



UNDOING PRECARITY

Elevating Positive Practices for Refugee Protection
in South and Southeast Asia

OPEN SOCIETY
JUSTICE INITIATIVE



REFUGEE SOLIDARITY
NETWORK

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Cover photo: Refugees gather outside the office of the United Nations High Commissioner for Refugees in Jakarta, Indonesia, on January 26, 2017. Photo: © Kemal Jufri/NYTimes/Redux

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A GUIDE TO USING THIS REPORT

This report highlights ways in which countries in South and Southeast Asia that are not signatories to the 1951 Refugee Convention or its 1967 Protocol have nonetheless extended protections for and advanced the rights of refugees living within their borders through various legislative and administrative practices. The guide seeks to promote practical and actionable steps that can be adopted and adapted in other settings, informing existing and emerging efforts to help refugees defend and realize their rights.

The research underlying this report was undertaken by the Refugee Solidarity Network and the Open Society Justice Initiative beginning in July 2018. It involved multiple stages and methods, including:

- desk review of primary sources, such as legislative acts, administrative orders and memos, and judicial opinions and decisions;
- findings, reviewed by experts, from six host countries: Bangladesh, India, Indonesia, Malaysia, Pakistan, and Thailand;¹
- consultations, held in-person in Kuala Lumpur, Dhaka, and Cox's Bazar, from April 2019, and then virtually up to December 2020;
- review and substantial contributions by regional expert Brian Barbour;²
- verification of findings and research into developments pertaining to the positive practices compiled in this report;
- peer review by T. Alexander Aleinikoff and Ian M. Kysel of the Secretariat of the Global Strategic Litigation Council for Refugee Rights.

This report provides a snapshot of policies and practices in place at the time of its writing (between 2019 and 2021). It is not intended as a comprehensive enumeration of all relevant positive practices in the region, nor does it include a thorough overview and discussion of the legal frameworks identified in each setting. Legal practitioners, advocates, and policymakers working on refugee rights issues in South and Southeast Asia are the report's primary audience and therefore some degree of familiarity with migration and refugee issues in the region on the part of the reader is assumed.

The report fully appreciates the risks associated with highlighting government action that falls short of established international protection standards. To be effective, any strategy aimed at improving conditions for refugees must involve a nuanced understanding of the evolving political dynamics that shape refugee and migration policy. The report's suggestions do not ignore those realities but seek to provide ideas for consideration for those engaged in the difficult task of navigating such complex environments.

TERMINOLOGY

Alternatives to Detention

Alternatives to detention are defined by the International Detention Coalition as “any law, policy or practice by which persons are not detained for reasons relating to their migration status.”³

Asylum Seeker

Given the widespread lack of a formal legal definition of refugee in the countries surveyed, for the purposes of this publication, the terms “asylum seeker” and “protection seeker” are used interchangeably with the term “refugee,” unless the distinction between recognized and unrecognized status of an individual is relevant to the discussion, at which point an explanation will be offered.

Customary International Law

Customary international law is a primary source of international law.⁴ Customary international law is established by showing state practice (how states behave, what they say and do) and *opinio juris* (a belief by states that the practice is required by law).⁵

Legal Identity

Legal identity can be “understood as a set of elements and characteristics, which defines each person and governs their relationships, obligations and rights under both private and public law.”⁶

Non-refoulement

Non-refoulement is a binding norm of international law that prohibits states from returning a person to territories where there is a risk that their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.⁷

Protection

As it is used in this report, protection encompasses the set of activities of a state or other actor that recognize, enable, and safeguard individuals’ rights in the provision of humanitarian assistance and other programs for displaced persons. Protection may be most fully expressed under the set of rights and entitlements laid out by instruments of international human rights and refugee law as a baseline, supplemented by rights-enhancing practices and policies. In practice, protection is often only partially realized.

TERMINOLOGY

Refugee

As defined in the 1951 Geneva Convention on the Status of Refugees, a refugee is a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.”⁸ Other instruments of international law, such as the Cartagena Declaration on Refugees and the Organization of African Unity Refugee Convention, provide a broader definition, considering individuals fleeing generalized violence or conflict in their country as refugees.

Throughout this document, the term “refugee” is used to include reference to any individual who has fled persecution or conflict and crossed an international boundary seeking international protection.⁹

Temporary Protection

“Temporary protection” has been employed in varying forms around the world over a long period of time, and therefore no single definition is available.¹⁰ This report understands “temporary protection” as “an interim response to mass influx, providing safety while a durable solution is sought.”¹¹ Temporary protection is premised on providing time-bound protective status and often granted via a group-based designation.

INTRODUCTION

The Rohingya crisis has illuminated a failure on the part of the global community to stop or prevent the well-documented sustained persecution of an ethnic and religious minority—or to hold accountable those responsible for it. The long-term and cyclical history of forced displacement of the peoples of Afghanistan, again triggered by yet another chaotic government transition, similarly highlights inadequacies in international diplomacy and peacekeeping. These long-standing conflicts have resulted in major outflows of refugees that have most significantly impacted South and Southeast Asia. While attention ebbs and flows in response to developments in both Myanmar and Afghanistan, the countries in the Global South hosting most Rohingya and Afghan refugees deserve consistent attention and unwavering support.

The Term “Refugee”

Knowing that states in the Global South often learn from and value one another’s experiences, this report highlights positive legislative, policy, and practice examples, as well as community-led examples of resilience and solidarity, with the aim of inspiring the further advancement of rights for populations with precarious legal status. The report provides a regional and Global South-based analysis of refugee protections in Bangladesh, India, Indonesia, Malaysia, Pakistan, and Thailand in order to inform efforts to increase protection for at-risk and underserved refugee communities in these and other host states. The states surveyed in this report are not signatories of the 1951 Refugee Convention or its 1967 Protocol; however, as this report shows, many non-signatory states nonetheless offer important protections through domestic legislation, policy, and discretionary administrative and executive actions, which are often, but not always, derived from or informed by international human rights law instruments.¹² Finally, it is important to note that in South and Southeast Asia, national protection frameworks assume even greater significance given the absence of a regional human rights framework.¹³ This report therefore takes a comparative approach toward mapping and analyzing patchwork sets of legislation and administrative decision-making which, taken together, govern each country’s reception, identification (or refusal to identify), and provision of rights or guarantees to individuals who have fled persecution and are in need of protection.

The positive practices enumerated in this report are organized according to the following thematic areas, which collectively encompass the majority of protections developed by host states within the region:

- legal status and documentation (including birth, death, and marriage registration)
- alternatives to detention (non-penalization of refugees for “unlawful” entry and presence in a state’s territory)
- access to basic rights and entitlements (education, employment, and health care)

This organization reflects certain assumptions and understandings on the part of the authors related to the hierarchy and conditionality of treatment by states: Without legal status, an individual is unable to be recognized and enjoy rights or entitlements. This reality underpins the primacy of legal status and documentation. From that starting point, the authors recognized the growing use of punitive immigration enforcement mechanisms such as mandatory detention and the interplay between precarity and such measures. In other words, freedom from arbitrary deprivation of liberty and freedom of movement, even if limited, are paramount and a necessary precondition to the enjoyment of other rights. Finally, basic rights and entitlements—such as those pertaining to education, health care, and work—are only meaningfully accessible if one is free from confinement and in possession of a legal identity of some kind. These subsections are also organized with the primary intended audience of the report in mind: civil society and advocates who are often engaged in efforts along these areas of work. The report is also intended to be useful in sections and not only as a comprehensive document.

INTERNATIONAL HUMAN RIGHTS LAW AND ALTERNATIVE PROTECTION REGIMES: PIECEMEAL PROTECTION IN THE ABSENCE OF HOLISTIC FRAMEWORKS

While ratification of the 1951 Refugee Convention or its 1967 Protocol by states allows for a structure and framework that assists states in developing mechanisms for refugee protection, the principles of protection underpinning the international refugee system are not exclusively contained in the Convention or Protocol. Rather, a number of international human rights mechanisms and norms establish a complex web of obligations and guidelines for the treatment of a persecuted foreign population seeking protection on a state’s territories. While international refugee law does not establish a treaty monitoring or complaint mechanism (international supervision is provided by the United Nations High Commissioner for Refugees (UNHCR) and the treaties provide a state-to-state dispute mechanism), human rights treaties are supported by their own treaty bodies, which promote and monitor state compliance with treaty obligations and process interstate and individual petitions on alleged violations. In addition, alternative protection regimes have continued to emerge. While at times these alternatives challenge (and potentially undermine) protections prescribed by international refugee law, they have led to important protections being provided by non-signatory states. In sum, there is a patchwork of mechanisms, norms, and obligations, as well as exceptional alternative protective arrangements, that can be used to guide states to take positive action in terms of refugee protection, including among those states which are not signatories to the 1951 Refugee Convention.¹⁴

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS THAT APPLY TO NON-CITIZENS, INCLUDING PROTECTION SEEKERS

PROTECTION	TREATY MECHANISM(S)
Non-refoulement	The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, Art. 3
	The International Covenant on Civil and Political Rights (ICCPR), Art. 7
Non-discrimination	ICCPR, Art. 26
	International Covenant on Economic, Social, and Cultural Rights (ICESCR), Art. 2
Freedom of thought, conscience and religion	ICCPR, Art. 18
	Convention on the Rights of the Child (CRC), Art. 14
Rights attaching to marriage	ICCPR, Art. 23
Right of association	ICCPR, Art. 22
	ICESCR, Art. 8
Access to courts and legal assistance	ICCPR, Art. 14
Right to engage in wage-earning employment	ICESCR, Art. 6
Right to housing	ICESCR, Art. 11
Right to public education	ICESCR, Art. 13
Freedom of movement	ICCPR, Art. 12

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS THAT APPLY TO NON-CITIZENS, INCLUDING PROTECTION SEEKERS

PROTECTION	TREATY MECHANISM(S)
Right to claim asylum	Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (AHRD), Arts. 2, 14, 15, 16 ¹⁵ Universal Declaration of Human Rights, Art. 14
Protection against torture and inhumane treatment	The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment, Art. 2
Right to family unity and assembly	Human Rights Committee, General Comment No. 19, Art. 23
Right to health	Committee on Economic, Social and Cultural Rights, General Comment No. 14, Art. 1
Right to liberty and security of person	ICCPR, Art. 9
Right to birth registration	ICCPR, Art. 24(2) Convention on the Rights of the Child, Art. 7

Although it falls beyond the scope of this report to describe each of those international obligations in detail, it is worth noting a few key provisions of international human rights law that have been interpreted to extend to non-citizens in need of international protection and have been applied by refugee host states in a variety of contexts.

The rights enumerated above are well-established within international human rights mechanisms and would apply in South and Southeast Asia states that have ratified them. However, as is the case with the 1951 Refugee Convention, a number of the region's states have not ratified these instruments. As a result, advocating for and realizing refugee protections in the region generally requires a distinct approach—involving asserting the broader international humanitarian and human rights obligations of states, including those derived from customary international law norms.

Of primary importance is the norm of non-refoulement, which is found expressly in international refugee law, international humanitarian law, and international human rights law, albeit with different scopes and conditions of application. Under international refugee law, Article 33 of the Refugee Convention and its Protocol prohibit the return of persons to territories where their life or freedom would be threatened. This is particularly recognized where there is a risk of torture and severe ill-treatment, arbitrary deprivation of life or of fundamental human rights, or other form of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion. Additionally, a number of other grounds might be covered depending on the treaties ratified by the states concerned. The prohibition against refoulement applies to all refugees, regardless of whether their status has been formally recognized. Crucially, because the core principle of non-refoulement has become customary international law, it binds all states regardless of whether they are a party to the Refugee Convention.¹⁶

International and regional instruments and jurisprudence establish the obligations and guidance necessary to prompt states to provide legal protection for non-citizen populations in precarious legal situations, including those seeking asylum and stateless individuals. Precisely why states act (or refuse to act) in defense of protection seekers is not easy to understand, though it is often geopolitically determined. Supra-national rights regimes, however, can and do play an important role in states' decision-making processes.¹⁷ But, as emphasized in this report, efforts centered around national-level commitments are often more impactful than those leveraging international regimes in advancing rights and protections for refugees. It is on these efforts and the lessons learned from them that this report will focus.

REGIONAL OVERVIEW OF REFUGEE PROTECTION RESPONSES

South and Southeast Asia are home to some of the world’s most protracted refugee situations, including two of the largest and most acute refugee crises in the world today, involving the Rohingya of Myanmar¹⁸ and the forced displacement of Afghans to countries across the region. The Rohingya have been called “the world’s most persecuted minority,” and have been subjected to pervasive human rights violations, including ethnic cleansing, statelessness, and genocide.¹⁹ As a result of the continuous discrimination and persecution experienced by this population over several decades, over 3.5 million Rohingya have fled Myanmar. Bangladesh hosts the majority of Rohingya refugees, with four major influxes occurring in 1977–78, 1992, 2016–17, and 2017. The Kutupalong–Balukhali Expansion Site near the town of Cox’s Bazar in Bangladesh (sometimes referred to as the “mega camp”) is now the world’s largest refugee camp.²⁰ The largest Rohingya refugee community—911,000 people—is in Bangladesh.²¹ In addition to Bangladesh, Rohingya communities have sought refuge primarily in five other countries in South and Southeast Asia:²² India (over 40,000),²³ Indonesia (nearly 2,000),²⁴ Malaysia (over 88,000),²⁵ Pakistan (over 300,000),²⁶ and Thailand (over 4,000).²⁷

Similarly, Afghan nationals have faced waves of conflict-driven forced displacement leading millions to seek protracted refuge in countries across the region, spanning the course of more than four decades.²⁸ According to the most recently available statistics, 57 percent of all registered Afghan refugees and asylum seekers were being hosted in Pakistan (a total of 1.45 million people), with significant populations in neighboring Iran (780,000) as well as in more distant countries of transit and destination, such as Turkey (over 129,000) and India (approximately 15,000).²⁹ The number of Afghan refugees being hosted by countries in the region will very likely swell as a result of the ongoing displacement caused by the August 2021 withdrawal of the U.S. military from Afghanistan and the country’s return to Taliban rule, making the need for the further advancement of rights-based refugee protection frameworks in the region ever more pressing.

The following sections provide an abridged overview of the refugee populations and protection systems in place in South and Southeast Asia, in order to provide context for the more detailed discussion of individual positive practices in the remainder of this report.

South Asia

Bangladesh

Since its independence from Pakistan in 1971, Bangladesh has hosted refugee and stateless populations—primarily the 250,000 Urdu-speaking habitual residents of Bangladesh or so-called “stranded Pakistanis,”³⁰ and nearly 900,000 Rohingya refugees.³¹ While moderate numbers of Myanmar’s ethnic Rohingya have historically sought refuge in Bangladesh from government persecution and disenfranchisement, large-scale influxes of Rohingya refugees occurred in 1978, 1992 (250,000 people), 2016, and most recently in August 2017, when over 800,000 people fled following waves of generalized military-backed violence in Myanmar.³²

Despite Bangladesh’s history as a de facto refugee-hosting state, the reception and treatment of refugees by the government of Bangladesh has been largely ad hoc and discretionary in nature, determined primarily by the central government rather than prescribed by legislation. In the absence of a legislative framework recognizing refugees as a distinct class that should be guaranteed a set of fundamental rights and freedoms, refugees’ presence in Bangladesh is governed primarily by the Foreigners Act of 1946, a vestige of colonial law common to Bangladesh, India, and Pakistan. As a result, individuals seeking asylum in Bangladesh fall within the general legal category of “foreigner,” although Bangladesh’s Supreme Court has recognized some obligations of the state toward non-citizens with protection needs.³³ There are also several protections under domestic law that should apply equally to citizens and foreigners, although in practice many of them are not being extended to refugee groups.³⁴

The two central authorities primarily responsible for governing refugee populations are the Foreign Ministry and the Office of the Refugee Relief and Repatriation Commissioner. Invoking the humanitarian imperative, these administrations issue policies that govern the everyday lives of refugee populations in Bangladesh, including the establishment and governance of refugee camps and interactions with UNHCR and other nongovernmental humanitarian assistance providers. Still, the protections afforded under such discretionary policies are subject to politicization, and Rohingya populations in Bangladesh have variously been portrayed as a community with an acute need for humanitarian assistance and as illicit “foreign infiltrators” seeking out economic opportunities. The latter narrative, however, is being challenged, often through court judgments that recognize the fundamental rights of Rohingya persons, including the right to life and liberty, the right to be released from detention after completion of a sentence or term of imprisonment, and the right to be protected against return to Myanmar based on the international law principle of non-refoulement.³⁵

Overall, Bangladesh’s approach toward the newest influx of Rohingya refugees can be described as a generous yet cautious grant of humanitarian aid, couched in terms of temporality.

India

India has hosted multiple refugee populations throughout its independent history, including some 150,000 Tibetan refugees, an estimated 80,000 Sri Lankan Tamil refugees, and approximately 14,000 Rohingya refugees.³⁶ This rich history does not lend itself to concise summary, nor can contemporary India be regarded as a positive example to draw from, given the negative trend of rolling back protections for refugees since 2017-18, as exemplified by the stated policy of “detect and deport.”³⁷

As is the case in Bangladesh and Pakistan, refugees' presence in India is governed primarily by the Foreigners Act of 1946, which does not provide for differentiated treatment of foreigners arriving to India with protection needs. Instead, refugee policy in India has evolved from a mix of ad hoc federal and state-level policies, which have subsequently been interpreted in diverse manners by various Indian courts. The absence of a legislative framework for the recognition and governance of refugee populations has resulted in a patchwork and fragile set of practices, granting varying levels of protection on a group-by-group basis (essentially amounting to *prima facie* recognition for certain groups). Reception conditions for refugees also range widely, from camp settings with severely restricted mobility to the granting of pathways to citizenship in the host country.

In 2019, the Indian government launched its National Register of Citizens (NRC) initiative, a program that relies on the expansive language of the Foreigners Act read in conjunction with the Citizenship Act of 1955. The NRC has rendered some two million individuals effectively stateless along the border between Bangladesh and the Indian state of Assam.³⁸ As a result of the NRC initiative, millions of Assamese are now facing legal precarity which closely mirrors that faced by other stateless and refugee populations. This development underscores the importance of considering—and advancing protections for—vulnerable populations beyond those that fit within the narrow definition of “refugee.”

The 2019 amendment of the Citizenship Act is another troubling development in India's treatment of populations with protection needs. The amendment extended pathways to Indian citizenship for refugees from Afghanistan, Bangladesh, and Pakistan belonging to minority religious communities, but it excluded Muslim refugees of the same national origins from the possibility of naturalizing or even regularizing their legal status. This disparate treatment of Muslim minorities is emblematic of the politicized rhetoric and exclusionary approach that is often applied in India with regards to legal protection, administrative orders, or directives.

Pakistan

Pakistan has been among the top five host countries of refugees for the last several decades. The country currently plays host to 1.4 million Afghan refugees³⁹ and substantial numbers of Rohingya refugees, although accurate figures for that population are very difficult to find. Pakistan also shares colonial era law with Bangladesh and India, including the Foreigners Act. However, this legislation has been interpreted by both executive and judicial branches of the government as having a specific application when it comes to protection seekers, leading to the provision of policies and practices for this subset of foreign nationals that collectively amount to the recognition of “refugees” as a distinct class afforded particular rights and entitlements. While such differential treatment is supported by administrative decisions and judicial precedent, Pakistan has not implemented such changes through legislation, leaving the recognition and reception conditions of non-Afghan refugees unclear.

Southeast Asia

Indonesia

Indonesia has a long history of offering protection to refugees, and it does not confine them within camp settings—most refugees live in urban settings or accommodations provided by

national and international NGOs. Indonesia currently hosts a refugee population of about 14,000 individuals, the majority of whom are from Afghanistan⁴⁰ (as of February 2016, there were 3,056 recognized refugees from Afghanistan and 3,859 Afghan asylum seekers registered with the UNHCR in Indonesia).⁴¹ In comparison to other countries in the region, a much smaller number of Rohingya refugees reside in Indonesia. While de jure statelessness does not widely impact non-refugee communities in Indonesia, approximately 11 million children do not have birth registration documentation and may therefore face barriers to accessing basic social entitlements such as enrolling in schools, benefiting from the state's universal health care system, and receiving social security benefits.

The reception of refugee populations in Indonesia is governed under Presidential Decree No. 125 Year 2016, issued on December 31, 2016.⁴² This decree defines who is a refugee and sets out procedures and standards for the rescue, evacuation, monitoring, registration, and accommodation of protection seekers.⁴³ As such, Indonesia is the only country examined in this report that has a comprehensive domestic refugee protection framework underpinned by national legislation, rather than administrative discretion.⁴⁴

Malaysia

As of 2019, Malaysia officially hosted 177,690 refugees who are known to UNHCR,⁴⁵ of which 97,750 were identified as Rohingya. In addition, the country is estimated to host between 40,000 and 140,000 non-registered refugees.⁴⁶ There are also at least 10,000 individuals, primarily in East Malaysia, who lack access to Malaysian nationality: mostly descendants of plantation workers brought from India and Sri Lanka under British colonial rule.⁴⁷

Despite hosting such a sizable refugee community, no refugee camps exist in Malaysia, making the refugee profile an entirely urban one.⁴⁸ This is a critical factor in the way the country's refugees are managed. In the absence of a legislative framework for the identification and management of refugee populations, protection seekers arriving in Malaysia fall under the scope of "foreigners" under the Immigration Act of 1959/63 and are frequently subjected to detention as "undocumented migrants."⁴⁹ Indeed, this is one of the principal shortcomings identified in Malaysian refugee policy. However, the government of Malaysia has introduced some discretionary measures that it applies in an ad hoc manner to some groups of protection seekers. Malaysia also permits UNHCR to conduct refugee status and determination procedures on the government's behalf. In practical terms, this results in some protections being available to individuals who are able to register with UNHCR, but others who arrive seeking protection are still criminalized.

With regards to Malaysia's stateless population, existing legislation provides a pathway to recognition of Malaysian citizenship, and significant progress has been made toward reducing the number of individuals denied citizenship. Still, incomplete application of citizenship recognition under this legislation persists, resulting in a severe restriction of rights and access to social entitlements for this population, including barriers to accessing education and health care.

Thailand

According to UNHCR, as of September 2019, Thailand hosted 93,132 refugees.⁵⁰ There are also more than 475,000 stateless individuals in Thailand, largely members of ethnic groups in northern

Thailand who have faced generations of statelessness. Over the last 15 years, the government of Thailand has taken significant measures to address statelessness and the rights of children by means of legislative amendments. While not characterized as addressing the needs of refugees, these measures have, in practice, provided benefits to refugee communities living in the country.

The government of Thailand has largely sought to end domestic statelessness through the adoption of legislative reforms that expand eligibility for Thai citizenship verification, coupled with administrative efforts and cooperation with UNHCR to engage stateless populations in civil registration and verification procedures. This approach toward stateless populations should be contrasted with Thailand's reception of refugees, which is governed completely by administrative discretion, as there is no distinction for foreigners with protection needs under the Thai Immigration Act. While this administrative discretion has recently been formalized through the implementation of a National Screening Mechanism in 2020 for identifying foreigners with protection needs, the mechanism falls short of codifying a transparent definition of "refugee" under Thai law, and advocates have criticized its lack of transparency and clear avenues for appeal.⁵¹

The government of Thailand has largely sought to end domestic statelessness through the adoption of legislative reforms that expand eligibility for Thai citizenship verification, coupled with administrative efforts and cooperation with UNHCR to engage stateless populations in civil registration and verification procedures.

HIGHLIGHTING POSITIVE PRACTICES IN THE PROTECTION OF NON-NATIONALS

The above overviews both provide essential context and highlight a degree of evolution in each host country. The following sections will identify specific positive developments and seek to understand how policies and practices have come to change in the region. Each section is organized by practice type, based on whether it is a legislative or judicial practice, a policy or administrative action, or stems from a regional cooperation framework or from civil society or community-led initiatives. Not every section will include each country; only specific positive practices will be highlighted. A brief discussion of the limitations of each practice in its current implementation follows each section.

LEGAL IDENTITY, STATUS AND DOCUMENTATION

Certain populations—including refugees, migrants, and nomadic and border populations—suffer increased risk of statelessness because their situations make it difficult for them to register births or to acquire related civil registration documents. While procedures may vary between countries, in general, birth registration involves an official entry into a state’s civil registry as well as the issuance of a birth certificate. A lack of birth registration does not on its own mean a person is at risk of being stateless; nor does the existence of a birth certificate suffice to confer nationality. However, a birth certificate is an important tool in preventing statelessness because it helps establish a child’s legal identity, and it is often a prerequisite to obtaining documentation that proves nationality.

The importance of legal identity to an individual’s life cannot be overstated. Refugees face a variety of challenges concerning their legal identity, particularly in host states lacking formal frameworks to establish a distinct legal status for refugees or procedures to identify them. While some of the challenges regarding legal identity are unique to foreign nationals seeking protection outside of their country of origin, many are shared by stateless individuals and other vulnerable nationals who are not able to prove their identity or ensure their recognition as citizens under the law.

This section will examine ways in which individuals lacking a legal identity and/or facing precarious legal status have been able to secure recognition by states, or in some cases navigate this precariousness and mitigate the challenges presented by it.

In addition, this section will highlight as examples of positive practices efforts to ensure issuance of legal documentation to individuals in precarious situations, including efforts to achieve state recognition of alternative forms of documentation. Forcibly displaced communities often flee their homes without identity documents, and may fear seeking help from authorities of their country of nationality. While a legal status and recognition by the state can in theory exist without the issuance of documentation, “[r]ecognition of legal identity often depends on an individual possessing valid legal identity documentation or other forms of proof of legal identity.”⁵² Individuals lacking documentation establishing their identity may be subject to detention or forcible removal from the country they are living in, and may face a greater likelihood of being subjected to human trafficking and/or smuggling. Because legal status and documentation also serve as the primary means enabling access to basic rights and entitlements, some practices to combat the lack of documentation are outlined in the third section of this report, which focuses on access to education, health care, and formal employment.

Legislative Practices Granting Legal Status through Citizenship or Refugee Recognition

Universal Birth Registration

In Bangladesh, despite the existence of a clear legislative mandate, birth registration for both Rohingya and Bangladeshi residents of Cox’s Bazar was, until recently, completely halted by the relevant Bangladeshi authorities. This suspension was purportedly imposed to prevent the registration of Rohingya children as Bangladeshi nationals.⁵³

BANGLADESH

The Births and Deaths Registration Act of 2004 introduced compulsory birth registration for “any Bangladeshi or any foreigner living in Bangladesh and also any refugee taking shelter in Bangladesh.” The Act’s applicability to Rohingya refugee children was further underlined by the issuance of a 2009 circular regarding the provision of birth registration to Rohingya refugee children living in the Kutupalong and Nayapara camps.⁵⁴

THAILAND

The 2008 Civil Registration Act amendments allowed for all children born in Thai territory to have their births registered, irrespective of their nationality and/or legal status, and also allowed retrospective registration;⁵⁵ children of migrants, refugees, asylum seekers, and stateless persons are therefore entitled to have their births registered. In 2010, Thailand also withdrew its reservation to Article 7 of the Convention on the Rights of the Child, reinforcing their obligation to provide birth registration to all children born on Thai territory. Article 7 includes provisions for the right to a name and the right to acquire nationality.

In Thailand, reforms toward universal birth registration are inconsistently and partially implemented in practice. Children born to refugee, asylum seeker, or stateless parents are disproportionately affected. While the birth registration rate of children born to Thai families stands at 99.5 percent, the birth registration rate of children born to non-Thai families is significantly lower. A survey of 675 children from migrant and minority households born in Thailand found that although 84 percent of those children were delivered in hospital settings, only 50 percent of the births were registered.⁵⁶ Furthermore, there have been reports of hospitals not issuing birth certificates to some parents, and instead issuing a document merely attesting that a child was born, which is not recognized by the authorities as a valid birth registration. There is a general lack of understanding of the requirement that parents go to District Offices to complete the birth registration of their children. Additionally, there is a fear among refugee, asylum seeker, and stateless persons that contacting state authorities will lead to arrest, punishment, or other repercussions. For this reason, some parents avoid completing the registration process.⁵⁷

While conflicting nationality laws or gaps in a country's nationality laws are one of the main causes of statelessness, laws also stipulate how individuals can acquire nationality (naturalize) and therefore provide an avenue to exit a state of legal limbo or irregularity. Positive legislative practices, including those which have been adopted by Bangladesh, Thailand, and Malaysia, can provide sustainable, legal pathways out of situations of statelessness.

Establishing Citizenship Laws that Thwart Statelessness

In Bangladesh, seemingly straightforward provisions that would provide citizenship by birth to any person born on Bangladeshi territory (including Rohingya) and lead to issuance of birth registration documentation⁵⁸ are often not applied in practice. Birth registration has been halted for Rohingya and even for members of the host community in the Cox's Bazar district, and attaining Bangladeshi citizenship by birth is de facto not considered applicable to Rohingya born in refugee camps.⁵⁹

With regards to Thailand, while the government's legislative reforms are promising, naturalization eligibility requirements related to educational attainment (which are dependent on possessing birth registration and other legal documentation) have significantly limited the reach of these amendments. Consequently, a significant number of stateless individuals living in Thailand are

BANGLADESH

Bangladeshi citizenship laws provide for several potential means to acquire Bangladeshi citizenship, including by birth within Bangladeshi territory, descent, and naturalization.⁶⁰

In the 2008 judgment in *Md. Sadagat Khan (Fakku) v. Chief Election Commissioner*,⁶¹ the Bangladesh Election Commission (Supreme Court of Bangladesh High Court Division) held that, according to Bangladesh's laws, Urdu-speaking habitual residents of Bangladesh could not be deprived of Bangladeshi citizenship other than by their own disavowal.

Alongside its citizenship law, Bangladesh regulates the registration of births through the 2004 Births and Deaths Registration Act and its associated implementing rules.⁶²

THAILAND

A 2008 legislative amendment of the 1965 Nationality Act provided a pathway to Thai citizenship for individuals born in Thailand prior to 1992, and 2016 cabinet resolutions made around 80,000 stateless individuals eligible for naturalization: the children of parents belonging to Hmong, Mon, Karen and other hill tribes, as well as Rohingya ethnic communities (if those children were registered with the Ministry of Interior and had been living in Thailand for at least 15 years, or had attained a bachelor's degree.⁶³ Orphaned migrant children living in Thailand for 10 or more years who had certifications from relevant ministries were also made eligible for naturalization.

MALAYSIA

The Federal Constitution of Malaysia provides that children born in Malaysia “who [are] not born as a citizen of another country” and cannot acquire nationality of another country by registration within a year of their birth are citizens of Malaysia by operation of the law.⁶⁴ The government of Malaysia has also extended efforts to enable access to birth registration with campaigns targeting stateless and undocumented persons, and, in 2017, by amending the country's Birth Registration and Death Act—which requires that all births and deaths in the country be registered—to extend the time frame for registering births in a bid to increase overall registration rates.⁶⁵

unable to benefit from these reforms. Positive experiences and examples to combat statelessness and ensure birth registration may nonetheless be instructive in this regard. The 2016 cabinet resolutions in Thailand provide a potential source of inspiration, as the effort did not only target refugees, but a broader group of stateless communities that included hill tribes and other ethnic minorities such as Karen, Hmong, Mon, and the Rohingya.⁶⁶ Thailand has also had some success in reinstating the registration of births following periods during which the practice had stalled.⁶⁷

In Malaysia, despite the broad, protective nature of the constitution's wording, practitioners report that access to Malaysian citizenship for foundlings and otherwise stateless children is extremely limited in practice and dependent on lodging individual legal challenges, as well as on the discretion of High Court judges. While a small number of children have been able to access their right to Malaysian citizenship, court decisions in individual cases do not create a justiciable precedent, nor have they led to policy changes.

Codifying a Domestic Definition of “Refugee” and Legislating Procedures for the Rescue, Monitoring, Registration, and Accommodation of Protection Seekers

Given the hesitation in many South and Southeast Asian host countries to even use the term “refugee” in official discourse or policy, Indonesia’s explicit recognition of a refugee status has been lauded as a promise to refugee rights and protection.⁶⁸ Implementation challenges aside, the symbolic significance of this recognition cannot be understated: It has enabled a shifting of narratives regarding refugees toward one of their protection rather than their supposed invasion, and has led to the creation of legal pathways and a more comprehensive and codified protection framework.

Despite the fact that Article 1(2) of the 2016 presidential decree includes a definition of “refugee” that mirrors the Refugee Convention’s, other provisions in the decree adopt an approach which more closely follows a pattern of immigration management. Rather than recognizing refugees as rights-holders, they are treated as passive agents to be managed—persons that need to be “detected,” “sheltered,” and “safeguarded.”⁶⁹ This immigration management approach, in turn, has led some Indonesian commentators to argue that the decree is not a genuine legal framework for protecting refugees and granting asylum so much as a discretionary “humanitarian” adaptation of an immigration management framework designed to deal with the emergency influx of refugees and asylum seekers.⁷⁰ Notwithstanding these critiques, it is important to recognize that the presidential decree continues to provide a promising precedent for refugee protection in a region where most states have not adopted the Refugee Convention and instead choose to host refugee communities on a discretionary and ad hoc basis.

INDONESIA

Presidential Decree No. 125 Year 2016 established the division of labor of various ministries regarding refugee protections and registration and codified repatriation as a voluntary request on the part of the refugee.⁷¹ With the issuance of this decree, which defined for the first time the mechanism for asylum applications, the right to apply for asylum in Indonesia laid out under the 1999 Law on Foreign Relations was finally effectively implemented.⁷²

Judicial Practices

Juridical Recognition of the Principle of Non-Refoulement as Binding Customary International Law

Bangladesh has tacitly, if not in writing, admitted Rohingya individuals into its territory as refugees based on their having fled torture and persecution. Administrative precedent from 1989-1991 and 1992 has additionally established that Rohingya who came to Bangladesh from Myanmar were accepted as refugees and have been allowed to stay in Bangladesh. The court’s judgment in the *RMMRU* case recognized that Rohingya are living in Bangladesh as refugees, effectively conferring a form of international protection.

BANGLADESH

The High Court Division's 2017 judgment in *RMMRU v. the Government of Bangladesh* explicitly recognized Bangladesh's obligation under the norm of non-refoulement, which was acknowledged as having become a part of customary international law. The decision declared unconstitutional the arbitrary detention of Rohingya prisoners after the completion of their prison terms and directed they be accommodated in the refugee camps administered by the Ministry of Disaster Management and Relief in collaboration with the UNHCR. By doing so, the court effectively read a prohibition on refoulement into the government's application of the Foreigners Act of 1946.⁷³ This limitation on the state's ability to return foreign nationals applies not only to Rohingya refugees, but to individuals of any nationality who would face torture or other inhumane treatment, or even persecution of other kinds, if returned to their country of origin.

INDIA

Various judgments issued by India's Supreme Court have affirmed the binding nature of the norm of non-refoulement on the Indian government. This includes the landmark case of *Malavika Karlekar v. Union of India*,⁷⁴ in which the Supreme Court recognized the principle of non-refoulement as customary international law. Additionally, other cases including *Bogyi vs. Union of India*, *Ktaer Abbas Habib al Qutaifi vs. Union of India*, and *Dongh Lian Kham vs. Union of India*,⁷⁵ set out the right of asylum seekers of any nationality to have their protection claims evaluated before a decision regarding their deportation is finalized.

In India, positive caselaw precedent has recently been overturned by more recent rulings, such as in *Saimullah v. Union of India*,⁷⁶ pointing to the political frailty of judicial interpretation of customary international law when compared to the more durable protections offered by ratification of international treaties or even domestic legislative frameworks. Despite earlier, clear guidance from the Supreme Court, Rohingya seeking asylum have been characterized by the government as potentially dangerous Muslim extremists and, in a handful of cases, Rohingya protection seekers were refouled to Myanmar.⁷⁷ Such narratives risk engendering hate crimes and violence, and underscore the importance of counternarrative campaigns to change public opinion and ensure that Rohingya refugees and other victims of discrimination are protected from racism, xenophobia, and refoulement.

High Court Jurisprudence on the Applicability of Local Law toward Afghan Refugees

Establishing clarity and confirmation of the applicability of domestic law toward refugees, particularly when it comes to employment law and family law, is an important first step in recognizing, accessing, and realizing their rights in host country jurisdictions. In this regard, the Islamabad High Court ruling that non-citizens in Pakistan fall within the jurisdiction of family courts and can bring suits to family court is significant.

PAKISTAN

A 1996 judgment declared that family courts have plenary jurisdiction to hear cases brought by non-citizens and citizens alike, so long as the matter occurred within the territorial jurisdiction of the relevant court (*Anil Mussarat Hussain v. Muhammad Anwar Naseem*,⁷⁸ further upheld in *Majid Hussain v. Farrah Naz*⁷⁹). These rulings clarify that the nationality of plaintiffs is immaterial to the question of the jurisdiction of Pakistan's family courts, and it is possible that Afghan refugees and other non-citizens in Pakistan may be similarly impacted by these rulings.

Administrative Policies and Actions

Country-Level Prioritization of Civil Registration

Ensuring that the births of all children, including refugee children, are registered and certified is an important first step in increasing the ability of those children to access their fundamental rights. Legal proof of identity can help children access legislative protections, as well as help secure access to education, social assistance, and health care services. Civil registration also protects children from violence and exploitation, against family separation and illegal adoption, and through providing official proof of age also reduces the risk of children being forced into early marriage or recruited into armed forces.

INDONESIA

In Indonesia, a national strategy for improving civil registration procedures and coverage incorporates cross-sector collaboration, including across health and education, to support the civil registration office with regards to birth registration. As a result, the percentage of children under the age of five whose births were registered almost doubled between 2007 and 2018.⁸⁰ Indonesia's Medium-Term National Development Plan includes a target to ensure that 100 percent of children have their birth registered immediately by 2024, and a number of legislative acts have provided a framework for implementing this plan.⁸¹

However, according to UNICEF, 60 percent of Indonesian children still have not received their birth certificate by the time they turned one year old, and children from impoverished families and those living in rural areas are much more likely not to have their births registered.⁸²

Working Recognition of UNHCR-issued Registration IDs and Differentiation of Individuals with Protection Needs

While UNHCR registration is often sufficient to prevent criminalization, the government of Malaysia does not recognize UNHCR-issued refugee ID cards as a valid form of legal identification. This prevents refugees from accessing banking services or any other services requiring a legally-recognized ID. A persistent lack of legal status for recognized refugees means that refugee communities are forced to remain dependent on humanitarian assistance to meet their basic needs and/or they may risk criminalization by engaging in unauthorized work to meet these needs.

MALAYSIA

Malaysia does not confine refugees registered with UNHCR to camps, and generally differentiates individuals with protection needs from non-protection-seeking foreign nationals on humanitarian grounds.⁸³ As a result, possessing a UNHCR-issued registration document is typically sufficient to prevent an individual with protection needs from being held in administrative detention on irregular migration charges.

Humanitarian Grants of Long-Term Visas to Individuals or Populations Fleeing Persecution

Although India's policy provides for the granting of long-term visas (LTVs) in "cases involving extreme compassion," in practice, LTVs are predominately afforded to Bangladesh and Pakistan nationals who belong to minority religious groups (mostly Hindus). India's LTV policy demonstrates that, where sufficient political will exists, the government has the means to provide meaningful access to rights and benefits for communities in need of protection.

INDIA

A 2011 policy on the granting of LTVs to individuals fleeing prosecution,⁸⁴ which was expanded in 2018⁸⁵ to include members of religious minority groups from Bangladesh and Pakistan, provides an avenue for legal stay to refugees who have sought asylum in India, and also includes provisions to legalize the stay of individuals who had entered Indian territory irregularly. LTV holders are provided with a legal identification and status, which enables their access to health care, education, employment, banking, and other benefits and services.

Regional Cooperation Frameworks

Tripartite Memorandum of Understanding between National Human Rights Commissions on Statelessness in Sabah

National human rights institutions (NHRIs) vary in structure and function, which can be productive as well as counterproductive where they are restrained by limited mandates and limited institutional independence. While their positioning as a state institution makes it more difficult for governments to dismiss their recommendations, NHRIs are also more vulnerable to government pressures, and constrained by their resources and institutional location.

MALAYSIA, INDONESIA, AND THE PHILIPPINES

The NHRIs of Indonesia, Malaysia, and the Philippines signed a memorandum of understanding (MOU) to strengthen efforts to address statelessness and the protection of the rights and welfare of stateless people in Sabah. The tripartite MOU followed a bilateral one, with the Philippines having previously being an observer due to the sensitivities around the territorial dispute between the Philippines and Malaysia over Sabah. Under the auspices of this MOU, the NHRIs of each country have organized joint dialogues on statelessness and issued a series of recommendations to the governments of Indonesia, Malaysia, and the Philippines.⁸⁶

Active Country-Level Engagement in the Bali Process' Civil Registration Toolkit

Some members of the Bali Process, such as Pakistan and Thailand, have actively and voluntarily taken part in the Process' assessment activities which seek to identify and alleviate gaps in national civil registration and vital statistics procedures.

PAKISTAN

Following from its engagement with the Bali Process' Ministerial Conference on Civic Registration and Vital Statistics (CRVS), the government of Pakistan has implemented a national CRVS coordination mechanism, completed a comprehensive assessment, and set national CRVS targets for 2024. Additionally, the government has begun planning for a voluntary inequality assessment to identify populations that are less able to access civil registration services.⁸⁷

In the case of Thailand, the piloting process has helped to identify critical gaps. The initiative is supported by the Regional Support Office and the UNHCR, which can collaborate and work on filling the gaps in the civil registration system.

THAILAND

The government of Thailand has similarly set national CRVS targets for 2024, promulgated a national policy for CRVS, and completed a voluntary inequality assessment.⁸⁸

ASEAN Commitment to Push Forward Civil Registration Focused on Universal Birth Registration

ASEAN membership itself provides a framework for more robust protections against statelessness, as Article 18 of the ASEAN Human Rights Declaration stipulates “the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.”⁸⁹ Additionally, all member states are parties to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities—instruments that all contain important guarantees with regards to the right to nationality.

The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children⁹⁰ undertook a country study looking at civil registration and issues of statelessness in 10 ASEAN member states, resulting in two key takeaways: (1) a continued commitment to push for civil registration and focus on securing birth registration for all children in ASEAN, and for the marriage of parents to be registered at the time of the birth of their child, and (2) a finding that domestic law in all of the 10 states in the study is generally open to birth registration of all children regardless of their legal status.

Civil Society and Community-led Initiatives

The Rohingya ID Project

Bypassing the common bottleneck of the need to provide a legal ID document in order to access services such as banking, health care, and SIM card registration, alternative and community-led identification programs such as the Rohingya ID Project may provide fruitful avenues to expand opportunities for the social and economic integration of stateless populations. However, this initiative remains in the proof-of-concept stage and does not currently facilitate access to any services on the planned social and financial platform.⁹¹

The Rohingya ID Project is a community-led initiative to ensure access to essential services for stateless refugees, in lieu of state or UNHCR-issued legal IDs. The project aims to leverage blockchain technology—in the form of a community-verified open ledger—to provide Rohingya refugees with a unique token that allows them to access to the larger Rohingya Project’s financial and social services, without the need for resorting to other types of (typically state-issued) identification.⁹²

Realizing the Right to a Legal Identity

Limited capacity of civil society organizations and state institutions, including a lack of knowledge of and experience with legal identity issues, human and financial resources, and physical geography, can complicate implementation and integration of services. These limitations underscore the need to work with district management systems and with the judicial system to augment access to legal identity documentation and realize legal identity rights in Indonesia.

The Australia Indonesia Partnership for Justice (AIPJ)

The AIPJ worked to increase access to legal identity documents for de facto stateless Indonesians, contributing to national policy change and to the implementation of these changes at the subnational level. The AIPJ collaborated with civil society organizations in conducting research and evidence-based advocacy, producing draft regulations, and in building relationships and facilitating coordination with state institutions responsible for legal status and documentation. The AIPJ also provided funding for legal identity work and to strengthen civil society capacity.

ALTERNATIVES TO DETENTION AND NON-PENALIZATION OF PROTECTION SEEKERS FOR “UNLAWFUL” ENTRY AND PRESENCE

Seeking asylum has been recognized as a universal human right, and states have a generally recognized duty not to penalize individuals for irregular entry or stay in a territory where they are seeking asylum.⁹³ States often rely on detention as a response to irregular migration, and it becomes a routine practice rather than a measure of last resort based on an individualized determination as to whether or not foreign nationals have international protection needs. It is imperative that any restrictions placed on the liberty and security of non-nationals should be carefully delineated in the law and subject to judicial and/or administrative review.

To prevent arbitrariness, detention needs to be “necessary in the individual case, reasonable in all circumstances and proportionate to a legitimate purpose.”⁹⁴ This requires that less intrusive and coercive measures have been determined to be ineffective in a given case.⁹⁵ Where detention is not based on individual assessments of its necessity—e.g. if it is aimed at overall deterrence of irregular migration—its use is generally unlawful under international law.⁹⁶

Detention increases the vulnerability of refugees and asylum seekers, exposing them to additional risk of torture or inhuman or degrading treatment, and negatively impacting their health and wellbeing.⁹⁷ Research has also shown that detention is costly and has limited deterrent effects on irregular migration.⁹⁸

Because asylum seekers in South and Southeast Asia are often undocumented or without the required immigration documents, they are regularly detained without regard for their potential international protection needs. Immigration detention in the region is frequently used as a migration management mechanism; furthermore, in the absence of protective domestic legislation, asylum seekers and refugees are treated as irregular migrants, are not screened separately to identify their protection needs, and therefore risk being placed in detention in what amounts to penalization of asylum-seeking. In many states, these detention practices extend to children and unaccompanied minors.⁹⁹ Nonetheless, there have been examples of positive practices in the region, including judicial scrutiny of detention and the adoption of alternatives to detention, as outlined below.

Legislative Practices

Alongside the use of immigration detention as a penalizing deterrent to seeking asylum, many states fail to adequately protect victims of human trafficking, particularly when those victims are non-nationals. Authorities often conflate migrant smuggling with human trafficking, resulting in the re-victimization of trafficked persons under anti-smuggling and/or immigration measures. The promulgation of legislation which adequately differentiates between perpetrators and victims of human trafficking, as well as distinguishing between human trafficking and migrant smuggling, may help to ensure that trafficked persons receive adequate protection and are not doubly victimized.

Malaysia's Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act is commendable in providing the opportunity for identified victims of trafficking, including non-citizens, to enjoy freedom of movement and gainful employment. Further, the law's recognition of the fact that smuggled migrants may also be victims of trafficking and therefore require the protection of the state reduces the likelihood of double victimization. However, serious limitations in this legislation's implementation by authorities reportedly persist, including a reliance on victims' own self-identification and failures to survey individuals apprehended during immigration enforcement raids for potential protection needs.¹⁰⁰

MALAYSIA

Malaysia's 2007 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act provides special protections for individuals who are recognized as victims of human trafficking. Under this law, Magistrate Courts may issue a protection order to individuals who are identified as trafficked persons, enabling them to be placed in a shelter for up to three months, during which time they may also be permitted to move freely and to engage in work. Following the expiry of the protection order, foreign nationals who require further care and protection may be ordered to remain in the shelter for as long as this protection need persists. Further, the act allows for courts to order that victims of human trafficking be compensated by their trafficker(s).

Judicial Practices

The use of judicial orders to apply discretion in the application of immigration law toward individuals with protection needs, while undoubtedly a stop-gap measure, nevertheless provides meaningful safeguards where more durable, legislative protective status frameworks are unavailable.

In India, refugees and asylum seekers are vulnerable to arrest and detention under the 1946 Foreigners Act if they are stopped by authorities before they can present their claim for asylum to the UNCHR. Refugee populations in India that fall under the UNHCR's mandate (as defined by the Indian government) are, at the discretion of the courts, sometimes permitted to request refugee status determination while in detention, but this is not always sufficient to secure release. For example, while the Gauhati High Court in *U Myat Kayew v. State of Manipur* allowed a Burmese asylum seeker to be released from detention in order to access UNHCR to present their claim,¹⁰¹ there have been instances where asylum seekers have been detained or issued a summons to leave the country on the basis of undocumented stay, despite holding a valid UNHCR-issued refugee card.¹⁰²

INDIA

In *Yogeswari v. State of Tamil Nadu*, the Madras High Court held that detention under Section 3(2)(e) of the Foreigners Act of 1946 may not violate Article 21 (right to personal liberty) or Article 22(4) of the Constitution of India (providing limits on preventive detention).¹⁰³ The petitioner was a Sri Lankan refugee who was granted bail by a lower court after being charged under the Indian Penal Code. Before his release on bail, he received a detention order issued under the Foreigners Act. Holding that constitutional guarantees prevail over the unrestricted powers of detention granted by the pre-constitutional Foreigners Act, the court quashed the detention order.

BANGLADESH

The High Court of Bangladesh found in *Faustina Pereira v. State* (2001) that holding a non-citizen prisoner in jail after they have served their sentence violates the rights conferred upon them by the Constitution of Bangladesh. In *Refugee and Migratory Movements Research Unit (RMMRU) v. the Government of Bangladesh* (2017), the High Court held that indefinite detention of foreigners is unlawful, ordering the release of five Rohingyas and directing the petitioner to take appropriate steps to accommodate them in Rohingya camps in Cox's Bazar.

Thus, while there is no systematic policy against the detention of UNHCR-registered refugees and asylum seekers in India, the aforementioned judicial practices do constitute positive developments by asserting limits on government powers to detain and reinforcing the recognition of every person’s right to personal liberty.

In both Bangladesh and Pakistan, where the Foreigners Act gives law enforcement agencies broad authority to detain foreigners on the grounds of lack of documentation and/or illegal entry, judicial precedents have imposed limits on those powers, including via rulings affirming the unconstitutionality of indefinite detention.

PAKISTAN

The Lahore High Court ruled in *Awais Sheikh vs. Secretary Ministry of Interior Islamabad* (2012) that indefinite detention is not in accordance with the Foreigners Act. A non-citizen may, following the expiry of their sentence, be kept in custody for no more than an additional three months where necessary in order to make arrangements for their deportation.

MALAYSIA

In Malaysia, the Attorney General’s Chambers issued an unpublished circular letter in 2005 stating that individuals who are registered with UNHCR at the time of their arrest should not be prosecuted for immigration offences.¹⁰⁴

Administrative Policies and Actions

Alternatives to Detention

In Indonesia, following the DGI’s 2018 circular letter, immigration detention centers have worked with the International Organization for Migration to release all remaining refugees and asylum seekers from immigration detention to community accommodation.¹⁰⁵ Out of 13,626 individuals registered with UNHCR in Jakarta, only 10 have remained in detention. Approximately 4,000 individuals who were previously detained have been released under alternatives to detention.¹⁰⁶

THAILAND

In Thailand, an MOU on “Determination of Measures and Approaches Alternative to Detention of Children in Immigration Centers”¹⁰⁷ recognized that children should only be detained as a measure of last resort and that any period of detention should be as brief as possible.

Thailand’s MOU focuses on refugee and migrant children but fails to make provisions to address family separation. Mothers in detention are granted release to reunite in holding shelters with their children who are also being held in immigration detention, upon a cash bail payment of \$1,500. This is too costly for most people, particularly those who do not have the right to work in Thailand. In addition, the bail provision for family reunification is wholly unavailable to fathers being held in immigration detention.¹⁰⁸ There is also a lack of transparency and information about people who remain in detention, and despite the MOU’s provisions civil society organizations regularly have to intervene in specific cases to argue for the release of children and their mothers under the MOU.

INDONESIA

Since 2010, Indonesia has increasingly moved toward using alternatives to detention. On December 31, 2016, Indonesia’s president signed a declaration designating immigration detention centers as registration facilities for asylum seekers and refugees. The immigration detention centers’ primary task is to collect data on asylum seekers, rather than to confine asylum seekers for a long period of time. Where an individual declares themselves to be a refugee, the immigration detention center coordinates with UNHCR Indonesia and facilitates their transport to shelters alongside the local regency or municipal government. On July 30, 2018, the Directorate General of Immigration (DGI) issued a circular letter on “Restoring the Function of Immigration Detention Centres.” This emphasized that the function of immigration detention centers is to temporarily confine irregular immigrants who are subject to administrative measures, rather than to serve as a shelter for refugees and asylum seekers.

ACCESS TO BASIC RIGHTS AND ENTITLEMENTS

For individuals who lack or are unable to obtain legal status, there are serious barriers to accessing and enjoying basic rights and entitlements, including enrolling in and attending schools, receiving work authorization, and receiving health care services from public providers. These challenges often stem from a lack of civil registration documentation: birth certificates, passports, and other forms of government-issued identification.

While all people have the right to receive an education, engage in work to sustain and improve their livelihoods, and receive basic health care services in accordance with the Universal Declaration of Human Rights and other international law instruments to which the countries surveyed here are bound, bureaucratic hurdles coupled with the general lack of national legislative frameworks for identifying populations with protection needs represent key obstacles to providing universal access to these basic rights and entitlements.

Recognizing the shortcomings regarding enforcement and justiciability of the rights laid out within instruments of international human rights law, this section examines a number of positive practices at the national level. These practices—whether in the form of judicial, administrative, or discretionary decisions; regional instruments; or civil society movements—are primarily relevant to noncitizen stateless and refugee populations, but may also extend to other marginalized and underserved communities.

Access to Education

Despite broad acceptance of the obligation to provide primary education to children of all statuses,¹⁰⁹ including stateless and refugee children, each country faces significant practical hurdles in the implementation of this right. These include a lack of civil registration or refugee status documentation and the exclusionary financial burden of costs such as educational materials and examination fees. In some countries, where accessing primary education is generally possible, stateless individuals and refugees may nevertheless be excluded from continuing their education at the secondary and tertiary levels. The positive practices included under this subsection thus focus on clarifying the applicability to stateless and refugee communities of the right to access education, as well as other policies and initiatives aimed at overcoming bureaucratic and practical barriers to enrollment in public schools for members of these groups.

Legislative Practice

Domestic Codification of Access to Education as the Right of All Children

In Pakistan, Bangladesh, India, and Thailand, legislation has been adopted to implement Article 28(a) of the Convention on the Rights of the Child at the national level, explicitly recognizing that the right to education extends to non-citizen children.

PAKISTAN

The Right to Free and Compulsory Education Act, 2012 guarantees the fundamental right to free and compulsory education in a neighborhood school to all children, regardless of sex, nationality, or race, making no mention of immigration status.

BANGLADESH

The state's obligation to provide free and compulsory education to all children is affirmed in Article 17 of the Constitution of the People's Republic of Bangladesh, and the Primary Education (Compulsory) Act, 1990 provides the government with the power to issue orders declaring primary education mandatory for all children ages six to ten who live within the area specified in these orders.

Yet in each of these four countries, several barriers to the full implementation and universal realization of children’s right to access education persist. In Bangladesh, the Primary Education (Compulsory) Act falls short of explicitly setting out access to education as a guarantee (despite the constitutional guarantee under Article 17), and the government of Bangladesh has demonstrated resistance toward providing refugee populations, including Rohingya refugees, access to formal schooling opportunities. In Pakistan and India, the costs associated with schooling have created a barrier to access for citizen and non-citizen children alike. In Thailand, where the government has taken multi-level action to ameliorate barriers to school enrollment, stateless and refugee children continue to experience difficulties in attending national examinations and obtaining their diplomas due to incomplete civil registration documentation.

Codification of the child’s right to access free and compulsory education represents a crucial first step toward guaranteeing universal primary education, but is in no way the last step in this process. The justiciability of the right to education should be ensured, and India’s Right to Education Act sets a positive example in this regard with the inclusion of grievance redressal procedures in the legislation, allowing violations to be addressed without the need for complex legal intervention.

INDIA

Article 21A of the Constitution of India establishes the fundamental right to free and compulsory education to all children ages six to fourteen. The 2009 Right to Education Act establishes that ensuring the enrollment of school-age children is a responsibility of the state. Further, the Act establishes a set of procedures for reporting violations of the right to education.

THAILAND

The country adopted “education for all” legislation in 1999 stipulating that all children up to the age of 15 shall be provided equal access to free, basic education regardless of nationality or legal status. In 2007, this right was enshrined in the Constitution, albeit reducing compulsory education from 15 to 12 years of age.

Policy/Administrative Practice

Ministry-level Action to Clarify Education Enrollment Procedures for Refugee or Stateless Children

Despite the administrative actions taken in Malaysia to expand access to education to all children, the approval rate for the registration of children identified as being stateless was reportedly low because it was left to the discretion of registration officers. The standard operating procedure issued by the Malaysian government is also limited in that it does not provide a

pathway to formal education for children who do not have at least one Malaysian national parent or guardian. Even for children with a qualifying parent or guardian, enrollment costs, book fees, and exam admission fees can present a barrier. As a result of these shortcomings, a parallel system of alternative “charity schools” (*Pusat Pembangunan Minda Insan*, or PPMI) continue to provide informal schooling to some refugee and stateless children.

In Indonesia, despite the instructions in the 2019 circular letter, only 577 of an estimated 3,800 refugee children have access to public, nationally accredited schools. Further, although the circular allows refugee children to access schools in theory, they are not permitted to sit for national exams without a national ID, thus hampering the ability of these children to enroll in secondary and tertiary-level educational institutes.

THAILAND

For several years, Thailand’s Ministry of Interior and Ministry of Education have engaged in survey initiatives to register stateless children and enroll them in schools in order to ensure that the civil registration and documentation pathways made available to stateless children are put into practice and result in access to education.

MALAYSIA

The Ministry of Education in Malaysia issued a standard operation procedure on January 15, 2018 clarifying that some stateless children were to be granted access to education, and announced a “Zero Rejections” policy in 2019 with the aim of ensuring that all children, regardless of legal status, have access to education.

INDONESIA

Indonesia’s Ministry of Education issued a circular on July 10, 2019 instructing state and municipal authorities to allow stateless and refugee children to enroll in schools, settling doubts on the part of administrators regarding their eligibility.¹¹⁰

In light of these persistent implementation challenges, issuance of clear guidance from central governments, including in the context of Malaysia and Indonesia, can help overcome obstacles from lower-level administrators that results in blocking access to education. Considering the immense public benefit of advancing education, addressing bureaucratic obstacles and removing barriers to accessing education should be made a political priority. The government of Pakistan has set a positive example in this regard through their focus on the importance of providing education to refugee children from day one of their displacement, so as to encourage and enable self-reliance and self-sufficiency during and beyond the situation of displacement.¹¹¹

Declaration Allowing Rohingya Children to Receive a Formal Education

States hosting refugee populations have a positive obligation under various international human rights instruments to provide educational opportunities to all children.¹¹² This obligation becomes even more pressing when there are limited prospects for repatriation and entire generations may be deprived of an education.

Bangladesh's positive signaling towards lifting the ban on access to formal education for some Rohingya refugees signals an important shift towards recognition of Rohingya persons as rights-holders. However, and especially given the protracted nature of Rohingya communities' displacement in Bangladesh, and the low likelihood of safe repatriation to Myanmar in the near-term, it must be noted that the government of Bangladesh's insistence on providing instruction in the Burmese language and in accordance with the Burmese curriculum runs counter to the goal of implementing long-term rights-based responses and promoting self-sufficiency and local integration with the host community. Additional action is needed to meet these commitments, including through a general implementation of access to formal education, providing additional financing, establishing a meaningful learning framework, and a clear pathway to accreditation.

BANGLADESH

Following a meeting of the National Taskforce on Rohingya in January 2020, the government of Bangladesh announced a pilot program through which Rohingya children in grades six to nine would be allowed to receive a formal education at learning centers run in collaboration with the UNHCR. The program will follow the Myanmar national curriculum and be taught in the Burmese language, in accordance with the government of Bangladesh's insistence on the imminent repatriation of Rohingya and aversion to providing opportunities to Rohingya that may be understood as improving their ability to integrate with the local community. However, due to the spread of COVID-19, the pilot program has not been initiated.

Access to Education for Children of LTV Holders

While the right to education is universal in India, registration of non-citizen children still represents a significant challenge. The issuance of a legal status (such as foreigner in possession of an LTV) and the accompanying legal identification makes education much more accessible in practice.

INDIA

A 2011 policy on the granting of LTV to individuals fleeing prosecution,¹¹³ expanded in 2018 to include members of religious minority groups from Bangladesh and Pakistan, offers legal stay and the ability to open bank accounts, and allows children of status-holders to enroll in schooling.

Access to Employment

Due to their regulation as “foreigners” under legislation, which does not provide for differentiated treatment of individuals with protection needs, stateless and refugee populations face significant challenges in accessing the formal labor market. As a result, many are often forced to take up work in the informal sector, where they benefit from fewer institutional protections and are more likely to experience exploitative working conditions, including wage theft.¹¹⁴

Legislative/Judicial Practice

Extension of Workplace Rights and Protections to Refugees

As demonstrated by the *Ali Salih Khalaf* case, courts can play a critical role in enforcing rights and entitlements for non-citizens provided by domestic law. However, while worker protections in national employment laws apply to all persons in Malaysia per the ruling, refugees are still not eligible for a Temporary Employment Pass, and thus are limited to engaging in informal and ad hoc employment opportunities.¹¹⁵

MALAYSIA

As upheld in *Ali Salih Khalaf v. Taj Mahal Hotel*,¹¹⁶ the term “any person” given in the definition of the Industrial Relations Act of 1967 is broad enough to cover a UNHCR-registered refugee and is in accordance with Article 8 of the Malaysian Constitution, which guarantees equal protection to all “persons.” Thus, refugees in Malaysia are offered the same labor protections enshrined in the 1955 Employment and 1967 Industrial Acts as any other worker.

Policy/Administrative Action

The Right to Work for Individuals Targeted under Statelessness Prevention and Redress Initiatives

The extension of the right to work to a significant proportion of the stateless population is a positive practice that demonstrates the feasibility of facilitating the right to work and access to the formal labor market for displaced populations.

THAILAND

On October 18, 2016, the Thai cabinet approved the proposal of the Committee Considering Working Aliens allowing individuals covered by the Thai state’s legal status and statelessness redress programs to legally engage in all lines of employment in the country.

The right to work is extended to individuals falling within one of 22 defined groups, which include 19 ethnic minorities and three groups of formerly undocumented/unregistered stateless persons. These groups account for approximately 488,105 individuals.¹¹⁷

Government-facilitated Access to Formal Labor Markets for Refugees

The role of host governments in facilitating the right of refugees to engage in fairly-remunerated and dignified work has been a politically difficult challenge, with only halting progress having been made in the countries surveyed in this report. For example, while 300 participants were targeted in Malaysia’s pilot program for UNHCR card-holders, reports from 2017 indicate that only 40 individuals ultimately took part in the scheme.¹¹⁸

In Pakistan, while Afghan refugees are de facto permitted to engage in entrepreneurship, the legislative grounds for this practice are unclear and reports indicate that most Afghan entrepreneurs resort to running their businesses without a valid registration or under the names of Pakistan friends and family members.¹¹⁹

MALAYSIA

In March 2017, Malaysia piloted a program aimed at facilitating 300 UNHCR-card-holding Rohingya refugees’ engagement in formal employment in the plantation and manufacturing sectors. In 2018, the Malaysian government, then led by the Pakatan Harapan (“Alliance of Hope”), also pledged to “legitimize [refugees]’ status by providing them with UNHCR cards and ensuring their legal right to work.”

PAKISTAN

Afghans with Proof of Registration cards (issued by the Pakistani government to registered Afghan refugees) or Afghan Citizen Cards (issued to Afghans in Pakistan without documentation as part of a program in 2017-2018) can establish businesses in Pakistan.¹²⁰

Access to Health Care

The positive practices profiled in this subsection cover legislative and administrative actions as well as other complementary initiatives aimed at providing stateless and refugee populations access to basic state-run emergency and preventative health care services at little or no cost.¹²¹

As evidenced in this report’s sections on education and other basic rights, constitutional protections (such as equality before the law) and other universal principles often present fruitful avenues for advancing the protection of protection seekers, and these principles may also include the right to access health care services.

Policy/Administrative Action

Extension of Universal Health Care to Individuals Awaiting Citizenship Verification Procedures and Health Care Enrollment Initiatives for Stateless Students

Thailand sets a strong example in the region and globally by providing many migrants and stateless individuals with access to health care, an effort which affirms access to health care as a basic right while also demonstrating the economic and public health benefits of inclusionary policies.

THAILAND

On March 23, 2010, the Thai cabinet approved a resolution extending access to the state's universal health care system to individuals who had a pending application for their verification as a Thai citizen.¹²² Another resolution was issued on April 20, 2015, reinstating the basic rights to public health for a group of approximately 208,631 individuals with legal status and rights problems who had been issued a 13-digit national ID number. Later in September 2020, the Thai cabinet approved 3,000 stateless students holding an eligible ID number to be enrolled in the National Healthcare Fund for Persons with Legal Status Problems.¹²³

Safe Access to Health Care for Unregistered Populations

THAILAND

In Indonesia, asylum seekers and refugees are provided access to community health centers for medical checkups or to be prescribed simple medicines. Receiving health care services from these centers is generally inexpensive but may require a UNHCR card, depending on the center. State hospitals, on the other hand, can only be accessed via referral and are often cost prohibitive. The International Organization for Migration and UNHCR implementing partners may cover hospital costs if the individual contacts these organizations in advance to arrange for payment.

LESSONS LEARNED AND POLICY RECOMMENDATIONS

The primary purpose of this report is to highlight positive practices adopted by governments and employed by advocates to advance the rights of those in need of international protection in jurisdictions that have mostly not formally recognized them as such. The above compilation of those practices also, however, notes myriad limitations, recognizing that no universal or comprehensive fix exists in the region. In addition to highlighting positive practices and their limitations for inspiration and adoption by policy-makers and advocates, there are a number of lessons to be learned from these experiences. These lessons have been adapted and formulated into the following recommendations. They are by no means exhaustive, but rather serve as a broad point of departure for the way forward.

STRATEGIZE WITH DISCRETION IN MIND

Local actors interviewed for this study expressed various viewpoints regarding the ramifications of discretion. To some, discretion is preferable to binding rules, because demands for more clarity can lead to more restrictive interpretations, limiting the ability of actors to exercise protection-oriented discretion on a case-by-case basis. Others argued that broad exercise of discretion sacrifices predictability, results in corruption, and while it may result in individual successes, it will usually not have a larger impact.

While a lack of firm guidelines certainly runs contrary to the ultimate goal of comprehensive protection codified in law, the flexibility and streamlined manner in which policy can be established may be advantageous for advocates in the region. Advocates may seek to construct strategies that are specifically designed to account for the discretionary authority in their context. In addition to calls for broad reforms or comprehensive measures in line with international standards, advocates at the national level may choose to form relationships with relevant government actors or divisions that possess such discretionary authority and use those relationships to call for changes within that authority. Regional or international advocates may seek to complement such efforts by drawing positive attention to previous discretionary measures and encourage their advancement and codification. In sum, a pragmatic, practical, and constructive approach to discretion may result in favorable and swift action from which broader reform efforts may be embarked upon.

PRESS FOR TRANSPARENCY AND LEGAL CERTAINTY

Many of the challenges shared across the six countries stem from a lack of understanding of what policies are legally binding on refugees, service providers, and even the government itself. For example, the ban on marriage registration between Rohingya and Bangladeshis in Bangladesh and the 1997 Circular in Pakistan do not make clear whether the Foreigners Act of 1946 applies in full or in part to non-citizens with protection needs. In Bangladesh, the government's apparent decision to leave the border open in August 2017 to allow over 600,000 Rohingya to cross and take residence in Cox's Bazaar has never been confirmed with a publicly circulated written order. In many instances, progressive policies exist, but are not accessible or available to the general public, as evidenced by a number of unpublished or private orders and circulars.¹²⁴ Where policies do exist, they can be ambiguous in their construction, leaving questions concerning scope of coverage and implementation. Unclear policies are open to varying interpretation by administrative or judicial officials and may be applied in conflicting or inconsistent ways. While strategic ambiguity can be deployed progressively or adversely depending on the outcome sought, justice is best served through a policy of clarity and transparency that bestows rights holders with certainty over the content and scope of their rights and entitlements of services—in other words, empowering them with the knowledge that is the necessary precursor to their ability to claim and enjoy said rights and entitlements.

As such, clarifying existing policies and addressing outstanding questions would benefit a range of actors, including refugees, aid agencies, and the various government officials who implement them. Advocates may benefit from concerted efforts to push for clarity alongside calls for broader reform. In some instances, seeking clarity on existing practices may be a useful starting point for campaigns. Where consistent engagement with relevant agencies or ministries proves unsuccessful, employing right to information legislation (if it is available) may offer a successful alternative.

Complementing attempts to clarify law and policy, actors within the region could clearly benefit from broader awareness of governmental determinations. Several judicial opinions remain unpublished or inaccessible to other practitioners and NGOs, as well as other government agencies. Advocates may seek to embark on broad awareness-raising efforts, elevating knowledge of judicial opinions or policies taken by the government, strategically targeted at those who may be reluctant to be seen as pushing the envelope and therefore would be positively influenced by the existence of judicial precedent. The complex political environments across the region may well benefit from concerted efforts to promote existing or previous action and focus on what has been done in order to build on those efforts, while also looking to prospective action to be taken.

CONSIDER UNHCR AS A TARGET OF ADVOCACY

UNHCR's role varies significantly among various countries in the region. In some contexts, such as Indonesia and Malaysia, UNHCR has generally positive and cooperative working relationships with the government and civil society, and is engaged with all refugee populations in the country. In other contexts, such as Thailand and India, UNHCR has a seemingly more selective role, working with only certain protection-seeking populations in specific parts of the country, while the respective government entities manage other populations of concern and geographic areas. In Pakistan, UNHCR does not conduct refugee status determination or resettlement operations, and populations other than Afghan refugees are not well documented.

In Bangladesh, UNHCR has been effective through registration and documentation exercises and appears to be taking a high-level and strategic approach, though government reluctance to accept UN standard operating procedures or to use the term “refugees” has been a challenge. Despite such variance across jurisdictions, UNHCR, as the lead protection agency, serves as a significant stakeholder with potential for implementing large-scale programs while maintaining high-level access to host governments. Advocates with entry points to UNHCR should use their access to push the agency to adopt bolder, concerted action—and more consistent policies across the regions. UNHCR will always maintain a unique role given that it is established by UN member states and entrusted with the protection of refugees. How the agency straddles that line is in large part dependent on engagement.

STRATEGICALLY UTILIZE COMPLEMENTARY PATHWAYS TO PROTECTION

Given the reluctance of many states in the region to legislate a framework for the general recognition of non-nationals fleeing persecution, complementary protection pathways must be identified and leveraged. For example, protections available to victims of human trafficking may afford an opportunity to provide legal protections to non-nationals without invoking the concept of asylum and avoiding the political sensitivities and resistance frequently associated with the term “refugee.” Malaysia’s Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act Amendment (Act A1500) serves as an example of a mechanism that could potentially be used to extend government support to a subset of non-nationals with protection needs, if interpreted and applied in a broad manner.¹²⁵ Taking the displaced Rohingya community as an example, advocates and stakeholders may consider this population not only as a refugee population in need of international protection, but also as a stateless population at risk of trafficking that should be provided protections within the framework of complementary efforts aimed at those issues. By engaging in advocacy efforts that strategically think beyond the framework of refugee status as the key determiner of the availability of protections, advocates may find more sympathetic ears among decision-makers while also helping to extend protections to other vulnerable non-refugee groups, such as stateless or undocumented populations.

EMPLOY CITIZENSHIP LAW AS A POSSIBLE PATHWAY TO PROTECTION

A number of states in the region surveyed have demonstrated commitment to reducing and ending statelessness, especially those with significant indigenous stateless populations, such as Indonesia, Malaysia, and Thailand. This political will toward combating statelessness should also be capitalized on in order to push for the equitable application of anti-statelessness measures toward refugee groups also facing statelessness, such as the Rohingya. Advocates may consider, for example, pushing for full application of existing provisions of citizenship law, especially where the proper application of national law is the only means of avoiding de facto statelessness. Particularly in situations of prolonged displacement, which increasingly represent the global norm, marriages between members of host and refugee communities are inevitable and must not result in intergenerational statelessness.

CONSIDER CALLING FOR TEMPORARY PROTECTION IN THE ABSENCE OF LONG-TERM SOLUTIONS, WHILE REMAINING AWARE OF ITS LIMITATIONS

The first two decades of the 2000s saw an increase in scholarship and examination of the place of temporary protection within the international refugee protection regime.¹²⁶ Temporary protection has increasingly shifted from being viewed as a complement to international protection only to be used in mass influx situations to a means for states to accomplish existing obligations, whether within the Refugee Convention or more broadly (as outlined briefly above in this report's section on international human rights law as a basis for "complementary" protection).¹²⁷

Currently, the number of temporary protection regimes being implemented in this way across the world is growing. For example, Turkey formally adopted a temporary protection regime in 2014 for Syrian nationals and refugees who were previously provided protection in Syria.¹²⁸ In 2021, Colombia announced that it would institute a formal temporary protective status for Venezuelan nationals, identified by some as having been modeled on the Turkish example.¹²⁹ And Peru employed a Temporary Stay Permit (*Permiso Temporal de Permanencia*, or PTP) for Venezuelan nationals who entered the country within a certain time period, extending to those individuals a legal status and the right to work for a period of one year.¹³⁰

The extent to which temporary protection regimes can prove instructive depends on the formalization of the framework, whether it includes a distinct legal status under law, and what rights are attached to the recognition of temporary protection status. Formulating a distinct legal status that is separate from that which governs other foreign nationals without protection needs often serves an important function as a basis from which further, longer-term protections can be sought.¹³¹ Where fundamental rights such as education, health care, and legal access to work are granted as part of a temporary status, the protection offered can be in line with that of the traditional international framework (i.e., the 1951 Refugee Convention). In other words, temporary protection regimes can accomplish the end goal of legal protection for refugees, despite the major weakness that they do not offer long-term certainty to populations in need of such protection.

Given the prevalence and prominence of status-related issues and challenges across the region, temporary protection may be a useful tool for advocates in the region. While temporary regimes present significant challenges for refugees in the form of possible extended legal limbo, especially when adopted for lengthy periods of time, temporary protective statuses may at least begin to address the legal precarity that is the focus of this paper. Such regimes would help satisfy the concerns of many host governments of shouldering responsibility for large populations with limited resources, while also improving the lack-of-status issues that have plagued these communities. In particular, they can mitigate the risk of detention and removal for protection seekers.

While temporary protection regimes should not be viewed as replacement for long-term protections, the role of temporary mechanisms should not be understated or overlooked, particularly in states with no existing refugee framework, including those in South and Southeast Asia. Advocates may wish to call for the use of such schemes, and in doing so ensure that the temporary status at its inception offers a pathway to transition to a more permanent one.

PUSH FOR *PRIMA-FACIE* RECOGNITION

While protection opportunities should be available to anyone in need, the current reality is that specific source countries account for the majority of asylum seekers and refugees. This reality underlies this report's focus on Rohingya and Afghan refugees—populations that could be candidates for group-based or prima facie designations. Similar but distinct from temporary arrangements, prima facie designations may be a way of managing the concern of governments that opening the doors to these particular populations encourages increased arrivals and applications for protection from all. Advocates may not want to shy away from calling for arrangements or measures that target specific nationalities or subsets of such populations—again like temporary frameworks—as a starting point to more formal protection. Governments may be encouraged, rather than criticized, for making group-based designations, particularly after crises unfold. Members of the Rohingya community are particularly apt for such a designation, given the widespread acknowledgment that they have experienced genocide; similarly, specific ethnic minority groups from Afghanistan such as the Hazara community may also be suitable for prima facie designations. Because limited protection for only some profiles may lead to a very real perception that certain groups are favored and others ignored, it will be critical for advocates to consider this to be a potential compromise with states that are seemingly unwilling to open the door at all. To counter negative outcomes, such an approach may be qualified as only temporary, which aligns with how the concept has been assessed by UNHCR.¹³² In this way, prima facie designations and temporary protection measures are interrelated and may be considered in tandem by advocates looking to promote policy responses that account for political realities in the region.

PRIORITIZE FREEDOM OF MOVEMENT

In some of the contexts featured in this report, refugees are not confined to living in camps. These practices align with UNHCR's organizational stance on the use of camp-based confinement of refugees, which highlight the ways in which camps can hinder refugees' self-management and access to livelihoods and cause negative environmental impacts, among other problems.¹³³

Regional refugee host countries like Malaysia, which does not maintain any formal camps, still face significant challenges in extending comprehensive rights and entitlements to refugee populations. But they demonstrate the feasibility of implementing freedom of movement even by non-signatory states.

Freedom of movement must be prioritized in conversations with states hosting refugees and spoken about in consultation with local host communities. There should be more effective and concerted awareness-raising regarding the negative impacts of restrictions on mobility for protection seekers, emphasizing both protection seekers' rights as well as the downsides for the host community.

ADVOCATE TO END IMMIGRATION DETENTION

Where immigration detention is being used by states against individuals with protection concerns, as is the case in a number of the countries surveyed, advocates may consider engaging in calls to end these practices, including through the promotion of rights-based alternatives.

Advocates may push for the introduction of alternatives to the use of immigration detention that are more affordable, support health and wellbeing, respect human rights, advance case resolution processes, and increase voluntary and independent departure rates.¹³⁴

Alternatives to detention should be formulated in a way that makes them inclusive, taking into account family unity and reunification. It should not be assumed that alternatives to detention bear no resemblance to detention: while they often lead to improved mobility and shelter outcomes, alternatives to detention are not always implemented without any “carceral purposes”¹³⁵ and do not necessarily guarantee freedom of mobility. As such, advocates should be aware that the introduction of alternatives to detention may not by themselves provide a durable solution for refugees and asylum seekers, especially if these alternatives do not aim at ending the practice of immigration detention and in cases where they do not form part of a holistic approach to integrating refugee populations into host societies with access to basic rights.¹³⁶

SUPPORT AND STRENGTHEN CIVIL SOCIETY

A global survey conducted in 2012 on “The Implementation of UNHCR’s Policy on Refugee Protection and Solutions in Urban Areas,” found that, “it is the relationship with civil society, at large, as opposed to a specific government entity, that is the key to expanding the protection space for urban refugees and asylum seekers.”¹³⁷ This principle has found global consensus through the “whole-of-society approach” of the Global Compact for Safe, Orderly, and Regular Migration and the “multi-stakeholder and partnership approach” of the Global Compact on Refugees.¹³⁸ Despite this official recognition, the role of civil society remains limited in official processes throughout the region.

National-level civil society actors are paramount to achieving improvements to refugee protection in the region. The case studies and positive practices featured in this report are overwhelmingly those conceived of, led, and carried out by national civil society organizations. This community remains fully dedicated to the issue when international assistance funding ebbs and flows or political priorities shift. Given their mandates and knowledge of local dynamics, they are the agents most able to dispel misinformation and counter community backlash.

National civil society organizations’ importance must be recognized by all relevant actors, most importantly UNHCR and other international agencies, government, and international and regional NGOs and networks. Advocates working to improve refugee protection from outside of national contexts, whether globally or regionally, must make greater efforts to increase consultation and collaboration with actors at the national level when designing interventions and strategies, engage in legal empowerment strategies, and place local actors in the driving seat of change.

Major improvements have been made in ensuring representation of refugees and affected populations in decision-making, though there remains a long way to go. Refugee-led organizations must be considered as a critical component of civil society, and similarly elevated.

Efforts to achieve a “whole of society” approach must be continued, and civil society’s critical position must not be sidelined by the inclusion of previously unrepresented voices such as that of the private sector. There must be renewed and strengthened support for civil society: Governments and all international actors such as UNHCR must not ignore the crucial part they play in effectuating positive change.

ENGAGE AND SUPPORT NATIONAL HUMAN RIGHTS INSTITUTIONS

National Human Rights Institutions or Commissions vary in their structure and function across the region, which can be productive but also counterproductive where they are restrained by limited mandates and limited institutional independence. While their positioning as a state institution makes it more difficult for governments to dismiss their recommendations, NHRIs are also more vulnerable to government pressures, and constrained by their resources and institutional location.

Depending on their mandate, NHRIs can promote conformity of national laws and practices, build institutional pathways of implementation, and use quasi-judicial powers to investigate complaints, among other things. Because implementation always operates within a political context, it may be advantageous for civil society advocates to consider engaging NHRIs as intermediaries and key partners.

ENHANCE AND EXPAND SOUTH-SOUTH COOPERATION

One concrete way in which funders and Global North-based actors can extend support to civil society advocates in countries hosting large numbers of refugees is by way of strategic convening and knowledge-sharing. Efforts to bring advocates from different contexts together to directly share experiences and to learn from one another must be scaled up. Such opportunities should take into account the expertise of civil society actors working on the front lines of refugee response and their capacity limitations, and thereby seek to facilitate such opportunities in accessible locations, timings, and formats.

CONCLUSION

As is evident from the case studies outlined in this paper, there are lessons to be learned and inspiration to be taken from the actions of governments and advocates in South and Southeast Asian nations. These countries' refusal or reluctance to ratify the 1951 Refugee Convention or its 1967 Protocol, and their lack of specific national legislation recognizing a distinct status for refugees, makes them particularly challenging contexts for refugee rights advocates. However, the experience of host countries in the region, and other non-signatory states beyond the region, demonstrates that in the absence of binding international law, creative and diverse actions rooted in national law and policy have in fact provided protections to some groups, and may serve as grounds for further expansion and enhancement to improve conditions for displaced communities.

Too often such host countries are solely criticized for their violations and shortcomings, with insufficient attention paid to the positive ways in which informal or alternative forms of protection have been made available, or the progress made toward achieving protection for refugees. There is reason to continue to promote the further adoption of the 1951 Refugee Convention and its 1967 Protocol and the jurisprudence that has developed around it, in order for states to provide more adequate protection to refugees. However, where states have not ratified the Convention or Protocol and/or are not prepared to adopt international standards in toto, there is certainly merit in assessing alternative practices and undertaking comparative reflection.

This report is meant to bring to light some of the measures that can be taken and the advocates whose experience can be a source of positive lessons. In doing so, it recognizes that the most effective means for drawing out instructive and innovative comparative practices is through engagement and mutual understanding. It is hoped that advocates across the contexts studied can continue to inspire each other through ongoing South-South dialogue, and that conditions for refugees in such settings can be continuously improved upon as a result.

ENDNOTES

- 1 Ridwanul Hoque and Quazi Omar Foysal (Bangladesh); the organizations Febi Yonesta and Suaka (Indonesia); Deepa Nambiar (Malaysia); the research group Musawi (Pakistan); and Asylum Access Thailand. The experts consulted for the India portion of this project have requested to remain anonymous.
- 2 Brian Barbour is senior regional refugee protection officer at Act for Peace, and the chair of regional protection at the Asia Pacific Refugee Rights Network.
- 3 *There Are Alternatives*, International Detention Coalition.
- 4 Article 38(1)(b) of the Statute of the International Court of Justice.
- 5 1969 North Sea Continental Shelf cases.
- 6 “Sustainable Development Goal 16.9: ‘Legal Identity’, Nationality & Statelessness,” Institute on Statelessness and Inclusion (2018): 2.
- 7 Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of *Non-Refoulement* (Opinion)” (United Nations High Commissioner for Refugees (UNHCR), June 20, 2001), www.unhcr.org/protection/globalconsult/3b33574d1/scope-content-principle-non-refoulement-opinion.html, 1.
- 8 Article 1A(2) of the Refugee Convention.
- 9 While all refugees are migrants, not all migrants are refugees. For more on this distinction, see Article 1 in Kysel et al, “International Migrants Bill Of Rights, With Commentary,” *Georgetown Immigration Law Journal*, 28, no 23 (2013): 33, <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/08/04-IMBR-with-Commentary.pdf>.
- 10 Joan Fitzpatrick, “Temporary Protection of Refugees: Elements of a Formalized Regime,” *The American Journal of International Law* 94, no. 2 (April 2000): 279, <https://doi.org/10.2307/2555293>.
- 11 Fitzpatrick 287.
- 12 Careful consideration of the South and Southeast Asian protection context reveals a region that is hesitant to offer a permanent refugee status, codified in law. Many states do not view the use of the term “refugee” favorably, associating the term with the 1951 Convention’s shortcomings in terms of international burden sharing. This guide intentionally considers protection mechanisms which are rooted in existing domestic law and policy as potentially more politically feasible avenues for extending crucially needed protections to vulnerable non-national populations.
- 13 Brian Barbour, “Beyond Asian Exceptionalism: Refugee Protection in Non-Signatory States,” *Forced Migration Review*, no. 67 (July 2021): 42–45.
- 14 For a more detailed discussion on interactions between non-signatory states and international refugee rights norms, see Maja Janmyr, “Non-Signatory States and the International Refugee Regime,” *Forced Migration Review*, no. 67 (July 2021): 39–42.
- 15 Article 2 of the AHRD provides guarantees for the freedoms that are at the base of the need for protection in the region, namely freedom from discrimination on the basis of “race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.” Article 14 of the AHRD enshrines the principle of non-refoulement when it states without qualification, “No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” Articles 15 and 16 refer to the right to freedom of movement and specifically the right to seek asylum. However, the right to seek asylum derived from the AHRD is “in accordance with the laws of such State and applicable international agreements,” and therefore it is a limited right in that it does not exist without supporting domestic legal provisions in any individual ASEAN state.
- 16 A detailed elaboration of the principle of non-refoulement and its place among other customary international law norms is given in Lauterpacht and Bethlehem.
- 17 Maja Janmyr, “The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda,” *International Journal of Refugee Law* 33, No. 2 (June 2021): 188–213, <https://doi.org/10.1093/ijrl/eeab043>.
- 18 Esther Kiragu, Angela Li Rosi, and Tim Morris, “States of Denial: A Review of UNHCR’s Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh” (*Policy Development and Evaluation Service, UNHCR*, 2011).
- 19 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*); Lindsey N. Kingston, “Protecting the World’s Most Persecuted: The Responsibility to Protect and Burma’s Rohingya Minority,” *The International Journal of Human Rights* 19, no. 8 (November 17, 2015): 1163, <https://doi.org/10.1080/13642987.2015.1082831>.
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- 25 “Figures at a Glance in Malaysia,” UNHCR, accessed October 28, 2019, <https://www.unhcr.org/figures-at-a-glance-in-malaysia.html>.
- 26 Saad Sayeed and Syed Reza Hassan, “Rohingya Refugees in Pakistan Fear for Relatives in Myanmar,” *Reuters*, September 10, 2017, <https://www.reuters.com/article/us-myanmar-rohingya-pakistan/rohingya-refugees-in-pakistan-fear-for-relatives-in-myanmar-idUSKCN1BL0B4>.
- 27 “Thailand | Global Focus,” UNHCR, accessed October 28, 2019, <https://reporting.unhcr.org/thailand>.
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The Open Society Justice Initiative, part of the Open Society Foundations, uses strategic litigation, advocacy, and legal empowerment to advance human rights and defend and promote the rule of law. In this work, we collaborate with a community of dedicated human rights advocates across the globe to pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption, and promote economic justice.

The Refugee Solidarity Network, a New York-based nonprofit organization, protects the rights of people uprooted from their homes and strengthens the communities where they seek safety. RSN employs a partnership model with advocates and local stakeholders in the Global South, to develop national capacities and advance legal frameworks as a means to refugee protection. RSN has contributed to projects involving the provision of legal assistance, information dissemination, training, and strategic litigation for refugees in Turkey, Bulgaria, Greece, and Bangladesh, and engages in research and advocacy on a regional and global level.

