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CHAPTER II
LITERATURE REVIEW

2.1 The Prominence of State-Centric Views in the Refugee Protection

The current refugee regime still finds its founding principles in the 1951 Convention Relating to the Status of Refugees and its subsequent 1967 Protocol. These two texts most significantly define the refugee, her rights and the obligations by moral agents (i.e. state, international community, individual) to protect these latter. A refugee is defined as:

> *[Any 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

In terms of refugee protection law, the 1951 Convention contains few articles that are of as much relevance and have acquired as wide international preeminence as Article 33; that of *non-refoulement*. Commonly accepted as customary law—a binding principle concerning all states, regardless of specific assent—it states the following:

> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life of freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

Despite the noble intentions conveyed by those texts and the rights they protect, historical inadequacy and resistance to maintain state sovereignty have

severely undermined the effectiveness of these laws. Firstly, the context and the purpose of the 1951 Convention was arguably to provide a legal framework by which to deal with displaced persons after the Second World War (Helton, 2002; Rodger, 2001). The situation was clear: European nationals had been forced outside of the borders of their country of nationality by Nazi Germany and its sympathizers (Ibid.). Though concerning great numbers, the situation was not nearly as overwhelming as the ones presented in some modern war-related human displacement, such as the 6.3 million Afghan refugees, as per UNHCR 1990 estimates (Helton, 2002). Today, modern warfare and repressive regimes mostly occur in the poor Global South; far from those traditional states who are capable financially and operationally to provide protection. Resulting human displacements are often internal by nature or from the poor Global South to the poor Global South. These new refugee trends render those legal texts unfit to respond (i.e. no border crossing, non-state threats, failed states and weak economies, stateless individuals) (Scheinman, 1983). The state of modern refugee affairs therefore puts serious stress on definitions and processes that were designed for another time and another place.

Secondly, concerned by potential infringement on their sovereign rule, states welcomed the writing of a second paragraph to follow Article 33 of the 1951 Convention on *non-refoulement*, as stated below:

> *The benefit of the present provision may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

This clause decisively opened the door to the most powerful argument used thus far by states to avoid fulfilling their protection responsibilities; that of national security. By and large susceptible to state discretion, the increasing "securitization" of the refugee debate is portraying refugees as competing for scarce resources and undermining the integrity of the state (i.e. peace, order, identity, etc.), especially since

the terrorist attacks of September 11, 2001 (Harris-Rimmer, 2010). The security discourse allows states to excuse any reluctance to fulfill their moral and legal obligations to protect and undermines fundamental principles of the refugee law, such as *non-refoulement*. The fact that U.S. government is the largest donor to UNCHR and the largest recipient of resettlement cases worldwide sent unprecedented ripple effects throughout international discourses of refugee policy and refugee funding. The result was the dramatic shrinking of refugee protection space by nearly half, both in terms of world resettlement capacity and overseas assistance monies (Smith, 2005). Ten years later, those two programs have gradually regained their pre-2001 levels.

But it is clear that, though originally drafted to protect the refugee in the face of great vulnerabilities, these legal instruments have been widely interpreted to serve state political convenience and have become unfit to respond to modern displacement crises.

On the other hand, it is unfair to categorically deny the UNHCR, chief authority in the current refugee regime, any political independence and institutional adaptability. The agency has a uniquely apolitical mandate that consists in the enforcement and oversight of the 1951 UN Convention Relating to the Status of Refugees (Harris-Rimmer, 2010). Over the last few decades, it has adapted to crises of human displacement by expanding its mandate to assume an increasingly important role in the delivery of refugee relief, intervening unilaterally where states have failed using its humanitarian command.

Ironically, in doing so, the UNHCR has seen its protective responsibilities somewhat eclipsed by urgent priorities to provide humanitarian aid (Hathaway, 2002). In terms of refugee protection, the UNHCR now faces an inherent conflict of interest in this shift of mandate—being the *de facto* and *de jure* authority to simultaneously deliver direct services and to police refugee rights. This dilemma exists even without considering the obvious fiscal and political compromise that lie in the state constituency of the UNHCR, which doubly hinders its objective implementing, enforcing and reporting mission (Ibid.; HPG, 2003). This latter duty has received

particular attention in refugee protection reform proposals, as it is argued that the lack of accurate and transparent information of protection failures largely undercut effective enforcement efforts and meaningful attempts at reform (Arulanantham, 2000).

Despite empirical evidence of an alarming trend of erosion of refugee protection law, a careful study of those instances show that no state will admittedly breach such principles as that of *non-refoulement*. In her dissertation, Jessica Rodger (2001) uses the examples of Rwandan, Liberian and Kosovar refugees to demonstrate that states will go to great length to legally justify their denial of protection. Similarly, the Royal Thai Government qualified the forced repatriation of Lao Hmong in December 2009 as largely voluntary (The Nation, 2010). Though the accuracy and validity of these excuses may be challenged, the simple fact that states claim to be acting lawfully validates the moral grounding of refugee law as a powerful and strategic tool to promote ethical behavior (Arulanantham, 2000; Rodger, 2001).

Reaffirming the refugee as a moral recipient, rather than a political and/or economic liability, and her experience as the starting point of protection policy reform and best practices constitute a convincing argument from which states cannot easily turn away. The failure to do so undeniably leads to protection unsuccesses.

2.2 The State of Refugee Policy in Thailand: Legal Inadequacy

Currently not a party of the 1951 Convention, Thailand has nonetheless a long history of hosting waves of refugee from neighboring countries and obeys its own national laws in dealing with refugees. In the aftermath of the Second Indochinese War, in the context of the Cold War, Thailand aligned itself with the US and the Western block to preserve Thai borders, serving as a military base for military troops and supplies and as a host to over 400,000 refugees in the 10 years following the war, most of them running away from the communist Pathet Lao and Khmer Rouge, and later the Viet Cong invasion in Cambodia (Lang, 2002). Motivated by the desire to

build strong foreign relations with the West and the necessity to address the overwhelming logistical and economic needs of asylum seekers, the Royal Thai Government (RTG) embraced the salience of the issue as well as the opportunity to fully participate in a highly institutionalized—and well-funded—humanitarian and resettlement initiative (Ibid.). With the support of the international community and in line with the Buddhist philosophy of compassion, the RTG leveraged international and national values to transform the issue of refugee management into a strategic choice to underpin its political ambitions.

Since then, the RTG officially requested the UNHCR for assistance in 1975, leading to a formal agreement and the creation of the Operations Center for Displaced Persons (OCDP) and provincial authorities under the Ministry of the Interior (MoI) (Ibid.). However, the current Thai legal framework remains largely inadequate to deal with refugees. It qualifies all individuals who enter Thai territory without proper consular documentation as "illegal immigrants," regardless of the causes of their uprootedness (Chongkittavorn, 2010; Lang, 2002). As such, the MoI defines a "displaced person" as someone "who escapes from dangers due to an uprising, fighting, or war, and enters in breach of the [1979] Immigration Act" and thereby as a *prima facie* illegal immigrant (Lang., p. 93). Such law challenges the idea that a refugee is not the product of her own doing, deprives her of any legal protection, and criminalizes an already vulnerable individual, inconsistent with the 1951 Convention's definition and legal obligations.

The result is the exercise of considerable flexibility in applying inappropriate immigration laws to refugees and asylum seekers in Thailand. Over the last 30 years or so, refugee initiatives have evolved from highly institutionalized and structured efforts by international agencies to solutions locally and individually negotiated with provincial governments. The room for local discretion has caused in some instances humanitarian compassion and in others, military ruthlessness (Lang, 2002). It is clear that Thailand is a subscriber to the statist view of refugee affairs; motivated by self-interests of political alliance and economic advancement and justified by arguments of national security and sovereignty.

2.3 The Lao Hmong Refugee Experience: The Erosion of Protection Rights

The Hmong were among the first waves of Indochinese populations seeking refuge in Thailand after Laos fell to the Lao People's Revolutionary Army in 1975. Having been recruited by the CIA to fight along the Western-backed royalist forces, thousands of Hmong fled in fear of reprisal by the Pathet Lao (Stuart-Fox, 1997). Many stayed behind to surrender to communist political control and ideological indoctrination or "seminars" while other Hmong ex-combatants retreated in the mountainous jungle of northern Thailand and have allegedly led a low-intensity insurgent movement (Arnold, 2006; Stuart-Fox, 1997).

The original camps housing Lao Hmong refugees that opened in Thailand were gradually closed. The last one—Huay Nam Khao camp in Petchabun province—gave shelter to Lao Hmong asylum seekers with a variety of backgrounds. Some families were spillovers from previously closed camps; some were villagers who were forced off their land by the Lao authorities, motivated by new development projects; some had fled due to increased Lao military operations to repress *Chao Fa* remnants; others were economic migrants (Refugee 1, 2010; Arnold, 2006). A group of them were determined POC by the UNHCR in early 2006 after escaping from the camp to Bangkok while the rest of them were later screened by Thai authorities who classified approximately 800 as meriting protection (Arnold, 2006). After three years of small scale repatriation efforts and political deadlock, 4,371 Lao Hmong asylum seekers from Huay Nam Khao camp and 158 Lao Hmong UN-recognized POCs from the Nongkhai Immigration Detention Center were pushed back to Laos on December 28-29, 2009 (The Nation, 2010). A small group of recognized refugees remains in the cities of Bangkok and Lopburi.

It became evident the Lao Hmong had become undesirable political liabilities for Thai foreign relations (Arnold, 2006; The Nation, 2010). Third party countries—namely the US, Australia, the Netherlands and Canada—had extended resettlement

offers and had started resettlement procedures, thereby lending support to the legitimacy of the Lao Hmong's claims of persecution (Refugee 1, 2010). In the meantime, Thailand was allegedly receiving pressing requests from Vientiane to repatriate the group; requests which, if left unfulfilled, could jeopardize regional dealings (Arnold, 2009).

In addition, the urgency of their situation had vanished from the public sphere; it had been eroded by: 1) humanitarian fatigue over successive waves of refugees coming out of Laos since 1975 and 2) a long-standing national campaign to reassert "Thai-ness" while systematically "othering" displaced populations (Lang, 2002). Combined with the inadequacy of Thai laws to properly define a refugee, tensed racialized and criminalized perceptions of refugees in general and of Lao Hmong refugees in particular were undermining refugee protection efforts and weathering away the perception of protective responsibilities. Their rights were eclipsed by political priorities, unsympathizing public opinion, and humanitarian fatigue.