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Realistic yet humanitarian? The comprehensive plan of action and refugee policy in Southeast Asia

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Abstract

The 1989 Comprehensive Plan of Action (CPA) has recently been described as a successful example of how to manage large protracted refugee flows. However, this article revisits the circumstances surrounding the CPA used to resolve the prolonged Indo-Chinese refugee crisis to highlight that part of its development was linked to the fact that Southeast Asian states refused to engage with proposed solutions, which did not include repatriation for the majority of the Indo-Chinese asylum seekers who were deemed to be 'non-genuine'[1] (UNGA, 1989a) refugees. This resulted in the CPA often forcibly repatriating 'non-genuine' refugees, particularly near the end of its program. This article reviews the CPA in order to assess whether its practices and results should be repeated.

This article investigates how the Comprehensive Plan of Action (CPA) was created by the Association of South East Asian Nations (ASEAN) states, Hong Kong, Western states, and the Office of the United Nations High

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1 The terms 'genuine' and 'non-genuine; come from the UHHCR documentation in 1988 and 1989.

Commissioner for Refugees (UNHCR) in a collaborative effort to solve the Vietnamese and Laotian refugee problem in the late 1980s. A different response was formulated for Cambodians, who were not part of the CPA, due to their classification as 'displaced persons' and the nature of the political situation surrounding their displacement (USCR, 1989c; Robinson, 1998).[2] The CPA has been the subject of both criticism and applause since its creation (Hugo and Bun, 1990; Barcher, 1992; Bari, 1992; Hathaway, 1993; Helton, 1993; McDonald, 1993; Robinson, 1998). However, over recent years the emerging consensus has been that the CPA was a sound example of genuine multi-actor cooperation that proved effective in 'reducing the number of clandestine departures' (Loescher and Milner, 2003) from Indo-China as it was able to separate the genuine from non-genuine refugee claimants (Feller, 2001; Okoth-Obbo *et al.*, 2003; Robinson, 2004).[3] Furthermore, it has been recently argued that the CPA 'focused on providing protection within the context of an asylum-migration nexus situation' and achieved a comprehensive approach to protecting 'genuine' refugees and finding solutions for 'non-genuine' (Betts, 2006; Towle, 2006). This has resulted in more recent CPA-based approaches being applied to Somali and Afghan refugee populations (UNHCR, 2001; 2005).

This article questions whether the CPA is a sound model for contemporary UNHCR operations. It argues that, on closer scrutiny, the CPA was flawed in important respects. The adoption of UNHCR guidelines for refugee status determination under the CPA did not provide a guarantee that, in practice, the screening states would abide by the guidelines. With the exception of the Philippines, Southeast Asian states were not members to the 1951 Convention Relating to the Status of Refugees (1951 Convention) or its addendum, the 1967 Protocol. The fact that the screening states were not and still are not signatories meant that they had no obligation towards the guidelines, and as a result, did not apply the CPA as they were expected to do so. Furthermore, the CPA helped justify Southeast Asian states arguments that asylum seekers should not be considered or even treated as 'genuine' refugees *until proven otherwise*. Southeast Asian states succeeded in persuading Western states and the UNHCR, both of which had earlier opposed this argument, of their case and the CPA amounted to an affirmation of Southeast Asia's activities towards the Indo-Chinese asylum seekers from the beginning of the crisis in 1975 (Davies, 2006a). The outcome of this process was that ultimately those deemed 'genuine' refugees were resettled outside the region and those deemed

2 The Paris Accords decided that the Cambodian population should be repatriated as soon as possible. The UNHCR for the first time assisted some 300 000 Cambodians to repatriate.

3 Even Courtland Robinson, once a critic, has recently written that a CPA should be applied, for the example, to the displaced Palestinian population.

'non-genuine' were forcibly repatriated. The CPA relied on the presumption of 'non-genuine' refugees, producing a system that was arbitrary and biased against the asylum seekers. This suggests that future support for a CPA-based approach must consider whether a region can resolve a protracted refugee problem without seriously compromising UNHCR's own refugee status-determination process and the protection of those most vulnerable.

This article is divided into three parts. The first part charts the lead up to the 1989 International Conference on Indo-Chinese Refugees organized by the UN Secretary General. In March 1989, ASEAN states had requested all interested parties meet in Kuala Lumpur to discuss a new framework to replace the failed 1979 Orderly Departure Program (ODP) (Davies, 2006a).[4] This meeting marked the beginning of the CPA; the second part of the article will discuss the CPA itself, focusing on what it aimed to achieve. The two central strategies of the CPA – screening and repatriation – were met with a variety of responses. I will argue that both strategies failed to persuade ASEAN states to comply with international refugee law, resulting in the CPA institutionalizing non-compliance and compromising asylum seekers full access to seeking refugee status. In the final part of the article, I will assess the consequences of the CPA for those asylum seekers who continued to seek refugee assistance until its conclusion in 1996.

1 Replacing a 'failed' refugee response system

Between 1988 and 1989, the number of Vietnamese who sought asylum in Southeast Asia and Hong Kong increased by 84 percent (UNGA, 1989b). This was largely attributed to a temporary lapse in the ODP, as well as continued poverty and instability in the region. The ODP had been developed in 1979 through a Memorandum of Understanding between the UNHCR and Vietnamese government to permit the 'orderly departure' of family reunion cases and special humanitarian cases, while preventing 'illegal' departures. Lists would be prepared by the Vietnamese government and receiving countries – then the lists were compared and those who appeared on both were permitted leave (Robinson, 1998, p. 57). However, for the ten years of its duration there were perpetual problems due to differences between the US and Vietnam about who could be given immediate refugee status and resettlement (USCR, 1998b; Robinson, 1998, p. 195). As a result, the numbers prepared to

4 The ODP was developed in the 1979 Conference on Indo-Chinese refugees where Southeast Asian states agreed to stop pushbacks of asylum seekers on international waters and Vietnam agreed to allow the orderly departure of individuals whose safety was feared for by the United States and France. For more details on the 1979 Conference and its program of action please see Davies, S.E. (2006a).

pay people smugglers US$1,500 for a place in a boat steadily rose by the mid-1980s (USCR, 1988a).

At the same time as the number of asylum seekers increased, Southeast Asian states and Hong Kong, became increasingly frustrated with the slow rates of resettlement to the West. Moreover, the long-stayers who were repeatedly denied refugee status but refused repatriation remained and were joined by a seemingly endless stream of arrivals (USCR, 1988d).

From 1986 to 1987 there was a major increase in the number of Vietnamese boat people from 19,527 to 28,056 (Druke, 1993). By December 1988, the UNHCR was attempting to negotiate a new Memorandum of Understanding with Vietnam to restart the ODP. There was some success: the ODP expanded and accelerated departures, while the UNHCR was given access to those seeking resettlement (Robinson, 1998, p. 183).

Still, these efforts failed to reduce the rate of those leaving independently. The problem with the majority of those leaving by boat was that they were not eligible for ODP departure (USCR, 1987b).[5] In addition, Vietnam blocked many requests for people wishing leave under the ODP to reunite with their families and those in re-education camps were particularly 'off-limits' (Ibid., pp. 1–2). Vietnam also seemed to be using the ODP mainly to rid itself of ethnic-Chinese. Finally, because the ODP waiting period was so long, many preferred to take their chances by boat and others were simply not aware of the ODP procedures and how they could use them to secure departure (Ibid., p. 5).

As a result, there was a continued increase in the number of asylum seekers between 1988 and 1989. Several Southeast Asian states started to publicly decry the failure of the 1979 ODP agreement and call for new solutions. In 1988, ASEAN denounced the 1979 ODP agreement as inherently unable to produce a durable solution to the problem:

> The ASEAN Foreign Ministers are seriously concerned about the continued outflow of refugees, displaced persons and illegal immigrants from Indo-China and the problems this poses for the ASEAN countries. The Foreign Ministers note with particular concern the large increase in the number of Vietnamese boat people coming into the ASEAN region over the past year. The Foreign Ministers are of the view that the structures, premises and assumptions of the past are no longer capable of dealing with the Vietnamese boat people problem. The Foreign Ministers agree that a new comprehensive program of action is needed (ASEAN, 1988).

5 ODP required that the receiving state – mostly the United States agreed with the listing of those on Vietnam's departure list and vice versa – making the process quite prolonged and susceptible to politics.

At the 1988 UNHCR Executive Committee of the High Commissioner's Program (hereafter referred to as the Executive Committee) meetings, the ASEAN states, with the support of Australia and Japan, further expressed their discontent with the system of response set up in 1979. ASEAN states drafted a proposal for the Executive Committee's consideration: an international conference to resolve the Indo-Chinese refugee crisis. Australia was the first to support it (UNGA, 1988, p. 6) and Japan followed suit (Ibid., p. 4). Indonesia, Malaysia, and Thailand repeatedly stressed the importance of a new conference (Ibid., pp. 12–16). Thailand, for instance, argued that it was becoming 'increasingly apparent that the norms and principles formulated at an earlier time in one part of the world and under a particular set of circumstances could not always be applied automatically to other regions or situations' (Ibid., p. 5). The new conference's purpose was to reach a 'new consensus. . .on comprehensive and durable solutions to deal in a realistic yet humanitarian manner'(Ibid., p. 11).

On 28 January 1988, the Thai Ministry of the Interior announced that all Vietnamese boats heading toward Thailand would be pushed back to sea (USCR, 1988a). In the next month, the United States Committee for Refugees (USCR) reported that more than 550 people were pushed back from Thai waters, with at least 100 people dying in the water and another 530 people stranded on remote islands with no food, water, or shelter (Ibid). Thailand's action was designed to inhibit the rise of boat people seeking asylum. In the first five months of 1989, Malaysia also had 'near-record levels' of boat people arriving; Indonesia, Japan, the Philippines, and Thailand also recorded 'unusually high arrival figures' (UNGA, 1989c, p.2). By the end of June 1989, the number of boat people registered at UNHCR camps in the region stood at 96,669 – representing an 82 percent rise compared with the same period in 1988 (Ibid).

By April 1988, Indonesia was also reported to be practicing pushbacks (USCR, 1988c, p. 11). The Thai government claimed in March that its pushbacks had been discontinued, but reports suggested otherwise (Ibid). As a result, the loss of life increased. The possibility of Malaysian pushbacks increased when the government stated in April that 'there is a big possibility of the government setting a one-year period, from a date to be fixed later to resettle the Vietnamese . . . starting from that date, the government will no longer adopt a soft attitude to these illegal immigrants and will turn them away' (Ibid). As prior to the 1979 Conference, pushbacks were again being employed by Southeast Asian states to encourage the international community to take responsibility for a problem they did not consider of their making (Davies, 2006a; Davies, 2006b).[6]

6 For further discussion of Southeast Asian states realpolitik tactics see: Davies, S.E. (2006b).

On 15 June, the Hong Kong government announced that all newly arrived Vietnamese would have to prove their refugee status to be eligible for resettlement, or 'face detention as illegal aliens until they could be returned to Vietnam' (USCR, 1988d, p. 6). Hong Kong was the first state to introduce the screening of asylum seekers, and as the conditions in camps worsened, this move had two purposes. The first was to deter Vietnamese without 'genuine' refugee claims from leaving Vietnam and the second was for Vietnam to step up its repatriation negotiations with UNHCR. Resettlement numbers from the West had reached an all-time low and Hong Kong insisted that the only solution was screening (Ibid., p. 7).

Prior to Hong Kong's announcement, ASEAN states had met in May 1988 at a Ford Foundation sponsored conference in Cha-Am, Thailand to discuss the continuing refugee crisis. The ASEAN delegates, along with those from Hong Kong, agreed that non-genuine refugees should be prevented from seeking asylum and that *region-wide screening procedures* should be established. A further proposal was that the UNHCR set up a holding center in the region, which would house asylum seekers who had been screened and rejected. This would reduce the long-stay camp population in first asylum states while the UNHCR negotiated repatriation agreements with Vietnam. The delegates also wanted 'more predictable and multi-year resettlement guarantees' (Ibid., p. 9), along with an expansion of countries prepared to offer resettlement. Most importantly, ASEAN states wanted a solution for those found not to be refugees. ASEAN states insisted that immediate repatriation was the best option as it would not just reduce the load on first asylum camps, but would also serve as a deterrent to those leaving Vietnam because of 'economic factors' (Ibid). It was unanimously argued that the introduction of screening and repatriation was the most effective way of solving the crisis.

Screening was important because it meant that asylum seekers could be separated into *genuine* and *non-genuine* claimants. This demarcation determined which camp the person would be allocated to and what level of assistance they would receive. Hong Kong had been screening asylum seekers with UNHCR assistance since June 1988 and ASEAN states observed the success it was having in that those who were screened and found eligible for refugee status under the 1951 Convention were immediately accepted for resettlement in the West; while those who were not could be relocated to long-term camps. Here, living conditions were less welcoming in order to put pressure on the Vietnamese to accept repatriation. Repatriation was the second part of this plan, once people had been screened-out, their claim to UNHCR protection was no longer valid. Technically, these people could be involuntarily returned because their refugee claim had failed. The significance of this in terms of fulfilling these peoples' right to asylum will be further discussed below.

It is important to note that the Cha-Am meeting set the stage for introducing the screening of asylum seekers from an agreed cut-off date after which arrivals would no longer receive *prima facie* refugee status. There would be increased resettlement speed for those screened then judged to be legitimate refugees, and immediate repatriation for those rejected refugee status. The following ASEAN Foreign Ministers meeting in Bangkok on 4 July 1988 called for a 'new CPA' (ASEAN, 1988). This in turn led to a decision by the UNHCR Executive Committee to host a new international conference on Indo-Chinese refugees (Bronee, 1993, p. 538). The Malaysian government convened another meeting in Kuala Lumpur from 2–9 March 1989, to discuss the first draft of the CPA. The UNHCR and ASEAN cooperated closely in preparing the draft.

The Southeast Asian states collectively agreed that the cut-off date for asylum seekers' access to immediate refugee status would be 14 March 1989. After this date all arrivals would be screened, and the CPA provided a precise formula for how the asylum seekers would be met, treated and dealt with according to whether or not they received refugee status. There were eight sections in the CPA. The first covered *clandestine departure* and the objective here was to enlist the Vietnamese and Laotian governments to prevent people leaving their country illegally. It was suggested that this was to be done through central government directing local authorities on the need to prevent departures. The media was also to alert its listeners to the dangers of clandestine departures, the introduction of status determination in asylum countries, the difficulty of resettlement and the need to consider an alternative, regular, means of departure. The second section covered *regular departure program*, through which the UNHCR and Intergovernmental Committee for Migration (now International Organization of Migration) would assist in expediting and processing departures.

The third section concerned the *reception of new arrivals* and stressed that 'temporary refuge will be given to all asylum seekers, who will be treated identically regardless of their mode of arrival until the status-determination process is completed' (Robinson, 1998, p. 183). It goes on to say that the UNHCR was to be given 'full and early access to arrivals' and 'full access to the refugee status-determination process' (UNGA, 1989a, p. 4). The fourth section covered *refugee status* and insisted that all asylum seekers, regardless of mode of arrival and whether they arrived before or after the cut-off date, should be given the opportunity to seek refugee status and must be considered refugees until proven otherwise.

Screening was to be a 'consistent region-wide refugee status-determination process', which would take place in accordance with 'national legislation and internationally accepted practice' (Ibid). The status of an asylum seeker was to be determined by national authorities, according to the refugee criteria and

procedures set out in the 1951 Convention and 1967 Protocol. In addition, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was to be 'an authoritative and interpretative guide in developing and applying the criteria' (Ibid, p. 5). *Therefore, the UNHCR's procedures and articles for determining refugee status were to be used by ASEAN authorities.* In addition, the UNHCR was to be consulted on the development of a questionnaire for interviewing applicants and given access to the decisions made on each applicant. The UNHCR was also to train officials across the region in the determination process, experience which it had gained from conducting similar training exercises in Hong Kong. However, it is significant to note that the *status determination process was still a national exercise*, carried out by government officials.

The fifth section of the CPA focused on *resettlement* and stated that a resettlement program should be formulated specifically for the 'long-stayers' present in camps prior to the cut-off date (Ibid., p. 6). Resettlement states were to provide multi-year commitments to resettle all Vietnamese who had arrived in camps prior to the cut-off date. A resettlement program for 'newly determined refugees' was also created with resettlement countries asked to accept all those screened-in as genuine refugees within a 'prescribed period' (Ibid).

The sixth section of the CPA covered *repatriation/plan of repatriation*. Those who had been determined not to be refugees were to 'return to their country origin in accordance with international practices reflecting the responsibilities of States towards their own citizens' (Ibid, p. 7). The implication of 'in the first instance' was that after the first instance, involuntary return was acceptable. The next point made in this section was that the country of origin was to accept its citizens 'within the shortest possible time', in safety and dignity without fear of persecution. Then in a further reference to voluntary repatriation, the section stated:

> If, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined (Ibid).

Thus, the section stated quite clearly that repatriation, voluntary or otherwise, would be the eventual outcome for those determined not to be refugees.

The seventh section of the CPA addressed *Laotian asylum seekers*. Though it could be assumed that much of the CPA was relevant to the situation of the Laotians in Thailand, it was nonetheless considered necessary to include a separate section on them. The majority of Laotian refugees only sought temporary asylum in Thailand and a screening process had been in place for them since 1985. The only resettlement country accepting Laotians by this stage was the United States. The section announced that 'intensified trilateral

negotiation between the UNHCR, the Lao People's Democratic Republic and Thailand' was to continue (Ibid., p. 7). The CPA's purpose in this regard was to give all displaced Laotians safe access to the Lao screening process as there had been reports that only the Hmong had enjoyed sporadic access to screening procedures (USCR, 1987a). Also, the Laotian government was required to improve its compliance in permitting those deemed not to be refugees to return home safely (UNGA, 1989, p. 7). Finally, this section of the CPA insisted that resettlement offers for Laotian refugees remained essential (Robinson, 1998, p. 223).

The eighth and final section of the CPA covered *implementation and review procedures*. This section created the Steering Committee, which was to be based in Southeast Asia and contained representatives from all governments making commitments to the CPA. It was to meet under UNHCR chairmanship to discuss the implementation of the CPA, provide for areas found to need improvement and deal with the implementation of status determination, repatriation and resettlement (UNGA, 1989, p. 8). The CPA was also to be reviewed annually at the UNHCR Executive Committee sessions.

It can be seen that the CPA was devised with five (according to Robinson) or six (according to Bronee) objectives in mind (i) to prevent clandestine departures, (ii) guarantee temporary first asylum, (iii) encourage the continuation of the ODP and promote its expansion in Vietnam (Robinson links this with point one), (iv) establish consistent, region-wide status-determination processes, (v) continue the resettlement of refugees and long-stayers, and (vi) repatriate rejected asylum seekers to Vietnam (and Laos) (Robinson, 1998, p. 189; Bronee, 1993, p. 540). In the next section of this article, I will focus particularly on points four and six of the CPA. These two sections raise the question of whether the adoption of UNHCR guidelines for screening refugees reflected Southeast Asian recognition of the basic principles of the 1951 Convention and 1967 Protocol and explores whether those repatriated to Vietnam and Laos received a genuine opportunity by screening states to seek refugee status, in accordance with the UNHCR guidelines.

2 CPA in practice: screening and repatriation

The introduction of screening procedures, some have argued, marked a new level of compliance by Southeast Asian states with the terms for determining the status of asylum seekers according to 1951 Convention and 1967 Protocol (Martin, 1997; Helton, 1993, pp. 544–558; Muntarbhorn, 1992).[7,8] The

7 However, Helton did concede that there were problems with states implementing the screening procedures, which placed doubt on their adherence to these principles.

8 The American Society of International Law.

repatriation of 'non-genuine' asylum seekers to their country of origin and the prevention of the continual exodus of such people has also been cited as evidence of the CPA's success in dealing with complex, enduring refugee situations (Helton, 1993, p. 557; Feller, 2001; Loescher and Milner, 2003). It must be kept in mind though that the primary purpose of the CPA was actually to be 'a deterrent measure to facilitate the return of those determined by the authorities not to be refugees' (Helton, 1993, p. 556). The CPA was the result of Southeast Asian states successfully arguing that the majority of asylum seekers from Indo-Chinese were not genuine refugees. Therefore, this section will look at how screening and repatriation developed in relation to that objective of the CPA – to end non-genuine refugees seeking asylum. I argue that Southeast Asian practices in screening procedures and repatriation did not reflect an affirmation of international refugee protection principles; the actions of Southeast Asian states were primarily geared towards ending what they saw as non-genuine refugees exploiting their charitable generosity. Therefore, the CPA did not illicit regional compliance with the 1951 Convention and 1967 Protocol. Rather, the CPA only served to further demonstrate how malleable refugee protection could be in the hands of states determined not to share in the burden of a refugee problem.

2.1 CPA procedures in practice

A number of changes were made to the CPA by the first asylum countries right after these procedures were agreed to in June 1989 at the International Conference on Indo-Chinese Refugees. But first let us briefly look at the difference that the first year of screening made, keeping in mind that before March 1989, arrivals were given immediate refugee status on a *prima facie* basis. In the first five months of 1990, the number of boat people arrivals fell overall by 40 percent (UNGA, 1990, pp. 1–2). However, there was an increase of arrivals in Indonesia and Thailand with a shift away from the more popular arrival destinations in 1989 of Malaysia and Hong Kong. The shift can largely be accounted for by increased awareness of the 'deplorable'[9] (USCR, 1990b) conditions in Hong Kong camps and the pushback of boats by Malaysia (Helton, 1993; Robinson, 1998). The Malaysian authorities had been practicing pushbacks since March 1989 and even after the 1989 Conference this activity continued, with most of the boats towed towards Indonesian waters (Helton, 1992).

9 In 1990, Hong Kong was accused of deliberately making camp conditions 'deplorable' through overcrowding, restriction on services, poor sanitation causing higher rates of transferable diseases in order to make people volunteer to return to Vietnam.

Robinson accounts for Malaysia's indifference to the call for providing first asylum by pointing to the government's bitterness towards resettlement states for their refusal to allow the cut-off date to be set at June 1989 (Robinson, 1998, p. 190). Malaysia, along with Hong Kong, had been housing the highest numbers of boat arrivals since 1988 and was therefore hoping for resettlement states to accept these populations as well as the massive numbers that had arrived in the first six months of 1989. The refusal by resettlement states to take any more *prima facie* refugees after March 1989 led Malaysia to 'cut its losses' and conduct its own first asylum policy irrespective of its commitments to the CPA (Ibid). Due to its re-adoption of the pushback policy, Malaysia was successful in deterring arrivals by boat. As a result, by 1990 Indonesia had a ten-fold increase in its number of arrivals, while Malaysia's arrivals for the same year numbered only 1,300 (Ibid., p. 191). This was in contrast to 1989 when there were 20,475 arrivals in Malaysia and 4,428 in Indonesia (UNGA, 1991, pp. 13–17).

Further changes after the CPA came in the number of people that left via the ODP – 43,177 in 1989 compared with 15,123 in 1988 (Druke, 1993; UNGA, 1991, p. 2).[10] In the first five months of 1990, 23,300 had already left via the ODP, and the expectation was that this figure would remain high – which it did throughout the six years of the CPA (Ibid.; Robinson, 1998, p. 198). In addition, over 60 percent of those who arrived before the cut-off date had been resettled by the beginning of 1990 (UNGA, 1991, p. 1). However, funding for the CPA was low; at the beginning of 1990 it was still US$63 million short of its requirement of US$116 million (Ibid., p. 2). This money was essential for it was to cover all the costs of refugee-status determination procedures in Southeast Asia, repatriation costs, resettlement aid, care, and maintenance and transport costs – particularly essential when considering that countries such as Malaysia were increasingly refusing to cooperate if outside assistance was not forthcoming. These financial problems reflected the UNHCR's wider budget and management difficulties and partly accounts for how the CPA developed (USCR, 1990f; Loescher, G. (2001, pp.268,273; Barnett and Finnemore, 2004, ch. 4).[11,12]

In 1990 the UNHCR reported the refugee-status determination procedures were 'functioning' in Southeast Asian states, but there was still a region-wide

10 1988 figure came from Druke (1993), 1989 figure came from UNGA (1991).

11 Sadako Ogata was appointed as High Commissioner in December 1991. During her time at the post the UNHCR's budget and staff increased rapidly, but with budget expansion the UNHCR did lose its independence and autonomy to the donor states. According to Loescher, donor interference rapidly dominated Ogata's decisions, and the expansion of the institution's focus led to a further loss of emphasis on protection.

12 However, Barnett and Finnemore provide an interesting account of UNHCR's repatriation culture in the 1980s as a further explanation, see Chapter 4 in Barnett, M. and Finnemore, M. (2004).

need for more 'expeditious decisions on refugee status' (UNGA, 1991, p. 1). The single greatest concern was the inability to 'reach a consensus related to the future of those Vietnamese asylum seekers determined not to be refugees, and, in particular, the question of their return, other than voluntary, to their country of origin' (Ibid.). Repatriation will be discussed in more detail later, but suffice to say at this stage, the backlog of 'non-genuine' refugees in first asylum camps was affecting the refugee-status-determination procedures.

By 1992–93, it had become clear that there were problems with the way refugee status determination was being conducted in Southeast Asia. Robinson's verdict of the region's screening process was that 'the most fundamental consistency across the region proved to be that *each country did things differently, some better than others and none perfectly*' (Robinson, 1998, pp. 202–203). There are two obvious reasons for this. The first is that even internally, the UNHCR had difficulty with uniform refugee status-determination procedures. In Hong Kong, a field officer argued that those Vietnamese who were seeking asylum because they had family members who had been persecuted were to be 'given full and due consideration' for the 'UNHCR is in a very dangerous position right now of losing all creditability with the Vietnamese asylum seekers' (Ibid., p. 204). By contrast, Erika Feller, the UNHCR's Representative in Malaysia and Regional Coordinator of Status Determination, was quoted as saying that though the boat peoples' stories were not ones 'I should like to have for my children . . . these are *not refugee* stories' (Ibid., p. 205).

James Hathaway argued that the problem the UNHCR faced was that it could not include socio-economic persecution into its understanding of the 1951 Convention and this was the greatest problem with the CPA (Nichols and White, 1993, pp. 32,37,38; Hathaway, 1993, 686–702).[13] Socio-economic persecution has persistently caused great numbers of people in the Third World to flee *en masse*, perhaps more so than politically based persecution (Zolberg *et al.*, 1989; Hathaway, 1993, pp. 686–702). This supports Zolberg, Suhrke, and Aguayo's argument that the 1951 Convention's definition of persecution does not take into account the economic and social violence that particularly developing countries can perpetrate against their citizens (Zolberg *et al.*, 1989). But as Erika Feller's comments demonstrate that, in spite of the factual and moral basis of these arguments, the UNHCR was nonetheless bound to operate within the 1951 Convention and the refugee definition constructed between 1949 and 1951.

The second problem with the screening process was that it was conducted by states that believed they had no legal or moral obligation to the 1951 Convention and its 1967 Protocol. To this day, with the exception of the

13 James Hathaway quoted in Nichols, A. and White, P. (1993).

Philippines, none of first asylum states in Southeast Asia have yet signed the 1951 Convention or 1967 Protocol. The screening process that these states engaged in was strictly perfunctory, in the sense that it was done as a deterrent exercise to future asylum seekers. A humanitarian consideration of determining 'genuine' from 'non-genuine' refugees was not at the forefront of this practice. The region had a history of using its non-signatory status to extract more assistance from international community and, due to the Cold War origins of the Indo-Chinese refugee problem, disowned any responsibility to deal with the crisis for political or humanitarian reasons (Davies, 2007).

Arthur Helton's 1993 analysis of the screening process demonstrated that non-signatory states disavowed the protection principle as the screening officials' underlying assumption was that 'most of the boat people were *not refugees*' (Helton, 1993, p. 556). Thus the CPA had been practiced as a deterrent measure, which 'profoundly affected its implementation' and Helton found status determination was flawed, for it was implemented 'in a way that fails to accord the benefit of the doubt to asylum seekers. . ..due to the fact that the arrangement has been imbued with migration control considerations' (Ibid.). This brings into question whether all asylum seekers experienced a fair and expeditious hearing to their claims for refugee status as specified in the CPA procedures (UNGA, 1989d).

Indonesia. According to the UNHCR, a leaflet describing the determination of refugee status was distributed to all arrivals at Galang camp. However, this did not 'articulate the 'internationally recognized criteria' with respect to the asylum seeker's claim to refugee status' (Helton, 1993, p. 547). Asylum seekers were able to meet with the UNHCR Eligibility Unit in a weekly information session before their screening interview. Prior to Indonesian authorities screening the asylum seekers, the UNHCR legal consultants interviewed them and an initial assessment of the person's claim for refugee status was forwarded to the Indonesian authorities. The P3V Committee (an Indonesian government asylum hearing committee composed of legal and military officials) conducted the main interview with asylum seekers and decided their status. UNHCR legal consultants were not present during these interviews. However, the practice of 'fast-track' screening was widely practiced in Indonesia: interviews were conducted for only 10–15 minutes and decisions were immediately made based on this one brief interview. There were concerns that this form of status-determination procedures had a 'get them in and out' mentality as opposed to a careful adjudication process (Nichols and White, 1993, pp. 28–30). When the P3V and UNHCR disagreed on the status of an asylum seeker, discussions were held jointly in order to reach a resolution. An applicant denied refugee status received a written decision, but the 'reasons for the decisions are cursory' (Helton, 1993, p. 548). Asylum seekers had 15 days to appeal the

decision. However, UNHCR Durable Solutions staff would first 'counsel asylum seekers on the voluntary repatriation program' though before they made an appeal (Ibid.).

If the asylum seeker still wished to appeal they could do so through the UNHCR, who forwarded this to the Review Committee in Jakarta, made up only of government officials from the ministries of foreign affairs and immigration and the P3V. If the appeal did not present any new findings, then the denial of appeal was upheld. If there had been a misinterpretation of elements within the claim, then the appeal was sent to the Appeal Board (which consisted of the same representation as the Review Committee, but all of a higher ranking). A UNHCR official was present at the Review Committee and the Appeal Board and able to present their views on each individual case. However, the UNHCR did not assist in the preparation of the appeal for the Appeal Board, but screened-in Vietnamese were at times allowed to assist those seeking an appeal. Of the 11,039 persons interviewed in Indonesia by July 1992, 3,657 received 'positive' decisions or refugee status, and 7,382 received negative decisions. 1,980 persons appealed the decision and out of this number only 165 received a positive review decision (Ibid., p. 549).

The differences between the CPA and Indonesia's actual practice in relation to the screening of refugees are very noticeable. First, the CPA said the UNHCR was to *participate in all stages of the procedures* and be *present as an observer at such [P3V] interviews* (UNGA, 1989, pp. 4–5), and yet we find that the UNHCR was not present at the most important part of the process – the interview with P3V officials (Helton, 1993). Second, there was to be a Screening Commission, led by an immigration officer, an official from P3V and UNHCR to collect information from all new arrivals. In practice, there is no mention of the Screening Commission. Third, the Review Committee in 1992 was a *new* addition to the appeals procedure, as originally, all appeals were to go to the Appeal Board. Another two issues of concern were that in the screening process, UNHCR assistance was not provided to those submitting applications and second, UNHCR officials were advising rejected applicants to first consider voluntary repatriation as opposed to an appeal. These practices indicate not only a failure to follow the procedures specified in the 1951 Convention and the UNHCR Handbook on Criteria and Procedures, but also an acquiescence on the part of UNHCR, which did not demur when deviations occurred. Arguably, UNHCR's inability to be present at the interviews enabled the development of Indonesia's 'fast tracking' interview process; while the Review Committee enabled quick rejection of many applicants as demonstrated by the fact that the number of appellants were overwhelmingly rejected (Ibid., p. 549).[14]

14 Totally 11,039 were interviewed, 1,980 appealed and 1,815 were again rejected.

Clearly, Indonesia was not demonstrating a willingness to embrace international refugee law or ensure that asylum seekers were granted access to the screening rules that they agreed to under the 1989 CPA. Boundaries were manipulated to allow the expeditious refusal of refugee status and deter potential boat people, while processing according to CPA guidelines was sporadic at best. This indicates that while the CPA was drafted as the answer to the Indo-Chinese refugee problem, in practice showed it was vulnerable to states, which had little legal or moral obligation to refugee protection in the first place.

Malaysia. In Malaysia after March 1989, the UNHCR provided information leaflets to all recent arrivals. These leaflets covered various issues such as refuge status determination, the ODP, special procedures for unaccompanied minors and voluntary repatriation. Yet none of the leaflets addressed the definition of a refugee, or explained the purpose of the interview (Ibid.). The UNHCR provided group, not individual, sessions for asylum seekers on the adjudication process. Military officers attached to National Task Force VII (which dealt with the Indo-Chinese arrivals) conducted screening interviews and Malaysia is the only country where the UNHCR was present for all interviews. The interviewer and the UNHCR legal consultant together discussed the merits of each claimant and the UNHCR provided written assessments to the government authorities on every case. The UNHCR assessment and the interviewer's assessment were both sent to the National Task Force for a decision. Written notice of decisions were then hand-delivered to each asylum seeker. Like Indonesia, no reasons were provided to the asylum seeker for the decision that was made.

In practice, asylum seekers had seven days to submit an appeal. The UNHCR did not directly assist in this process, but they recruited Malaysian lawyers to advise the Review Advice Groups (an informal network set up voluntarily by university-educated asylum seekers). Appeals went to the Refugee Status Review Board, which comprised different officials, and the UNHCR was an observer and advisor on this board. As of December 1992, 15,032 persons had been interviewed for refugee status and 3,487 had been screened-in as refugees; 7,362 received negative decisions. The number that appealed were 5,463 with 964 accepted as refugees on review; 4,499 were rejected (Ibid., p. 550).[15]

Malaysia's practice of screening did allow the UNHCR to be present for all interviews with the asylum seekers. The Malaysian government also did not deviate from its obligation to screen and follow the procedures as set out in

15 The discrepancy in the number screened and outcome for those screened is due to 'decisions pending'.

the CPA. This observation and adherence to screening procedures of course needs to be contrasted with the Malaysian government actions to arrivals (UNGA, 1989e). By pushing back boats after June 1989 at the alarming rate discussed earlier they *did* breach the CPA agreement to provide first asylum. Thus, Malaysia's adherence to the screening procedures may indicate, in principle, an acceptance of international refuge law. However, it must be remembered that at the same time, the Malaysian government was breaching its commitment to provide first asylum (Ibid).

The Philippines. The Philippines, the only state in the region to be a signatory to the 1951 Convention and 1967 Protocol, did not wish to locally resettle asylum seekers. Therefore, they also conducted the CPA screening process and were in favor of repatriating those screened-out by the refugee status-determination procedures. The Philippines practiced determination in three stages: reception, status determination and appeal.

Once asylum seekers were transferred to government-administered camps they were registered by UNHCR staff and then interviewed by UNHCR legal consultants. The UNHCR prepared reports on each asylum seeker, which served as a predetermination interview for submission to the officials from the Bureau of Immigration and Deportation (BID), who interviewed the asylum seekers and determine their refugee status. A UNHCR report was considered non-binding by the Philippines (Helton, 1993, p. 552).

Before a screening interview, the second part of determining refugee status in the Philippines, asylum seekers were able to seek out UNHCR counseling. On their arrival, the UNHCR gave a verbal and written explanation of the CPA in Vietnamese; then two weeks later, the UNHCR registrar distributed an information leaflet; at the third visit the UNHCR legal consultant counseled groups before they had their individual interview and then a UNHCR legal consultant individually interviewed each asylum seeker, it was at this point that the UNHCR prepared their pre-determination report. A BID official, trained by the UNHCR, would conduct the interview with a UNHCR observer present, but the UNHCR did not interfere with the interview process as it took place. However, a BID official could ask the UNHCR officer for their views on each case. The government department that administered the camps, PFAC, decided on each asylum seeker's refugee status according to all the information received.

The appeal was the optional third stage of the CPA procedure in the Philippines. An appeal was to be made within 15 days of receiving the decision in writing. Three government officials from each department of Justice, Foreign Affairs and National Defense, Social Welfare and Development, and the Office of the President made up the Appeals Board. The Appeals Board sent copies of all appeals to the UNHCR and the UNHCR was permitted to

send a written statement in support of the appeal. The UNHCR attended all appeals and was able to present its comment to the Board. The times when the UNHCR did not directly assist with appeals, a self-help group of Vietnamese asylum seekers provided advice. A UNHCR legal consultant provided supervision and advice to this group, and the Jesuit Refugee Service and Legal Assistance for Vietnamese Asylum Seekers provided legal assistance for the appeals. In July 1992 out of the 7,952 boat people screened for refugee status, 3,245 persons were successful and 3,622 were found not to be refugees. A total of 902 people appealed and 71 had their decisions changed as a result (Ibid., p. 554).

In the Philippines the appeal process was the only procedure that had not changed in substance. What can be drawn from this? It is true that the Philippines had the region's fairest refugee determination process. The deviation from the procedures put in place for interviews and determination of refugee status do not indicate a faithful adherence to the refugee protection principles as laid out in the CPA. It could be concluded that as the Philippines was more generous than others in its processes, its signatory status and assistance coming from the United States, was influencing its policy to some degree. However, overall the Philippines met the basic structural requirements of the CPA but did not express any aspirations towards permanent refugee protection procedures (Robinson, 1998, p. 209; UNHCR, 1995).[16]

Thailand. In Thailand, the process was similar to the region in general. The majority of asylum seekers were rejected and the UNHCR was allowed to be present only on the sidelines. Once again, the screening procedure in Thailand served the purpose of deterrence. All boat people were labeled 'illegal immigrants' if and until proven otherwise. Upon arrival in the detention camp, asylum seekers were provided with leaflets explaining the CPA process, but there was 'no explanation of the criteria upon which the refugee determination is made' (Helton, 1993, P. 550). Asylum seekers had no access to the UNHCR, non-governmental organizations, or any other organization until their interview. Screening interviews were carried out by officials within the Ministry of Interior (MOI) and the UNHCR was allowed to be present as observers for only 20 percent of interviews. After the interview, the interviewer drafted a recommendation and sent the file to an MOI field supervisor, who then sent it to the Refugee Status Determination Committee (Screening Committee) in Bangkok. If the UNHCR was present, then their

16 There were allegations of corruption and bribery for positive refugee status made against the Philippines government. US House of Representatives Hearing in July 1995 heard 12 'substantiated' allegations. A UNHCR investigation cleared the Philippines government and its officials of any wrong doing. See UNHCR. (1995).

recommendation would also be sent with the file. If the UNHCR was not present at the interview, the field supervisor would send the file but not their recommendation to the UNHCR.

Screening Committee decisions on cases were sent to the Operations Center for Displaced Persons (OCDP) in Bangkok prior to final decision. After deliberation in Bangkok the asylum seeker would receive the decision in a letter, often with 'cursory reasons for the denial' (Ibid., p. 551) and given seven days to appeal through the UNHCR. The Appeal Board consisted of representatives from MOI, National Security Council, Ministry of Foreign Affairs, Navy, Immigration, and Marine Police. The UNHCR attended all Appeal Board meetings in the capacity of observer and advisor. The UNHCR also held information sessions for appeal applicants – but it would only assist in the cases where it was thought that valid grounds for appeal could be argued. By July 1992, 6,480 of the 13,856 Vietnamese asylum seekers in Thailand had been screened. Of the 6,480 persons screened, 1,364 were found to be refugees and 5,063 were refused rejected refugee status; 886 persons went on to appeal and only 29 had their status changed to that of a refugee (Ibid).

A comparison of Thailand's practice to its procedural guidelines in the CPA indicates significant discrepancies. The most obvious discrepancy was the minimal UNHCR presence at the screening interviews. In 1989 it was agreed that the UNHCR would have 'full access to observe these interviews and to present its views', but this did not happen (UNGA, 1999, p. 8). The other discrepancy was that all rejected cases were to receive full explanation for rejection of their refugee status in writing (Ibid). By 1992 this had also changed, with the Screening Committee issuing only 'cursory reasons' for denial of refugee status.

2.2 Voluntary repatriation

The CPA stated that in the 'first instance, every effort will be made to encourage the voluntary return' of persons deemed not to be refugees (UNGA, 1989). However, if 'after the passage of reasonable time', voluntary repatriation was not efficiently expediting the return of asylum seekers who did not receive refugee status, then 'alternatives recognized as being acceptable under international practices would be examined' (Ibid). Educational and orientation program were also to be delivered to the failed asylum seekers aimed at encouraging their return. Though the United Kingdom issued a formal demand for the forced repatriation of Vietnamese, which was seconded by Australia, it was believed to be an initiative drawn up by Hong Kong and the ASEAN states. At the 1989 Conference, all but two states agreed with the possible necessity of forced repatriation (USCR, 1989a). Rather ironically, these two states were the United States and Vietnam. The United States

argued that 'unless and until dramatic improvements occur in [Vietnam's] economic, social, and political life, the United States will remain unalterably opposed to the forced repatriation of Vietnamese asylum seekers' (Ibid.). Vietnam concurred with the need to avoid forced repatriation; it argued that such 'coercion constitutes a violation of the Declaration of Human Rights and could only bring on unforeseeable consequences' (Ibid).

The progress of repatriation for those deemed 'non-genuine' refugees was to be reported in Steering Committee meetings of the CPA. The first of these was held in October 1989 and, as at the earlier Conference, it was agreed that if no progress had been made in convincing people to return 'alternative measures including compulsory repatriation may have to be considered' (Ibid, p. 8; p. 6). At the same time, the United Kingdom was meeting with Vietnam to prepare the way for their acceptance of non-genuine refugees from camps in Hong Kong. However, Vietnam insisted returnees would not be accepted unless their return was voluntary. On 12 December 1989, Hong Kong began its first forcible repatriation of Vietnamese asylum seekers, after a repatriation agreement (involving a sizable aid program) had been signed between Vietnam and Britain earlier that month. It should be noted that Hong Kong, though at the time under United Kingdom administration, was excised from the UK's signatory status to the 1951 Convention and 1967 Protocol.

At the Steering Committee conference on Indo-Chinese refugees in Geneva on 23 and 24 January 1990, the US and Vietnam reiterated their opposition to involuntary repatriation of asylum seekers until at least after July (USCR, 1990a). The United States had originally been 'unalterably opposed' to forced returns until after 1 July 1991, and Vietnam was opposed until after 1 October 1990. However, the remaining 27 countries at the Steering Committee conference insisted on 1 July 1990 as the deadline (Ibid). United Kingdom said that it would continue permitting Hong Kong officials to return non-genuine refugees to Vietnam by force if necessary, while ASEAN states started to suggest the possibility of refusing first asylum until the situation improved and the backlog of non-genuine refugees refusing to return voluntarily to Vietnam were forcibly returned (Ibid, p. 2).

In a Joint Declaration of the eighth ASEAN-EC Ministerial Meeting in Kuala Lumpur on 16–17 February 1990, ministers all agreed that 'there must be an early implementation of the CPA as regards the repatriation of those not qualifying for the status of refugees to the country of origin in a phased, orderly and safe manner' – but the term 'voluntary return' was not mentioned (Ibid., p. 7). On the 16 May 1990, the ASEAN Foreign Ministers issued their first statement indicating that if the CPA continued to be undermined by 'selective representation of its provisions by states' (mainly US and Vietnam), countries of asylum had the 'right to take such unilateral action as they deem necessary to safeguard their national interests, including the abandonment of

temporary refuge' (Ibid). Furthermore, they insisted that any country, which opposed involuntary repatriation had a direct obligation to offer a solution (ASEAN, 1990a).

On 24 July 1990 the Joint Statement by the ASEAN Foreign Ministers on the Problem of Vietnamese Boat People stepped up the demand for a solution with reprisals if this warning was not heeded:

> The Foreign Ministers reiterated the *sovereign right of the CTR* [Countries of Temporary Refuge, i.e. ASEAN states] to take such actions as they deem necessary, in a more coordinated and concerted manner, *to safeguard their national interests including the abandonment of temporary refuge* (ASEAN, 1990b).

In essence, the ASEAN states argued that as other participants in the CPA were only practicing 'selective implementation' of the CPA, they were absolved of any 'responsibility to honor their own commitments' (USCR, 1990c). ASEAN states therefore did not see the CPA as the stepping stone to the acceptance of wider refugee principles, but rather as a means to end the refugee problem in which everyone involved had reciprocal obligations and if one member broke it ASEAN states were not under any a moral or legal obligation to uphold their end of the deal. There were no 'rules', which they had to obey and obligation was only necessary if reciprocal. As Hathaway argued, the worst part of the CPA was that the 'UNHCR has been co-opted into the legitimation of the tacit pact between first asylum and resettlement states to relegate the explicit human rights mandate to the realm of pure symbolism' (Nichols and White, 1993, p. 32).[17] Furthermore, as demonstrated in this article, ASEAN states could take such an uncompromising line towards refugee principles because they had no historical, legal, or institutional commitment to these principles (Davies, 2006b).

2.3 CPA – the end result

The actions taken to bring the CPA to a close and resolve the repatriation problem were numerous and troubling. In particular, three circumstances of concern arose when attempts were made to close the CPA. The first was the repeated threats by ASEAN states to stop providing first asylum when the rate of voluntary repatriation slowed. This galvanized non-governmental organizations such as the USCR to request that the United States change its policy against forcible repatriation, so that more could be sent back to their country of origin. The second was the UNHCR's own efforts to bring the CPA to a 'rapid close'. This involved not only speeding up the forcible return of non-

17 Hathaway quoted in Nichols and White (1993).

refugees, but also agreeing to allow conditions in the camps to worsen so as to encourage departures. The final act was an agreement made between Vietnam and each of the Southeast Asian states concerning the forcible return of the Vietnamese still in camps.

At this stage of the CPA (1991–1992) progress was being made with the repatriation of Laotians through a tripartite agreement between UNHCR, Thailand and Laos. Over 300,000 Cambodians were repatriated to Cambodia under an agreement between UNHCR, Cambodia, and Thailand, in time for the 1993 Cambodian general elections (UNGA, 1992, p. 7; USCR, 1989c; 1990e). However, the CPA's attempts to repatriate the Vietnamese experienced continued difficulty; the Malaysian government conducted pushbacks on a regular basis and cited the United States refusal to allow forced repatriation as the cause (USCR, 1990c). Courtland Robinson, policy analyst for the USCR, testified to the US Senate Subcommittee that 'the United States must seek a new consensus on involuntary repatriation of the screen-out. . .with some compromise likely to be needed on the length of the moratorium' (USCR, 1990b). This suggestion came just before the ASEAN states threatened to completely break from the CPA because of the United States and Vietnamese position on forced return. The ASEAN states argued that in their refusal to allow involuntary repatriation, the US and Vietnam were not fulfilling the CPA and this meant that ASEAN states could 'take such unilateral action as they deem necessary to safeguard their national interests, including the abandonment of temporary refuge' (USCR, 1990f). The Southeast Asian states were not alone in their frustration. The British government insisted that if the US did not want to allow involuntary repatriation then they could have the 9,000 screened-out Vietnamese in Hong Kong in a special camp in Guam (USCR, 1990e). Even the Philippines, which up until then had been continuing to accept boat people rescued on international waters, refused to accept 101 Vietnamese boat people rescued by a US naval supply ship (USCR, 1990f).

In 1991, the United States agreed to the involuntary return of Vietnamese – but insisted on international monitors being present at 'both ends of the mandatory return process' (Robinson, 1998, p. 215). This meant that involuntary repatriation would still not be condoned by the largest donor to the CPA process. In 1993, the Hong Kong UNHCR office drew up a paper to present at the CPA Steering Committee Meeting in Jakarta to discuss the progress of the CPA. At this stage, 44,000 Vietnamese had returned home, the screening process was nearly completed and the Vietnamese exodus had dramatically slowed down (Helton, 1993; Robinson, 1998, p. 217). However, there were still tens of thousands of 'screened-out' Vietnamese refusing to leave the camps. The UNHCR report argued 'time is and has been the worst enemy of those who still remain. There is an urgent need to act' (Robinson, 1998, p. 218). The recommendations were that screening be quickly completed; new arrivals be

'summarily returned' unless an obvious basis for asylum was demonstrated; and that further agreements on the involuntary return of non-refugees should be 'promoted and implemented' between Vietnam and first asylum states. The final UNHCR recommendation was that conditions in camps be sharply reduced so that 'expectations of permanence of life in detention should cease' (Ibid). The UNHCR endorsed cutbacks in medical and counseling assistance; freedom of movement; elimination of income-generating activities; reduction in employment opportunities and monthly remittances from overseas; and the elimination of all educational program above primary school level (Ibid).

These acts were in contrast to the 1989 agreement that *even if* rejected asylum seekers refused to return to their country of origin there were not to be any steps taken to increase their 'social outcast mentality' (UNGA, 1989d). In essence, they were not to be denied basic services that would affect their sense of normalcy in a situation where they obviously had little control. Rejected cases were to be allowed to maintain their dignity while they deliberated on eventual repatriation to their country of origin. This was to be achieved via 'basic education for school-age children; Vietnamese literacy, and numeracy for adults and vocational training with emphasis on program to facilitate reintegration into the country of origin' (Ibid). However, the 1993 paper endorsed the removal of the two latter services in order to encourage voluntary repatriation.

In addition to the UNHCR's deterrence measures, ASEAN states began signing Orderly Return Program agreements with the Vietnamese government. Indonesia signed the first on 2 October 1993, and the remaining ASEAN states followed suit soon after. By this stage, neither Vietnam nor the US opposed involuntary repatriation. All involved states had reached their limits with the 'protracted problem' of Indo-Chinese asylum seekers (Robinson, 1998, p. 219–220). The deadline for repatriation was set for 25 June 1996, and Malaysia was the first to send its remaining camp populations back by the due date. Singapore followed in the next two days, and on the 30 June, UNHCR ceased all funding for processing Vietnamese boatpeople. Indonesia and Thailand were not able to successfully repatriate all of their rejected cases by the deadline, but 'each moved aggressively on involuntary repatriations in the latter half of 1996' (Ibid., p. 220). During these operations, the UNHCR was not allowed to access the camps and thus there is no way of knowing the extent to which force was used to repatriate the asylum seekers.

3 Conclusion

How had the UNHCR gone from supporting *prima facie* refugee recognition for the Indo-Chinese asylum seekers, to allowing non-signatory states of the 1951 Convention and 1967 Protocol to decide who could be given refugee

status? The seemingly endless arrival of boat people heightened Southeast Asia's resistance to boat people and also increased resistance among resettlement states. Resettlement states started to agree with Southeast Asian states' characterization of arrivals as 'economic migrants' and 'non-genuine' refugees. With asylum states *and* resettlement states joining forces on the Indo-Chinese refugee population, the UNHCR had little option but to agree to compulsory screening and eventually, forcible repatriation.

However, the fact that until March 1989 if an Indo-Chinese arrived on any shore they received *prima facie* refugee status, and then a month later they did not, demonstrates a concerning malleability of refugee protection. Essentially, the CPA created a mechanism that enabled the region to utilize elements of the 1951 Convention to justify the expulsion of asylum seekers. Though the 1951 Convention had proven to be a useful tool for dividing 'genuine' refugees from 'non-genuine', two outcomes must be remembered when looking at the CPA practice in Southeast Asia. The first is that, as Helton's analysis of status procedures in the region demonstrated, Southeast Asian states *never embraced screening-in the name of refugee protection but only as a deterrent measure* to the Indo-Chinese refugees (Helton, 1993, pp. 556–557). Southeast Asian states' primary concern was not how to best provide refugee protection, but how to deter them. As Chang-Muy has argued, the screening procedures had no basis in law and 'have been formed in response to specific refugee caseloads, the regime for the protection of refugees in Asia remains fragile' (Chang-Muy, 1992). Therefore, we must doubt the effectiveness of the 1951 Convention being used as a 'tool' by non-signatory, even signatory states, when the stated priority is deterrence rather than protection. This is further demonstrated by the fact that none of the Southeast Asian states, with the exception of the Philippines, ever sought to ratify the 1951 Convention and 1967 Protocol during this crisis or since.

Second, the 1951 Convention had not been institutionalized in the region, which meant that the outcome for the Indo-Chinese seeking asylum was not a primary concern to the screening states in the region. The only way that the UNHCR and resettlement states, in particular the United States, had agreed to the resettlement or repatriation of these people was if they were individually screened. Southeast Asian states were financially assisted in the screening processes, those accepted as refugees would be resettled in another country, and those who were not were to be repatriated. As such, there was little commitment to the screening process. The screening process was a 'one-off practice' to expedite a problem that governments believed had gone on for too long.

Indo-Chinese asylum seekers had gone from being *prima facie* refugees in 1988 to having to prove their claim to refugee status in 1989. The arbitrary dateline was the product of a desire to end the protracted refugee influx. It was this desire to end the problem, which led to Western states, and in turn

the UNHCR, to support the CPA and the eventual forced return of asylum seekers by the 1990s. However was the desire to end an, admittedly extreme, protracted refugee problem at the cost of refugee protection?

As this article has demonstrated, the CPA endorsed the Southeast Asian position that asylum seekers were illegal migrants until proven otherwise. This meant that non-signatory states were applying the 1951 Convention's refugee status-determination procedures without the 'benefit of doubt'. Yet, the 'benefit of doubt' position was twice referred to in the 1992 Handbook for Determining Refugee Status and Guidelines on International Protection, with specific reference to treatment of asylum seekers (UNHCR, 1992).[18] Though the CPA did lead to more than 507,000 Indo-Chinese being resettled (either out of first asylum countries or through direct departure) compared with 442,000 in the same period prior to the CPA[19] – it also led to a large number of individuals being forcibly repatriated to their country of origin (Robinson, 2004; Towle, 2006). By the early 1990s, Southeast Asian states were signing individual agreements with Vietnam to forcibly remove those resisting repatriation. There is little doubt that the UNHCR was vulnerable to both budgetary and political attacks in relation to the Indo-Chinese refugee crisis. This vulnerability was demonstrated by the fact that although some UNHCR officials doubted that the CPA safeguarded the rights of the Indo-Chinese, there was little they could do. However, because the UNHCR is the only institution with the moral and legal authority to insist on the protection of asylum seekers and refugees, it needs to be cautious in promoting or becoming involved in future CPAs where their vulnerability to the interests of sovereign actors can result in comprising refugee protection.

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18 See paragraph 197 and 203 in UNHCR. (1992)

19 I would like to thank an anonymous reviewer for this point.

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