
PROTECTING REFUGEES, PRESERVING STATE SOVEREIGNTY AND MANDATING EQUITABLE INTERNATIONAL BURDEN-SHARING: FINDING THE BALANCE FOR MALAYSIA

Farid Sufian Shuaib^{*}

Saiful Izan bin Nordin[†]

ABSTRACT

The main international treaty pertaining to refugees and asylum-seekers is the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. Many countries within the region of Southeast Asia, including Malaysia, had not ratified or acceded to the treaty. There are many reasons to it but one of the main reasons relates to the sovereignty of the nation which include cross-border movements and for fear of its negative impact to the security of the nation. The non-recognition of refugees and asylum-seekers together with the absence of the legal framework as required under the Convention cause hardship and compromise the safety of refugees and asylum-seekers. This article investigates the historical aspect of migration within the Malay Archipelago and shows how Malaysia has always welcomed the integration of others into its community. The article then discusses the dilemma faced by a country such as Malaysia and the manner upon which Malaysia seeks to contribute to the aim of the abovementioned treaty by

^{*} *Farid Sufian Shuaib*, Professor of Laws, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 53100 Jalan Gombak, Kuala Lumpur Malaysia, Email: farid@iium.edu.my

[†] *Saiful Izan bin Nordin*, PhD Candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 53100 Jalan Gombak, Kuala Lumpur, Malaysia, Email: nordinsaifulizan@gmail.com

ensuring that the humanitarian needs of individuals who are fleeing their country as refugees and asylum-seekers are fulfilled. This article then highlights some of the current initiatives to overcome the humanitarian challenges pertaining to refugees and asylum-seekers. The article finally discusses the means to assuage the hesitancy of Malaysia in ratifying or acceding to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, including mandating equitable international burden sharing.

Keywords: refugee, asylum, Malaysia, treaty

INTRODUCTION

A refugee is someone who is outside his/her country and fearful of persecution because of his/her race, religion, or nationality and is unwilling to return for fear of persecution.¹ He/she may also be compelled to leave his/her country because of external aggression or serious disturbance in public order.² This would include threat of generalised violence, foreign aggression, internal conflicts, massive violation of human rights, and serious disturbance of public order.³ For persons who claim to be refugees but whose status have yet to be determined, they are referred to as asylum-seekers.

Malaysia has approximately 179,550 refugees and asylum-seekers registered with the United Nation High Commissioner for Refugees (UNHCR). The numbers include some 45,900 children below the age of 18; 68% of refugees and asylum-seekers are men, while the remaining 32% are women.⁴ The vast majority are from Myanmar (including Rohingyas), and the rest are from Afghanistan, Pakistan, Yemen, Syria, Iraq, and other countries.

¹ “Convention Relating to the Status of Refugees” (1951), Opening date for signature (July 28, 1951), Date of Entry into Force (April 22, 1954): 189 U.N.T.S. 150; “Protocol Relating to the Status of Refugees” (1967), Opening date for signature (January 31, 1967), Date of Entry into Force (October 4, 1967): 606 U.N.T.S. 267.

² “OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,” (1969), adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa (September 10, 1969).

³ “The Cartagena Declaration on Refugees” adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, (November 22, 1984).

⁴ UNHCR, “Figures at a Glance in Malaysia”, accessed August 8, 2021, <https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html?query=statistic%20malaysia>.

Refugees require humanitarian assistance and protection throughout their journey, especially since they are venturing outside their countries of origin and familiar territories, and therefore, desperately require support from the host states and host communities.

However, the State also ensures the preservation of its sovereignty — such as protecting the integrity of its territories, including cross-border movements as well. It is in these sometime conflicting considerations that the Malaysian authority must continue to find a balance.

International Legal Protection for Refugees

Although the legal framework for refugees within the region of Southeast Asia is considered to be generally weak,⁵ legal protection is offered to refugees and asylum-seekers under international law which offers legal protection to those who flee their country because of fear of persecution or threat of violence⁶ and require assistance. This recognition evolved from the juridical term because an individual may find himself/herself without the benefit of the formal protection of his/her government, to the social term which emphasises on the need to render assistance to individuals who are away from his/her home society, and to the individualist

⁵ Joyce Chia, and Justice Susan Kenny, “The Children of Mae La: Reflections on Regional Refugee Cooperation”, *Melbourne Journal of International Law* 13, (2012): 1.

⁶ UN General Assembly Official Records, “Universal Declaration of Human Rights”, G.A. res. 217A (III), 3rd session, 183rd plen mtg, U.N. Doc A/RES/217A (III), (December 10, 1948): article 14(1); “American Declaration of the Rights and Duties of Man”, OAS Res XXX, (1948) article XXVII; “African Charter on Human and Peoples’ Rights”, Opened for signature (June 27, 1981), 1520, U.N.T.S. 217, entered into force (October 21, 1986): article 12(3).

terminology where a refugee is defined as someone escaping persecution from his/her home country.⁷

The two main legal documents that define “refugees” are the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. They confer the rights to refugees and lay out the obligations of States. Among the ASEAN countries, only Cambodia and Philippines have ratified or acceded to the Convention and Protocol.⁸ The rights of refugees are also supplemented by other international and regional human rights treaties such as the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),⁹ the International Covenant on Civil and Political Rights (ICCPR),¹⁰ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹ the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹² the Convention on the Rights of the Child

⁷ James C. Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950”, *International and Comparative Law Quarterly* 33, no. 2 (April 1984): 348.

⁸ UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”, accessed August 26, 2021, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

⁹ “The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, Opened for signature (December 10, 1984), entered into force (June 26, 1987): 1465 U.N.T.S. 85.

¹⁰ “International Covenant on Civil and Political Rights”, Opened for signature (December 19, 1966), entered into force (March 23, 1976): 999 U.N.T.S. 171.

¹¹ “International Covenant on Economic, Social and Cultural Rights”, Opened for signature (December 19, 1966), entered into force (January 3, 1976): 993 U.N.T.S. 3.

¹² “Convention for the Protection of Human Rights and Fundamental Freedoms”, Opened for signature (November 4, 1950), entered into force (September 3, 1953): 213 UNTS 222, as amended by “Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms”, opened for signature (May 27, 2009), entered into force (September 1, 2009): CETS No. 204.

(CRC),¹³ and the Declaration on Fundamental Principles and Rights at Work and Its Follow-Up.¹⁴ According to the Convention Relating to the Status of Refugees 1951, a refugee is someone who “has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. The person is outside his/her country of nationality or of habitual residence and is unable or unwilling to avail himself/herself of the protection of that country because of the fear of persecution.¹⁵

The Convention offers protections to refugees in recognising the precarious condition that they are in. The contracting State parties of the Convention agree not to discriminate refugees based on race, religion, or country of origin.¹⁶ The contracting State parties agree to provide refugees with freedom of religion,¹⁷ competency to acquire properties,¹⁸ right to intellectual property,¹⁹ right to non-political and non-profit associations,²⁰ access to courts,²¹ access to employment and profession,²² and access to welfare provisions including public elementary education.²³

¹³ “Convention on the Rights of the Child”, Opened for signature (November 20, 1989), entered into force (September 2, 1990): 1577 U.N.T.S. 3.

¹⁴ “International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up”, Declaration adopted by the International Labour Conference, 86th session, Geneva, 18 June 1998.

¹⁵ “Convention Relating to the Status of Refugees” (1951), article 1; reads together with “Protocol Relating to the Status of Refugees,” (1967).

¹⁶ “Convention Relating to the Status of Refugees” (1951), article 3.

¹⁷ “Convention Relating to the Status of Refugees” (1951), article 4.

¹⁸ “Convention Relating to the Status of Refugees” (1951), article 13.

¹⁹ “Convention Relating to the Status of Refugees” (1951), article 14.

²⁰ “Convention Relating to the Status of Refugees” (1951), article 15.

²¹ “Convention Relating to the Status of Refugees” (1951), article 16(1).

²² “Convention Relating to the Status of Refugees” (1951), articles 17, 18 and 19; ICESCR, article 6 on the grant of the right to work; “Declaration

Recognising the interest of the security of host States, such rights of refugees do not extend to any person who has committed a war crime, crime against humanity, or serious crimes.²⁴

Considering that refugees are fleeing from their own country for fear of persecution, one of the main principles is non-expulsion from the host State. However, exception is given on the grounds of national security or public order.²⁵ Nevertheless, the expulsion may only be made after it has undergone the due process of law where the refugee is given the opportunity to provide evidence, to appeal, and to be represented before the competent authority.²⁶

The core principle of refugee law relating to expulsion is *non-refoulement*. According to this principle, a refugee should not be returned to a country where he/she faces serious threats to his/her life or freedom.²⁷ This rule is now part of customary international law.²⁸ Additionally, the

on Fundamental Principles and Rights at Work and Its Follow-Up”, which declares on the principle of equality of treatment in labour and freedom from servitude and forced labour.

²³ “Convention Relating to the Status of Refugees” (1951), article 22.

²⁴ “Convention Relating to the Status of Refugees” (1951), article 1(F).

²⁵ “Convention Relating to the Status of Refugees” (1951), article 32(1).

²⁶ “Convention Relating to the Status of Refugees” (1951), article 32(2).

²⁷ “Convention Relating to the Status of Refugees” (1951), article 33(1).

“The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, article 3 prohibits refoulement regarding a real risk of torture; “Convention for the Protection of Human Rights and Fundamental Freedoms”, article 5(1).

²⁸ UN High Commissioner for Refugees (UNHCR), “The Principle of Non-Refoulement as a Norm of Customary International Law”, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, (January 31, 1994), accessed July 25, 2021,

<https://www.refworld.org/docid/437b6db64.html>; Mohamad Naqib

non-refoulement principle is supported under Shariah law, under the principle of “*aman*” or safety where anyone who requires refuge should be given protection.²⁹

On the other hand, refugees are obligated to abide by the laws and regulations of the host States.³⁰ It is incumbent upon them to conform to measures that are imposed for the purpose of maintaining public order.

To safeguard the rights of refugees, the host country needs to provide administrative assistance, including the issuance of necessary documentations, certifications, identity papers, and travel documents.³¹ Refugees should be able to move freely and to choose the place of residence.³² Apart from the option of facilitating the admission of refugees to another country, the host State should also facilitate the assimilation and naturalisation of the refugees.³³

The Convention also envisages the host country to take provisional measures by firstly determining the refugee status of the asylum-seeker and the need of such process because of national security. However, such provisional measures are restricted to circumstances connected with necessity during the period of armed conflict and other exceptional circumstances.³⁴

Ishan Jan, Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, *International Refugee Law* (Gombak: IIUM Press, 2017).

²⁹ Ahmed Abou-el-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law: A Comparative Study* (Riyadh: UNHCR, 2009); “The Cairo Declaration of Human Rights in Islam” (1990), article 12.

³⁰ “Convention Relating to the Status of Refugees” (1951), article 2.

³¹ “Convention Relating to the Status of Refugees” (1951), articles 25, 27 and 28.

³² “Convention Relating to the Status of Refugees” (1951), article 26.

³³ “Convention Relating to the Status of Refugees” (1951), article 34.

³⁴ “Convention Relating to the Status of Refugees” (1951), article 9.

The list of rights stated above refers to “refugees lawfully staying” in the States. Thus, this implies that the Convention does envisage the entry as irregular migrants. In such circumstances, the individual who is fleeing from persecution or threat of persecution may have no other option but to enter into the territory of another without authorisation. For such refugees, they are under the obligation to present themselves to the authority of the host country and explain their unlawful entry.³⁵ Any restriction of movement to such refugees should only be until their legal status in the country are regularised or until they have obtained admission to another country.³⁶

During such restriction or detention, consideration should also be given in ensuring non-separation of a child from his/her parents against his/her will unless it is “necessary for the best interests of the child”.³⁷ Such restriction of movement or detention should not be arbitrary and should be treated in accordance with the spirit of humanity and dignity.³⁸

The host country is expected to work together with the United Nations High Commissioner for Refugees (UNHCR) on matters pertaining to the protection and assistance of refugees.³⁹ The UNHCR is regarded as the “guardian” of the 1951 Convention and its 1967 Protocol that looks at about 26.4 million refugees in the world. This is by working in 132 countries and territories with approximately 180,000 people under its employment using

³⁵ “Convention Relating to the Status of Refugees” (1951), article 31(1).

³⁶ “Convention Relating to the Status of Refugees” (1951), article 31(2).

³⁷ UN General Assembly, “Convention on the Rights of the Child”, United Nations, Treaty Series, vol. 1577 (November 20, 1989), article 9(1).

³⁸ ICCPR, articles 9(1), 10(1).

³⁹ “Convention Relating to the Status of Refugees” (1951), article 1(D).

an annual budget of about USD1 billion.⁴⁰ UNHCR was established in 1950 to assist European refugees in the aftermath of World War II. It started its operations in Malaysia in 1975 in managing the arrival of Vietnamese refugees. Since then, it has been working very closely with the Malaysian Government.

I. Malaysia and The History of Movement of People

Malaysia is a multi-ethnic, multi-religious and multi-cultural society. From the Malaysian population of approximately 32.7 million, the number of non-citizens has declined from 3 million in 2020 to 2.7 million in 2021 with the closure of national borders and return of foreigners following the COVID-19 pandemic.⁴¹ The Bumiputera (indigenous peoples consisting of the Malays, aborigines in the Malay Peninsula and the Natives in Sabah and Sarawak) composition is 69.8 percent, the Chinese composition is 22.4 percent, the Indian composition 6.8 percent, and other ethnicities at 1.0 percent.⁴² This ethnic mix did not change much after the formation of the Federation of Malaya in 1957 and the subsequent inclusion of Sabah and Sarawak in the Federation to form Malaysia in 1963.⁴³

Malaysia is situated in the Malay Archipelago, situated between the Indian and Pacific Oceans, and consisting of waterways and islands. The practice of geographical mobility has its origins during the period when

⁴⁰ UNHCR, “Figures at a Glance”, accessed July 25, 2021, <https://www.unhcr.org/en-my/figures-at-a-glance.html>

⁴¹ Department of Statistics Malaysia, “Current Population Estimates, Malaysia, 2021”, accessed July 25, 2021, <https://www.dosm.gov.my>.

⁴² Department of Statistics Malaysia, “Current Population Estimates, Malaysia, 2021”, accessed July 25, 2021, <https://www.dosm.gov.my>.

⁴³ Singapore joined the Federation of Malaya in 1963 but left the Federation in 1965.

the Malay Archipelago consisted of kingdoms of Malay Sultanates. This practice led to the creation and existence of a plural society even before the arrival of colonial powers. This plural society was linked together by religious, social and political relationship.⁴⁴ Prior to colonialism, amicable relationships between ethnic groups were well established, and exemplified by the Malays accepting the absorption of the Bugis population into the Malay royalties, and intermarriages between the Malays and the Chinese and Indian Muslims, producing the Baba and Jawi Peranakan, respectively.⁴⁵

In the years leading to Independence, the readiness of the Malays to again provide refuge to other ethnic groups was seen when they agreed to provide to the Chinese and Indian migrant communities who intended to make the Malay Peninsula their permanent abode, citizenship through inter-ethnic negotiations.⁴⁶ Although some may want to highlight the inter-racial conflicts that happened in the lead-up to the negotiations for independent Malaya, and the post-independence racial riot of 13 May 1969, all-in-all, the absence of major violence post-1969 is

⁴⁴ Zawawi Ibrahim, "Globalization and National Identity: Managing Ethnicity and Cultural Pluralism in Malaysia," in *Growth and Governance in Asia*, ed. Yoichiro Sato (Honolulu: Asia-Pacific Center for Security Studies, 2004).

⁴⁵ Charles Hirschman, "The Making of Race in Colonial Malaya: Political Economy and Racial Ideology", *Social Forum* 1, no. 2 (1986): 330.

⁴⁶ Joseph M Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur: The Malaysian Branch of the Royal Asiatic Society, 2002); Mohd Rizal Yaakop, and Shamrahayu A Aziz, *Kontrak Sosial Perlembagaan Persekutuan 1957* (Kuala Lumpur: ITBM, 2014); Farid Sufian Shuaib, "Islam, Nation-State and the Legal System of Malaysia", *SDUHF* 7, no. 1 (2017): 75.

considered exceptional for some, for a multi-racial and multi-religious society such as Malaysia.⁴⁷

Offering refuge to people of forced migration is not an alien practice in Malaysia. Forced migration within the region of Southeast Asia has occurred due to armed conflicts involving foreign powers such as the Vietnam War, the rebellious forces and secessionists movements such as in the Southern Philippines and Aceh, or majoritarian oppression over minorities such as the Rohingya's plight. In general, Malaysia does not turn refugees away.

The communist was the victor in 1975 in the war of the former French colonies of Indochina, namely Vietnam, Cambodia and Laos. It was a continuous war from 1945, causing immense suffering, and exacerbated by the rivalries of the United States of America, the Soviet Union and China. During the following two decades, a mass exodus of over three million people fleeing the region, took place. It was reported that the total annual expenditure of UNHCR from 1975 to 1980 increased from USD80 million to USD500 million.⁴⁸

Refugees from Vietnam started arriving in the east coast of Peninsular Malaysia after the war. Malaysia had accepted more than 250,000 refugees. The main settlement for the Vietnamese "boat people" was in Pulau Bidong, originally an uninhabited island situated off the coast of Terengganu, with the last refugee departure from Malaysia in 2005. The UNHCR had assisted in the

⁴⁷ Leon Comber, *13 May 1969*, (Singapore: Marshall Cavendish, 2009). See also Kua Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969* (Petaling Jaya: SUARAM, 2007); Kusuma Snitwongse & W Scott Thompson ed., *Ethnic Conflicts in Southeast Asia* (Singapore: ISEAS, 2005).

⁴⁸ UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 79.

resettlement of 240,000 Vietnamese refugees from Malaysia to third countries and the return of some 9,000 to Vietnam.⁴⁹ The Malaysian Red Crescent Society had also supported the humanitarian assistance of the Vietnamese Boat People for over 20 years, from the 1970s to the 1990s.

It is interesting to note that the Indochina refugee episode introduced the concept of “first asylum”. According to this concept, a country’s agreement or readiness to receive refugees is dependent upon another country’s offer of resettlement.⁵⁰ This is the combination of the ideas of international burden-sharing and temporary asylum.

Another consequence of the Indochina war is the persecution of Cambodians, including the Chams or Malay Chams who are Muslims, between 1975 and 1979 during the Khmer Rouge regime. Malay Cham villagers and religious leaders were executed.⁵¹ From 1975 to 1985, Malaysia had accepted around 10,000 Malay Chams for resettlement in Malaysia. The local resettlement is considered an exception as most refugees from Indochina were assisted to be resettled in third countries. The local resettlement was made because of the historical connection and religious affinity between the Malay Cham and the local Malay community in states such as Kelantan and Terengganu.⁵² The first temporary refugee resettlement camp was opened in Kelantan and known as Taman Putra. It

⁴⁹ UNHCR Malaysia, “Last Vietnamese boat refugee leaves Malaysia”, (August 30, 2005), accessed July 31, 2021, <https://www.unhcr.org/news/latest/2005/8/43141e9d4/vietnamese-boat-refugee-leaves-malaysia.html>.

⁵⁰ UNHCR, *The State of the World’s Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 102.

⁵¹ Federico Sabeone, *The Fate of the Cham Muslims* (np.: European Institute of Asian Studies, 2017).

⁵² Mohamad Zain bin Musa, “Perpindahan dan Hubungan Semasa Orang Cam”, *Sari* 26 (2008): 257.

was officially opened by the former first Prime Minister of Malaysia, Tunku Abdul Rahman Putra Al-Haj ibni Almarhum Sultan Abdul Hamid Halim Shah in 1976, who was then the Secretary General of the Organisation of Islamic Conference (OIC), and involved the Federal and State governments together with the Muslim Welfare Organisation of Malaysia (PERKIM).

Another armed conflict in the region that caused forced migration is the conflict in Mindanao and the Sulu Archipelago in Southern Philippines. The Muslim minority was demonised as “Moros” by the Spanish colonial regime in their efforts of evangelisation and expansion of colonial rule, together with their anti-Islamic prejudices brought from Spain’s post-*Reconquista*.⁵³ By the 15th century, the *Bangsa Moro* had established an independent Islamic Sultanate in Mindanao and Sulu.⁵⁴ After the independence of the Philippines in 1946, the Muslim minority areas continued to be subordinated politically and economically. The declaration of martial law by President Ferdinand Marcos in 1972 ran parallel with the call for Moro’s independence for the Muslim minority. This, coupled with the transplantation of Christian settlers in Mindanao, resulted in conflict between the Muslims and the Christian settlers, and politicians and businessmen over land rights and other resources which escalated into armed conflict.⁵⁵

⁵³ Eva-Lotta E Hedman, *The Philippines: Conflict and Internal Displacement in Mindanao and the Sulu Archipelago*, (np: United Nations High Commissioner for Refugees, Emergency and Technical Support Service, 2009).

⁵⁴ Ikuya Tokoro, “The Re-emergence of Islam in the Context of Muslim Separatism in the Philippines” in Ikuya Tokoro (Ed.), *Islam and Cultural Diversity in Southeast Asia*, (Tokyo: Research Institute for Languages and Cultures of Asia and Africa (ILCAA), 2015).

⁵⁵ Ikuya Tokoro, “The Re-emergence of Islam in the Context of Muslim Separatism in the Philippines” in Ikuya Tokoro (Ed.), *Islam and*

The Moro National Liberation Front (MNLF) was formed challenging the martial-law regime. In the 1970's, 75 percent of the Armed Forces of the Philippines (AFP) was deployed to Mindanao and the Sulu Archipelago. Thus far, the cost of the conflict is 150,000 casualties and one million refugees and Internally Displaced Persons (IDPs).

The inflow of refugees from the Mindanao and Sulu Archipelago's conflict into Sabah increased in 1972 until 1984. The Sabah government, that has the authority on immigration matters under the Federal Constitution, permitted them to remain in Sabah — about 100,000 refugees in the early 1970s — on humanitarian, social, economic and political grounds.⁵⁶ The refugees were granted the permission to stay and work in Malaysia. The UNHCR closed their office in Sabah in 1987 following the Malaysian Government's decision to issue residency visas to them.⁵⁷

Another group of refugees that Malaysia has assisted is the Acehnese who fled to Malaysia during the counter-insurgency operations in Aceh between 1990 and 1993 and the military offensive between 1999 and 2005. Aceh has had a long history of being an independent Islamic Sultanate, and from their perspective, they were unceremoniously lumped together with other provinces to form the independent Republic of Indonesia on 17th August

Cultural Diversity in Southeast Asia, (Tokyo: Research Institute for Languages and Cultures of Asia and Africa (ILCAA), 2015).

⁵⁶ Azizah Kassim, "Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future," *Southeast Asian Studies* 47, no. 1 (2009): 52.

⁵⁷ UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report — 17th Universal Periodic Review: Malaysia*, n.d., accessed January 3, 2022,

<https://www.refworld.org/pdfid/513d9a0e2.pdf>.

1945. Aceh is a province of Indonesia in the northern tip of the island of Sumatra, parallel to Penang Island in Malaysia over the Straits of Malacca. Despite the fact that it is rich in natural gas, Aceh was still one of the poorest provinces in Indonesia then. This dissatisfaction contributed to the call for Aceh's independence in the 1970s.⁵⁸ The late Hasan Di Tiro formed the Free Aceh Movement (GAM) in 1976 and GAM spearheaded the secessionist rebellion. The Indonesian Government imposed a Military Operations Zone (DOM) in Aceh from 1989 to 1998 as a platform for severe counter-insurgency measures taken against the Acehnese.⁵⁹ Another round of military operations and martial law commenced in 2003, including patrols and "sweepings" to identify separatists or their supporters. Some of the Acehnese integrated into the Malaysian community, while others settled in other third countries. There were also those who were forced to, or voluntarily, returned home.⁶⁰

The accounts above indicate that Malaysia does recognise the need for identifying the humanitarian needs of refugees and offering assistance to them by making Malaysia a "temporary asylum" and a transit country for their resettlement. Those accounts also provide examples where Malaysia resettled groups of refugees inside Malaysia. Thus, although Malaysia had not ratified or acceded to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, as well as its chequered history of treating refugees and asylum-seekers, Malaysia still provides assistance to refugees.

⁵⁸ Anthony Reid (Ed.), *Verandah of Violence: The Background to the Aceh Problem* (Singapore: Singapore University Press, 2006).

⁵⁹ Kamarulzaman Askandar, "Aceh Refugees and Conflict Transformation", *Accord* 22 (2011): 63.

⁶⁰ UNHCR, "Malaysia deports asylum seekers to Aceh despite UNHCR appeal", September 5, 2003, accessed August 29, 2021, <https://www.unhcr.org/news/latest/2003/9/3f58b05a4/malaysia-deports-asylum-seekers-aceh-despite-unhcr-appeal.html>.

State Sovereignty and the Legal Treatment of Refugees

Sovereignty provides authority with the right to command and the right to be obeyed. Sovereignty is legitimate when it is supported by law, tradition, and consent or endorsement. Power is required to support the sovereign authority's claim to legitimacy. Legitimacy which conjures allegiance and respect could by itself support the sovereign claims.⁶¹

The traditional view of state sovereignty includes the absolute supremacy to govern the internal affairs within its territory, the absolute right to govern the people, and freedom from external interference.⁶² The emphasis on the territorial integrity can be traced back to the Westphalian notion of state sovereignty. The historical revolutions of the Peace of Westphalia in 1618 that ended the Thirty Years' War and the Eighty Years' War and the decolonisation process after the World War II brought with it the notion of legitimate political authority over a defined population and territory, and recognition of interaction between equally sovereign states. This territorially based body politic exerts its right for self-determination, the power and responsibility over population within the territory claimed. This includes the right and power to control the movement of people into the territory.

The concept of right and power does not only encompass the topic of territorial integrity and security. It also encompasses the responsibility over those who enters into its territory. This requires the use of available resources – be it administration, enforcement, and services and resources to provide for the living such as food, accommodation, education and livelihood. Under the

⁶¹ Daniel Philpott, "Sovereignty: An Introduction and Brief History," *Journal of International Affairs* 48 (1995): 353.

⁶² Guiguo Wang, "The Impact of Globalization on State Sovereignty", *Chinese Journal of International Law* 3, no. 2 (2004): 473.

Westphalian notion of sovereignty, the state is under the responsibility to consider the fate and the interest of its citizen over that of the migrants. In confronting the dynamic of international and domestic economic and social factors, the state cherishes its agility in setting policies and regulations in dealing with non-citizens which it may not have if its hands are tied after ratifying or acceding to a treaty. The state is reluctant to surrender its right to lay down the required policies and regulations that is needed in governing using its limited resources.

However, in the age of globalisation, such idea of state sovereignty is being challenged by the growing power of non-state actors such as the International Monetary Fund and the World Bank which directly or indirectly dictate the economic and fiscal policy of states; treaty bodies such as the Human Rights Committee under the International Convention for Civil and Political Rights (ICCPR) and the Committee on the Elimination of Discrimination against Women (CEDAW) which determine compliance of states with international norms; and transnational corporations that influence state policies or even cause states to become bankrupt. The social media giants of the world — the likes of Facebook and Google — are the gatekeepers or the ones who decide whether to man the gate that may cause detriment to the social fabric of societies.

One may even say that the language of sovereignty is appealing to states without much might — states that are without adequate resources to protect their territorial integrity or domestic tranquillity, and are under

constant challenges over their territory and domestic polity.⁶³

Thus, the language of sovereignty is still relevant for a small country such as Malaysia to assert control over its territory and domestic polity. The concept of sovereignty is expressed through its continual refusal to adopt the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. This is one of the reasons that Malaysia does not want to legally recognise refugees as a special group of migrants.

However, the absence of ratification or accession to relevant treaties does not mean that Malaysia has no responsibility to refugees. As discussed earlier, the principle of *non-refoulement* in international law is a customary international law that every state, including Malaysia is subjected to. The principle of *non-refoulement* forbids the host country of refugees or asylum-seekers from returning them to a country in which they would be in likely danger of persecution based on race, religion, nationality, and membership of a particular social group or political opinion. Policy-wise, Malaysia is resolute that “illegal immigrants and refugees” may have negative impact on the social, economic, and security of the nation.⁶⁴

The Immigration Act 1959/63 is the primary pillar for immigration legislation in Malaysia. It does not mention anything about refugees. The Act provides that a person’s entry into and departure from Malaysia need to be in accordance with the prescribed routes, immigration

⁶³ Hans Morgenthau, Kenneth Thomson, and David Clinton, *Politics Among Nations: The Struggle for Power and Peace*, 7th Ed., (New York: McGraw-Hill Education, 2005).

⁶⁴ National Security Council, *National Security Policy* (np.: National Security Council, nd.), para 4.1.3.

control posts, or points of entry.⁶⁵ To enter Malaysia, a non-citizen must possess an entry permit or pass.⁶⁶ A non-citizen who fails to abide by this requirement may be fined, imprisoned, or whipped. Additionally, under the Passports Act 1966, it is a requirement for non-citizens to produce a passport with the necessary visa upon entering or leaving Malaysia.⁶⁷ Non-conformance with the requirement may result with the person being removed from Malaysia.⁶⁸ Those without permit or pass, or with expired permit or pass, may also be removed.⁶⁹

From the above two legislations, refugees who enter Malaysia through regular means — namely through the prescribed routes and processes as non-citizens — would be treated as non-citizens with valid entry permit or pass. With the expiry of permit or pass, they must leave Malaysia. Those who enter Malaysia irregularly are treated as illegal immigrants who may be subjected to prosecution and deportation.

Such regulation may be harsh for those who had left their country without a choice and to escape persecution. However, the law is of general application to regular and irregular migrants who are largely not refugees. For regular and irregular migrants that the authority decides should be given exception to the general rule, the legislation allows for exceptions to be made. For regular and irregular migrants, the requirement of ordinary entry permit or pass or visa may be waived. They may be given permission to remain in Malaysia. The authority has the power to consider some circumstances as an exception to the rule.

⁶⁵ Immigration Act 1959/63 (Act 155), section 5.

⁶⁶ Immigration Act 1959/63 (Act 155), section 6.

⁶⁷ Passports Act 1966 (Act 150), section 2.

⁶⁸ Passports Act 1966 (Act 150), section 5.

⁶⁹ Immigration Act 1959/63 (Act 155), sections 32 and 33.

In other words, the legal framework in Malaysia does allow for special treatment to be given to refugees and asylum-seekers. Such special treatment, including that of entry without pass and permit and the permission to stay after the expiration of such pass or permit, may be provided to specific persons or group of persons. For instance, an entry permit may be given upon application,⁷⁰ an exemption to the requirement of a valid entry permit or pass for non-citizens to enter Malaysia,⁷¹ and their wives or children may be included in the permit or pass.⁷²

What seems to be lacking is a law mandating special treatment to refugees and asylum-seekers, and the setting up of institutions and mechanism dealing with refugees as required under the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. In this regard, the hesitancy of Malaysia perhaps may be based on the inability to rely on concrete assistance from international institutions and other wealthier countries in dealing with the influx of irregular migrants who may be claiming themselves to be refugees. A Malaysian Foreign Minister shared the apprehension that the Convention will compel Malaysia to provide facilities to refugees that may exceed facilities given to its own citizens.⁷³ The Malaysian Government also seems to have the concern that ratifying the Convention will enable and encourage migrants to seek asylum in the country.⁷⁴ As commented earlier, the Indochina refugee episode introduced the concept of “first asylum”, where a country’s agreement to receive refugees is

⁷⁰ Immigration Act 1959/63 (Act 155), section 10.

⁷¹ Immigration Act 1959/63 (Act 155), section 6.

⁷² Immigration Act 1959/63 (Act 155), section 12.

⁷³ “Malaysian finds ‘conflict’ in UN Refugee Convention”, *Australia Network News*, 12 November 2012.

⁷⁴ “Malaysia will not sign UN convention on refugees, says Minister”, *Malay Mail*, 12 March 2015.

dependent upon another country's offer of resettlement.⁷⁵ Although this principle of international equitable burden-sharing is sometime practised, it is not found in the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol.

Current Treatment of Refugees and Asylum-Seekers

Although Malaysia has not ratified or acceded to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol and does not provide any legal framework or mechanism for refugees and asylum-seekers, Malaysia is still a favourite destination for regular and irregular migrants, including refugees and asylum-seekers. UNHCR Malaysia reported that there are 179,550 refugees and asylum-seekers registered with them at the end June 2021, including refugees who have stayed for decades in Malaysia.⁷⁶ Comparatively, amongst ASEAN countries, Malaysia is the highest net recipient of refugees.⁷⁷

One of the pulling factors for the relatively large number of refugees in Malaysia is the relaxed visa requirement, including for ASEAN and Muslim-majority countries.⁷⁸ Thus, migrants could easily and lawfully enter Malaysia by flights using visa on arrival, for instance.

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- ⁷⁵ UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 102.
- ⁷⁶ UNHCR Malaysia, "Figures at a Glance in Malaysia," accessed August 8, 2021, <https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html?query=statistic%20malaysia>.
- ⁷⁷ A. A. Ahmad, Z. Rahim, and A. M. H. Mohamed, "The Refugee Crisis in Southeast Asia: The Malaysian Experience", *International Journal of Novel Research in Humanity and Social Sciences* 3, no. 6 (2016): 80.
- ⁷⁸ Katrina Munir-Asen, "(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management", Econstor. Discussion Paper, no. 29 (2018).

Additionally, for refugees from ASEAN and Muslim countries, because of the long history of Malaysian hospitality to migrant communities, the extensive networks of family relations and countrymen, and promises by non-governmental organisations (NGOs) of providing refugees or migrants with welcoming platforms for them to start a new home, either within or outside the Malaysian legal framework. The community groups among the refugees are systematic and coordinated among each other to cater to some of the basic humanitarian needs of the refugee's community. Such informal support systems provide links to the immigration authorities, the UNHCR, and employment or business opportunities.⁷⁹

The relatively secure environment in Malaysia in comparison to other ASEAN or Muslim-majority countries is another pull factor for refugees. Malaysia's governmental institutions provide better access for migrants in comparison to some other countries. For instance, refugees prefer to stay in Kuala Lumpur rather than in Bangkok because the UNHCR has better access to the detention centre in Kuala Lumpur, should they be detained under the immigration law and wish to be released.⁸⁰

Today, Malaysia does not place refugees and asylum-seekers in camps. This is in comparison with the practice in the 1970s when dealing with the influx of the "boat people", as described earlier. They may live among the host communities and different refugee groups in urban areas. For some, as a transit country, this is more attractive than living in camps or prescribed accommodations such as in Indonesia where they are housed in the International

⁷⁹ Katrina Munir-Asen, "(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management", Econstor. Discussion Paper, no. 29 (2018).

⁸⁰ P. Palmgren, "Irregular Networks: Bangkok Refugees in the City and Region", *Journal of Refugee Studies* 27 no. 1 (2013): 21.

Organisation for Migration residences, as this enables them to live on their own and earn a living, albeit in irregular employment status and informal economy.⁸¹

Be that as it may, since Malaysia has not ratified or acceded to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, Malaysia does not put in place an institutionalised protection mechanism for refugees. As an international body mandated to safeguard the rights of refugees, the UNHCR in Malaysia provides the machinery for the protection of refugees, including the reception, registration, documentation, and determination of refugee status of asylum-seekers.⁸² Some may regard this arrangement as less than satisfactory, but this is because Malaysia is not a party to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol and is therefore unwilling to take up the responsibility of determining the status of refugees for asylum-seekers.⁸³

The Government of Malaysia cooperates with the UNHCR in providing better identification for refugees. In April 2017, for the purposes of keeping track of refugees and for gathering statistics, Malaysia put in place the Tracking Refugees Information System (TRIS), which stores the personal information and biometric data of refugees and works additionally to the identification system for refugees in the form of the UNHCR card issued by the UNHCR. By using TRIS, the Government hoped to obtain

⁸¹ Katrina Munir-Asen, “(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management”, Econstor. Discussion Paper, no. 29 (2018).

⁸² UNHCR Malaysia, “Protection in Malaysia”, accessed August 8, 2021, <https://www.unhcr.org/en-my/protection-in-malaysia-591401344.html>.

⁸³ Rohaida Nordin, Norilyani Hj Md Nor, and Rosmainie Rofiee, “Ineffective Refugee Status Determination Process: Hindrance to Durable Solution for Refugees Rights and Protection”, *Indonesia Law Review* 1 (2021): 73.

data on refugees in the country, and registered refugees and asylum-seekers would be given an identity card (MyRC).⁸⁴ The take-up of this system was however, lacklustre at first; in August 2017, only 291 of the total 150,000 migrants listed with the UNHCR in Malaysia were registered under TRIS.⁸⁵

The UNHCR card is issued by the UNHCR for those claiming to be refugees; refugees are required to be registered with the UNHCR, in order for their status to be determined. This card does not have any legal value in Malaysia, and only acts as an identity document that may assist the holder by stating that he/she is under the protection of the UNHCR, thereby enabling him/her to obtain access to health and other support services.⁸⁶ However, the Malaysian Government has tacitly recognised the UNHCR card in administering and managing what it refers to as “illegal immigrants”.⁸⁷ The body responsible for coordinating the implementation mechanism to manage refugees and asylum-seekers is the National Security Council.⁸⁸

As a non-citizen and without a special refugee legal framework, refugees and asylum-seekers in Malaysia generally do not have access to public education and health services. The UNHCR provides some assistance to fill in the gap for those essential services, but is under limited resources that does not keep up with expanding numbers of

⁸⁴ “MYRC Malaysia,” Facebook, accessed August 10, 2021, <https://www.facebook.com/trismalaysia/>.

⁸⁵ Aina Nasa, “Gov’t introduces Tracking Refugee Information System to update, gather data on refugees”, *New Straits Times*, August 2, 2017.

⁸⁶ UNHCR Malaysia, “Registering with UNHCR”, accessed August 10, 2021, <https://refugeemalaysia.org/support/registering-with-unhcr/>.

⁸⁷ See for instance the Ministers of the Federal Government (No. 2) Order 2013.

⁸⁸ Ministers of the Federal Government (No. 2) Order 2013.

refugees and asylum-seekers.⁸⁹ For example, the UNHCR facilitates limited education for pre-primary, primary and secondary education for refugees and asylum seekers.⁹⁰

Although Malaysia is known for its generally accessible and successful public health care sector, the public-funded healthcare system treats non-citizens differently from Malaysian citizens. Non-Malaysians pay slightly higher fees for the public health services,⁹¹ while Malaysian citizens pays highly subsidised fees for public health services (in comparison with private health services). Thus, refugees and asylum-seekers, as non-citizens, face heavy financial constraints in accessing private or public health services.⁹² Nonetheless, in addition to assistance offered by NGOs and the private sector, the Government offers non-citizen UNHCR card holders with a 50% discount of the rate of primary care services.⁹³

During the early period of the COVID-19 pandemic, the treatment of migrants, including UNHCR card holders, was beset with controversies when they were rounded up and ferried to detention centres. The policy of

⁸⁹ Jeff Crisp, Naoko Obi, Liz Umlas, *But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia* (UNHCR: Geneva, Switzerland, 2012).

⁹⁰ UNHCR Malaysia, "Education Services", accessed August 10, 2021, <https://refugeemalaysia.org/support/education-services/>.

⁹¹ Ministry of Health Malaysia. *Garis Panduan Pelaksanaan Perintah Fi (Perubatan) (Kos Perkhidmatan)* (Ministry of Health Malaysia: Putrajaya, Malaysia, 2014).

⁹² Fiona Leh Hoon Chuah, Sok Teng Tan, Jason Yeo, and Helena Legido-Quigley, "Health System Responses to the Health Needs of Refugees and Asylum-seekers in Malaysia: A Qualitative Study", *International Journal of Environmental Research and Public Health*, (2019).

⁹³ Ministry of Health Malaysia. *Garis Panduan Pelaksanaan Perintah Fi (Perubatan) (Kos Perkhidmatan)* (Ministry of Health Malaysia: Putrajaya, Malaysia, 2014); UNHCR Malaysia, "Health Services", accessed August 10, 2021, <https://refugeemalaysia.org/support/health-services/>; *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 MLJ 628.

the Government in extending free COVID-19 vaccination to everyone, including “legal or illegal immigrants”, had lessened the criticism against the Government in its treatment of immigrants — including refugees and asylum-seekers — during the pandemic.⁹⁴

Even though, as indicated above, the government does offer some recognition to refugees and asylum-seekers processed by the UNHCR, the recognition is not based on any legal provisions, and thus, may be disregarded by the authorities. The Courts may still convict a person registered with the UNHCR under the immigration law,⁹⁵ and sentence him/her to imprisonment and whipping irrespective of his/her status as a UNHCR card holder.⁹⁶ However, in other circumstances, the Courts have considered the status of the UNHCR card holder by excluding certain punishment such as whipping, for offences under the immigration law including for not possessing a valid pass.⁹⁷

However, there are cases where possessing the UNHCR card proved to be more helpful than escaping whipping. In a case involving an underage asylum-seeker, the Court allowed intervention from the UNHCR and

⁹⁴ UNHCR Malaysia, “UNHCR continues supporting Malaysia’s national vaccination programme, including in sharing refugee population figures”, (June 15, 2021), accessed August 21, 2021, <https://www.unhcr.org/en-my/news/latest/2021/6/60c84d714/unhcr-continues-supporting-malaysias-national-vaccination-programme-including.html>; “IIUM becomes first higher learning institution to join state vaccination programme”, *Selangor Journal*, (August 18, 2021), accessed August 21, 2021, <https://selangorjournal.my/2021/08/iium-becomes-first-higher-learning-institution-to-join-state-vaccination-programme/>.

⁹⁵ Immigration Act 1959/63 (Act 155), section 6(1)(c), “for not possessing a valid pass to be in Malaysia”.

⁹⁶ *Subramaniam Subakaran v PP* [2007] 1 CLJ 470.

⁹⁷ Immigration Act 1959/63 (Act 155), section 6(1)(c); *Tun Naing Oo v Public Prosecutor* [2009] 5 MLJ 680.

UNHCR representation at the Court. This subsequently led to the retraction of the charge.⁹⁸ The Court may also consider the status of a person as a UNHCR card holder when delivering judgment, by considering his/her employment status in awarding damages for his/her loss of income.⁹⁹

Similar to the decisions of the Government, the decisions of the Courts also indicate inconsistency in handling matters pertaining to refugees and asylum-seekers. This is due to the non-existence of a legal framework for refugees and asylum-seekers. Unpredictable decisions may stem from the absence of a clear policy or an indeterminant policy put in place on purpose, which enables a greater extent of discretion in exercising powers by the authorities.

CONCLUDING REMARKS

The conclusion that could be made from the earlier discussion is that Malaysia is keen to provide assistance to refugees and asylum-seekers. However, Malaysia does not wish its hands to be tied under an obligation to provide protection to non-citizens at all times, under any circumstance. This could be considered as a “strategic ambiguity” on the part of Malaysia.¹⁰⁰ The experience from the Vietnamese “boat people” in the 1970s to the 1990s had shown the possibility of a drastic influx of migrants who admittedly were refugees. This may overwhelm the resources of a relatively small country which at one time

⁹⁸ *Iskandar Abdul Hamid v PP* [2005] 6 CLJ 505.

⁹⁹ *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 MLJ 628.

¹⁰⁰ Compare the discussion on Indian “strategic ambiguity” in BS Chimni, “Status of Refugees in India: Strategic Ambiguity” in Ranabir Samaddar (ed), *Refugees and the State: Practices of Asylum and Care in India, 1947–2000* (SAGE Publications India 2003).

was left to fend for itself in dealing with the wave of the Vietnamese “boat people” by the international community.

Although Malaysia has been hosting refugees and asylum-seekers, more could be done to assist refugees on its land. There is a need to affirm the solidarity among humans and to assist the victims of war and persecution. Such affirmation could be expressed by the ratification or accession to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, which the Pakatan Harapan government (May 2018–February 2020) had promised in its 2018 general election manifesto to ratify.¹⁰¹ However, since the Convention comes with the imposition of responsibilities on the host country over refugees and asylum-seekers, the next question is: how to address, in the case of an influx of refugees, the ballooning financial, economic, security, and social cost. Turkey is currently being stretched to the breaking point in hosting 3.7 million refugees.¹⁰² The European Union is expected to aid Turkey up to the amount of EUR 6 billion since European Union member countries will be directly impacted by the influx of refugees if Turkey pushes away these refugees and they head off to other parts of Europe instead.¹⁰³ Without any direct impact to developed countries if an influx of refugees happened in Malaysia, one could only guess the amount and speed of substantial aid to materialise.

We have also seen the conduct of signatories of the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol in facing the influx of refugees or the

¹⁰¹ Pakatan Harapan, *Buku Harapan: Rebuilding Our Nation, Fulfilling Our Hopes*, n.d., at 121.

¹⁰² UNHCR, “Refugee Data Finder”, accessed August 11, 2021, <https://www.unhcr.org/refugee-statistics/>.

¹⁰³ European Commission, “The EU Facility for Refugees in Turkey”, accessed August 11, 2021, https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en.

arrival or near arrival of less-than-ideal refugees. The Australian law confer powers to intercept and detain non-citizens outside Australian territories, including to intercept and turn back refugee boats outside Australian waters, which is against the spirit of the Convention and the Protocol. Such measures may be considered in opposition to the treaty because the host state has an obligation to protect even refugees who arrive irregularly.¹⁰⁴ Sweden changed its generous refugee policies after facing what it described as a refugee crisis in 2015. This was when Sweden received 163,000 asylum applications, with 51,000 from Syria.¹⁰⁵ Those are some of the challenges faced and responses taken by developed countries that a developing country such as Malaysia may lack the wherewithal to muster.

Having seen the mass influx of refugees from the Middle East and North Africa (MENA) region in 2015–2016 to Turkey and Europe, among others, the United Nations recognises the need for an equitable international burden-sharing to address the needs of the refugees. The UN General Assembly adopted the New York Declaration for Refugees and Migrants in 2016 to reaffirm the international refugee regime and the commitment of the States to strengthen the mechanism to protect forced migrants. Resulting from this are two global commitments, namely a Global Compact on Refugees, and a Global Compact for Safe, Orderly, and Regular Migration. The Declaration includes a commitment to increase international burden-sharing. However, in contrast to the Convention Relating to

¹⁰⁴ Daud Hassan, and Hassan Al Imran, “Boat Refugees, International Law and Australia’s Commitment: An Analysis”, *Journal of Maritime Law and Commerce* 51, no.3 (2020): 187, which refers to the Maritime Powers Act 2013.

¹⁰⁵ Sayaka Osanami Torngren, and Henrik Emilson, *Measuring Refugee Integration Policies in Sweden: Results from National Integration Evaluation Mechanism (NIEM)* (np.: National Integration Evaluation Mechanism, 2020).

the Status of Refugees 1951 and its 1967 Protocol for the State parties, the compacts are non-binding.¹⁰⁶

International human rights treaties, such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), impose obligations on State parties pertaining generally to its own citizens upon its own soil. On the other hand, the obligation under the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol relates to non-citizens whose fear and suffering are usually caused by their own governments and armed conflicts in lands foreign to the host country and outside the control of the host country. Thus, there is a hesitancy to shoulder the obligatory responsibility (if a State ratified or acceded to the Convention and its Protocol) of offering protection, including education and employment of non-citizens, which may be overwhelming to the host country. If such international obligation from the host country comes together with the obligation of equitable international burden-sharing, the hesitancy may be eased.

It is for this reason that there is the need of such burden to be equitably shared among the international community in an explicit and binding instrument. Rather than confining the discussion under the platform of the United Nations, the dialogue should also be extended to the International Conference of the Red Cross and Red Crescent, which are not only attended by the components of the International Red Cross and Red Crescent Movement, including 192 National Societies, the International Federation of the Red Cross and Red Crescent Societies (IFRC), and the International Committee of the Red Cross (ICRC), but also representatives from member states who

¹⁰⁶ Randall Hansen, “The Comprehensive Refugee Response Framework: A Commentary”, *Journal of Refugee Studies* 31, no. 2 (2018): 131.

are mostly signatories to the Geneva Conventions. Today, it is one of the very few international platforms for discussion on humanitarian issues, such as on refugees and asylum-seekers.¹⁰⁷

Aside from ratifying the Convention and mandating the equitable international burden-sharing, Malaysia could take intermediate steps to improve the plight of refugees and asylum-seekers by establishing a clear policy framework. Such a framework could form a basis to provide administrative directive to relevant government agencies in ensuring that basic security and basic needs such as health and education of refugees and asylum-seekers, are met.¹⁰⁸

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¹⁰⁷ Michael Meyer, “The Importance of the International Conference of the Red Cross and Red Crescent to National Societies: Fundamental in Theory and Practice,” *International Review of the Red Cross* 91, no. 876 (2009): 713.

¹⁰⁸ See for instance the recommendations by the Bar Council Malaysia in Bar Council, *Roundtable on Developing a Comprehensive Policy Framework for Refugees & Asylum-Seekers* (n.p.: Bar Council, 2009); Bar Council, “Press Release: Implement Holistic Measures to Improve Treatment of Refugees and Asylum-Seekers,” (June 20, 2019), accessed January 10, 2022, <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-implement-holistic-measures-to-improve-treatment-of-refugees-and-asylum-seekers>.