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REFUGEES IN MALAYSIA: PROTECTION FRAMEWORK, CHALLENGES, AND IMPLICATIONS

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ABSTRACT

The arrivals and protracted presence of asylum seekers and refugees in Malaysia have been met with policies largely shaped by humanitarian approaches leading to inconsistent responses and an impasse in achieving durable solutions to refugee dilemmas. This qualitative study using the method of desk review of materials such as books, journals, and newspaper articles identifies the human rights protection framework for asylum seekers and refugees and the problematic implications and challenges for both refugees and the host country, Malaysia, due to the absence of a formal refugee protection framework at the national level. Despite gaps in and outdated nature of the 1951 Refugee Convention relating to the Status of Refugees, it calls for refugee legal protections to be based on a legal and governance framework rather than non-binding aspirations and ad hoc approaches. The latter has proved adverse to both the interests of the host state and refugee communities. The findings indicate that the impacts on denial and violation of the rights and protections of refugees across political, social, and economic terrains are accompanied by risks to Malaysia's public security and interests. The study concludes with several early recommendations on the need to firstly recognise the legal status of refugees in Malaysia and the urgency to design an adequate protection and governance framework complemented with a system of shared responsibility to protect and manage refugees who have been in protracted limbo for an average of 20 years, if not more, without durable solutions to their plight.

Keywords: *Refugees, durable solutions, Malaysia, protection framework, UNHCR, 1951 Refugee Convention*

Introduction

Refugees are defined and protected under international law. The 1951 Refugee Convention relating to the Status of Refugees ("the 1951 Refugee Convention") is the key legal document that defines 'refugee' as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion (Article 1 A. (2)). The country has hosted forced migrants from within the subregion of Southeast Asia, namely, Vietnamese, Cambodians, Acehnese, and Southern Filipinos

prior to them getting a passage to third countries. Protracted refugee communities who have been living in Malaysia for many years with limited prospects for resettlement, repatriation, or integration comprise mainly Burmese ethnic and religious minorities.

In the 1970s, Malaysia had to deal with two large refugee movements of the Filipinos and Indochinese refugees. Starting from 1973, a large group of Filipinos crossed the borders into Sabah, Malaysia, when President Marcos declared martial law in the Philippines. This Muslim-majority group was from Southern Philippines who fled due to religious differences and armed conflicts with the Christian majority. In 1975, Indochinese asylum seekers fled Vietnam to escape the Communist regime. In the 1980s, taking flight from the brutal regime of the Khmer Rouges (Idris, 2012), Cambodian asylum seekers landed in Malaysia, entering the country through Thailand by land. Some of them were Indochinese Muslim asylum seekers who had been accepted for permanent resettlement in Malaysia (Pangilinan, 2014).

Other refugees seeking temporary or permanent refuge have chosen Malaysia as a major destination from devastating conflicts in and outside of the region. Malaysia continues to receive refugees from Myanmar's persecuted ethnic minorities, especially the stateless Rohingya. Malaysia does allow the presence of refugees in the country based on humanitarian grounds and cooperates with the United Nations High Commission for Refugees (UNHCR) in addressing refugee issues. The country had given a place of protection to Bosnian Muslims who escaped ethnic conflict in 1994 although before that a small number of them had arrived in Malaysia in 1991 (Ahmad et. al., 2012). The Rohingyas from Myanmar are considered by the United Nations (UN) as the most persecuted minority. After the establishment of Myanmar in 1948, the Arakanese Muslim minority continues to face constant anti-Rohingya campaigns accompanied by denial and violation of their rights and discrimination. In 2015, the Rohingya from Myanmar fled their country through ships and boats to reach Indonesia, Thailand, and Malaysia. The discriminatory policies of the government in the Rakhine State, which have persisted since the 1970s resulting in an unending surge of refugees, have been compounded by the response of many of Myanmar's neighbouring countries that prefer not to accept refugees into their countries based on their fear of a migrant influx that would be hard to handle on the political and economic front (Pagano, 2016).

Malaysia currently hosts 180,440 registered refugees and asylum seekers as of December 2021 with the majority of them originating from Myanmar (155,400), followed by countries such as Pakistan (6,730), Yemen (3,720), and Syria (3,300) (UNHCR, 2021). It must be noted that UNHCR-registered individuals have to go through an extensive refugee determination process and only those who qualify for the UNHCR cards are granted refugee status (Yasmin et.al., 2016). Being a non-signatory to the 1951 Refugee Convention, Malaysia has not formally recognised the right to seek asylum nor set up any mechanisms to process asylum claims or to provide legal protections for refugees (including protection against refoulement) (Hedman, 2009). Reliance on the state's migration policies, which can be punitive, and lack of interest in offering durable solutions by the host state are contributed predominantly by the prevalence of mixed migration flows comprising refugee, regular, and irregular migrant populations, as well as preservation of the country's ethnic balance and national identity (Cheung, 2011). The national policy approaches by Malaysia and countries in the broader region and subregion of the Asia Pacific and Southeast Asia in fact in their underlying objectives and strategies echo the recognised immigration premise and measures taken throughout Europe and America (McConnahie et. al., 2014).

Normatively, the human rights protection framework offered by international law, primarily the 1951 Refugee Convention and its 1967 Protocol are complemented by other human rights treaties and countries' commitments to norms and values embodied in international and regional human rights declarations and non-binding compacts. The following section will outline the international protection framework, which is largely inapplicable in Malaysia's domestic context as a result of non-ratification of the relevant treaties, reservations of certain treaty provisions, and norms that are not translated into binding law or legislation. This will be followed by a discussion on the implications of the long-standing protection lacunae and impasse on durable solutions for both refugees, and the host country and its populations.

Human rights protection framework: Commitments and challenges

According to the meaning ascribed by UNHCR, ‘protection’ refers to:

the extent to which a conducive environment exists for the internationally recognized rights of refugees to be respected and their needs to be met ... in most refugee situations, protection space is not static, but expands and contracts periodically according to changes in the political, economic, social and security environments (UNHCR, 2009).

Although the notion of refugee protection is wider than that of refugee rights, it must be rooted in law (McConnahie et. al., 2014, p 37), promote durable solutions, protect against refoulement, and meet the basic necessities of refugees (Nirmal, 2018). The framework of rights and protections that address refugees comprise international conventions based on human rights, rules of customary international law, general principles of law, national laws, and constantly evolving standards in the practice of states and international organisations, in particular, the Office of UNHCR. Part of the legal framework to support refugees and asylum seekers includes the Universal Declaration of Human Rights (UDHR).

Article 14(1) of UDHR provides for the right to seek and enjoy asylum in other countries. Yet it has been observed that Article 14 remains largely aspirational for not having been incorporated into subsequent treaties such as the International Convention on Civil and Political Rights 1966 (ICCPR). During the Nineteenth Conference of Foreign Ministers of Islamic States which was held from 31 July to 5 August 1990, members of the Organisation of the Islamic Conference (OIC) agreed to support the Cairo Declaration on Human Rights in Islam (Cairo Declaration). It declared the purpose of the Cairo Declaration as a general guideline for OIC members in the field of human rights. Article 12 of the Cairo Declaration clearly upholds the rights of both migrants and refugees to “the same universally recognised human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times” and prohibits “all forms of discrimination, including racism, xenophobia, and intolerance, against migrants and their families...” (Organisation of Islamic Cooperation, 1990). In November 2012, ASEAN countries that convened in Phnom Penh unanimously voted to adopt the ASEAN Human Rights Declaration. Under Principle 16 of the ASEAN Human Rights Declaration, “Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements” (Association of Southeast Asian Nations, 2012).

Domestically, the Federal Constitution is the highest law of Malaysia. According to Section 4(4) of the Human Rights Commission of Malaysia Act 1999, provisions in UDHR that are not in line with the Federal Constitution are not considered part of Malaysia’s domestic law. On that basis, one must show that denial of human rights guaranteed by UDHR is contrary to any of the provisions of the Constitution or other domestic laws in order for the breach to be enforceable (Mohamad, 2014). Malaysia has not ratified the 1951 Refugee Convention and its 1967 Protocol, which primarily embody the rights and obligations of both the refugees and contracting countries. Although the Malaysian Government has declared that Malaysian human rights have been developed with four main references in mind; the Federal Constitution, the UDHR, Malaysian politics and socio-culture, and the Cairo Declaration on Human Rights in Islam (CDHRI), (MalayMail, 2018), without the adoption of the relevant provisions through a binding treaty or legislation, the norms become merely influential and ‘voluntarist’ in nature.

Treaties and national laws remain the primary legal tools outlining and prescribing state obligations in order to safeguard asylum seekers and refugees against penalty, expulsion or refoulement, and denial of rights and benefits due to asylum seekers and refugees. In fact, treaties such as ICCPR and the 1966 International Convention on Economic, Social and Cultural Rights (ICESCR) contain stronger provisions that are of significant relevance to refugees as the rights are guaranteed for everyone and not just those who are within the territory lawfully. Freedom of religion and association and liberty of movement are among those that ICCPR provides for (Articles 12, 28, 22) whereas the rights to work and favourable condition of work, and the right to education, including free and compulsory primary education are those available under ICESCR (Articles 6, 7, 13). In contrast to countries like Jordan that

signed up to these key international human rights instruments despite not being signatories to the 1951 Refugee Convention, none of the aforementioned pertinent provisions binds Malaysia as it is not a party to these core human rights instruments.

Although Malaysia ratifies the 1989 Convention on the Rights of the Child (CRC), it reserves a number of provisions that are important to refugee children. These include Article 2, which ensures all the rights within the CRC to be enjoyed “without discrimination of any kind,” Article 7, which sets out the right to birth registration and to a nationality, Article 14 on freedom of thought, conscience, and religion, Article 28(1)(a) on free and compulsory education at primary level and Article 37 on torture and deprivation of liberty. On the positive side, Malaysia does not reserve Article 8, which requires states to “respect the right of the child to preserve his or her identity, including nationality” and remedy the illegal deprivation of the child’s identity or elements thereof. It is also bound by Article 22, which singles out refugee children as due appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the CRC and provides for an explicit duty to assist in reunification with the child’s family. Article 3 is the overarching provision that requires the “best interest of the child” to serve as a primary consideration by contracting states, including Malaysia.

While seeking asylum is not expressly addressed in the Convention on the Elimination of Discrimination Against Women (CEDAW) that Malaysia ratified in 1995, the principle of prohibition of discrimination against women necessitates that contracting parties meet the obligation to ensure that women are not discriminated against during the entire asylum process, beginning from the moment of arrival at the borders, in line with Articles 1-3, 5 (a) and 15 of CEDAW (UN Committee on the Elimination of Discrimination Against Women, 2014). Despite not reserving these provisions, several human rights-related cases illustrate that CEDAW lacks the force of law for not being enacted into local legislation (*Merdeka University Berhad v. Government of Malaysia* [1981] 2 MLJ 356; *SIS Forum (Malaysia) v. Dato’ Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377 at p 394; *Beatrice AT Fernandez v Sistem Penerbangan Malaysia* [2005] 2 CLJ 713; *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297).

Turning to the Magna Carta of refugee rights and state obligations, according to UNHCR, the 1951 Refugee Convention and its 1967 Protocol cover three main subjects:

- The refugee definition, along with provisions for cessation of, and exclusion from, refugee status;
- The legal status (rights and obligations) of refugees in their country of asylum, which includes the duty of refugees to respect the laws and regulations of the country of asylum and their rights in that country, including to be protected from *refoulement*; and
- Obligations of States, including to cooperate with UNHCR and to assist in its duty of supervising the application of the Convention (Jastram et al., 2001, p 10).

To meet the definition of a refugee, four requirements must be fulfilled according to Article 1 A (2) of the 1951 Refugee Convention, namely: (i) the person must have a well-founded fear of persecution; (ii) the fear is based on any of the five grounds stated in the provision; race, religion, nationality, membership of a particular social group, or political opinion; (iii) the person must be outside their country of nationality or for a stateless, outside the country of habitual residence; (iv) the person must be unable to return or, owing to her/ his fear, unwilling to avail herself/ himself of the protection of that country (Art 1(A)(2), 1951 Refugee Convention). Persons fleeing armed conflicts and caught fighting armed groups technically will not qualify for the refugee definition if there is no proven link between fearing persecution and the restricted grounds of fear provided in the Convention (Ineli-Ciger, 2017). Although there are inherent weaknesses such as in the definition and scope of refugees, the fact that the 1951 Refugee Convention contains an important set of refugee rights and directives that can practically enforce the political commitment to protect and support refugees should not be undermined (Hathway, 2018).

Article 33 (1) protects refugees against *refoulement* or forced expulsion or return to the territories where the life or freedom of refugees would be threatened on account of the grounds of persecution mentioned in Article 1(A)(2). However, even countries that are not parties to the 1951 Refugee Convention are

bound by this provision as it is generally accepted that the prohibition of refoulement is part of customary international law (Jastram et al., 2001,14). According to Articles 31 and 32 of the 1951 Refugee Convention, the right to seek asylum means asylum-seekers should be free from detention and punishment from illegal entry from a territory where their lives or freedom were threatened, except in extreme cases such as when there is evidence of the asylum-seekers' criminal records and/or affiliations that may pose a risk to national security or public order or when s/he has employed fraudulent documents to mislead the authorities.

States have also agreed to provide certain facilities to refugees, including administrative assistance (Article 25); identity papers (Article 27), and travel documents (Article 28); the grant of permission to transfer assets (Article 30); and the facilitation of naturalisation (Article 34) (Weis, 1972, p 598). Three standards underpin the treatment of refugees under the 1951 Refugee Convention, namely, (i) national treatment that entails treatment accorded to the nationals of the country where the refugee seeks asylum; (ii) most-favoured nation treatment; and (iii) general treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances. The first standard applies among others to the freedom of refugees to practise religion, access to Courts, primary education, wage-earning employment after the refugees have resided for three years in the country, labour regulations, and social security. The second applies to wage-earning employment for those who have resided for less than 3 years, and the right of association in non-political and non-profit-making associations and trade unions. The third extends to rights concerning property; self-employment in agriculture, commerce, industry, and handicrafts; the liberal professions; housing; rationing; secondary and higher education, recognition of foreign diplomas, and the award of scholarships (Weiss, 1972).

There is no accepted definition of a 'durable solution' under the 1951 Refugee Convention. The established three solutions promoted by UNHCR are voluntary repatriation, local integration, and re-settlement. Local integration is not legally obligated and is understood to be wider than naturalisation of refugees, which is promoted in Article 34 of the 1951 Refugee Convention. It entails the assimilation of refugees into the social and economic life of a national community resulting in self-sufficiency and may or may not be followed by the grant of citizenship (Nirmal, 2018, p. 181-182). Voluntary repatriation is not expressly addressed in the 1951 Refugee Convention but is rather recognised in other legal sources such as Article 13(2) UDHR, which provides that everyone has the right "to return to his country" and in Article 12(4) of ICCPR that acknowledges "No one shall be arbitrarily deprived of the right to enter his own country." UNHCR's mandate has been recognised to be wide enough for it to initiate voluntary return or repatriation, including promoting favourable conditions to enable such a durable solution (Goodwin-Gill et. al., 2007, p 494). The Statute of UNHCR and the UN General Assembly Resolutions mandate the organisation to pursue resettlement as one of the three durable solutions. Resettlement, which entails refugees who are unable to return home relocating from an asylum country to a third country, however, has only been able to accommodate less than one per cent of refugees out of some 20.7 million refugees of concern to UNHCR at the end of 2020 (UNHCR Malaysia, 2020). This critical gap inevitably locks international efforts to achieve one of the promising durable solutions in a stalemate.

Critical views of governments, scholars, and non-governmental organisations (NGOs) have centred on the suitability of the 1951 Refugee Convention, described as 'a Euro-centric, World War II-era convention for today's new and changing displacement situations (Asylum Access, 2021). For instance, the 1951 Refugee Convention does not address comprehensively who counts as a refugee, the question of admission, causes of flight, and neither does it require a state of refuge to provide asylum as such. Furthermore, it is not concerned with how to manage refugees and forced migration and deal with responsibility sharing among states and other stakeholders' writ large, which has primarily triggered rethinking of the existing treaty (Goodwin-Gill, 2014; Ferracioli, 2014).

It has been observed that Asian nations may indeed be more inclined to welcome the 1951 Refugee Convention if it is perceived as a truly global system that pursues fair and balanced responsibility through meaningful cooperation and burden sharing (McConnahie et al., 2014, p 11). The primary challenge for host countries in this region like Malaysia has been largely unfeasible durable solutions when repatriation is unlikely especially of the largest protracted refugees in the face of continued

conflict and political repression in Myanmar, local integration being resisted by host nations and large-scale resettlement rejected by third countries (Türk, 2018).

Based on the realisation that a sustainable solution to address refugee situations will be impossible to achieve without burden sharing and international cooperation, the Global Compact on Refugees (GCR) was developed out of the New York Declaration for Refugees and Migrants in 2016. It introduces a Comprehensive Refugee Response Framework for addressing large-scale refugee situations envisioning: (a) strengthening national and local infrastructures so that refugees and their host communities can live in dignity, having access to education, health care, and livelihoods; (b) providing support for economic and social inclusion of refugees to enable them to gain from and contribute to the well-being of the host communities; and (c) galvanising partners to invest in comprehensive planning (Türk, 2018, pp 575–583). The political commitment to supporting the momentum of GCR was expressed by the Malaysian leadership in 2018, noting that “while legally non-binding, (GCR) contains many positive elements to provide a comprehensive support system for both refugees and host communities” (Malaysia Ministry of Foreign Affairs, 2018).

Regionally, the modern contexts of refugee situations are better embraced and addressed by developed instruments that can serve as new models for refugee rights frameworks going forward. Guidance can be drawn from the 1984 Cartagena Declaration (among Central American states, Mexico and Panama) and the 1969 Organisation of African Unity (OAU) Convention (among African states). The OAU Convention, for instance, offers voluntary repatriation in its Article V, emphasizing the significance of collaboration between the country of origin and country of refuge, as well as amnesties, non-penalisation, and assistance to those returning (Goodwin-Gill et. al, 2007, p 493). In Europe, the 1950 European Convention on Human Rights led to the adoption of provisions on ‘subsidiary’ or ‘complementary’ protection within the legal system of the European Union based on the protection doctrine under the Convention. These frameworks, while not directly binding, have found better traction with the states that often adopted them into their national refugee laws (Asylum Access, 2021).

Meanwhile, alternative pathways to durable solutions have been promoted such as through the New York Declaration, which include measures such as expanded humanitarian admission programmes, temporary evacuation schemes, flexible arrangements to assist family reunification, private individual sponsorship, education pathways (including through targeted scholarships, student visas, and apprenticeships, as in Canada, the Czech Republic, and Germany), and labour mobility schemes (including in partnership with the private sector) (New York Declaration for Refugees and Migrants 2016 , para 77, as cited in McAdam, 2017, p 7).

Assessment of the impacts of the lack of protection framework in Malaysia

Historically, the experiences of refugees from Indochina and Myanmar and the Andaman Sea crisis of 2015 that turned the global attention to the responses of countries in Southeast Asia to mass refugee flows notably brought to light the difficulty of managing and protecting refugees in the absence of binding legal obligations. The massive exodus of the refugees from these two crises was responded with pushing back boatloads of refugees, claimed as an engagement of mass refoulement. In the case of the Indochinese refugees, the ‘north-south burden sharing’ through the Comprehensive Plan of Action (CPA) was concluded with resettlement places, status determination, and repatriation as the agreed measures that successfully led to processed asylum claims of 1,436,556 people, and resettlement of 1,311,183 (UNHCR, 2000, p 98).

Both of these events undeniably generated calls for a common trajectory towards better regional cooperation to protect the rights and safety of forced migrants. Noting the need to move the needle on burden sharing and international cooperation by pursuing a more holistic and effective refugee protection framework, it is submitted that without any other international, regional, or domestic alternatives to the 1951 Refugee Convention and its 1967 protocol, countries like Malaysia should not simply avoid the 1951 Refugee Convention (Fitzpatrick, 2017). In the broader international context, McAdam (2017) argues that without the refugee regulatory components of the 1951 Refugee

Convention, the protection regime would be impaired, resulting in an even larger influx of disorderly movements.

On the domestic front, Malaysia's political commitment to largely non-binding values while still going by its long-standing official narrative of humanitarian toleration in handling refugees and asylum seekers would only sustain its 'political leverage for electoral votes and assuages international concerns about human rights violations without taking responsibility' (Abd Jalil, 2021). It will continue to leverage a space that is conducive for state obligations to be set at a minimum, allowing for flexibility in accommodating the state's perceptions and policies according to what is expedient rather than based on legal commitments and obligations (Mohamed Razali, & Mamat, 2019). From the lens of the implications for refugees and the host state, the groups will continue to be subjected to inconsistent policy implementation and treated with impunity in the so-called 'safe haven'. Meanwhile, their unregulated arrivals and presence simultaneously pose undesirable consequences to the local host population in Malaysia, as will be addressed and exemplified in the following subsections.

a) Inconsistent policies and treatment concerning refugees

According to Davies (2008), mirroring the 'Asian approach' to forced migration that has been founded on respect for sovereignty and the achievement of economic development, the Malaysian government's preference for its sovereignty on immigration issues even in the context of refugee acceptance and treatment has seen its discretionary admission of refugees on humanitarian grounds or based on social, political or economic factors (Munir-Asen, 2018), including the kinds of facilities and benefits that are available for them. The Malaysian Government is known to adopt a strict policy on citizenship, which is in the interest of controlling the size of 'illegal' migrants in the country (Human Rights Commission of Malaysia, 2017, p 21). However, the propensity to integrate refugees can be linked to religion and cultural/linguistic affinity, which was a major factor that influenced qualification for protection, including access to certain rights for refugees in Malaysia. Thai Muslims from Southern Thailand, Cham from Cambodia and Vietnam, and Acehnese from Indonesia shared a common origin in the greater Malay world and a bond through the religion of Islam. In addition, charity causes, films, and other funding activities to address the plight of Palestinian refugees are a show of sympathy towards fellow Muslim refugees by Malaysia (Hoffstaedter, 2017, p 294).

In the cases of the Indochinese and Filipino refugees, both were initially housed in camps and administered with basic necessities by the UNHCR. The Vietnamese were finally repatriated or resettled to third countries, while those Muslim refugees from Mindanao were given residency permits and permitted to stay without a fixed time limit (Munir-Asen, 2018). Malaysia additionally issued temporary residence and work pass to persons of concern from the Indonesian province of Aceh, opening their access to the Malaysian labor market and stay in Malaysia legally. As for refugees from Bosnia and Syria, Malaysia leveraged the cause of supporting the Muslim victims of the war to project a political image as a 'leader in the (moderate) Islamic world' (Hoffstaedter, 2017, p 294).

Picking and choosing between who receives admission on humanitarian grounds and better treatment in terms of durable solutions, including integration, reflects the Malaysian government's aim to remain sovereign on immigration issues (Davies, 2008, p 149). While a select group of Muslim refugees have been better integrated through legal stay, the protracted presence of the Rohingya, who, despite sharing the bond of religion with the Muslim majority population, represents 'the impasse between migration control policies and dim prospects for solutions' (Cheung, 2011, p 50). The mutability of humanitarianism pursued via the selective and voluntarist approach leads to unjustified disenfranchisement of many refugees while affording them no space and means to meaningfully contribute to the host country and society.

b) On non-refoulement principle

Around the world, asylum seekers and refugees are prevented from reaching the territories of states through rigid entry controls, interception at sea, restrictive visa requirements, safe country, and first

country asylum. These practices have induced the smuggling and trafficking of refugees and asylum seekers trying to flee for safety. In order to be qualified for protection against refoulement under Article 33 of the 1951 Refugee Convention, one has to qualify as a refugee under Article 1 A (2). Although it is argued that the principle only applies to refugees who are within the territories of a particular State party and not to instances of push-backs and acts of rejection at the frontier (Gammeltoft-Hansen, 2013, p 45), without taking any concrete action towards implementing a comprehensive framework with procedures to determine asylum claims, it falls on UNHCR to intervene to ensure asylum seekers are not subject to arrest, detention, deportation, or refoulement.

In addition to that, the Government refused to include a proposed provision in the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Bill 2015 to the effect that upon expiry of the Protection Order period, an undocumented foreign national/trafficked person who has applied for refugee status or has been determined to be a refugee will not be returned to his country of origin (Equal Rights Trust, 2016, p. 101). Recently, the UNHCR, however, has been prevented entry into Malaysia's detention centres since August 2019, making it impossible for the organisation to identify detained refugees and leaving little alternatives for the asylum seekers who may be subject to deportation (Reuters, 2021).

In the broader practical context of trafficking in persons, deprived access to a protection system, including via refoulement, would have the unintended outcome of incentivising brokering agents, smugglers, and traffickers to flourish their trafficking businesses and operations when refugees are left to struggle with no other options to gain lawful entry and admission (Schapendonk, 2018, p 64; Hathaway, 2018, p 603).

c) Refugees and Criminalisation of Irregular Migration

According to the latest 2021 -2025 National Security Policy, the presence of refugees and asylum seekers in the country has brought about a host of problems that necessitate the government to treat the refugee situation as a national security challenge. It is in fact officially acknowledged that refugees holding a UNHCR card or asylum applicants are considered an Immigrant Without Permit (PATI) under Malaysian law (National Security Council of Malaysia, 2021, p 32).

A refugee shall be bound by section 6 of the Immigration Act 1959/63 (Act 155), which states that no person other than a citizen shall enter Malaysia unless he is in possession of a valid Entry Permit on which his name is endorsed, or a valid Pass lawfully issued to him to enter Malaysia. Although their refugee cards issued by UNHCR identify them as refugees and that in 2005, the Malaysian attorney general produced a (nonbinding) directive to prosecutors to withhold prosecution of UNHCR cardholders, such measures do not necessarily guarantee the refugees freedom from arrest and immigration enforcement. In the past, it was reported that cards were seized or disposed of as fakes by police and immigration. Such inconsistent policy implementation illustrates a protection ecosystem that is contingent on the goodwill and recognition of public officials, in addition to UNHCR staff, and ordinary Malaysian citizens (Hoffstaedter, 2014; Hoffstaedter, 2017).

According to Section 6(3) of Act 155, an undocumented person / irregular migrant may face a fine not exceeding ten thousand (Malaysian) Ringgit or imprisonment for a term not exceeding five years or both and also a whipping (discretionary) not more than 6 strokes. The police and immigration authorities are granted far-reaching powers of arrest, detention, and deportation of any undocumented person under the Act, which does not limit the permissible period of detention at immigration detention centres. Section 56(1)(d) Act 155 provides that to assist or harbour an undocumented person in Malaysia is likewise punishable by fines, imprisonment, and even judicial caning under the Act.

In 2016, 2,290 asylum seekers and refugee children were detained in immigration detention centres (IDCs) (Parthiban and Khoo, 2019, p 61). The continued detention of children seeking asylum, however, was held to be in contravention of Article 22 of the CRC, which Malaysia has fully accepted when it ratified the Convention, as well as the Child Act 2001 that recognises the rights and protections

of children without regard to race, colour, gender, language, etc. In the said decided case, several Rohingya children who were detained for their unlawful entry under Section 56(2) of Act 155 were ordered by the Court to be released and placed in an appropriate shelter that could ensure their wellbeing (Ruwaida v. Komandan, Depot Imigresen Belantik, Kedah, 2018).

Child detention as an immigration measure of border control proves to still persist. While not knowing the asylum-seeking status of the affected children, as of October 2020, the Home Ministry provided the figure of 756 children being held in detention centres. Of this number, 405 children were detained without their guardians. These children were reported to be from Myanmar: 326, Vietnam: 31, Indonesia: 17, Cambodia: 16, Thailand: 7, the Philippines: 4, China: 2, Pakistan: 1, and Bangladesh: 1. (Malaysia House of Common, 2020).

d) Increased public security risks

The 1951 Refugee Convention was not drafted as an instrument to circumvent migration controls when its component of refugee status determination requires the most stringent checks of all (McAdam, 2017, p 8). The absence of mechanisms for verifying asylum and not distinguishing refugees from the broader group of irregular migrants does not only create acute protection challenges for refugees but simultaneously heightens national security threats due to the lack of information and data on the movements and whereabouts of asylum seekers and refugees in the country, which can compromise measures for ensuring law and order. Registering and regularising refugees and asylum seekers would eventually benefit the authorities in their management of Malaysia's national security concerns related to forced migration, including minimising irregular entry and presence through smuggling and trafficking channels and the ensuing implications.

Trafficking of refugees in Malaysia has markedly affected the Rohingya from Myanmar as reported by Maria Grazia Giammarinaro, the Special Rapporteur on trafficking in persons, especially women and children (Human Rights Council, 2015). The first scenario described typically involves debt bondage of Rohingya arriving in Thailand through maritime routes or overland before being trafficked to palm oil plantations for labour exploitation while others are held captives and abused. The latter is evidenced by the controversial discovery of dozens of secret camps and 140 graves in Wang Kelian, located in the northern state of Perlis (Beh, 2015). Secondly, evidence of child trafficking linked to forced begging was also reported amongst the refugee population, primarily the Rohingya children. Thirdly, trafficking for labour exploitation has been highlighted among the refugees, asylum seekers, and stateless persons from the Filipino and Indonesian communities in Sabah, and Rohingyas from Myanmar (Human Rights Council, 2015, pp 7-8). Being outside of the state system and lack of access to education, formal work and access to justice have been cited as the vulnerability factors that amplify their risk of being preyed upon by unscrupulous traffickers (Human Rights Council, 2015).

e) Denial of formal right to work, risk of exploitation, and social protection deficit

Deemed illegal under Section 6 of Act 155 and excluded from any of the interpretation clauses of the Employment Act 1955, legal employment is not available for the majority of refugees in Malaysia. Although the IMM13 passes have been issued to some of the Acehnese and Filipino refugees with permission to reside and work, to date, Rohingya refugees have not been authorised to legally participate in the economic sector except for a number of initial pilot attempts at allowing them to work (Cheung, 2017). The absence of a refugee legal and protection framework in effect renders refugees in Malaysia to be part of the attractive, cheap, flexible, and easily exploitable workforce. Not subjected to the registration and statutory minimum wage, the costs of hiring refugees are significantly lower than hiring foreign workers.

According to a report, the UNHCR has received at least five daily telephone calls from prospective employers regarding the implications of hiring refugees in terms of their illegal status and availability for hire (Yasmin et al, 2019, p 7). The exploitative conditions experienced by the refugees working

informally have been narrated by a case study on the Rohingya in the Klang Valley. According to Zio Rahaman, a Rohingya who worked in the construction sector, he was once defrauded by a local company of the payment of his salary for 14 months amounting to RM 12,000. He said the company refused to pay his salary because it knew the Rohingya could not report the conduct to the police or the Labor Department as the Rohingya were in principle not allowed to work (Ab Wahab, 2017 p.164-165).

In the case of Chin refugees in Malaysia, a fieldwork visit revealed that:

As they are employed illegally, they have no insurance or legal recourse in case of injury. On a visit to a convalescent home on the outskirts of Kuala Lumpur, the vulnerable situation of refugees employed illegally became all too clear, as I witnessed multiple workplace injuries that have scarred and disabled people for life. One patient had been severely burnt in a workplace accident and was hospitalised in Malaysia, while his family was resettled to a third country. He remains in a vegetative state, unable to eat or communicate, oblivious to the fate of his family or himself (Hoffstaedter, 2014, p 873).

It is clear that as these refugees pursue their right to life and livelihoods in Malaysia, they will take up informal jobs that may be exploitative, below minimum wage, in a risky and dangerous environment, and with no legal, social, and health protections.

f) Social impact on healthcare

The impact of the lack of legal status and framework for the protection of refugees on healthcare can be assessed from two dimensions. Firstly, the lack of access to healthcare, including inoculation in their origin countries due to poverty or discrimination results in increased exposure to infectious diseases, such as tuberculosis, hepatitis, and other communicable diseases. This certainly poses the risk of spreading the diseases to the public in this country, as well as members of their communities, which is indeed concerning when according to UNHCR, the majority of refugees in Malaysia informally work in the food and beverage, other than construction and repairs (automotive and electronics) sectors (Yasmin et. al., 2019, p 7-8).

In Malaysia, unlike citizens who can enjoy highly subsidised public healthcare, non-citizens are charged higher rates. UNHCR Malaysia successfully secured a Memorandum of Understanding with the Ministry of Health in 2005 under which all refugees recognised by UNHCR would be given a 50% discount off the foreigners' rate at public healthcare facilities. Despite this discount, the cost of medical care is still largely unaffordable, creating barriers to accessing basic healthcare services, particularly following a 100% increase in medical charges for all foreigners via a 2014 amendment to the 1951 Medical Fees Act (Chuah et al., 2019, p 2).

Fees specific for non-citizens can be steep for the majority of the refugees who are unable to legally work in this country. For instance, the 3rd class ward deposit as of 2018 was MYR 1400, 70 times higher than the rate for citizens, which was at MYR 20 (Loganathan et al., 2019, p 3). Other barriers to healthcare among refugees and asylum-seekers are exacerbated by security and protection threats, lack of language abilities, and low health literacy (Loganathan et al., 2019, p 3). Some public hospitals prepared counters to report on patients with no proof of legal status in the country (Equal Rights Trust, 2016). This may also be due to Circular 10 issued by the Ministry of Health in 2001 requiring all staff of the said Ministry to report undocumented migrants to the police according to the requirements of the immigration law of the country (Ministry of Health, 2001). The inconsistent treatment by different authorities is induced by the legal and administrative uncertainty over the rights of the refugees in the country. The paradox in the policies has been alluded to by a respondent from the State government:

“In theory, public health providers should provide treatment regardless of legal status; but they also have to follow the mandate from the ministry and immigration laws of the country. This places them in a difficult position when dealing with undocumented asylum-seekers” (Chuah, et. al., 2019, p 9).

The Government has taken several critical measures to control the COVID-19 rates of transmission. Among others, foreigners with COVID-19 symptoms were provided with free testing and treatment. The Government also reassured that undocumented foreigners who come forward for testing and treatment would not face arrest for immigration offences (UNHCR Malaysia, 2020). Despite this initial commitment, migrants including asylum seekers who were waiting for registration by UNHCR and UNHCR cardholders whose registration has lapsed and could not be renewed due to the lockdown were also arrested in certain Enhanced Movement Control Order areas (Verghis, et. al., 2021).

g) Social impact on education

Article 28 of the CRC makes the right to education compulsory for every child, requires free primary education for all and different forms of secondary education; higher education; educational and vocational guidance; as well as measures to encourage regular school attendance. However, Malaysia maintains a reservation to Article 28 (1) (a). The public-school system merely admits certain categories of children of non-citizens. The Education (Admission of Pupils to Schools, Keeping of Registers and Conditions under which Pupils may be Retained in Schools) Regulations 1998 (P.U.A (275)) regulates entrance into the Malaysian public schools. 4 categories of non-citizens may be admitted to a school, namely; (a) a child of a staff of a foreign embassy; (b) a child of a non-citizen parent working in government service or agency, statutory body, or any other place with a valid working permit; (c) a child of a permanent resident of Malaysia and (d) students selected to study in Malaysia by their respective country's governments (Regulation 5). Refugee children are clearly excluded from access to the Malaysian public education system.

Most refugee children could only study in various ad-hoc schools or classrooms setup by non-governmental organisations (NGOs) and community organisations with limited resources and funding, learning only basic skills and religious education. Due to limited education facilities and aid, only 33 per cent of refugee children of school-going age attend some 130 community-based learning centres (Todd et al., 2019). The quality of education is said to be below par with teacher absences and dropout cases among the students being cited as common problems. The latter is contributed by poor or unstable family income to support the children and their education (Khoso & Hussin, 2020). The current exclusionary education policy is churning out a generation of young adult refugees with limited education and skills, directly jeopardising their capacity to sustain and improve their lives and provide for their families in the future (Yasmin et al, 2019, p 9).

The Government, despite maintaining the exclusion of refugee children from the public education system, adumbrated the possible undesirable outcomes of not supporting the education of refugee children in terms of difficulty in getting those without education/qualifications resettled to third countries (Ruzki, 2022). Furthermore, marginalised and disadvantaged children unable to access formal education or exams are commonly at risk of being employed as child labour in the informal workforce. Their lack of documentation and legal status exposes them to exploitation, including leaving them with no or limited recourse when faced with unfair treatment, abuse, or injury in the workplace (Child Rights Coalition, 2018, p 6).

h) Deprivation of marriage and family rights

Even though Malaysia does accept, among others, the obligation to ensure the same right to freely choose a spouse and enter into a marriage with free and full consent (CEDAW, Art. 16(1)(b)), marriages of refugees are not regulated under the legal framework in Malaysia. The absence of such a legal framework leads to informal marriages and a lack of legal proof of such marriages, exacerbating protection issues relating to child marriage and pregnancy, bigamy or polygamy, child right to a legal identity that begins with birth registration, and access to justice, such as the right of women to seek divorce due to domestic violence during marriage and other consequential rights and remedies following marital breakdown and marriage dissolution. The harsh consequences certainly illustrate the injustices that the principle of non-discrimination and the Shari'ah norms on such matters seek to avoid (Kassim, 2015; Mohamed Razali and Mamat, 2019).

Conclusion

In the absence of an alternative framework for governing and protecting refugees, it has been demonstrated that not being a signatory to and/ or not having a domestic policy and legal framework that aligns with the regulatory and protection components of the 1951 Refugee Convention contributes to a multitude of negative consequences that impact both the refugees and the host country, Malaysia. From the human rights perspective, treating the refugees as irregular migrants is tantamount to denying the refugees the right to seek asylum and protection as allowed under international law. As refugees continue to languish in the liminal space contingent on ‘selective’ humanitarianism and discretionary treatment of the bureaucrats, the impact of their lack of recognition and regulation of status extends to the public security sphere. While the presence of migrants, including foreign workers is regulated through registration and work permits, the government does not have a governance framework to register and regulate the presence of asylum seekers and refugees in Malaysian society, a policy and legal gap that certainly poses threats to public order relating to containing infectious diseases and crime prevention, including trafficking and forced labour. Without economic inclusion, refugees will continue their precarious aid-dependent existence, without the capacity to build self-reliance for sustainable livelihoods. Their children will grow up inheriting the ‘irregular’ tag, deprived of the most basic rights to formal education and affordable healthcare, becoming a social and economic burden in the long-term to the host country. The immediate response to the problematic status quo has to lie in defining the group as refugees and distinguishing them from the punitive label and treatment as ‘irregular’ migrants. The protection space then must be crafted leveraging the existing customary international law and norms in treaties, declarations, and compacts that Malaysia has committed itself to. The regulatory and protection principles and mechanisms in the 1951 Refugee Convention and other regional treaties concerning refugee protection should inspire construction of policy, legal and institutional frameworks that are attuned to the local circumstances while the country assesses its capacity and limits, which then necessitate and justify a complementary framework of responsibility sharing with international, civil society and private actors and stakeholders. To do all this, there must be a political will, agenda, and action plan to engage with and acquire knowledge and assistance from the relevant local, regional, and international stakeholders in finding and designing the shared solutions.

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