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A Proposal for Malaysia's Asylum Act

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ABSTRACT

Asylum is granted to people in search for international protection from persecution or serious harm in their own country. The right to asylum for refugees in Malaysia is far from realization and in dire need of a practical solution. Due to the lack of a proper enactment of Asylum Act, asylum seekers are to deal with denial of basic rights. Asylum seekers are also denied of education and healthcare due to high cost since these are not provided by the government. This article discusses the need for a proper enactment of Asylum Act in Malaysia in relation to the rising numbers of asylum seekers and refugees in the country. In this research, a comparative analysis between Malaysia's existing laws dealing with asylum and the law of Australia, United Kingdom, Indonesia, and European Union was carried out.



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It was found that these countries have developed their legal framework for asylum considerably and could legally accommodate the influx of refugees into their respective countries, in contrast to Malaysia's increasingly poor management of the refugees and asylum-seekers. The study suggests the possibility for the adoption of recommended legal principles from those countries into the proposed Malaysian Asylum Act.

Keywords: Asylum, Refugees, Malaysia, Human rights, International law

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1. Introduction

According to Cambridge Dictionary, asylum is defined as 'protection or safety, especially that given by a government to people who have been forced to leave their own countries for their safety or escape from warfare.' The right of asylum is categorised into three types; territorial, extraterritorial, and neutral. Territorial asylum is granted within the territorial bounds of the state offering asylum and is an exemption to the practice of extradition. An individual who seeks for extraterritorial asylum is granted from embassies, legation and consulates in foreign territory where the asylum is permitted within the territory of the state from which protection is sought. Neutral asylum is granted by a neutral country, during warfare, to offer asylum within its territory to the troops of belligerent states, provided they will be subjected to internment for the duration of the war.¹

Asylum-seekers refer to a group of people whose requests for international protection and sanctuary has yet to be succeeded.² They flee from their home country and enter into another country to seek asylum. A refugee is defined as an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group as stated under Article 1(A)(2) of the 1951 Refugee Convention. Furthermore, Article 3 of the Cartagena Declaration and Article 1(2) of the 1969 Organisation of African Unity (OAU) Convention further extends the definition of a refugee to 'an individual who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'³

Based on the established definition of asylum seeker and refugees, there is often confusion between the two as they are both running away from their country. However, clarifications were made by the Australian government, who follows the 1951 Refugee Convention. The clarification given by the Australian government was that an asylum seeker is seeking international protection however their refugee status has yet to be determined. Whereas a refugee is someone who has been conferred the refugee status and therefore is

¹ Richard L Fruchterman, 'Asylum: Theory and Practice' (1972) 26 JAG Journal 169.

² Refugees U, 'Asylum-Seekers' (UNHCR) <<https://www.unhcr.org/en-my/asylum-seekers.html>>.

³ Steve Kirkwood and others, *Who Counts as an Asylum-Seeker or Refugee?* (Palgrave Macmillan 2016) ch 5, 78-95.

protected under the state. In a sense, an asylum seeker is seeking to become a refugee.⁴ However, without any asylum law in Malaysia, there is no set procedure to handle the acceptance, rejection or maintenance of asylum seekers. There is no official way for asylum seekers to be admitted into an asylum and become a refugee.

In Malaysia, the government has received refugees from different countries such as Indonesia, Myanmar, and the Philippines since 1970s. The following context lists the refugees from different countries and the reasons why they came to Malaysia.

The Filipinos were the first amongst many to seek asylum in Malaysia. Since 1972, large groups of Filipinos have travelled without rest from the southern Philippines to the Eastern Malaysian state of Sabah. This population flow happened during the booming of logging and plantation activities, and Sabah met difficulties to handle labour demands due to its small population size and its difficulty in receiving supply of labour force from the more populated Peninsular Malaysian states. Another reason was based on its then-chief minister, Mustapha Harun's claim of ancestry to the Sultanate of Sulu from where the Filipinos came from and this ought him to protect his brethren. From one perspective, the acceptance of Filipinos Muslim helped to strengthen the power of Mustapha's political party, the United Sabah National Organisation, or otherwise Sabah would be dominated by non-Muslim. This can be proven where approximately 800,000 conversions to Islam has taken place in Sabah between 1960 and 1980, which saw an increase of Muslims population from 40 per cent in 1970 to 51 per cent of the total population by 1980.⁵

The subsequent group is the Vietnamese. Nicknamed the 'boat people', they comprised mostly Chinese ethnic groups escaping reprisal from other Vietnamese after Saigon's surrender to North Vietnam following the conclusion of the Vietnam War. They started reaching Malaysian shores in April 1975. One of the catalysts was the Vietnamese authorities who were suspected of smuggling out the ethnic Chinese from Vietnam. By cooperating with UNHCR under the Comprehensive Plan for Action, Malaysia has hosted 250,000 of these Vietnamese where 240,000 of them were resettled and another 10,000 were repatriated.⁶

Thirdly, it was the Acehnese from Indonesia that also sought asylum since 1991. They were fleeing the counter-insurgency operations conducted by the Indonesian military against the Free Aceh Movement. Initially, the Malaysian government achieved the same consensus with Indonesian government not to recognise the Acehnese as refugees. In 2005 however, the Malaysian government reversed its statement by issuing temporary stay permits known as IMM13 to Acehnese.⁷ The 2004 tsunami disaster in Indonesia and the

⁴ Janet Phillips, 'Asylum seekers and refugees: what are the facts?' (Department of Parliamentary Services 2011) 2.

⁵ Kassim Azizah, 'Filipino Refugees in Sabah: State Responses, Stereotypes, and Dilemma over their Future' (2009) 47 *Journal of Southeast Asian Studies* 52.

⁶ Interview with Andrew Khoo, Chairperson, Human Rights Committee, Malaysia Bar Council (2010).

⁷ Alice M Nah and Tim Bunnell, 'Ripples of Hope: Acehnese Refugees in Post-Tsunami Malaysia' (2005) 2 *Singapore Journal of Topical Geography* 249.

unexpected labour shortage in Malaysia served as the factors which led to the change of Malaysian government's stands in accepting Acehnese as refugees.

Fourthly, the Rohingyas from Myanmar who have been seeking asylum in Malaysia as early as the 1980's and in larger numbers since 1992. The Rohingyas are a stateless Muslim minority originating from Myanmar's North Arakan (Rakhine) State, adjacent to Bangladesh. Persecution suffered by the Rohingyas in the hands of the Burmese included severe restrictions on their movement, forced labour, arbitrary confiscation of property and religious persecution which were put into record.⁸

To sum up, asylum seekers had come to Malaysia due to various factors such as warfare, natural disaster, political persecution, and religious matters. The refugees are not only limited to the above, but also include Thai Muslim, Pakistani and Cambodian. Since the Malaysian government has accepted so many refugees from various countries, do they have any proper measures and procedures to settle these refugees in Malaysia?

2. A Void Desperately to be Filled: The Lack of Asylum Law in Malaysia.

As background information, one of the promises made by the Malaysian government in 2018, whereby they strive to remedy the inaction and inadequacy in handling the Rohingya and Palestinian crisis and thus they promised to make serious attempts to provide assistance and solutions to resolve the Rohingya conflict and the Palestinian crisis.⁹ In fact, one of the speeches given by the seventh Prime Minister, Tun Dr Mahathir, during the 73rd UN General Assembly had addressed the Rohingya issue by asking how the world could simply watch as people are massacred under the presumption of non-interference with internal affairs of nations.¹⁰ While the authors of this article do admit that there were more pressing issues facing the nation at the time, the government's lack of consideration to asylum seekers was said as concerning.

Additionally, in an article published by Dina Imam Supaat titled 'Escaping The Principle of Non-Refoulement', Malaysia follows the principle of non-refoulement based on customary international law despite not being a party of the 1951 Refugee Convention due to Malaysia's past actions of admission of Indochinese asylum seekers, cooperating with UNHCR and other NGOs, along with a lack of objection to non-refoulement.¹¹ Due this very principle of non-refoulement, however, it is the obligation of Malaysia not to return a refugee to a state where his life or freedom would be threatened due to his race, religion, nationality

⁸ Zama Coursen-Neff, 'Living in Limbo: Burmese Rohingyas in Malaysia' (2000) 12 Human Rights Watch Report <<https://www.hrw.org/legacy/reports/2000/malaysia/index.html>>.

⁹ Pakatan Harapan, 'Buku Harapan: Rebuilding Our Nation Fulfilling Our Hopes' (1 September 2019) <https://kempen.s3.amazonaws.com/pdf/Buku_Harapan.pdf>.

¹⁰ Mahathir Mohamad, 'Dr Mahathir at 73rd UN General Assembly' New Starts Times (29 September 2018) <<https://www.nst.com.my/news/nation/2018/09/415941/speech-text-dr-mahathir-73rd-un-general-assembly>>.

¹¹ Dina Imam Supaat, 'Escaping the Principle of Non-Refoulement' (2013) 2 International Journal of Business, Economics and Law 86.

or membership.¹² Therefore, asylum seekers are essentially stuck in a legal limbo where the government cannot send them away yet they do not have any legal rights.

Speaking of legal rights, one of the main sources of human rights in Malaysia is the Federal Constitution (FC). However, many of its provisions merely states that citizens have rights, not foreigners. For instance, Art 10 (1)(a) FC states that every citizen has the right to freedom of speech and (1)(b) states that citizens have the right to peaceful assembly. It makes no mention of foreigners and there have been reports of refugees demonstrating in Malaysia, such as the demonstration by Chin refugees in June 2018.¹³ In the eyes of law, only citizens have the right to peaceful assembly. From that logic, this would be considered as 'illegal assemblies'. This would drastically impact the movement for refugee rights, and this further proves the need for an asylum laws; to give some form of rights to asylum seekers and refugees.

In order for foreigners to work in Malaysia, they are required to obtain a work permit, which requires a passport. In most cases, refugees and asylum seekers arrive in Malaysia with bare necessities. Since they do not have a work permit, they are technically working illegally. As such, they are not subject to labour laws or even have a right to earn the minimum wage. The minimum wage as of 2019 is RM1,100,¹⁴ but a survey in 2013 showed that 26% of refugees had earned less than RM500 and 58% had earned RM500-RM1,000 per month.¹⁵ While the survey is from 2013, it is still relevant as refugees are still working illegally and therefore not entitled to the minimum wage. The worst part is that, since they are working illegally, they can be arrested, detained and perhaps even deported.

It is reported that 25% of the registered refugee population are children, and only 30% of these children go to school.¹⁶ S. 29A (2) of the Education Act 1996 only states that Malaysian citizens are entitled to mandatory education. Refugees and asylum seekers are not citizens and therefore cannot send their children to public schools, which are almost free to attend. Without any laws to consider their condition, refugees would have to rely on community-based learning centres which face a multitude of difficulties. For one, these schools do not have a stable financial condition and must rely on public donations to make ends meet. On top of that, there is a high turnover rate for teachers, which makes the schools understaffed and sometimes not qualified to teach. But the direst thing is that there is a lack

¹² UNHCR, 'Note on Non-Refoulement (Submitted by the High Commissioner)' (23 August 1977) UN Doc E/EC/SCP/2.

¹³ Rashvinjeet S Bedi, Samantha Chow and Justine Yeap, 'Chin Refugees Protest at UNHCR Offices over UN Decision on Refugee Status' *The Star* (29 June 2018) <<https://www.thestar.com.my/news/nation/2018/06/29/chin-refugees-protest-at-unhcr-offices-over-un-decision-on-refugee-status/>>.

¹⁴ Minimum Wages Order 2018.

¹⁵ Rashvinjeet S Bedi and Hariati Azizan, 'Grant refugees in Malaysia the right to work' *The Star* (23 June 2019) <<https://www.thestar.com.my/news/nation/2019/06/23/grant-refugees-in-malaysia-the-right-to-work>>.

¹⁶ Raudah Mohd Yunus and others, '70 per cent of refugee kids do not go to school' *New Straits Times* (4 August 2019) <<https://www.nst.com.my/opinion/letters/2019/08/510066/70-cent-refugee-kids-do-not-go-school>>.

of certification and access to public examinations, which makes it near impossible to get into higher education.¹⁷

In regard to healthcare, the government have to decide who to prioritize with their budget. As a result, foreigners including asylum seekers and refugees have to face 100% increased rates for access to public health facilities¹⁸ as they are not subsidised in any way. A research in 2012 showed that over 43% of the participating refugees were unable to have access to healthcare due to financial difficulties.¹⁹ In a sense, their right to health is drastically jeopardised without the existence of any asylum laws. In fact, the increase in medical fees for foreigners have impacted the UNHCR's capability to provide financial aid to refugees who needs secondary and tertiary care.²⁰

The closest law that remotely resembles asylum law in Malaysia is the Immigration Act 1959/63 (IA). However, the Act gives absolutely no consideration to asylum seekers or even refugees. In fact, S.55E of IA considers all unauthorized foreigners as illegal immigrants. As a result, this leads to refugees and asylum seekers being forced in the same category as illegal immigrants. When read together, S. 6(3), 15(4) and 36 of IA confirms that illegal entry is a crime and those who commit it must serve time in prisons before being transferred to an immigration depot pending deportation.

Worse still is the procedural standards. Immigration detainees are not informed of the reasons why they are detained in a language they understand. UNHCR refugee cardholders in immigration depots have a chance to be released but must first serve immigration related sentences in prison.²¹ But up to the point of release or for those who end up not being released, the conditions in these immigration detention centres are considered inhumane. Inmates live in overcrowded cells with almost no food, water and medical care. Due to the cramped conditions, diseases spread rapidly and became the cause of multiple deaths. One critical thing to emphasise is that there have been a few inmates who have died from beatings but were passed off as 'death from disease'.²²

Malaysia follows the non-refoulement principle under international customary law, but there are still instances of asylum seekers and refugees getting deported. For asylum seekers

¹⁷ UNHCR, 'Education in Malaysia' (1 September 2019) <<https://www.unhcr.org/education-in-malaysia.html>>.

¹⁸ UNHCR, 'Public Health in Malaysia' (1 September 2019) <<https://www.unhcr.org/public-health-in-malaysia.html>>.

¹⁹ Mary Crock and others, *Refugees and Asylum Seekers with Disabilities: A Preliminary Report from Malaysia and Indonesia* (University of Sydney 2015).

²⁰ Fiona Leh Hoon Chuah and others, 'Health System Responses to the Health Needs of Refugees and Asylum-Seekers in Malaysia: A Qualitative Study' (2019) 16 *International Journal of Environmental Research and Public Health* 1584.

²¹ Global Detention Project, 'Malaysia immigration detention profile' (July 2015) <<https://www.globaldetentionproject.org/countries/asia-pacific/malaysia>>.

²² Laignee Barron, 'Refugees describe death and despair in Malaysian detention centres' *The Guardian* (16 May 2017) <<https://amp.theguardian.com/world/2017/may/16/dozens-of-refugees-have-died-in-malaysian-detention-centres-un-reveals>>.

without a UNHCR card and those holding Under Consideration letters, as in both are not fully recognised refugees as of arrest, they are more likely to be deported by court order.²³ It is noted that if a country requests for a specific individual, Malaysia is likely to return the said individual even if they are refugees as in the case of Praphan Pipithnamporn who was a refugee and a ‘person of concern’ by the UNHCR. She was a Thai activist who was accused of sedition for being part of a peaceful anti-monarchy group. By request of Thai authorities, the Malaysian police arrested her and sent her back to Thailand.²⁴

A similar situation had happened with Arif Komis. Despite the Turkish schoolteacher being granted protection by the United Nations, Komis was arrested by the Polis DiRaja Malaysia after being accused by the Turkish government for being a member of the Gulen group. It is likely that Komis has been deported as Malaysia has previously obliged requests by Turkey to deport its nationals seeking asylum, as seen in 2017 where they deported three Turkish nationals.²⁵

3. Silent Guardians: UNHCR and the NGOs

The United Nations High Commissioner for Refugees (UNHCR) was established under the general assembly of the United Nations in 1951. According to Article 2(a) of UNHCR statute, UNHCR’s main objectives are to provide international protection to refugees and resolve refugee problems all around the world.²⁶ This is in line with Article 14(1) of the Universal Declaration of Human Rights,²⁷ which gives right to every person to seek asylum from being prosecuted.²⁸ It works in co-operation with the government, member states, and Non-Governmental Organisations (NGO) to seek long term solutions for refugees.

In order to recognise asylum seekers, UNHCR is in charge of refugee determination status (RSD) procedures. The officers will examine the details and interview the applicants. Those who fail to gain the status may appeal before it comes to a final decision while successful applicants may get resettlement as they have become recognized refugees.²⁹

²³ Asia Pacific Refugee Rights Network, ‘Country Factsheet: Malaysia’ (September 2018) <<http://aprrn.info/wp-content/uploads/2018/09/APRRN-Country-Factsheet-Malaysia-4-Sept-2018.pdf>>.

²⁴ Human Rights Watch, ‘Malaysia: Thai Asylum Seeker Forcibly Returned’ Human Rights Watch (13 May 2019) <<https://www.hrw.org/news/2019/05/13/malaysia-thai-asylum-seeker-forcibly-returned>>.

²⁵ FMT Reporters, ‘Malaysia set to deport Turkish family despite UN protection’ Free Malaysia Today (30 August 2019) <<https://www.freemalaysiatoday.com/category/nation/2019/08/30/malaysia-set-to-deport-turkish-family-despite-un-protection/>>.

²⁶ Statute of the Office of the United Nations High Commissioner for Refugee, Art 2(a).

²⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

²⁸ Art 14(1).

²⁹ Jera Beah H Lego, ‘Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the “Humanitarian Exception”’ (2012) 1 Journal of Political Science & Sociology 75.

Malaysia government has achieved a tacit agreement with UNHCR in 1975 when Vietnamese asylum seekers arrived in Malaysia by boat.³⁰ Malaysia did not sign the 1951 Refugee Convention, and no law is enacted to recognise the status of asylum seekers which grant them no right to seek asylum. Hence, UNHCR has become the primary body that deals with the entire process including seeking new homes and repatriating them when the condition permits.³¹ UNHCR conducts all activities including the registration, documentation and resettlement of refugees. For example, they interviewed Rohingyas to establish their ethnicity by differentiating them from non-Rohingyas before granting them refugee status.³²

Since Malaysia does not recognize asylum seekers and treat them as illegal migrants, they do not have access to legal employment, sustainable livelihoods, formal education. Therefore, through NGOs, several humanitarian support programmes are conducted for them to exercise their rights. For example, Malaysia has Asylum Access Malaysia (AAM) which was established in 2014. The organisation provides legal services for refugees and asylum seekers. For example, Know-Your-Options training sessions were conducted by AAM to expose the refugees with fundamental rights they are entitled to.³³

Mercy Malaysia (Medical Relief Society Malaysia) has established UNHCR Mobile Clinic to meet the need of asylum seekers in health care. The clinics are supported by medical volunteers that provide health screening, vaccination, deworming and basic hygiene education.³⁴ Meanwhile, Tenaganita is a Malaysia Human Right Organisation that supports Rohingya asylum seekers and refugees in terms of their labour and civil rights through the Refugee Action Programme. On the arrival and arresting of asylum seeker, Tenaganita will protect them by documenting their information. Through them also, refugees are able to get jobs and are protected from violation, as legal action will be taken to tackle the issue.³⁵ Generally, NGOs has helped asylum seekers to have a better life in Malaysia.

3.1 Recommendations made by UNHCR

In light of the weakness of the asylum system in Malaysia, UNHCR has suggested possible solutions in its reports. This part of article discuss several recommendations made by

³⁰ UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Malaysia, July 2018, 3rd Cycle' (2018) <<https://www.refworld.org/docid/5b56f3067.html>>.

³¹ United Refugees, 'UNHCR Representation In Malaysia' (UNHCR 2021) <<https://www.unhcr.org/unhcr-in-malaysia.html>>.

³² United States Committee for Refugees and Immigrants, *World Refugee Survey 2008 – Malaysia* (2008) <<https://www.refworld.org/docid/485f50c385.html>>.

³³ Corbett R Skrine and BA Rudolph Foundation, 'Our Programs: Malaysia' (Asylum Access) <<https://asylumaccess.org/program/malaysia/>>.

³⁴ 'UNHCR Mobile Clinic' (Mercy Malaysia) <<https://www.mercy.org.my/programme/unhcr-mobile-clinic/>>.

³⁵ Tenaganita, 'Tenaganita' <<http://www.tenaganita.net/>>.

UNHCR for Malaysia government to achieve the international standard in handling refugee issues.³⁶

Firstly, under the UNHCR recommendation, it suggests that any actions and policies taken by the Malaysia government be in line with the 1951 Convention and its 1967 Protocol. This is to ensure the Malaysian government upholds the humanitarian principles expounded in the international law that serves as an excellent guideline. In line with this, the UNHCR proposed to the Malaysia government to establish a legislative and administrative framework in order to secure the protection and treatment of refugees. In addition, a government agency is suggested to handle the registration process of refugees. Another government agency in collaboration with UNHCR should also be established to discuss issues relating to refugee and asylum seekers.

In respect of the refugees and asylum seekers that have entered Malaysia, the UNHCR recommended that the refugee and asylum seekers should not be penalised for illegal entry and stay in the country. The detention of asylum seekers should be used as a last resort only and the duration of detention of asylum seekers should not be prolonged. Judicial safeguard should be provided in order to prevent arbitrary and indefinite detention. A proper documentation should be given to any person in need of international protection and shall then have access to the local opportunities and rights such as accommodation, employment, and education. It is also in the UNHCR's interest that the Malaysian government should ensure all the validity of the registration of all birth in the country to prevent statelessness in compliance with Art. 7 of the Convention on the Right of the Child.

From the proposals as stated by the UNHCR, it can be noted that an actual asylum law is a fundamental instrument to regulate the refugee activities in Malaysia. There are several importance of enacting an Asylum Law in Malaysia.

First and foremost, it would be to provide relief for the growing burden of UNHCR in Malaysia. UNHCR can only operate with limited discretion as it is a United Nations' body and not within the branch of the Malaysian government. With the number of registered refugees increasing in 2019,³⁷ UNHCR will be understaffed with loads of work and modest budget³⁸ to manage the refugees even with assistance of both the government and the NGOs as they do not have the legal resources to aid their work. If the Parliament were to legislate the Asylum Act, a statutory body can be established to handle the grunt work with more discretionary powers. This will mean that refugee programs can be governed effectively and progressively with more resources allocated by the government.

³⁶ UNHCR n (30).

³⁷ Ainaa Aiman, 'UNHCR Sees Higher Number Of Refugees Registering Over Past Year' Free Malaysia Today (20 June 2019) <<https://www.freemalaysiatoday.com/category/nation/2019/06/20/unhcr-sees-higher-number-of-refugees-registering-over-past-year/>>.

³⁸ UNHCR, *UNHCR Global Report 2019* (2019) <https://reporting.unhcr.org/sites/default/files/gr2019/pdf/GR2019_English_Full_lowres.pdf#_ga=2.180579687.1122954938.1625934086-186975249.1625155044>.

The second importance would be the formal recognition of the rights of refugees and asylum seekers in Malaysia. UNHCR does not have the power to formally recognise refugee rights in Malaysia soil when there are no statutory provisions allocated for such matters. The Human Rights Commission of Malaysia admitted to this fact in their 2009 Annual Report that refugees and asylum-seekers can be detained for illegal immigration under Malaysian laws, even if they are registered with UNHCR.³⁹ Many refugees are also deprived from many basic rights in Malaysia, especially the right to life with the most notable example where many Myanmar refugees died from various diseases whilst placed in detention centres.⁴⁰ An Asylum Act with provisions to recognise refugee rights would be the equivalent of treating those who fled their countries as actual humans and lending them a helping hand.

The third importance would be for the government to keep a better supervision over refugees and asylum-seekers in Malaysia. As mentioned in the above paragraphs, having a statutory body overseeing refugees would be more effective as they are allocated with more resources. This also brings an advantage to the government as more data regarding the refugees can be procured and the government can make more shrewd decisions when formulating national policies regarding the refugee and asylum issues. This was also pointed out in a paper published presented in a world conference on refugees that Malaysia is an apparent failure in implementing a proper refugee network.⁴¹ This is a major issue as these people are 'stateless' in law and no one can assure whether they are provided with necessities or in a worse situation, the negative impacts that they would bring to the society.

As outlined above, these are among the key importance of having Asylum Act in Malaysia. Many parties have urged for the Malaysian government to provide proper legal framework for refugees and asylum-seekers, including Malaysians Against Death Penalty and Torture (Madpet),⁴² and supported by various reports, such as one by Keio University.⁴³ The author recommends for the Malaysian government to take these importance into considerations in hopes for legislating the Asylum Act in the future.

4.0 Ratification of the Refugee Convention

Admittedly Malaysia is critically lacking a proper asylum legislative framework to manage its refugees, but the current situation cannot be improved based on UNHCR's

³⁹ SUHAKAM, *Annual Report 2009* (2009) <<http://www.suhakam.org.my/wp-content/uploads/2013/11/annual-report2009.pdf>>.

⁴⁰ Laignee Barron, 'Refugees Describe Death And Despair In Malaysian Detention Centres' *The Guardian* (16 May 2017) <<https://www.theguardian.com/world/2017/may/16/dozens-of-refugees-have-died-in-malaysian-detention-centres-un-reveals>>.

⁴¹ Allan Mackey and Maya Bozovik, 'Can the International Association of Refugee Law Judges (IARLJ) Assist?' (11th World Conference of the IARLJ, Athens, November 2017).

⁴² Charles Hector, 'Malaysia Needs to Enact a Law on Refugees, Asylum Seekers—Aliran' *Aliran* (22 June 2019) <<https://aliran.com/civil-society-voices/malaysia-needs-to-enact-a-law-on-refugees-asylum-seekers/>>.

⁴³ Lego n (29).

recommendations alone. Inspirations must be obtained from other countries with more advanced frameworks before a comprehensive and effective law can be enacted to fill in the gap.

There are many countries which have enacted their own asylum laws, and most of them follows the guidelines set by the United Nations (UN). UN, which was founded in 1945, it is an international organization that currently consists of 193 Member States.⁴⁴ At first, the UN General Assembly established the UNHCR with a three-year mandate to help Europeans who were displaced by World War II. However, with the adoption of the 1951 Refugee Convention, UNHCR has been working ever since to help refugees.⁴⁵

Malaysia takes on the dualistic approach where international law cannot claim supremacy within the domestic legal system unless it is domesticated. Thus, asylum seekers and refugees are not protected under Malaysian law and are considered 'illegal'. To date, there is still no ratification on the Convention despite repeated calls by the Human Rights Commission of Malaysia (SUHAKAM) due to the violation of the principle of non-refoulement following the recent controversy of deportation of UNHCR-recognised Turkish asylum seekers.⁴⁶

The Convention has played an important part in dealing with issues relating to refugees and asylum-seekers especially in Malaysia where there is a lack of legislation regarding this subject matter. Thus, the following are some of the significant articles of the Convention that should be incorporated into the proposed Malaysian Asylum Act.

First of all, Article 17(1) and 24 of the Convention provides that refugees have the right to engage in wage-earning employment and shall be governed by state labour legislation and social security scheme. This ensures that the refugees can have the ability to maintain themselves and can indirectly reduce the government's expenses on them. Likewise, it will also contribute to the economic development of the country. Article 26 of the Convention grants refugees the freedom of movement within the state while Article 31 of the Convention states that penalties should not be imposed on refugees who entered into the state illegally due to the life-threatening situation in their country of origin and the government should provide refugees with necessary facilities during the waiting period for the approval of refugee status in that particular state or admission into another state. Article 38 of the Convention grants the right of a refugee to settle disputes at the International Court of Justice at the request of a party in the dispute.⁴⁷

⁴⁴ United Nations, 'Overview' <<https://www.un.org/en/sections/about-un/overview/index.html>>.

⁴⁵ United Nations, 'Refugees' <<https://www.un.org/en/sections/issues-depth/refugees/>>.

⁴⁶ Soo Wern Jun, 'Ratify The 1951 United Nations Convention Relating to the Status of Refugees, Says Sukaham' Malay Mail (31 August 2019) <<https://www.malaymail.com/news/malaysia/2019/08/31/ratify-the-1951-united-nations-convention-relating-to-the-status-of-refugee/1786120>>.

⁴⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 United Nations Treaty Series 137.

It is important to note that Malaysia is a party to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.⁴⁸ Therefore, the ratification of the 1951 Convention is said to be in accordance with the two conventions mentioned above as the rights of children and women refugees can be upheld. Article 22 of the Convention declares that the refugees shall be given the same treatment in terms of public education. Education is the key factor to ensure social stability of a community especially for refugees who may have language barriers. This is due to illiteracy which can contribute to the risk of violation of human rights as they would not understand the written law that governs human rights.

The principle of non-refoulement is strongly upheld by Article 33(1) of the Convention. This principle is not only applicable to the signatory countries of the Convention but also non-signatory countries due to humanitarian importance.⁴⁹ In many cases, Malaysia's strict compliance of extradition agreement with another state had violated this principle and caused the refugees or asylum seekers to face unnecessary persecution or harm. For instance, Malaysia had violated the principle of non-refoulement in May 2019 when the government extradited Praphan Pipithnamporn upon the request of the Thailand authorities.⁵⁰ This shows that the ratification of the Convention is much needed as it can help the government to determine whether the rights of refugees are being upheld by the principle of non-refoulement and extradition agreement between other countries.

To conclude, Malaysia should become a signatory to the Convention and enact an Asylum Act to recognise the legal status of refugees in the country as per the guidelines outlined by the 1951 Convention. It is ought to imply that such actions are considered as humanitarian obligations of a UN member state. Besides, this guideline is essential in enacting an effective asylum law which is reasonably comprehensive because the basic structure is already present, and the remaining gaps can be filled by the local authorities as they deemed fit.

5. The National Legal Framework for Refugees: The Practices in Selected Jurisdictions

5.1 Australia

Australia is one of the more advanced countries in regard to the development of asylum legislative framework. A signatory to the Refugee Convention just like the other UN member states, Australia has domesticated the treaties signed because it is its legal tradition not to automatically incorporate international laws until domesticated.

⁴⁸ Dato' Seri Mohd Hishamudin Yunus, 'Refugees, Asylum Seekers and the Law' (Lee Hishammuddin Allen & Gledhill 2017) <https://www.lh-ag.com/wp-content/uploads/2017/04/5_Refugees-Asylum-Seekers-and-the-Law.pdf>.

⁴⁹ UNHCR n (12).

⁵⁰ Human Rights Watch n (24).

Statutory laws dealing with refugees are regarded as federal matters as prescribed under Section 51 of the Australian Federal Constitution. Thus, the principal act of federal parliament dedicated to refugee issues is the Migration Act 1958,⁵¹ where the definition of a refugee is provided comprehensively. Here, the author opines that the Malaysian government can adopt a similar approach by enshrining the asylum matters in the Federal Constitution. This way, asylum laws enacted by the Malaysian Parliament will be upheld by rule or law and not easily repealed by the whims of the succeeding legislators.

There are two types of RSD system in Australia, namely onshore RSD and offshore RSD. The general process is that the asylum seeker must first determine which visa he is eligible to apply for Refugee category visa, permanent visa or temporary protection visa. The application can be submitted via post or online. In some cases, if the application is rejected, the asylum seeker can seek review by the tribunal or ministerial invention.⁵² The Australian government has imposed a very comprehensive RSD system because they duly believe they have the obligation to uphold human rights for all asylum seekers and refugees. Thus, they would not be returned to their country of origin or a third world country by the government if they will face violation of human rights in those countries. This even applies to those who failed to obtain refugee status after their application which is in line with the principle of non-refoulement.⁵³

Perhaps the most astonishing part of the Australian asylum system is its addition of a judicial review authority to its refugee determination system apart from the administrative review proposed by the Executive Committee of UNHCR. Comparing to the Committee's proposal, the Australian system implements a fair and effective first instance and appeal procedure for the asylum-seekers. The Australian government manifested this in the form of the Refugee Review Tribunal to re-examine the previous administrative decisions.

Part 7 of the Migration Act has provided instructions on the procedures of the reviews conducted by the Refugee Review Tribunal, whereby the primary decisions are required to be 'fair, just, economical, and quick' and the process is not restricted to 'technicalities, legal forms or rules of evidence'. The Tribunal must also 'act according to substantial justice and merits of the case'.⁵⁴ This means that judges will examine the case not on the basis of procedures or protocols but on the more important basis which is whether refugee status is needed and deserved by the asylum-seeker.

⁵¹ Colin Fong, 'Researching the Legal Aspects of Asylum Seekers and Refugees in Australia and Canada' (2007) 15 Australian Law Librarian 23.

⁵² Australian Government Department of Home Affairs, 'Protection Visas (Onshore)' (2019) <<https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/onshore-protection>>.

⁵³ Australian Human Rights Commission, 'Asylum Seekers and Refugees Guide' (2014) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide>>.

⁵⁴ Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 The International Journal of Refugee Law 377.

The Tribunal, in essence, functions by hearing applications made by asylum-seekers whose protection visas were refused or cancelled by the Commonwealth Department of Home Affairs (DOHA). If the application is successful, the Tribunal will remit the visa application to DOHA. If it is not successful, the Tribunal will reaffirm DOHA's decision by providing detailed reasons.⁵⁵ This is illustrated in its latest decision in 2015, where the Tribunal reaffirmed the decision not to grant a visa to a Sri Lankan because his fears of returning to Sri Lanka is not well founded based on the Tribunal's findings.⁵⁶

Criminal deportation is also decisively formulated by the Minister for Immigration, Local Government and Ethnic Affairs in the Australia's Criminal Deportation Policy which was presented to the Parliament in 1992.⁵⁷ According to the policy, if a person commits crime while in his refugee status, then he shall be deported back to his country of origin so as to protect the citizens from further criminal conduct or abuse of asylum rights in Australia. It is highly recommended for this principle to be adopted in the proposed Asylum Act so that the Malaysian government can better regulate the refugees in the country.

Another feature of the Australian asylum system that is worth to be noted is the accountability of the government towards the decisions made in asylum issues. In a report made by the Australian Select Committee on a Certain Maritime Incident, the accountability of the Ministers and their staff is reviewed by the Committee and proposals are made to ensure the relevant ministries are more responsible towards their actions.⁵⁸

In light of the accountability, the proposed Asylum Act is suggested to contain provisions regarding the responsibilities of relevant government bodies in asylum issues. One of the major problems in the current Malaysian refugee policy is the lack of accountability. The bulk of the administrative and management of the refugee programs are done by UNHCR in Malaysia, and there is no weight being carried by the government in respect of responsibility. Ergo, the author hopes that provisions that can hold government bodies accountable be considered in the proposed Asylum Act.

5.2 European Union

While Malaysia has a different legal system compared to the European Union (EU), the authors recommend taking inspiration from the EU as they have vast experience in dealing with a huge influx of refugees. The EU comprises 28 different states, all of which with different laws and customs. Thus, the EU states practice a streamlined system of asylum laws called the Common European Asylum System (CEAS) since 1999. Their philosophy is

⁵⁵ Stephen H Legomsky, 'Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia' (1998) 76 Washington University Law Quarterly 243.

⁵⁶ 1405747 [2015] RRT, RRTA (RRT).

⁵⁷ Minister for Immigration, Local Government and Ethnic Affairs, '*Australia's Criminal Deportation Policy*' (House Committee 2019).

⁵⁸ Select Committee on a Certain Maritime Incident, '*A Certain Maritime Incident*' (Parliament of Australia 2002) ch 7, 149.

that every member state has a collective responsibility to receive asylum seekers and ensure fair treatment.⁵⁹ Furthermore, all EU states are under the Court of Justice of the EU, which plays an integral part in streamlining asylum laws and even has case laws on the criteria for refugee status.

In fact, there are several measures taken to further harmonize the minimum standards for asylum throughout all states. For example, the European Refugee Fund (ERF) supports EU states in receiving refugees by co-financing actions that improve reception accommodation or services, legal and social assistance to asylum seekers and refugees, as well as acquisition of skills and language training for refugees. There is also the Temporary Protection Directive founded in 2001 which provides immediate and temporary protection for displaced persons who are unable to return to their country of origin when the standard asylum system is under negative risk from processing an influx of claims.

There are also a series of revised directives and regulations which were unanimously agreed by the states to set out a higher standard to ensure asylum seekers are treated more equally in an open and fair system. Among these revised directives and regulations are the Asylum Procedures Directive which aims for a fairer, quicker and better asylum decisions, the Reception Conditions Directive that ensures humane reception conditions, and the Qualification Directive which clarifies grounds for granting international protection which makes asylum decisions more robust.

In EU, CEAS acts as a guideline that is set in stone. In fact, the directives in particular will prove useful in creating an asylum law. Malaysia should definitely apply Asylum Procedures Directive to ensure a more just asylum judgment when deciding to give someone the refugee status. This will tremendously smooth out the process of becoming a refugee. Furthermore, asylum seekers with special needs should be given the necessary support, such as overcoming the language barrier, to support their case.⁶⁰

In addition to the Asylum Procedures Directive, the Qualification Directive is absolutely vital to asylum seekers and refugees as it will ensure proper housing and living conditions for those seeking refuge in addition to setting out criteria to have the refugee status.⁶¹ It also makes it that detention will become a last resort and by doing so would mean the amount of needless deaths from disease, beatings and inhumane conditions in the detention centres will be reduced.

⁵⁹ European Commission, 'Common European Asylum System' (1 September 2019) <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en>.

⁶⁰ Vincent Chetail, 'The Common European Asylum System: Bric-à-Brac or System?' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Immigration and Asylum Law and Policy in Europe Series, vol 39, Brill-Nijhoff 2017).

⁶¹ Helen O'Nions, 'Asylum – A Right Denied: A Critical Analysis of European Asylum Policy' (2015) 27 *International Journal of Refugee Law* 522.

5.3 United Kingdom

The United Kingdom (UK) has gone through a vigorous development of Asylum Law since 1990's. Prior to 1990's, asylum applications in the UK were handled as a branch of immigration law and were governed by the Immigration Act 1971, which made no specific reference to refugees. Nevertheless, the asylum law was soon developed and underwent several amendments from 1993 to 2002. There are several recommendations of application of UK's asylum law principles in Malaysia.

One of the recommendations is that accommodation centres should be provided to the asylum seekers as their temporary shelters. The Nationality, Immigration and Asylum Act 2002 (The 2002 Act) enables the Secretary of State to set up centres with full-board accommodation, access to health care, religious facilities, education, interpreters, and legal advice, in addition to anything else the Secretary of State decides ought to be provided for 'proper occupation or 'maintaining good order'.⁶² Indeed, there are certain requirements and restrictions where the asylum seekers ought to adhere to. Since the centre is a temporary shelter, an asylum seeker will only be allowed to stay up to the maximum period of six months, extendable to nine months if agreed with asylum seekers, or if deemed appropriate.

Furthermore, limitations and restrictions of the amount of support to asylum seekers should be imposed by the government. This is a very important policy to be imposed under asylum law in order to prohibit overwhelming movement of foreigners which might leave negative impacts towards the local citizens. Under s.54 of the 2002 Act, no one shall move to the UK for the sole purposes of accessing residential recommendation.⁶³

5.4 Indonesia

This part of the article will discuss the Indonesian Law that is recommended to be applied in Malaysia. The authors acknowledge the difference of the legal systems of both countries and recommend certain measures that can be adapted and implemented in Malaysia. This is mainly due to the fact that both Indonesia and Malaysia are in the Southeast Asian region as well as member states of the Association of Southeast Asian Nations (ASEAN) thus a similarity in the nature of the refugee problem could be traced. Unlike Malaysia, Indonesian Constitution does expressly mention the status of asylum, where Art. 28G (2) provides the right to asylum for asylum seekers. A further enactment was provided in Article 27 (1) of the Law of The Republic of Indonesia Number 37 Year 1999 Concerning Foreign Relations, which provides that the President shall determine policy in regard to foreign refugees with respect to the views of the Minister.⁶⁴

Currently, there are two drafts of presidential decree so far in Indonesia, which are Draft Presidential Decree on the Handling of Asylum Seekers and Refugees 2014, and Draft

⁶² D Stevens, 'The Nationality, Immigration and Asylum Act 2002' (2004) 67 *The Modern Law Review* 616.

⁶³ Stevens n (62).

⁶⁴ Law of The Republic of Indonesia Number 37 Year 1999 Concerning Foreign Relations, Art 27(1).

Standard Procedures on the Handling of Asylum Seekers and Refugees 2015. The draft Decree of 2014 has provided rights for asylum seekers and refugees.⁶⁵ In Malaysia, the asylum seekers are exposed to unreasonable detention, deportation, and arrest due to lack of national law that could safeguard their basic rights. Therefore, it is reasonable for Malaysia to enact national law on asylum issue to avoid the breach of human rights.

By contrast, the 2015 version of the draft Decree does not provide full protection for refugees rather they will send those who are not eligible for refugee status back to their country, particularly those with irregular departures. This is to ensure that no one abuses the right to asylum by claiming asylum when there is no actual crisis. As for detention issue, vulnerable groups such as the elderly and the children will be excluded from detention. Malaysian government is advised to adopt the method of sending back asylum seekers who failed to satisfy the requirements or have irregular departures. Recently, Malaysian government's act of deporting a family from Turkey who was under the protection of UNHCR is said to be unreasonable as they may suffer from prosecution in their country.⁶⁶ On the other hand, the asylum seekers who came to Malaysia may face high risk of unreasonable detention as they are treated as illegal migrants. Therefore, the exclusion of vulnerable groups such as pregnant women and children from detention may reduce or avoid unreasonable detention in immigrant detention camps.

6. Possible Solutions to be Implemented in Malaysia

After a close look at examples of the implementation of asylum practices in other countries, there are several key considerations that are recommended to be weighed by the government before legislating an asylum law. These considerations serve as an improvement to the current asylum practice in Malaysia and can be developed further down the line.

The most pertinent is for Malaysia to be a signatory to the Refugee Convention. Ratifying the Convention would be the best starting point to truly improve asylum rights and better practices as it shows Malaysia's commitment to recognise the rights of asylum seekers and make the necessary legislative amendments to accord the rights. Similar to Australia and Indonesia, incorporating asylum rights to the Federal Constitution would be an ideal domestication of the Refugee Convention into national legal framework and would serve as the solid foundation to enact a proper asylum law.

The next measure in mind that could be executed in Malaysia would be the registration of the asylum seekers. The Australian laws would be the perfect model to derive inspirations as it offers a comprehensive and detailed registration for all who wish to seek asylum. The

⁶⁵ Nikolas Feith Tan, 'The Status of Asylum Seekers and Refugees in Indonesia' (2016) 28 International Journal of Refugee Law 365.

⁶⁶ Julia Chan, 'Malaysia Wrong in Deporting Turkish Family under UN Protection, Says NGO' Malay Mail (30 August 2019) <<https://www.malaymail.com/news/malaysia/2019/08/30/malaysia-wrong-in-deporting-turkish-family-under-un-protection-says-ngo/1785885>>.

Australian RSD system is suitable to be applied in Malaysia as it is a clearly defined procedure that allows fair protection of refugees and asylum seekers and the right to review their application of RSD. It also ensures that the refugees and asylum seekers have access to basic needs and services such as healthcare, education and employment. They are also protected by Australian workplace law if they worked there. Not only that, but they are also eligible to become a citizen of the host country and can sponsor eligible family members to obtain permanent residency in the host country.

Learning from the Australia's Refugee Review Tribunals, the Malaysian government can establish a separate judicial body to review administrative decisions for asylum matters through the provisions in the proposed Asylum Act. This recommendation is strongly supported because there are many refugees in Malaysia wrongfully detained and they would require specialised jurists to conduct proper investigation into their complex backgrounds. These jurists should also be knowledgeable in international laws and can provide better insight as to how to hear these appeals.

S. 54 of the UK's Nationality, Immigration and Asylum Act is an important provision that the government should consider putting a cap to the number of refugees managed in Malaysia. The authors understand that facilitating refugees would require vast resources and the government is recommended to place a reasonable restriction as to the number of people allowed to seek asylum in Malaysia. This limit may be fixed from time to time provided that it is reasonable.

A concern to enact an asylum law in Malaysia would be that their obligation to local laws, specifically criminal laws. This is indeed a legitimate concern as the asylum seekers are not citizens of Malaysia by law thus an asylum law would need to impose such obligation with proportional punishment. Malaysia can refer to the Australia's Criminal Deportation Policy for actions that can be taken for criminal offences committed by refugees whilst on Malaysian soils. As in Malaysia, the local government should not allow any refugees to disrupt the harmony and public order of the society. For instance, Zakir Naik, a Muslim preacher from India, has made sensitive racial remarks by addressing the Chinese and Indians as 'old guests' from Malaysia during a speech given at Kelantan, Malaysia on 3 August 2019. This type of refugees should not be allowed to reside in Malaysia because they will distort the racial harmony and public order of the society. By this, this will secure and maintain the local's benefits by not being disrupted by the foreigners' influences.

7. Conclusion

In conclusion, the early parts of this paper have established the current situation in Malaysia whereby there are numerous refugees and asylum-seekers from various nations to be accommodated and properly tend to, but the present Malaysian system leaves much to be desired. UNHCR has always done excellent work to monitor the refugee programs in Malaysian soil, but it is far from perfect and would be overwhelmed by the ever-increasing number of people seeking asylums if the government does not take appropriate measures.

The later parts of the paper have established the many legal principles and provisions from the countries with advanced asylum systems that are suitable to be applied in Malaysia. The authors have analysed these principles and its possible implications in Malaysia, concluding that it would result in better management of refugees and asylum-seekers as well as safeguarding their fundamental rights.

It can be concluded that asylum law is a much-needed framework in Malaysia. In a world where armed conflicts and disasters are frequent, many countries have enacted proper laws to accommodate the victims of these tragedies. With their rights safeguarded, these refugees can live their life in the peace that they deserved as they could not have from their country of origin. More importantly, refugees or asylum seekers are also human beings who deserve to be provided with a basic facility such as a safe shelter or a place they can call 'home'.

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