


NOTES AND COMMENTS

Living in the Shadows: Rohingya Refugees in Malaysia

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Abstract

Denied citizenship and persecuted in Myanmar, the Rohingya have fled to various countries, including Malaysia. However, Malaysia is not a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. It also has weak domestic legal and regulatory mechanisms to protect refugees and asylum-seekers. In this paper, the authors study the treatment of Rohingya refugees in Malaysia and suggest how the Malaysian legal system can better protect them by adapting international legal practices.

Keywords: Human rights; other areas of international law; refugee law; asylum; UNHCR

Refugees and their rights have arguably been given little consideration in Malaysia. Currently, Malaysia has no formal legislative or regulatory mechanism to protect asylum-seekers and refugees. Despite the presence of the United Nations High Commissioner for Refugees (UNHCR) in Malaysia for over four decades, there is no formal status agreement. Additionally, Malaysia is not a party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

The Malaysian government has declined to provide refugees on its territory with security, including legal status. It labels undocumented foreign nationals as “illegal immigrants”, which puts them at risk of apprehension, conviction, incarceration, expulsion, and refoulement. Malaysia also limits their ability to obtain legal employment, healthcare, and education, thereby exposing them to sexual and economic exploitation and other human rights abuses.

This paper first explains the intersection of refugee law and Malaysia’s state practice. Second, it describes the treatment of Rohingya refugees in Malaysia. Third, it examines the shortcomings of the Malaysian legal system regarding refugee protection. Fourth, it suggests recommendations that could alleviate the plight of Rohingya refugees in Malaysia. It concludes by highlighting the need for the Malaysian legal system to accommodate international principles.

I. Intersection of Refugee Law and Malaysia

Asylum applicants are often treated as undocumented and illegal immigrants even though such treatment violates international law. Additionally, there is the risk that asylum

applicants may be repatriated to their country of origin where they may suffer grievous harm, thus violating the non-refoulement principle.

The non-refoulement principle is expressed in Article 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention):¹

1. No Contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This principle is considered as customary international law² and some scholars even classify it as having *jus cogens* status.³

Generally, Malaysia should avoid violating the non-refoulement principle by repatriating asylum-seekers or returning and rerouting boats carrying asylum seekers.⁴ Although Malaysia may claim exemption from the non-refoulement principle based on it being a persistent objector to such a principle, its past actions diminish such a claim. For example, during the influx of Indochinese refugees in the late 1980s, Malaysia cooperated with UNCHR and non-governmental organizations. It also promised temporary shelter to the “boat people”.⁵ During this time, Malaysia neither expressed non-responsibility on refugee protection nor explicitly objected to the non-refoulement principle.⁶

II. Treatment of Rohingya Refugees in Malaysia

The Rohingya are an ethnoreligious Muslim minority group from Myanmar’s Rakhine province, which is located in Myanmar and borders Bangladesh. In Myanmar, many Rohingya civilians have “a well-founded fear of being persecuted for reasons of ... nationality”, are outside of their home country, and are “unable to avail themselves of that country’s security”.⁷

¹ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954), art. 33(1).

² “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” *UNHCR* (31 January 1994), online: UNHCR <<https://www.refworld.org/docid/437b6db64.html>>.

³ Jean ALLAIN, “The jus cogens Nature of non-refoulement” (2001) 13 *International Journal of Refugee Law* 533 at 533; Cathryn COSTELLO and Michelle FOSTER, “Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test” (2016) 46 *Netherlands Yearbook of International Law* 273.

⁴ Arthur C. HELTON, “The Malaysian Policy to Redirect Vietnamese Boat People: *Non-Refoulement* as a Human Rights Remedy” (1992) 24 *New York University Journal of International Law and Politics* 1203 at 1205.

⁵ Yen TRAN, “The Closing Saga of the Vietnamese Asylum-seekers: The Implications on International Refugees and Human Rights Law” (1995) 17 *Houston Journal of International Law* 463; Dina Imam SUPAAT, “Escaping the Principle of Non-Refoulement” (2013) 2 *International Journal of Business, Economics and Law* 92.

⁶ Dina Imam SUPAAT, “Escaping the Principle of Non-Refoulement” (2013) 2 *International Journal of Business, Economics and Law* 92.

⁷ “The Rohingya’s Citizenship: The Root of the Problem” *Human Rights Watch* (1 August 2000), online: Human Rights Watch <<https://www.hrw.org/reports/2000/malaysia/maybr008-04.htm#P987404>>.

The Rohingya in Malaysia have been subjected to harassment, extortion, imprisonment, and even deportation.⁸ During the COVID-19 pandemic, the treatment of the Rohingya in Malaysia worsened.⁹ For example, although the Malaysian High Court granted a temporary stay on the deportation of 1,200 Myanmar refugees in February 2021, immigration authorities transferred 1,086 refugees to the Myanmar Navy for repatriation to Myanmar.

Rohingya refugees who entered Malaysian seas could face imprisonment and punishment for unlawful entry.¹⁰ For instance, forty Rohingya men were sentenced to seven months in jail during the pandemic for entering Malaysia without a valid permit. Although they were spared from caning by the Malaysian High Court,¹¹ this imposition of criminal penalties contravenes international law because refugees cannot be penalized for reasonable immigration violations committed while fleeing persecution.¹² Notably, the few positive measures undertaken by the government, such as refraining from caning refugees and releasing them to the United Nations, was the result of civil society advocacy.¹³

III. The Malaysian Legal System

Regarding the treatment of refugees, there are a number of inadequacies in Malaysia's legal system. On non-discrimination and equality, Malaysia's legal and policy system falls short of international standards.¹⁴

Articles 8 and 12 of Malaysia's Federal Constitution are the main provisions relating to non-discrimination and equality. Article 8(1) states that "all persons are equal before the law and are entitled to equal protection under the law", while Article 8(2) states that "no discrimination against *people* [emphasis added] on the basis of religion, ethnicity, descent, place of birth, or gender shall be permitted". Therefore, a non-citizen's right to equality is protected by Article 8, but not their right to non-discrimination.¹⁵

Article 12 of the Federal Constitution ensures that all persons are protected from educational discrimination. Additionally, Article 5 recognizes that all citizens have the right to be brought before a magistrate without undue delay and within 24 hours of arrest, but non-citizens can be detained for up to fourteen days. Articles 9 (banishment, prohibition, and freedom of movement) and 10 (freedom of expression, assembly, and association) contain additional discriminatory provisions against non-citizens. Malaysia has yet to implement domestic legislation or policies governing the identification, registration, and security of refugees and stateless people.

⁸ Institute of Human Rights and Peace Studies, Mahidol University, "Equal Only in Name: The Human Rights of stateless Rohingya in Malaysia" *Equal Rights Trust* (17 October 2014), online: Equal Rights Trust <<https://www.equalrightstrust.org/sites/default/files/ertdocs/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>> at 16-17; "UNHCR Lauds Malaysia for Accepting Persons Rescued at Sea" *UNHCR* (19 December 2012), online: UNHCR <<https://www.unhcr.org/en-my/news/press/2012/12/59116b927/unhcr-lauds-malaysia-for-accepting-persons-rescued-at-sea.html>>.

⁹ Hanh NGUYEN, "Surviving Fear and Uncertainty: Rohingya Refugees in Malaysia" *Mixed Migration Centre* (13 January 2021), online: MMC <<https://mixedmigration.org/articles/surviving-fear-and-uncertainty-rohingya-refugees-in-malaysia/#>>.

¹⁰ *Ibid.*

¹¹ "Malaysia spares Rohingya refugees from caning" *Thomson Reuters* (July 2020), online: Reuters <<https://www.reuters.com/article/us-myanmar-rohingya-malaysia-idUSKCN24N0NT>>.

¹² "Malaysia: Stop Treating Rohingya Refugees as Criminals", *supra* note 14.

¹³ "Malaysia spares Rohingya refugees from caning", *supra* note 16.

¹⁴ "Washing the Tigers: Addressing Discrimination and Inequality in Malaysia" *Equal Rights Trust* (November 2012), online: Equal Rights Trust <<https://www.equalrightstrust.org/content/washing-tigers-full>>.

¹⁵ *Ibid.*

Greater clarity on the law on refugees and asylum seekers in Malaysia would better allow the government to identify whether a person qualifies as an asylum seeker or refugee and is thus entitled to complete governmental protection, including respect for the non-refoulement principle.

A. Deviation from International Law

Malaysia's immigration law significantly deviates from the international law principles of non-refoulement and asylum. Regarding the Immigration Act 1959/63 (Immigration Act or Act), Section 6 states that a person shall not enter Malaysia without a valid permit.¹⁶ Section 6(3) further reiterates that whomsoever contravenes subsection 1 shall be guilty of an offence and receive due punishment, including being liable to whipping of not more than six strokes.¹⁷ Since asylum-seekers would not have fulfilled the exceptional circumstances listed in Section 6(1),¹⁸ this means that Malaysia has not clearly distinguished between asylum seekers and illegal immigrants entering the country. Consequently, asylum seekers face the risk of being guilty of an offence under Section 6(3),¹⁹ which could result in deportation in contravention of the non-refoulement principle.

Additionally, the law provides a list of persons considered as "prohibited immigrants" who are not allowed to enter Malaysia, and persons who fall within the scope of "prohibited immigrants" are liable to detention and deportation if they enter the country or become prohibited after they enter.²⁰ The non-refoulement principle has a vast scope, including the state's duty to identify such persons entitled to protection with a proper screening procedure and respecting the due process of law.²¹ Moreover, screening and identification procedures need to be conducted by impartial bodies.²²

Applicants also lack the opportunity to review or challenge their decisions. For example, although a special court has been established to expedite the trials of immigration prisoners, its aim is not to determine if the prisoner is a refugee, but to determine if the individual has breached the Immigration Act's requirements for illegal entry and remain.²³

A person imprisoned in an immigration detention centre is considered to be under lawful custody²⁴ and the procedure to determine the location of the detention centre and the treatment received by a refugee is ambiguous. Such arbitrary use of power could affect the Rohingya substantially, especially when they are mostly employed in Malaysia's construction sector and subject to dangerous working environments.²⁵

Furthermore, Section 34(1) of the Immigration Act²⁶ could lead to arbitrary detentions of refugees because it provides that a person may be detained in custody "for such period as may be necessary" before removal. Regulation 11 of the Immigration Regulations 2003

¹⁶ Immigration Act 1959/63 (Act 155), s. 6.

¹⁷ *Ibid.*, at s. 6(3).

¹⁸ *Ibid.*, at s. 6(1).

¹⁹ *Ibid.*

²⁰ *Ibid.*, at s. 8.

²¹ Elihu LAUTERPACHT and Daniel BETHLEHEM, "The Scope and Content of the Principle of Non-Refoulement: Opinion" in Erica FELLER, Volker TURK, and Frances NICHOLSON, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

²² Dina Imam SUPAAT, "Escaping the Principle of Non-Refoulement" (2013) 2 *International Journal of Business, Economics and Law* at 94.

²³ *Ibid.*, at 94–5.

²⁴ Immigration Act 1959/63 (Act 155), s. 51B.

²⁵ Melati NUNGSARI, Sam FLANDERS, and Hui-Yin CHUAH, "Poverty and precarious employment: the case of Rohingya refugee construction workers in Peninsular Malaysia" (2020) 7 *Humanities and Social Sciences Communications* 1.

²⁶ Immigration Act 1959/63 (Act 155), s. 34(1).

(Administration and Management of Immigration of Depots) states that a child under the age of twelve can stay with either of his parents, generally in the women's adult facility with the mother, but a male child above thirteen years old must be placed in the male adult facility while the female child can continue to stay in the women's adult facility. Consequently, several children are placed in detention, in unsanitary conditions, and sometimes without parents.²⁷

Furthermore, unless it presents an issue of conformity with the Immigration Act's procedural requirements, Section 59A²⁸ precludes judicial review of any act or decision made by the Minister or the Director General (defined to include any immigration officer exercising his function). Section 59A(2)²⁹ defines "judicial review" broadly to embrace a wide variety of administrative law activities as well as any other suit or action.

The Immigration Act also raises a number of problems relating to the administration of justice. When employers or agents have passports and permits, the migrant has the burden of producing evidence such as documentation to demonstrate legality.³⁰ Furthermore, Section 34(3) of the Act³¹ allows for detention in any location authorized by the Director General, which might lead to widely disparate detention conditions and confinement in locations that are not appropriately inspected or overseen. Although legal remedies and/or proceedings, such as employment tribunals and civil law lawsuits, are available to migrants in an attempt to gain restitution, there are major impediments to access to justice and financial restraints which make this exceedingly difficult in practice.³²

B. Caning as a Punishment

As only adult males under the age of fifty-five are subjected to caning, the sentences they have received have had little effect in deterring them from becoming illegal migrants.³³

While the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture (CAT) elaborates on the term torture, and provides for its general scope,³⁴ Article 1(1) is particularly important:³⁵

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

²⁷ "Malaysia: End Abusive Immigration Detention" *Human Rights Watch* (20 November 2020), online: HRW <<https://www.hrw.org/news/2020/11/20/malaysia-end-abusive-immigration-detention>>.

²⁸ Immigration Act 1959/63 (Act 155), s. 59.

²⁹ *Ibid.*, s. 59A(2).

³⁰ Immigration Act 1959/63 (Act 155), s. 6(4).

³¹ Immigration Act 1959/63 (Act 155), s. 34(3).

³² "Undocumented Migrants and Refugees in Malaysia: Raids, Detention and Discrimination", *International Federation of Human Rights* (8 December 2021), online: IFHR <<https://www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf>>.

³³ Azizah KASSIM and Ragayah Hj Mat ZIN, "Irregular Migrants and the Law" (2011) 38 *Philippine Journal of Development* 85.

³⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, GA Res. 39/46 (entered into force 26 June 1987), art. 1.

³⁵ *Ibid.*, at art. 1(1).

On the basis of Article 1(1), there is an issue of whether caning and other types of state-sanctioned corporal punishment could constitute torture or other forms of ill-treatment insofar as they are carried out in compliance with detailed legal provisions. In his report to the United Nations Commission on Human Rights in 1997, the United Nations Special Rapporteur on torture stated that the exclusion of “lawful sanctions” apply to sanctions that are universally recognized as valid by the international community, such as deprivation of liberty by incarceration, which is common in most penal regimes.

Deprivation of liberty is a legal punishment if it complies with universally agreed criteria, such as those outlined in the United Nations Uniform Minimum Rules for the Treatment of Prisoners. The Special Rapporteur did not accept the notion that the administration of punishments that involve illegal acts could be deemed legal because the punishment has been authorized in a procedurally legitimate manner. Furthermore, barbaric, inhuman, or degrading treatment is prohibited regardless of which “lawful sanctions” are removed from the concept of torture. Since barbaric, inhuman, or degrading punishments are illegal by definition, they hardly qualify as “lawful penalties” under Article 1 of the CAT.³⁶

In terms of post-caning remedies, prisoners said they had to rely on self-care because prison workers refused to offer medical treatment.³⁷ Moreover, caning could result in psychological issues for the refugees and asylum seekers:³⁸

Caning can also directly lead to psychological pain and suffering. Many caning victims expressed anguish about impotence caused by caning and also its possible consequences... The procedure of caning puts the victim into a state of utter helplessness and powerlessness. For some victims, this was one of the most painful elements of the process...

Additionally, prison authorities have caned inmates before transferring them to facilities with unsafe conditions.³⁹

IV. Recommendations: Amendment of Malaysian Immigration Law

Given the limited protections in Malaysia, the following legislative amendments are suggested.

First, the Malaysian government should consider granting refugees basic rights by exempting them from penalties under the Immigration Act and providing them with protection from retaliation. If the Malaysian government is unable to officially recognize the roles and responsibilities of the UNHCR, it may consider legally recognizing refugees through the immigration department. Given that corporal punishment is forbidden under international human rights law, provisions providing for a sentence of whipping for immigration offences need to be removed from the scope of the Immigration Act. The actual period of imprisonment for these offences also needs to be reduced. All derogatory and inhuman forms of punishment such as caning should also be removed from the Act. Since revisions were made to the Immigration Act in 2002, a total of 47,914 migrants have been subjected to caning for immigration violations.⁴⁰

³⁶ “A Blow to Humanity: Torture by Judicial Caning in Malaysia” *Amnesty International* (6 December 2010), online: Amnesty International <<https://www.amnesty.org/en/documents/ASA28/013/2010/en/>> at 50–51; *Commission on Human Rights, Report of the Special Rapporteur Mr. Nigel S. Rodley*, submitted pursuant to Commission on Human Rights Resolution 1995/37 B, UN Doc. E/CN.4/1997/7 (10 January 1997) paras. 7–8.

³⁷ *Ibid.*, at 36; United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 8 January 2016, GA Res. A/RES/70/175, rr. 22–26.

³⁸ *Ibid.*, at 38.

³⁹ *Ibid.*, at 38–39.

⁴⁰ “Caning a violation of human rights” *The Daily Star* (4 July 2009), online: The Daily Star <<https://www.thedailystar.net/news-detail-95537>>.

Second, the government needs to ensure the protection of women and children through protective measures against sexual abuse and violence. Refugee women in Malaysia face the risk of sexual and gender-based violence because they lack legal status and are given limited access to protection and justice mechanisms.⁴¹ Concerns have also been expressed about children in detention centres and the impacts that they could have on the children.⁴² As Malaysia has ratified the United Nations Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, which recognize the special status of women and children, it needs to uphold its duties under these conventions. The Immigration Act must include protective provisions for the benefit of women and children.

The power given under Section 34(1)⁴³ should be given a narrow scope. This could be achieved by limiting the power to detain through the establishment of specific time limits for any duration of detention, periodic judicial oversight, and fixing a specific period of time for the persons to be removed from the country.

Additionally, alternatives for detention must be provided by the Immigration Act, especially for women and children. Detention should be viewed as a last resort and a short-term solution. The impact of prolonged detention on health and psychological well-being must be considered. Potential alternatives include community placement such as placement with host families, bail schemes that ensure that the requirements of the immigration proceedings are satisfied, and support from guarantors or sponsors to ensure that asylum seekers are looked after.

Even if the detention remains in place, the amount of time a person must be detained before being brought before a judge should be reduced from fourteen days to a maximum of twenty-four hours or less, and a person should not be expelled from Malaysia while legal proceedings are still pending. Such measures could, possibly, ensure that efficacious proceedings while assuring refugees and asylum seekers that there are proper procedures that consider their well-being. Detainees must further be allowed to appeal the reasons for their detention and dismissal, as well as other reviewable decisions under the Act – in this vein, the ouster clause in Section 59A should be removed.⁴⁴

Moreover, the Malaysian government should consider ratifying the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on the Protection of the Rights of All Migrant Workers; the Convention Against Torture; the Optional Protocol on the Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; and the Optional Protocol on the Prevention. The Malaysian government should also ensure that prosecutions for violations of the Immigration Act are conducted in accordance with internationally recognized requirements for the administration of justice and fair trial, as well as Article 40 of the UNCRC. This could be achieved by ensuring an independent tribunal, the right to silence, interpretation, and the right to appeal.

⁴¹ Natasha DANDAVATI, “Refugee women in Malaysia are at increased risk of gender-based violence, while having limited access to protection and justice” *Women’s Aid Organization* (11 January 2021), online: WAO <<https://wao.org.my/refugee-women-in-malaysia-are-at-increased-risk-of-gender-based-violence-while-having-limited-access-to-protection-and-justice/>>.

⁴² Emily FISHBEIN, “Lone children among hundreds in Malaysia immigration detention” *Aljazeera* (10 December 2020), online: Aljazeera <<https://www.aljazeera.com/news/2020/12/10/lone-children-among-hundreds-in-malaysia-immigration-detention>>.

⁴³ Immigration Act 1959/63 (Act 155), s. 34(1).

⁴⁴ *Ibid.*, at s. 59A.

V. Conclusion

Even though Malaysia is not a signatory to the Refugee Convention or the accompanying Protocol, it has allowed refugees to stay in the country temporarily before they return to their home country or relocate to a third country. On a temporary basis, the power conferred on the Minister of the Interior by Section 55 of the Immigration Act⁴⁵ may be used to address the various issues that refugees face, and legalize their presence in the country. However, amendments to the Malaysia's legal framework in light of international principles should be considered. Also, the Malaysian government may either ratify the Refugee Convention and the accompanying Protocol, or pass a law governing refugee issues.

Overall, while the Malaysian government has experimented with a variety of policy approaches, more coherence and protection are needed. Furthermore, policy concerns about the control of undocumented workers must be seen in the light of a broader political and economic environment that depends on foreign labour.

A successful approach to protecting Rohingya refugees necessitates significant deviations from a humanitarian perspective, including measures for long-term settlement and de facto integration. This may require a mindset shift from thinking of refugees as passive victims in need of security, or as end-receivers of aid to the creation of favourable structural and policy conditions in which refugees can pursue their livelihoods and aspirations while contributing to host communities.

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⁴⁵ *Ibid.*, at s. 55.