thailand's Labour Protection Act and other domestic labour laws apply equally to non-nationals, most employers in the informal sector are exempt from such provisions and enforcement mechanisms are generally weak.<sup>62</sup> This consequently places this group in an even more vulnerable position at risk of dangerous work environments and of exploitation and abuse.

While temporarily taking refuge and awaiting refugee status determination or resettlement procedure, most refugees and asylum seekers sustain their living by their savings or receiving money from remittances from family and friends from other places.<sup>63</sup> Although some basic financial assistance is provided by NGOs and in some cases by UNHCR, amidst serious funding cuts, this limited assistance is insufficient to cover basic necessities.<sup>64</sup>

## **2.5 Access to healthcare**

While refugees and asylum seekers have access to affordable healthcare through Thailand's health security system, care under the universal healthcare scheme is typically limited to certain government hospitals and only available in emergency situations.<sup>65</sup> Urban refugees have described access to healthcare as one of the most critical concerns.<sup>66</sup>

Many experience significant linguistic barriers when seeking medical treatment at Thai government hospitals and may also be unable to cover the cost of their treatment and medical

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<sup>58</sup> *Ibid.*

<sup>59</sup> Fortify Rights, "Joint Submission", 9.

<sup>60</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand".

<sup>61</sup> Muntarhorn, *Refugee Law and Practice*, 23.

<sup>62</sup> Fortify Rights, "Joint Submission", 10.

<sup>63</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand".

<sup>64</sup> *Ibid.*

<sup>65</sup> Fortify Rights, "Joint Submission", 9.

<sup>66</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand".

expenses.<sup>67</sup> In some cases, those seeking medical treatment are rejected or face discrimination from public healthcare providers,<sup>68</sup> whereas some might even refuse to visit hospitals out of fear of arrest. Although private hospitals offer better services, including interpretation service, the medical fees and expenses are prohibitively high for refugees and asylum seekers who are not allowed to legally seek employment in Thailand.<sup>69</sup>

It has been reported that for those detained in IDCs, doctors can be summoned to provide medical treatment and advice, but their instructions are frequently ignored by IDC officials.<sup>70</sup>

### **3. THE PM'S OFFICE REGULATION ON THE NATIONAL SCREENING MECHANISM: AN ANALYSIS**

In the past years, the Thai government has made strong commitments to improve the situation of refugee protection in Thailand. On September 20, 2016, Prime Minister Prayut Chan-o-cha pledged at the September 2016 UN Summit for Refugees and Migrants and the Leaders' Summit on Refugees in New York to establish a screening mechanism.<sup>71</sup> Not long after that, on January 10, 2017, Thailand adopted Cabinet Resolution 10/01 B.E. 2560, which set up a "Committee for the Management of Undocumented Migrants and Refugees" to develop policies concerning the screening and management of undocumented migrants and refugees.<sup>72</sup> During the UN General Assembly in December 2018, the country joined the international community in adopting the two Global Compacts, i.e. the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration.<sup>73</sup>

Following the commitments and concerted efforts, the concrete outcome was eventually achieved when the Thai Cabinet approved "the Prime Minister (PM)'s Office Regulation on the Screening of Aliens Entering into the Kingdom and Unable to Return to their Country of Origin (B.E. 2562)" (Regulation on National Screening Mechanism) on December 24, 2019. The Regulation is hailed a legal milestone, for it is the first national law on the formal screening mechanism for this group of vulnerable individuals.

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<sup>67</sup> *Ibid.*

<sup>68</sup> Fortify Rights, "Joint Submission", 9.

<sup>69</sup> Asia Pacific Refugee Rights Network (APRRN), "Country Factsheet: Thailand".

<sup>70</sup> OHCHR, *Country Overview: Thailand*.

<sup>71</sup> Ministry of Foreign Affairs of the Kingdom of Thailand, "Press Release: Thailand Pledged Additional Assistance to Alleviate the Plights of Displaced Persons", 21 Sep. 2016, available at: <http://www.mfa.go.th/main/en/media-center/14/70440-Thailand-pledged-additional-assistance-to-alleviat.html> (last visited 26 Apr. 2020).

<sup>72</sup> Human Rights Watch, "Thailand: Implementation Commitments".

<sup>73</sup> Ministry of Foreign Affairs of the Kingdom of Thailand, "Press Release: Thailand Joined the International Community in Adopting the Global Compact for Safe, Orderly and Regular Migration (GCM) during 10-11 December 2018 in Marrakesh, Kingdom of Morocco", 20 Dec. 2018, available at: <http://www.mfa.go.th/main/en/news3/6886/97663-Thailand-Joined-the-International-Community-in-Ado.html> (last visited 26 Apr. 2020).

While bearing in mind that the law is in its infancy and a 180-day period is given to develop a Standard Operating Procedure (SOP) under the National Screening Mechanism,<sup>74</sup> this essay seeks to examine the Regulation, discuss, and share a critical analysis, some constructive observations as well as recommendations from an international law perspective. The aim is to ensure that Thailand's momentous move in adopting such an instrument is a good practice in line with the international standards and truly a positive step towards human rights protection for refugees and asylum seekers.

### 3.1 General observations

A brief overview of the Regulation on National Screening Mechanism is discussed below. By exploring its provisions, some striking preliminary and general observations are subsequently shared, which intriguingly indicate the country's position on balancing between the national security and individual human rights.

The objective of the enacted Regulation is to manage aliens who enter into Thailand and are unable to return to their country of origin because there are substantial grounds for believing that they would be at risk of persecution upon deportation. Under this law, a screening mechanism is established to determine the status of this particular group of aliens and to provide them with protection, assistance and solutions accordingly.

It is composed of thirty articles divided into five main sections: I) The Screening Committee (required qualifications, terms, functions and duties, etc.); II) The status screening procedure (application forms, application procedure, etc.); III) Arrangements for persons granted protection status (*non-refoulement*, voluntary repatriation, resettlement, rights and assistance, etc.); IV) Review and assessment; and V) Transitory provision. For the purpose of this essay, only Sections II and III will be discussed in detail.

It is of the first general observation that although the Regulation was drafted in order to cope with the specific group of aliens, that is refugees and asylum seekers, no direct term of "refugee(s)" or "asylum seeker(s)" is mentioned anywhere in the texts. In lieu, the descriptive wording "aliens who enter into Thailand and are unable to return to their country of origin because there are substantial grounds for believing that they would be at risk of persecution upon deportation" is used, as seen in the preamble and the title of the Regulation itself. Throughout this legal instrument, two categories of persons: "those granted protection" (*Pu-dai-rub-garn-koomkrong*) and "those pending status screening" (*Pu-yoo-rawang-kadgrong-satana*) are referred to when talking about these individuals in need of international protection

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<sup>74</sup> The SOP is to be developed within 180 days before its implementation following the date of its official publication in the Government Gazette on December, 25 2019. See: The PM's Office Regulation on the Screening of Aliens Entering into the Kingdom and Unable to Return to their Country of Origin B.E. 2562 (2019), 25 Dec. 2019, Art. 2: "This Regulation shall be implemented after 180 days from the date of its official publication in the Government Gazette." (unofficial translation).



during the screening procedure. The enduring phobia of the international notion of refugee seems not to be easily uprooted.

Second, regardless of the Regulation's title and its objective to screen and determine the status of forcibly displaced persons, no single detail on eligibility criteria for the purpose of status determination is elaborated in the provisions. Indeed, the Regulation merely touches upon procedural issues while keeping silent on substantive criteria, including the definition of persons eligible for protection status. This raises serious concerns over objectivity, transparency, predictability and legitimacy of the Thai asylum application and screening procedure. The country's willingness to uphold the international definition of refugee when assessing asylum claims under the National Screening Mechanism remains to be seen.

Third and finally, two different terms appear when it comes to arrangements for persons granted protection status in Section III of the Regulation. The term "resettlement country" (*Pra-tade-ti-ja-pamnak-tor-pai-dai*) appears in Article 25(2), whereas "third country" (*Pra-tade-ti-sam*) is used in Article 27 despite the two terms being referred to in the same circumstance where a third country is considered an appropriate solution. It is unclear whether there is any distinction between the two words in terms of legal implication and implementation. More significantly, whether a third country prescribed in Article 27 must satisfy the requirements of the international notion of a safe third country.

### **3.2 Critical analysis through the lens of international refugee law and international human rights law**

The fact that Thailand has adopted the Regulation on a formal National Screening Mechanism is much welcomed and should be commended. Even so, it is important to examine and analyse this novel law through the lens of the most relevant international law, that is international refugee law and international human rights law. This is to ensure that the domestic Regulation neither falls short of the international standards nor it serves as a political device to deter forced migration and/or to circumvent the human rights protection for this group of individuals fleeing persecution and seeking international sanctuary.

#### **3.2.1 The principle of *non-refoulement***

The principle of *non-refoulement* is commonly deemed as "the cornerstone of asylum and of international refugee law".<sup>75</sup> According to Article 33(1) of the Refugee Convention, "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

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<sup>75</sup> UNHCR, "UNHCR Note on the Principle of Non-Refoulement", Nov. 1997, available at: <https://www.refworld.org/docid/438c6d972.html> (last visited 29 Apr. 2020).

The significance of this cardinal principle is not only endorsed by Article 42 where it states that any reservation to Article 33 is prohibited,<sup>76</sup> but also by the well-established acknowledgement that the *non-refoulement* principle is a principle of customary international law.<sup>77</sup> This is partly because the principle has been reinforced in numerous international human rights treaties to which many states, including Thailand, are party, namely Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>78</sup> Article 3(1) CAT provides that “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. Furthermore, the Executive Committee, as early as 1982,<sup>79</sup> and some scholars even suggested that the principle of *non-refoulement* amounts to a rule of *jus cogens*.<sup>80</sup>

The principle of *non-refoulement* is recognised by the Thai Regulation in Article 15 for “an alien claiming to be eligible for protection” and in Article 25(1) for “a person granted protection status”. Considering from the perspective and in the language of international refugee law, the personal scope of the Regulation provisions extends to both asylum seekers and refugees. The recognition of the principle of *non-refoulement* by Thailand, as a non-state party to the Refugee Convention, deserves applause and is significant, for it represents a state practice and emphasises a customary nature of the *non-refoulement* principle.<sup>81</sup> However, three remarks are to be noted.

Firstly, whereas the prohibition of *refoulement* under Article 33(1) of the Refugee Convention is formulated in an inclusive language “in any manner whatsoever”, which “clearly acknowledges that the prohibition of *refoulement* applies to any act of forcible removal or rejection that puts the person concerned at risk of persecution”,<sup>82</sup> and, as such, the decisive consideration lies not at the legal nature of the act, but its consequence,<sup>83</sup> the prohibited actions of *refoulement* under the Regulation are exclusively restricted to “deportation” (Article 15) and “return” (Article 25(1)).

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<sup>76</sup> V. Chetail, *International Migration Law*, Oxford University Press, 2019, 186.

<sup>77</sup> *Ibid.*, 119-124; E. Lauterpacht & D. Bethlehem, “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, 140-164.

<sup>78</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46 (entry into force: 26 Jun. 1987) [CAT].

<sup>79</sup> Executive Committee of the High Commissioner’s Programme, *General Conclusion on International Protection*, EXCOM Conclusion No. 25 (XXXIII), 20 Oct. 1982, para. (b). In Conclusion No. 79 (XLVII) 1996, the Executive Committee emphasised that the principle of *non-refoulement* was not subject to derogation.

<sup>80</sup> Lauterpacht & Bethlehem, “The Scope and Content”, 141; C. Costello & M. Foster, “Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test” in *Netherlands Yearbook of International Law 2015*, The Hague, T.M.C. Asser Press, 2016, 273-327.

<sup>81</sup> See further: Chetail, *International Migration Law*, 120-121.

<sup>82</sup> Chetail, *International Migration Law*, 186.

<sup>83</sup> Chetail, *International Migration Law*, 187.

Secondly, under international law, the prohibition of *refoulement* is applicable to the case in which a refugee is *refouled* to any “frontiers of territories” where his life or freedom would be threatened on account of the five conventional grounds (Article 33(1) of the Refugee Convention), and to “another State” where there are substantial grounds for believing that the individual would be in danger of being subjected to torture (Article 3 of the CAT). On the contrary, the principle of *non-refoulement* guaranteed under Article 25(1) of the Regulation is solely confined to the person’s “country of origin”. In short, the protection against *refoulement* under international refugee law and international human rights law is broader than that under the domestic Regulation.<sup>84</sup>

Lastly, while allowing the exception to *non-refoulement* principle on the basis of national security as in Article 33(2) of the Refugee Convention,<sup>85</sup> the Regulation disregards the absolute protection of the principle of *non-refoulement* under Article 3 of the CAT.<sup>86</sup> The situation may arise where Thailand, as a state party to the CAT, finds itself in a conflict between the two bodies of law. On the one hand, according to Articles 15 and 25(1) of the Regulation, a person concerned could be subjected to *refoulement* if there are grounds for regarding as a danger to the security of the country. On the other hand, as a result of the absolute nature of the *refoulement* prohibition under Article 3 CAT, Thailand is bound not to push back the person concerned to a country where he/she would be exposed to a risk of torture, cruel, inhuman or degrading treatment or punishment.

Drawing a normative analogy from the international refugee regime, the way to resolve such inconsistency is found in Article 5 of the Refugee Convention. Article 5 states that “nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention”. “The *travaux préparatoires* relating to Article 5 indicate that it was inserted as an attempt to safeguard more generous practices of some states that had been assumed voluntarily at the time of drafting.”<sup>87</sup> Accordingly, where the two legal realms clash, later, more generous obligations assumed by states under various human rights treaties prevail over their obligations under international refugee law.<sup>88</sup> In this way, a

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<sup>84</sup> This is an important point from the angle of safe third country removal.

<sup>85</sup> Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954), Art. 33(2): “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

<sup>86</sup> See, for instance: *Paez v. Sweden* (39/1996), CAT/C/18/D/39/1996 (28 Apr. 1997), para. 14.5; *Aeimey v. Switzerland* (34/1995), CAT/C/18/D/34/1995 (9 May 1997), para. 9.8; *Agiza v. Sweden* (233/2003), CAT/C/34/D/233/2003 (20 May 2005), para. 13.8.

<sup>87</sup> A. Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law*, 293, 2005, 305-307.

<sup>88</sup> *Ibid.*, at 306; See also: J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, 108-110; Chetail, *International Migration Law*, 185-186, 198; V. Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in R. Rubio-Marin (ed.), *Human Rights and Immigration, Collected Courses of the Academy of European Law*, Criminal Justice, Borders and Citizenship Research Paper No. 2147763, Oxford University Press, 2014, 37; V. Chetail, “Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human

refugee or asylum seeker who is excluded under the exclusion clause or in application of Article 33(2) of the Refugee Convention would still be protected from *refoulement* pursuant to the absolute human rights principle of *non-refoulement*.

In view of the above, the domestic legal provisions on the *non-refoulement* principle should be amended to be in full compliance with international law. Moreover, or alternatively, when implementing the provisions in practice, the concerned authorities should interpret the provisions in a more generous and inclusive manner by paying regards to the *non-refoulement* principle under international law. They should also bear in mind the related international obligations by which Thailand is bound, notably the absolute prohibition of *refoulement* under Article 3 CAT, when considering any potential deportation or return. To achieve such goal, capacity-building undertaken through workshops or training to promote greater knowledge and understanding of international human rights law and refugee rights among all relevant stakeholders, especially immigration officers and local authorities at borders is the key.

### 3.2.2 Right to seek and enjoy asylum

The right to seek and enjoy asylum from persecution is universally recognised by several instruments,<sup>89</sup> including the 1948 Universal Declaration of Human Rights (UDHR)<sup>90</sup> which Thailand has agreed upon and proclaimed.<sup>91</sup> Article 14 of the UDHR provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution” and that “this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.

Article 14 of the UDHR was later reaffirmed in the 1967 UN Declaration on Territorial Asylum (preamble and Article 1)<sup>92</sup> as well as the 1993 Declaration to the UN World Conference on Human Rights (Article I (23)).<sup>93</sup>

Article 1(1) of the 1967 UN Declaration on Territorial Asylum notes that “asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights...shall be respected by all other States”. But, “it shall rest with the State granting asylum to evaluate the grounds for the grant of asylum” (Article 1(3) of the 1967 UN Declaration).

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Rights Law”, in A. Clapham & P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, 720.

<sup>89</sup> See for example: Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1, 18 Dec. 2000 (entry into force: 1 Dec. 2009), Art. 18; African Charter on Human and People’s Rights, 1 Jun. 1981 (entry into force 21 Oct. 1986), Art. 12(3); American Convention on Human Rights, 22 Nov. 1969 (entry into force 18 Jul. 1978), Art. 22(7).

<sup>90</sup> Universal Declaration of Human Rights, GA Res. 217 (III), UN Doc. A/810 (1948).

<sup>91</sup> Human Rights Council: Working Group on the Universal Periodic Review (12<sup>th</sup> Session, 3-14 October 2011), *National Report submitted in accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: Thailand*, UN Doc. A/HRC/WG.6/12/THA/1, 19 Jul. 2011, para. 17.

<sup>92</sup> Declaration on Territorial Asylum, 14 Dec. 1967, A/RES/2312(XXII).

<sup>93</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, 25 Jun. 1993.

Article I (23) of Vienna Declaration and Programme of Action (1993) provides that “the World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments...”

The texts of the above instruments neither define “asylum” nor create any binding obligations for states.<sup>94</sup> Indeed, they suggest a considerable margin of appreciation with respect to who is granted asylum and what exactly this means.<sup>95</sup>

Although it has been recognised that, according to customary international law, to grant or refuse asylum is not a right belonging to individuals but to states,<sup>96</sup> the right to seek asylum is different. While Article 14 of the UDHR clearly falls short of granting a substantive right to be granted asylum, “its formulation was intended to maintain procedural right – the right to an asylum procedure, i.e. to grant access to refugee status determination”.<sup>97</sup> This also finds support in the opinions expressed by some legal scholars who perceive the right to seek asylum as covering the entire range of rights associated with receiving a proper status determination in and from a state of refuge.<sup>98</sup>

In this view, the right to seek asylum is thus a free-standing right and should be recognised on its own and divorced from an assurance of receiving asylum. Unlike the right to be granted asylum, the right to seek asylum, save for the exceptions under Article 14(2),<sup>99</sup> should autonomously be guaranteed without being subjected to states’ discretion.

Examining the domestic provisions on asylum procedure, Article 16 of the Regulation prescribes that an alien claiming to be eligible for protection shall submit “an application to request for the right to be a person granted protection” (*Kam-rong-kor-rab-sit-pen-pu-dai-rub-garn-koomkrong*) to the competent authorities. The authorities shall consider the application within thirty days from the day of receipt of the application (Article 17 paragraph 1). If the authorities find that an alien does not have the right to submit such application, the application shall be declared inadmissible, and the alien has the right to appeal against the result to the

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<sup>94</sup> G.S. Goodwin-Gill, “The International Law of Refugee Protection”, in E. Fiddian-Qasmiyeh & others (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford University Press, 2014, 42.

<sup>95</sup> *Ibid.*

<sup>96</sup> Chetail, *International Migration Law*, 190-191.

<sup>97</sup> T. Gammeltoft-Hansen & H. Gammeltoft-Hansen, “The Right to Seek – Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU”, *European Journal of Migration and Law*, 10, 2008, 441, 446.

<sup>98</sup> M. Den Heijer, *Europe and Extraterritorial Asylum*, Hart Publishing, 2012, 141; Edwards, “Human Rights, Refugees”, 300-301.

<sup>99</sup> Universal Declaration of Human Rights, GA Res. 217 (III), UN Doc. A/810 (1948), Art. 14(2): “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

Screening Committee within fifteen days from the date of notification (Article 17 paragraph 1). The decision of the Committee shall be deemed final (Article 17 paragraph 3).

In the case where the authorities find that an alien has the right to submit the application under Article 17, the authorities shall inform the alien of the decision in order for the alien to further submit “an application for being a person granted protection” (*Kam-kor-pen-pu-dai-rub-garn-koomkrong*) to the Screening Committee (Article 18).

The aforementioned provisions indicate that to apply for a refugee status in Thailand, a two-layer application process is required. Unless and until an alien’s application to request for the right to be a person granted protection is affirmative, he/she shall be eligible to submit an application for being a person granted protection.

Particular attention should be paid to the first-step application process undertaken by the authorities – what precisely is this application process and what is it for? Is it equivalent to the right to seek asylum in the language of international human rights law, which encompasses the right to an asylum process and the right to receive a proper status determination? If this is the case, not only the Regulation provisions are mute on eligibility criteria for considering the first-step application, but the rationale of its very existence is also questionable.

It must also be noted that Article 17 paragraph 1 clearly lays down a timeframe for the first-step application to be considered by the authorities as well as for an applicant to exercise the right to appeal against a negative outcome to the Screening Committee. This is in stark contrast with the second-step process of protection status determination, where neither a timeframe for considering the merits of asylum claims nor the right to appeal is mentioned.

Against this backdrop, one cannot avoid being sceptical that this first-step application process appears to serve as an initial stumbling block that hinders an asylum claimant from accessing the right to a satisfactory refugee status determination procedure.

To ensure the Regulation’s compliance with international law, it is recommended that the first-step application process be eliminated and replaced by a registration procedure, in which the basic biodata and preliminary asylum claims of aliens seeking refuge in Thailand are to be registered for the purpose of database/records before proceeding to the next step of status determination. The key point is that no substantive determination on the asylum claims should prematurely be undertaken at this stage.

### **3.2.3 Right to appeal/right to an effective remedy**

The right to appeal is recognised in Article 8 of the UDHR, which states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

It is also confirmed in a treaty law. Article 16(1) of the Refugee Convention ensures free access to the courts for a refugee,<sup>100</sup> which presumably includes access to courts for reviewing any refusals of refugee status.<sup>101</sup>

Furthermore, Article 14 of International Covenant on Civil and Political Rights (ICCPR),<sup>102</sup> which Thailand has ratified, guarantees the human right to a fair trial that “all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

Whether the right to appeal in refugee status determination process is guaranteed within the ambit of Article 14 ICCPR is debatable. Some refugee law scholars affirmatively argued that by examining the provision of Article 14 “all persons” in tandem with the broad and inclusive approach adopted by the Human Rights Committee (HRC) when interpreting the concept of determination of rights and obligations “in a suit at law”,<sup>103</sup> it can be concluded that Article 14 establishes “the entitlement of refugees to a formal legal determination of their rights, at least by way of review or appeal if these are denied by more informal decision-making structures”.<sup>104</sup> Other scholars further suggested that “the practical need for a second, effective (i.e. independent) look at a rejected asylum claim is in fact implicit within the international law principle of effective implementation that underpins the refugee status determination process overall”.<sup>105</sup> In sum, in the views of the scholars, asylum procedure is seen as a process that attracts procedural guarantees in its own right.

In contrast, the recent HRC jurisprudence demonstrates that “immigration hearings and deportation proceedings” or a decision on “a refugee claim” does not constitute the

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<sup>100</sup> Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954), Art. 16(1): “A refugee shall have free access to the courts of law on the territory of all Contracting States.”

<sup>101</sup> Chetail, “Are Refugee Rights?”, 52.

<sup>102</sup> International Covenant on Civil and Political Rights, 16 Dec. 1966, GA Res. 2200A (XXI) (entry into force 23 Mar. 1976) [ICCPR].

<sup>103</sup> Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc. CCPR/C/GC/32, 23 Aug. 2007, para. 16: “The concept of determination of rights and obligations “in a suit at law” (*de caractère civil/de caractère civil*) is more complex. It is formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, are equally authentic, and the *travaux préparatoires* do not resolve the discrepancies in the various language texts. The Committee notes that the concept of a “suit at law” or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.”

<sup>104</sup> Hathaway, *The Rights of Refugees*, 647-648.

<sup>105</sup> D.J. Cantor, “Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence”, *Refugee Survey Quarterly*, 34, 2015, 83; G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford University Press, 2007, 537.

determination of “rights and obligations in a suit at law” engaging the protections of the general due process guarantees in the right to a fair trial as prescribed in Article 14(1) ICCPR.<sup>106</sup> Rather, the Committee views refugee status determination as intrinsically related to *refoulement* or expulsion and, as a result, governed by human rights standards concerning due process.<sup>107</sup> The sources of these human rights standards are far from consistent, but, according to the HRC, its primary legal bases are found in Article 13 ICCPR (risk of arbitrary expulsion), or in Articles 7 and 6, coupled with Article 2(3) ICCPR (consequential risk of exposure to serious harm), or in a combination of both.<sup>108</sup>

Leaving aside divergent views as to from which provision(s) the right to appeal in asylum procedure is derived, what is evident is that the right to an effective remedy, which includes the right to appeal against a negative first instance decision, is securely guaranteed under the ICCPR. The right to an effective remedy ensures three main guarantees.<sup>109</sup> First, the non-fulfilment of formal requirements – such as late submission of an asylum request – cannot lead to a request being excluded from the examination of the merits of the claim by national authorities.<sup>110</sup> Second, “the right to effective remedy requires independent and rigorous scrutiny of the claim that substantial grounds exist to fear a real risk of inhuman or degrading treatment”.<sup>111</sup> Third, during the examination of the asylum claim, any removal must be suspended.<sup>112</sup>

In addition, albeit non-binding, UNHCR’s EXCOM Conclusion No. 8 of 1977<sup>113</sup> regarding the determination of refugee status recommends that: “(e) procedures for the determination of refugee status should satisfy the following basic requirements: (vi) if the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem”.

Considering Article 17 paragraph 1 of the Thai Regulation, it can be seen that in the case where the first-step application (an application to request for the right to be a person granted protection) is rejected by the competent authorities, the rejected applicant has the right to appeal to the Screening Committee. Nonetheless, the right to appeal in the second-step application process, where an application for being a person granted protection is denied by the Screening Committee, is precluded (Article 20 paragraph 3 of the Regulation).

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<sup>106</sup> Cantor, “Reframing Relationships”, 87; Human Rights Committee, *General Comment No. 32*, para. 17.

<sup>107</sup> Cantor, “Reframing Relationships”, 89.

<sup>108</sup> *Ibid.*

<sup>109</sup> Chetail, “Are Refugee Rights?”, 53.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, 54.

<sup>112</sup> *Ibid.*

<sup>113</sup> Executive Committee of the High Commissioner’s Programme, *Conclusion on Determination of Refugee Status*, EXCOM Conclusion No. 8 (XXVII), 12 Oct. 1977.



Article 20 paragraph 3 clearly states that the decision, either to grant or to reject the protection status, made by the Screening Committee shall be deemed final. This is alarming given that the right to appeal is a core right for the fair procedural standards to safeguard the rule of law and particularly that the second-step application process is where the merits of asylum claims are assessed and determined.

To be sure, no right to appeal against the decisions made either by the competent authorities or the Screening Committee before a competent, independent and impartial tribunal established by law such as the court is guaranteed under the domestic Regulation. The only available recourse for aliens whose refugee applications are rejected is to submit a re-opening application to the Screening Committee, which is contingent upon the vague and subjective condition: only “when the information or facts as prescribed by the Committee’s declaration arise” (Article 24).

Thailand’s failure to guarantee the right to appeal or to have the merits of rejected asylum claims reviewed by a competent, independent and impartial body is a flagrant violation of human rights standards concerning due process guaranteed under the ICCPR. It is therefore urged that the right to an effective remedy, including the right to appeal against adverse findings in this case be guaranteed under the National Screening Mechanism Regulation.

### **3.2.4 Legal status**

Since refugees and asylum seekers presumably flee their country of origin from persecution or other forms of serious human rights violations committed or condoned by their home state authorities, they are unlikely to have the relevant legal valid travel documents such as passports or visas. Based on this rationale, Article 31 of the Refugee Convention gives refugees, under some prerequisites, immunity from penalties on account of their illegal entry or presence in a state of asylum.

Article 31 enumerates that “the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

Related to this is the provision on arbitrary arrest or detention under the international human rights law. Article 9(1) of the ICCPR, which is also applicable to refugees and asylum seekers, provides that “no one shall be subjected to arbitrary arrest or detention”. In its General Comment, the HRC stated that “an arrest or detention may be authorised by domestic law and nonetheless be arbitrary”.<sup>114</sup> The notion of “arbitrariness” must be interpreted more broadly to

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<sup>114</sup> Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of the Person)*, UN Doc. CCPR/C/GC/35, 16 Dec. 2014, para. 12.

include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.<sup>115</sup> The Committee specifically provided comments on the arrest or detention of migrants at immigration centres that “detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time”.<sup>116</sup> Asylum seekers who unlawfully enter a state party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.<sup>117</sup> The HRC further clarified that extending the detention of asylum seekers while their claims are being resolved would be arbitrary if it is not subject to periodic re-evaluation and judicial review, if in the absence of particular reasons, including risk of absconding or of acts against national security, and if the state party fails to establish that there was no less invasive means of achieving the same ends.<sup>118</sup>

The legal status of forcibly displaced persons seeking refuge in Thailand has long been an issue of protection concerns. This is due primarily to the 1979 Immigration Act that considers them illegal immigrants and hence they are subject to penalties on account of their illegal entry and/or presence as well as at risk of human rights violations. When the newly adopted Regulation was drafted, it was anticipated that a positive step towards domestic legal status of refugees and asylum seekers, which in turn would guarantee their fundamental rights and freedoms, would be taken. Such anticipation unfortunately proved to no avail.

While aliens pending refugee status determination are entitled to an issuance of status and identity documents and registration (Article 19 paragraph 1 of the Regulation), there is no clarification on what the documents entail in practice in terms of their legal status. To be sure, no explicit recognition of their lawful stay/presence in the country is confirmed anywhere in the instrument.

This is exacerbated by paragraph 2 of Article 19 of the Regulation, which stipulates that in accordance with the Immigration Act, the authorities may authorise aliens pending status determination to stay at a place “as deemed appropriate”. This equivocal wording leaves a wide margin of appreciation to the Thai authorities. Most critically, it raises concern as to whether immigration detention centres (IDCs) remain an option. If so, it means that regardless of the papers issued by the competent authorities, those seeking refuge under the Thai asylum procedures are not safeguarded from the risk of arbitrary detention.

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<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, para. 18.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

Moreover, in contrast to Article 31 of the Refugee Convention, the Regulation does not provide an exemption from penalties imposed on this group of aliens on account of their illegal entry and/or presence in Thailand.

The opaque legal texts of the Regulation bear detrimental effects. Without the recognised legal status and the penalties exemption, these individuals remain vulnerable and at risk of various forms of human rights violation, including arbitrary arrest and/or indefinite detention, restriction of free movement as well as restriction of the rights to education, to employment and to healthcare as demonstrated above.

In light of the aforementioned, it is therefore strongly recommended that, during a processing of asylum claims under the National Screening Mechanism, the legal status or lawful stay/presence of asylum seekers and refugees in Thailand be expressly recognised. This is pivotal, for the recognition of legal status is a ground on which other human rights and fundamental freedoms flourish.

### **3.2.5 The refugee definition and protection status**

Article 1A(2) of the Refugee Convention, read together with the 1967 Protocol and without time or geographical limits, offers the definition of refugee as any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. In the case of stateless persons, their country of origin is understood as the country of their former habitual residence.

Examining the relevant provisions of the domestic Regulation, the remarks to be discussed are as follows. Firstly, it is found that no single detail on eligibility criteria for the purpose of status determination is elaborated anywhere in the texts. The closest wording to the international definition of refugee is found in the preamble of the Regulation. Even so, the preamble merely mentions this group as “aliens who enter into Thailand and are unable to return to their country of origin because there are substantial grounds for believing that they would be at risk of persecution upon deportation” without elucidating or specifying the grounds of persecution. And as a matter of fact, this descriptive wording appeared in the preamble only to explain a contextual migration-related problem cannot be used as the eligibility criteria for the purpose of status determination.

Secondly, indeed, Article 20 paragraph 1 of the Regulation does refer to the term “criteria” for status determination. The provision is, nonetheless, extremely substantively thin and formulated in a vague manner. It prescribes that the Screening Committee shall determine the applications for being a person granted protection in accordance with “the criteria, means and conditions set by the Committee subjected to the Cabinet’s approval”. No further details

on the inclusion criteria are elaborated. This obviously undermines the principles of objectivity, predictability and procedural fairness.

Thirdly, it is welcomed that certain international safeguards, namely the principle of family unity and the right to be assisted in the application procedure, are explicitly recognised in Article 20 paragraph 1 as the factors to be taken into consideration when assessing the applications. The list of rights, however, appears meagre. Given that there are many other crucial human rights guarantees concerning refugee status determination procedure, such as the principle of non-discrimination (Article 2 ICCPR), the best interests of the child (Article 3 of the 1989 Convention on the Rights of the Child (CRC) to which Thailand is a party), as well as the absolute prohibition of collective expulsion, which arguably forms part of customary international law and thus binds all states regardless of their ratification of the relevant treaties,<sup>119</sup> it is dubious whether the list is exhaustive. Further, the vaguely formulated “right to be assisted in the application procedure” also raises questions as to whether it encompasses the right to *legal* assistance which would include the right to legal counsel and representation, and whether such aid would be provided by the government free of charge.

Fourthly, whereas it is true that Article 20 paragraph 1 pays regard to international obligations, such obligations are broadly mentioned as the general international obligations. No explicit reference to the core and much relevant human rights treaties to which Thailand has acceded is made, including the ICCPR, ICESCR, CAT, CEDAW, CRC and CERD.

Fifthly and lastly, as prescribed by paragraph 2 of Article 20, after having considered the applications, the Screening Committee has two options: either to reject or to grant protection status to the applicants. As earlier discussed, the Committee’s decision to reject the applications is deemed final and the right to appeal against such negative decision is ruled out (Article 20 paragraph 3). Besides, even if the decision is positive, the granted protection status is neither absolute nor definite, for it could still be dependent on any additional conditions required by the Committee (Article 20 paragraph 2(2)).

In view of the above, it is highly recommended that the eligibility criteria for a person granted protection status be clearly and objectively defined by taking the international definition of refugee as a minimum standard. Furthermore, once the protection status has been granted, no subjective additional conditions should be allowed. Or else, the concern that the Regulation would serve as a political device to curtail human rights of these vulnerable individuals would be far from underestimated.

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<sup>119</sup> Chetail, *International Migration Law*, 138-140.

### 3.2.6 Cancellation clause

Apart from the inclusion clause, international refugee law lays down two other layers of requirements for the refugee definition, namely the exclusion and cessation clauses in Articles 1D, E, and F, and Article 1C respectively.

Even if a person satisfies all inclusion criteria stipulated in Article 1A(2), he/she is excluded from refugee status under the international refugee instrument if such person falls into three groups. The first group (Article 1D) consists of persons already receiving protection or assistance from the UN agencies other than UNHCR. This, for instance, includes persons who receive protection and assistance from the United Nations Relief and Work Agency for Palestinian Refugees in the Near East (UNRWA).<sup>120</sup> The second group (Article 1E) deals with persons who are not considered to be in need of international protection. This provision relates to persons who have been granted most of the rights normally enjoyed by nationals, but not formal citizenship.<sup>121</sup> The third and last group (Article 1F) involves persons who are not considered to be deserving of international protection.<sup>122</sup> This exclusion clause is applicable to any person with respect to whom there are serious reasons for considering that he/she has, *inter alia*, committed a crime against peace, a war crime, or a crime against humanity, or a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee. The rationale behind this provision is that the Refugee Convention provides international protection to those who flee persecution, not from (lawful) prosecution.

Based on the conception that refugee status is of a temporary nature, Article 1C of the Refugee Convention spells out the conditions under which a refugee ceases to be a refugee. Cessation clauses are applicable where, for instance, a refugee has voluntarily re-availed himself/herself of the protection of the country of his/her nationality, or the circumstances in connexion with which he/she has been recognised as a refugee have ceased to exist. This provision is based on the consideration that international protection should be terminated where it is no longer necessary or justified.<sup>123</sup>

Compared with international refugee law which sets forth three clauses for the refugee definition, i.e. the inclusion, exclusion and cessation clauses, the Thai Regulation interestingly includes the cancellation clause in Article 21.

While not stipulated in the Refugee Convention, in practice, cancellation of refugee status is possible and applicable. As noted by the UNHCR Handbook on Procedures, the cessation clause (Article 1C) does not deal with cancellation of refugee status, but

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<sup>120</sup> *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/1P/4/ENG/REV.4, 2019, 34, para. 142.

<sup>121</sup> *Ibid.*, 35, para. 144.

<sup>122</sup> *Ibid.*, 34, para. 140.

<sup>123</sup> *Ibid.*, 29, para. 111.

circumstances may come to light that a person should never have been recognised as a refugee in the first place.<sup>124</sup> The circumstances include, but are not limited to, if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that one of the exclusion clauses would have applied to him/her had all the relevant facts be known.<sup>125</sup> In such cases, the recognised refugee status will normally be cancelled.<sup>126</sup>

It can be seen that, according to the international standards, the threshold to apply the cancellation clause is high and the grounds for cancellation of refugee status must be serious and owing generally to *mala fides* of the applicants.

Article 21 paragraph 1 of the Regulation provides that the Screening Committee may revoke the status of persons pending status screening procedure or of those granted protection status under the circumstances where they: (1) violate conditions set by the Committee; (2) do not comply with this Regulation; or (3) do not cooperate with the Committee, Sub-Committee, or competent authorities. Not only such provision is vague, but considerably subjective. This again raises concerns over transparency, objectivity and predictability of the screening procedure.

In addition, as in the case of a negative decision of asylum claim, the decision of status cancellation by the Screening Committee is final and the right to appeal is debarred (Article 21 paragraph 2). Re-opening submission remains the only available remedial action, which is further dependent upon the vague and subjective condition: only “when the information or facts as prescribed by the Committee’s declaration arise” (Article 24).

To uphold the international standards, the criteria that trigger an applicability of the cancellation clause should be clearly and objectively identified, and the right to appeal against the status cancellation decision before a competent, independent and impartial body should be guaranteed.

### **3.2.7 Durable solutions and accompanying rights and assistance to persons granted protection status**

The traditional durable solutions for refugees are repatriation to their country of origin, local integration in the country of asylum, and resettlement to a third country.<sup>127</sup>

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<sup>124</sup> *Ibid.*, 30, para. 117.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA Res. 428(V), 14 Dec. 1950, chapter I(1); Executive Committee of the High Commissioner’s Programme, *Conclusion on International Protection*, EXCOM Conclusion No. 89 (LI), 13 Oct. 2000; UN General Assembly (UNGA), *Report of the United Nations High Commissioner for Refugees*, UN Doc. A/RES/38/121, 16 Dec. 1983, para. 8; Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (12-13 December 2001)*, HCR/MMSP/2001/09, 16 Jan. 2002, paras. 8, 13; Executive Committee of the High Commissioner’s Programme, Standing Committee, *Agenda for Protection*, UN Doc. EC/52/SC/CRP.9/Rev.1, 26 Jun. 2002.

Article 25(2) of the Regulation discusses voluntary repatriation and resettlement. It provides that when an alien is granted protection status, the relevant agencies shall facilitate a voluntary repatriation when the reasons of inability to return have ceased to exist, or facilitate and coordinate for resettlement. The details on the relevant agencies and process for consideration of the two solutions are further elaborated in Article 27. Article 28 provides that the process in which a person granted protection status departs Thailand shall be undertaken in pursuance of the immigration law. When a person granted protection status is sent outside the Kingdom as prescribed in Article 28 paragraph 1, the alien's protection status shall cease (Article 28 paragraph 2).

Interestingly, apart from voluntary repatriation and resettlement, which are the durable solutions already available for those seeking refuge in Thailand and recognised as a refugee by UNHCR, Article 25(3) of the Regulation paves the way for a possibility of local integration for the first time. It stipulates that when an alien is granted protection status, the relevant agencies shall authorise him/her to reside in Thailand "on an exceptional basis", or "to temporarily stay" in the country, in pursuance of the immigration law and by taking the status screening outcome into account. Added to its ambiguous and insubstantial provision, the observations of Article 25(3) are as follows.

It is first peculiar why a temporary stay is expressly acknowledged here as part of durable solutions applicable solely to those already granted protection status. Indeed, a temporary stay should be a minimum safeguard guaranteed to all persons seeking international protection prior to and following their status recognition, for it is the practical means to respect the *non-refoulement* principle.

Next, albeit being granted protection status and authorised to reside/stay in Thailand, their legal status remains volatile and, most critically, is still subject to the immigration law. This appears not to be in conformity with the international notion of local integration, which means in essence that "a refugee is granted some form of *durable legal status* that allows him or her to remain in the country of first asylum *on an indefinite basis*, and *fully to participate in the social, economic, and cultural life of the host community*".<sup>128</sup> According to the international notion, it is doubtful whether local integration has actually become a viable solution for refugees in Thailand. Needless to say, unlike the provision of the international refugee instrument,<sup>129</sup> the domestic Regulation offers no prospect of naturalisation for persons granted protection and authorised to stay in the country. Looking from this perspective, the conception of local integration under the Regulation is so ambivalently drafted that it may never be implemented

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<sup>128</sup> Hathaway, *The Rights of Refugees*, 977-978 (emphasis added).

<sup>129</sup> Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954), Art. 34: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

in reality. And if this is the case, status quo on the available solutions for recognised refugees in Thailand would be maintained.

Another key issue involves the accompanying rights and assistance to persons granted protection status. It is found that the rights and assistance provided to those granted protection status under the Regulation are scant. Only the right to education for children granted protection status and the right to healthcare are explicitly guaranteed in Article 25(4).

While on the surface, the recognition of the right to education for refugee children appears commendable, Article 25(4) in fact neither provides a new guarantee for refugee children nor imposes a new obligation on Thailand, for the right to education is in any case recognised to every child, including refugee and asylum seeking children, under Article 28 of the Convention on the Rights of the Child (CRC)<sup>130</sup> to which Thailand is a signatory.

When it comes to other rights and protections for children granted protection status, the Regulation chooses to keep silent. This is not unintentional, for one must be reminded that at the time of accession to the CRC in 1992, Thailand has made the reservation to Article 22,<sup>131</sup> which specifically protects the rights of a child seeking refugee status or considered a refugee.<sup>132</sup> Despite repeated urges from the Committee on the Rights of the Child to withdraw the reservation, until today, the reservation to Article 22 remains effective.<sup>133</sup> In sum, as a result of the applicability of the Regulation in tandem with the reservation to Article 22 CRC, other protections for displaced children, apart from the right to education and the right to healthcare, are not guaranteed.

The minimal list of accompanying rights and protection suggests that the *raison d'être* of the newly adopted law is far from being a human rights instrument. In fact, most of the

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<sup>130</sup> Convention on the Rights of the Child, 20 Nov. 1989 (entry into force 2 Sep. 1990) [CRC], Art. 28: "1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates..."

<sup>131</sup> V. Muntarbhorn, *The Core Human Rights Treaties and Thailand*, Leiden, Brill Nijhoff Press, 2017, 70.

<sup>132</sup> Convention on the Rights of the Child, 20 Nov. 1989 (entry into force 2 Sep. 1990) [CRC], Art. 22: "1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention."

<sup>133</sup> Committee on the Rights of the Child, *Considering of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Thailand*, UN Doc. CRC/C/THA/CO/3-4, 17 Feb. 2012, para. 10.



provisions conspicuously reflect the Westphalian principle of state sovereignty and security. The Regulation is accordingly more state-centric than human rights instrument.

Considering the aforementioned, it is recommended for Thailand to amend the provision on local integration by taking into account the international notion of the same. Wider range of rights and protections accompanied to persons granted protection status should be explicitly guaranteed. This includes, among others, the right to employment, freedom from arbitrary arrest and/or detention, and freedom of residence and internal movement. Particularly relevant to refugee children, Thailand should consider withdrawing its reservation to Article 22 CRC and take all necessary measures to protect the rights and assist all refugee and asylum seeking children in the country.

## **CONCLUSION**

The adoption of the Thai Regulation on National Screening Mechanism is commended, for it is the first domestic instrument establishing a formal national procedure to determine the status of displaced persons in need of international refuge. Nevertheless, the substantive provisions on refugee rights and protection are so meagre that it questions whether this legal milestone is truly a step forward for refugee protection. The provisions of the Regulation are vaguely formulated and, in many cases, subjected to a wide margin of appreciation of the Thai authorities.

Neither the definition of person eligible for protection status nor any detail on eligibility criteria for the purpose of status determination is elaborated anywhere in the Regulation. While the principle of *non-refoulement* is guaranteed, it offers protection in a narrow sense and is not absolute. The additional first-layer application process appears to serve nothing but to discourage access to a proper refugee status determination. The right to appeal against the adverse findings of the merits of asylum claims as well as cancellation decisions by the Screening Committee before a competent, independent and impartial body is ruled out. Legal status of these vulnerable individuals remains unclear and the risk of arrest and/or detention on account of their illegal entry/stay is not explicitly discarded. Whereas the Regulation seems to pave the way for local integration, when carefully examining the relevant provision, it is dubious whether it has actually become a viable solution for refugees in Thailand. Additionally, the accompanying rights and assistance to persons granted protection status are minimally guaranteed. Taken as a whole, the Regulation is a welcome but insufficient move towards the protection of refugees.

To enhance and reinforce refugee rights and protection, and to ensure the national Regulation's compatibility with international law, much can be done. This includes, *inter alia*, to clearly and objectively identify the criteria for a person eligible for protection status in line with the international definition of refugee; to respect the obligation of prohibition against

*refoulement*; to replace the first-step application process with a registration procedure; to guarantee the right to an independent review of unfavourable decisions; to explicitly recognise legal status of those seeking asylum under the national screening procedure, including to guarantee freedom from arbitrary arrest and/or detention; to expand the list of rights and assistance provided to persons granted protection status; and to promote greater knowledge and understanding of and empathy for international human rights law and refugee rights among all relevant stakeholders, namely key government agencies, local authorities, civil society organisations, media, academics, local communities, and refugees as well as asylum seekers themselves. This can be undertaken through formal and non-formal education, *ad hoc* workshops and training.

It is not too late for Thailand to make this step a true step forward, not a missed opportunity for refugee protection.

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