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PAVING THE WAY FOR THE NON-REFOULEMENT PRINCIPLE IN DOMESTIC COURTS

[i]Dina Imam Supaat

[i](Corresponding Author) Senior Lecturer, Faculty of Syariah And Law, Universiti Sains Islam Malaysia (USIM)
dinasupaat@yahoo.com

ABSTRACT

The application of international custom in domestic courts is a contentious exercise. This paper examined the importance and applicability of the principle of non- refoulement in domestic courts. Discussion begins with the scrutiny of the formation of the principle as international custom. Next, it deals with the status of international customary law in the domestic legal framework of a dualist state with the analysis of the judicial response to attempt to invoke international custom in cases. The result shows that there are legal impediments that must be removed to enable meaningful application of the principle for the benefit of refugees.

Keywords: *non-refoulement, refugee, customary international law, domestic courts.*

INTRODUCTION

The *non-refoulement* principle is a cornerstone of international refugee protection. The principle protects refugees from forced return. Under this principle, states are prohibited from rejecting, returning or removing refugees and asylum-seekers from their jurisdiction to any frontier that will expose them to a threat of persecution, or to a real risk of torture, cruel, inhuman or degrading treatment and punishment, or to a threat to life, physical integrity and freedom (Chimni, 2000). Protection

against return is provided in Article 33 of the 1951 Convention Relating to the Status of Refugees (CRSR) as well as other international and regional instruments. For example, Article 5 of the *Universal Declaration of Human Rights* (UDHR), Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (ECHR), Article 7 of the *International Covenant* CCPR, Article 5 (2) of *American Convention on Human Rights 1969* (ACHR), and Article 5 *African Charter on Human and People's Rights 1981* (Banjul Charter) show common prohibition of torture, cruel, inhuman or degrading treatment and punishment.

Scholars argue that the principle has become an international custom that binds all state but this is met with some opposition and continue to be debated (Lauterpacht & Bethlehem, 2003). The argument claims that Malaysia is legally bound to adhere to the *non-refoulement* rule and thus should not return any refugee and asylum seekers (Supaat, 2013, 2015). The aim of this article is to analyze **the applicability of the customary rule in the international refugee law in Malaysian courts, that is, the principle of *non- refoulement.* To achieve that, it** first discusses and analyzes the formation of the rule as an international custom but not including the persistent objector rule. Next, this article examines the position of international law and customs under the Malaysian legal framework to predict the applicability of customary international law rules in local courts. This involves the examination of primary law and previous case laws.

THE FORMATION OF THE NON- REFOULEMENT PRINCIPLE AS CUSTOMARY INTERNATIONAL LAW.

States have been practicing the rule of non- return even before the adoption of the CRSR in 1951. The concept was first articulated in international instrument in Article 3 of the 1933 Convention Relating to the International Status of Refugees (Goodwin-Gill & McAdam, 2007). It was then codified in Article 33 of the CRSR and even though the rule already existed in treaty law, it can also exist in the form of international custom (*North Sea Continental Shelf cases (*1969) ICJ Reports 3; *Nicaragua v United States of America* (1984) ICJ Reports 169).

In fact, a customary rule can crystallize out of a provision of a treaty if it satisfies the three conditions: i) that the rule is fundamentally norm-creating character; ii) widespread and representative state support including affected states; and iii) consistent state practice and general acceptance and recognition of the rule (*North Sea Continental Shelf cases (*1969) ICJ Reports 3).

Two components must be satisfied in the formation of customary international law - general practice and acceptance as law or *opinio juris* (Statute of the International Court of Justice, Article 38 (1b) but there is a continuing debate over the of each component. For a practice to become 'customary', it must be constant, uniform and considered mutually obligatory among states (Shaw, 2008 & Hathaway, 2005). Uniformity of the practice is not absolute but should be substantial, consistent, and without significant uncertainty, fluctuation, contradictory practice and discrepancy. Furthermore, claims made by states without assertive acts do not amount to practice as required. For example, in the *Fisheries Case (United Kingdom v Norway (*1951) ICJ Reports 191).

The first element, the generality of practice, no specific number of states can be ascertained or determined but it shall take into account the participation of states including the reaction of other states towards such practice (Akehurst, 1974). Extensive acceptance among states whose interests are particularly affected is also vital according to the Internatioanl Court of Justice (ICJ) in the *Fisheries Jurisdiction Case (United Kingdom v Iceland (*1974) Merits, ICJ Reports 3). Only general acceptance is needed to create customary law, not absolute recognition of a practice. Hence, a custom will also state that some states have not consented to the rule and do not object to it. Generality could require a large majority as in *South West Africa `Cases (*1966) ICJ Reports 291) and in some cases, generality depends on the evidence available for a particular circumstance (Akehurst, 1974; Brownlie, 2008 and Kunz, 1953).

Widespread practice with a representative participation among states, for example according to region is good example of general acceptance (Tunkin, 1974; *Fisheries Jurisdiction Case (United Kingdom v Iceland (*1974) Merits, ICJ Reports 3; *North*

*Sea Continental Shelf cases (*1969) ICJ Reports 3. Generality does not demand specificity of time or duration (Brownlie, 2008). Cheng (1965) even suggests that in extreme situations where precedents or prior practice are absent, custom could emerge instantly. The second component, the *opinio juris*, requires that the practice be accepted and acknowledged as law, and that states voluntarily agree to be bound by the 'law' (Hathaway, 2005).

In determining the customary status of a rule, the traditional and modern custom has different views. They give different weights to both elements of state practice and *opinio juris*. The traditional custom makes general and consistent state practice as the primary consideration, and derives *opinio juris* from actual state practice. Greater weight is put on action than what the state publicly expresses. There are commentators who simply reject the *opinio juris sive necessitates* and rely solely on practice (Kelsen, 1952). The modern custom however, puts greater importance to states expressions and declaration rather than their actual conduct (Roberts, 2001 and Guzman, 2005). Their stand is that a state may know that it has obligation under some laws but simply act contrary to the rule. This group believes that only *opinio juris* is vital in determining customary rules but not general practice since it is possible for customary rules to develop instantaneously even though the practice has never generally taken place (Cheng, 1965). The relevant proof of acceptance as law may include the assurance of policy-makers that certain practice is obligatory and has reached customary status (Amato, 1971). Thus, contrary action by a state pertaining to a rule is unimportant when it has openly expressed the obligatory nature of a particular rule.

The membership of international and regional organizations that adopt non- legal documents containing provisions of *non-refoulement* is another general practice (Lauterpacht & Bethlehem, 2003). Malaysia is a member state of the AALCO, which adopted the Bangkok Principles, a non-binding document concerning refugees that recognize prohibition of forced return. The other practice is states' incorporation of the ratified treaties into municipal laws especially the principle of *non-refoulement.* More than 120 states have incorporated the

non-refoulement provisions in their municipal law (Lauterpacht & Bethlehem, 2003). Malaysia is not included in the statistic. Last but not least is states' actual practice of not rejecting, removing and returning refugees including their practice in relation to extradition. Nevertheless, many states do act against the principle and justify the breach and violation with security, social and economic reasons.

The rule of *opinio juris* is taken from a number of state expressions and statements including the unanimous view conveyed by state representatives during the UN Conference on the Status of Stateless Persons, which stated that the provision of *non- refoulement* in the Convention was taken as a demonstration and representation of a generally accepted principle of non-return (Lauterpacht & Bethlehem 2003). The fact that the provision of non-return is embodied in various international treaties apart from the CRSR is also an *opinio juri*. Protests and objection by states and UNHCR to any breach of the *non-refoulement* principle or any conduct that amounts to *refoulement* demonstrate sense of legal obligation (Gluck, 1993; Coleman, 2003; Bettis, 2011). Lastly, the provision of Article 33 of the CRSR is considered to have a norm-creating character, the foundation of a customary law (*North Sea Continental Shelf cases (*1969) ICJ Reports 3). It is argued that Article 33 satisfies all the three prerequisites to become a customary rule as identified and applied by the ICJ in the *North Sea Continental Shelf Case.*

Regardless of the evidence, some commentators dispute the customary status. Hathaway (2005) insists that, despite decades of refugee problems and acknowledgement of their rights under the CRSR, no custom has ever been established, for several reasons. Firstly, there is a lack of consistent and uniform practice among contracting states (Hathaway, 2005). In this regard, several instances can be referred to in establishing the negative practices of states, which are contrary to the prerequisite of uniform and consistent practice (Colesman, 2003).

In concluding that there is no customary law of *non-refoulement,* Hailbronner (1985) argues that actual state practice, as seen from the asylum laws and actions of Western Europe, the

USA and Canada, has constituted contradictory evidence against customary status. Secondly, it is claimed that the principle will not easily reach customary status because the rule is against states' desire to maintain control over their own borders; in other words, it is contrary to states' idea of sovereignty. The rule will impose on states an obligation to accept aliens into their territories or will remove states' powers, while states insist on their prerogative to allow or disallow entry. The next counter-argument contests the sufficiency of clear proof. The attainment of customary status is not sufficiently convincing as there is inadequate evidence to support the proposal. This argument takes into consideration all the inconsistent practice that has been occurring for decades to this day. The idea of the customary status of the *non-refoulement* principle and its recognition is regarded as wishful legal thinking rather than a careful factual and legal analysis (Hailbronner, 1985).

Proponents of the customary status of the *non-refoulement* argue that negative and inconsistent state practice should be regarded as violation rather than denial of obligation. In Asia, during the Indochina crisis, Thailand, Malaysia, Indonesia, Singapore and Australia were all criticized for rejecting refugees by not allowing their boat to land and disembark on their shores. Boats were ask to redirect to other destination such as to Indonesia but such redirections according to Manstead (2007) as not amounting to a violation of the rule of non-*refoulement* if the boats are redirected to a safe country. In Australia, the *Tampa* incident is a modern example of classic rejection. A freighter, which rescued Afghanistan refugees on the high seas was not allowed to land despite concern over the welfare and health of the refugees and the crew (Magner, 2004; Willheim, 2003; Edwards 2003).

Despite continuously asserting that the refugees should not be allowed to apply for political refugee status and should not enter Australia illegally, Australia never denied its responsibility not to *refoule* the refugees (Willheim, 2003). In these cases states' actions are considered as breaches or violations of the rule rather than a denial of obligation under the rule of *non-refoulement*. Another argument to support *non-refoulement* as custom is the incorporation of the principle into

domestic laws that should be taken as the *opinio juris* of the state. Such move is a demonstration that state has acted out of the sense of obligation under the principle of *non-refoulement.*

By comparison, there are two significant and consistent state practices: first, becoming members of instruments that contain *non-refoulement* principle; and, second, the incorporation of the principle of *non-refoulement* into national laws. In addition to that, the number of states that practise the rule is greater than the number of states that violates the principle. The incompatible practices are insufficient to dismiss the consistency and generality of the *non-refoulement* principle. Thus it can be concluded that the principle of *non-refoulement* has become an international custom.

MALAYSIA'S DUTIES UNDER THE CUSTOMARY PRINCIPLE OF *NON- REFOULEMENT*

Based on discussion by Lauterpacht and Bethlehem (2003), Malaysia's duties and obligation under the rule shall include the duty to identify 'persons' entitled to the protection of the rule. This could involve screening of aliens. The other duty is to provide the proper avenue to deal with the exception in the application of the protection (Willheim, 2003). Malaysia is required to determine that a person is in fact a refugee or someone who cannot be returned, thus enabling him/her to claim protection under the principle. The determination should be carried out by a specific body with a specific function similar to refugee status determination (RSD), as practised by contracting states to the CRSR which also provide appeal avenue (UKBA, 2013). However, since the UNHCR in Malaysia is allowed to process the application without any control, participation or involvement of the government throughout the process, the issue is whether the action amounts to the positive discharge of the duty? The author argues that the screening and refugee determination by the UNHCR is an insufficient discharge of the duties under the non-refoulement principle because UNHCR has no real legal power to execute its findings.

In a Hong Kong case, *C v. Director of Immigration* [2013] 4 HKC 563, the applicants sought judicial review against the decision of the UNHCR of not recognizing the applicants as

refugees and then the refusal upon appeal. They also sought a number of declaratory reliefs. It was held by the court in the first instance that the principle is a customary international law; but it was found to be contradictory to Hong Kong law and thus rendering the rule inapplicable in Hong Kong. On appeal to the Court of Final Appeal, the court held that refugee screening is a duty of state even though UNHCR is already in the territory to conduct refugee status determination. It was also acknowledged that *non- refoulement* is a customary international law as was decided in the Appeal Court earlier. This case is relevant to the present study since Hong Kong and Malaysia are non-parties to the CRSR, and both persistently adhere to the policy of not granting refugee status, have no provisions for refugee protection and handling, and UNHCR fully handles refugee registration and determination of application for refugee status.

THE APPLICABILITY OF THE CUSTOMARY INTERNATIONAL LAW RULES FOR REFUGEES IN MALAYSIAN COURTS

Malaysia has been practising a dualist approach towards international law and treaties (Hamid, 2005). In the dualism theory, international law and municipal law are two separate systems of rules without superiority effect over each other since each body of law regulate different subject matter (Shaw, 2008). Nevertheless, in practice, dualist states often make laws that suppress international law (Shaw, 2008). In dualist state, its municipal law cannot be invalidated by international law (Fitzmaurice, 1957). The monism theory however, treats international law as supreme over national law (Fitzmaurice, 1957). It considers both laws as a single unit and international law is the basic law (Fitzmaurice, 1957) and as a result, international law will automatically become part of municipal law once accepted (Fitzmaurice, 1957). Nevertheless, even though international and national law operate in different domain, there are occasions where both laws becomes in conflict which caused a state to breach its international obligation while acting in accordance with the domestic law (Wallace, 2009). An example of this situation is the problem of asylum where state is trying to enforce its own law on regulating the admission of

immigrant without valid travel document and penalize them for immigration offence while the principle of *non- refoulement* prohibit states from rejecting a refugee and the CRSR prohibit state from taking criminal action against refugee. In this situation the state is liable for the failure to fulfill its obligation under international law (Fitzmaurice, 1957).

The Malaysian Federal Constitution does not provide the status or the effect of international treaties in Malaysian law and its legal framework (Hamid, 2005). The Constitution declares that it is the supreme law of the land and that any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistencies be void (Malaysian Federal Constitution, Article 4 (1)). Article 4 (1) of the Constitution is silent regarding international law but only provides that where the Constitution is in conflict with other statutes, the Constitution shall prevail. The Constitution also identifies specific powers of the Parliament to make laws in respect of matters concerning Malaysia's relation with other countries and international organizations as provided under Article 74 (1) read together with the Ninth Schedule.

The Parliament has to incorporate provisions of treaties, agreements and conventions into written legislation before it can be applied in Malaysian courts. The executive authority is empowered to administer and to implement matters, which fall under the authority of the Parliament (Federal Constitution, Article 80). A number of Parliamentary statutes have been enacted to give effect to international treaties such as the Geneva Conventions Act 1962 (Act 512) (Revised 1993) which adopted provisions of the four Geneva Conventions for the Protection of the Victims of War or 1949; the Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636) (Revised 2004) that gives legal effect to the Vienna Convention on Diplomatic Relations 1961; and the International Organizations (Privileges and Immunities) Act 1992 (Act 485) that gives legal effect to the Convention on the Privileges and Immunities of the United Nations 1946. However, these have not yet fulfilled the obligation to implement some other treaties. Only selected

provisions of the treaties are consolidated and incorporated into Malaysian laws such as the United Nations Convention on the Rights of the Child (CRC).

It is important to determine the application of customary international law, an unwritten law that binds Malaysia without no state consent and ratification. Even if the court can be convinced that the rule is an international custom, can a refugee be able to claim the right not to be returned under the *non-refoulement* principle in local courts? In the case of *C v. Director of Immigration* [2008] HKCU 256 the Court of Appeal recognised the right of refugees under customary norm of *non-refoulement* and this provide a *locus standi* for the refugee to claim their rights in the courts. Questions on how exactly customary international law can be applied and the extent of its legality as a source of law in the country have not sufficiently addressed both academically and judicially. Very limited journal articles and case laws discussed this matters including Dickstein (1974).

It is suggested that customary international law is applicable in Malaysia if it is regarded as part and parcel of the common law by virtue of Section 3 (1) of Civil Law Act 1956 (Revised 1972) (Hamid, 2005). Local courts are bound to apply common law and the law of equity as administered in England on the 7 April 1956 (for Peninsular Malaysia); 1 December 1951 (for Sabah); and 12 December 1949 (in the case of Sarawak) depending on the suitability of the law to local circumstances. It has been argued and confirmed in many English cases that the customary international law form parts of English common law and thus, customary international law could also be applied in Malaysia for the same reason.

In *Buvot v Barbuit* (1737) Cas. Temp. Talbot 281, Lord Talbot declares the court's recognition of international law as law in England by stating that: 'the law of nations in its full extent was part of the law of England'. After that, in *Triquet v Bath* (1764) *3* Burr 1478, Lord Mansfield agreed with the declaration made in *Buvot v Barbuit* (Shaw**,** 2008**;** Harris 1998).

In a *Chung Chi Cheung v R* [1939] AC 160 or *Chung Chi Cheung v The King* [1939] 1 MLJ 1, Lord Atkin asserts that the courts will only apply international law which has been expressly accepted by English law and as for customary international law, it will be valid if it is consistent with written law and previous decisions of the courts. Later, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356 and *Maclaine Watson v Department of Trade and Industry* [1988] 3 WLR 1033 confirmed and reaffirmed the employment of the doctrine of incorporation as the correct approach in deciding the acceptance of customary international law rules into English law. These cases demonstrate that the application of customary international law in England is firmly founded on the doctrine of incorporation in which the rules are accepted and recognised by the courts provided that they are not in conflict with any statute of the Parliament or decisions of the highest court**.** Nonetheless, the application is limited by the rule that the court shall not take the role of the Parliament to create criminal sanctions (*R v Jones and Others* [2006] UKHL 16, [2006] 2 All ER 741).

In Malaysian context, the status of customary international law as a component of English law could be viewed as part of the common law which is applicable in the country as far as the rules are not in conflict with Malaysian law, public policy and local circumstances (Hamid, 2005). However, the application of customary international law in domestic court is still an ambiguous issue due to the very limited judicial consideration. In the case of *PP v Wah Ah Jee* (1919) 2 F.M.S.L.R. 193, the court stated that it is the courts' duty to take the law as it is or as they find it and thus, whether a written law is contrary to international law should not be considered.

In *Olofsen v Govt. Of Malaysia* [1966] 2 MLJ 300, the Singapore High Court applied a customary rule of state sovereignty despite no explanation was made on how did the rule is accepted into domestic legal framework. In *PP v Oei Hee Koi* [1968] 1 MLJ 148, the Privy Council held that the customary international law as stated in the Oppenheim's International Law

(Vol. 11 7th Ed) applied to the accused. It was also held that provisions of the Geneva Convention have not abrogated the rule of customary international law yet again, the extent to which customary international law shall be applied in Malaysia was not explained.

On the contrary, the court in *PP v Narogne Sookpavit* [1987] 2 MLJ 100, found the accused guilty of an offence under section 11(1) of the Fisheries Act 1963 (Revised 1979). The court rejected the defence council's argument that 'the right to innocent passage' has become customary international law and thus, is part of Malaysian law and therefore, the respondents should be able to enjoy the right of innocent passage. According to Shanker J, the court is obliged to consider evidence that a particular custom really exist before endorsing its existence (Evidence Act 1950, Section 13) and held that the right to innocent passage as a customary international law is not proved. The court further held that even if it can be proved that an innocent passage is indeed a right, it cannot be applied and upheld as it is contrary to Malaysian statute particularly Regulation 3(b) of the Fisheries (Maritime) Regulations 1967.

This judgement is an example where the court is capable of rejecting the existence of a customary rule by citing a contradictory written law. Here, the Fisheries Act 1963 puts an obstacle to the application of the customary rule in domestic courts. It also shows that in order to establish the existence of an international custom, the Evidence Act 1950 must be closely adhered to (Evidence Act 1950, Section 45). This case also declares the supremacy of domestic laws over customary international law.

However, the case of *Village Holdings Sdn. Bhd. v Her Majesty The Queen in Right of Canada* [1988] 2 MLJ 656 depicts a different decision. Shanker J held that Malaysia by virtue of section 3 of the Civil Law Act 1956, Malaysia is bound by the doctrine of absolute state immunity a common law of England. He also refers to the fact that "the common law of England as administered in England on April 7, 1956 was that

the immunity from legal process accorded to a foreign sovereign was absolute". The case of *Mighell v Sultan of Johore* [1894] 1 QB 149 and *Duff Development Company Limited v Kelantan Government & Anor* [1924] AC 797 are also illustrative of this point. It was argued that court's recognition of the sovereign immunity principle demonstrates that since the rule is also a recognized as customary international law it impliedly points out that when Malaysian courts accept it as common it also means the acceptance of the rule as customary rule by the Malaysian courts (Hamid, 2005).

The decision shows that the acceptance of common law is still subject to confirmation that it is a common law of England that is being administered as at April 7, 1956 since at that time, the common law of England on sovereign immunity has changed and developed to restrictive immunity as in the case of *Trendtex.* This is the position if the provision of Section 3 of the Civil Law Act 1956 is to be strictly applied. It means that any developments in the common law of England after the cut -off date of April 7, 1956 cannot be applied in Malaysia (Hamid, 2005). In this situation, the legislature is the proper forum to update the development of the common law by enacting new laws.

Nevertheless, the real situation in Malaysia is somewhat different than the theoretical understanding of Section 3 of the Civil Law Act 1956. The restrictions is ignored in some instances and observed at other times. For example, in the case of *Saad Marwi* v *Chan Hwan Hua & Anor* [2001] 3 CLJ 98, Gopal Sri Ram JCA asserts that after 1956, the judiciary are at liberty to shape the way the common law of England are to be applied in Malaysian courts Thus, he chose to apply the English doctrine of unconscionable bargain developed in England after 1956 through Section 3 of the Civil Law Act. On the contrary, the case of *Majlis Perbandaran Ampang Jaya* v *Steven Phoa Cheng Loon & Ors* [2006] 3 MLJ 389, was treated differently. Abdul Hamid Muhammad Federal Court Judge (FCJ) in dealing with the question whether common law developed after 1956 should be followed states that:

"[30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries."

Abdul Hamid Muhammad FCJ is of the view that Malaysian courts can choose to apply the common law of England developed after 1956 if no common law before that date is found for a specific matter. He also acknowledges that the application of the common has sometimes failed to follow the correct approach as provided by the Civil Law Act 1956. He further asserts that:

"[31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying "archaic" common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision."

In the above case the Federal Court applies "…the old common law authorities which limited the claim for pure economic loss in cases of negligence, in particular severely limiting such claims against a local authority" (Syed Ahmad, 2012).

The application of the doctrine of absolute state immunity is also reviewed by the Supreme Court in *Commonwealth of Australia v Midford (Malaysian) Sdn Bhd.* [1990] 1 CLJ 878, [1990] 1 MLJ 475. Gunn Chit Tuan SCJ in answering whether absolute state immunity applies admits the applicability of the restrictive immunity rule through English common law that developed after 1956 as reflected in the case of *Philippine Admiral* (1977) AC 373, *Trendtex* (1977) 2 WLR 356 and *The 'I Congreso' case* (1983) 1 AC 244 but the court is silent of the status of the immunity rule as customary international law. It is more concern with the question of whether or not the rule has been made part of common law of England. Moreover, the court further asserts the principles in the application of common law in Malaysia: first, the court is at liberty to adopt the approach of applying common law rule that suits the legal needs of the country; and second, the Parliament has the power to enact a legislation which may be inconsistent with common law and thus, will have effect on the applicability of that rule.

The Malaysian cases referred to argue that there were not enough clarification on the formation of the custom, and second, that there are inconsistencies in the onus of proof of this matter. In some cases the court insisted that the defence or the party who asserts the existence of such rule made insufficient effort to prove that a particular customary rule exists (*PP v Narogne Sookpavit* [1987] 2 MLJ 100). In other cases, the court takes extra mile to show that a customary rule in question is a recognised rule in international law and thus applicable in local disputes such as in *Olofsen.*

Three main principles are identified in the application of customary international law in its domestic courts: first, the rule can be applied if it can be considered as Common Law. Second, the rule is not inconsistent with any written law, and third, the duty to prove a custom lies with the party who wants to invoke it (Benvenisti 1993).

To prove that the principle of *non-refoulement* is a common law, we have to look at the practice of English Courts in relation to *non- return*. In discussing the rights and protection of refugee, reference is always made to the CRSR and UK's obligation under it as a contracting state. The UK signed the CRSR on 28 July 1951 and ratified it on 11 March 1954. As a signatory to the CRSR, its regulation regarding asylum in the Asylum and Immigration Appeals Act 1993 incorporates provisions of CRSR (Nazarova 2002). UK is also a party to the European Convention on Human Rights (ECHR) and its provisions are adopted into the Human Rights Act 1998 and the protection against return or *non-refoulement* is provided under Article 3 of the Human Rights Act 1998.

Without evidence supporting the position of *non-refoulement* as a common law, the rule cannot be applied in Malaysia via common law route. Even if the principle cannot be proved to be a common law, this study is of the view that the court is still open to follow the written law of England to some extent because the situation of refugee is not dealt with in Malaysian law and there is a lacuna. Thus, can the court refer to the written law of England on non- return, since the Civil Law Act 1956 only warrant the application of common law? In the case of *Chan Ah Moi v Phang Wai Ann* [1995] 3 CLJ 846, the High Court, relying on the provision of Section 3, Civil law Act 1956, allows the application to exclude the husband from a matrimonial home based on the British Domestic Violence and Matrimonial Proceedings Act 1976 since no provisions dealing with such application is provided in any written law in Malaysia (*Chan Ah Moi v Phang Wai Ann* [1995] 3 CLJ 846).

Later, however, in the case of *Jayakumari v Suriya Narayanan* [1996] 1 LNS 74 James Foong J. stated that the case of *Chan Ah Moi* was wrongly decided as it relies on the written law when it is not provided under the Civil Law Act 1956. In other words, the written law should not bind Malaysia. He insists that the cut- off date should be complied with regardless of the absence of law. In deciding the case before him, he relies on several other English cases not referred to by the earlier case (*Jayakumari v Suriya Narayanan* [1996] 1 LNS 74).

The principle of customary international law accepted as common law in Malaysia is applicable provided that they are not inconsistent with any written law (statutes or Acts of Parliament) or decisions of the highest court. This is also the practice of many other states. What is not firmly established is the extent to which such inconsistency should takes effect or how much inconsistency is required before a principle of customary international law can be found void and thus entirely inapplicable in Malaysian courts. Section 5 of t**he Malaysian Immigration Act 1959/63 provides that it is an offence for anyone to enter and leave Malaysia through unauthorized entry points and to enter and stay in Malaysia without valid permit. The penalty for such offences includes fines and whipping and also removal and deportation (**Immigration Act 1959/63, Section 6)**. These provisions is contrary to the *non-refoulement* principle that prohibits states to return an asylum seeker or refugee to a territory where there is a risk of being persecuted and when he/ she has no valid travel document or has entered a country illegally, penalty should not be imposed.**

From one perspective, this inconsistency can be used by the authority to deny its obligation. The provisions of the Immigration Act 1959/63 may be used to invalidate any attempt to invoke the principle of *non- refoulement* in Malaysian courts. If the court is to follow the finding in *Norogne*, there is a possibility that the principle of *non-*

***refoulement* will be a futile method to protect refugees from deportation or removal from Malaysia.** On the contrary, this study is of the view that laws which are deemed to be inconsistent with customary rule should be fully scrutinized to determine their effect.

The idea that a customary international law cannot be applied at all when an inconsistent domestic law is present is unacceptable. Such notion will result in defeating international law by manipulating provisions of domestic laws rather than utilizing the rules on state obligation and responsibilities for the benefit of marginalized population. It is suggested that courts should clearly outline the degree of inconsistency between a particular customary rule and the domestic law or even court's decision and specify the implication of such inconsistency. **An inconsistent legal provision should only have limited restriction effect on the principle of *non- refoulement.* It should not invalidate the whole principle or its contents. It should only become invalid to the extent of the inconsistency. This understanding is in parallel with provision of the Federal Constitution that limit the effect of inconsistent law with the Constitution.**

CONCLUSION

There are conclusive legal evidence to show that customary international law is theoretically applicable in Malaysian courts because of its common law status. However, to convince the court of the existence of the customary rule of *non- refoulement* and it is a common law of England during the cut- off date is a complicated task. There is a possibility that the *non- refoulement* principle can be applied by the courts if the court is willing to adopt a liberal approach as in *Saad Marwi* and *Chan Ah Moi*. Nevertheless, if the court approaches it from restrictive point of view as in *Majlis Perbandaran Ampang Jaya* v *Steven Phoa Cheng Loon & Ors* [2006] 3 MLJ 389 or refuse to address a lacuna in domestic law, customary international law will have no place in local courts. It was shown that the Malaysian judiciary is reluctant to use and apply customary international law in the adjudication of domestic disputes except for a limited number of

established rules such as the diplomatic immunity. Reasons for not allowing the customary international law to take effect lie with the argument that a particular rule has not been sufficiently proved as custom and or that there are existing municipal laws that inhibit its operation domestically. This study implies that the effort to apply international custom in domestic courts will continue to be challenged. It also implies that the legal impediments could be removed if the authority is willing to amend and reform the immigration law with refugee protection in mind.

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BIOGRAPHY

Dina Imam Supaat graduated with LL.B (Hons) and LL.M from the Universiti Kebangsaan Malaysia, a PhD from the University of Birmingham, UK and holds a Certificate of Mediation. She is currently attached with the Faculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM). In addition, she is the Coordinator at the Centre for Soft Skill Development at the university as well as the trainer for a co- curriculum course, "Transformational Squad for the Protection of Children, Women and the Elderly People". Her research interests includes the rights and protection of refugee children and women in Malaysia; stateless children; children's right to education; best interests of the child; human rights of workers in 3D job sector; protection of the environment, clinical legal- education; and legal issues in family conflict. Her recent publication include 'Refugee Children in Malaysia: Past, Present and Future'; 'The Best Interests Of The Child: State Practice'; and 'Deforestation and Haze in Malaysia: Status of Corporate Responsibility and Law Governance'. In 2015 she founded KRUWARGA, an NGO that provides training and support in the empowerment effort for women, children and the elderly people.