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## **UNHCR and the migration regime complex in Asia-Pacific**

Between responsibility shifting and responsibility sharing

**Moretti Sebastien**

**Senior Fellow at the Global Migration Centre (GMC)  
The Graduate Institute of International and Development Studies  
Geneva**

Email: [sebastien.moretti@graduateinstitute.ch](mailto:sebastien.moretti@graduateinstitute.ch)

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**United Nations High Commissioner for Refugees  
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Switzerland**

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## INTRODUCTION<sup>1</sup>

In a series of articles and lectures between 2007 and 2008, the High Commissioner for Refugees, Antonio Guterres, observed that the 21<sup>st</sup> century would be “the century of people on the move”.<sup>2</sup> The world, he noted, is witnessing “new and more complex patterns of displacement and migration” provoked by a combination of climate change and environmental degradation, armed conflicts and violence, and a growing gap “between the winners and losers in the globalisation process [that] will induce millions more people to look for a future beyond the borders of their own country”.<sup>3</sup> Some 10 years later, the increasing number of people on the move throughout the world seems to prove him right.

In 2015, there was an estimated 244 million international migrants worldwide, that is, around 3.3% of the global population. The number of people on the move has grown rapidly over the past fifteen years, up from 222 million in 2010, 191 million in 2005 and 173 million in 2000.<sup>4</sup> Though most people have moved in search of better living conditions, the number of forcibly displaced persons has considerably increased. According to UNHCR, by the end of 2015 some 65,3 million persons had been forcibly displaced, including 21.3 million refugees, the highest number since the Second World War.<sup>5</sup> While most of the refugees – around 86% according to UNHCR – remain in developing regions, the ongoing crisis in Europe and the Mediterranean Sea illustrates the growing phenomenon of the globalisation of migration and forced displacement.

As noted by the High Commissioner, however, the number of people on the move is not only higher, movements over the past decade have also become more complex. In Europe and the Asia-Pacific, in the Gulf of Aden and the Red Sea, in the Caribbean and Latin America, the movements of people take the form of so-called mixed migratory movements, that is, situations in which persons with various motivations and objectives move alongside each other using the same routes and means of transport or engaging the services of the same smugglers.<sup>6</sup> These movements typically include a mix of refugees and asylum seekers fleeing persecution or conflicts, persons fleeing environmental degradation, migrants seeking economic opportunities and better living conditions, women, unaccompanied and separated children (UASC) and victims of trafficking. These mixed movements, whether by land or by sea, usually take place on an irregular basis and expose the concerned persons to a broad range of risks and abuses, which may include threats and violence, including sexual violence, racket, kidnapping for ransom, detention, abandonment and disappearance, trafficking, and exposure to starvation and thirst.

Against this backdrop, migration and displacement issues have come very high in the agenda of the international community over the last decade. However, despite the fact that migration is

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<sup>1</sup> I would like to thank in particular Professor Sandra Lavenex (UNIGE) for all the support and guidance she provided me while writing this paper.

<sup>2</sup> This statement has been made for the first time at the occasion of the Executive Committee’s meeting in 2007. See *UNHCR, Opening Statement by Mr. Antonio Guterres, United Nations High Commissioner for Refugees, at the Fifty-eight Session of the Executive Committee of the High Commissioner’s Programme (ExCom)*, Geneva, 1 October 2007, available at:

<http://www.unhcr.org/4700eff54.html>. See in particular UNHCR, *Guterres: Complex global population movements demand new strategies*, 1 October 2007, available at

<http://www.unhcr.org/4700b4f24.html> ; UNHCR, *People on the Move: The challenges of Displacement in the 21<sup>st</sup> Century*, International Rescue committee UK Annual Lecture by Mr. Antonio Guterres, United Nations High Commissioner for Refugees, Royal Geographical Society, London, 16 June 2008, available at: <http://www.unhcr.org/48873def4.html>.

<sup>3</sup> A. Guterres, *People on the move*, *The Guardian*, 11 December 2007, available at: <http://www.theguardian.com/commentisfree/2007/dec/11/peopleonthemove> (last visited 19 June 2016).

<sup>4</sup> UN Department of Economic and Social Affairs, *International Migration Report 2015*, ST/ESA/SER.A/375, 2016, available at: [http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015\\_Highlights.pdf](http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf).

<sup>5</sup> UNHCR, *Global Trends : Forced Displacement in 2015*, 20 June 2016, available at: <http://www.refworld.org/docid/57678f3d4.html>.

<sup>6</sup> UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, 2011, p. 8.

in essence a transnational issue, involving countries of origin, countries of transit and countries of destination, there is a clear lack of coherent global governance on this issue.<sup>7</sup> In the absence of an international instrument relating to migration, similar to the 1951 Convention relating to the Status of Refugees with regard to the specific category of refugees, global migration governance appears as a complex system of formal and informal regimes and institutions operating at the international, regional, sub-regional, or inter-regional levels, and involving a broad range of states and non-state actors.

In the context of the increase in South-North movements since the 1980s and the growing securitisation of asylum and migration issues in the 1990 and early 2000s, several initiatives have been undertaken at the international level to tackle this issue in a more coordinated way, but they remain very limited in their ambition. In December 2003, the UN Secretary-General and a number of governments launched the Global Commission on International Migration (GCIM), which handed down its report in 2005. The first High Level Dialogue on International Migration and Development (HLD) was subsequently held in 2006 during the UN General Assembly in order to discuss the multidimensional aspects of international migration and development and was followed by a second HLD organised in 2013. The HLD brought together state delegates and experts on migration to discuss how to support the developmental benefits of international migration and at the same time addressing its economic and social costs. The Member States unanimously adopted a formal Declaration as an outcome of the HLD in 2013.<sup>8</sup>

At present, there are only two institutional forums dealing with migration issues at the global level. In 2006, the Secretary-General instituted the Global Migration Group (GMG) in response to a recommendation of the Global Commission on International Migration. The GMG is derived from the Geneva Migration Group, initially set up in 2003 with a more limited number of members. It is an inter-agency group bringing together 18 international agencies working on migration and aims “to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration”.<sup>9</sup> There is also the Global Forum for Migration and Development (GFMD) that was established the same year and is an informal, non-binding and government-led process open to states and UN agencies. It aims to facilitate cooperation and sharing of best practices on issues at the crossover between migration and development.

Given the limitations of the forums established at the international level to deal with migration, efforts toward a better governance of the migration phenomenon have shifted to the regional level. The region indeed appears as “an increasingly important political unit in relation to migration”.<sup>10</sup> Thus, a myriad of Regional Consultative Processes (RCPs) aimed at facilitating dialogue and strengthening cooperation between countries on different aspects of migration have mushroomed in different regions in recent years, including, the Bali Process in Asia-Pacific, the Almaty Process for Central Asia, the Puebla Process in Latin America, the Budapest Process for Eastern Europe, the Euro-African Dialogue on Migration and Development (Rabat Process) linking the European Union (EU) and the countries in North, West and Central Africa, amongst others.<sup>11</sup> These processes do not aim at creating formal multilateral agreements; they exist in order to enable states to engage in dialogue and information-sharing on specific issues

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<sup>7</sup> A. Betts, “Introduction: Global Migration Governance”, in A. Betts (ed.), *Global Migration Governance*, Oxford, Oxford University Press, January 2011, pp. 1-4.

<sup>8</sup> United Nations General Assembly (UNGA), *Declaration on the High-level Dialogue on International Migration and Development*, UN doc., A/RES/68/4, 21 January 2014, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/68/4](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/4).

<sup>9</sup> Global Migration Group, *What is the GMG?*, available at: <http://www.globalmigrationgroup.org/what-is-the-gmg> (last visited 19 April 2016).

<sup>10</sup> A. Betts, “Introduction: Global Migration Governance”, *op. cit.*, p. 18. See also C. Thouez and F. Channac, “Shaping international migration policy: The role of regional consultative processes”, *West European Politics*, August 2006, p. 372.

<sup>11</sup> In 2010, Hansen identified 14 RCPs, but some have disappeared, such as the Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC), while new ones are envisaged, such as one in the Caribbean region. See R. Hansen, “An Assessment of Principal Regional Consultative Processes on Migration”, *IOM Migration Research Series*, No. 38, 2010.

requiring a collaborative approach. They can represent many forms of collaboration, such as between receiving countries only or they can extend to sending and transit countries.

Through these institutions, states have demonstrated their interest in strengthening cooperation and coordination between countries in the field of migration. International and regional institutions provide venues where discussions can take place and where common sets of rules or norms can be developed. These norms generally pursue two main objectives, that is, improving the “management” of migration flows while at the same time ensuring the protection and the respect for the human rights of the “people on the move”, be they migrants, refugees, victims of trafficking, or other persons on the move. However, the excessive “proliferation” of institutions and regional processes may present some important challenges, regarding in particular the “coherence” and “consistence” of the normative framework.<sup>12</sup>

## 1. The Asia-Pacific context

The focus on the Asia-Pacific context is relevant due to the conjunction of two elements: the particularly complex nature of the migration and displacement movements in the region on the one hand; and the absence of a strong legal framework pertaining to the protection of people travelling as part of these – largely irregular – movements, on the other. This “paradox”, as it has sometimes been referred to,<sup>13</sup> is characteristic of the region and raises important questions regarding the protection of the concerned persons.

### 1.1. A particularly complex phenomenon of mixed movements in the region

The movements of people by sea that have taken place in the region of the Bay of Bengal and Andaman Sea for almost one decade can be characterized as mixed migratory movements. These movements typically include a mix of people from Bangladesh and Myanmar pursuing different objectives. While the Bangladeshis are portrayed as migrants looking for economic opportunities and better living conditions in Malaysia, the Rohingyas, a Muslim ethnic minority living in the predominantly Buddhist Myanmar, are generally considered as asylum seekers and refugees fleeing persecution, discrimination and marginalization in the Rakhine State in Myanmar, at the border with Bangladesh. The situation of the Rohingyas is particularly complex due to the fact that they are also stateless as the government of Myanmar considers them to be “illegal migrants” from Bangladesh.

The situation in the region was described in the 2014 UNHCR Regional update as follows:

Mixed migratory movements, particularly by sea, continue to be common in the region. During the first half of 2014, an estimated 20,000 people are said to have risked their lives to cross the Indian Ocean. Many were Rohingya who fled from Myanmar to elsewhere in the region, often arriving in poor health due to malnutrition and abuse during the journey. Several hundred people were also intercepted on boats heading to Australia. Tackling the issues caused by irregular movements remains a global priority for UNHCR. These movements affect all States, reinforcing the need for shared responsibility to address the many factors driving these flows. The Office remains concerned by measures taken by some States in the region to tighten border control, conduct offshore processing of asylum-seekers and forcibly return those seeking international protection. Although many countries in the Asia-Pacific region are not signatories to the 1951 Refugee Convention, these measures are contrary to international customary law and humanitarian principles.<sup>14</sup>

Alongside migrants and refugees, there have been numerous reports of people, both from Bangladesh and Myanmar, being abducted and forced into the boats, in all likelihood to be

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<sup>12</sup> K. Raustiala and D.G. Victor, "The Regime Complex for Plant Genetic Resources", *International Organization*, vol. 58, n°2, April 2004, p. 277.

<sup>13</sup> S.E. Davies, *Legitimizing Rejection: International Refugee Law in South East Asia*, Boston, Martinus Nijhoff, 2008.

<sup>14</sup> UNHCR, *Executive Committee of the High Commissioner's Programme. Sixty-fifth session. Regional update - Asia and the Pacific*, 17 September 2014, sect. A.

trafficked for the purpose of labour trafficking.<sup>15</sup> There have also been cases of people who have fallen prey of traffickers at some point during the journey, often because they or their family was not able to pay the amount of money demanded by the agents or facilitators. Other people have been deceived by traffickers with the prospect of finding work opportunities in Malaysia. The categories are obviously not exclusive; people travelling as part of mixed migratory movements can move from one category to another, or even belong to different categories at the same time.

This phenomenon of “irregular maritime movements”, as it is sometimes referred to in the region,<sup>16</sup> has been increasing in the Bay of Bengal and Andaman Sea in recent years. While the number of people moving irregularly by sea in the region was limited until 2011, there was a clear increase in 2012 with an estimated 20,000 people taking to the sea, most of them in the second part of the year following the outbreaks of communal violence in the Rakhine State in June and October 2012. The number of people departing irregularly by sea from Bangladesh and Myanmar was estimated at 50,000 in 2013, 63,000 in 2014, and 25,000 people in the first quarter of 2015.<sup>17</sup>

Whatever their motivations, the plight of people taking to the sea through the Bay of Bengal and Andaman Sea represents the most important humanitarian issue in the region. This was clearly illustrated by the so-called “Bay of Bengal and Andaman Sea Crisis” that erupted in May 2015. Following a series of measures taken by the Thai authorities against smuggling and trafficking rings in the south of Thailand, thousands of people, mostly migrants from Bangladesh and Rohingyas refugees, were abandoned at sea by the smugglers that had arranged their journey. The first who made it to shore shared horrific stories regarding their treatment in the hands of the smugglers. They had spent weeks, sometimes months, on board unseaworthy vessels, exposed to the sun, starving and dying from thirst. Passengers on the boats were threatened and beaten when they dared to beg for more water, and some were even killed, whilst some women were sexually abused. The situation was aggravated when it appeared that the governments of Malaysia, Thailand, and Indonesia were preventing people from disembarking on their territory by implementing a “help-on” policy that consisted of intercepting boats in their territorial waters and redirecting them toward another destination. These events raised a significant outcry from the international community and impelled the concerned countries to engage in a number of initiatives to find a solution to the crisis.

### *1.2. The absence of a robust legal framework pertaining to the protection of “illegal migrants”*

In terms of legal framework pertaining to the protection of people on the move, the situation in the region has been characterized as a “no man’s land of human and legal rights”.<sup>18</sup> The law for the protection of refugees and migrants in the region seems to be more the exception than the rule. Most of the governments concerned have systematically denied having any obligations

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<sup>15</sup> E. Stoakes and C.K.A. Kelly, “Revealed: how the Thai fishing industry trafficks, imprisons and enslaves”, *The Guardian*, 20 July 2015, available at: <http://www.theguardian.com/global-development/2015/jul/20/thai-fishing-industry-implicated-enslavement-deaths-rohingya> (last visited 19 June 2016).

<sup>16</sup> Various expressions have been used in the framework of the Bali Process to refer to these movements: “irregular maritime ventures”; “maritime people smuggling ventures”; “irregular maritime migration”; “irregular movements by sea”; “irregular migration by sea”. The expression “irregular maritime movements” seems to have been favoured by UNHCR, most probably because the organization is reluctant to use the word “migration” to refer to what it considers to be “displacement”, that is, the forced movement of people. The expression “irregular maritime movements” has also been used in the context of the Jakarta Declaration.

<sup>17</sup> UNHCR, IOM, and UNODC, *Bay of Bengal and Andaman Sea Proposals for Action*, May 2015, available at: <http://www.unhcr.org/55682d3b6.html>.

<sup>18</sup> The International Rescue Committee (IRC) and Jesuit Refugee Service (JRS), *Nowhere to Turn: A Report on Conditions of Burmese Asylum Seekers in Thailand and the Impacts of Refugee Status Determination Suspension and the Absence of Mechanisms to Screen Asylum Seekers*, 2005, p. 1 ; D. Chusri, T. Rubin, E. Silva, J.D. Theede, S. Wongchalee and P. Chansawang, “The Dynamics, Needs and Constraints of Stakeholders”, in P. Vungsiriphisal, D. Chusri and S. Chantavanich (eds), *Humanitarian Assistance for Displaced Persons from Myanmar*, Springer International Publishing, Cham, 2014, p. 149.

with regard to refugees, claiming that they are providing protection and assistance to people in need on a “humanitarian” basis only.

The Convention relating to the status of refugees adopted in 1951 and its protocol adopted in 1967 are the two main universal instruments for the protection of refugees. As of 31 December 2015, 145 states are parties to the 1951 Convention (19 signatories), while 146 are parties to the 1967 Protocol.<sup>19</sup> The most important gap regarding these two instruments is to be found in the Asia-Pacific region, with only 20 states parties out of 45 states.<sup>20</sup> Amongst the 10 ASEAN states, only two – Cambodia and the Philippines – have acceded to the Refugee Convention and its protocol. The situation is even bleaker in the Bay of Bengal and Andaman Sea region, with not one of the coastal states directly concerned by the movements of migrants and refugees, that is, Bangladesh, Indonesia, Malaysia, Myanmar, and Thailand, being parties to the 1951 Convention, or to its protocol.

At the regional level, there is no instrument relating to the protection of refugees, as is the case in Africa.<sup>21</sup> The only instrument relevant in this context is the Principles of Bangkok on the Status and Treatment of Refugees adopted in 1966 by the Asian-African Legal Consultative Committee (AALCC), with a “final” version of the text being adopted in 2001 by what had become in the meantime the Asia-Africa Legal Consultative Organization (AALCO).<sup>22</sup> The Principles of Bangkok are, however, “declaratory and non-binding in character”.<sup>23</sup> Unlike the Cartagena Declaration in Latin America,<sup>24</sup> which is also a soft law instrument, the Bangkok Principles have not been incorporated in the national legislations and have not been invoked as a reference by the concerned countries, giving the impression that there has not been much effort to implement them. In sum, according to UNHCR, the Principles “are important, but have not achieved the same prominence and legal value as the instruments in other regions”.<sup>25</sup>

Mention must also be made of the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Protocol against Trafficking)<sup>26</sup> and the Protocol against the Smuggling of Migrants by Land, Sea and Air (Protocol against Smuggling),<sup>27</sup> both of which were adopted in 2000, and supplement the Convention against Transnational Organized Crime. The Protocol against Trafficking does contain some provisions regarding the protection of victims, however the focus of this instrument is primarily on the prosecution and prevention of trafficking, rather than the protection of victims. The Protocol against Smuggling also contains some provisions that may be important for the protection of persons on the move in the region (referred to as “persons being the object of smuggling” rather than as “victims”). While these provisions are mainly discretionary, they may nonetheless constitute an additional source of protection for refugees who are also objects of smuggling or victims of trafficking.

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<sup>19</sup> For ratification of treaties, see <https://treaties.un.org/Pages/ParticipationStatus.aspx>.

<sup>20</sup> See UNHCR, *Regional Bureau for Asia and the Pacific. Fact Sheet*, September 2014, available at: <http://www.unhcr.org/5000139a9.html> (last visited 19 June 2016).

<sup>21</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“OAU Convention”), 10 September 1969.

<sup>22</sup> The AALCO includes countries from Africa and Asia, with some countries from South and Southeast Asia (Indonesia, Myanmar, Sri Lanka, India, Thailand, Malaysia, Singapore, Bangladesh, Brunei Darussalam).

<sup>23</sup> *Final Text of the Asian-African Legal Consultative Organization’s 1966 Bangkok Principles on the Status and Treatment of Refugees*, 2001.

<sup>24</sup> *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.

<sup>25</sup> UNHCR, *The State of the World’s Refugees 2012: In Search of Solidarity*, Oxford, Oxford University Press, 2012, p 42. See also A. Zimmermann and C. Mahler, « Article 1A, para. 2 (Definition of the Term “Refugee”/Définition du Terme “Réfugié”)”, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, Oxford, Oxford University Press, 2010, p. 320.

<sup>26</sup> UNGA, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

<sup>27</sup> UNGA, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational crime*, 15 November 2000.

In these circumstances, international human rights law represents the main venue for the protection of refugees and asylum seekers in the region,<sup>28</sup> as well as for migrants in general. Several of the most important provisions contained in the Refugee Convention, such as the principle of *non-refoulement*, the right to work, or the freedom of movement, can also be found in international human rights law, in particular in the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as in the International Covenant on Civil and Political Rights (ICCPR). In some cases, international human rights law goes even *beyond* the standards for the protection of refugees as set out in the Refugee Convention. Indeed, international human rights law covers some important protection aspects that were not taken into consideration by the Refugee Convention – such as the right to life, the freedom from slavery and forced labour, the right to a fair trial, the right to private and family life and the right to hold opinions and freedom of expressions, amongst others. Refugees and asylum seekers, even though they are not officially recognized as such, may benefit from the protection afforded by international human rights law. There are, however, some critical gaps in this regard as countries such as Malaysia and Myanmar are neither parties to the ICESCR, nor to the ICCPR, nor to the Convention against Torture (CAT). For these countries, international customary law, which is binding to all states irrespective of the accession to the conventional instruments, is the only source of obligations.<sup>29</sup>

Adopted in December 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) provides a rather comprehensive set of provisions to protect both regular and irregular migrants. The Convention, however, has not achieved the desired support from states. The CMW took 13 years to reach the threshold of 20 ratifying states and only entered into force in July 2003. As of 31<sup>st</sup> December 2015, only 48 states have ratified the Convention with no one of them being a major receiving country. In Southeast Asia for instance, only the Philippines and Indonesia are parties to the CMW, but neither of them are important countries of destination and it can be assumed that their accession to the Convention aimed rather at guarantying the protection of their own nationals abroad rather than the protection of foreigners in their territories.

At the regional level, the Asia-Pacific region remains “the last frontier of regional cooperation”<sup>30</sup> in the field of human rights, with no regional level instrument pertaining to the protection of human rights. At the sub-regional level, there is only the *ASEAN Human Rights Declaration*, which was adopted in 2012 and is also non-binding in character. Despite some progress towards the development of a framework to protect human rights, the ASEAN’s human rights system remains relatively weak; at present there is no human rights court and the ASEAN Intergovernmental Commission on Human Rights, which was established in 2009, does not have mandate to receive complaints or conduct investigations.<sup>31</sup>

### 1.3. *The need for more cooperation at the regional level*

Given the complexity of the mixed migratory movements in the region and the paucity of the legal framework relating to the protection of persons traveling as part of them, there is a clear need to address irregular migration in a more concerted and cooperative way.

Over the past two decades a myriad of informal organizations and processes dealing to varying degrees with asylum and migration issues have been established. The Manila Process, the Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime; and the “Jakarta

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<sup>28</sup> S. Moretti, *La protection internationale des réfugiés en Asie du sud-est: du privilège aux droits*, Brussels, Bruylant, 2016, pp. 77-101.

<sup>29</sup> The right to leave any country, the principle of *non-refoulement*, the prohibition of torture, inhuman or degrading treatment, the prohibition of racial discrimination, the interdiction of collective expulsion, as well as some fundamental judicial guarantees are part of international customary law, and as such they are binding to Southeast Asian states as well.

<sup>30</sup> B. Saul, J. Mowbray, and I. Baghoomians, “Resistance to regional human rights cooperation in the Asia-Pacific: demythologizing regional exceptionalism by learning from the Americas, Europe and Africa”, in *Human Rights in the Asia-Pacific Region. Towards Institution Building*, Milton Park, Abingdon, Oxon ; New York, Routledge Research in Human Rights Law, 2011, p. 107.

<sup>31</sup> ASEAN, *ASEAN Intergovernmental Commission on Human Rights. What You Need to Know*, Jakarta, ASEAN Secretariat, 2012.



Declaration” process are the main examples of such forums and institutions where states can engage in dialogue and share information on issues related to migration and displacement, though through different prisms. In the region of the Bay of Bengal and Andaman Sea, the Association of Southeast Asian Nations (ASEAN) is another major actor with an interest on migration issues.

There are also several formal international organizations (IOs) working in the region on issues related to migration and displacement, and whose mandates sometimes overlap. UNHCR and the International Organization for Migration (IOM) are the two main actors in this field, while the United Nations Office on Drugs and Crime (UNODC) plays an increasingly important role from an anti-trafficking and anti-smuggling angle. Other international organizations and UN agencies, such as the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Children’s Emergency Fund (UNICEF), the International Labour Organization (ILO), the United Nations Population Fund (UNFPA) and the International Maritime Organization (IMO), amongst others, may also play a role depending on the context and based on their specific areas of expertise. UNHCR, ILO, and OHCHR have a normative role and a protection mandate in their respective fields: refugees, labour and social protection and human rights. IOM, for its part, is a non-normative international organization and does not have a protection mandate, although it claims that its activities “contribute to protecting human rights, having the effect, or consequence, of protecting persons involved in migration”.<sup>32</sup>

Given the challenges inherent to mixed migration, a comprehensive and effective response would need to rest on full cooperation amongst all the key actors, with the aim of maximizing the use of different capacities and expertise available among the various stakeholders involved.

## 2. Analytical framework

The sphere of international organizations has been the object of numerous studies demonstrating not only their importance and relevance in an increasingly interconnected world,<sup>33</sup> but also the difficulties associated with these forms of institutions - what we generally refer to as the “pathologies” of international organizations.<sup>34</sup> The problems of cooperation and coordination between IOs have been particularly emphasized, be they due to the influence and control of states over IOs,<sup>35</sup> to their increasing autonomy, to the compartmentalization of institutions, or to the broadening of their mandate and activities with the risk of overlapping.<sup>36</sup>

More recently, scholars have focused their attention on the multiplication, or “proliferation”, of formal and informal organizations, that is, on the phenomenon of “regime complex”. The term was first coined in 2004 by Kal Raustiala and David Victor in their seminal article on the governance of plant genetic resources.<sup>37</sup> The concept has attracted considerable attention and there have been many attempts since then to define it with more precision. According to Orsini, Morin, and Young, for instance, regime complex refers to “a network of three or more international regimes that relate to a common subject matter; exhibit overlapping membership; and generate substantive, normative, or operative interactions recognized as potentially problematic whether or not they are managed effectively”.<sup>38</sup> A regime is commonly defined as a set of “implicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”.<sup>39</sup> Regime complexes are characterized by the existence of a plurality of agreements adopted and maintained in different

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<sup>32</sup> IOM, *Mission*, available at : <http://www.iom.int/mission> (last visited 16 May 2016).

<sup>33</sup> See for instance K.W. Abbott and D. Snidal, “Why States Act through Formal International Organizations”, *Journal of Conflict Resolution*, vol. 42, n°1, February 1998, p. 18.

<sup>34</sup> See in particular M.N. Barnett and M. Finnemore, “The Politics, Power, and Pathologies of International Organizations”, *International Organizations*, vol. 53, n°4, automne 1999, pp. 699-700 ; P. De Senarclens, “Les organisations internationales face aux défis de la mondialisation”, *Revue internationale des sciences sociales*, n°4, 2001, p. 559-572.

<sup>35</sup> Voir notamment M.N. Barnett and M. Finnemor, *op. cit.*, p. 717 ; P. De Senarclens, *op. cit.*, p. 565.

<sup>36</sup> M.N. Barnett and M. Finnemore, *op. cit.*, pp. 699-700.

<sup>37</sup> K. Raustiala and D.G. Victor, “The Regime Complex for Plant Genetic Resources”, *op. cit.*

<sup>38</sup> A. Orsini, J.-F. Morin, and O. Young, “Regime Complexes: A Buzz, a Boom, or a Boost for Global Governance?”, *Global Governance*, vol. 19, n°1, 2013, p. 29.

<sup>39</sup> S. Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables”, in S. Krasner (ed.), *International Regimes*, Ithaca, 1985, p. 2.

forums, at different times and under different circumstances, and with the participation of different sets of actors. Some of these agreements may be supported by formal organizations. In the field of migration, international human rights law, international refugee law, labor law, the law of the sea, and the set of rules pertaining to smuggling and trafficking constitute separated, but intrinsically interrelated, regimes.

The number of forums, processes and institutions relating to migration and displacement in Asia-Pacific constitutes what can be referred to as a “regime complex”. This kind of situation raises several questions regarding the causes behind this phenomenon, the consequences of this complexity at the normative level, and the role and strategies of key stakeholders involved in these processes, including IOs.

### 2.1. Determining the causes of institutional regime complexity

There has been important literature produced on the “causes” of international regime complexity, that is, on the factors and reasons behind the proliferation of formal and informal institutions at the global or regional level.<sup>40</sup> Different elements have been put forward to explain this phenomenon, including the “spillover effect” or “snowball factors”<sup>41</sup> when one process showed success and was replicated in another region, or when actors engaging in cooperation in a certain domain realize that there is a need to go further, or that there is the need to address other related issues.<sup>42</sup> In these circumstances, the proliferation of institutions responds to a need for more normative clarity on a specific issue. The “complexity” in this case is unintended; it will only come into being if the governance activities of the different institutions involved begin to overlap.<sup>43</sup>

Conversely, institutional complexity can be the result of purposive action of some state actors. For instance, in some cases the creation of new institutions on the initiative of a country or a group of countries may represent an attempt to “externalise” the effects of their immigration policies on other countries.<sup>44</sup> In other cases, the creation of new institutions may reflect an attempt at “regime-shifting”; an effort to move the discussions on a specific topic to a new venue, potentially with a different group of states and a different decision-making process that may provide a more favourable outcome for them.<sup>45</sup> Some countries can support the development of new regimes in a deliberate attempt to create a “strategic inconsistency” in the interpretation of rules and regulations, perhaps with the aim to dilute their obligations in the broader response to irregular migration.<sup>46</sup> In these cases, the proliferation of institutions is obviously detrimental to the development of a cooperative framework at the regional level.

### 2.2. Analysing the consequences of international regime complexity

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<sup>40</sup> See S. Lavenex, F. Jurj, T.E. Givens, and R. Buchanan, “Regional Migration Governance”, in T.A. Börzel and T. Risse (eds), *Oxford Handbook of Comparative Regionalism*, Oxford University Press, Oxford, 2016, pp. 470-472 ; K. Raustiala and D.G. Victor, *op. cit.*; V. Aggarwal, “Reconciling Multiple Institutions: Bargaining, Linkages, and Nesting”, in V. Aggarwal (ed.), *Institutional Designs for a complex World: Bargaining, Linkages & Nesting*, Ithaca, New York, Cornell University Press, 1998, pp.1-31.

<sup>41</sup> IOM, “The Role of Regional Consultative Processes in Managing International Migration”, *IOM Migration Research Series* 3, 2001, p. 28.

<sup>42</sup> T. Johnson and J. Urpelainen, “A Strategic Theory of Regime Integration and Separation”, *International Organization*, vol. 66, n°4, October 2012, pp. 645- 648.

<sup>43</sup> T. Gehring and B. Faude, “The Dynamics of Regime Complexes: Microfoundations and Systemic Effects”, *Global Governance*, vol. 19, n°1, 2013, p. 123.

<sup>44</sup> C. Thouez and F. Channac, *op. cit.*, p. 378.

<sup>45</sup> K.J. Alter and S. Meunier, “The Politics of International Regime Complexity”, *Perspectives on Politics*, vol. 7, n°1, March 2009, p. 17 ; D.W. Drezner, “The Power and Peril of International Regime Complexity”, *Perspectives on Politics*, vol. 7, n°1, March 2009, pp. 66- 67 ; L.R. Helfer, “Regime Shifting in the International Property System”, *Perspectives on Politics*, vol. 7, 2009, pp. 39- 44 ; T. Gehring and B. Faude, “A theory of emerging order within institutional complexes: How competition among regulatory international institutions leads to institutional adaptation and division of labor”, *The Review of International Organizations*, vol. 9, n°4, December 2014, pp. 474- 483.

<sup>46</sup> K. Raustiala and D.G. Victor, *op. cit.*, pp. 301-302.

In contrast to the debate on the “causes” of international regime complexity, the consequences, or effects, have been the object of much less attention from scholars.<sup>47</sup> The issue raises some very important questions, however, regarding the effectiveness of the international and regional regimes, the impact on the engagement strategies of the main stakeholders, and the way it empowers some of them at the detriment of other actors.<sup>48</sup> In the context of this paper, it is important to understand what the consequences of the increasing regime complexity in the Asia-pacific are for the development of a normative framework pertaining to the protection of the different categories of people on the move, often put under the same label of “irregular migrants”, in the region.

The first and most important question relates to the effectiveness of the international and regional regime in strengthening cooperation between the concerned actors. Does the growing density and overlap among institutions enhance or undermine the effectiveness of the international governance regime? Does it facilitate or hinder the ability of the concerned states to manage “irregular migration” through cooperation? In some cases, the overlap “introduces positive feedback effects that enhance cooperation and the effectiveness” of a regime. Successful cooperation in one institution can have a positive spillover effect in facilitating the pursuit of the objectives in other institutions. It has been argued, for instance, that regime complexity facilitates the creation of small groups who constantly interact in different settings and that this type of connection can contribute to building trust and mutual understanding between actors increasing their willingness to solve a problem collectively.<sup>49</sup> The proliferation of institutions and processes could also lead to an important and coherent normative production and could, therefore, shed some clarity on the obligations and rules to follow in a specific domain. In other words, “transferring models of migration cooperation” through the multiplication of institutions could in fact “strengthen policy convergence”.<sup>50</sup>

Much recent work has, however, emphasized the negative effects of international regime complexity.<sup>51</sup> In some contexts, complexity presents the risk of “unhelpful competition” across actors and may compromise the objectives of international cooperation and international governance.<sup>52</sup> Through the multiplication of forums and venues where related issues are discussed, institutional proliferation can actually impair the objective of increased cooperation underlining the concept of international organizations. For instance, if the aim of a regional migration regime is, in theory, to facilitate the development of a clear set of regulations regarding potential responses to migration and displacement issues that are accepted and followed by the main actors, then the proliferation of initiatives may lead to the “fragmentation” of the normative framework, in the sense that it may reduce the clarity of legal obligations and standards by introducing a set of overlapping and sometimes diverging rules and jurisdictions governing the issue.<sup>53</sup> This “negative spillover” effect is likely to happen when interrelated issues are discussed in different venues, as even positive cooperation in one area may unintentionally undermine the pursuit of objectives in a related area.<sup>54</sup> States would then be in a position to choose to abide by the rules and regulations that are more advantageous to them. In these circumstances, international regime complexity is reflective of the diverging views of states regarding a specific issue.

Morse and Keohane have recently coined the concept of “contested multilateralism” to refer to situations where “multilateral institutions are challenged through the use of other multilateral

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<sup>47</sup> See S. Lavenex, F. Jurj, T.E. Givens, and R. Buchanan, “Regional Migration Governance”, *op. cit.*, pp. 472-474 ; K.J. Alter and S. Meunier, *op. cit.*, pp. 13-14.

<sup>48</sup> K.J. Alter and S. Meunier, *op. cit.*, pp. 13-14 ; L. Gomez-Mera, “Regime complexity and global governance: The case of trafficking in persons”, *European Journal of International Relations*, September 2015.

<sup>49</sup> K.J. Alter and S. Meunier, *op. cit.*, p. 18.

<sup>50</sup> C. Thouez and F. Channac, *op. cit.*, pp. 370-372.

<sup>51</sup> L. Gomez-Mera, *op. cit.*, p. 5.

<sup>52</sup> K.J. Alter and S. Meunier, *op. cit.*, p. 14. See also T. Gehring and B. Faude, “The Dynamics of Regime Complexes: Microfoundations and Systemic Effects”, *op. cit.*, p. 123.

<sup>53</sup> K.J. Alter and S. Meunier, *op. cit.*, p. 16.

<sup>54</sup> T. Johnson and J. Urpelainen, *op. cit.*, pp. 646.

institutions”.<sup>55</sup> According to them, the phenomenon of contested multilateralism occurs when states and/or non state actors who are dissatisfied by the existing institutional arrangements “either shift their focus from one existing institution to another or create an alternative multilateral institution to compete with existing ones”,<sup>56</sup> thus exacerbating the institutional complexity. One of Morse and Keohane’s major contributions comes from the idea that existing regimes would normally seek to “adapt” to the situation, since their authority and the scope of their impact would be “adversely affected by the establishment of alternative organizations or practices”. It is thus necessary to also pay attention to how the challenged regime will respond, notably by integrating some of the changes demanded by a “dissatisfied coalition”.

The existence of several institutions working in parallel and partly overlapping influences the way states and other actors interact with the system and the strategies they pursue to attain their objectives. The effectiveness of cooperation depends to a certain extent on the cross-institutional strategies of the actors involved, which may range from “cooperative”, to “opportunistic” to “non-cooperative”.<sup>57</sup> International regime complexity provides state and non-state actors with opportunities for *forum shopping*, allowing states and other actors to select the venues where they think they are best able to defend their interest or promote their own objectives.<sup>58</sup> While the goal of forum shopping is usually to obtain favourable decisions on certain issues, there is also the possibility that some of the actors may take advantage of the situation and engage in *regime-shifting* with the aim of influencing and reshaping the predominant framework, perceived as unfavourable, and altering the constellation of actors involved in the process of decision making.<sup>59</sup> As opposed to “forum shopping”, “regime shifting” is “an iterative, longer-term strategy that seeks to create outcomes that have feedback effects in other venues”.<sup>60</sup> This strategy, which has been used on many occasions by developing countries trying to defend their interest against more powerful states, could even lead to the creation of “counter regime norms”.<sup>61</sup> Some states may also choose, here again, to engage in a “strategic inconsistency” strategy, by taking advantage of the regime complexity to promote regulations that are contradictory to the rules adopted in a different venue, thus undermining their relevance.<sup>62</sup> In these circumstances, the concerned states would be able to exploit the rule ambiguity and legal fragmentation resulting from the institutional regime complexity to interpret and implement rules in a way more favourable to them. While in most cases complex regimes seem to empower the most powerful state actors,<sup>63</sup> this kind of scenario tends to benefit weaker actors.<sup>64</sup>

### 2.3. Regime complexity and the evolving role of International Organizations

Finally, regime complexity in the field of migration has important consequences for non-states actors, such as IOs, NGOs, and experts, who may develop new strategies to engage effectively with these processes and maximize their impact. Participation to several, if not all, processes means for instance that they have more opportunities to interact with governments, to control the information governments’ representatives receive and to influence the way the situation is perceived and how it can be addressed.<sup>65</sup>

In this regard, a growing body of literature has recently emphasized the role that IOs could play as “orchestrators” enlisting and supporting “intermediary actors” that can help them reach

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<sup>55</sup> J.C. Morse and R.O. Keohane, “Contested multilateralism”, *The Review of International Organizations*, vol. 9, n°1, March 2014.

<sup>56</sup> *Ibid.*

<sup>57</sup> L. Gomez-Mera, *op. cit.*, p. 1.

<sup>58</sup> K. Raustiala and D.G. Victor, *op. cit.*, pp. 299-300. See also K.W. Abbott and D. Snidal, “Why States Act through Formal International Organizations”, *op. cit.*, pp. 3-32 ; M. Busch, “Overlapping Institutions, Forum Shopping, and dispute Settlement in International Trade”, *International Organization*, vol. 61, n°4, 2007, pp. 735-761.

<sup>59</sup> L.R. Helfer, *op. cit.*, p. 39.

<sup>60</sup> *Ibid.*

<sup>61</sup> L.R. Helfer, *op. cit.*, p. 41. See also J.C. Morse and R.O. Keohane, *op. cit.*

<sup>62</sup> K. J. Alter and S. Meunier, *op. cit.*, p. 17.

<sup>63</sup> D.W. Drezner, *op. cit.*, pp. 65- 70.

<sup>64</sup> K.J. Alter and S. Meunier, *op. cit.*, p. 13.

<sup>65</sup> K.J. Alter and S. Meunier, *op. cit.*, p. 17-18. See also L. Gomez-Mera, *op. cit.*, pp. 24-25.

“target actors” in pursuit of their governance objectives.<sup>66</sup> Lacking the capacity to compel states to respect their commitments or to abide by their obligations under a specific regime, IOs may indeed attempt to guide the behaviour of states through intermediaries, such as other states or regional institutions that can exert an influence on other actors. They do so through different kind of support to intermediaries, such as material support (i.e. financial or administrative assistance) and “ideational” support (technical expertise, formal or political endorsement).<sup>67</sup> Orchestration is thus an “indirect” and “soft” mode of governance for IOs.<sup>68</sup>

Several commentators have emphasized the fact that regime complexity may increase the competition between international organizations, or between IOs and NGOs.<sup>69</sup> Indeed, International Organizations may compete for a higher visibility, funding, or to get in a better position to influence the discussions, notably through secretariat functions. UNHCR and IOM, the two main intergovernmental organizations active in the field of migration and displacement, are particularly important in this regard. Their relationship has been characterized as “charged with competition and suspicion”<sup>70</sup> and they are often seen as being engaged in a “competitive struggle over different sections of the migrant business”.<sup>71</sup>

There are also cases where complexity can increase the level of cooperation between the main actors. For instance, IOM and UNHCR have cooperated closely in the preparation of the conferences and roundtables organized in different regions in the context of the UNHCR’s “10-Point Plan of Action Project”, with constant exchange at all levels that has helped to identify areas of disagreement, to clarify positions and to agree on common interests and objectives. This approach “has provided a good basis for continued cooperation on the follow up to and implementation of the conference recommendations”, that is, in the establishment and in the activities of several new RPCs.<sup>72</sup> Operationally, the participation of different actors, provided that there is some coordination between them, can increase the level of resources available and improve the provision of assistance and services to affected communities.

### 3. Problematic and methodology

This paper provides an analysis of the institutional regime complexity in the field of migration governance in the Asia-Pacific region, with a particular focus on UNHCR’s role in this context. The primary objective of the research is to understand the consequences of regime complexity on the development of a framework pertaining to the protection of refugees and migrants in the region, in particular those travelling by sea in the region of the Bay of Bengal and Andaman Sea. In other words, this research aims to determine whether the increasing regime complexity in the field of migration in Asia-Pacific has led to a weakening and a dilution of the protection framework in the region, or, on the contrary, whether this situation has resulted in a reaffirmation of some of the core principles related to the protection of migrants and refugees.

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<sup>66</sup> K.W. Abbott, P. Genschel, D. Snidal and B. Zangl, “Orchestration: global governance through intermediaries”, in K.W. Abbott and D. Snidal (eds), *International Organizations as Orchestrators*, Cambridge, Cambridge University Press, p. 4. See also K.W. Abbott and D. Snidal, “International regulation without international government: Improving IO performance through orchestration”, *The Review of International Organizations*, Vol. 5, n°3, September 2010, pp. 315-344.

<sup>67</sup> K.W. Abbott, P. Genschel, D. Snidal and B. Zangl, “Orchestration: global governance through intermediaries”, *op. cit.*, p. 14.

<sup>68</sup> *Ibid.*, p. 17.

<sup>69</sup> See for instance S.C. Hofmann, “Overlapping Institutions in the Realm of International Security: The Case of NATO and ESDP”, *Perspectives on Politics*, Vol. 7, Issue 1, March 2009, pp. 45-52 ; J. Kelley, “The More the Merrier ? The Effects of Having Multiple International Election Monitoring Organizations”, *Perspectives on Politics*, Vol. 7, Issue 1, March 2009, pp. 59-64.

<sup>70</sup> See J. Elie, “The Historical Roots of Cooperation Between the UN High Commissioner for Refugees and the International Organization for Migration”, *Global Governance*, Vol. 16, n°3, July-September 2010, p. 345 ; H. Simon, *Quagmire and Cooperation : IOM and UNHCR Action in the Arab Spring, Programme for the Study of Global Migration*, The Graduate Institute, Geneva, June 2011.

<sup>71</sup> A. Koch, “The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return”, *Journal of Ethnic and Migration Studies*, vol. 40, n°6, 2014, p. 917.

<sup>72</sup> T. Howe, “Refugee Protection and International Migration. Achievements, Challenges and Lessons Learned from UNHCR’s 10-Point Plan Project”, Division of International Protection, January 2012, p. 10.

Although they may have accepted international obligations in this regard, for a variety of reasons states have generally demonstrated a limited interest in the issue of the protection of non-nationals. In these circumstances, it can be assumed that the development of new regional institutions in the field of migration governance in Asia-Pacific would tend to shy away from protection considerations and rather emphasize other issues of far more importance to states, such as issues related to security, border control and law enforcement (*hypothesis 1*). As a consequence, it can be expected that the governance of migration in the region would tend to shift towards a border control and law enforcement agenda, with a focus on the prevention of irregular movements (*hypothesis 2*). The increasing importance of the anti-trafficking and anti-smuggling discourse at the global and regional level has been a catalyst in this regard. The change of paradigm has been supported by the creation of several regional platforms for dialogue or processes initiated by states or International Organizations aiming at shifting the migration regime towards their own priorities.

As most of the decisions with an impact on migration issues are taken outside the refugee institutions, such as the Executive Committee (ExCom), one could assume that UNHCR would tend to adjust its engagement strategies with the states concerned and the different migration-related institutions in the region in order to remain relevant and to maximize the influence it can have on the development of a protection regime for refugees (*hypothesis 3*). Moreover, in a context of mixed migration, UNHCR cannot only speak out for the rights of “refugees” at the exclusion of other people of concern. As the Agency’s identity is largely based on its somewhat unique protection mandate and humanitarian role within the United Nations system, it must advocate for the protection of all people on the move, while of course insisting on the specific vulnerabilities of refugees (*hypothesis 4*).

As this paper will demonstrate, in the Asia-Pacific context UNHCR has been quite successful in taking advantage of institutional complexity, of the divisions between states on the governance of migration in the region, and of its role as an “orchestrator” to further advance a more protection-oriented migration framework. Far from leading to a “fragmentation” of the framework related to the protection of people on the move, the recent developments in the region seem to have led to the reaffirmation of a coherent set of principles and strategies to respond to mixed migratory movements in a way that balances the duty of states regarding the necessity to safeguard their sovereignty and national security with their obligations under international human rights and international refugee law. While this does not prejudge the way states would react in practice when faced with the arrival of new people, it already represents an important achievement in a region known for its general and long-standing resistance to framing the movements of people as a protection issue.

To start with, it is necessary to explain the existing arrangements related to migration and displacement in the region and understand why the phenomenon is regulated in the way it is. The Comprehensive Plan of Action (CPA) adopted in 1989 to put an end to the arrival of Vietnamese boat people raised hopes regarding the development of a regional asylum system in the region.<sup>73</sup> However, from the late 90s the tendency has rather been a shift towards a more restrictive and counter-trafficking regime in the region. The first two parts of this paper will present the regional regime complexity and analyse the dynamics behind these developments. This shift can be demonstrated through the analysis of four aspects, namely:

(a) *The identification of the main actor(s) behind the initiatives leading to the establishment of a new institution.* It can indeed be assumed that each actor, be it a state or an international organization, pursues its own agenda and objectives, and in this regard the proposals and the measures taken toward the establishment of a new institution can be considered as an attempt to draw more attention and resources to the issues of interest to that state or international organization.

(b) *The context in which these initiatives take place.* The context may be very important as the decision to propose the establishment of a new institution may be a reaction to a certain event or to a course of events, or could stem from anticipation that the response will not be satisfactory from the point of view of the concerned states. It is likely that the establishment of a new institution would be proposed in a situation where some actors, states or international

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<sup>73</sup> S. Moretti, *La protection internationale des réfugiés en Asie du sud-est: du privilège aux droits*, op. cit., pp. 53-57.

organizations, are not satisfied by the existing institutional arrangements and thus their efforts may tend to change the *status quo*.<sup>74</sup>

(c) *The mandates of the newly established institutions.* The mandates of the newly established institutions reflects the priorities and objectives pursued through these initiatives, and thus it is important to see to what extent they differ from the existing arrangements.

(d) *The degree of interest from other relevant actors as expressed by their participation or the membership to a newly established institution.* It is indeed possible to estimate to a certain extent the success of a regime-shifting attempt by looking at the reaction of other states, for instance if they strongly embrace the new initiative through their participation in conferences or through accession to the newly established institutions, and simultaneously disengage from the existing institutional arrangements.

The comparative table provided in Annex I summarizes the main characteristics of each of the processes/dialogues initiated in the region and highlights the shift toward a more restrictive migration regime. These developments have also had an impact on UNHCR; the organization played a key role in the implementation of the CPA, but its role became less important in the region afterwards when the protection and human rights dimension of people movements were largely neglected.

In a third section, this paper explores UNHCR's initiatives that aimed at injecting some "protection-sensitive" considerations into the actions and policies of states through its participation in selected migration forums. It also seeks to identify the main protection considerations that emerge from the work of the migration-related institutions in the region. The extent to which UNHCR efforts are successful is not easy to estimate given that the main outcomes of regional institutions such as the ASEAN, the APC, or the Bali Process are declarations and statements rather than concrete activities. It is possible, however, to evaluate the impact of UNHCR's efforts by comparing the language used and the recommendations made by UNHCR prior to the meeting with the outcomes documents. References to the tool used as a reference by UNHCR when engaging with regional institutions, namely the *10-Point Plan of Action on refugee protection and mixed migration*, are particularly important.

Developed in 2006 by UNHCR, the 10-Point Plan is an instrument "to assist governments and other stakeholders to incorporate refugee protection considerations into migration policies".<sup>75</sup> The 10 recommended action points include cooperation among key partners; data collection and analysis; protection-sensitive entry systems; reception arrangements; mechanisms for profiling and referral; differentiated processes and procedures; solutions for refugees; secondary movements; return arrangements for non-refugees and alternative migration options; and information strategies. An additional action point should be added to this list, that is, the need to address the "root causes" of mixed movements.<sup>76</sup> If it appears that some of these elements are taken into consideration and included in the outcomes document issued by the concerned institutions, then it can be said that UNHCR's efforts have begun to bear fruit.

While protection considerations have long appeared at the margin of the work of regional processes and dialogues focusing on migration and displacement, it is argued that UNHCR has been particularly successful in taking advantage of a situation of "contested multilateralism" with an increasing number of initiatives from different states to promote a more protection-sensitive approach to irregular migration. Its efforts have been awarded in particular by the adoption of the Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime at the Sixth Bali Process Ministerial Conference in March 2016. A decisive factor leading to these developments has been the recent Bay of Bengal and Andaman Sea Crisis, which seems to have led to some changes in the way states in the region balance migration policies and protection considerations.

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<sup>74</sup> J.C. Morse and R.O. Keohane, *op. cit.*

<sup>75</sup> UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, 2011, p. 8.

<sup>76</sup> *Ibid.* While the 10-Point Plan does not include this issue as a specific action point, it does recognize the need for "longer-term engagement and sustainable development geared towards peacebuilding, democratization and the creation of livelihood opportunities" as part of a comprehensive and collaborative approach.

## PART I – MIGRATION INSTITUTIONAL COMPLEXITY IN ASIA-PACIFIC

With regard to large-scale movements of refugees and asylum seekers, Southeast Asia has long been associated with the Vietnamese boat people crisis, which spanned over twenty years from the mid-1970s to the mid-1990s. During this period, it is estimated that more than half a million Vietnamese crossed the sea to reach other countries in the region, notably Thailand, Malaysia and Indonesia, but also countries beyond Southeast Asia such as Hong Kong, South Korea or Japan.<sup>77</sup> The crisis led to the Comprehensive Plan of Action (CPA), which was adopted in June 1989 at the International Conference on Indochinese Refugees.

The CPA has arguably been a landmark in the contemporary history of refugee and migration movements. The “comprehensive” nature of the plan, which sought to address the regional refugee crisis in its totality, including through the participation of the countries of origin, was described as “a turning point” in the approach by the international community to one of the major refugee problems of recent time,<sup>78</sup> or as “the beginning of a new era” in the international community’s approach to the world’s refugee problems.<sup>79</sup> In short, the CPA provided for the establishment of Refugee Status Determination (RSD) procedures at the regional level; and while those considered as refugees would be resettled to a third country, those screened out were to be repatriated to their home country. At the regional level, the adoption of the CPA gave rise to hopes that in the long term it may bring “several east and Southeast Asian countries into the existing international refugee regime” and lay the basis “for the beginning of a regional migration regime”.<sup>80</sup> However, while the CPA was undoubtedly successful in putting an end to the influx of Vietnamese boat people in the region, it did not lead to the development of a regional framework related to refugee and migration issues.

Despite the long-standing recognition of the importance of regional cooperation on migration and displacement issues in the region, the situation in the Asia-Pacific today represents a good example of a “regime complex”, with several of the organizations and institutions working on the issue of migration and displacement presenting a considerable overlap in terms of membership and potentially different agendas. However, as Orsini et al. observe, it “would be wrong to assume that regime complexes evolve naturally”.<sup>81</sup> There is, indeed, certain logic behind the development of the regime complex in the region. While the complexity may not be intended, the situation is the by-product of initiatives from states, mainly receiving or transit states affected by a problem of irregular migration inviting other countries to address the issue, and to some extent from international organizations led by their own interest and pursuing their own objectives.

The regional migration frameworks in the Asia-Pacific region take three different forms. The ASEAN, similar to the European Union or the Economic Community of West African States (ECOWAS), is a regional integration framework that includes an internal mobility component that regards in particular high skilled migrants. The Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC), the Manila Process and the Bali Process on People Smuggling Trafficking in Persons and Related Transnational Crime count, or counted, amongst the so-called Regional Consultative Processes (RCPs). That is, informal and non-binding mechanisms at the regional level which allow for more open discussions between states on migration-related issues.<sup>82</sup> Finally, there are a series of repeated regional meetings dedicated to discussing some aspects of migration with a lower level of institutionalisation than the RCPs, such as the Jakarta Declaration or the Special Meetings on Irregular Migration in the Indian

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<sup>77</sup> UNGA, *Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General*, UN Doc. A/44/523, 22 September 1989, Annex, Declaration and Comprehensive Plan of Action, para. 21.

<sup>78</sup> S.A. Bronee, “The History of the Comprehensive Plan of Action”, *International Journal of Refugee Law*, vol. 5, n°4, 1993, p. 539.

<sup>79</sup> S. Bari, “Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment”, *International Journal of Refugee Law*, vol. 4, n°4, 1992, p. 488.

<sup>80</sup> R. Rogers and E. Copeland, *Forced Migration, Policy Issues in the Post-Cold War World*, Medford MA, The Fletcher School of Law and Diplomacy, Tufts University, 1993, p. 116.

<sup>81</sup> A. Orsini, J.-F. Morin, and O. Young, “Regime Complexes: A Buzz, a Boom, or a Boost for Global Governance?”, *op.cit.*, p. 36.

<sup>82</sup> IOM, “The Role of Regional Consultative Processes in Managing International Migration”, *op. cit.*, p. 9. ; R. Hansen, *op. cit.*, pp. 12-13.



Ocean. Although these initiatives are not supported by a secretariat like the RCPs, they have both led to the adoption of normative documents and regular meetings are organized to follow up on their implementation. They therefore contribute to the increasing regime complexity in the region. While IOM has played an important role in disseminating the RCP model in several regions throughout the world, UNHCR has been at the forefront of many initiatives at the regional level aiming at strengthening the protection of refugees in the context of international migration.

## 1. The ASEAN

As Alexander Betts argues, states might be assumed “to formulate their migration policies on the basis of attempting to maximize their economic and security interests”. In this sense, he adds, they attempt “to attract ‘desirable migrants’ who meet the economy’s labour market needs, while deterring “undesirable migrants” who offer little economic benefit and who are perceived to be a threat to that society’s security”.<sup>83</sup> This is particularly obvious in the case of the Association of Southeast Asian Nations (ASEAN), which comprises of ten Southeast Asian countries, that is, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. The ASEAN is the most important sub-regional organisation in Asia-Pacific; and although is not a RCP, it plays a role on migration issues at the regional level.

ASEAN has been involved on migration issues for a long time, though the focus has been primarily on regular – or “documented” – migrants. In particular, high-skilled migration has been the object of numerous agreements, with eight ‘Mutual Recognition Arrangements’ (MRA) adopted to date in order to facilitate the mobility of professionals and skilled labor within ASEAN.<sup>84</sup> By contrast, the issue of irregular migration has been largely set aside, despite the importance of the phenomenon in the region. Thailand and Malaysia are the two main receiving countries for migrant workers; they both host between two and four million migrant workers, most of them irregular, and rely heavily on this workforce for their economic development. Migrants in an irregular situation are generally performing the “3D” jobs; that is, dangerous, dirty and difficult work, for instance in construction, fisheries, or on rubber plantations. Because they are typically paid much less than local people would be for the same work it can be argued that the refusal to regulate the conditions of work of irregular migrants is primarily a way for the concerned countries to continue to benefit from this form of exploitation. For instance, while an ASEAN Declaration on the Protection and Promotion of the rights of Migrant Workers was adopted in 2007, the adoption of a binding Convention has not been possible due to the refusal of Malaysia to grant rights to irregular migrant workers.

The position of ASEAN with regard to refugees is more complex for historical and political reasons. As early as the 1970s, the ASEAN, composed of only five non-communist countries at the time (Malaysia, Thailand, Singapore, Indonesia and the Philippines), was confronted with refugee flows with the beginning of the Indochinese Refugee Crisis. The main countries of asylum in the region, in particular Thailand, but also Malaysia, Indonesia, and the Philippines in the case of the Vietnamese boat people, agreed to provide the persons concerned with temporary shelter, but only under the condition that they would be resettled in the shortest possible time. Indeed, the ASEAN countries considered that they were not responsible for the refugee crisis, and thus that they should not be left alone to “bear the burden” of refugee presence in their territories. From their point of view, Western countries, primarily France and the United States, were responsible for the situation in Indochina, and hence they were expected to step in and to provide the necessary support to help these countries to deal with the arrivals, mainly in the form of resettlement places and financial contributions.

During this period, the ASEAN became an umbrella for its members to put forward their claims for more support and contributions, and for more efforts from the international community in the search for solutions. The ASEAN Members systematically insisted on the need to discuss responses to the Indochinese Crisis in a much broader framework, involving the Western countries as well as the countries of origin, to the extent this was possible. The Meeting on

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<sup>83</sup> A. Betts, “Introduction: Global Migration Governance”, *op. cit.*, p. 20.

<sup>84</sup> See *ASEAN Mutual Recognition Arrangements*, <http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/868/asean-mutual-recognition-arrangements.html>.

Refugee and Displaced Persons in South-East Asia organized in Geneva in July 1979 by the Secretary-General of the United Nations was convened upon a call from the ASEAN. The ASEAN also called for the organization of a Conference to deal with what they considered to be the direct cause of the Cambodian displacement at the border with Thailand, namely, the invasion of Cambodia by Vietnam in 1979.<sup>85</sup> While some states wanted this new conference to take place within the ASEAN framework, the ASEAN member states refused, arguing that “the Kampuchean conflict has international dimensions” and that the proposed conference, at the ASEAN level, was “not the appropriate forum to resolve this issue”.<sup>86</sup> The same logic presided over the convening of the second international conference on Indochinese refugees in 1989. Organized at the insistence of ASEAN, it led to the adoption of the CPA, which has been described as “a model of universal responsibility sharing”,<sup>87</sup> or as “a remarkable and ultimately effective instrument of multi-state cooperation and burden sharing”.<sup>88</sup> Some 10 years after the first meeting in 1979, the ASEAN states succeeded in obtaining a renewed commitment from the international community regarding a solution to the Indochinese refugee crisis. The fact that the 1951 Convention attributes the responsibility for the assistance and protection of refugees solely to the asylum countries, without a proper burden-sharing mechanism, appears in these circumstances as one of the reasons why most of them, with the exception of the Philippines, have always refused to accede to it.<sup>89</sup>

The situation changed with the end of the Indochinese refugee crisis and the subsequent enlargement of the ASEAN to traditionally refugee-producing countries such as Vietnam (1995) Laos (1997), and Cambodia (1999). Since then, the ASEAN has remained particularly silent on issues related to refugee movements, including regarding movements coming from Myanmar, the most important country of origin of refugees in the region nowadays, whose accession to the ASEAN in 1997 was surrounded by controversy.<sup>90</sup> This silence is generally attributed to the principle of non-interference in the internal affairs of other states, which underpins the organization.<sup>91</sup> While the granting of asylum should be considered as a “peaceful and humanitarian act”,<sup>92</sup> it can become a source of tension between countries of origin and countries of asylum, as accepting refugees could be seen in certain circumstances as a way to endorse the position of political opponents. With regard to Myanmar, the ASEAN members, in particular Thailand, have favoured a “constructive engagement” policy with the country since the mid-1990s, thus avoiding fuelling tensions around the issue of refugees and asylum seekers. The principle of non-interference within ASEAN and the “good neighbourliness”

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<sup>85</sup> An international conference on Kampuchea (Cambodia) was organized in New York in July 1981.

<sup>86</sup> ASEAN, *Press Statement of the Philippine Foreign Minister on Mr. Essaafi's visit*, April 1981, para. 2- 3. See also ASEAN, *Statement by the Philippine Foreign Minister as Chairman of the ASEAN Standing Committee*, Manila, August 1980 ; ASEAN, *Statement by the Chairman of the ASEAN standing Committee on USSR Appeal*, Manila, 27 mars 1981.

<sup>87</sup> H. Asha and A. Suhrke, “Responsibility Sharing”, in J.C. Hathaway (ed.), *Reconceiving international refugee law*, The Hague ; Boston : Cambridge, MA, Kluwer Law International, 1997, p. 100. See also R. Towle, “Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?”, *International Journal of Refugee Law*, vol. 18, n°3- 4, October 2006, p. 562.

<sup>88</sup> In short, in exchange for temporary asylum, the countries of first asylum received the guarantee that Vietnamese refugees would be resettled. The Philippines and Indonesia proposed to host transit centres for refugees, while Vietnam agreed to implement a programme for the “orderly departure” of “family reunion and other humanitarian cases”, which would allow them to be directly resettled from Vietnam to the United States. See UNGA, *Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General*, UN Doc., A/34/627, 7 November 1979.

<sup>89</sup> S. Moretti, *op. cit.*, pp. 53-57.

<sup>90</sup> Myanmar acceded to the Treaty of Amity and Cooperation in Southeast Asia (known as the Bali Treaty) in 1995. It was then accepted as an observer in 1996 and eventually became a member of ASEAN in 1997. The admission of Myanmar into ASEAN was opposed by Western countries due to the violent repression of the democratic elections held in 1990, which led to the election of Aung San Suu Kyi.

<sup>91</sup> ASEAN, *Treaty of Amity and Cooperation*, 1976, articles 2.b-c.

<sup>92</sup> UNGA, *Declaration on Territorial Asylum*, UN doc. A/RES/2312(XXII), December 1967, Preamble.

argument<sup>93</sup> have also been put forward to explain the refusal of most Southeast Asian states to accede to the 1951 Convention.<sup>94</sup>

These developments have raised the question of the existence of “refugees” within ASEAN, a particularly sensitive issue in view of the principle of non-interference in the internal affairs of other states. The presence of refugees originating from other ASEAN countries is generally considered by the authorities of asylum countries as a “serious embarrassment”.<sup>95</sup> For instance, Thailand, which hosts tens of thousands of Burmese refugees in nine camps along the border with Myanmar, has not allowed UNHCR to proceed with the refugee status determination of asylum seekers originating from Myanmar, nor does it give UNHCR access to asylum seekers from Laos. This suggests that ASEAN countries may be considered to some extent as “safe countries” for their counterparts, with the premise that there can be no “ASEAN refugees”. This tendency is likely to become stronger as the “ASEAN community” moves toward more integration.

It is clear in these circumstances that Southeast Asian states have no interest in developing an asylum system to deal with movements within the ASEAN, including the movements of the Rohingyas across the Bay of Bengal and Andaman Sea. Although the ASEAN has made some progress in the development of a human rights framework, the development of a regional approach to displacement in the region is rather unlikely.<sup>96</sup>

## **2. The Manila Process and the Bangkok Declaration on Irregular Migration**

In December 1996, IOM organised a regional Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia in Manila to discuss issues pertaining to irregular migration and trafficking in presence of representatives of countries from East and Southeast Asia. This meeting and those that followed it became known as the “Manila Process” and comprised of 16 states (17 with Hong Kong), including the 10 ASEAN states, as well as Australia, China, Japan, New Zealand, Papua New Guinea, and the Republic of Korea.<sup>97</sup>

With IOM acting as the Secretariat, the agenda focused primarily on issues related to trafficking and smuggling, migration management, border control, and return. The idea behind the Manila process was “to pursue the exchange of general information among participants on issues of common interest, work together to harmonise legislation and penalties relating to irregular migration [...], and to expand the dialogue to other countries directly concerned with irregular movements in and through the region”.<sup>98</sup> As a follow up of the first Seminar, IOM arranged other meetings on issues such as “International Cooperation to Prevent and Better Manage Irregular Migration in East and South East Asia” (Manila, December 1997), “Irregular Migration and Labour Migration in East and South East Asia during the Economic Crisis” (Bangkok, September 1998), or “Migration and Migrant Trafficking in East and South East Asia” (Jakarta, October 2000).

The Manila Process led to an increase in awareness on the issue of trafficking and other forms of irregular migration, and on the need to address them through some form of regional cooperation. It thus paved the way to the adoption of the Bangkok Declaration on Irregular Migration by the 18 countries invited to an International Symposium on Migration in Bangkok in April 1999,<sup>99</sup> in the aftermath of the Asian economic crisis. Some commentators consider the

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<sup>93</sup> See A. Amitav, *The Quest for Identity: International Relations of Southeast Asia*, Oxford, Oxford University Press, 2000.

<sup>94</sup> S. Moretti, *op. cit.*, pp. 58-60.

<sup>95</sup> Operation Centre for Displaced Persons in Thailand, “The Unfair Burden - Our House is Full!”, September 1979, p. 23. See also H. Lang, “The repatriation predicament of Burmese refugees in Thailand: a preliminary analysis”, *New Issues in Refugee Research*, July 2001, p. 7.

<sup>96</sup> S. Petcharamesree, *op. cit.*, p. 15.

<sup>97</sup> IOM, *Manila Process*, available at <https://www.iom.int/manila-process> (last consulted: 04 April 2016).

<sup>98</sup> Bali Process, *Manila Process*, <http://www.baliprocess.net/other-regional-organizations-processes-and-resources/manila-process> (last consulted 04 April 2016).

<sup>99</sup> This includes the 10 ASEAN countries plus Australia, Bangladesh, China, Japan, New Zealand, Papua New Guinea, the Republic of Korea, and Sri Lanka.

Bangkok Declaration as “a breakthrough in the quest for Asian collective efforts in migration arrangements” insofar as it represents the first instrument recognizing the importance of regional cooperation amongst Asian countries in the field of migration.<sup>100</sup> The influence of IOM, who produced one of the background papers to inform the discussions, is notably manifest through the reference to the “orderly management of migration”<sup>101</sup> and the focus on trafficking. The Declaration also recognizes “the important role and contribution of regional consultative mechanisms, such as the Asia-Pacific Consultations on Refugees, Displaced Persons, and Migrants, and the Manila Process, on issues relating to irregular migration”.<sup>102</sup>

The Asia-Pacific Consultations on Refugees, Displaced Persons, and Migrants, to which the Bangkok Declaration refers, is another regional consultative process that had been running in parallel to the Manila Process since 1996. All in all, only a few meetings were organized under the auspices of the Manila Process, with the fourth and last one taking place in Jakarta in October 2000. The Manila Process was then merged with the APC.

### **3. The Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants**

In November 1996, shortly before the organization of the regional Seminar in Manila, UNHCR and the Australian government had organized a separate regional meeting on refugees and displaced persons in Asia-Pacific, with the participation of 24 governments, including the ASEAN countries. The conference was the first meeting of what would become the Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC), an informal forum to discuss issues of migration and displacement within the region. UNHCR and IOM acted as the secretariat and co-arrangers of the meetings and, to a large extent, financially supported the process.

While initially limited to issues of refugees and displaced persons, the scope of the agenda was expanded in 1997, with IOM becoming a partner of the group, to cover migration, including irregular migration. When the APC merged with the Manila Process its agenda extended further to also cover issues related to human trafficking and migrant smuggling. In 2003, UNHCR came to deplore the fact that “the Asia-Pacific Consultations process, which was created to address refugee and displacement issues, [was] increasingly concentrating on illegal migration and border control”.<sup>103</sup>

The APC, however, started to decline in importance with the establishment of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime in 2002. While the possibility of merging the two processes was envisaged at that time, a working group established in 2003 to discuss the future of the APC considered that the Consultations should continue as an independent process. It was suggested, however, that its mandate should be narrowed down to the issues that prompted its creation at the first place, that is, the movements of refugees, internally displaced persons and migrants, with a particular focus on the protection of vulnerable groups.

One of the main interests of the APC was the fact that the majority of participants were not parties to the 1951 Convention, nor to its protocol. Thus, the APC provided a somewhat institutionalized forum to discuss issues pertaining to the protection of refugees with these states. However, the focus on protection aspects seems to have been of limited interest to most states, as they started to disengage from the Process. New Zealand withdrew from the APC in 2003, conditioning its return to the revitalization of the process. Other states such as Japan, South Korean, Singapore or Brunei also started to question their participation. In 2007, UNHCR suggested discussing the Rohingya movements within the APC, but the idea fell short of revitalizing interest in the process. In 2013, the Consultations still counted 34 members, but the

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<sup>100</sup> P. Wongboonsin, “Transnational Cooperation and Regional Migration Processes: Asian labour migration and regional arrangements”, in K. Tamas and J. Palme (eds.), *Globalizing Migration Regimes*, 2006, p. 207.

<sup>101</sup> *The Bangkok Declaration on Irregular Migration*, 23 April 1999, para. 2.

<sup>102</sup> *Ibid.*, preamble.

<sup>103</sup> UNHCR, *Bullet point summary of the Strategic Presentation on UNHCR’s Operations in Asia and the Pacific*, 26th meeting of the Standing Committee, 4 March 2003.

process can now be considered as “moribund”.<sup>104</sup> To a large extent, the APC became a victim of the refocusing of priorities following the creation of the Bali Process. Clearly, the issue of refugee protection was not deemed interesting enough by the countries in the region.

#### 4. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime

Issues related to migration and displacement in the region have largely been referred to another regional process established in 2002: the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (“Bali Process”). The Bali Process is a state-led mechanism covering the Asia-Pacific region and comprising more than 45 members, including countries of origin, transit and destination, plus some 30 observers.<sup>105</sup> Most of these states were already members of the Manila Process and of the APC. The Bali Process has also acknowledged the work of the pre-existing institutions; the Co-Chairs Statement issued in February 2002 at the end of the first Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, which led to the creation of the Bali Process, referred to the 1999 Bangkok Declaration on Irregular Migration as well as to the work of the APC and of ASEAN. The Statement also welcomed the “existing ASEAN mechanisms in combating people smuggling, trafficking in persons and related transnational crime”.<sup>106</sup> It has to be noted that while the ASEAN countries are all members of the process, the ASEAN Secretariat is an independent observer. UNHCR, IOM and UNODC have become full members of the Process.

The Bali Process was established at the initiative of the Australian Government in the wake of the *M.V. Tampa incident* in August 2001. The Tampa incident led to the development of the “Pacific Solution”; a set of measures at the regional level aimed at preventing the arrival of boat people in Australia therefore foreclosing the possibility of them lodging an asylum claim.<sup>107</sup> The Bali Process is thus “intrinsicly linked” to Australian national policy on asylum seekers,<sup>108</sup> and in fact, it can be considered to a large extent as the external dimension of the “Pacific solution”. While the Bali Process is officially co-chaired by Australia and Indonesia, the agenda is very much dominated by a “regional hegemon”, Australia, who also funds most of the programmes.<sup>109</sup> As Susan Kneebone put it, “under the Bali Process, Australia emphasizes the collective responsibilities of other countries in the region [...] to prevent onward ‘flows’ of asylum seekers to Australia”.<sup>110</sup> In other words, the Bali Process “encapsulates the restrictive side of the international refugee regime and the idea of responsibility-shifting rather than burden-sharing”<sup>111</sup> by putting the onus on Southeast Asian countries.

The focus of the Bali Process is on combatting smuggling and trafficking in the Asia-Pacific region, mainly through the development of measures aimed at deterring new irregular movements. In this regard, the main priorities, as listed in the Bali Process website, are the development of more effective information and intelligence sharing; the cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks; the cooperation on border and visa systems to detect and prevent illegal movements; the rise of public awareness in order to discourage trafficking and smuggling activities; the

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<sup>104</sup> IOM, *Regional Inter-State Consultation Mechanisms on Migration: Approaches, Recent Activities and Implications for Global Governance of Migration*, 2013, pp. 63- 64.

<sup>105</sup> Bali Process, *Membership*, available at: <http://www.baliprocess.net/membership>.

<sup>106</sup> Bali Process, *Co-Chairs’ Statement. Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, 26-28 February 2002*, 28 February 2002, para. 14, available at: <http://www.baliprocess.net/files/ConferenceDocumentation/BRMC1.pdf>.

<sup>107</sup> See for instance C.M.-J. Bostock, “The International Legal Obligations owed to the Asylum Seekers on the MV Tampa”, *International Journal of Refugee Law*, Vol. 14, n°2/3, 2002, pp. 280-301; S. Kneebone, “The Pacific Plan: The Provision of ‘Effective Protection’?”, *International Journal of Refugee Law*, Vol. 18, n°3-4, 2006, pp. 696-721.

<sup>108</sup> S. Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region”, *Journal of Refugee Studies*, vol. 27, n°4, December 2014, p. 4.

<sup>109</sup> See also S. Lavenex, F. Jurj, T.E. Givens, and R. Buchanan, “Regional Migration Governance”, *op. cit.*, p. 472.

<sup>110</sup> *Ibid.*, p. 9.

<sup>111</sup> *Ibid.*, p. 2.

increasing effectiveness of return as a strategy to deter people smuggling and trafficking; the cooperation in verifying the identity and nationality of “illegal migrants” and trafficking victims; and the enactment of national legislation to criminalise people smuggling and trafficking in persons.<sup>112</sup>

The Bali Process has become the main regional consultative process in the Asia-Pacific region, but its importance over the first years of its existence was uneven, with no meetings at the ministerial level taking place between 2003 and 2009. The issue of the movements of people from Afghanistan, Sri Lanka, and Myanmar, both in the Pacific and in the Bay of Bengal and Andaman Sea region, in 2008 and 2009 led to renewed interest for cooperation at the regional level. The third Ministerial Conference of the Bali Process was organized in April 2009, in the context of an increase in asylum seeker boat arrivals in Australia and a scandal surrounding the treatment of Rohingyas refugees and asylum seekers by the Thai authorities.<sup>113</sup> It was decided on this occasion to revive the *Ad Hoc* Group of the Bali Process (AHG), which includes the “most-affected countries” as well as relevant international organizations, that is, IOM and UNHCR.<sup>114</sup> The AHG offered the possibility to discuss movements in the region, including “irregular maritime ventures” on a case-by-case basis upon the request of affected countries. However, difficulties became apparent during the first meetings, when Sri Lanka, followed by Myanmar, decided to boycott some sessions considering that they were too heavily pointed out and blamed for the situation. Other states were reluctant to comment on the situation in other countries, so that the issue of the Rohingyas was quickly sided away and diluted on more general discussions about irregular movements by sea.

The issue came back in 2012-2013 following the outbreaks of violence in the Rakhine State in June and October 2012, which led to “unprecedented irregular migration flows by sea in the Asia Pacific”.<sup>115</sup> A Regional Roundtable on Irregular Movement by Sea in the Asia-Pacific Region was then organized under the auspices of the Regional Support Office (RSO) of the Bali Process on March 2013 to discuss movements in the region.<sup>116</sup> Since then, in a context where the movements towards Australia have almost completely stopped, the issue of irregular movements by sea in the Bay of Bengal and Andaman Sea has remained a priority.

## 5. The Jakarta Declaration

While the Bali Process remains the most important regional consultative process in Asia-Pacific, another recent initiative has been undertaken in the region. In August 2013, Indonesia stepped aside from the Bali Process and convened a Special Conference on Irregular Movement of Persons in Jakarta. The meeting was organized in the context of increasing tensions between Australia and Indonesia regarding the response of the Australian authorities to the arrival of boat people. Tony Abbott, the leader of the Liberal Party in Australia, was likely to win the elections scheduled for September, with a campaign focusing on the imperative to stop the arrival of boat people to Australia at all cost. The Australian Government seemed to be more interested in dealing with irregular migration through bilateral agreements with countries such as Indonesia, Papua New Guinea, Nauru, or Cambodia, rather than addressing the issue through the existing regional cooperative arrangements.

Though the Special Conference in Jakarta was organized outside the framework of the Bali Process, it gathered some 13 states,<sup>117</sup> including most of the members of the *Ad Hoc* Group of

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<sup>112</sup> See Bali Process, *About the Bali Process*, available at: <http://www.baliprocess.net/>.

<sup>113</sup> Petcharamesree, *op. cit.*, pp. 13-14.

<sup>114</sup> Afghanistan, Australia, Bangladesh, India, Indonesia, Malaysia, Maldives, Myanmar, Pakistan, Sri Lanka, Thailand, UNHCR, and IOM. The Philippines, Canada, the U.S, Vietnam as well as the ASEAN and UNODC are observers.

<sup>115</sup> Bali Process, *Co-Chairs' Statement, Bali Process Senior Officials Meeting*, Bali, Indonesia, 1 April 2013, para. 6, available at: <http://www.baliprocess.net/files/ConferenceDocumentation/SOM%20Co-Chairs%20Statement%20-%20FINAL.pdf>.

<sup>116</sup> Bali Process, *Regional Roundtable on Irregular Movement By Sea in the Asia-Pacific Region*, Jakarta, Indonesia, 18-20 March 2013, available at: <http://www.baliprocess.net/regional-support-office/regional-roundtable-on-irregular-migration-by-sea>.

<sup>117</sup> Afghanistan, Australia, Bangladesh, Cambodia, Indonesia, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Sri Lanka, and Thailand. UNHCR and IOM were also present.

the Bali Process. However, compared to the Bali Process, India and the Maldives were absent, while Papua New Guinea, Cambodia, and the Philippines were invited – the presence of these two countries bringing to six the number of ASEAN Member States represented. The Conference regrouped the main countries of origin of migrants and asylum seekers trying to reach Australia by boat, that is, Afghanistan, Pakistan, and Sri Lanka - with Iran declining the invitation - as well as the main countries of transit and the other countries of destination in the region.

The meeting led to the adoption of the Jakarta Declaration on Addressing Irregular Movement of Persons,<sup>118</sup> a document revolving around four pillars: prevention, early detection, prosecution, and protection.<sup>119</sup> A couple of follow up meetings have subsequently been organized under the auspices of the Jakarta Declaration, including an International Workshop on the Protection of Irregular Movements of Persons at Sea in April 2014. This second meeting was referred to in the Co-Chairs' Summary as "part of a process of dialogue on irregular maritime issues" that started in March 2013 with the Jakarta Special Conference,<sup>120</sup> thus indicating that the focus of what can be called the "Jakarta Declaration Process" has been narrowed down to issues related to irregular maritime movements. The Co-Chairs' Summary is more explicit on the rationale behind the establishment of this new process; that is, the need for Indonesia to counter-balance the approach taken by Australia vis-à-vis irregular maritime movements. In his opening statement, His Excellency Dr. R.M. Marty M. Natalegawa, the then Indonesian Minister for Foreign Affairs, deplored the fact that "in spite of best efforts through the Bali Process, the irregular movement of persons, particularly by sea, continues", adding that a comprehensive solution must imperatively involve "responsibility sharing rather than responsibility shifting", something Australia was accused of.<sup>121</sup>

## 6. The Special Meeting on Irregular Migration in the Indian Ocean

In response to the so-called Bay of Bengal and Andaman Sea Crisis in May 2015, the Thai Government, which counted amongst the most affected countries, organized a "Special Meeting on Irregular Migration in the Indian Ocean" in Bangkok on the 29 May. The meeting gathered some 17 governments, including Bangladesh and Myanmar, the two main countries of origin.<sup>122</sup> The meeting resulted in the adoption of a set of recommendations that represent a "roadmap" for the definite resolution of the problem of irregular maritime movement in the Bay of Bengal and Andaman Sea.<sup>123</sup> The document revolved around the immediate responses to provide protection to people stranded at sea; the measures to be taken to prevent irregular migration, smuggling of migrants and trafficking in persons in the region; and the need to address the "root causes". The "roadmap" thus aimed not only at resolving the crisis, but also at addressing irregular movements by sea in the region over long term.

Two follow up meetings were subsequently organized by the Thai authorities: a "Follow up meeting to the Special Meeting on Irregular Migration in the Indian Ocean" on the 3-4 December 2015, and a "Special Retreat on Irregular Migration in the Indian Ocean" on the 1 February 2016. While the outcome of these two meetings has not been made public, their organization suggests the existence of a new cycle of meetings to monitor the progress and developments

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<sup>118</sup> *Jakarta Declaration on Addressing Irregular Movement of Persons*, 20 August 2013, available at: <http://www.unhcr.org/5214ae709.html>.

<sup>119</sup> *Ibid.*, section C.

<sup>120</sup> UNHCR, *Co-Chairs' Summary. International Workshop on the Protection of Irregular Movements of Persons at Sea*, Jakarta, Indonesia, 22 April 2014, available at: <http://www.refworld.org/docid/53882cb34.html>.

<sup>121</sup> *Ibid.*, para. 5.

<sup>122</sup> With 17 states present, participation extended far beyond the five countries affected by the Bay of Bengal and Andaman Sea Crisis. Beside Thailand, Malaysia, Indonesia, Bangladesh and Myanmar, other participants included Afghanistan, Australia, Cambodia, India, Iran, Lao PDR, New Zealand, Pakistan, Papua New Guinea, The Philippines, Sri Lanka, and Vietnam. Representatives from UNHCR, IOM and UNODC were also invited. The participation of the Government of Myanmar had long been uncertain because of their objection to the use of the term "Rohingya", which has been carefully avoided. Japan, Switzerland and the United States also attended as observers.

<sup>123</sup> *Summary, Special Meeting on Irregular Migration in the Indian Ocean*, Bangkok, Thailand, 29 May 2015, Bangkok, Thailand, available at: <http://www.mfa.go.th/main/en/media-center/14/56880-Summary-Special-Meeting-on-Irregular-Migration-in.html>.

related to the implementation of the “Roadmap” adopted in May 2015, thus adding to the institutional complexity in the region. The participants to these meetings are the same as the members of the Jakarta Declaration Process, with also the inclusion of India, Laos and Vietnam, three countries that do not count amongst those affected in the first place by the movements in the Bay of Bengal and Andaman Sea region. While a clear risk of duplication between the two initiatives exists, the main difference lies in the leadership, with Thailand instead of Indonesia being in charge of the organization and preparation of the meetings on Irregular Migration in the Indian Ocean.

## **PART II - THE SECURITIZATION OF MIGRATION AND THE SHIFT TOWARDS A LAW ENFORCEMENT AND BORDER CONTROL APPROACH**

The existence of parallel institutions with overlapping mandates in Asia-Pacific has implications for the protection of refugees and other persons travelling as part of mixed migratory movements. In particular, there has been a general tendency, in the region and beyond, to frame the issue of the arrival of migrants and refugees as a “security” issue rather than a human rights and protection issue. In this context, the multiplication of new institutions has offered states the opportunity to engage with organizations and processes that correspond more to their own interests and to demand for cooperation on security and border control issues. They have, therefore, deserted other venues that were less important from their perspective.

Institutional proliferation in the field of migration and displacement may be said to have undermined refugee protection in the sense that the most relevant political decisions regarding all forms of movements, including refugee flows, are henceforth “increasingly made in the context of migration and security discussions”.<sup>124</sup> The problem is that policies aimed at preventing irregular migration are generally indifferent about the type of people they concern and may affect different categories of people, such as refugees, migrants or victims of trafficking, in an indiscriminate way.

These developments at the institutional and normative level have been supported by the practice of states. Governments in Southeast Asia have implemented a rather restrictive policy with a clear focus on border control and law enforcement, illustrated by the so-called push-back, or “help-on” policy. Confronted with the phenomenon of irregular movements by sea, Thailand in particular, but also Malaysia, Singapore, and perhaps Indonesia, have sent back the vessels intercepted in their territorial waters, or “redirected” them towards other countries. In the Pacific, Australia has also recently increased its efforts to prevent the arrival of any boat people on its territory. The transfer of asylum seekers to ‘offshore regional processing centres’ in Nauru and Papua New Guinea, the systematic interception of vessels at sea and their return to Indonesian territory, and the creation of the Operation Sovereign Borders following the arrival into power of Tony Abbot in September 2013 are all measures aimed at preventing the arrival of people, refugees and migrants, by boat all together. The objective, in other words, is simply to “stop the boats”. UNHCR noted in its 2014 Regional Operations Profile that “a number of states implement detention, border-control, and restrictive maritime and other policies to manage irregular migration and ensure national security, which at times are detrimental to international protection”.<sup>125</sup>

### **1. “Words matter”: the securitization of migration in Asia-Pacific**

Regional Consultative Processes aim first at bringing together stakeholders who may have different perceptions about the issues at stake. These differences are particularly obvious in the context of migration, with countries of origin, transit, and destination potentially sitting at the same table but having clearly diverging views on the phenomenon and on the measures and responses that should be adopted. Consequently, one of the main roles of a RCP is to influence the construction of the actor’s understanding of the reality and their perception of migration issues so that they have an interest in cooperating. The creation of a shared understanding,

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<sup>124</sup> A. Betts, “Institutional Proliferation and the Global Refugee Regime”, *Perspectives on Politics*, vol. 7, n°1, March 2009, p. 55. See also A. Betts, “The Refugee Regime Complex”, *Refugee Survey Quarterly*, Vol. 29, n°1, pp. 12-37.

<sup>125</sup> UNHCR, *Southeast Asia. Global Appeal 2014-2015*, p. 2.



that is, a “common ground” on an issue as sensitive as migration, is particularly important for further discussions and in view of reaching agreements on the issue.<sup>126</sup>

The language used to refer to the different categories of people on the move is an important part of this process. The issue has always been a contentious one in Southeast Asia. During the Indochinese Refugee Crisis, the terminology used to refer to the concerned persons varied considerably, with states generally avoiding speaking about refugees due to the fact that they were not parties to the 1951 Convention. Most of the ASEAN states generally referred to people fleeing Cambodia, Laos or Vietnam as “illegal migrants”. The reports published by UNHCR over the first years of the crisis also carefully avoid the term “refugee”, using instead diverse expressions such as “uprooted persons” or “displaced persons from Indochina”. The use of the expression “boat people” was also convenient in the sense that it doesn’t have a legal meaning,<sup>127</sup> as it is the case with the word “refugee”. It is only in 1978 that UNHCR started to use the word “refugee” in a more systematic manner.<sup>128</sup> As per the ASEAN, the communiqués published in 1979 made references to “refugees and displaced persons or illegal immigrants from Indochina” all together,<sup>129</sup> thus maintaining some degree of vagueness on the nature of the movements. The reference to “refugees” became more common with the organization of the Meeting on Refugees and Displaced Persons in South-East Asia in July 1979, at least in the case of the Vietnamese boat people, who were recognized as refugees under a *prima facie* basis. This changed with the organization of the International Conference on Indochinese Refugees and the adoption of the CPA in 1989. As explained above, the CPA assumed that the recent arrivals were primarily of an economic nature and a refugee status determination procedure was established at the regional level to differentiate between *bona fide* refugees and economic migrants.

While the discourse about people moving in the region has mainly revolved around refugee protection during the Indochinese refugee crisis, the discourse and terminology that has developed in the region since then focuses clearly more on the security, border control, immigration and law enforcement aspects. In Thailand, Malaysia or Indonesia, refugees and asylum seekers are considered primarily as “illegal” or “irregular migrants”.<sup>130</sup> This is all the more so given the fact that these countries are not parties to the 1951 Convention, and thus they purportedly avoid the use of the term “refugee” for fear of giving the idea they may have some obligations towards them. This terminology is reflected in most of the regional processes, with all the categories of people on the move generally being referred to as “irregular” or “undocumented” migrants. There are very rare references to “refugees” in the work of the RCPs in the region, apart from the context of the APC, which have, however, fallen into abeyance to some extent due precisely to their focus on refugee issues. Generally speaking, as Susan Kneebone noted, there is a clear tendency in the region to avoid “the language of human rights to frame refugees”.<sup>131</sup>

The question whether refugees are specific categories of migrants, alongside other sub-categories such as “migrant workers” or “victims of trafficking”, or if they form a separate category, has been particularly debated recently in the context of mass arrivals in Europe. UNHCR, for its part, maintains that “refugees are not migrants”<sup>132</sup> because of their specific predicament – the fact that they cannot go back to their “home” country - and that the conflation between the concepts is likely to impair the refugee protection regime. According to the Agency, “blurring the two terms takes attention away from the specific legal protections refugees require”

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<sup>126</sup> R. Hansen, *An Assessment of Principal Regional consultative Processes on Migration*, *op. cit.*, p. 31 ; C. Thouez and F. Channac, *op. cit.*, p. 384.

<sup>127</sup> M.B. Tsamenyi, “The “Boat People”: Are They Refugees? », *Human Rights Quarterly*, vol. 5, n°3, August 1983, p. 348.

<sup>128</sup> S. Moretti, *op. cit.*, pp. 152-154.

<sup>129</sup> ASEAN, *Joint Statement, The Special ASEAN Foreign Ministers Meeting On The Current Political Development In the Southeast Asia Region, Bangkok*, 12 January 1979, para. 1 ; ASEAN, *Joint Communiqué of the Twelfth ASEAN Ministerial Meeting, Bali*, June 1979, para. 22.

<sup>130</sup> See S. Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region”, *op. cit.*, p. 3.

<sup>131</sup> *Ibid.*, p.4.

<sup>132</sup> See in particular E. Feller, “Refugees are not Migrants”, *Refugee Survey Quarterly*, Vol. 24, n°4, 2005, pp. 27-35.

and “it can undermine public support for refugees and the institution of asylum.<sup>133</sup> However, in the Asia-Pacific context, all persons moving irregularly, irrespective of the reasons of their flight, are generally put under the same label; they are all “irregular migrants”, and as such they can be subjected to measures such as interdiction to enter the territory, arrests, detention, and deportation. The terminology favoured in the region thus reflects a “general reluctance within the region to see refugees as persons in need of protection”.<sup>134</sup> This does not mean that the concerned countries do not provide some form of protection to refugees and asylum seekers, however, they prefer to decide on a case-by-case basis which people would be subjected to a different kind of treatment.

## **2. The increasing focus on counter-trafficking and counter-smuggling in the Asia-Pacific region**

The tendency toward more restrictive asylum policies in developed countries started in the 1980s and continued in the 1990s following the end of the Cold War. This period was marked by what Shacknove refers to as a shift “from asylum to containment”,<sup>135</sup> with Western States increasingly attempting to contain refugees in their region of origin through measures such as carrier sanctions, visa requirements, safe third-country agreements as well as through increasingly restrictive interpretations of the 1951 Convention.<sup>136</sup> These phenomena have become even more prominent following the 9/11 terrorist attacks on the World Trade Centre in New York, which marked an important turn in terms of “securitization” of migration. The increasing focus on security in the migration discourse has clearly shifted the priority towards the need to prevent the arrival of new “irregular migrants” at the detriment of more protection-oriented mechanisms designed to respond to the specific needs of the people concerned.

The increasing emphasis on the need to combat smuggling and trafficking since the end of the 1990s has been instrumental in this regard. Trafficking in persons, which used to be confused with smuggling, was traditionally considered as a purely human rights issue. However, during the negotiations in view of an international instrument on this issue in the late 1990s, it was decided to deal with smuggling and trafficking separately and to adopt two protocols under the United Nations Convention against Transnational Organised Crime, with UNODC as the guardian of the new regime. This controversial move resulted in relocating trafficking “from the sacred chambers of the international human rights system to the area of the UN that dealt with drugs and crime”.<sup>137</sup>

### *2.1. The Palermo Protocols*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons<sup>138</sup> and the Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>139</sup> focus primarily on the need to strengthen border controls, limit the irregular movement of people and criminalize trafficking and smuggling. Against this backdrop, the protection needs and the respect for the human rights of victims of trafficking and persons who are the object of smuggling have become

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<sup>133</sup> UNHCR, “UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?”, *News stories*, 27 August 2015, available at: <http://www.unhcr.org/55df0e556.html> (last visited 4 April 2016). See also UNHCR, “‘Refugees’ and ‘Migrants’ – Frequently Asked Questions (FAQs)”, *New Stories*, 16 March 2016, available at: <http://www.unhcr.org/56e95c676.html>.

<sup>134</sup> S. Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region”, *op. cit.*, p. 4.

<sup>135</sup> See A. Shacknove, “From Asylum to Containment”, *International Journal of Refugee Law*, Vol. 5, n°4, pp. 516-533.

<sup>136</sup> G. Loescher and J. Milner, “UNHCR and the Global Governance of Refugees”, in A. Betts (ed.), *Global Migration Governance*, Oxford, Oxford University Press, 1 January 2011, pp. 196-197.

<sup>137</sup> A.T. Gallagher, *The International Law of Human Trafficking*, Cambridge, Cambridge University Press, 2012, p. 4.

<sup>138</sup> UNGA, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

<sup>139</sup> UNGA, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

secondary considerations.<sup>140</sup> The two protocols do include some provisions that can contribute to the protection of the concerned persons, but the scope of the protection afforded by these provisions seems rather weak. The Protocol against Trafficking contains very few binding and detailed obligations related to protection,<sup>141</sup> like the Protocol against Smuggling.<sup>142</sup>

In comparison, the two protocols contain numerous provisions on the criminalization of trafficking and smuggling,<sup>143</sup> on information exchange,<sup>144</sup> as well as on border control. In this regard, both protocols call for the strengthening of border control “as may be necessary to prevent and detect” trafficking and smuggling.<sup>145</sup> States parties to the protocols are required, for instance, to adopt legislative or other appropriate measures to prevent the use of transport operated by commercial carriers (e.g. through carrier sanctions) for trafficking or smuggling purposes, or to improve the security and control of travel and identity documents.<sup>146</sup> Other prevention measures include the organization of information campaigns as well as measures aimed at addressing the “root causes” of trafficking and smuggling, such as poverty or underdevelopment.<sup>147</sup> The Protocol against Smuggling also contains a detailed provision on measures to be taken against a vessel suspected of smuggling migrants at sea.<sup>148</sup>

Many countries, mostly asylum and transit countries along the migratory routes have a clear interest in containing irregular migration, that is, to prevent the arrival of new “irregular migrants”. Many commentators have already pointed out that states use the anti-trafficking and anti-smuggling regimes to justify attempts to restrict irregular migration.<sup>149</sup> The law enforcement and border control emphasis of the Protocol against Trafficking actually offers a convenient pretext for states “to pursue a border control agenda under the cover of promoting human

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<sup>140</sup> A.T. Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis”, *Human Rights Quarterly*, Vol. 23, n°4, November 2001, pp. 990-993 ; J.C. Hathaway, “The Human Rights Quagmire of ‘Human Trafficking’”, *Virginia Journal of International Law*, Vol. 49, n°1, pp. 2-3.

<sup>141</sup> A.T. Gallagher, *op. cit.*, p. 990 ; S. Kneebone, “The Refugee-Trafficking Nexus: Making Good (the) Connections”, *Refugee Survey Quarterly*, vol. 29, n°1, 2010, p. 143. In particular, article 6.3 of the Protocol against Trafficking provides that each state party “shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons”, including, if appropriate, through the provision of appropriate housing, counselling and information, medical, psychological and material assistance, and employment, educational and training opportunities. Victims of trafficking should also have the possibility of obtaining compensation for damage suffered (art. 6.6). Apart from these provisions, the Protocol envisage the repatriation of victims of trafficking to their home country as the main outcome (art. 8), though states are let with the possibility to adopt more appropriate measures, including regarding the possibility to permit victims of trafficking to remain in their territory, temporarily or permanently (art. 7.1). This provision recognizes the fact that return to their home country may not be the best solution for victims of trafficking, who may be exposed to further risks upon return.

<sup>142</sup> Article 5 of the Protocol against Smuggling is particularly important in this regard, as it provides that migrants “shall not become liable to criminal prosecution [...] for the fact of having been the object” of smuggling. The scope of this provision is however undermined by article 6.4 insofar as the persons concerned could still be held liable for an act that constitutes an offense under domestic law, including irregular entry into a territory. There is also the article 16 which provides that state party “shall take, consistent with [their] obligations under international law, all appropriate measures [...] to preserve and protect the rights” of smuggled migrants, “in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Further, states are required to “take appropriate measures” to protect migrants against violence that may be inflicted upon them, or to “afford appropriate assistance” to those whose lives or safety are endangered, by reason of being the object of smuggling (art. 16.1-3).

<sup>143</sup> *Protocol against Trafficking*, art. 5 ; *Protocol against Smuggling*, art. 6.

<sup>144</sup> *Protocol against Trafficking*, art. 10 ; *Protocol against Smuggling*, art. 10.

<sup>145</sup> *Protocol against Trafficking*, art. 11 ; *Protocol against Smuggling*, art. 11.

<sup>146</sup> *Protocol against Trafficking*, art. 11-13 ; *Protocol against Smuggling*, art. 11-13.

<sup>147</sup> *Protocol against Trafficking*, art. 9 ; *Protocol against Smuggling*, art. 15.

<sup>148</sup> *Protocol against Smuggling*, art. 8.

<sup>149</sup> S. Kneebone, “The Refugee-Trafficking Nexus: Making Good (the) Connections”, *op. cit.*, p. 138. Hathaway, *op. cit.*, pp. 25-35.

rights”.<sup>150</sup> And while it explicitly aims at combatting the smuggling of migrants, the Protocol against Smuggling seems to have been designed rather to put in place a multilateral framework against irregular immigration in general.<sup>151</sup> It is no surprise in these circumstances that states have increasingly invested in forums offering technical expertise on trafficking, migration management, border control and law enforcement activities.

In terms of accession to the Palermo Protocols, all the ASEAN countries, with the exception of Brunei Darussalam, are parties to the Protocol against Trafficking. In the Bay of Bengal and Andaman Sea region, India and Sri Lanka have also acceded to the Protocol, while Bangladesh is yet to do so. The Protocol against Smuggling has attracted less interest, with only 5 out of the 10 ASEAN states being parties to it: Philippines, Laos, Myanmar, Cambodia, and Indonesia. Thailand has signed the Protocol but has not yet acceded to it. Regarding the other countries in the Bay of Bengal and Andaman Sea region, India has acceded to the Protocol while Sri Lanka has only signed it.

## *2.2. The preeminence of the need to combat trafficking and smuggling over protection considerations in the region*

The development of new regional processes, the majority of them focusing on trafficking and smuggling, has contributed to this shift towards a more restrictive policy by putting these issues at the top of the agenda and by strengthening cooperation and information sharing between governments in the field of counter-trafficking and counter-smuggling. Here also, the protection and assistance needs of the concerned persons, in particular victims of trafficking, have not attracted the same level of attention.

Initiated in 1996, the Asia-Pacific Consultations was the only forum in the region established since the end of the Indochinese Refugee Crisis to facilitate discussions on migration and asylum management from the perspective of protection. The Manila Process, which focused more on combatting trafficking and smuggling, was established at the same time, thus offering states the possibility to engage in *forum shopping* until the two processes were merged in the beginning of the 2000s. It may be argued, however, that a paradigm shift started in the region during this period with the creation of the Manila Process and the subsequent adoption of the Bangkok Declaration on Irregular Migration barely three years later. The Declaration provides for several measures aimed at combatting trafficking, including through the passing of new legislation, the prosecution and penalization of all offenders, the exchange of information, and the organization of public information campaigns. The Declaration also mentions the “sovereign rights and legitimate interests of each country to safeguard its borders”.<sup>152</sup>

By contrast, the Declaration contains no reference to refugees or human rights; it only provides that “irregular migrants should be granted humanitarian treatment, including appropriate health and other services, while the cases of irregular migration are being handled according to law”, adding that “any unfair treatment towards them should be avoided”.<sup>153</sup> In this regard, the language of the 1999 Bangkok Declaration on Irregular Migration contrasts sharply with the language of another “Bangkok Declaration” adopted in 1993 ahead of the World Conference on Human Rights, and which emphasized “the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons”.<sup>154</sup> This difference, according to Susan Kneebone, “highlights how the regional agenda on refugees shifted during the 1990s to conflate the issue with irregular migration”.<sup>155</sup>

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<sup>150</sup> J.C. Hathaway, *op. cit.*, p. 26.

<sup>151</sup> J.C. Hathaway, *op. cit.*, p. 27; V. Chetail, “Droit international des migrations: fondement et limites du multilatéralisme”, in R. Mehdi, and H. Ghérari, (eds), *La société internationale face aux défis migratoires*, Brussels, Bruylant, 2012, p. 58.

<sup>152</sup> *The Bangkok Declaration on Irregular Migration*, preamble, para. 12.

<sup>153</sup> *The Bangkok Declaration on Irregular Migration*, para. 14.

<sup>154</sup> *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights* (“Bangkok Declaration”), 1993, para. 11.

<sup>155</sup> S. Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region”, *op. cit.*, p. 5.

The increasing importance of, and focus on, the need to combat trafficking has also been reflected in the work of ASEAN since the end of the 1990s, with the adoption in 1997 of the ASEAN Declaration on Transnational Crime which calls for joint efforts to combat transnational crime in the region, including trafficking in women and children. Several instruments have since been adopted under the auspices of ASEAN, including an ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children in 2004,<sup>156</sup> as well as an ASEAN Convention Against Trafficking in Persons, especially Women and Children in November 2015.<sup>157</sup> Both documents highlight the importance of a regional approach to prevent and combat trafficking in persons, with a clear focus on criminal and law enforcement cooperation. Within ASEAN, the issue of trafficking is mainly dealt with through mechanisms such as the Senior Officials Meeting on Transnational Crime (SOMTC) or the Director-General of Immigration Departments and Heads of Consular Affairs Divisions of the Ministries of foreign affairs Meeting (DGICM). In practice, ASEAN's efforts in terms of trafficking are mainly related to information exchange and trainings of responsible officials and law enforcement agencies.<sup>158</sup>

Cooperation on immigration-related matters at the regional level has, therefore, primarily come to revolve around the issue of smuggling and trafficking. The Bali Process, in particular, elevated the fight against smuggling and trafficking to a higher level in the region through a more developed set of measures to address these two phenomena. The APC, with its focus on asylum and protection issues, has been the first victim of these developments, as the Consultations were considered as increasingly irrelevant by several states in the region. The Bali Process, as will be demonstrated in more details hereafter, has largely side-lined the issue of protection to focus on the prevention and prosecution aspects of trafficking and smuggling.

The emphasis in these new processes has largely been on measures aimed at *preventing* smuggling and trafficking, rather than on measures aimed at dealing with the consequences once they have occurred. In the context of the Bali Process, for instance, the Co-chairs' statement issued following the first Ministerial meeting in 2002 refers to "practical cooperative measures to prevent, intercept and disrupt people smuggling, trafficking in persons and other forms of illegal migration".<sup>159</sup> The adoption of a strict legislation that specifically criminalises migrant smuggling and trafficking in persons is considered as "an important strategy to deter and prevent" such activities.<sup>160</sup> Improving the cooperation of law-enforcement agencies aims primarily at detecting, deterring and preventing illegal movements.<sup>161</sup> In the same vein, information campaigns and measures aimed at increasing public awareness about trafficking should contribute to "discourage" new movements.<sup>162</sup> Mention is made also of the need to address "the root causes of the illegal movement of people" and to offer "more opportunities for legal channels of migration".<sup>163</sup>

The importance of the efforts to prevent irregular movements within the region has been reaffirmed on many occasions. Recently, the 5<sup>th</sup> Bali Process Ministerial Conference organized in April 2013 "underscored" the fact that "strengthening efforts to reduce irregular movement in the region was paramount".<sup>164</sup> Ministers agreed to further strengthen efforts towards deterrence through a new set of measures, including increased airport security, the use of biometrics in

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<sup>156</sup> ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, 2004.

<sup>157</sup> ASEAN Convention Against Trafficking in Persons, Especially Women and Children, 21 November 2015.

<sup>158</sup> S. Petcharamesree, *op. cit.*, p. 10.

<sup>159</sup> Bali Process, *Co-Chairs' Statement. Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime op. cit.*, para. 16.

<sup>160</sup> *Ibid.*, para. 18.

<sup>161</sup> *Ibid.*, para. 17.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*, para. 21.

<sup>164</sup> Bali Process, *Co-Chairs' Statement. Fifth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 2 April 2013*, para. 2, available at:

<http://www.baliprocess.net/files/ConferenceDocumentation/FIFTH%20MINISTERIAL%20CONFERENCE%20CO-CHAIRS%20STATEMENT%20-%20FINAL.pdf>.

immigration systems, and improved information and intelligence sharing.<sup>165</sup> A document titled 'Bali Process Strategy for Cooperation: 2014 and Beyond' was subsequently drafted to identify the capacity building and cooperation activities to be undertaken by the Bali Process and the RSO. The strategy focuses primarily on deterrence, prevention, detention, disruption and prosecution actions to reduce irregular migration, with very few initiatives in the field of protection.<sup>166</sup>

In practice, a broad range of measures have been adopted by states in Asia-Pacific, starting with Australia, to make it more difficult for "irregular migrants" to reach their territory. Visa restrictions or interception and pushbacks implemented by the governments in Australia and in Southeast Asia *vis-à-vis* migrants and refugees arriving by boat are examples of such policies designed to prevent new arrivals.

### 2.3. *The impact of the anti-trafficking and anti-smuggling regimes on refugee protection*

The measures envisaged in the Palermo Protocols have clear detrimental effects on the possibility for some people to seek asylum. The migration control efforts under the Protocol against Trafficking and the Protocol against Smuggling to limit the irregular movements of migrants and refugees are generally implemented in an indiscriminate way, without consideration of the specific situations of refugees.

While the right to leave a country, including one's own, has been largely recognized under international human rights law<sup>167</sup>, the Protocol against Smuggling seems to encourage states to take measures to prevent their nationals from leaving their country in an irregular way.<sup>168</sup> The Protocol does not even prohibit the detention of persons who have been objects of smuggling; it merely seeks to ensure that the state parties inform the concerned persons of their rights regarding the notification to the consular authorities<sup>169</sup> – a measure that can be detrimental to refugees if carried out without their consent. While the Protocol provides that smuggled persons should not become liable for the fact of having been the object of smuggling, the state is allowed to take measures "against a person whose conduct constitutes an offence under its domestic law",<sup>170</sup> in other words, for having entered irregularly into that country. The ambiguity regarding the liability of smuggled persons in these circumstances may well "encourage the perception of the refugee as a criminal element".<sup>171</sup>

The Refugee Convention stipulates specifically that refugees, and by extension asylum seekers, should be exempted from being punished on account of their illegal entry or presence, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>172</sup> The drafters considered that refugees, given the circumstances of their flight, could not be expected to comply with the administrative formalities in order to seek asylum in a new country. However, the non-penalization provision and the principle of *non-refoulement* apply to refugees once they have reached the territory or when they are placed under the jurisdiction of a State, while the Protocol against Smuggling provides

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<sup>165</sup> *Ibid.*, para. 11.

<sup>166</sup> Bali Process, *Bali Process Strategy for Cooperation: 2014 and Beyond*, 2014, available at: [http://www.baliprocess.net/files/Ad%20Hoc%20Group/Bali%20Process%20Strategy\\_FINAL%20\(following%20AHG%20SOM%20revisions\)\\_140807.pdf](http://www.baliprocess.net/files/Ad%20Hoc%20Group/Bali%20Process%20Strategy_FINAL%20(following%20AHG%20SOM%20revisions)_140807.pdf). The "strategy" is conceived as a "living document" to be updated on a regular basis. The actions envisaged in the field of protection were limited to the drafting of policy guides on protection and assistance to victims of trafficking; the organization of a Regional workshop/symposium on labour trafficking, and the development of thematic Briefs on Effective Practices on International Migration and Refugee Protection.

<sup>167</sup> See in particular the *Universal Declaration of Human Rights* (UDHR), 10 December 1948, art. 13.2 ; *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, art. 12.2.

<sup>168</sup> C. Harvey and R.P. Barnidge, "Human Rights, Free Movement, and the Right to Leave in International Law", *International Journal of Refugee Law*, vol. 19, n°1, March 2007 ; S. Kneebone, "The Refugee-Trafficking Nexus: Making Good (the) Connections", *op. cit.*, p. 157.

<sup>169</sup> UNGA, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (Protocol against Smuggling), 15 November 2000, art. 16.5.

<sup>170</sup> *Ibid.*, art. 5 and 6.4.

<sup>171</sup> S. Kneebone, "The Refugee-Trafficking Nexus: Making Good (the) Connections", *op. cit.*, p. 156.

<sup>172</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, art. 31.1.

for measures aimed at preventing the arrival of people, including refugees and asylum seekers, on the territory of a state. There is thus an inherent contradiction between the two regimes that can be detrimental to refugee protection.

Potential conflicts between legal regimes, as in the case of the provisions in the Smuggling or Trafficking Protocol that may impair the right of refugees to seek asylum, are symptomatic of the situation of regime complex. Such issues may be solved through so-called saving clauses, such as the ones included in the two protocols. Art. 19 of the Protocol against Smuggling provides that “nothing in this Protocol shall affect the other rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein”. UNHCR welcomed this provision as well as the similar provision included in the Protocol against Trafficking,<sup>173</sup> considering that they were “meant to safeguard the rights of asylum seekers and refugees under the 1951 Convention and the 1967 Protocol”.<sup>174</sup> However, as noted by James Hathaway, this guarantee “is of little practical value when migration control efforts are implemented in an indiscriminate way, precisely the approach required by the anti-trafficking and anti-smuggling treaties”.<sup>175</sup> In these circumstances, the saving clauses included in the two Protocols may appear “more formulaic than substantively meaningful”.<sup>176</sup>

On another note, the emphasis on border control and law enforcement inherent in the anti-trafficking and anti-smuggling regimes may also turn out to be counterproductive in the case of people, such as refugees, who by definition are forced to flee a life-threatening situation. While smugglers are often portrayed as criminals, they can also represent the only hope for people compelled to flee their country and in need of asylum – a fact that the Protocol against Smuggling fails to take into consideration. The obligations under the anti-trafficking and anti-smuggling regimes can only exacerbate the problems and vulnerabilities faced by refugees, who may have to take more risks – and pay a higher price – to seek asylum elsewhere. Ironically, if not tragically, this vicious circle is likely to fuel the smuggling industry, while increasing the risk of trafficking for smuggled migrants through the process of debt bondage. The objective should be to reconcile the imperative of combatting trafficking and smuggling with the protection of refugees and asylum seekers; however, this has proved to be no small challenge.

## 2.1. The increasing importance of IOM and UNODC

The proliferation of regimes related to migration and displacement at the global and regional levels has also had an important impact on the work, mandate, and activities of formal international organizations working in the field of migration and displacement. Alexander Betts has proposed the concepts of “challenged institutions” and “reinforced institutions” to describe the ways in which existing regimes, and the international organizations that oversee those regimes, “are affected by and respond to the consequences of emerging institutional overlaps”.<sup>177</sup>

As the main organization in charge of migration, IOM has come to play an increasingly prominent role in relation to global migration governance. This is partly as a result of the multiplication of RCPs, to which the organization has greatly contributed.<sup>178</sup> In the Asia-Pacific region, IOM was behind the creation of the Manila Process, organizing the first seminar in December 1996, and a follow-up meeting one year later, as well as acting as the Secretariat of the Process. Today, IOM is a major actor in the Bali Process. The organization has been given increasing importance as an “expert” on migration issues, undertaking research, providing policy advice, and playing an important role in terms of data and information collection and

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<sup>173</sup> *Protocol against Trafficking*, art. 14.1.

<sup>174</sup> V. Türk, “Current Migration Flows: the Task of Protection”, *Refugee Survey Quarterly*, vol. 20, n°2, 2001, p. 92.

<sup>175</sup> J.C. Hathaway, *op. cit.*, p 6.

<sup>176</sup> *Ibid.* p 40.

<sup>177</sup> A. Betts, “Regime Complexity and International Organizations: UNHCR as a Challenged Institution”, *Global Governance*, vol. 19, 2013, p. 70.

<sup>178</sup> F. Düvell, *op. cit.*, p. 82.

analysis, both at the international and regional level. In this capacity, IOM is in a very good position to shape the agenda and frame the way governments envisage migration-related issues.<sup>179</sup>

The role of IOM is to promote “humane and orderly migration for the benefit of all”<sup>180</sup> through the provision of a broad range of “migration management services” to governments.<sup>181</sup> IOM is an intergovernmental organization with some 162 Member States and although discussions have been ongoing in this regard for a long time, it has only been recognized as a UN-related organization in September 2016. The organization is not funded through the UN regular budget, which means that it mainly relies on project-based funding, and therefore it has limited powers to reject the demands of states.<sup>182</sup> Unlike UN organizations, IOM was not bound by the obligation to respect human rights as long as it remained outside the UN system, a situation that changed with the signing of a new agreement with the United Nations. The organization was perceived therefore as “a service provider that does not have an inbuilt mechanism to check its actions against a specific normative framework or protection mandate, and that is likely to go a long way in securing projects”.<sup>183</sup>

In a context of increasing competition between actors, states can choose which institution they ask to perform some actions. As a service provider, IOM tends to implement some of its Member States’ policies, in particular those of the Western countries who support its programmes and operations. However, some of these programmes appear to have been outsourced to IOM by governments who find themselves “unable or unwilling” to carry them out for legal and political purposes.<sup>184</sup> In that sense IOM performs a “laundering function” insofar as activities “that might be unacceptable in their original state-to-state form become acceptable when run through an independent, or seemingly independent, IO”.<sup>185</sup> IOM has actually been accused on many occasions of engaging “in some ethically and politically questionable work along the edges of sovereign territory and jurisdiction”.<sup>186</sup> In the same vein, some commentators consider that IOM “appears to operate in the interest of the protection of states” over the protection of migrants and refugees.<sup>187</sup> Amongst the range of services proposed by IOM, activities related to return and detention are particularly important.<sup>188</sup> The Assisted Voluntary Return and Reintegration (AVRR) programme, in particular, is one of the core activities of the organization.<sup>189</sup>

IOM has also become a central actor due to its increasing involvement in “counter-trafficking” activities. The fact that many of the Regional Consultative Processes established over the past decades have a focus on countering smuggling and trafficking has placed IOM in a very favorable position. The organization has developed activities in favor of the authorities, such as technical assistance in the drafting of new counter-trafficking legislation, or the organization of trainings to national and international law enforcers on how to detect and intercept traffickers.<sup>190</sup> It has also implemented some projects aimed at preventing (e.g. through awareness raising campaigns), but also assisting and supporting victims of trafficking, notably through their repatriation and reintegration in their home country.

The other agency that has greatly benefited from the paradigm shift toward a focus on counter-smuggling and counter-trafficking issues is the United Nations Office on Drugs and Crime. UNODC, by its mandate, focuses on the security and crime aspects of irregular migration, with

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<sup>179</sup> C. Thouez and F. Channac, *op. cit.*, p. 382.

<sup>180</sup> IOM, *About IOM*, available at : <http://greece.iom.int/about-iom> (last visited 04 March 2016).

<sup>181</sup> A. Koch, “The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return”, *Journal of Ethnic and Migration Studies*, Vol. 40, Issue 6, 2014, p. 911.

<sup>182</sup> A. Koch, *op. cit.*, p. 918.

<sup>183</sup> A. Koch, *op. cit.*, p. 913.

<sup>184</sup> I. Ashutosh and A. Mountz, “Migration management for the benefit of whom? Interrogating the work of the International Organization for Migration”, *Citizenship Studies*, Vol. 15, n°1, pp. 21-22.

<sup>185</sup> K.W. Abbott and D. Snidal, “Why States Act through Formal International Organizations”, *op. cit.*, p. 18.

<sup>186</sup> See I. Ashutosh and A. Mountz, *op. cit.*, p. 22.

<sup>187</sup> I. Ashutosh and A. Mountz, *op. cit.*, p. 28.

<sup>188</sup> *Ibid.*

<sup>189</sup> I. Ashutosh and A. Mountz, *op. cit.*, p. 29.

<sup>190</sup> IOM, *IOM Counter-Trafficking Activities*, *op. cit.*



trafficking and smuggling being considered today as transnational crimes. The organization provides technical assistance to states regarding the development of repressive national legislations, as well as support in the field of data collection and analysis on smuggling and trafficking routes. One of the major initiatives of UNODC in the framework of the Bali Process has been the Voluntary Reporting System on Migrant Smuggling and Related Conduct (VRS-MSRC) established in 2013. The VRS-MSRC is an online tool to collect, share and analyze information on migrant smuggling, irregular migration and other related conduct.<sup>191</sup> As an acknowledgment of its increasingly important role in the region, UNODC has become a full member of the Bali Process in 2014.

### **PART III – TOWARDS A FRAMEWORK FOR THE PROTECTION OF REFUGEES AND MIGRANTS IN ASIA-PACIFIC?**

While the discourse about migration issues in Asia-Pacific, as elsewhere, has been dominated by security considerations, the potential protection and humanitarian needs of people on the move cannot be completely ignored. Even in the field of trafficking, the traditional framework regarding any “comprehensive” response revolves around the “3P” strategy; that is, “Prevention”, “Prosecution” and “Protection”, with “Partnership” sometimes added to this list. Protection should, therefore, be an integral part of the response, although it seems to have been somewhat superseded by the two other pillars.

Against this backdrop, this section explores the way the issue of protection and human rights of people on the move, be they migrants, refugees or victims of trafficking, has been reflected in the work of the migration-related regional processes in Asia-Pacific. In particular, it seeks to identify if some principles related to protection have emerged from the institutional complexity in the region with some coherence, or if this phenomenon has led to a complete fragmentation of the protection framework. As will be demonstrated, a certain number of initiatives have been taken to introduce a more “protection-sensitive” perspective in the different forums. The role played by UNHCR in this regard is particularly important as the organization is indeed “the main agent and custodian of protection” in the region,<sup>192</sup> with a discourse on protection that goes beyond the mere category of refugees.

#### **1. The evolving strategy of UNHCR**

The proliferation of regimes related to migration and displacement at the global and regional level has also had a profound impact on the work of UNHCR. Alexander Betts has described how UNHCR, acting as a “challenged institution” has been able to adapt its mandate to remain relevant in the new context characterized by a clear focus on law enforcement and security issues at the detriment of refugee protection.<sup>193</sup> While UNHCR has traditionally asserted that it was not “a migration organization”, the increasing importance of the “asylum-migration nexus” and the multiplicity of mixed migratory movements in different parts of the world, has led the organization to look beyond the immediate scope of the refugee regime to ensure that refugee protection aspects are also part of the discussions.

The issue of “refugee protection in the context of international migration”, according to the terminology used by UNHCR, has therefore been of increasing importance in the discourse and work of the organization over the last decade. In 2006, UNHCR developed its 10-Point Plan of Action on Refugee Protection and Mixed Migration.<sup>194</sup> The following year, the High Commissioner for Refugees dedicated its first annual Dialogue on Protection Challenges to the

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<sup>191</sup> UNODC, *Voluntary Reporting System on Migrant Smuggling and Related Conduct in Support of the Bali Process*, 2013, available at : [https://www.unodc.org/documents/southeastasiaandpacific//topics/Illicit\\_trafficking/migrant-smuggling/reporting\\_system\\_leaflet.pdf](https://www.unodc.org/documents/southeastasiaandpacific//topics/Illicit_trafficking/migrant-smuggling/reporting_system_leaflet.pdf).

<sup>192</sup> ExCom, *Overview of UNHCR's operational strategies in Asia and the Pacific*, 6 March 2012, section A.

<sup>193</sup> A. Betts, “Regime Complexity and International Organizations: UNHCR as a Challenged Institution”, *op. cit.*

<sup>194</sup> UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007.

issue of “Refugee Protection, Durable Solutions and International Migration”.<sup>195</sup> This approach was based on the acknowledgement of a certain number of tendencies that could not be ignored. States, and in particular donor states, have been increasingly concerned by aspects related to terrorism and security, and in this context migration control has become a priority for them. By ignoring this reality, UNHCR would be at risk of “being bypassed”.<sup>196</sup> Consequently, UNHCR has adapted its discourse to take into consideration the concerns of states, while at the same time highlighting the specific situation of refugees. The 10-Point Plan of Action calls for the implementation of “protection-sensitive” entry systems, that is, a system that balance the interest of the state and its sovereign right to choose whom to admit, with the protection needs of individuals seeking access to a state territory.<sup>197</sup> Similarly, UNHCR systematically recognizes that smuggling and trafficking in persons “are serious transnational crimes” which require “rigorous law enforcement”, while at the same time calling states to put in place appropriate safeguards to protect those in need,<sup>198</sup> including refugees and asylum seekers.

Indeed, UNHCR has also adapted to this new context by emphasizing the linkages between refugee protection and some aspects of international migration. The phenomenon of mixed migration and the issue of “Protection at Sea” are some examples, with UNHCR having taken the lead on the issue of Search and Rescue (SAR) at sea based on its experience in this regard during the Indochinese Refugee Crisis. The link between trafficking and smuggling on the one hand, and refugee protection on the other, has also been given increasing importance. For instance, faced with difficulties in accessing the territory of other states to seek asylum, refugees and asylum seekers may need to resort to the services of smuggling networks, with the risk of some of them falling prey of traffickers during or at the end of the journey.<sup>199</sup> Alternatively, victims of trafficking can become refugees if, as a consequence of their situation, they develop a well-founded fear of persecution in their country of origin based on one of the Convention grounds. The exercise of issue-linkage has thus legitimized the engagement of UNHCR on the broader migration discourse.

The multitude of multilateral partnerships and processes on migration issues that have been developed recently at the global and regional level represent the main “entry points” to raise UNHCR’s concerns and promote its approach to mixed migratory movements. UNHCR has been trying to convince states to develop and implement “protection-sensitive” border control and migration management strategies that take into consideration the differentiated protection needs of people travelling within mixed flows, in particular those of the refugees. It has done so through *forum shopping*, that is, through the selection of, and engagement with, the processes where the organization considered that it could have a more important impact. In Asia-Pacific, for instance, UNHCR initiated the Asia-Pacific Consultations, but it increasingly engaged with the Bali Process as it became the main venue for the discussions on migration-related issues within the region. It has also done so through orchestration, by using intermediaries as channels of influence over states to promote its own objectives. UNHCR thus played a key role in the Jakarta Declaration in the hope that the new initiative would prove to be more protection-oriented than the Bali Process.

### 1.1. UNHCR’s engagement with the Bali Process

In Asia-Pacific, the efforts of UNHCR to include more protection considerations in the debate during the first years of the Bali Process were not very successful. The Bali Process has of course not been convened to deal directly with the issue of refugee protection; its focus is on the regional cooperation to combat trafficking and smuggling, which are considered as international crimes. Nevertheless, the Co-chairs’ statement following the first Ministerial

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<sup>195</sup> UNHCR, *Refugee Protection, Durable Solutions and International Migration*, High Commissioner’s Dialogue on Protection Challenges, 2007, available at: <http://www.unhcr.org/pages/4a12a6286.html>.

<sup>196</sup> G. Loescher and J. Milner, *op. cit.*, p. 205.

<sup>197</sup> See in particular UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, *op. cit.*, p. 76.

<sup>198</sup> UNHCR, *Special Conference on Irregular Movement of Persons. Jakarta, Indonesia. Statement by Volker Türk, Director of International Protection*, August 2013, available at: <http://www.unhcr.org/521386b39.html>.

<sup>199</sup> S. Kneebone, “The Refugee-Trafficking Nexus: Making Good (the) Connections”, *op. cit.*, pp. 139-140.

meeting in 2002 acknowledged “the human rights dimensions of the problems of people smuggling and trafficking in persons”.<sup>200</sup> With regard to refugees, the Statement includes a “saving clause” stating that “nothing in this statement was intended to prejudice the legitimate rights of genuine refugees to seek and enjoy asylum in accordance with relevant Conventions and Protocols”. The Ministers also “called for effective measures to be put in place to ensure that protection is provided, consistent with the international obligations of individual States”, adding that “all countries, - including origin, transit and potential destination, should play a part in finding solutions for refugees, while providing for return in a humane manner for those found not to be refugees”.<sup>201</sup>

The following year, UNHCR submitted a paper ahead of the second Ministerial meeting to propose some elements for an International Cooperative Framework aimed at guiding the response of states to mixed migratory movements, while taking into consideration the protection needs of the persons concerned.<sup>202</sup> An important link was made in the document between the lack of protection in certain countries and secondary movements in the region, which seemed to resonate with the members of the Bali Process. As a result, the Second Co-Chairs’ Statement included a new sentence recognizing the importance of “improving the availability of solutions for refugees” as a way to “reduce the pressure for onward secondary movement and thereby complement the international community’s efforts comprehensively to combat people smuggling, trafficking in persons and related transnational crime”.<sup>203</sup> More generally, the Co-Chairs’ Statement also specifies that the Ministers “acknowledged the human rights dimensions of the problems of people smuggling and trafficking in persons, particularly women and children”.<sup>204</sup>

However, starting in 2009, UNHCR became more engaged in the Bali Process to attempt to shift the priorities toward a more protection-sensitive agenda, while efforts were made to revitalize a process that had been somehow put on hold since the convening of the second Ministerial meeting six years before. The UNHCR 2010 summary of the situation in Asia-Pacific presented the situation in the following terms:

“UNHCR is promoting comprehensive regional approaches to protection including: addressing the root causes of displacement in countries of origin; improving conditions of stay in countries of asylum; and finding durable solutions. The recent Bali Process meeting, co-chaired by Australia and Indonesia, provided the opportunity for UNHCR to put forward refugee protection issues as an important element of this regional consultative process. Cooperation with civil society representatives and countries belonging to the Association of South-East Asian Nations (ASEAN) paved the way for consultations in 2010 on access to asylum and refugee protection, and access to basic services, particularly in the context of broader migration movements”.<sup>205</sup>

This coincided with (a seeming) momentum for a more constructive engagement on these issues.<sup>206</sup> In light of the tragic events which took place in the region during this period, including the accusation of push-backs by the Thai authorities which may have resulted in the death of some 300 people,<sup>207</sup> the Statement following the Third Ministerial Meeting convened in April 2009 acknowledged the fact that “trafficked persons are victims, especially women and children, and need protection and assistance through victim support, rehabilitation and

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<sup>200</sup> Bali Process, *Co-Chairs’ Statement, Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime*, *op. cit.*, para. 3.

<sup>201</sup> *Ibid.*, para. 26.

<sup>202</sup> UNHCR, *Co-operation to Address the Irregular Movement of Asylum-Seekers and Refugees: Elements for an International Framework*, 2003.

<sup>203</sup> Bali Process, *Co-Chairs’ Statement. Second Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29-30 April 2003*, 30 April 2003, para. 35.

<sup>204</sup> *Ibid.*, para. 6.

<sup>205</sup> UNHCR, *Update on UNHCR’s operations in Asia and the Pacific*, 30 September 2010, p. 3.

<sup>206</sup> S. Petcharamesree, *op. cit.*, pp. 13-14.

<sup>207</sup> “Torment of Rohingya in Thailand: New Report Documents Their Agony”, *The Phuket Wan*, 18 October 2014, available at: <http://phuketwan.com/tourism/torment-rohingya-thailand-report-documents-agony-21208/> (last visited: 4 April 2016).

reintegration”.<sup>208</sup> The Statement also recognized for the first time “the importance of a victim-centered approach to law enforcement, especially in relation to trafficking in persons”.<sup>209</sup> With regard to refugees, the Ministers noted that, while the Conference “had not been convened to deal directly with the issue”, they would nonetheless “use their best endeavors to deal with the issues of refugees, particularly those based on humanitarian grounds”, that is, those arriving in countries that are not parties to the 1951 Convention. The Ministers also reaffirmed the fact that “nothing in [the] statement was intended to prejudice the legitimate rights of genuine refugees to seek and enjoy asylum in accordance with relevant UN Conventions and Protocols to which states are party, national law and practices”.<sup>210</sup> Further in the document, they noted that “all countries, including origin, transit and destination countries, according to their national laws and national policies, could use their endeavours to play a part in ensuring protection and in finding solutions” for them.<sup>211</sup>

To follow up on these commitments, the issue of protection was specifically addressed for the first time in the framework of the Bali Process as a matter in its own right during a Workshop on Protection, Resettlement and Repatriation organized in Bali in June 2010. The 2011 *Ad Hoc* Group Progress Report noted that “in addition to the traditional Bali Process interest in border integrity and law enforcement measures, AHG members have increasingly turned their attention to issues of protection, resettlement, repatriation and reintegration as a means of addressing irregular movements”. Here again the link between protection and onward movement was key in convincing states to pay attention to protection issue. Indeed, the disparity between approaches in the areas of timeframes, accommodation and the treatment of irregular migrants “was identified as a contributor to irregular migration”; participants hence “agreed that uniformity in these areas would be a strong disincentive to irregular migration”.<sup>212</sup>

### 1.2. *The Regional Cooperation Framework (RCF)*

During this period, UNHCR’s efforts to include protection of refugees into the agenda of the Bali Process culminated with the adoption of a Regional Cooperation Framework at the Fourth Regional Ministerial Conference of the Bali Process in March 2011. Following the Workshop on Protection, Resettlement and Repatriation held in Bali, the AHG of the Bali Process endorsed the idea of a second UNHCR co-hosted workshop to develop “a coordinated and comprehensive regional approach to refugees and irregular movements, including secondary movements”.<sup>213</sup> Organized in Manila in November 2010, the Workshop on Regional Cooperation on Refugees and Irregular Movements was informed by a UNHCR paper titled ‘Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement’, which laid down some proposals for the foundations of the RCF.<sup>214</sup>

To respond to the challenge of “mixed flows”, where refugees move onward together with other groups of migrants in the region, the document proposed by UNHCR regarding the Regional Cooperation Framework drew largely on the 10-Point Plan of Action on Refugee Protection and Mixed Migration - e.g. on the development of protection-sensitive migration management practices; on the establishment of profiling and referral mechanisms to identify and differentiate between different categories of persons; on the access to “differentiated processes and procedures” for the various categories of people concerned; on the measures to address

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<sup>208</sup> Bali Process, *Co-Chairs’ Statement. Third Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 14-15 April 2009*, 15 April 2009, para. 5, available at: [http://www.baliprocess.net/files/Co%20chairs%20statement%20BRMC%20III\\_FINAL.pdf](http://www.baliprocess.net/files/Co%20chairs%20statement%20BRMC%20III_FINAL.pdf).

<sup>209</sup> *Ibid.*, para. 7.

<sup>210</sup> *Ibid.*, para. 18.

<sup>211</sup> *Ibid.*, para. 21.

<sup>212</sup> Bali Process, *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, Ad Hoc Group Progress Report by the Co-chairs*, 2011, available at: <http://www.baliprocess.net/files/FINAL%20Signed%20AHG%20Progress%20Report.pdf>.

<sup>213</sup> Bali Process, *Co-Chairs’ Statement, Third Meeting of Ad Hoc Group Senior Officials, Bali, Indonesia, 10-11 June 2010*, 11 June 2010, para. 11, available at: <http://www.baliprocess.net/files/Co-Chairs%20statement%20AHG%20SOM%2010%20to%2011%20June%202010.pdf>.

<sup>214</sup> UNHCR, *Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement. UNHCR discussion Paper*, November 2010, available at: <http://www.refworld.org/docid/4e92d7c32.html>.

onward movements; and on the provision of solutions for those in need of international protection and outcomes for the others.<sup>215</sup> In this regard, the “timely return” of persons found not to be in need of international protection was referred to as a “priority”.<sup>216</sup> The situation of “people moving irregularly by sea” was also proposed as a specific category of “onward movers” which could be the object of a “dedicated regional understanding”.<sup>217</sup>

In her statement at the beginning of the Ministerial Conference in March 2011, Erika Feller, the then Assistant High Commissioner for Protection, declared that asylum-related issues had been “somewhat on the periphery of the discussions” until recently, but that there was “an evolution of thinking in this regard”. She added that this development flew “logically from the reality that failure to address the humanitarian and protection needs of refugees only destabilises refugee groups, contributes to their onward movement and feeds the growth of a now flourishing people-smuggling industry in the region”<sup>218</sup> and expressed her hopes that the envisaged RCF would be endorsed by the Ministers. However, if the adoption of the RCF marked a step forward insofar as the issue of refugee protection, closely related to the issue of smuggling and trafficking, seemed to be finally recognized as an area of common concern in the region, it has certainly not lived up to UNHCRs’ expectations. The RCF only consists of a set of vague principles underpinning potential arrangements that states may choose to conclude on specific issues. The Co-chairs’ Statement adopted in March 2011 identified the following principles:

- “1. Irregular movement facilitated by people smuggling syndicates should be eliminated and States should promote and support opportunities for orderly migration.
2. Where appropriate and possible, asylum seekers should have access to consistent assessment processes, whether through a set of harmonised arrangements or through the possible establishment of regional assessment arrangements, which might include a centre or centres, taking into account any existing sub-regional arrangements.
3. Persons found to be refugees under those assessment processes should be provided with a durable solution, including voluntary repatriation, resettlement within and outside the region and, where appropriate, possible “in country” solutions.
4. Persons found not to be in need of protection should be returned, preferably on a voluntary basis, to their countries of origin, in safety and dignity. Returns should be sustainable and States should look to maximise opportunities for greater cooperation.
5. People smuggling enterprises should be targeted through border security arrangements, law enforcement activities and disincentives for human trafficking and smuggling”.<sup>219</sup>

In addition to these principles, the Ministers agreed that the following “considerations” should guide the development and implementation of practical arrangements under the RCF:

- i. Arrangements should promote human life and dignity.
- ii. Arrangements should seek to build capacity in the region to process mixed flows and where appropriate utilize available resources, such as those provided by international organisations.

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<sup>215</sup> *Ibid.*, p. 4-6.

<sup>216</sup> *Ibid.*, p. 2.

<sup>217</sup> *Ibid.*, p. 5.

<sup>218</sup> UNHCR, *Statement by Erika Feller, Assistant High Commissioner (Protection)*, Fourth Bali Regional Ministerial Conference, Bali, Indonesia, 30 March 2011, available at: <http://www.baliprocess.net/files/BRMC%20IV%20UNHCR%20Statement.pdf>.

<sup>219</sup> Bali Process, *Co-Chairs' Statement. The Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, March 29-30, 2011*, 30 March 2011, para. 16, available at: [http://www.baliprocess.net/files/110330\\_FINAL\\_Ministerial\\_Co-chairs%20statement%20BRMC%20IV.pdf](http://www.baliprocess.net/files/110330_FINAL_Ministerial_Co-chairs%20statement%20BRMC%20IV.pdf).

- iii. Arrangements should reflect the principles of burden-sharing and collective responsibility, while respecting sovereignty and the national security of concerned States.
- iv. Arrangements should seek to address root causes of irregular movement and promote population stabilization wherever possible.
- v. Arrangements should promote orderly, legal migration and provide appropriate opportunities for regular migration.
- vi. Any arrangements should avoid creating pull factors to, or within, the region.
- vii. Arrangements should seek to undermine the people smuggling model and create disincentives for irregular movement and may include, in appropriate circumstances, transfer and readmission.
- viii. Arrangements should support and promote increased information exchange, while respecting confidentiality and upholding the privacy of affected persons".<sup>220</sup>

The operationalization of the RCF was supported by a Regional Support Office (RSO), established in Bangkok in 2012 and placed under the co-management of Australia and Indonesia, with IOM and UNHCR representatives seconded to the Secretariat.<sup>221</sup> The objective of the RSO is primarily "to facilitate the operationalization of the RCF and to support and strengthen practical cooperation among Bali Process Member States regarding refugee protection and international migration, including irregular migration, human trafficking and smuggling".<sup>222</sup> In this regard, the RSO was tasked to act as a focal point for interested states in the following areas: information sharing between states on issues related to refugee protection and international migration, including smuggling and trafficking, border management and other components of migration management; capacity building and exchange of best practices; pooling of common technical resources; logistical, administrative, operational and coordination support for joint projects.<sup>223</sup> The issue of irregular movement by sea was envisaged as the type of situations where the RCF and the RSO could be relevant by contributing to the development of a "coherent and predictable response".<sup>224</sup> The RSO is a good example of intermediary through which UNHCR has been trying to exert influence over the outcomes of the Bali Process, in the hope of ultimately influencing the policies of Bali States members. Orchestration in this case has been primarily through the provision of both material and ideational support, but with mixed results.

Indeed, there are important limitations regarding the RCF and the RSO. The RCF in itself is not a binding instrument and the funding and the implementation of programmes and agreements under its auspices depends on the goodwill of states. Moreover, the scope of the RCF has been left deliberately vague enough to offer a large margin for states to manoeuvre and choose projects that are more important to them than refugee protection. This ambiguity seems to have been the price to pay for the adoption of the document. Under these circumstances, risks existed from the start of the RSO becoming the implementing arm of all kind of projects developed under the Bali Process, without necessarily much emphasis on the protection of refugees. At the end of Fifth Ministerial Meeting of the Bali Process, Erika Feller urged states to move "beyond the language of cooperation to practical and concrete action", or else "the momentum towards including asylum and refugee protection objectives as an integral part of

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<sup>220</sup> *Ibid.*, para. 19.

<sup>221</sup> In October 2011, the Fifth Meeting of the Bali Process Ad Hoc Group Senior Official agreed to the establishment of a Regional Support Office (RSO). See Bali Process, *Fifth Meeting of Bali Process Ad Hoc Group Senior Officials*, Sydney, Australia, 12 October 2011, para. 14, available at: <http://www.baliprocess.net/files/111012%20Fifth%20AHG%20SOM%20Co-Chairs%20%20Statement%20-%20FINAL.pdf>.

<sup>222</sup> Bali Process, *Bali Process Steering Group Note on The Operationalisation of the Regional Cooperation Framework in the Asia Pacific Region*, 28 September 2011, section 1, available at: <http://www.baliprocess.net/files/111012%20Steering%20Group%20Note%20on%20RCF%20-%20FINAL.pdf>.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*, section 2.2. See also UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movement*, UNHCR Discussion Paper, *op. cit.*

the Bali Process agenda [would be] in real danger of being lost”.<sup>225</sup> The discrepancy between this statement and the one made two years before is striking.

The Bali Process website mentions “the provision of appropriate protection and assistance to the victims of trafficking, particularly women and children” as one of its core objectives alongside security and border control concerns.<sup>226</sup> It also claims to play a role in “assisting countries to adopt best practices in asylum management, in accordance with the principles of the Refugee Convention”. In reality, little has been done in the framework of the Bali Process in terms of protection and assistance to people on the move, be they victims of trafficking or refugees. The efforts of UNHCR to promote a more protection-sensitive perspective within the process cannot be said to have been very successful. According to Susan Kneebone, “neither Australia nor the agenda of the Bali Process support the key elements of the global refugee protection regime, namely the right to asylum and durable solutions through burden-sharing”.<sup>227</sup> The RSO has undertaken a broad range of activities proposed by different actors over the past years,<sup>228</sup> but most of them, under Australian funding, have focused on border control and migration management,<sup>229</sup> with very few initiatives aimed at strengthening a protection approach.

## 2. “Contested multilateralism” in Asia-Pacific: UNHCR and The Jakarta Declaration

The second half of 2013 arguably marked a change in the way that the issue of irregular migration was to be dealt with in the region. As Australia moved toward a tighter stance *vis-à-vis* the arrival of migrants and refugees by sea, Indonesia and UNHCR convened the first Special Conference on Irregular Movement of persons in August, which led to the adoption of the Jakarta Declaration on Addressing Irregular Movement of Persons. This initiative represented a good example of what Morse and Keohane have called “contested multilateralism”, that is, a situation “that results from the pursuit of strategies by states, multilateral organizations, and non-state actors to use multilateral institutions, existing or newly created, to challenge the rules, practices, or missions of existing multilateral institutions”.<sup>230</sup> Since the adoption of the Jakarta Declaration, the centre of gravity of migration cooperation in Asia-Pacific seems to have somewhat shifted towards what can be called the “Jakarta Declaration Process”. In 2014 and 2015, two meetings were organized under the auspices of the Jakarta Declaration, while no Ministerial meeting in the framework of the Bali Process took place.

### 3.1. UNHCR as an orchestrator: towards the Jakarta Declaration

In August 2013, both the government of Indonesia and UNHCR were arguably unsatisfied with the *status quo*. Indonesia had decided to discuss irregular migration in the region outside the framework of the Australian-led Bali Process and UNHCR had not been rewarded for its efforts to promote a more protection oriented approach to irregular migration within the same process.

For UNHCR, the organization of the Special Conference on Irregular Movement of Persons, to which it contributed substantially, was an opportunity to draw the issue of protection to the attention of governments to the region, with the support of the Indonesian government. The importance of the Bali Process was thus challenged by the creation of a new framework that stemmed from the coincidence of interests between UNHCR and Indonesia, both of whom were interested in promoting a “responsibility-sharing” agenda rather than endorsing the

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<sup>225</sup> UNHCR, Erika Feller, *Statement of the Assistant High Commissioner for Protection*, Fifth Bali Regional Ministerial Conference, Bali, Indonesia, 2 April 2013.

<sup>226</sup> Bali Process, *About the Bali Process*, available at: <http://www.baliprocess.net/> (last visited 04 April 2016).

<sup>227</sup> S. Kneebone, “The Bali Process and Global Refugee Policy in the Asia-Pacific Region”, *op. cit.*, p. 19.

<sup>228</sup> The RSO is an open structure that can take on assignments proposed by government officials and other contributions from Bali Process member states. New projects submitted by members will be considered by the RSO, in consultation with UNHCR, IOM and the Bali Process Steering Group, and under the oversight of the Bali Process Co-Chairs.

<sup>229</sup> S. Petcharamesree, *op. cit.*, p. 14.

<sup>230</sup> J.C. Morse and R.O. Keohane, *op. cit.*

“responsibility-shifting” approach of the Australian Government. UNHCR acted as an orchestrator through this initiative, enlisting the Government of Indonesia and the Jakarta Declaration meeting as intermediaries “to shape state preferences, beliefs and behaviour in ways that enhance state consent to and compliance”<sup>231</sup> with its own goals regarding the development of a protection-sensitive approach to migration.

Compared to the Bali Process, the Jakarta Declaration is much more protection-oriented, and has resulted in a comprehensive framework that balances the protection and the law-enforcement elements of a comprehensive response to trafficking and smuggling. The influence of UNHCR in the outcome document is consequent. The preamble of the Declaration acknowledges that “the issue of irregular movement of persons also covers asylum seekers and refugees and their possible secondary movements”.<sup>232</sup> The document also calls for the development of a regional approach that is “protection-sensitive”, a key term of UNHCR to ensure the protection of refugees in the context of international migration, which has been largely absent in the outcome documents of the Bali Process. UNHCR was also able to bring the issue of “Protection at Sea” to the centre of the discussion, as it strived to do in the context of the Bali Process. In its statement at the Special Conference on Irregular Movement of Persons, Volker Türk, the Assistant High Commissioner for Protection, stated that in UNHCR’s view, “it would be good to activate a regional ‘road map’ for action, focusing first on specific caseloads/populations or situations – such as irregular maritime movements”.<sup>233</sup> This suggestion echoed the proposals made by UNHCR regarding the focus of the RSO.

The Jakarta Declaration includes some protection strategies and activities in the section on “Prevention”, notably through the emphasis on the need to address the root causes,<sup>234</sup> the organization of information campaigns,<sup>235</sup> or training on rescue at sea.<sup>236</sup> There is, however, a full section on “Protection” that goes far beyond what has been agreed in the context of the Bali Process. The participants to the Jakarta Conference committed in particular to pursue coordinated joint action through the establishment of “mechanisms at multilateral, regional, and bilateral levels for victims of trafficking from victim identification, protection, rehabilitation, repatriation and reintegration of victims upon return to their respective countries of origin as well as prevention of revictimization”.<sup>237</sup> Mention was made of the importance of ensuring that smuggled and trafficked people are not “held liable for people smuggling and trafficking in persons offence”, and of providing “protection for witnesses and whistleblowers”.<sup>238</sup> Though the focus of this section is primarily on the protection of victims of trafficking and smuggled migrants, the Declaration also stresses the importance of “enhancing communication and coordination to support SAR at sea, disembarkation, reception, processing, and outcomes”.<sup>239</sup> This series of activities largely reflects the UNHCR’s 10 Point Plan of Action which aims at making sure that the different categories of people concerned, including refugees, are duly identified and protected. With regard to the outcomes, the return to the country of origin for persons not in need of international protection, but also for refugees through voluntary repatriation schemes, is encouraged.<sup>240</sup>

A follow-up meeting was organised by Indonesia and UNHCR in April 2014, under the auspices of the Jakarta Declaration, to “exchange on operational policies and practices” in the implementation of the Declaration.<sup>241</sup> The International Workshop on the Protection of Irregular Movements of Persons at Sea, held in Jakarta, focused largely on issues related to Protection

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<sup>231</sup> K.W. Abbott, P. Genschel, D. Snidal and B. Zangl, “Orchestration: global governance through intermediaries”, *op. cit.*, p. 11.

<sup>232</sup> *Jakarta Declaration on Addressing Irregular Movement of Persons*, August 2013, para. 6.

<sup>233</sup> UNHCR, *Special Conference on Irregular Movement of Persons, Jakarta, Indonesia, Statement by Volker Türk, Director of International Protection*, *op. cit.*

<sup>234</sup> *Jakarta Declaration on Addressing Irregular Movement of Persons*, para. 10.A.a-c.

<sup>235</sup> *Ibid.*, para. 10-A.d.

<sup>236</sup> *Ibid.*, para. 10.A.h.

<sup>237</sup> *Ibid.*, para. 10.C.a.

<sup>238</sup> *Ibid.*, para.10.C.d.

<sup>239</sup> *Ibid.*, para.10.C.e.

<sup>240</sup> *Ibid.*, para.10.C.f.

<sup>241</sup> UNHCR, *Co-Chairs’ Summary. International Workshop on the Protection of Irregular Movements of Persons at Sea, Jakarta, Indonesia, 21-22 April 2014*, 22 April 2014, para.3.



at Sea and the SAR regime. Protection was highlighted at the opening of the meeting, both by UNHCR's representative and by the Ministers of Foreign Affairs of Indonesia, who underscored the importance of a "comprehensive solution" involving "responsibility sharing rather than responsibility shifting".<sup>242</sup> A large number of conclusions and recommendations were made regarding the development of a more robust regime pertaining to the protection of the rights of rescued or intercepted persons at sea and upon their disembarkation, largely inspired by UNHCR 10-Point plan of Action and with reference to some of UNHCR's documents and initiatives.

### 3.2. *The link between the Jakarta Declaration and the Bali Process*

The fact that the Bali Process and the meetings under the Jakarta Declaration have been running in parallel raises the question of their relationships. According to Morse and Keohane, if dissatisfied actors have an outside option then "we should normally expect adaptation by the existing institution, since its authority and the scope of its impact will be adversely affected by the establishment of alternative organizations or practices".<sup>243</sup> In this regard, it must be noted that the Jakarta initiative was not initiated to replace the Bali Process, but rather to challenge it by presenting a different voice. The Jakarta Declaration ended with the Ministers saying that they looked forward "to collaborate in effective implementation of such actions though [their] respective national authorities as well as in within the framework of the Bali Process".<sup>244</sup> The Co-Chairs' Summary of the International Workshop on the Protection of Irregular Movements of Persons at Sea specifies that the meeting was "intended to complement the Bali Process on People Smuggling, Trafficking in Persons and other related Transnational crime".<sup>245</sup> What is particularly noteworthy, though, is that it was proposed to bring the "practical actions highlighted at the Workshop, as reflected in the Co-Chairs' Summary", to the attention of the Bali Process Steering Group and Ad Hoc Group "to seek guidance on possible way forward under the Bali Process for proceeding with the modalities of their implementation".<sup>246</sup>

As an increasingly "challenged institution", the Bali Process seems to be adapting to these developments in order to remain relevant. The link between the outcomes of the meetings under the auspices of the Jakarta Declaration and the Bali Process has been fully recognized by the AHG,<sup>247</sup> the Bali Process Strategy for Cooperation developed in 2014 drawing on key outcomes from the two processes.<sup>248</sup> In sum, with the Bali Process becoming the forum to follow up with the implementation of activities, the "Jakarta Declaration" has proved instrumental in UNHCR's effort to bring more protection considerations in the work of the Bali Process, with some success.

Still, it remains to be seen to what extent protection will remain in the agenda of the Bali Process. The 2014 Bali Process Strategy for Cooperation did include protection in the range of activities envisaged, but the number of initiatives proposed was limited and the emphasis remained on actions aimed at combating trafficking in persons, addressing the nexus between irregular migration and transnational organised crime, and preventing movements.<sup>249</sup>

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<sup>242</sup> *Ibid.*, para. 5.

<sup>243</sup> J.C. Morse and R.O. Keohane, *op. cit.*

<sup>244</sup> *Jakarta Declaration on Addressing Irregular Movement of Persons*, section 12.

<sup>245</sup> UNHCR, *Co-Chairs' Summary. International Workshop on the Protection of Irregular Movements of Persons at Sea*, *op. cit.*, para. 2.

<sup>246</sup> *Ibid.*, para. 18.

<sup>247</sup> Bali Process, *Co-Chairs' Statement. Bali Process Ad Hoc Group Senior Officials Meeting*, Canberra, Australia, 6 August 2014, para. 3-4, available at: <http://www.baliprocess.net/files/Ad%20Hoc%20Group/AHG%208th%20SOM%20Outcomes%20Statement.pdf>.

<sup>248</sup> Bali Process, *Bali Process Strategy for Cooperation: 2014 and Beyond*, *op. cit.*

<sup>249</sup> As of December 2015, the main protection-related initiatives organized by the RSO have been the organization of a Regional Roundtable on Irregular movements by Sea in Jakarta in March 2013; the organization of a meeting titled "Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea" in Bangkok in March 2014; the development of a Bali Process policy guides on the identification and protection of victims of trafficking; the organization of a Workshop on Comprehensive Approaches for Addressing Irregular Movements by Sea, funded by the United States and hosted by UNHCR and IOM in Bangkok in January 2015 ; and

### 3. Toward a new regional framework to respond to irregular maritime movements in the region?

The beginning of the Bay of Bengal and Andaman Sea Crisis in May 2015 dramatically illustrated the shift towards a stricter immigration regime that has been taking place in the region over the past two decades. Both Thailand and Malaysia implemented measures to curb smuggling and trafficking activities. This included measures aimed at preventing the crime of trafficking as well as a stricter law enforcement approach through the arrest and prosecution of number of people suspected to be involved in these criminal activities. However, the “protection” component that should be part of any comprehensive strategy to combat smuggling and trafficking was absent; the authorities at first refused to give access to their territory to those people stranded at sea, despite easily available information regarding their humanitarian needs. However, under considerable pressure from the international community the governments of Thailand, Malaysia and Indonesia engaged in a series of meetings to discuss possible responses to the crisis. With these countries placed under considerable scrutiny, protection became an important part of the discussion.

The communiqué issued at the end of the 20 May meeting, known as the “Putrajaya Statement”, acknowledged that “a comprehensive and durable solution to the crisis require, inter alia, the involvement of relevant stakeholders and through the various existing international mechanisms”.<sup>250</sup> The three governments also announced their intention to intensify search and rescue operations in the Andaman Sea. Furthermore, Malaysia and Indonesia agreed to provide “temporary shelter” to a maximum of 7’000 people allegedly stranded at sea, under the condition that they would be resettled in third countries within a timeframe of one-year.<sup>251</sup> Thailand only committed not to push-back any more people stranded in Thai territorial waters;<sup>252</sup> those intercepted would be sent to Indonesia or Malaysia. While the Putrajaya Statement signalled a shift in policy by the countries in the region, Thailand, Malaysia, and Indonesia made clear that they were providing assistance “on a humanitarian grounds” only, not out of any legal obligations due to the fact that they are not parties to the 1951 Refugee Convention.

The Putrajaya Statement puts emphasis on three other aspects. Firstly, the need to immediately identify and address the “root causes and other contributory factors to the recent influx of irregular migrants” in the region. Secondly, their expectation that the international community would “share the burden” and provide the necessary support to the three countries in addressing the problem, particularly through financial support and responsibility for the repatriation and resettlement of the persons concerned. Finally, the Putrajaya Statement emphasises the need to address the phenomenon of trafficking in persons through the ASEAN mechanisms. The Government of Thailand also announced the organization of a “Special Meeting on Irregular Migration in the Indian Ocean” in May 2015, with the participation of a large group of government representatives. While they could have provided a venue to discuss the response to the crisis with a broader group of participants, the Bali Process and the Jakarta

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the development of a partnership with a South Korean entity to develop training programs aimed at enhancing a victim-centred approach to trafficking. See Bali Process, *RSO activities*, available at: <http://www.baliprocess.net/regional-support-office/activities>.

<sup>250</sup> Ministers of Foreign Affairs of Malaysia, Indonesia and Thailand, *Joint Statement: Ministerial Meeting on Irregular Movement of People in Southeast Asia*, 20 May 2015, available at: <http://reliefweb.int/report/myanmar/joint-statement-ministerial-meeting-irregular-movement-people-southeast-asia> (last visited 03 April 2016).

<sup>251</sup> *Ibid.*

<sup>252</sup> “Thailand won’t push back migrants stranded in waters: Thai MFA”, *Channel NewsAsia*, 20 May 2015, available at: <http://www.channelnewsasia.com/news/asiapacific/thailand-won-t-push-back/1860500.html#.VVyX6LZDH1M.twitter> (last visited 03 February 2016). However, rather than receiving them on its territory, by fear that they would stay for an indefinite period of time because of the lack of other solutions, the Thai government proposed to deploy two Navy vessels as “floating platforms” with medical team on board off the coast of Thailand to provide necessary assistance and medical help. Thailand would then “facilitate” the passage of the concerned persons to the “temporary shelters” in Malaysia and Indonesia. See “Thai PM deploys carrier to act as migrant processing centre”, *Channel NewsAsia*, 25 May, available at: <http://www.channelnewsasia.com/news/thai-pm-deploys-carrier/1871388.html> (last visited 03 April 2016).

Declaration, were not considered by Thailand, Malaysia and Indonesia as appropriate forums for this discussion to take place.

### 3.1. *The joint Bay of Bengal and Andaman Sea Proposals for Action*

International organizations such as UNHCR, IOM, and a group of human rights experts comprising some of the Special Rapporteurs of the Human Rights Council issued statements welcoming the measures announced in Putrajaya as “an important initial step” in the search for solutions to the situation, while stressing the need to take urgent measures to bring people ashore without delay.<sup>253</sup> It is in this context that UNHCR elaborated a Plan of Action titled *Bay of Bengal and Andaman Sea Proposals for Action*<sup>254</sup> to be circulated ahead of the 29 May meeting in order to influence its outcome. The document was also endorsed by IOM and UNODC. The core elements of the Plan of Action were already announced in a Joint Statement issued by UNHCR, IOM, OHCHR, and the Special Representative of the Secretary-General (SRSG) for International Migration, Peter Sutherland, on the 19 May.<sup>255</sup>

The Plan of Action actually sets out 10 “concrete steps that governments in the region could take immediately to respond to the challenge confronting them” in the Bay of Bengal and the Andaman Sea. These included the strengthening of SAR operations; the establishment of effective, predictable disembarkation to a place of safety; the establishment or enhancement of reception facilities; the identification and treatment of those with international protection needs; the facilitation of solutions for persons in need of international protection; support for return of those not in need of international protection; the reinforcement of gathering, sharing, analysis and use of information related to movements by sea; capacity building activities in countries of transit and first asylum; the expansion of legal alternatives to dangerous movements; and activities aimed at addressing the humanitarian, human rights and development needs in source countries. The document drew extensively on UNHCR 10-Point Plan of Action and built upon the Regional Cooperation Framework that lies “at the heart of the Bali Process”<sup>256</sup> according to UNHCR.

### 3.2. *The Special Meeting on Irregular Migration in the Indian Ocean*

The Special Meeting on Irregular Migration in the Indian Ocean took place in Bangkok with the participation of 17 governments, including Bangladesh and Myanmar. Apart from the renewed commitment from the concerned states to strengthen the efforts to rescue the people stranded at sea, the meeting resulted in the adoption of a set of recommendations presenting a “Roadmap” for the definite resolution of the problem of irregular maritime movement in the Bay of Bengal and Andaman Sea.

The 17 recommendations are articulated around three main parts which relate to the immediate responses needed to provide protection to people stranded at sea; the measures to be taken to prevent irregular migration, smuggling of migrants and trafficking in persons in the region; and the need to address the “root causes”. Some of the measures put forward in the joint Proposals for Action for the protection of the concerned persons were endorsed, but not all of them, thus reflecting the specific concerns of the affected countries. All in all, the roadmap

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<sup>253</sup> UNHCR, *UNHCR Statement on southeast Asia Sea Movements*, 20 May 2015, available at: <http://www.unhcr.org/555c53ca9.html> (last visited 03 April 2016); OHCHR, *SE Asia/Migrants: “Saving the lives of those stranded at sea should remain the priority” – UN rights experts*, 21 May 2015, available at:

<http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=15992&LangID=E> (last visited 03 April 2016); IOM, *IOM Welcomes Decision to Save Lives of Migrants at Sea in Southeast Asia*, 20 May 2015, available at: <http://www.iom.int/news/iom-welcomes-decision-save-lives-migrants-sea-southeast-asia> (last visited 03 April 2016).

<sup>254</sup> UNHCR, IOM, and UNODC, *Bay of Bengal And Andaman Sea: Proposals for Action*, *op. cit.*

<sup>255</sup> *Joint Statement by UNHCR, OHCHR, IOM and SRSG for Migration and Development. Search and Rescue at sea, disembarkation, and protection of the human rights of refugees and migrants now imperative to save lives in the Bay of Bengal and Andaman Sea*, 19 May 2015, available at: <http://www.unhcr.org/555aee739.html>.

<sup>256</sup> UNHCR, IOM, and UNODC, *Bay of Bengal and Andaman Sea: Proposals for Action*, *op. cit.*, Introduction.

provides a quite good balance between protection considerations and the security concerns of states.

The influence of UNHCR, who contributed substantively to the meeting based on its expertise, has been pervasive. The first set of measures aimed at providing protection to people stranded at sea includes most of the elements proposed by UNHCR, that is, information-sharing;<sup>257</sup> the intensification of search and rescue operations;<sup>258</sup> the need to identify predictable disembarkation options and to harmonize the reception arrangements;<sup>259</sup> and the identification of people with protection needs through effective screening processes.<sup>260</sup> It also calls for the establishment of a “mechanism or joint task force to ensure the necessary support to those rescued at sea”.<sup>261</sup>

Solutions for persons in need of international protection, as well as clear outcomes for other persons, were also part of the Bay of Bengal and Andaman Sea Proposals for Action.<sup>262</sup> That refugees should be provided with a durable solution, while persons found not to be in need of protection should be returned, counted amongst the 'core principles' underpinning the RCF adopted in the context of the Bali Process in March 2011.<sup>263</sup> Interestingly, the summary document issued at the May 29 Meeting in Bangkok seems to overlook this issue. References to resettlement and repatriation are only included in the proposals to establish a mechanism or joint task force to support countries that provide humanitarian assistance to the 'irregular migrants'. Countries in the region did not want to refer to 'solutions for persons in need of international protection', that is, for refugees, as a separate action point because they do not recognize officially the fact that some of these people may be 'refugees'.

The second set of measures relates to the “prevention of irregular migration, smuggling of migrants, and trafficking in persons”. It includes some of the measures already envisaged in the framework of the other existing regional institutions dealing with smuggling and trafficking from a law enforcement and border control perspective. For instance, it calls for the strengthening of national law enforcement and cooperation among states;<sup>264</sup> the identification of national contact points for the purpose of information and intelligence sharing;<sup>265</sup> the implementation of practical operations aimed at curbing transnational criminal networks and their activities;<sup>266</sup> or the establishment of a “special investigation taskforce” among the key affected countries to suppress transnational organized criminal syndicates.<sup>267</sup>

Two other measures included in this part also play a protective role. On the one hand, the document recommends the development and implementation of “comprehensive multimedia regional communication campaigns”. While the objective of these campaigns is primarily to “send a strong message to transnational criminal syndicates” regarding the determination of the concerned countries to “seriously suppress their activities”, they also aim at informing - and ultimately deterring – potential candidates to the trip of the risks that such journeys entail.<sup>268</sup> On the other hand, the roadmap calls for the enhancement of “legal, affordable and safe channels of migration”, that is, for legal alternatives to irregular movements.<sup>269</sup> Humanitarian admission programs, community-based or academic sponsorships, programmes to admit relatives of those already residing in a country, or labour mobility schemes through which people could pursue employment opportunities in a third country are some examples of such alternatives. Offering legal avenues for accessing safety and protection, or better economic

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<sup>257</sup> *Summary, Special Meeting on Irregular Migration in the Indian Ocean, op. cit.*, para. 10.f.

<sup>258</sup> *Ibid.*, 10.b.

<sup>259</sup> *Ibid.*, 10.c.

<sup>260</sup> *Ibid.*, 10.e.

<sup>261</sup> *Ibid.*, 10.g.

<sup>262</sup> UNHCR, IOM, and UNODC, *Bay of Bengal And Andaman Sea*, steps 5-6.

<sup>263</sup> See Bali Process, *Co-Chairs' Statement. Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, op. cit.*, para. 16.3-4.

<sup>264</sup> *Ibid.*, 10.i.

<sup>265</sup> *Ibid.*, 10.j.

<sup>266</sup> *Ibid.*, 10.k.

<sup>267</sup> *Ibid.*, 10.l.

<sup>268</sup> *Ibid.*, 10.o.

<sup>269</sup> *Ibid.*, 10.p.

opportunities for those fleeing poverty and misery would ensure that less people embark on long and dangerous journeys by sea.

Measures to respond to the challenges posed by smuggling and trafficking were subsequently discussed at the “ASEAN Ministerial Meeting on Transnational Crime: Irregular Movement of Persons in the Southeast Asia Region” convened on 2 July 2015. The meeting focused on the law enforcement aspects of the response to the crisis and led to the adoption of a new document known as the “Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia” which puts the emphasis on law enforcement measures. It was, however, recommended to develop “comprehensive regional communication campaigns” to prevent irregular movements that are “closely linked to trafficking in persons and people smuggling” – an initiative that echoed one of the measures proposed in the 29 May “Roadmap”. It was decided also to establish a “trust fund” for voluntary contributions from states “to support the humanitarian and relief efforts involved in dealing with challenges resulting from irregular movement of persons in Southeast Asia.”<sup>270</sup> The establishment of such a task force, but with a much narrower mandate limited to investigations on smuggling and trafficking crimes, was proposed during the Meeting on Irregular Migration in the Indian Ocean at the end of May.<sup>271</sup>

Lastly, the 29 May “Roadmap” includes a section highlighting the need to address the “root causes” of displacement through a broad range of economic, political and social measures.<sup>272</sup> The need to address the root causes of the displacement in the region had been strongly emphasized by Thailand, Malaysia and Indonesia in the Putrajaya Statement. The joint UNHCR, IOM, and UNODC Proposals for Action also contained a section focusing on the need to address the root causes, that is, to work toward the development of the region and the regularization of the status of the Rohingyas. Bangladesh and Myanmar, who participated in the meeting in Bangkok, seem to also agree on the necessity to address the factors prompting the displacement in the first place. Indeed, it seems illusory, as history demonstrates amply in the case of the Rohingyas, to hope that their movements would stop unless their situation is substantially improved.

While the Bay of Bengal and Andaman Sea Crisis quickly disappeared from the headlines following the May 29 meeting in Bangkok, with no additional boats being found adrift after this date, a series of meetings were subsequently organized to follow up on proposals made to address the issue of irregular maritime movement in the region. A Second Special Meeting on Irregular Migration in the Indian Ocean was convened in Bangkok on 3-4 December 2015 to exchange on the efforts and measures that have been undertaken in this regard by the main stakeholders – the five most affected countries, plus UNHCR, IOM and UNODC. A “draft Action Agenda” with concrete actions to address the problem of irregular migration in the Indian Ocean was submitted by Thailand, but more discussions on the proposals were needed. Thailand also announced its intention to move with “a multimedia regional information campaign” in the five concerned countries with the support of IOM.<sup>273</sup> The Second Special Meeting was followed by the organization of a “Special Retreat on Irregular Migration in the Indian Ocean” on February 2016. In the meantime, a “Jakarta Declaration Roundtable Meeting on Addressing the Root Causes of Irregular Movement of Persons” was organized by the Government of Indonesia in November 2015 to follow up on the commitments to address the root causes.

#### **4. An increasing focus on protection within the Bali Process as a result of the Bay of Bengal and Andaman Sea Crisis**

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<sup>270</sup> ASEAN, *Chairman’s Statement. Emergency ASEAN Ministerial Meeting on Transnational Crime concerning Irregular Movement of Persons in Southeast Asia*, Kuala Lumpur, Malaysia, 2 July 2015, available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/Chairman-Statement-Emergency-ASEAN-Ministers-Meeting-on-Transnational-Crime-2-July-2015-1.pdf>.

<sup>271</sup> *Summary, Special Meeting on Irregular Migration in the Indian Ocean*, *op. cit.*, para. 10.1.

<sup>272</sup> *Ibid.*, 10.q.

<sup>273</sup> Ministry of Foreign Affairs of the Kingdom of Thailand, *Top Stories: Result of the 2<sup>nd</sup> Special Meeting on Irregular Migration in the Indian Ocean*, 4 December 2015, available at: <http://www.mfa.go.th/main/en/media-center/28/62757-Result-of-the-2nd-Special-Meeting-on-Irregular-Mig.html>.

The developments at the regional level following the Bay of Bengal and Andaman Sea Crisis have had a substantial impact on the Bali process, whose Sixth Ministerial Conference took place on the 23 of March 2016. The Bali Process was once again challenged with the response to the crisis being framed outside the existing framework, thus pressuring it to find a way to remain relevant in the new institutional landscape.

#### *4.1. The sixth Ministerial Conference and the recognition of the importance of protection alongside other measures*

The Ministerial Conference not only took note of the various national and regional efforts to respond to the crisis in the region, it also tried to find a niche for the Bali Process within the wider response framework to the crisis. For instance, the Ministers recommended that the members of the Bali Process undertake a review of the region's response to the crisis "to share lessons and work to implement necessary improvements".<sup>274</sup> The Ministers also agreed to develop "a mechanism which would authorize the Co-chairs to consult, and if necessary, convene future meetings to discuss urgent irregular migration issues with affected and interested countries in response to current regional issues or future emergency situation".<sup>275</sup> While it was sidelined at the beginning of the crisis, this proposal may be seen as way for the Bali Process to adapt to the situation in order to keep its relevance. In particular, the proposal of a "mechanism" to allow members to come together quickly in case of emergencies may give a more important role to the Bali Process in similar situations.

While the protection of people on the move in the region has been neglected until recently, it seems to have become a priority alongside the traditional focus on law enforcement and border control measures. For the first time in the Bali Process history, the Co-Chairs' Summary placed as much emphasis on the protection aspects of a response to irregular movements by sea in the region as on the criminal aspects. In particular, Ministers "underscored the importance of addressing humanitarian and protection needs in managing irregular migration". The measures they recommended in this regard are largely inspired from the main elements of the response to the Bay of Bengal and Andaman Sea Crisis as reflected in the joint Proposals for Action and the 29 May "Roadmap". For instance, the Ministers "directed that members give priority to coordinating procedures for rescue at sea, identifying predictable places for disembarkation, improving reception and screening systems, and engaging civil society in delivery of post-disembarkation emergency assistance". They also "highlighted the importance of temporary protection and locals stay arrangements and recommended research into their viability".<sup>276</sup> Other aspects highlighted by the Ministers include the need to address the root causes of irregular migration;<sup>277</sup> the importance of information dissemination to raise awareness of the risk of irregular sea voyages;<sup>278</sup> the need to expand safe, legal and affordable alternative pathways to irregular movements;<sup>279</sup> and the importance of "civil registration in border management and in providing basic protection for migrants, refugees and asylum-seekers" as a way "to identify and provide protection to at-risk populations".<sup>280</sup> The advocacy work of UNHCR had thus made its way into the Bali Process to an extent that would certainly not have been conceivable before the crisis.

#### *4.2. The Bali Declaration: a breakthrough at the regional level*

In response to the crisis, the members of the Bali Process also adopted a "Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime". The new Declaration is particularly important insofar as it clearly emphasizes the protection aspects of the response to mixed migratory movements rather than measures aimed at combatting

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<sup>274</sup> Bali Process, *Co-chairs' Statement. Sixth Ministerial Conference on the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia*, 23 March 2016, para. 2, available at : <http://www.baliprocess.net/files/BPMC%20Co-chairs%20Ministerial%20Statement%20with%20Bali%20Declaration%20attached%20-%202023%20March%202016.docx.pdf>.

<sup>275</sup> *Ibid.*, para. 5.

<sup>276</sup> *Ibid.*, para. 8.

<sup>277</sup> *Ibid.*, para. 6.

<sup>278</sup> *Ibid.*, para. 9.

<sup>279</sup> *Ibid.*, para. 10.

<sup>280</sup> *Ibid.*, para. 7.

trafficking and smuggling. For instance, the new Declaration acknowledges “the importance of a comprehensive approach to managing irregular migration by land, air and sea, including victim-centered and protection-sensitive strategies, as appropriate”.<sup>281</sup> It highlights the need to “identify and provide safety and protection” to all categories of people on the move, i.e. migrants, victims of human trafficking, smuggled persons, asylum seekers and refugees.<sup>282</sup> With regard to refugees, the Ministers recognized “the need to grant protection for those entitled to it” while reaffirming that in all cases “the principle of *non-refoulement* should be strictly respected”.<sup>283</sup> Trafficking in persons is referred to as “a serious violation of human rights” whose victims “should be provided with assistance and protection”.<sup>284</sup>

The Declaration also makes reference to the set of measures proposed by UNHCR and included in the 29 May “Roadmap” to address irregular movements by sea. In particular, the Declaration mentions the need to strengthen SAR operations, the identification of predictable disembarkation options, the identification of those with protection needs,<sup>285</sup> the need to find “comprehensive and long-term solutions” for persons in need of international protection<sup>286</sup> and to provide for “safe and dignified return” for the other people,<sup>287</sup> the importance of expanding safe, legal and affordable migration pathways to reduce irregular movements,<sup>288</sup> the organization of public information campaigns<sup>289</sup> and the need to address the “root causes” of irregular movements in the region.<sup>290</sup> It also goes beyond these elements by encouraging member states “to explore potential temporary protection and local stay arrangements for asylum seekers and refugees”; by acknowledging the need for adequate access by humanitarian providers, including UNHCR and IOM, as appropriate; by encouraging member states to explore alternatives to detention for vulnerable groups,<sup>291</sup> and by acknowledging the importance of civil registration in providing identity and basic protection for individuals.<sup>292</sup> The Ministerial Declaration was welcomed by UNHCR,<sup>293</sup> with the Assistant High Commissioner for Protection stating that the organization was “encouraged by the realization that responses must be holistic”, combining “the need to cover border control, security aspects, and combating smuggling and trafficking” with “a clear and unequivocal human security, and indeed, protection-of-people dimension, including for refugees”.<sup>294</sup>

The Declaration is of course a non-binding document. The language used remains quite soft – states are generally “encouraged” to take such measures, while the Ministers “acknowledge” the importance of different aspects related to the protection of persons on the move. However, the Declaration – the first-ever declaration adopted in the 14 years of existence of the Bali Process - arguably represents a breakthrough in the framework of the Bali Process. Never before has the importance of protection been expressed in such a clear manner within the Process. In comparison, the Declaration contains only one paragraph highlighting the importance of effectively criminalizing smuggling and trafficking and developing law enforcement capacities.<sup>295</sup> The developments in the region since 2013, with the emergence of

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<sup>281</sup> *Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime*, 23 March 2016, para. 5, available at:

<http://www.baliprocess.net/files/Bali%20Declaration%20on%20People%20Smuggling%20Trafficking%20in%20Persons%20and%20Related%20Transnational%20Crime%202016.pdf>.

<sup>282</sup> *Ibid.*, para. 3.

<sup>283</sup> *Ibid.*, para. 5.

<sup>284</sup> *Ibid.*, para. 8.

<sup>285</sup> *Ibid.*, para. 5.

<sup>286</sup> *Ibid.*, para. 9.

<sup>287</sup> *Ibid.*, para. 10.

<sup>288</sup> *Ibid.*, para. 4, 11-12.

<sup>289</sup> *Ibid.*, para. 13.

<sup>290</sup> *Ibid.*, para. 4.

<sup>291</sup> *Ibid.*, para. 6.

<sup>292</sup> *Ibid.*, para. 7.

<sup>293</sup> UNHCR, *UNHCR welcomes Ministerial Declaration in Bali, calls for new compact to absorb refugees in the region*, 23 March 2016, available at: <http://www.unhcr.org/56f259336.html>.

<sup>294</sup> UNHCR, *Statement by Volker Türk, Assistant High Commissioner for Protection, Ministerial Meeting of the Bali Process, Bali, Indonesia*, 23 March 2016, available at :

<http://www.unhcr.org/56f2598f9.html> (last visited 12 May 2016).

<sup>295</sup> *Ibid.*, para. 8.

competing initiatives such as the Jakarta Declaration and the eruption of the much mediatized Bay of Bengal and Andaman Sea Crisis, may thus have led the Bali Process to proceed to some institutional adjustments, in particular through a better acknowledgment of the protection aspects of the response to irregular movements, in order to remain relevant in the region.



## CONCLUSION

Global migration governance is characterized by “a fragmented tapestry of institutions at the bilateral, regional, inter-regional, and multilateral levels, which vary according to different types of migration”<sup>296</sup> and the Asia-Pacific region offers a particularly good example of this complexity, of the challenges it raises, as well as of the opportunities it opens to international organizations. The situation in the region is all the more interesting insofar as many countries are not parties to the main international instruments related to the protection of the different categories of people on the move, and as they tend to resist any attempt toward the development of regional/sub-regional binding frameworks on these issues. With their informal and non-binding nature, RCPs and other similar initiatives thus have a particularly important role to play in promoting the principles that should underpin the management of migration and displacement movements in the region in a way that respects the rights and dignity of people on the move.

In the context of the Indochinese Refugee Crisis, the initiatives in the region had long been focusing on the need to respond to a mass influx of refugees in a way that balanced the concerns of states and the protection needs of the concerned people. The Comprehensive Plan of Action adopted in 1989 arguably represented the first international initiative to respond to a situation of mixed migratory movements, with an increasing number of Vietnamese boat people being considered as economic migrants rather than refugees. The end of the CPA in 1996-1997 corresponded with a change of paradigm in the way states in the region approach the phenomenon of migration. While UNHCR continued to promote a regional dialogue on refugee protection and asylum issues, the priorities of states in the region increasingly shifted toward more restrictive measures in the name of the fight against smuggling and trafficking, which have been considered in the meantime as transnational crimes. The Manila Process, the Bangkok Declaration and the Bali Process embodied this regime shift, while the focus and the mandate of the Asia-Pacific Consultations evolved in the same direction. In this context, the protection aspects of migratory movements were largely sidelined despite UNHCR's efforts to promote a more protection-sensitive approach through its engagement within the regional institutions.

The complexity of the migration institutional arrangements in the Asia-Pacific region has increased recently with the initiatives taken by Indonesia and Thailand under the umbrella of the “Jakarta Declaration” and the “Special Meeting on Irregular Migration in the Indian Ocean”, respectively. As this paper suggests, these two initiatives illustrated a situation of “contested multilateralism” where states tend to disagree on the dynamics and the “lead” of the existing processes rather than on the normative content of the regime in itself. Indeed, both Indonesia and Thailand initiated these meeting cycles to address a specific situation they were facing, that is, the strict immigration policy implemented by Australia in the former case, and the Bay of Bengal and Andaman Sea Crisis in the latter. In doing so, they contributed to the increasing complexity of the migration-related institutional architecture in the region, while at the same time reinforcing the counter-smuggling and counter-trafficking framework through the restatement of the same rules and recommendations in different forums.

In normative terms, the most important change stemming from these recent developments is the increasing recognition of the necessity to address the protection and humanitarian needs of migrants and refugees alongside more restrictive measures. This shift has mainly been prompted by a series of humanitarian and diplomatic crisis related to irregular movements by sea that have attracted considerable media attention and led to the development of new initiatives. In this regard, this paper demonstrated how UNHCR has been able to adapt and take advantage of the increasing regime complexity in order to successfully impose its discourse on the development of a more “protection-sensitive” approach to irregular migration across the region. While the Bali Process seemed for long time largely unresponsive to UNHCR's initiatives, the convening of the Special Conference on Irregular Movement of Persons in Jakarta in August 2013, in a context of tensions between Indonesia and Australia, represented an un hoped-for opportunity for UNHCR to promote a different message based on the principle of “responsibility-sharing” rather than on attempts to shift responsibility towards other states. While Southeast Asian states were under the spotlight of the international community regarding their response to the Bay of Bengal and Andaman Sea Crisis, the “Roadmap” they adopted during the Special Conference on Irregular Migration in the Indian

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<sup>296</sup> A. Betts, “Introduction: Global Migration Governance”, *op. cit.*, p. 1.

Ocean included many elements from UNHCR's "toolbox" concerning a comprehensive response to mixed migratory movements by sea. These include, *inter alia*, the need to strengthen SAR operations, the identification of the different categories of people concerned, the need to provide an outcome for both people found in need of international protection and those who are not, the development of alternative legal pathways, the organization of information campaigns and the need to address the "root causes" of movements.

But the peak of these developments is the adoption of the Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime in March 2016. Acting as a challenged institution at risk of becoming increasingly irrelevant, the Bali Process adapted by acknowledging the legacy of the other initiatives and by envisaging a role in their follow up. The language of protection promoted by UNHCR and embedded in both the Jakarta Declaration and the 29 May "roadmap" thus made its way into the Bali Process, something that would have been hardly conceivable in other circumstances. The Declaration is certainly the most solemn document adopted in the Framework of the Bali Process, and its content revolves primarily around protection considerations. Both the language and the recommendations are here also largely inspired from UNHCR's 10-Point Plan of Action or from the Bay of Bengal and Andaman Sea Proposals for Action.

The phenomenon of regime complexity in the field of migration in Asia-Pacific has thus not led to a fragmentation of the normative framework pertaining to the protection of migrants and refugees, as might have been feared, but rather to its reinforcement through the reaffirmation of principles that are largely shared globally. This opens the way to a proper "comprehensive" approach to irregular movements in the region, addressing both the security and national concerns of states and the protection needs of the people concerned. As the Bay of Bengal and Andaman Sea Crisis illustrated, an approach focusing solely on prevention and prosecution is likely to fail. Not only would it have the unintended effect of pushing more people towards the use of criminal networks in an attempt to circumvent the measures in place, thus fueling further smuggling and trafficking, it would also create additional human suffering that would in turn put the concerned states under considerable scrutiny and pressure.

However, while the developments at a normative level are encouraging, there are still challenges ahead in the concrete implementation of the principles related to the protection of migrants and refugees that have been reaffirmed on many occasions. In Southeast Asia in particular, the main receiving states, i.e. Malaysia, Thailand and Indonesia, have largely tolerated the presence on their territory of some categories of people with specific protection needs, such as refugees. However, these states have generally relied on International Organizations and NGOs to distribute assistance, to provide specific services such as healthcare and psychosocial support, to run shelters and livelihood programs, or to organize return. Concrete responsibility sharing arrangements with a broad range of partners will thus be key in ensuring protection in the context of mixed migratory movements in the region.

## Annex I: Main migration-related regional processes and institutions in Asia-Pacific

Name	Initiator / Secretariat	Context	Main Areas of Interest	Participants
Association of South-East Asian Nations (ASEAN)	ASEAN Secretariat	Established in 1967 in the context of the Cold War by Indonesia, Malaysia Philippines, Singapore and Thailand to oppose the rise of communism in the region and promote economic development.	While not specifically established to deal with migration issues, the ASEAN addresses issues related to regular migration (in particular high-skilled migration) and trafficking	Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam.
Manila Process (IOM Regional Seminar on Irregular Migration and Migrant Trafficking in East and South-East Asia) – no more active	Initiator: IOM Secretariat: IOM	Outgrowth of a “Regional Seminar on Irregular Migration and Trafficking” organized by IOM with the Government of the Philippines	Primary focus on combating and reducing irregular migration and trafficking within the region; return and reintegration; entry/border control.	Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Republic of Korea, Laos, Malaysia, Myanmar, New Zealand, Papua New Guinea, Philippines, Singapore, Thailand, Vietnam and the Hong Kong SAR.
Inter-governmental Asia-Pacific Consultations on Refugees, displaced Persons, and Migrants (APC) - no more active	Initiators: UNHCR and Australia Secretariat: APC, supported by IOM and UNHCR	Outgrowth from a meeting organized by UNHCR and the Government of Australia	Issues relating to population movements, including refugees and displaced persons. Mandate extended to cover trafficking and irregular migration in 1997.	Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Fiji, Hong Kong SAR, India, Indonesia, Japan, Kiribati, Laos, Macau SAR, Malaysia, Micronesia, Mongolia, Myanmar, Nauru, Nepal, New Caledonia (France), New Zealand (until 2003), Pakistan, Papua New Guinea, the Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Vanuatu and Viet Nam.
Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process)	Initiator: Australia Secretariat: Australia and Indonesia (+IOM and UNHCR in the RSO)	The Bali Process was established following the <i>M.V. Tampa</i> incident in 2002. It is arguably the “regional dimension” of the Pacific solution established by the Government of Australia to prevent further arrival by boat on its territory.	Migrant smuggling and human trafficking; prevention of irregular movements; information and intelligence sharing; cooperation among law enforcement agencies; border control; return; information campaigns to deter new arrivals.	Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, DPR of Korea, Fiji, Hong Kong SAR, India, Indonesia, Iran, Iraq, Japan, Jordan, Kiribati, Lao PDR, Macau SAR, Malaysia, Maldives, Mongolia, Myanmar, Nauru, Nepal, New Caledonia (France), New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Thailand, Timor-Leste, Tonga, Turkey, United Arab Emirates, United States of America, Vanuatu, Viet Nam. IOM, UNHCR, and UNODC are also members.
The Jakarta Declaration	Indonesia and UNHCR	The first Special Conference on Irregular Movements of Persons was organized in August 2013 in a context of growing tensions between Australia and Indonesia on Australian interdiction policies.	Irregular migration and trafficking; prevention, early detection, protection, prosecution.	Afghanistan, Australia, Bangladesh, Cambodia, Indonesia, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Sri Lanka, Thailand, UNHCR, and IOM. Iran participated to the subsequent meetings.
The Special Meeting on Irregular Migration in the Indian Ocean	Thailand	The first meeting was organized on the 29 May 2015 in the context of the Bay of Bengal and Andaman Sea Crisis	Prevention of irregular migration, smuggling of migrants and trafficking in persons, protection, “root causes”.	Afghanistan, Australia, Bangladesh, Cambodia, India, Indonesia, Iran, Lao PDR, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Sri Lanka, Thailand, and Vietnam. Representatives from UNHCR, IOM and UNODC were also invited.

## Annex II: Main International instruments related to human rights and migration

	ICESCR	ICCPR	ICERD	CEDAW	CAT	CRC	CMW	Refugee Convention	1967 Protocol	Protocol against Smuggling	Protocol against trafficking
<b>Bangladesh</b>	05 Oct. 98 (a)	06 Sep. 00 (a)	11 Jun. 79 (a)	6 Nov. 84 (a)	05 Oct. 98 (a)	03 Aug. 90 (r)	24 Aug. 11 (r)				
<b>Brunei Darussalam</b>				24 May 06 (a)	22 Sep. 15 (s)	27 Dec. 95 (a)					
<b>Cambodia</b>	26 May 92 (a)	26 May 92 (a)	28 Nov. 83 (r)	15 Oct. 92 (a)	15 Oct. 92 (a)	15 Oct. 92 (a)	27 Sep. 04 (s)	15 Oct. 92 (a)	15 Oct. 92 (a)	12 Dec. 05 (a)	02 Jul. 07 (a)
<b>India</b>	10 Apr. 79 (a)	10 Apr. 79 (a)	03 Dec. 68 (r)	09 Jul. 93 (r)	14 Oct. 97 (s)	11 Dec. 92 (a)				05 May 11 (r)	05 May 11 (r)
<b>Indonesia</b>	23 Feb. 06 (a)	23 Feb. 06 (a)	25 Jun 99 (a)	13 Sep. 84 (r)	28 Oct. 98 (r)	05 Sep. 90 (r)	31 May 12 (r)			28 Sep. 09 (r)	28 Sep. 09 (r)
<b>Lao PDR</b>	13 Feb. 07 (r)	25 Sep. 09 (r)	22 Feb. 74 (a)	14 Aug. 81 (r)	26 Sep. 12 (r)	08 May 91 (a)				26 Sep. 03 (a)	26 Sep. 03 (a)
<b>Malaysia</b>				05 Jul. 95 (a)		17 Feb. 95 (a)					26 Feb. 09 (a)
<b>Myanmar</b>	16 Jul. 15 (s)			22 Jul. 97 (a)		15 Jul. 91 (a)				30 Mar. 04 (a)	30 Mar. 04 (a)
<b>Philippines</b>	07 Jun 74 (r)	23 Oct. 86 (r)	15 Sep. 67 (r)	05 Aug. 81 (r)	18 Jun. 86 (a)	21 Aug. 90 (r)	5 Jul. 95 (r)	22 Jul. 81 (a)	22 Jul. 81 (a)	28 May 02 (a)	28 May 02 (a)
<b>Singapore</b>				05 Oct. 95 (a)		05 Oct. 95 (a)					28 Sep. 15 (a)
<b>Sri Lanka</b>	11 Jun. 80 (a)	11 Jun. 80 (a)		05 Oct. 81 (r)	03 Jan. 94 (a)	12 Jul. 91 (r)	11 Mar. 96 (a)			13 Dec. 00 (s)	15 Jun. 15 (r)
<b>Thailand</b>	05 Sep. 99 (a)	29 Oct. 96 (a)	28 Jan. 03 (a)	09 Aug. 85 (a)	02 Oct. 07 (a)	27 Mar. 92 (a)				18 Dec. 01 (s)	17 Oct. 13 (a)
<b>Vietnam</b>	24 Sep. 82 (a)	24 Sep. 82 (a)	09 Jun. 82 (a)	17 Feb. 82 (r)	05 Feb. 15 (r)	28 Feb. 90 (r)					08 Jun. 12 (a)

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