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Stateless and Fleeing Persecution: The Situation of the Rohingya in Thailand

By Amanda Crews Slezak, Thalia Roussos Singer, and Rupa Ramadurai*

And then there are the Rohingya—just one poignant example of Myanmar’s new freedoms becoming exploited by bullies and extremists. How can people be treated in such a way—hunted down, homes torched, beaten and killed—in the name of a warped sense of nationalism? Do the perpetrators not know that we are from the same human family?¹

I. INTRODUCTION

It has been said that “the Rohingya people are the most persecuted community of individuals in the world.”² The Rohingya are a Muslim minority population that has lived in the Arakan State of Burma for hundreds of years, many still finding their way.³ Regardless of the longevity of their presence, the Burmese government considers the Rohingya to be “undocumented immigrants” and denies the Rohingya legal status as citizens, or even as an individual ethnic group. Burmese authorities accomplished the exclusion of the Rohingya through the enactment of the 1982 Citizenship Law of Burma,⁴ which has condemned the Rohingya to live as stateless people.⁵

When deprived of nationality, a person is deemed stateless.⁶ There are two international treaties that provide guidance on defining stateless individuals and how countries are to deal with these individuals.⁷ Neither of these treaties are signed or ratified by Burma.⁸ The Convention Relating to the Status of Stateless Persons pertains to the treatment of *de jure* stateless persons, “who are not considered as a national by any State under the operation of its law.”⁹ What is not

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¹ In April 2013, Desmond Tutu, archbishop emeritus of Cape Town and a Nobel peace laureate, wrote an opinion editorial about the Rohingya for the *Washington Post* after having visited Burma and witnessing firsthand how the Rohingya lived without safety or even dignity. Desmond Tutu, *Myanmar’s Chance to Do Right by All Its People*, WASHINGTON POST (Apr. 19, 2013), http://www.washingtonpost.com/opinions/myanmars-chance-to-do-right-by-all-its-people/2013/04/19/a43ead3e-a868-11e2-8302-3c7e0ea97057_story.html.

² *Why is There Communal Violence in Myanmar?*, BBC NEWS (July 3, 2014, 3:01 AM), <http://www.bbc.co.uk/news/world-asia-18395788>.

³ *Briefing: Myanmar’s Rohingya Crisis*, INTEGRATED REG’L INFO. NETWORKS (Nov. 16, 2012), <http://www.irinnews.org/report/96801/briefing-myanmar-s-rohingya-crisis>.

⁴ *Id.* This Article follows U.S. policy in referring to the country as Burma in most contexts rather than its official name Myanmar. *U.S. Relations with Burma: Fact Sheet*, U.S. DEP’T OF STATE (Sept. 3, 2014), <http://www.state.gov/r/pa/ei/bgn/35910.htm>.

⁵ *Briefing: Myanmar’s Rohingya Crisis*, *supra* note 3.

⁶ Benjamin Zawacki, *Defining Myanmar’s “Rohingya Problem”*, 20 HUM. RTS. BRIEF 18, 19 (2013), *available at* <http://www.wcl.american.edu/hrbrief/20/3zawacki.pdf>.

⁷ *Id.* at 19.

⁸ *Id.*

⁹ *Id.*; United Nations Convention Relating to the Status of Stateless Persons art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117; *see also* U.N. High Comm’r for Refugees, *Guidelines on Statelessness No. 1: The Definition of “Stateless Person” in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons*, ¶¶ 35–37, U.N. Doc. HCR/GS/12/01 (Feb. 20, 2012) [hereinafter *Guidelines on Statelessness*].

clear, however, is whether the Convention would apply to the Rohingya in Burma, as the Convention only applies to stateless persons who are legally residing in the country at issue.¹⁰ As a result of the 1982 Citizenship Law, the Burmese government has determined that the Rohingya are not legal residents of the nation.¹¹

The Burmese Citizenship law affects Rohingya adults and children alike.¹² A specific provision of the law requires government authorization for marriage, as well as a “two-child policy.”¹³ These restrictions have made Rohingya children “‘evidence’ of unregistered marriages, an act punishable by up to ten years in prison.”¹⁴ Should a family choose to have more than two children, each subsequent child who is unregistered becomes “blacklisted for life, unable to travel, attend school, or get married.”¹⁵ These stateless children, along with men and women, confront inadequate healthcare and starvation, resulting in avoidable health problems.¹⁶ These are just a few examples of the extreme restrictions imposed on the Rohingya by the Burmese government and military officials in the Arakan State, essentially “nullifying or impairing the Rohingya’s recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, and cultural life of the people of [Burma].”¹⁷

Due to repression and violence, thousands of Rohingya have fled Burma with the hope of finding a peaceful place to live.¹⁸ In past years, many Rohingya have fled to Bangladesh. However, they are now no longer welcome in the Bangladeshi refugee camps because they have been deemed to be a “drain on resources.”¹⁹ With seemingly no place to turn, the Rohingya have been forced to flee Burma by sea, and have been branded as the “Boat People.”²⁰ Though inhumane treatment of the Rohingya has persisted for centuries, recent media exposure has illustrated the desperation of the Rohingya as they wash up on the beaches of southern Thailand.²¹ One of the many challenges Thailand now faces is coordinating support efforts with the international community in order to manage the hundreds of Rohingya refugees.

With the surge of Rohingya asylum-seekers, the capacity of the United Nations High Commissioner for Refugees (“UNHCR”) remains limited in its ability to determine the status of refugees in the absence of a national asylum framework or legislation in Thailand.²² Without an asylum law in Thailand, and due to the Rohingya’s status as stateless people,²³ the Rohingya have

¹⁰ *Guidelines on Statelessness*, *supra* note 9, ¶¶ 35–37.

¹¹ Burma Citizenship Law No.4 (Oct. 15, 1982), available at <http://www.refworld.org/docid/3ae6b4f71b.html>.

¹² *Thailand: Protect Rohingya ‘Boat Children’*, HUMAN RIGHTS WATCH (Jan. 6, 2014), <http://www.hrw.org/news/2014/01/06/thailand-protect-rohingya-boat-children>.

¹³ *In Brief: 40,000 Rohingya Children in Myanmar Unregistered*, INTEGRATED REG’L INFO. NETWORKS (Jan. 19, 2012), <http://www.irinnews.org/report/94672/in-brief-40-000-rohingya-children-in-myanmar-unregistered>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Thailand: Protect Rohingya ‘Boat Children’*, *supra* note 12.

¹⁷ AMNESTY INT’L, MYANMAR THE ROHINGYA MINORITY: FUNDAMENTAL RIGHTS DENIED 13 (2004), available at <http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf>.

¹⁸ *Briefing: Myanmar’s Rohingya Crisis*, *supra* note 3.

¹⁹ Steffan Balsom, *Rohingya: A Nation Orphaned by History*, INTERCONTINENTAL CRY (Oct. 10, 2012), <http://intercontinentalcry.org/rohingya-a-nation-orphaned-by-history/>.

²⁰ *Thailand Don’t Deport Rohingya ‘Boat People’*, HUMAN RIGHTS WATCH (Jan. 2, 2013), <http://www.hrw.org/news/2013/01/02/thailand-don-t-deport-rohingya-boat-people>.

²¹ *Id.*

²² 2014 UNHCR Country Operations Profile: Thailand Overview, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/49e489646.html>; ALICE FARMER, HUMAN RIGHTS WATCH, TWO YEARS WITH NO MOON: IMMIGRATION DETENTION OF CHILDREN IN THAILAND 8, 17–18 (Bede Sheppard et al. eds., 2014), available at http://www.hrw.org/sites/default/files/reports/thailand0914_ForUpload_0.pdf.

²³ FARMER, *supra* note 22, at 14.

no way to legally enter Thailand.²⁴ In response to this, the Rohingya must be provided with a way to legally seek asylum and other forms of protection, either by permitting the UNHCR to create a refugee status for the Rohingya or by reinstating the government-led process of placing these refugees in Thai-Burmese border camps.²⁵ The Thai government must also stop its practice of indefinitely detaining Rohingya refugees, especially children, in immigration detention centers.²⁶ The international community must take concrete steps to share the responsibility of protecting the Rohingya.²⁷

This Article will first discuss the background of the Rohingya to provide an understanding of their flight from Burma, as well as their treatment upon arrival in Thailand as dictated by Thai policies. Next, this Article will identify gaps between existing international and Thai laws, illuminating the lack of a legal framework to guide the asylum-seeking process in Thailand. Finally, the Article will discuss various proposals for responding to the Rohingya crisis, specifically suggesting substantive changes in Thai law and increased cooperation and accountability with other countries.

II. BACKGROUND OF THE BURMESE ROHINGYA AND INTERNAL CONFLICT IN BURMA

The Rohingya are a Sunni Muslim population who reside primarily in the Arakan State of Burma near the border of Bangladesh.²⁸ The Burmese government claims that the Rohingya are originally Bengalis who have arrived in Burma in the last few generations.²⁹ The conflict between the majority, the Burmese Buddhists, and the minority, the Muslim Rohingya, however, dates back to the fifteenth century, when Muslims began to migrate to Burma.³⁰ Aggressive persecution of the Rohingya began in 1784, when the Burmese government took over the independent Rakhine province.³¹ Subsequently, the Burmese government instituted discriminatory policies against the Rohingya; this included restricting the group's movement and dispelling their right to marry.³² When Burma gained its independence from British rule in 1948, the Burmese Junta³³ announced that the Rohingya would no longer be considered citizens, highlighting a religious divide between Islam and Buddhism.³⁴ In 1947, a group of Rohingya were involved in the

²⁴ Nikki Ostrand, *The Stateless Rohingya in Thailand*, CTR. FOR MIGRATION STUDIES (July 16, 2014), <http://cmsny.org/the-stateless-rohingya-in-thailand/>; Zoe Daniel, *Thai Military Accused of Trafficking Refugees*, ABC NEWS (Mar. 11, 2013, 7:45 AM), <http://www.abc.net.au/news/2013-03-11/thai-military-accused-of-trafficking-refugees/4566234>.

²⁵ FARMER, *supra* note 22, at 62.

²⁶ *Id.* at 61.

²⁷ Salem News, *International Community Urged to Stop the 'Silent Genocide' of Rohingya Muslims*, U.N. HIGH COMM'R FOR REFUGEES (Jan. 26, 2014), <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=52e9f13e5>.

²⁸ *Id.*; Express Tribune, *Rohingya: Stateless and 'Friendless' in Myanmar*, U.N. HIGH COMM'R FOR REFUGEES (June 12, 2012), <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=4fd825005>.

²⁹ Syed Zubair Ahmad, *Rohingya Muslims: A Brief History of Centuries-Long Persecution*, TWOCIRCLES.NET (July 29, 2012, 3:21 PM), http://twocircles.net/2012jul29/rohingya_muslims_brief_history_persecution.html#.VFFKmfldVZc.

³⁰ DANISH IMMIGRATION SERV., ROHINGYA REFUGEES IN BANGLADESH AND THAILAND: FACT FINDING MISSION TO BANGLADESH AND THAILAND 7 (2011) [hereinafter ROHINGYA REFUGEES IN BANGLADESH AND THAILAND], available at <http://www.nyidanmark.dk/NR/rdonlyres/B08D8B44-5322-4C2F-9604-44F6C340167A/0/FactfindingrapportRohingya180411.pdf>.

³¹ *Id.*

³² *Id.* at 9.

³³ Burmese military personnel, infamously known for having ruled the country from 1962 until 2011, suppressing all dissent, and wielding absolute power in the face of international condemnation and sanctions. Specifically, the Junta have been accused of gross human rights abuses, including the forcible relocation of civilians and the widespread use of forced labor, including children. *Myanmar Profile*, BBC NEWS (Oct. 7, 2014, 10:26 AM), <http://www.bbc.co.uk/news/world-asia-pacific-12990563>.

³⁴ Zubair Ahmad, *supra* note 29; Rodion Michael Ebbighausen, *Myanmar Monks Protest Against Minority Muslims*, DEUTSCHE WELLE (Mar. 9, 2012), <http://www.dw.de/myanmar-monks-protest-against-minority-muslims/a-16217797>; see also *Burma Acknowledges Mass Burnings in Rakhine Unrest*, BBC NEWS (Oct. 27, 2012, 12:13 AM), <http://www.bbc.co.uk/news/world-asia->

formation of an extremist Muslim group called the Mujahid Party, whose goal to create an autonomous Muslim state magnified the Burmese government's suspicion of the Rohingya.³⁵ Although the group did not succeed, their actions enabled the Burmese government to justify its treatment of the Rohingya as non-citizens.³⁶

In 1978, the Burmese government undertook a harrowing military operation called "Operation King Dragon," which resulted in the flight of more than 200,000 Rohingya to Bangladesh.³⁷ The military "scrutiniz[ed] each individual living in the state, designated citizens and foreigners in accordance with the law, and [took] actions against foreigners who ha[d] filtered into the country illegally."³⁸ The Burmese government specifically aimed Operation King Dragon at the Rohingya civilians, employing mass murder, rape, and desecration of Muslim religious landmarks.³⁹ As a result of increasing protest from the international community, Burma temporarily allowed repatriation of the Rohingya.⁴⁰

The 1982 Burmese Citizenship law overshadowed the brief period of repatriation; the law denied the Rohingya of all the benefits and rights of citizenship.⁴¹ Upon implementation of this law, the Rohingya became a truly stateless community, deprived of citizenship documentation, and thus unable to seek refuge anywhere.⁴² The law denies nationality for the Rohingya by creating "three classes of citizens—full, associate, and naturalized—none of which has been conferred on most [Rohingya]."⁴³ The Burmese government grants citizenship on a very limited basis to: Burmese who lived in the country on or before 1823 or individuals who belong to one of the 130 recognized national ethnic groups, none of which included the Rohingya.⁴⁴

Those who qualify to apply for the status of associate or naturalized citizenship either resided in Burma on or before 1948, or at the very least have an awareness of a former Burmese law, which would confer such a status upon them.⁴⁵ Even if a Rohingya person meets such criteria, "the Central Body still had the discretion to deny citizenship."⁴⁶ The law is implemented in a discriminatory fashion in that although the restrictions do not remain applicable to the Rohingya alone, enforcement of the law is not uniformly imposed on other Buddhists or Muslims who live in the Rakhine State, or any other ethnic minority who live in the country.⁴⁷ The consequences have extended further, as the Rohingya have been stripped of the right to receive adequate education, health care, social security, and employment opportunities.⁴⁸

One of the largest exoduses of Rohingya refugees from Burma occurred in the 1990s when the State Law and Order Restoration Council ("SLORC"), the militant government of

[20110150](#) ("The Burmese authorities regard the Rohingya as illegal immigrants and correspondents say there is widespread public hostility to them.").

³⁵ Zubair Ahmad, *supra* note 29.

³⁶ ROHINGYA REFUGEES IN BANGLADESH AND THAILAND, *supra* note 30, at 7.

³⁷ Zubair Ahmad, *supra* note 29.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ ROHINGYA REFUGEES IN BANGLADESH AND THAILAND, *supra* note 30, at 8.

⁴¹ Zubair Ahmad, *supra* note 29.

⁴² *Id.*

⁴³ Zawacki, *supra* note 6, at 18.

⁴⁴ *Id.*

⁴⁵ *Id.* at 18–19.

⁴⁶ *Id.*

⁴⁷ *Id.* at 19.

⁴⁸ *Problems Faced by Stateless People*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c161.html> (last visited Jan. 20, 2015).

Burma, isolated the Rohingya in militarized zones.⁴⁹ SLORC justified the sequestration as necessary to protect against a supposed threat of Muslim extremist insurgents.⁵⁰ As a result, the Rohingya have since suffered with a poor quality of life and growth of hostility directed toward their people.⁵¹

In May 2012, reports that Muslim men had raped and murdered an Arakanese Buddhist woman spurred intense bloodshed.⁵² Since the report, the Burmese government has further isolated the Rohingya by placing them in camps where their main source of food and other resources is foreign donors.⁵³ In addition, Burmese officials maintain checkpoints with armed guards that prohibit those in the camps from returning to their work.⁵⁴ Because of prolonged lack of food and the inability to maintain their livelihoods while in the camps, many Rohingya are continuously malnourished.⁵⁵ Organizations, such as Doctors Without Borders, have faced hostile threats from Burmese forces demanding the cessation of medical care to the Rohingya camps.⁵⁶ The heavy reliance of the Rohingya on foreign aid has been, and continues to be, an unstable source of support, given the attacks made upon foreign aid operations resulting in the suspension of their services.⁵⁷ Although Burmese officials have argued that the purpose of the camps is to keep the Rohingya safe, the harm the Rohingya face as a result of living in these camps makes the government's position difficult to accept.⁵⁸

III. CURRENT SITUATION

To date, the UNHCR estimates that more than 86,000 people, the majority of whom are Rohingya, have fled by sea since June 2012.⁵⁹ This has left many Rohingya shipwrecked and washed ashore in Thailand.⁶⁰ However, Thailand was not the desired destination for many Rohingya; many were actually en route to more welcoming nations such as Malaysia or Indonesia, nations with larger Muslim populations.⁶¹ With no intention of settling in Thailand, inadequate means of travel have left many Rohingya stranded on the beaches of southern Thailand, often left

⁴⁹ ROHINGYA REFUGEES IN BANGLADESH AND THAILAND, *supra* note 30, at 8.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Burma: Government Forces Targeting Rohingya Muslims*, HUMAN RIGHTS WATCH (Aug. 1, 2012), <http://www.hrw.org/news/2012/07/31/burma-government-forces-targeting-rohingya-muslims-0>.

⁵³ Jason Motlagh, *Pushed from Burma, Stateless Rohingya Flee by Boat*, TIME (Feb. 17, 2013), <http://world.time.com/2013/02/17/pushed-from-burma-stateless-rohingya-flee-by-boat/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Charlie Campbell, *U.N.: 86,000 Rohingya Have Fled Burmese Pogroms by Boat*, TIME (June 12, 2014), <http://time.com/2863042/u-n-86000-rohingya-have-fled-burmese-pogroms-by-boat/>; Eliane Coates, *Rohingya Boat People: A New Challenge for SE Asia*, NATION (Feb. 21, 2013, 1:00 AM), <http://www.nationmultimedia.com/opinion/Rohingya-boat-people-a-new-challenge-for-SE-Asia-30200771.html>.

⁶⁰ *Thailand Don't Deport Rohingya 'Boat People'*, *supra* note 20.

⁶¹ E-mail from Alan Morison, Journalist, Phuket Wan Thailand News, to Rupa Ramadurai, Attorney at Law, Hodges, Loizzi, Eisenhammer, Rodick & Kohn (Mar. 21, 2013) (on file with author) (“Thailand’s response to arriving Rohingya asylum seekers contrast sharply with the policy in Malaysia, where the authorities have routinely allowed the UN refugee agency access to arriving Rohingya. Those recognized by the agency as refugees are released from immigration detention”); *Thailand Don't Deport Rohingya 'Boat People'*, *supra* note 20; *Thailand: Fleeing Rohingya Shot in Sea by Navy*, HUMAN RIGHTS WATCH (Mar. 13, 2013), <http://www.hrw.org/news/2013/03/13/thailand-fleeing-rohingya-shot-sea-navy>.

at the mercy of the Thai navy, where they are sent to detention centers, or sold to human traffickers.⁶²

A. Thai Policies Addressing the Arrival of Rohingya Refugees

Thailand's response to the influx of Rohingya refugees has evolved over the past few years. Before the international media publicized the crisis, Thai officials allegedly responded to the arrival of Rohingya in Thai waters by dragging refugee boats back out to sea, leaving passengers to die.⁶³ In March 2013, reports indicated that various Thai navy officials shot, and sometimes killed, Rohingya refugees.⁶⁴ These officials denied directly shooting at the refugees, but differing narratives exist as to the purpose of this violence.⁶⁵ In some instances, Thai officials have also been accused of selling Rohingya asylum-seekers to human traffickers.⁶⁶ The UNHCR drew attention to Thailand's treatment of the Rohingya when these reports began to surface and has substantiated the accounts of violence through multiple sources.⁶⁷

While the Thai government asserted its intention of investigating the corruption, one correspondent worries that "Thai officials are rarely called to account for these kinds of allegations."⁶⁸ Villagers witnessing the violence inflicted by officials have come forward saying they not only heard the shots, but also found and buried dead bodies.⁶⁹ Though many have called for a thorough investigation, Thailand already feels burdened by the challenges to its security along the western border.⁷⁰ Therefore, it has been explained that "interceptions out at sea are all in the hands of the Thai security forces with no civilian oversight."⁷¹

The Thai military's interception of boats carrying Rohingya refugees has been coined as Thailand's "help-on" policy and is just one example of Thailand's response to the influx of Rohingya refugees.⁷² The "help-on" policy, as reported, allows Thai officials to re-supply intercepted boats with fuel, food, and water, while the passengers remain on board; these provisions are contingent upon the boat immediately continuing its journey to another country.⁷³

In the beginning of 2013, the Thai government agreed to utilize a different policy in responding to the Rohingya influx in place of the "help-on" policy. The new program offered six months of temporary humanitarian assistance and protection to the Rohingya.⁷⁴ Thailand vowed to use the six months to discuss its course for addressing the increasing number of Rohingya fleeing to Thailand.⁷⁵ However,

⁶² *Thailand Don't Deport Rohingya 'Boat People'*, *supra* note 20.

⁶³ *Thai Navy Denies Shooting Rohingya Refugees*, BBC NEWS (Mar. 15, 2013, 3:44 AM), <http://www.bbc.co.uk/news/world-asia-21796825>.

⁶⁴ *Id.*

⁶⁵ Nirmal Ghosh, *Deaths of Rohingya Refugees a Tricky Issue in Thailand*, STRAITS TIMES (Mar. 22, 2013), <http://www.straitstimes.com/the-big-story/asia-report/myanmar/story/deaths-rohingya-refugees-tricky-issue-thailand-20130322>.

⁶⁶ *Thai Navy Denies Shooting Rohingya Refugees*, *supra* note 63; Jason Szep & Andrew R.C. Marshall, *Special Report – Thailand Secretly Supplies Myanmar Muslim Refugees to Trafficking Rings*, REUTERS (Dec. 4, 2013, 12:34 AM), <http://uk.reuters.com/article/2013/12/05/uk-thailand-rohingya-special-report-idUKBRE9B400920131205>.

⁶⁷ Donn Bobb, *UN Refugee Agency Concerned About Treatment of Rohingya Refugees in Thailand*, U.N. RADIO (Mar. 15, 2013), <http://www.unmultimedia.org/radio/english/2013/03/un-refugee-agency-concerned-about-treatment-of-rohingya-refugees-in-thailand/>.

⁶⁸ *Thai Navy Denies Shooting Rohingya Refugees*, *supra* note 63.

⁶⁹ *See Ghosh*, *supra* note 65.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *Thailand Don't Deport Rohingya 'Boat People'*, *supra* note 20.

⁷³ *Id.*

⁷⁴ *Thailand: Fleeing Rohingya Shot in Sea by Navy*, *supra* note at 61.

⁷⁵ *Id.*

With about 1,700 Rohingya locked up nationwide, the Thai government set a July deadline to deport them all and opened talks with [Burma] on how to do it. The talks went nowhere because the [Burmese] government refused to take responsibility for what it regards as illegal immigrants from Bangladesh.⁷⁶

In the process, families were separated upon arrival, male Rohingya were detained at immigration detention centers by the Thai police, and Rohingya women and children were put in shelters by the Thai Human Trafficking Bureau of the Ministry of Social Development and Human Security.⁷⁷ The conditions of the immigration detention centers are reported to be inhumane, requiring a meager seventy-five baht per day to supposedly sustain each male refugee.⁷⁸

Some organizations are working to improve the situation for these separated families, but this has been a slow process. For example, the Thai government allowed groups such as the Organization of Islamic Cooperation (“OIC”) to tour these detention centers and shelters, in response to the OIC’s public condemnation of Thai policies.⁷⁹ The OIC also visited a women and children’s shelter in the south of Thailand, noting satisfaction with their treatment.⁸⁰

A final policy instituted by the Thai government is “soft-deportation,” otherwise known as informal deportation.⁸¹ An informal deportation occurs when the Thai government takes a person to the Thai-Burmese border and forces them to cross back into Burma, as opposed to handing the person over to Burmese authorities directly.⁸² When a vessel actually lands on the Thai shore, or Thai officials determine that it presents a danger to Thailand, the officials are authorized to deport its passengers by land.⁸³ This process has resulted in the detainment of Rohingya in Thai immigration detention centers, later to be sent back across the Thai-Burma border.⁸⁴ The border crossing presents further danger to Rohingya refugees, as human traffickers scout the border to take advantage of the desperate situation of these refugees.⁸⁵ Despite Thailand’s alleged commitment to combatting human trafficking, provisional procedures like “soft deportation” exacerbate the situation of Rohingya refugees, making them even more susceptible to human trafficking.⁸⁶ These informal, impromptu policies will be discussed in further detail in the sections that follow.

Regardless of the changes that the Thai government has purportedly made to its policy toward the Rohingya, the reality remains that Thailand has continued to be unwelcoming and hostile to the Rohingya people. Instead, its staunch approach towards the 13,000 Rohingya that

⁷⁶ Szep & Marshall, *supra* note 66.

⁷⁷ *Thailand: Protect Rohingya ‘Boat Children’*, *supra* note 12; Interview with Benoit Chavez & Ticha Nopratkhat, Prot. Coordinators, Int’l Comm. of the Red Cross, in Bangkok, Thai. (Mar. 8, 2013) [hereinafter Interview with the ICRC]; *Thailand: Release and Protect Rohingya ‘Boat People’*, HUMAN RIGHTS WATCH (Aug. 20, 2013), <http://www.hrw.org/news/2013/08/20/thailand-release-and-protect-rohingya-boat-people>.

⁷⁸ Bill Frelick & Adam Saltsman, HUMAN RIGHTS WATCH, AD HOC AND INADEQUATE: THAILAND’S TREATMENT OF REFUGEES AND ASYLUM SEEKERS 85 (Phil Robertson ed., 2012), available at <http://www.hrw.org/sites/default/files/reports/thailand0912.pdf>; Interview with the ICRC, *supra* note 77.

⁷⁹ Jamilah Begum, *OIC Hails Thailand’s Assistance for Rohingyas*, BRUNEI TIMES (Feb. 2, 2013), <http://www.bt.com.bn/2013/02/02/oic-hails-thailands-assistance-rohingyas>.

⁸⁰ *Id.*

⁸¹ *Thailand Don’t Deport Rohingya ‘Boat People’*, *supra* note 20.

⁸² U.N. HIGH COMM’R FOR REFUGEES, ANALYSIS OF GAPS IN REFUGEE PROTECTION CAPACITY: THAILAND 10 (2006), available at <http://www.unhcr.org/457ed0412.pdf> [hereinafter GAPS IN REFUGEE PROTECTION].

⁸³ *Thailand Don’t Deport Rohingya ‘Boat People’*, *supra* note 20.

⁸⁴ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 18.

⁸⁵ *Id.* at 19.

⁸⁶ *Thailand Don’t Deport Rohingya ‘Boat People’*, *supra* note 20; Szep & Marshall, *supra* note 66.

have washed ashore has been to refuse them access to the UNHCR, where they could file a claim for refugee status.⁸⁷ The Thai National Security Council has devised this “special policy” in the name of national security, essentially denying the Rohingya the opportunity to attain refugee status.⁸⁸ Furthermore, the Thai Prime Minister, aware of the conditions the Rohingya face in Burma, requested that the Burmese President assist in efforts to repatriate approximately one thousand Rohingya back to Burma.⁸⁹ As of February 2014, Thailand has deported approximately 1300 Rohingya back to Burma.⁹⁰

B. Thai Policies Enable Human Trafficking of the Rohingya

The Rohingya have been put in a vulnerable position. Because of their desperation and need to flee the Arakan State of Burma, the Rohingya have become vulnerable to human traffickers—both when trying to leave Burma and when they arrive in Thailand.⁹¹ It has been reported that Thai officials have been involved in selling Rohingya to brokers, who in turn sell them as “bonded” laborers.⁹² Other reports explain that unaccompanied children who either arrive in Thailand alone, or who arrived with a parent but are left alone in a shelter while the parent is detained, are highly susceptible to trafficking.⁹³ Children, particularly older boys, are reported to be among those most likely to be trafficked.⁹⁴ Human Rights Watch described the Thai process for screening unaccompanied minors as “inadequate,” leading to boys placed alone in immigration detention centers with “unrelated adults.”⁹⁵ In fact, at least seven children are missing from a shelter because there is no accountability system in place, and the concern is that they “may have fallen prey to human traffickers.”⁹⁶

One Rohingya man reported that the Thai navy stopped his boat, whereupon officers asked the man where he was coming from and if he had any food.⁹⁷ The Thai navy officials told the man not to tell anyone that the Thai navy had seen him or any others.⁹⁸ Then, the navy officials sold the Rohingya man to a human trafficker.⁹⁹

This kind of direct involvement with human trafficking by Thai officials is not the only concern, however. Another main concern is that the informal procedures used by the Thai government to deal with asylum-seekers and refugees are increasing the vulnerability of the Rohingya.¹⁰⁰ The lack of Thai laws or formal procedures that clearly define a process for seeking asylum has given great discretion to individual officials in dealing with certain asylum-seekers.¹⁰¹

⁸⁷ Simba Shani Kamaria Russeau, *Rohingyas at Home and Nowhere*, JAKARTA GLOBE (May 3, 2013, 4:55 PM), <http://www.thejakartaglobe.com/international/rohingyas-at-home-and-nowhere/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Charlie Campbell, *Thailand Sends 1,300 Rohingya Back to Hell*, TIME (Feb. 14, 2014), <http://time.com/7335/thailand-sends-1300-rohingya-back-to-hell/>.

⁹¹ *Rohingya Refugees at Risk of Trafficking*, AL JAZEERA (Jan. 29, 2014, 5:15 AM), <http://www.aljazeera.com/news/asia/2014/01/rohingya-refugees-at-risk-trafficking-201412941426451421.html>; Dene-Hern Chen, *Thailand Downgraded in Trafficking Report; Burma Remains on Watch List*, DVB MULTIMEDIA GRP. (June 21, 2014), <https://www.dvb.no/news/thailand-downgraded-in-trafficking-report-burma-remains-on-watch-list-myanmar/41715>.

⁹² Daniel, *supra* note 24; Szep & Marshall, *supra* note 66; Zoe Daniel, *Claims of a Trade in Rohingya Refugees*, ABC NEWS RADIO (Mar. 11, 2013, 6:18 PM), <http://www.abc.net.au/pm/content/2013/s3713004.htm> [hereinafter Daniel, *Claims of a Trade*]

⁹³ Szep & Marshall, *supra* note 66; *Thailand: Protect Rohingya 'Boat Children'*, *supra* note 12.

⁹⁴ *Thailand: Protect Rohingya 'Boat Children'*, *supra* note 12.

⁹⁵ *Id.*

⁹⁶ Daniel, *supra* note 24.

⁹⁷ Daniel, *Claims of a Trade*, *supra* note 92.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 320–22 (2010)* [hereinafter 2010 TIP REPORT], available at <http://www.state.gov/documents/organization/142979.pdf>.

¹⁰¹ *Id.* at 321.

This discretion has led to abuse, in turn creating a situation very conducive to trafficking, largely because of a lack of accountability.¹⁰² Regardless of how a Thai official decides to handle the situation, be it an informal deportation, “helping on” boats of Rohingya that come ashore, or selling the Rohingya to traffickers, the official’s decision may be found satisfactory due to the lack of any standard procedure. Because of this, there is very little accountability for those who wish to take advantage of a very vulnerable group of people.

In this regard, the United States’ Trafficking Victims Protection Act of 2000¹⁰³ (the “TVPA”) is very relevant to the situation of the Rohingya in Thailand. The TVPA requires the government to publish the Trafficking in Persons (“TIP”) Report each year.¹⁰⁴ The U.S. Department of State (“State Department”) places each country into one of four tiers, based on the extent of their government’s efforts to comply with the “minimum standards for the elimination of trafficking” under section 108 of the TVPA.¹⁰⁵ The U.S. government uses the TIP Report to engage with foreign governments to advance anti-trafficking reforms.¹⁰⁶ Changes were made to the TVPA in 2008 that provided that any country that remained on the Tier 2 Watch List for two consecutive years would remain on the Tier 2 Watch List instead of being moved to Tier 3.¹⁰⁷ The automatic downgrade provision came into effect in 2011, but the U.S. Secretary of State is authorized to waive the downgrade based on credible evidence that the government is making significant efforts to comply with the TVPA’s minimum standards.¹⁰⁸

In 2014, the State Department downgraded Thailand to a Tier 3 country in its Trafficking in Persons Report.¹⁰⁹ The State Department, in the past, made an agreement with Thailand that if the government formulated a written a plan that, if properly implemented, “would constitute making significant efforts to meet the minimum standards for the elimination of trafficking,” Thailand would not be downgraded to Tier 3.¹¹⁰ But the TVPA authorizes only a maximum of two consecutive “waivers,” or the agreement entered into with Thailand.¹¹¹ Another waiver is not available to Thailand because it has been on the Tier 2 Watch List for more than two consecutive years, and the State Department determined that Thailand has not made “significant efforts to comply with the minimum standards as required by the TVPA.”¹¹²

The issues mentioned in the TIP Reports from previous years continue to be issues for Thailand, supporting the argument that the failure to enact clearly-defined laws that deal with refugees and asylum-seekers contributes to the issue of human trafficking. For example, the 2012 TIP Report stated, “[f]oreign migrants, ethnic minorities, and stateless persons in Thailand are the greatest risk of being trafficked.”¹¹³ The Rohingya fit into all three of those categories. Additionally, the TIP Report states:

¹⁰² *Id.*

¹⁰³ 22 U.S.C §§ 7101 (“The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”); *see also* U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 373 (2014) [hereinafter 2014 TIP REPORT], *available at* http://www.state.gov/j/tip/rls/tiprpt/2014/?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+R.

¹⁰⁴ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2012) [hereinafter 2012 TIP REPORT], *available at* <http://www.state.gov/j/tip/rls/tiprpt/2012/>.

¹⁰⁵ *Id.* at 37.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 43.

¹⁰⁸ *Id.* at 44.

¹⁰⁹ 2014 TIP REPORT, *supra* note 103, at 373.

¹¹⁰ 2012 TIP REPORT, *supra* note 104, at 339.

¹¹¹ 2014 TIP REPORT, *supra* 103, at 373.

¹¹² *Id.*

¹¹³ 2012 TIP REPORT, *supra* note 104, at 338.

Lack of documentation continues to expose migrants to potential exploitation; in the northern areas of Thailand, lack of citizenship makes highland women and girls particularly vulnerable to being trafficked. Some children from neighboring countries are forced by their parents or brokers to sell flowers, beg, or work in domestic service in urban areas.¹¹⁴

While Thailand allowed thirty trafficking victims to live and work temporarily within Thailand in 2012, “[e]ffective anti-trafficking law enforcement efforts were hindered by authorities’ failure to identify and adequately protect victims, and the country’s migrant labor policies continued to create vulnerabilities to trafficking and disincentives to victims to communicate with authorities, particularly if the workers are undocumented.”¹¹⁵ The report also stated that participation in human trafficking by Thai officials remains an important issue.¹¹⁶

The 2013 TIP Report revealed that the Thai Government had yet to come into compliance with the minimum standards required by the TVPA.¹¹⁷ The 2013 report mentioned reports of Rohingya asylum-seekers from Burma being “smuggled into Thailand en route to Malaysia and ultimately sold into forced labor, allegedly with the assistance of Thai civilian and military officials.”¹¹⁸ As a result, Thailand continued to remain on the Tier 2 Watch List in 2013.¹¹⁹ “According to the [2014 TIP] report . . . both Thailand and Burma are engaged in the systematic trafficking of Burmese, Cambodian and Laos men to work on Thai fishing trawlers.”¹²⁰ The report further alleges that Rohingya asylum-seekers are particularly at risk because they “continue to be smuggled from Burma and Bangladesh by corrupt Thai navy, military and government officials.”¹²¹ The report essentially reveals the lack of progress made by Thailand in the legal arena and prioritization of the dire issues of trafficked asylum-seekers:¹²² “Overall anti-trafficking law enforcement efforts remained insufficient compared with the size of the problem in Thailand, and corruption at all levels hampered the success of these efforts.”¹²³ As the TVPA illustrates, even strong legal mechanisms require international cooperation and follow-through within each country in order to have a true impact.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 339, available at <http://www.state.gov/documents/organization/192598.pdf>.

¹¹⁶ *Id.*

¹¹⁷ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2013), available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215633.htm>; 22 U.S.C. § 7106(a) (“For purposes of this chapter, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for victims of severe forms of trafficking are the following: (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking; (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault; (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense; (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.”).

¹¹⁸ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2013), *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ Chen, *supra* note 91.

¹²¹ *Id.*

¹²² *Id.*

¹²³ 2014 TIP REPORT, *supra* note 103, at 373.

IV. EXISTING LAWS: INTERNATIONAL AND DOMESTIC

The question of whether the Rohingya are refugees, and therefore deserving of international protection, depends not on Thailand's recognition of them as such but on whether the Rohingya meet the internationally-accepted definition of a refugee.¹²⁴ The United Nations Convention and Protocol Relating to the Status of Refugees ("Refugee Convention") defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."¹²⁵

If the Rohingya can show that they are fleeing persecution based on one or more of these five protected grounds when they arrive in Thailand, and that they have a well-founded fear of persecution if they were to return to Burma, then they would meet the definition of a refugee as defined by the Refugee Convention.¹²⁶ They would also have a basic human right to seek asylum.¹²⁷ Thailand is not a party to the Refugee Convention, however, and does not have a permanent legal framework to adjudicate asylum claims and provide protection to refugees.¹²⁸ For this reason, Thailand must bring its domestic laws into compliance with international human rights principles and provide a way for the Rohingya to seek asylum.

This part will discuss the intersection of existing international laws and Thai domestic laws governing refugees and asylum-seekers and will frame this through its applicability to the Rohingya. This part is organized into three main sections: (1) international laws that govern the issue of asylum-seekers; (2) the lack of Thai domestic laws regarding this issue; and (3) the importance of a clearly-defined framework for people to seek asylum in Thailand. As discussed below, Thailand must create laws that clearly define what a refugee is and outline a process by which a person can seek asylum. The failure to enact such laws and policies has made the Rohingya more vulnerable to human rights violations and has created a regional situation conducive to human trafficking.¹²⁹

A. International Laws

The 1948 Universal Declaration of Human Rights ("UDOHR") has been the foundation for many international human rights treaties and is generally agreed to be the basis for international human rights law.¹³⁰ "It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights."¹³¹

While not binding, the UDOHR represents an agreement by the international community to a set of minimum standards for the treatment of all human beings. Specifically in regard to the

¹²⁴ United Nations Convention Relating to the Status of Refugees 3, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention], available at <http://www.unhcr.org/3b66c2aa10.pdf>; FARMER, *supra* note 22, at 18.

¹²⁵ Refugee Convention, *supra* note 124, at 3.

¹²⁶ *Id.* at 14–16.

¹²⁷ Universal Declaration of Human Rights, G.A. Res. 217 A (III), art. 14, U.N. Doc. A/RES/217(III), at 74 (Dec. 10, 1948) [hereinafter UDOHR], available at <http://www.un.org/en/documents/udhr/index.shtml#a14>.

¹²⁸ EQUAL RIGHTS TRUST, INST. HUMAN RIGHTS & PEACE STUDIES, MAHIDOL UNIV., THE HUMAN RIGHTS OF STATELESS ROHINGYA IN THAILAND 7 (2014), available at [http://www.equalrightstrust.org/ertdocumentbank/The%20Human%20Rights%20of%20Stateless%20Rohingya%20in%20Thailand\(small\).pdf](http://www.equalrightstrust.org/ertdocumentbank/The%20Human%20Rights%20of%20Stateless%20Rohingya%20in%20Thailand(small).pdf).

¹²⁹ FARMER, *supra* note 22, at 16; Szep & Marshall, *supra* note 66.

¹³⁰ *The Foundation of International Human Rights Law*, U.N., www.un.org/en/documents/udhr/hr_law.shtml (last visited Jan. 20, 2015).

¹³¹ *Id.*

situation of the Rohingya, article 14 of the UDOHR states, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”¹³² Article 15 is also applicable in that it maintains that all persons have the right to a nationality, and “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”¹³³ As discussed later in this part, the vast majority of Rohingya have been denied the right to seek asylum in Thailand¹³⁴ and have no practical way to migrate legally because of their statelessness.¹³⁵

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights articulate many rights already established in the UDOHR and make those rights binding on the states that ratified the Covenants.¹³⁶ These two Covenants, along with the UDOHR, make up the International Bill of Human Rights.¹³⁷ Although Thailand has not ratified either of these covenants, they nevertheless provide guiding principles in dealing with asylum-seekers and refugees. Article 7 of the International Covenant on Civil and Political Rights states, “[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”¹³⁸ Additionally, article 9 provides, “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”¹³⁹ Since Thailand has no laws or uniform policies regarding the treatment of asylum-seekers or detailing a process by which persons can seek asylum, many refugees, including the Rohingya, have been indefinitely detained in immigration detention centers.¹⁴⁰ Thai officials have arrested and detained even those refugees whose status has been determined by the UNHCR.¹⁴¹

In 2013, UNHCR found that there were 77,913 Burmese refugees in refugee camps in Thailand, and 34,289 of those refugees were children.¹⁴² These estimates may be low as organizations working in the ten camps on the Thai-Burmese border estimate that there were around 117,000 Burmese refugees as of May 2014.¹⁴³ Burmese refugees who are registered in the camps have two options: (1) they can stay in the camps and remain relatively safe from being arrested and detained, but are unable to move freely or work and are dependent on aid organizations, or (2) they can live and work outside the refugee camps “but typically without legal status of any kind, which makes them subject to exploitation, extortion, arrest, and deportation.”¹⁴⁴ Refugees who are registered by UNHCR and asylum-seekers “tend to live at the margins of society in Thailand’s cities.”¹⁴⁵ Because there is no way for refugees to legalize their status with the government of Thailand, they risk arrest and detention.¹⁴⁶ “When the Thai government detains a refugee or an asylum-seeker, it argues that it is simply detaining an

¹³² UDOHR, *supra* note 127, at art. 14.

¹³³ *Id.* at 74.

¹³⁴ *Thailand: Fleeing Rohingya Shot in Sea by Navy*, *supra* note 61.

¹³⁵ Ostrand, *supra* note 24.

¹³⁶ *The Foundation of International Human Rights Law*, *supra* note 130.

¹³⁷ *Id.*

¹³⁸ United Nations International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

¹³⁹ *Id.* at art. 9.

¹⁴⁰ Asylum Access, *A Refugee's Testimony: Thivya*, YOUTUBE (Jun. 6, 2012), http://www.youtube.com/watch?NR=1&v=A_wU27R6P4E&feature=endscreen; FARMER, *supra* note 22, at 14.

¹⁴¹ FARMER, *supra* note 22, at 10; Asylum Access Thailand, <http://asylumaccess.org/AsylumAccess/who-we-are/thailand>.

¹⁴² FARMER, *supra* note 22, at 14.

¹⁴³ *Id.* at 14–15.

¹⁴⁴ *Id.* at 15.

¹⁴⁵ *Id.* at 16.

¹⁴⁶ *Id.*

irregular migrant in order to deport him or her.”¹⁴⁷ As a result, many refugees and asylum-seekers are indefinitely detained as they wait to be resettled to a third country.¹⁴⁸

Migrant children—both children in families and unaccompanied children—are arbitrarily detained in squalid detention facilities in Thailand. Authorities routinely detain children from neighboring countries (Burma, Cambodia, and Laos) for relatively short periods that can range from a few days to a few weeks, while children from countries that do not border Thailand can be held for much longer periods. Children of refugees and asylum seekers can be held for years. Migrants, including children, are typically detained without judicial review or bail, access to lawyers, or any way to challenge their detention. Such indefinite detention without recourse to judicial review amounts to arbitrary detention prohibited under international law.¹⁴⁹

In contrast, Thailand ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) in 2007.¹⁵⁰ The Torture Convention defines “torture” as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason, based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁵¹

In article 3, the Torture Convention states, “[n]o 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,”¹⁵² as defined above. Therefore, if Thailand has “substantial grounds” for believing that the Rohingya are in danger of being subjected to torture in their country of origin as defined by the Torture Convention, Thailand would be in violation of this treaty if it were to send the Rohingya back to Burma or any other place where they may be subject to torture.¹⁵³

Numerous reports detail the atrocities and violence committed against the Rohingya in Burma, by and with the consent of Burmese officials.¹⁵⁴ For example, the Human Rights Watch

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 19.

¹⁵⁰ Asylum Access, *supra* note 140.

¹⁵¹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT], available at <http://www.unhcr.org/49e479d10.html>.

¹⁵² *Id.* at art. 3.

¹⁵³ *Thailand Sends Rohingya Muslims Back to Burma*, BBC NEWS (Feb. 13, 2014, 11:27 AM), <http://www.bbc.com/news/world-asia-26167676>.

¹⁵⁴ *Abuse Against Myanmar's Rohingya Erodes Recent Progress*, AMNESTY INT'L (July 19, 2012), <http://www.amnestyusa.org/news/press-releases/abuse-against-myanmar-s-rohingya-erodes-recent-progress> (mentioning reports by Rohingyas of cases of “physical abuse, rape, destruction of property and unlawful killings carried out by both Rakhine Buddhists and security forces”); Henry Zheng, *Myanmar Conflict: Ethnic Discrimination in Rakhine State Sparks Violence Against Muslim Rohingya*, MIC (June 22, 2012), <http://www.policymic.com/articles/10025/myanmar-conflict-ethnic-discrimination-in-rakhine-state-sparks-violence-against-muslim-rohingya> (discussing alleged human rights abuses in the Rakhine State by the Nasaka, or the Border

report, “All You Can Do Is Pray,” alleges that Burmese state officials were involved indirectly and directly in the crimes against the Rohingya in Burma.¹⁵⁵ The report states:

While much of the violence appears to have been carried out by mobs with weapons, various branches of the state security forces stood by and did nothing to provide security for attacked Muslims and at times participated directly in the atrocities—this includes the local police, Lon Thin riot police, the inter-agency border control force called Nasaka, and the army and navy.¹⁵⁶

Despite these reports, the Thai government has stated that it has already deported around 1300 Rohingya back to Burma.¹⁵⁷

Further, Thailand is a signatory to the Convention on the Rights of the Child (“CRC”), which sets minimum standards and freedoms that signatories are expected to respect in regard to children.¹⁵⁸ World leaders created this convention in 1989 specifically for children because they recognized that people under eighteen years old generally need special care and protection that adults do not necessarily need.¹⁵⁹ Thailand acceded to the CRC in 1992, but made a reservation,¹⁶⁰ which states, “[t]he application of articles 22 of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand.”¹⁶¹ Article 22, section 1 declares:

State 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.¹⁶²

Section 2 of article 22 states that nations will cooperate with organizations of the United Nations or other organizations that are competent “to protect and assist” refugee children and aid them in reunifying with their family.¹⁶³

In making this reservation to article 22 of the CRC, the Thai Government has made it clear that it will deal with child refugees and asylum-seekers according to its own policies and

Administration Force, which consists of military, police, and customs and immigration officers, including “rape, forced labor, and extortion”).

¹⁵⁵ MATTHEW SMITH, HUMAN RIGHTS WATCH, ‘ALL YOU CAN DO IS PRAY’: CRIMES AGAINST HUMANITY AND ETHNIC CLEANSING OF ROHINGYA MUSLIMS IN BURMA’S ARAKAN STATE 15 (Phil Robertson et al. eds., 2013), available at http://www.hrw.org/sites/default/files/reports/burma0413webwcover_0.pdf.

¹⁵⁶ *Id.* at 15.

¹⁵⁷ Campbell, *supra* note 90.

¹⁵⁸ United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 44–61 [hereinafter UNCRC], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf> (last visited Jan. 20, 2015); Signatories to the United Nations Convention on the Rights of the Child 3 [Signatories to the UNCRC], available at <https://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

¹⁵⁹ UNCRC, *supra* note 158, at 45.

¹⁶⁰ Signatories to the UNCRC, *supra* note 158, at 3.

¹⁶¹ Signatories to the UNCRC, *supra* note 158, at 9.

¹⁶² UNCRC, *supra* note 158, at art. 22, § 1.

¹⁶³ UNCRC, *supra* note 158, at art. 22, § 2.

domestic laws. As discussed below however, the Thai government has yet to pass any laws or create formal, clearly-defined procedures for children or adults to seek asylum within Thailand. As one reporter from the Phuket Wan News wrote, “[o]bfuscation helps Thailand justify its policies and allows it to avoid being saddled with unwanted immigrants. To ascribe to international standards would mean Thailand having to care for the region’s unwanted people.”¹⁶⁴ By making this reservation to the CRC, specifically to the article that speaks to the treatment of refugee children,¹⁶⁵ the Thai Government is going out of its way to remain unburdened by laws that would obligate it to provide certain fundamental and internationally-recognized rights to refugees, specifically refugee children.

The Thai Government has not yet adopted the Convention and Protocol Relating to the Status of Refugees (“Refugee Convention”).¹⁶⁶ The Refugee Convention is founded on article 14 of the UDHR, which recognizes the right of persons to seek asylum in other countries when fleeing persecution.¹⁶⁷ “The [Refugee] Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level.”¹⁶⁸ The Refugee Convention has been subject to only one amendment since it entered into force on April 22, 1954: the 1967 Protocol that removed the time and geographical limits of the Refugee Convention.¹⁶⁹ Originally when it was adopted in 1951, the Refugee Convention only applied to persons who were fleeing World War II and the events that led to the war in Europe.¹⁷⁰ The 1967 Protocol expanded the scope of the Refugee Convention to universal coverage.¹⁷¹

As mentioned above, the Refugee Convention adopts a single definition of the term “refugee,”¹⁷² and is marked by the principles of non-discrimination, non-penalization, and non-refoulement.¹⁷³ This means that the rights provided for in the Refugee Convention should be applied to every person meeting the definition of a refugee without discrimination as to race, religion, or country of origin.¹⁷⁴ As will be discussed in more detail later in this part, Thailand’s informal policies regarding the treatment of refugees depend on the person’s country of origin, with some non-Burmese urban asylum-seekers permitted to have refugee status determinations completed by UNHCR, while Burmese asylum-seekers are prohibited from participating in that process.¹⁷⁵ In addition, the Refugee Convention recognizes that when a person seeks asylum he or she necessarily breaks immigration laws, and indicates that people seeking asylum “should not be penalized for their illegal entry or stay.”¹⁷⁶ The Thai government is penalizing refugees by arresting, detaining, and often deporting them back to their country of origin without determining

¹⁶⁴ E-mail from Alan Morison, *supra* note 61.

¹⁶⁵ U.N. Secretary-General, Reservations to the Convention on the Rights of the Child: Thailand: Note by the Secretary-General (July 11, 1994), https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-11&chapter=4&lang=en#EndDec.

¹⁶⁶ *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1961 Protocol*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/3b73b0d63.html> (last visited Jan. 20, 2015).

¹⁶⁷ Introductory Note to the Refugee Convention, *supra* note 124, at 2.

¹⁶⁸ *Id.* at 3.

¹⁶⁹ *Id.* at 2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 3.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 16; Ostrand, *supra* note 24.

¹⁷⁶ Refugee Convention, *supra* note 124, at 3.

whether they are deserving of refugee protections.¹⁷⁷ Many times, those Rohingya who are found by the Thai navy are not allowed to come ashore—they are simply made to continue on in their barely seaworthy boats.¹⁷⁸

The Refugee Convention also sets standards in regard to the right of refugees to work, education, housing, movement, association, identity papers, and travel documents, among other things.¹⁷⁹ Although Thailand has not adopted this Convention, it would be a good starting point for the government to reform its policy regarding the treatment of refugees. Currently, refugees in Thailand are prohibited from working and face a real risk of being arrested and detained.¹⁸⁰

The Rohingya are especially vulnerable as asylum-seekers because they are stateless.¹⁸¹ Two U.N. conventions deal with the issue of stateless persons: the Convention Relating to the Status of Stateless Persons (“1954 Stateless Convention”) and the Convention on the Reduction of Statelessness (“1961 Stateless Convention”).¹⁸² The 1954 Stateless Convention defines a “stateless person” as someone “who is not considered as a national by any State under operation of its law.”¹⁸³ “Possession of nationality is essential for full participation in society and a prerequisite for the enjoyment of the full range of human rights.”¹⁸⁴ Stateless people are often unable to obtain identity documents and the documents necessary to travel.¹⁸⁵ This makes it very difficult for stateless people, like the Rohingya, to migrate legally because identity documents are necessary to do so.¹⁸⁶ Identity documents are required for people to seek asylum in countries like Thailand, where persons who lack papers are considered illegal migrants subject to detention, prosecution, and removal.¹⁸⁷ In fact, those who wish to migrate to Thailand are required to complete a nationality verification.¹⁸⁸ If, however, a person is stateless and not recognized as a citizen by any country, like the Rohingya, nationality verification is impossible to complete.¹⁸⁹

It was for these reasons that the UNHCR established the minimum standards of treatment and a framework for the international protection of stateless persons.¹⁹⁰ The rights delineated in the 1954 Stateless Convention are similar to the Refugee Convention: the rights to primary education, movement, identity papers and travel documents, and housing.¹⁹¹ The 1954 Stateless Convention in article 32 also states that the nations shall facilitate the assimilation and naturalization of stateless persons.¹⁹² The vulnerability of stateless persons, who are under the

¹⁷⁷ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 14 (discussing how the Thai government treats all refugees as illegal, economic migrants and does not necessarily respect the refugee status determinations made by UNHCR).

¹⁷⁸ *Thailand Don't Deport Rohingya 'Boat People'*, *supra* note 20.

¹⁷⁹ Refugee Convention, *supra* note 124, at art. 15, 17, 21, 22, 26, 27, 28.

¹⁸⁰ Ostrand, *supra* note 24.

¹⁸¹ *Id.*

¹⁸² United Nations Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter *1954 Stateless Convention*], available at <http://www.unhcr.org/3bbb25729.html>; United Nations Convention on the Reduction of Statelessness, art. 21, 22, 26, 27, 28, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter *1961 Stateless Convention*], available at <http://www.unhcr.org/3bbb286d8.html>.

¹⁸³ *1954 Stateless Convention*, *supra* note 182, at art. 1, § 1.

¹⁸⁴ *Stateless People: Searching for Citizenship*, U.N. HIGH COMM'R FOR HUMAN RIGHTS, <http://www.unhcr.org/pages/49c3646c155.html> (last visited Jan. 20, 2015).

¹⁸⁵ *Id.*

¹⁸⁶ Ostrand, *supra* note 24.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Refugee Convention, *supra* note 124.

¹⁹¹ *1954 Stateless Convention*, *supra* note 182, at art. 21, 22, 26, 27, 28.

¹⁹² *Id.* at art. 32.

protection of and provided rights by no government, is such that nations should do all they can to facilitate their naturalization as quickly as possible.

The second convention relating to stateless persons is the 1961 Stateless Convention, which entered into force on December 13, 1975.¹⁹³ This Convention concerns the prevention of statelessness and includes measures relating to the conferral and non-withdrawal of citizenship.¹⁹⁴ Statelessness occurs for many reasons, and it affects approximately ten million people worldwide, including the Rohingya.¹⁹⁵ One such reason is the discrimination against minority groups in nationality legislation, which occurred in Burma against the Rohingya with the 1982 Citizenship Act, as described in Part II of this Article.¹⁹⁶ While Thailand is not a party to either of these statelessness conventions, the Thai Government amended the Civil Registration Act in 2008 to mandate universal birth registration.¹⁹⁷ This amendment provides that birth certificates must be issued to all persons born in the country, regardless of the immigration status of his or her parents.¹⁹⁸ However, while this law provides that all children born in Thailand will receive identity papers, it does not mean that they receive the rights and protections afforded to citizens of Thailand.¹⁹⁹ For the Rohingya, the situation is even more complicated as some children have been born while at sea.²⁰⁰

B. No Thai Domestic Law Governing the Asylum Process

Thailand has no domestic law that defines what a refugee is, or that provides a national framework for persons to seek asylum.²⁰¹ In section 12 of the 1979 Thai Immigration Act, it states that all who enter Thailand without the proper documentation are considered illegal migrants.²⁰² Because there is no existing domestic asylum law and Thailand has not ratified the 1951 Refugee Convention, refugees and asylum-seekers are considered illegal immigrants, and are allowed to remain in Thailand only at the discretion of the government.²⁰³ Since most refugees in Thailand are considered illegal immigrants, they risk detention once they cross into its borders.²⁰⁴

Immigration authorities control access to Thailand at overland border points and airports.²⁰⁵ Anyone who tries to enter the country without the proper permission and documentation is subject to various consequences.²⁰⁶ At the airport, the Immigration Commissioner, the Corrections Department, and the Ministry of Justice cooperate with the

¹⁹³ Introductory Note to the 1961 Stateless Conventions, *supra* note 182, at 3; Refugee Convention, *supra* note 124, at 1.

¹⁹⁴ Refugee Convention, *supra* note 124, at 3–4.

¹⁹⁵ *Stateless People: Searching for Citizenship*, *supra* note 184.

¹⁹⁶ ROHINGYA REFUGEES IN BANGLADESH AND THAILAND, *supra* note 30, at 9; Greg Constantine, Between Burma and Bangladesh: Rohingya, a Stateless People, PULITZER CTR. (Apr. 18, 2012), <http://pulitzercenter.org/reporting/burma-bangladesh-rohingya-stateless-citizenship-act-refugees>.

¹⁹⁷ U.N. HIGH COMM'R FOR REFUGEES, UNHCR GLOBAL APPEAL 2013 UPDATE: COUNTRY OPERATIONS PROFILE: THAILAND 230–34 (2013) [hereinafter 2013 UNHCR COUNTRY OPERATIONS PROFILE], available at <http://www.unhcr.org/50a9f82d20.html>.

¹⁹⁸ *Id.*

¹⁹⁹ Ostrand, *supra* note 24.

²⁰⁰ Agence France-Presse, *Rohingya Baby Born on Refugee Boat*, AQUILA STYLE (Feb. 1, 2013, 3:44 PM), <http://www.aquila-style.com/focus-points/rohingya-baby-born-on-refugee-boat/29279/>; Daniel Rook, *Mothers, Children Flee Myanmar on Desperate Voyage*, ROHINGYA BLOGGER (Feb. 24, 2013), <http://www.rohingyablogger.com/2013/02/mothers-children-flee-myanmar-on.html>.

²⁰¹ HUMAN RIGHTS WATCH, WORLD REPORT 2013 (2013), https://www.hrw.org/sites/default/files/wr2013_web.pdf; FARMER, *supra* note 22, at 14.

²⁰² Immigration Act, B.E. 2522 (1979) [Thailand] (May 30, 1979), available at <http://www.refworld.org/docid/46b2f9f42.html>.

²⁰³ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 4.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 12.

²⁰⁶ *Id.*

UNHCR and allow the UNHCR access to persons who are detained.²⁰⁷ The UNHCR then conducts refugee status determination interviews of asylum-seekers who are not from Burma.²⁰⁸ The UNHCR is also allowed to conduct refugee status determination interviews in other prisons and immigration detentions centers.²⁰⁹

Once refugees from nations that border Thailand are detained, they are often informally deported back to their country of origin.²¹⁰ For example, persons from Burma constitute the largest group of people who enter Thailand without proper documentation; they are often taken to the border and either left there or made to cross.²¹¹ In 2006, the Thai Government deported as many as ten thousand people per month back to Burma.²¹² Those who are informally deported in this manner are frequently left in locations where there are no Burmese government officials to oversee movement across the border.²¹³ But some of these border points are controlled by insurgent groups who demand bribes from the deportee in order to be released from the insurgent group and allowed to cross the border back into Thailand.²¹⁴ While formal deportations do occur, this puts refugees at risk because authorities from the refugee's country of origin are notified prior to the deportation, exposing the refugee to persecution when they arrive.²¹⁵ Persons from nations who do not border Thailand "tend not to be deported for illegal presence, generally because of the high cost of removing them. They are, however, subject to long periods of indefinite detention."²¹⁶

1. Refugees from Burma

Over the past few decades, Thailand has seen an influx of more than three million refugees.²¹⁷ The majority of those refugees for the past twenty years have come from Burma.²¹⁸ The Government of Thailand has generally recognized those fleeing Burma as "displaced persons fleeing fighting."²¹⁹ However, to be recognized as such a person, the Burmese refugees are required to be admitted to and stay in one of the nine isolated border camps on the Burmese-Thai border.²²⁰ The Thai Provincial Admissions Board (the "Board") determines admissibility into the camps.²²¹ The Board is the agency in charge of completing refugee status determinations for all Burmese asylum-seekers, and "[r]eports indicate that the [Board] . . . does not recognize the Rohingya as needing protection in the camps."²²² In addition, if a refugee leaves the camp, they are at risk of being detained and deported.²²³

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 4.

²¹¹ *Id.* at 12.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 4.

²¹⁶ *Id.* at 12; Michael Bachelard, *Rohingya Refugees a Growing Problem for Indonesia*, SYDNEY MORNING HERALD (Apr. 9, 2013), <http://www.smh.com.au/world/rohingya-refugees-a-growing-problem-for-indonesia-20130408-2hh6w.html>.

²¹⁷ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 4.

²¹⁸ *Id.* at 7.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 13.

²²² Ostrand, *supra* note 24.

²²³ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 14.

Previously, eligibility to remain in Thailand was based on whether the person was considered to be “fleeing fighting.”²²⁴ In 2004, that criterion was expanded to include, “fleeing persecution or other reasons.”²²⁵

Under this new system, [Burmese] nationals are pre-screened by authorities responsible for border security, informed of the Provincial Admissions Board process and admitted to a Reception Centre where their bio-data is taken. From there they are sent to Holding Centres in the camp along with those who are apprehended after entering Thailand and who have registration slips issued by UNHCR. Applicants are interviewed by four-person teams, led by the district officer (or the authorized deputy district officer) where the camp is located, joined by the deputy district officer, the UNHCR field officer in the area, and an interpreter. Their assessment is forwarded to the Provincial Admission Board for further determination. The Provincial Admissions Boards are comprised of eight members, at least half of whom must be present for there to be a quorum. Decisions are by majority vote. Each PAB includes a UNHCR representative.²²⁶

Refugees may be determined to be “fleeing fighting” or “fleeing persecution.”²²⁷ Those with either of those statuses are granted “displaced person status” and moved to one of the camps to be registered.²²⁸ This status is temporary, as those who were determined to be fleeing fighting may be removed to Burma if the situation changes.²²⁹ Those who are determined to be fleeing persecution are eligible for third-country resettlement.²³⁰

An applicant who is denied “displaced person status” is informed of his or her right to appeal and must do so with the UNHCR within seven days of the Provincial Admissions Board’s decision.²³¹ The UNHCR then provides further documentation to the Appeals Board, which is comprised of representatives of various Thai governmental agencies including the Ministry of the Interior, the Ministry of Foreign Affairs, and the National Security Council.²³² Refugees who are rejected after appeal are informed on notice boards at the holding centers.²³³ Those who are not given “displaced person status” or who do not file an appeal remain in the holding centers until they are removed to Burma.²³⁴

The Board, however, has not been functioning since 2006, resulting in a significant backlog of cases.²³⁵ In 2012, however, the Thai Government began a “fast-track procedure” that allows unregistered camp residents access to the Boards if they have immediate family members who are registered refugees in a particular camp.²³⁶ Still, not every asylum-seeker had access to

²²⁴ *Id.* at 15.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 16.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ 2013 UNHCR COUNTRY OPERATIONS PROFILE, *supra* note 197; E-mail from Chris Lewa, Founder/Journalist for The Arakan Project, to Thalia Roussos Singer, Attorney (Mar. 14, 2013, 1:24 PM) (on file with author).

²³⁶ *Id.*

this process even when the Provincial Admissions Board was functioning. Many were informally deported or indefinitely detained as illegal migrants.²³⁷ The failure of the Thai Government to pass clearly-defined laws that provide a standardized process for people to seek asylum has created a discretionary situation, allowing individual Thai officials to decide who may seek asylum, who may be relocated to the border camps, and who will be immediately deported or indefinitely detained.²³⁸

2. Non-Burmese Refugees

In addition to the refugees within the nine border camps, there are thousands of refugees throughout Thailand who are considered illegal migrants.²³⁹ The Thai Government estimates that there are approximately two million illegal migrants in the country and as many as two hundred thousand may be refugees.²⁴⁰ The UNHCR conducts refugee status determinations for all urban, non-Burmese asylum-seekers.²⁴¹ In total, there are roughly 2100 urban refugees and asylum-seekers in Thailand, representing thirty-nine nationalities.²⁴² As of 2013, there were approximately 84,900 registered refugees in the country.²⁴³

The UNHCR has a process for refugee status determinations that is separate from the process established by the Thai Government for the Burmese.²⁴⁴ Those who want to be recognized as refugees by the UNHCR are first interviewed through an interpreter who explains the criteria to be considered a refugee, and the process.²⁴⁵ The refugees then complete a basic biographical data form and are required to make a written statement in their own language.²⁴⁶ They are provided assistance if they are illiterate.²⁴⁷ After this, individual documents are given to each member of the family, including a photograph, contact information for the UNHCR office, and several security features.²⁴⁸ A future interview is also scheduled.²⁴⁹

The decisions as to who is given refugee status and who is not are issued in writing along with the reasons for rejection, if applicable.²⁵⁰ If needed, verbal rejection counseling is offered upon written request.²⁵¹ Rejected applicants are also given thirty days from the notification of their rejection to appeal the decision.²⁵² There are non-profit organizations that provide legal advice and services to asylum-seekers in Bangkok who have been rejected.²⁵³ The organizations include Jesuit Refugee Services and Asylum Access.²⁵⁴

²³⁷ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 4.

²³⁸ *Id.* at 4–5.

²³⁹ *Id.* at 7.

²⁴⁰ 2013 UNHCR COUNTRY OPERATIONS PROFILE, *supra* note 197, at 230; GAPS IN REFUGEE PROTECTION, *supra* note 82, at 7.

²⁴¹ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 16; Ostrand, *supra* note 24.

²⁴² 2013 UNHCR COUNTRY OPERATIONS PROFILE, *supra* note 197, at 124.

²⁴³ Interview with Chris Lewa, *supra* note 235; 2013 UNHCR COUNTRY OPERATIONS PROFILE, *supra* note 197, at 230.

²⁴⁴ 2013 UNHCR COUNTRY OPERATIONS PROFILE, *supra* note 197, at 230.

²⁴⁵ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 16.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Asia Pacific*, JESUIT REFUGEE SERV., <http://www.jrsusa.org/RegionsInfo.cfm?RID=APR> (last visited Jan. 20, 2015); *Thailand*, ASYLUM ACCESS, <http://asylumaccess.org/AsylumAccess/who-we-are/thailand> (last visited Jan. 20, 2015).

3. The Importance of Establishing a Process to Seek Asylum

One fundamental problem with this system, apart from the Thai government's failure to register refugees in the camps for the past several years, is that many of the Rohingya are not entering Thailand at the Thai-Burmese border.²⁵⁵ As discussed, many Rohingya are fleeing Burma by boat, subsequently landing on the shores of Thailand or being discovered by the Thai military at sea near the southern provinces of Thailand.²⁵⁶ Because there is no law defining a national framework for how persons can seek asylum, Thai officials decide on an ad hoc basis how this group of refugees will be treated.²⁵⁷ This not only invites abuse of the Rohingya refugees, leaving them vulnerable to human traffickers, but also violates clearly established and fundamental international human rights law.²⁵⁸

V. RECOMMENDATIONS TO ADDRESS AND ENSURE THE PROTECTION OF THE HUMAN RIGHTS OF ROHINGYA REFUGEES

In light of Thailand's obligation to protect international human rights, this part proposes various recommendations for Thailand to address the influx of Rohingya while upholding their human rights. Primarily, it must be recognized that the Rohingya crisis is rooted in the inhumane policies of the Burmese government toward the Rohingya.²⁵⁹ However, in focusing on Thailand, a strategy for addressing the Rohingya influx will require immediate measures within Thailand as well as regional and international support to protect the human rights of the Rohingya.

The most urgent steps include reuniting Rohingya families that have been separated as will be discussed in section (a), creating a registration process for the Rohingya with options for resettlement or temporary protection under UNHCR systems, discussed in section (b), and addressing human trafficking associated with the Rohingya flight in section (c). These proposals represent a minimum of those that Thailand should consider; however, sections (d) and (e) provide recommendations for long-term change in Thai law, active participation from the Association of Southeast Asian Nations ("ASEAN"), and collective responsibility from the international community.

A. Family Reunification

Thailand should immediately work to reunite Rohingya families, as many of the Rohingya men have been separated from their wives and children for six months in Thai detention centers.²⁶⁰ While Thai officials are not actively working to reunify families, the International Committee for the Red Cross ("ICRC") has been allowed access to interview Rohingya and try to find family members of that individual in any other part of Thailand or a third country.²⁶¹ "One of the strongest emotional needs of refugees is to be reunited with close

²⁵⁵ *Thailand: Fleeing Rohingya Shot in Sea by Navy*, *supra* note 61; Motlagh, *supra* note 53.

²⁵⁶ *Thailand: Fleeing Rohingya Shot in Sea by Navy*, *supra* note 61.

²⁵⁷ E-mail from Alan Morison, *supra* note 61.

²⁵⁸ Szep & Marshall, *supra* note 66.

²⁵⁹ While this is a primary concern, it is outside the scope of this Article other than recommendations dealing with confrontation of Burma by the international community in Part V(E); *Thailand: Investigate Departure of Rohingya 'Boat People': Motorless Vessel with 91 Migrants Turns Up 700 Kilometers Away*, HUMAN RIGHTS WATCH (Feb. 21, 2011), <http://www.hrw.org/print/news/2011/02/21/thailand-investigate-departure-rohingya-boat-people> [hereinafter *Thailand: Investigate Departure*].

²⁶⁰ Interview with the ICRC, *supra* note 77.

²⁶¹ *Id.* (explaining that women and children are being held in temporary shelters, run by human traffickers. Proposed solutions include "Reconnect Families," an effort by the International Committee of the Red Cross to utilize different ways of finding family and

family members who have been left behind in the country of origin, or in a country of provisional asylum or transit.”²⁶² The ICRC’s program, called “Restoring Family Links,” involves intense coordination with Red Cross centers in Thailand and other countries in order to facilitate maintaining healthy and safe families for the Rohingya.²⁶³

In addition to the ICRC efforts, the United Nations Children’s Fund (“UNICEF”) has recognized the importance of reunifying Rohingya families with children who were separated during the detention process, and is working to provide for basic hygienic and psychological needs.²⁶⁴ Many organizations and individuals are demanding answers about what will be accomplished during detention and how the Rohingya will be treated during this time: “[I]n the past, we detained them for so long in confined quarters some of them died. We must learn from the past,” said Kessarinn Tiawsakul, an investigator from the National Human Rights Commission of Thailand.²⁶⁵ Beyond basic provisions by outside organizations, Thailand should expedite registration, or merely identification, of the Rohingya in each shelter and detention centers and make this information available to the ICRC to enable communication between family members in different centers. The story of one Rohingya family is illustrative of the plight of many: it took eight months for the parents of nine children to learn that two of them were safe or, at a minimum, alive.²⁶⁶ After twenty-two months, the family was able to communicate through the Internet.²⁶⁷ Organizations aiding the Rohingya should consider tools like Skype that could help families, separated by miles of ocean and land, to remain in contact.²⁶⁸

The more time the Rohingya remain in detention awaiting a refugee status determination hearing separated from their families, the more this will negatively impact their mentality.²⁶⁹ One news reporter documented the story of a young Rohingya girl, one of the few who entered a foster family, and her experience communicating with her family through the Internet:

When it’s time to say goodbye, Senwara keeps staring at the screen even after the faces disappear. She still doesn’t understand why her village was burned or what forced her to leave home. She only knows one thing. ‘I don’t think I will ever be able to see my parents,’ she says, softly. ‘For the rest of my life.’²⁷⁰

Indeed, the young children in these shelters may compose “[e]ntire generations of refugee children . . . grow[ing] up in uncertainty and despair.”²⁷¹ Additionally, if eventual repatriation is

friends the Rohingya have left behind, and to reconnect men with their wives and children who are separated between shelters and detention centers).

²⁶² James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 163 (1997).

²⁶³ See *Restoring Family Links*, INT’L COMM. OF THE RED CROSS, <http://familylinks.icrc.org/en/Pages/Countries/Thailand.aspx> (last visited Jan. 20, 2015); Edith Buffalohead, *From Burma, With Love*, RESTORING FAMILY LINKS: PERSONAL BLOG, <http://restoringfamilylinksblog.com/blog/2014/7/24/from-burma-with-love> (last visited Jan. 20, 2015).

²⁶⁴ UNICEF Gives Assistance Rohingya Children and Women in Shelters in Southern Thailand, UNICEF (Feb. 14, 2013), http://www.unicef.org/media/media_67838.html (providing that under article 10 of the CRC, countries are supposed to take urgent steps to reunite children with their families); Hathaway & Neve, *supra* note 262, at 163–64.

²⁶⁵ *Myanmar Rohingya Asylum Seekers Safe in Thailand, For Now*, JAKARTA GLOBE (Feb. 3, 2013, 1:51 PM), <http://www.thejakartaglobe.com/international/myanmar-rohingya-asylum-seekers-safe-in-thailand-for-now/569272>.

²⁶⁶ Margie Mason & Robin McDowell, *Desperate Rohingya Kids Flee Alone By Boat*, YAHOO! NEWS (Apr. 28, 2014, 3:37 AM), <http://news.yahoo.com/desperate-rohingya-kids-flee-alone-boat-155932904.html>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Hathaway & Neve, *supra* note 262, at 132–33.

²⁷⁰ Mason & McDowell, *supra* note 266.

²⁷¹ *Id.*

desired by any Rohingya, it “will often be unsuccessful when family and collective social structures of refugees have not been preserved during the period of protection abroad, when refugees are denied opportunities to develop their skills and personalities in the asylum state. . . .”²⁷² Regardless of which identification process Thailand employs, Thailand should help refugees foster their communal traditions to maintain their identity.²⁷³ But this cannot be accomplished by separating families.²⁷⁴

B. Refugee Status Determination and the UNHCR Process

Two possible systems Thailand should consider for processing the Rohingya would require the aid of the UNHCR: either UNHCR’s established status determination process or a similar alternative called temporary protection.²⁷⁵ Thailand could also develop its own process, as it currently does not have a functioning process, but as the Rohingya crisis is ongoing, there may not be time to do so.²⁷⁶ One necessity for both processes is the immediate provision of identification documents that Thailand agrees to recognize. This is necessary to ensure the provision of essential services, as well as providing “an important symbol of security and . . . [an] important message of recognition and protection.”²⁷⁷ It is feasible for Thailand to issue identification cards during any process, as well as uphold the documents, not as a grant of citizenship, but as necessary individual recognition and protection. The following two subsections discuss the possible processes for registering and identifying the Rohingya.

1. Thailand Should Give the UNHCR Greater Access to the Rohingya to Conduct an Efficient and Thorough Status Determination Process

Although Thailand will need to address the gaps in its refugee policy, the Rohingya crisis urgently necessitates at least a standard process to identify the status of each person. Vulnerable groups, like children, have a variety of needs that cannot be addressed with a blanket solution that may seem appropriate for adults.²⁷⁸ The need for children to feel secure and safe cannot be met by placing them in a detention center with unrelated adults, no space to move, and nothing to do.²⁷⁹ Rohingya children are becoming increasingly deconditioned from lack of exercise, decreasing

²⁷² *Id.* at 140.

²⁷³ *Id.*

²⁷⁴ Human Rights Watch, *Thailand: Minority Rohingya Children Face Critical Trafficking Dangers*, WOMEN NEWS NETWORK, <http://womennewsnetwork.net/2014/01/28/minority-rohingya-children/> [hereinafter *Children Face Critical Trafficking Dangers*] (“The 2,055 Rohingya migrants Thailand permitted to enter the country in 2013 were treated as “illegal migrants” and did not receive protection as refugees under international law. The government separated families, holding adult men and some male children, including unaccompanied boys, in immigration detention centers, and detaining others, primarily women and younger children, in closed shelters run by the Ministry of Social Development and Human Security.”).

²⁷⁵ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 11 (providing that the Status Determination Process requires a UNHCR representative to interview and screen refugees based on the criteria from the UNHCR Mandate as to whether or not a person meets the definition of a refugee; temporary protection is a similar mechanism to Status Determination, employed often in countries like Thailand that have not signed the 1951 Refugee Convention. These refugees are also interviewed, but must be recommended to the Thai Provincial Admissions Board in order to have a final determination of whether the person qualifies for protection); Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT’L L.J. 1, 11–12 (2004).

²⁷⁶ Frelick & Saltsman, *supra* note 78, at 4–5.

²⁷⁷ *Id.* at 161–63.

²⁷⁸ *Rohingya in Thailand-Safe For Now*, INTEGRATED REG’L INFO. NETWORKS (Jan. 29, 2013), <http://www.irinnews.org/report/97365/rohingya-in-thailand-safe-for-now> (quoting UNHCR spokeswoman Vivian Tan as explaining, “[t]here are likely to be different profiles within these groups, including people who may need international protection, vulnerable individuals like unaccompanied children, and possibly people seeking economic opportunities elsewhere. Different groups will need different solutions”).

²⁷⁹ *Children Face Critical Trafficking Dangers*, *supra* note 274 (“The lack of access to education violates Thai and international law. Under the Convention on the Rights of the Child, to which Thailand is party, all children are entitled to education regardless of migration status. The Thai government has said that migrant children with or without legal status in the country are entitled to enroll in schools, yet these Rohingya children have been prevented from doing so by virtue of their detention.”).

their odds of survival in such unsanitary conditions.²⁸⁰ Status determinations by an outside international organization with the proper resources would provide a pathway to recognize these particular needs.²⁸¹ Although Thailand has created a new policy since 2013, allowing children under age twelve into shelters rather than immigration detention centers, boys over age twelve would still be with adults in the detention centers.²⁸² The U.N. Committee on the Rights of the Child has been clear in its policy: “[C]hildren should never be detained because of their immigration status.”²⁸³ In excluding unaccompanied boys from shelters, Thailand places them at greater risk of harm and trafficking.²⁸⁴

In an article from the Integrated Regional Information Network, Phil Robertson, the deputy director of Human Rights Watch in Asia, asserted,

The Rohingya should have a right to apply for asylum and have the right to go through a full refugee status determination process overseen by the UNHCR with the Thai authorities If they are found to be refugees they should be provided with all entailed in terms of protection, not just temporarily but over the long term if needed.²⁸⁵

Thailand’s failure to recognize stateless people like the Rohingya complicates this process.

This complication stems from Thailand’s ban against the UNHCR to conduct refugee status determinations for Burmese refugees.²⁸⁶ Although Thailand has technically lifted this ban, the human trafficking rings and overcrowded conditions have made access to registration difficult.²⁸⁷ Thailand did not put a new process in place, instead declaring that there would be no legal status for the refugees outside camps.²⁸⁸ Although the UNHCR still informally determines international refugee status, the refugee will be settled in a third country, as Thailand does not recognize this international identification and thus provides no legal protection.²⁸⁹ Even if Thailand reinstated its own past processes,²⁹⁰ Thailand still requires documentation of citizenship that the Rohingya do not possess; in fact, “no member of the [ASEAN] has procedures for designating an individual as stateless. Instead, the protection of stateless individuals is . . . dealt with on an ad hoc, case-by-case basis.”²⁹¹

Before attempting to reinstate or create a process integrated into Thai law, Thailand should immediately allow greater access by the UNHCR, in the short-term, to help determine the status of the Rohingya.²⁹² The UNHCR process of conducting status determination as required under the 1951 Refugee Convention offers the best protection of the human rights of the

²⁸⁰ *Id.*

²⁸¹ Myanmar Rohingya Asylum Seekers Safe in Thailand, For Now, *supra* note 265.

²⁸² Children Face Critical Trafficking Dangers, *supra* note 274.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Myanmar Rohingya Asylum Seekers Safe in Thailand, For Now, *supra* note 265 (internal quotation marks omitted).

²⁸⁶ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 4–5; Frelick & Saltsman, *supra* note 78.

²⁸⁷ Rohingya in Thailand-Safe For Now, *supra* note 278.

²⁸⁸ *Id.*

²⁸⁹ E-mail from Alan Morison, *supra* note 61.

²⁹⁰ GAPS IN REFUGEE PROTECTION, *supra* note 82, at 4–5.

²⁹¹ Alec Paxton, *Finding a Country to Call Home: A Framework for Evaluating Legislation to Reduce Statelessness in Southeast Asia*, 21 PAC. RIM L. & POL’Y J. 623, 633–34 (2012).

²⁹² Thailand: Give UN Access to Rohingya ‘Boat People’, <http://www.hrw.org/news/2011/02/02/thailand-give-un-access-rohingya-boat-people>.

Rohingya.²⁹³ If countries begin using untested processes due to a lack of their own refugee law, in a pending crisis, “the strength and integrity of the Refugee Convention regime—based on concrete state obligations incorporated in the widely-accepted international instruments—are undermined by an ad hoc system that is not grounded in any international convention.”²⁹⁴

With the UNHCR process, Rohingya would be settled in third countries, which many Rohingya declared was their initial goal.²⁹⁵ Some worry that the option of third-country resettlement puts the Rohingya at greater risk of human trafficking in trying to reach these third countries, essentially enabling smugglers to take advantage of a refugee situation.²⁹⁶ However, Thai officials like Lieutenant General Paradon Pattanathaboot have been clear that after the six-month detainment that Thailand provided for in early 2014, Thailand cannot offer shelter because this would require Thailand to “deal with a far greater influx.”²⁹⁷ Lt. Gen. Pattanathaboot expressed that Thailand expects reciprocity from those countries that urged Thailand to step in.²⁹⁸ Contrarily, an article from the Asia News Network quotes Surapong Kongjanteuk, head of Thailand’s Lawyer’s Council Human-Rights Subcommittee on the Stateless, Migrant Workers and Displaced People in Thailand, asserting, “[i]t would be good for Thailand to allow the UNHCR to work with the Rohingya people . . . Thailand would no longer have to shoulder [such a large] burden.”²⁹⁹ Though “Thai authorities have agreed in principle to give [UNHCR] access to this group,” full access still has not begun.³⁰⁰

Furthermore, the UNHCR could remedy some of the inefficiency and disorganization Thailand faces with the Rohingya crisis, as the UNHCR already has a detailed process that could be immediately implemented, if Thailand allowed.³⁰¹ In describing the goal of the process in an article from Thomson Reuters Foundation, UNHCR spokesperson Vivian Tan asserted, “[i]deally we’d like to speak to these groups to find out who they are, where they came from, and if they need international protection.”³⁰² Another reason for UNHCR status determination is that “[i]t is unclear if the detainees are from [Burma] or Bangladesh . . . or if they are migrant workers or

²⁹³ Akram & Rempel, *supra* note 275, at 14–15 (“When states substitute a non-formalized temporary protection system for the Refugee Convention regime, they may fail to grant basic human rights that the Refugee Convention guarantees to refugees. . . . Because there is no internationally binding standard that guarantees certain human rights for persons granted temporary protection, a state may deny even basic Refugee Convention rights at its discretion.”).

²⁹⁴ *Id.* at 13–14.

²⁹⁵ Wassana Nanuam & King-Oua Laohong, *NSC Floats Plan of Rohingya Shelters*, BANGKOK POST (Jan. 29, 2013), <http://www.bangkokpost.com/news/security/333080/nsc-floats-plan-of-rohingya-shelters> (quoting the Thailand National Security Council chief as saying, “[t]he Rohingya do not want to live in Thailand but want to work in a Muslim country. The government will continue to define them as illegal immigrants”).

²⁹⁶ AlertNet, *UNHCR Seeks Access to Rohingya Detained in Thailand*, THOMSON REUTERS FOUND. (Jan. 15, 2013, 10:53 AM), <http://www.trust.org/alertnet/news/unhcr-seeks-access-to-rohingya-detained-in-thailand> [hereinafter *UNHCR Seeks Access*].

²⁹⁷ Nanuam & Laohong, *supra* note 295 (“The National Security Council (NSC) Secretary General, Lt Gen Paradon Pattanathaboot, said that Thailand will not set up permanent refugee camps, though it could still build temporary detention centers. Bangkok promised to receive Rohingyas for a maximum of six months, but warned that it would deport those who try to escape. More than 1,400 Rohingyas have been rounded up since early January.”); Khalid Iqbal, *No Willing Hosts for Rohingyas*, NATION (Feb. 4, 2013), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/columns/04-Feb-2013/no-willing-hosts-for-rohingyas>.

²⁹⁸ Nanuam & Laohong, *supra* note 295.

²⁹⁹ Nation, *Myanmar, Bangladesh Urged to Solve Rohingya Crisis*, ASIA NEWS NETWORK (Jan. 24, 2013), <http://asianewsnet.net/Myanmar-Bangladesh-urged-to-solve-Rohingya-crisis--41872.html>.

³⁰⁰ Terry Fredrickson, *UN Gains Rohingya Access*, BANGKOK POST (Jan. 17, 2013, 11:09 AM), <http://www.bangkokpost.com/learning/learning-from-news/331270/un-gains-rohingya-access>.

³⁰¹ Saksith Saiyasombut & Siam Voices, *UPDATED: Thailand Moves to Deport 800 Rohingya as Exodus Continues*, ASIAN CORRESPONDENT (Jan. 16, 2013, 10:15 AM), <http://asiancorrespondent.com/95470/thailands-foreign-minister-determined-to-deport-hundreds-of-rescued-rohingya-refugees/> (explaining that while Thailand has said the UNHCR will have access to the Rohingya to begin screening, no date has been set to begin the process).

³⁰² *UNHCR Seeks Access*, *supra* note 296.

asylum seekers”³⁰³ The UNHCR has “technical expertise” and an obligation to protect stateless refugees, but upholding this obligation requires urgent access to the Rohingya in all receiving states.³⁰⁴ The UNHCR must represent that:

Recognizing that ‘a fair status determination process is the key to the legitimacy’ of any scheme involving refugee screening, provision of asylum, or repatriation, the UNHCR should formulate a plan of action for the Rohingya that ‘sets forth the elements of refugee status determination as well as the requirements for implementation which are to ensure fair screening.’³⁰⁵

While the UNHCR process has been used elsewhere, it is criticized for various reasons. For example, the process as applied to different Southeast Asian countries “differs substantially, with long and opaque processing, having adverse effects on the lives of asylum-seekers, and offering little or no protection.”³⁰⁶ Critics have said that the “UNHCR also fails to respect the place of legal representation throughout the process in Thailand, Indonesia, and Malaysia. Such legal representation is an essential part of procedural fairness”³⁰⁷ These critics propose that the UNHCR set guidelines that apply to every state using the UNHCR process in order to avoid procedural inequity.³⁰⁸

Based on the Thai Government’s action, it seems that Thailand has its own reservations about implementing processes like the UNHCR Status Determinations.³⁰⁹ If Thailand is too reluctant to act on its grant of UNHCR access, Thailand should create a process of their own; most efficiently, this would mean reinstating its past process or consider allowing the Rohingya to stay in the long-established Burmese refugee camps although they lack citizenship documentation.³¹⁰ Another alternative to the established UNHCR practice follows.

2. Modified UNHCR Refugee Status Determinations: Temporary Protection

Temporary protection is another way that Thailand could process the Rohingya. Some may debate whether the Rohingya would qualify for such protection: temporary protection applies to those “fleeing situations of armed conflict or civil strife,” whereas the 1951 Refugee Convention more closely defines the situation of flight due to persecution.³¹¹ However, the varieties of reasons that the Rohingya have fled seem to encompass both definitions, and in the case of a country that does not recognize the Convention or stateless people, temporary protection may be more suitable.³¹²

The UNHCR, when faced with a mass influx like that of the Rohingya to Thailand, has acknowledged the difficulty of conducting status determinations on every individual; the UNHCR

³⁰³ AlertNet, *Thailand Grants UNHCR Access to Rohingya Detainees*, THOMSON REUTERS FOUND. (Jan 16, 2013, 8:45 AM), <http://www.trust.org/alertnet/news/thailand-grants-unhcr-access-to-rohingya-detainees/> [hereinafter *Thailand Grants UNHCR Access*].

³⁰⁴ *Thailand: Investigate Departure*, *supra* note 259.

³⁰⁵ Thomas K. Ragland, *Burma's Rohingyas in Crisis: Protection of "Humanitarian" Refugees Under International Law*, 14 B.C. THIRD WORLD L.J. 301, 333–34 (1994).

³⁰⁶ Exec. Comm. of the High Comm’r’s Programme, Standing Comm.: 53d Meeting, U.N. HIGH COMM’R FOR REFUGEES, *NGO Statement on Asia and the Pacific* (Mar. 13–15, 2012) [hereinafter *NGO Statement on Asia and the Pacific*], available at http://reliefweb.int/sites/reliefweb.int/files/resources/PDF_121.pdf.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Frelick & Saltsman, *supra* note 78, at 6–8; Fredrickson, *supra* note 300; *Rohingya in Thailand-Safe For Now*, *supra* note 278.

³¹⁰ Frelick & Saltsman, *supra* note 78, at 6–8; *NGO Statement on Asia and the Pacific*, *supra* note 306.

³¹¹ Akram & Rempel, *supra* note 275, at 3, 10.

³¹² *Id.*

may conduct a more basic and fast-moving process that would only grant temporary protection in nearby regions without an extensive interview about the individual's circumstances.³¹³ The temporary protection process might ease some of Thailand's concerns, as the process would operate under an agreed-upon time frame rather than an indeterminate one.³¹⁴ "Temporary protection was endorsed as a pragmatic and flexible means to provide refugees with safety and a reasonable degree of stability."³¹⁵

By providing temporary protection, Thailand could open the door to "greater collectivized protection efforts."³¹⁶ Collective responsibility encompasses a "systematic and ongoing sharing within associations of states [called] 'interest-convergence groups.'"³¹⁷ Because countries differ in their capacity to contribute, these groups would delineate duties based on "common but differentiated responsibility."³¹⁸ This highlights the "need to decide both how to provide safe and humane protection to the refugees (responsibility sharing) and how to apportion the fiscal costs of meeting protection needs (burden sharing)."³¹⁹ Interest-convergence groups would analyze how each country in the group could contribute to temporary protection long before any particular refugee crisis arises: one country may best serve as a host, others may accept resettled refugees, and others may fiscally contribute to a permanent fund.³²⁰ Each country would be "secure in the knowledge that a speedy decision would be made to allocate protective responsibilities among partner states" based on a country's capacity.³²¹

Countries that are directly impacted by refugee influx (those that would make up the "inner-circle") will find commonality in such an interest convergence group, providing "reasons to cooperate by reason of their shared vulnerability to refugee flows."³²² Further, it "guarantees them access to intra-group co-operation in return for a promise to provide similar assistance to other states when required."³²³ Moreover, in supporting the inner-circle, a looser array of countries, only indirectly affected, may offer monetary and "more managed forms of responsibility sharing, like providing permanent resettlement options for special needs cases and for refugees who are unable to return home at the end of a reasonable period of temporary protection."³²⁴ An advantage of joining this outer group is the ability to implement a more solid framework to assess their own migration laws.³²⁵ Furthermore, these countries can develop trade relationships, political good will, and connections with shared cultures.³²⁶

While the development of inner and outer convergence groups seems like a long-term process, it is essentially what Thailand is asking for through reciprocity, funding, and welcoming

³¹³ Hathaway & Neve, *supra* note 262, at 158–59.

³¹⁴ *Id.* at 132, 181–83.

³¹⁵ *Id.*

³¹⁶ *Id.* at 143–46.

³¹⁷ *Id.* at 143.

³¹⁸ *Id.* at 144.

³¹⁹ *Id.* at 144–45.

³²⁰ *Id.* at 146–47 ("Each government belonging to a interest-convergence group would instead have access to a system that would fairly distribute refugee protection responsibilities. A guarantee of shared responsibility would enable states of the South faced with even a mass influx to remain open to refugee arrivals, secure in the knowledge that a speedy decision would be made to allocate protective responsibilities among partner states. Equally important, because the state of arrival would benefit from a binding guarantee of financial support from extraregional members of the interest-convergence group, its own obligations would be limited to what it could reasonably afford.")

³²¹ *Id.* at 147.

³²² *Id.* at 190–91.

³²³ *Id.*

³²⁴ *Id.* at 192.

³²⁵ *Id.* at 192–93.

³²⁶ *Id.*

resettlement in third countries.³²⁷ A key difference is that these inner and outer groups would be indefinite in order to prevent the full burden of a crisis from landing on the shoulders of one country in the future—leaving a system in place.³²⁸ Furthermore, as “somewhat removed from the immediate political factors that may lead states to respond in ways that are insensitive or even hostile to refugee needs,” the UNHCR processes could help by responding directly to the needs of the entire group.³²⁹ As a more impartial source, the UNHCR may be able to apportion burdens based upon set factors, while also having immediate connections to effective non-governmental organizations.³³⁰ Some of the factors that convergence groups should have in allocating burdens of offering temporary protection include “security, functional compatibility, cultural harmony, and geographical proximity.”³³¹ Creating these convergence groups would allow for faster access by the UNHCR, especially if it participated in the discussions of refugee issues.³³²

The challenge of temporary protection for individuals and groups who do not meet the definition of a refugee under the 1951 Refugee Convention arises when regions have great disparities in processing individuals.³³³ This can lead to the inability to monitor the protection of human rights, and without a standard processing system across countries, it is unclear which basic rights would carry over the Refugee Convention.³³⁴ Some believe temporary protection allows countries to minimize refugee rights,³³⁵ nevertheless, the concept may convince Thailand to grant full access sooner.

Finally, because temporary protection requires countries to share responsibility, by taking over when a temporary protection period has terminated larger convergence groups may struggle with implementation. If these groups are to succeed in providing temporary protection by allocating burdens, the most essential part:

[I]s the ability of any member of an interest-convergence group or the UNHCR to convene a meeting of the group when faced with a refugee influx with which it feels support from other countries is warranted. The purpose of the meeting would be to concretize and operationalize pre-determined criteria for sharing responsibilities and burdens in a specific context. Members of the group would bind themselves in advance to attend any such meeting and to negotiate in good faith the nature of the shared response to the arrival of refugees.³³⁶

This is the core of shared responsibility and could be the backing that would make Thailand and other countries feel comfortable when undertaking an offering of temporary protection.

³²⁷ See, e.g., Nanuam & Laohong, *supra* note 295.

³²⁸ Hathaway & Neve, *supra* note 262, at 143–46.

³²⁹ *Id.* at 196–97.

³³⁰ *Id.*

³³¹ *Id.* at 205.

³³² *Id.* at 197 (“This obligation could sensibly be implemented by inviting UNHCR to serve as a secretariat to interest convergence groups on refugee protection issues. UNHCR should be privy to, and participate in, the interest-convergence groups’ discussions of refugee protection at all times: when general principles for apportioning responsibilities and burdens are being developed, when those principles are applied in response to the arrival of refugees in a member state, and when respect for refugee rights during temporary protection and eventual repatriation or resettlement is monitored.”).

³³³ Akram & Rempel, *supra* note 275, at 13–14.

³³⁴ *Id.* at 14.

³³⁵ Hathaway & Neve, *supra* note 262, at 167.

³³⁶ *Id.* at 199.

C. Addressing Human Trafficking Through Clearer Thai Migration Policy

Human trafficking from Burma to Thailand has become an increasingly well-documented consequence of Burmese oppression of the Rohingya.³³⁷ Facing certain danger and persecution in Burma, many Rohingya find no other choice of escape than to risk exploitation at the hands of human smuggling rings, especially because of their lack of citizenship or identification documents.³³⁸ The large presence of human trafficking from Burma to Thailand is yet another reason for Thailand to embrace the UNHCR refugee status determination process more quickly.

[It is] extremely difficult for a country to accurately distinguish between victims of trafficking and violators of immigration laws as well as between economic migrants and genuine asylum seekers Genuine refugee and asylum claims are arbitrarily and summarily dismissed, without the government agencies allowing the proper agencies concerned to carry out refugee status determination³³⁹

The UNHCR is seasoned in addressing claims of individuals within a group of refugees and may be able to recommend next steps for Thailand.³⁴⁰ Although Thailand has a legitimate interest in its country's security and upholding Thai law, these interests can still be met while helping the Rohingya.³⁴¹ As Mr. Surapong Kongchantuk of the Human Rights Committee of the Lawyers' Council of Thailand expressed, regardless of gaps in Thai refugee law, human trafficking victims must be recognized. He asserted in the Committee Report, "no matter what we call them, 'refugees or economic migrants' . . . this is immaterial here."³⁴²

Other countries must not perpetuate the problems created by Burma through the inadequacy of their own laws, especially when international organizations have the means to help. Moreover, a strong incentive for Thailand to grant immediate access to the UNHCR is the ranking of Thailand on the State Department's Tier 3 List.³⁴³ The 2014 Trafficking in Person's Report states:

The Government of Thailand does not fully comply with the minimum standards for the elimination of trafficking. In the 2012 and 2013 TIP Reports, Thailand was granted consecutive waivers from an otherwise required downgrade to Tier 3 on the basis of a written plan to bring itself into compliance

³³⁷ Alan Morison & Chutima Sidasathian, *Second Rohingya Trafficking Camp Raided, Rights Group Calls for UN Intervention*, PHUKET WAN (Jan. 11, 2013), <http://phuketwan.com/tourism/second-rohingya-camp-raided-rights-group-calls-intervention-17407> ("Hundreds more captive Rohingya were freed from traffickers in a fresh raid by authorities early today as an international rights organisation called on the Thai government to permit UN access to the rescued people. Human Rights Watch spokesperson Phil Robertson said: '[w]e are concerned that Thailand will quickly move to deport these groups without consideration for their rights.'").

³³⁸ LAWYER'S COUNCIL OF THAI: THAI ACTION COMM. FOR DEMOCRACY IN BURMA, SUB-COMM. ON THE HUMAN RIGHTS OF STATELESS PERSONS, DISPLACED PERSONS AND MIGRANT WORKERS, ROHINGYAS: STATELESS AND FORGOTTEN PEOPLE FACT-FINDING REPORT AND RECOMMENDATIONS FROM THE ROUNDTABLE DISCUSSION ON THE INHUMANE PUSH-BACK OF THE ROHINGYA BOAT PEOPLE 16-17 (2009) [hereinafter LAWYER'S COUNCIL], available at <http://www.eurac.edu/en/research/institutes/imr/Documents/TACDBFFMRoundtableSeminarFINALREPORTason13MARCH2009.pdf>.

³³⁹ *Id.* at 17.

³⁴⁰ *The Refugee Status Determination Unit*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/pages/4a16b1d06.html> (last updated July 2008).

³⁴¹ LAWYER'S COUNCIL, *supra* note 338, at 23.

³⁴² *Id.*

³⁴³ Saiyasombut, *supra* note 301 (asserting that Tier 2 on the Human Rights Watch List is the second-worst rating on the scale, and Thailand has remained at that level for three years because it has failed to uphold "minimum standards for the elimination of trafficking"); 2014 TIP REPORT, *supra* note 103, at 372.

with the minimum standards for the elimination of trafficking. The [TVPA] authorizes a maximum of two consecutive waivers. A waiver is no longer available to Thailand, which is therefore deemed not to be making significant efforts to comply with the minimum standards and is placed on Tier 3.³⁴⁴

In response to recent reports about corruption of Thai officials in human trafficking of the Rohingya, other Thai officials have tried to explain that this represents only a few.³⁴⁵ Yet, an official in Ranong “told us that working with the brokers was now regarded as the ‘natural’ solution.”³⁴⁶

Many still question whether Thailand’s response to human trafficking allegations will be purely symbolic, or whether it will lead to action.³⁴⁷ Reported raids of Rohingya smuggling rings directly coincided with the change of language employed to classify the Rohingya: they became “victims of trafficking” in Thailand, as opposed to their previous classification as illegal migrants.³⁴⁸ “The change suggests the Thai government may intend to use these raids to show they are fighting human trafficking in time for the U.S. government’s report on trafficking due out in July [2013].”³⁴⁹ In a recent article, an official of the Thai Ministry of Foreign Affairs reportedly said, “[w]e have not found that the Rohingya are victims of human trafficking . . . In essence, the Rohingya question is an issue of human smuggling.”³⁵⁰ Other reports explain that many Thai officials believe the Rohingya returning to Burma, even through suspect methods of deportation, is not human trafficking because they would be returning to their place of origin.³⁵¹ A report done by Reuters uncovered Thailand’s failure to recognize or combat the Rohingya trafficking problem, allowing trafficking rings to expand and profit.³⁵²

The lack of refugee policy and screening in Thailand increases the likelihood that the Rohingya will end up being trafficked, threatening sanctions from the international community.³⁵³

D. Durable Changes to Thai Law as a Preventative Measure

Although new Thai laws will take much longer to implement than UNHCR screening, Thailand should consider revising its immigration laws by including protections for refugees and outlining specific processes for dealing with refugees. It is necessary for Thailand to clarify its

³⁴⁴ *Id.* at 373.

³⁴⁵ Jonah Fisher, *Burmese Refugees Sold on by Thai Officials*, BBC NEWS (Jan. 21 2013, 3:08 AM), <http://www.bbc.com/news/world-asia-21115728>.

³⁴⁶ *Id.*

³⁴⁷ UNHCR *Seeks Access*, *supra* note 296.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Andrew R.C. Marshall & Amy Sawitta Lefevre, *Special Report - Flaws Found in Thailand’s Human-Trafficking Crackdown*, REUTERS (Apr. 11, 2014, 2:35 AM), <http://uk.reuters.com/article/2014/04/11/uk-thailand-rohingya-special-report-idUKBRE9B400320131205>?

³⁵¹ Jason Szep & Andrew R.C. Marshall, *Special Report: Thailand Secretly Supplies Myanmar Refugees to Trafficking Rings*, REUTERS (Dec. 4, 2013, 9:08 PM), <http://www.reuters.com/article/2013/12/05/us-thailand-rohingya-special-report-idUSBRE9B400320131205> (“The Thai authorities say the movement of Rohingya through their country doesn’t amount to human trafficking. But in interviews for this story, the Thai Royal Police acknowledged, for the first time, a covert policy called ‘option two’ that relies upon established human-smuggling networks to rid Thailand of Rohingya detainees.”).

³⁵² Marshall & Lefevre, *supra* note 350.

³⁵³ Nuanam & Laohong, *supra* note 295 (illustrating Thailand’s contrary view, Thai official Lt. Gen. Paradon Pattanathaboot asserted, “we consider them only as illegal immigrants and do not upgrade their cases to human trafficking status. Otherwise, other countries will step in and it will be difficult to solve the problem and get them out”); Andreas Schloenhardt, *Trafficking in Migrants in the Asia-Pacific: National, Regional and International Responses*, 5 SING. J. OF INT’L AND COMP. L. 696, 722 (2001) (explaining that human trafficking often occurs under a broader spectrum of organized crime, which many places, like Thailand, do not have laws directly dealing with organized crime connected to human smuggling, or inadequate criminal sanctions. This becomes especially problematic when there is no policy addressing the trafficked who are refugees from persecution in their home country).

own domestic law because “international law does not amount to much without some procedure to enforce it.”³⁵⁴ Additionally, implementation of both international and domestic law requires openness to humanitarian aid and diplomacy.³⁵⁵ As one example of the power of partnering with different groups, Thailand released some refugees from detention, “achieved as a result of collaboration between the Immigration Bureau and the National Human Rights Commission of Thailand, and civil society.”³⁵⁶

Thailand also should sign on to the 1951 Convention on Refugees and the 1954 and 1961 Statelessness Conventions, if only at first as immediate recognition that it supports humanitarian needs.³⁵⁷ One author explains,

‘[T]he Refugee Convention brought about a new focus on international responsibility-sharing of refugee flows, moving away from the prior focus on refugees as a solely regional or bilateral problem. . . . [T]he international community initiated a consensus model of refugee problem-solving, sharing the responsibility of implementing a multileveled durable solution process driven by the pivotal principle of refugee choice.’³⁵⁸ By signing these conventions, the international community may be more receptive to easing the burden felt by Thailand.³⁵⁹

Furthermore, the Thai government should pass laws to clearly define “refugee” as reflected in international law, incorporating the principle that statelessness does not exclude those in danger from seeking asylum.³⁶⁰ These laws should provide a process for seeking asylum in accordance with international principles, articulated in the previously-mentioned conventions and customary laws, which give asylum-seekers a fair opportunity to present claims and be protected while claims are pending.³⁶¹

In creating such laws, Thailand may be able to learn from the legal changes that other countries have made in response to a region’s unique refugee concerns. For example, the

³⁵⁴ Ragland, *supra* note 305, at 332 (quoting Mark W. Janis, Book Review, 4 CONN. J. INT’L L. 767, 768 (1989) (reviewing CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW (1987))).

³⁵⁵ *Id.*

³⁵⁶ NGO Statement on Asia and the Pacific, *supra* note 306.

³⁵⁷ Thailand Don’t Deport Rohingya ‘Boat People’, *supra* note 20. Thailand is currently not a signatory to any of these three Conventions.

³⁵⁸ Akram & Rempel, *supra* note 275, at 6.

³⁵⁹ *Id.* at 5–10.

³⁶⁰ See Agenzia Fides, ASIA/THAILAND - Stop the Deportation of the Rohingya Boat People, VATICAN TODAY (Jan. 3, 2013), <http://www.news.va/en/news/asiathailand-stop-the-deportation-of-the-rohingya> (“According to the Universal Declaration of Human Rights, every individual victim of persecution has the right to seek asylum. Although Thailand is not a party to the 1951 Refugee Convention, the country has the obligation not to return anyone who would be at risk.”); see Joy K. Park et al., *A Global Crisis Writ Large: The Effects of Being “Stateless in Thailand” on Hill-Tribe Children*, 10 SAN DIEGO INT’L L.J. 495, 498, 509, 519 (2009) (describing that the Hill-Tribes in Thailand, though Thai Law does have provisions for their citizenship, are restricted from many benefits of which other citizens qualify. In effect, many Hill Tribes are stateless because the Thai Government denies them citizenship documentation and crucial benefits like education and healthcare. As an ethnic minority, the Rohingya in Burma face parallel issues, except that the Rohingya have no way to gain citizenship under the law).

³⁶¹ See Park et al., *supra* note 360, at 549 (“The Thai government should take an active part in solving the problem of statelessness in order to ensure long term solutions. While Thai law already provides detailed steps to citizenship, the Thai government should now turn to the practical aspects of ensuring maximum compliance and implementation in practice. An important step in this direction would be the implementation of a birth registration program that ensures that all children are issued official birth certificates soon after birth More importantly, the Thai government must inform and train its own employees to understand and consistently implement the law.”).

Organization of African Unity Convention³⁶² includes a grant of temporary protection: “Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his re-settlement”³⁶³ With this addition, the Convention expanded the definition of refugee as follows:

The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality³⁶⁴

In creating such a definition, Thailand should explicitly include the international definition of the rights of stateless populations of refugees, as this seems to be a pertinent problem in the region. By applying the framework of the 1951 Refugee Convention and molding the understanding of refugee to suit its needs, Thailand will not face the same confusion in the future in determining status of stateless people like the Rohingya.

Thailand can address stateless people by implementing laws that allow stateless people to immigrate legally to Thailand without granting permanent status, but rather protection, i.e., not require a nationality verification from their country of origin, as explained in Part IV of this Article.³⁶⁵ Thailand must ensure that stateless people are not discriminated against, or have extra obstacles in seeking asylum because of their statelessness, by clarifying the current Thai law and adding stateless people as a defined group.³⁶⁶ Moreover, the lack of clearly-defined laws allow for abuse by government officials—as we have seen from reports of the “help on” policies and the sale of Rohingya to human traffickers.³⁶⁷

If Thailand is resistant to change its laws and adding a process for refugee determinations, it should consider codifying a standing agreement with the UNHCR to give immediate access to refugee groups during times like this. Perhaps Thailand can learn from its neighbors: in Malaysia, “the authorities have routinely allowed the [U.N.] refugee agency access to arriving Rohingya. Those recognized by the agency as refugees are released from immigration detention.”³⁶⁸ As the current detention and family separation of the Rohingya is central to human rights violations, an

³⁶² Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention], available at [http://www.sme.ao/attachments/article/205/Convention%20of%20the%20Organization%20of%20African%20Unity%20\(OAU\)%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf](http://www.sme.ao/attachments/article/205/Convention%20of%20the%20Organization%20of%20African%20Unity%20(OAU)%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf).

³⁶³ *Id.* at art. II(5); Akram & Rempel, *supra* note 275, at 88 (explaining that Article I of the Organization of African Unity Convention defines the term “refugee” in the section on the Refugee Convention Article 1A(2), and the Convention’s further explanation of this term in Article I(2), as expanded upon in the text of this Article).

³⁶⁴ Akram & Rempel, *supra* note 275, at 88.

³⁶⁵ Park et al., *supra* note 360, at 509–12 (“Within this framework of eligibility for Thai citizenship, the Minister of the Interior has considerable discretion to grant or deny citizenship. Specifically, the Minister has power to ‘consider and give an order for each particular case granting Thai nationality to any person under [section 7] paragraph one, in conformity with the rules prescribed by the Cabinet.’ . . . Temporary residence status applies to non-Thai persons granted the right to remain in Thailand for a certain period of time. District officials can grant temporary residency for a specific time period or can actually grant a semi-permanent residency status, which allows residency in Thailand for an indefinite period of time. Illegal immigrants, such as recent Burmese migrants, can be granted this type of semi-permanent residency. A person may also be granted temporary resident status when it cannot be ascertained how long the person has been in Thailand.”); Akram & Rempel, *supra* note 275, at 6; *see supra* p. 28 and notes 188–89.

³⁶⁶ LAWYER’S COUNCIL, *supra* note 338, at 5–6, 10, 32.

³⁶⁷ Fisher, *supra* note 345; Saiyasombut, *supra* note 301.

³⁶⁸ Thailand Don’t Deport Rohingya ‘Boat People’, *supra* note 20.

agreement with the UNHCR would be beneficial to protecting rights, improving Thailand's reputation.

E. Pushing for an Active Approach on the Part of ASEAN

Thailand is a member state of the ASEAN.³⁶⁹ The other members of ASEAN include Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Burma, Philippines, Singapore, and Vietnam.³⁷⁰ ASEAN was established "to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region" and "to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields."³⁷¹ Although non-interference in the internal affairs of member states is a key principle of ASEAN, the organization could provide a forum for Thailand, Burma, and other Southeast Asian nations to discuss the issue of stateless refugees.

ASEAN must recognize that the Rohingya crisis affects many of its member nations and must take more action to help Thailand and other receiving nations.³⁷² ASEAN is advocating for a regional approach to the Rohingya problem.³⁷³ However, most troubling is Burma's membership in ASEAN as well as the fact that Burma was the 2014 ASEAN Summit's Leadership Chair.³⁷⁴ Instead of using this chairmanship as an incentive for Burma to address its treatment of the Rohingya, ASEAN represented the role "as a reward for superficial reforms undertaken by Rangoon to ease its political isolation and open up its market beyond China and few other countries."³⁷⁵ Burma illustrated its resistance to open dialogue when it declined to participate in an ASEAN foreign ministerial conference regarding the Rohingya in 2012 and has succeeded in diverting attention from its internal issues, reasoning that such discussion was an "act of interference in the internal affairs of a member country" against ASEAN's model.³⁷⁶

Under ASEAN's "non-interference" stance, Burma also persuaded the twenty-first ASEAN Summit to cut the Rohingya issue from the schedule last year, arguing that the issue only impacts certain groups, not the entire region.³⁷⁷ ASEAN member countries, including Thailand, Indonesia, and the Philippines, have all stood up to Burma's human rights violations in the past.³⁷⁸ These countries even refused at first to sign the 2007 ASEAN Charter, "to protest the lack of action taken to force change in [Burma]"; nevertheless, all three countries eventually signed on.³⁷⁹ Thailand and others have continued to voice such concern, but because of a lack of consensus between ASEAN members about how to interfere, if at all, ASEAN takes a "soft

³⁶⁹ ASEAN Member States, ASS'N OF SE. ASIAN NATIONS, <http://www.asean.org/asean/asean-member-states> (last visited Jan. 20, 2015).

³⁷⁰ *Id.*

³⁷¹ *The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967*, ASS'N OF SE. ASIAN NATIONS, <http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration> (last visited Jan. 20, 2015).

³⁷² Charter of the Association of Southeast Asian Nations preamble, Nov. 20, 2007, available at <http://www.asean.org/archive/publications/ASEAN-Charter.pdf> ("Convinced of the need to strengthen existing bonds of regional solidarity to realize an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities.").

³⁷³ *ASIA: Regional Approach to Rohingya Boat People*, INTEGRATED REG'L INFO. NETWORKS (Mar. 2, 2009), <http://www.irinnews.org/Report/83232/ASIA-Regional-approach-to-Rohingya-boat-people>.

³⁷⁴ Kavi Chongkittavorn, *Thailand as the Rohingyas' New Destination*, NATION (Feb. 4, 2013, 1:00 AM), <http://www.nationmultimedia.com/opinion/Thailand-as-the-Rohingyas-New-Destination-30199262.html>.

³⁷⁵ Ramzy Baroud, *Ignoring Genocide: Rohingya People Deserve to Live*, MIDDLE EAST ONLINE (Mar. 7, 2013), <http://www.middle-east-online.com/english/?id=57397>.

³⁷⁶ Chongkittavorn, *supra* note 374.

³⁷⁷ *Id.*

³⁷⁸ John Arendshorst, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the Asean Charter*, 8 NW. U.J. INT'L HUM. RTS. 102, 111 (2009).

³⁷⁹ *Id.*

position . . . in an attempt to promote regional unity and minimize intercountry strife.”³⁸⁰ ASEAN members must be willing to stand by their beliefs to change this consensus about non-interference.

Some believe that ASEAN’s commitment to economic growth has hindered any focus on human rights and the political motivations to violate these rights.³⁸¹ The non-interference policy in Burma, coined “constructive engagement,” focuses on “gradual change in the human rights situation of [Burma] through cooperation between ASEAN and [Burma] on a variety of issues.”³⁸² However, some argue that this policy is a means to ensure continued economic growth in countries that violate human rights.³⁸³ Although ASEAN has warned Burma that its actions threaten its reputation as insincere within ASEAN, a much stronger stance must be taken.³⁸⁴ Not only will Burma, or its reputation, be at risk, but also “ASEAN’s credibility to manage regional issues and respect basic human rights is at risk.”³⁸⁵ ASEAN must take an active role in condemning Burma’s treatment of the Rohingya and immediately facilitate discussion between Burma and Thailand, among others, to deal with the many challenges resulting from the flight of the Rohingya.

One process laid out by ASEAN, called the “Bali Process,” facilitated by the International Organization for Migration and the UNHCR, brings ASEAN member countries together to discuss irregular migration and human trafficking.³⁸⁶ During the recent Bali Process, concern arose that “[g]iven the fact that many [Rohingya] are asylum seekers and refugees, the issue should never have been treated simply as a human smuggling issue. [ASEAN] should have addressed the need for comprehensive refugee protection among member states receiving [the Rohingya], and the root causes of the exodus.”³⁸⁷ The UNHCR has noted some success in creating a framework to address these challenges, but officials “cautioned, however, that much more remains to be done ‘to move beyond the language of cooperation to practical and concrete action.’”³⁸⁸ Thus, the Bali Process has contributed to a concept of cooperation to address human rights of groups like migrants at sea, but this move will be largely symbolic until tangible steps are put in place in each country to deal with each country’s specific needs.³⁸⁹

Primarily, ASEAN must be reminded of its obligation to bring up the Rohingya issue for discussion at their annual convention, without being swayed by excuses from Burma.³⁹⁰ Additionally, ASEAN must be critical of the proposed policies Burma puts forth, as the current proposal may just perpetuate the Rohingya crisis.³⁹¹ Burma’s current plan is to “construct temporary camps in required numbers for those who refuse to be registered and those without adequate documents . . . the government will ask the [U.N.] Refugee Agency, the UNHCR, for

³⁸⁰ *Id.* at 40.

³⁸¹ Baroud, *supra* note 375.

³⁸² Arendshorst, *supra* note 378, at 112.

³⁸³ *Id.*

³⁸⁴ David Scott Mathieson, *In Ignoring the Rohingyas, Asean Rejects a New Role*, JAKARTA GLOBE (May 25, 2009, 9:51 PM), <http://www.thejakartaglobe.com/opinion/in-ignoring-the-rohingyas-asean-rejects-a-new-role/277126>.

³⁸⁵ *Id.*

³⁸⁶ *ASIA: Regional Approach to Rohingya Boat People*, *supra* note 373.

³⁸⁷ Mathieson, *supra* note 384.

³⁸⁸ *UNHCR Calls for Concrete Steps to Protect Refugees Through Bali Process*, U.N. HIGH COMM’R FOR REFUGEES (Apr. 2, 2013), <http://www.unhcr.org/515af0d56.html>.

³⁸⁹ *Id.*

³⁹⁰ Mathieson, *supra* note 384 (“The drama of the Rohingya boat people revealed two glaring failures of the Association of Southeast Asian Nations: a disinclination to criticize systematic human rights violations against the Rohingya inside Burma, and the bloc’s reluctance to address the resulting decades-long exodus.”).

³⁹¹ *Myanmar Confirms Controversial Rohingya Plan at UN*, RAKYAT POST (Sept. 30, 2014, 8:08 PM), <http://www.therakyatpost.com/world/2014/09/30/myanmar-confirms-controversial-rohingya-plan-un/>.

help to resettle overseas those who fail to obtain citizenship.”³⁹² The obligations of ASEAN member nations, under its charter, must act in accordance with the U.N. Charter and other international law to protect groups like the Rohingya.³⁹³ Because Burma became ASEAN Chair in 2014, it is urgent to address and actively pursue change in Burma, as well as warning Burma that it will lose leadership positions, like its 2014 chairmanship, if it refuses to take action in its own country.³⁹⁴

ASEAN must also work to develop active steps to hold member countries accountable for their human rights commitments as members, instead of simply convening committees that report, raise awareness, and advocate, “but not to pass judgment regarding human rights in any member nation.”³⁹⁵ ASEAN will reinforce a perception of being “toothless” because of a voluntary lack of enforcement.³⁹⁶ Only through the active efforts of ASEAN will there be a forum in which to hold countries accountable—the current flight of the Rohingya puts Thailand and others in a position to come forward and require the changes that they have voiced in the past.³⁹⁷

VI. CONCLUSION

In conclusion, although the Thai government has legitimate concerns when dealing with the large population of refugees that has entered the country over the last several decades, it must pass laws to provide a way for refugees, especially the stateless Rohingya, to seek asylum. Thailand must address the gaps in its own law by considering the basic requirements of refugee protection in international customary law and relevant U.N. conventions. The failure to address these gaps leaves vulnerable groups, like the Rohingya, at risk of human rights abuses, such as being sold to human traffickers, as well as being denied their fundamental right to seek asylum from persecution. The Thai government must immediately stop the informal deportation and indefinite detention of the Rohingya, and allow the UNHCR to make refugee status determinations and possibly begin the process of voluntary repatriation. In the long term, Thailand must put into place a system for people to seek asylum, either by cooperation with the UNHCR, other South East Asian nations, or a completely independent, national system. The failure to enact refugee and asylum laws contributes to human rights abuses inflicted upon these very vulnerable populations. These steps will help Thailand communicate its needs to the international community and hopefully pave the way to address the heart of the Rohingya persecution in Burma.

³⁹² *Id.*

³⁹³ Arendshorst, *supra* note 378, at 112.

³⁹⁴ Pavin Chachavalongpun, *Myanmar's ASEAN Chairmanship in 2014: Legitimacy, Salvation and Interests*, CTR. FOR SE. ASIAN STUDIES KYOTO UNIV. (2012), <http://www.cseas.kyoto-u.ac.jp/edit/wp-content/uploads/2013/03/NL6613-16.pdf>.

³⁹⁵ Arendshorst, *supra* note 378, at 113.

³⁹⁶ *Id.* at 113–14.

³⁹⁷ *Id.* at 116 (“To address the weaknesses in the historical approach of constructive engagement, ASEAN could modify [its terms] to include a human rights court with the power to issue binding judgments. Such a court would provide a judicial, unbiased body to punish determine whether the SPDC violates the human rights violations and international humanitarian law provisions of the Charter.”). The development of such a court is outside the scope of this Article, but offers another interesting long-term preventative measure for ASEAN.