

Non-refoulement and Right of Entry for Asylum-seekers

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ABSTRACT

This article examines two questions: first, whether the Malaysian law regarding admission of asylum-seekers into its territory is consistent with international law, and second, whether the asylum-seekers who are already residing in Malaysia can be deported back to their places of origins. In answering these questions, this article analyses the legal aspects of the right to seek asylum under international law and its relation to the rule on non-refoulement. Additionally, it also examines the relevant provisions in the Malaysian legislations that regulate the admission of non-citizens into the country. This study is doctrinal legal research which is qualitative. The data used in this research was collected from library-based resources. These data were then analysed by using methods of content analysis as well as critical analysis. The article found that there are inconsistencies between international law and Malaysian law in matters concerning asylum-seeker's admission and those asylum-seekers in Malaysia should not be deported. Therefore, this study suggests that Malaysia should amend the provisions in the *Immigration Acts 1959/1963* and the *Passports Act 1966*. However, if the amendment of these legislations is not practical, it suggests that the Minister in charge of immigration affairs to make an order of exemption

to the asylum-seekers so that their entry at the border would not be denied. This article shows that despite states' firm belief that they are entitled to use domestic law to deny the admission of asylum-seekers into their territory, international law provides a few mechanisms to remedy the legal loopholes.

Keywords: Asylum-seeker, deportation, Malaysia, non-refoulement, right to enter

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INTRODUCTION

Maintaining territorial integrity has been every state's top priority. States will go to a great extent to protect their boundaries, often in disregard of human rights and established rules of law. State's sovereignty is closely related to territorial integrity. As states remain sovereign at all times, they can decide who can enter its boundary and who cannot (Jennings & Watts, 1992). This powerful notion of sovereignty has created a complicated situation between states' prerogative to maintain their borders in one hand and honouring the human rights of the asylum-seekers on the other. It is a well-established custom in international law that the asylum-seekers have the right to seek asylum (Gil-Bazo, 2015). Thus, it is consistent with the much invoked Universal Declaration of Human Rights (UDHR), under Article 14 that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." For such a right to be enforced, the asylum-seekers must first be able to enter the state's territory in order to enjoy the asylum (Hirsch & Bell, 2017).

Malaysia and Treatment of Asylum-Seekers at its Border

As a sovereign state, Malaysia has every right to guard its border against external intrusion. However, the notion of 'intrusion' sometimes blurs the line between a genuine need of the asylum-seekers to enter the state's territory for safety as provided under international law and state's legitimate interest in protecting its frontier. Malaysia's track records of treating asylum-seekers

who arrived at its border are somewhat complicated. Asylum-seekers are essentially those persons whose application for formal refugee status have not yet been assessed by relevant authorities. The incident that occurred in 2015, where the Malaysian authority decided to push away those boats that were carrying asylum-seekers from Myanmar back to the open sea was nothing new (Ng, 2015). Back in the 1990s, the Malaysian government had towed boats of Vietnamese asylum-seekers back to the sea. The former premier, Mahathir Mohamad described this action as for "preventing foreign vessels from entering [Malaysian] waters" and to protect local fishermen from intrusion from foreign boats (Erlanger, 1990). The treatment of Malaysia towards asylum seekers at that time had reached the unacceptable level. The former premier even used the word "scum" to refer to the asylum-seekers who remain in the country after they had been saved (Erlanger, 1989). However, in the 1970s with the incoming of large groups of Filipino asylum-seekers fleeing the southern Philippines after a major fight broke out, they were allowed entry into the country without much conflict from Malaysia (Kassim, 2009).

This harsh treatment of asylum-seekers now, to some extent, had changed, specifically with regards to the Rohingya asylum-seekers. The Malaysian government has laid down plans to accept and help these asylum seekers and had collaborated with relevant institutions such as the office of the United Nations High Commissioner for Refugees (UNHCR) (Zulkefli, 2017).

However, the authors would reiterate the fact that this treatment is a matter of humanitarian concerns, rather than consideration of any legal obligation. This humanitarian-based reaction has been continuously relied on by Malaysia as a basis on how it should treat the asylum-seekers since decades ago, which resulted in fluctuated and inconsistent policies.

MATERIALS AND METHODS

This article uses doctrinal legal research, which is a qualitative study to prove that Malaysia is obligated to allow asylum-seekers to enter its territory and second is that those asylum-seekers who are already residing in Malaysia should not be deported. The materials for analysis were found from multiple sources in international and local literature. These sources were collected from both primary and secondary data. These include primary data such as treaties, conventions and international agreements, as well as the Malaysian law statutes. Whereas, the secondary data include materials such as books, journal articles, newspaper reports, reports published by international agencies, law reports and others. These data were then analysed by using methods of content analysis and critical analysis.

THE INTERNATIONAL LAW POSITION

Malaysia is not signatory to the core conventions of international refugee law, which are the Refugee Convention 1951 and its protocol, the 1967 Protocol Relating to the Status of Refugees. Malaysia has no plan

to ratify the Refugee Convention for some vague reasons of difficulty with dealing with refugee “problems” (Palansamy, 2015), and fear that refugees will have more rights than its people, such as the right to work (Naidu, 2012). This thought is somewhat consistent with Malaysia’s perspective on human rights in general which is more towards the “Asian values” which prioritise the community rights as opposed to the individual rights (Nordin, 2010). Due to this reason, many of the rights applicable to the asylum-seekers and refugees are not enforceable in Malaysia. Thus, it has caused many legal conflicts between the standards required by international law, and what the Malaysian law provided. It is especially apparent in matters concerning asylum-seeker entry into the country.

Right to Seek Asylum

Although international law does not guarantee the right to *receive* asylum, the Universal Declaration of Human Rights (UDHR) which is the foundational document on international human rights provides for the right to *seek* asylum under Article 14. Everyone has the right to seek asylum regardless of their nationalities, religious beliefs or association to any particular group. The only exception to this right is if that person has committed non-political crimes or serious crimes of international nature, such as the crimes against humanity or war crimes (Kapferer, 2008). Admittedly, this Declaration is a soft law which has no binding effect on state parties. However, many of the provisions in this document

has since achieved the status of customary international law, including the right to seek asylum. The right to seek asylum is implicit in many of the international agreements such as the Convention Relating to the Status of Refugees 1951 and many other regional conventions governing the right of refugees such as the Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 and the Cartagena Declaration on Refugees 1984.

Rule on *Non-Refoulement*

The rule *non-refoulement* flows from the right to seek asylum. The concept of *non-refoulement* means the protection of a state other than the state of nationality of the asylum-seeker by not returning him to the place where he was fleeing from persecution (Duffy, 2008). The application of this rule is also extended to the non-rejection at the frontier when there is an attempt by the asylum-seekers to enter the state's territory. It is a widely held belief that the rule has now attained a status of customary international law which requires Malaysia to observe and follow even without an explicit international agreement that provided as such (Yogendran, 2017). This rule is the very fundamental of international human rights and refugee protection. This principle operates as some form of guarantee for individuals to have access to asylum. The system works through this principle by prohibiting states from expelling the asylum-seekers when they reach the frontiers of those states intending to seek asylum. This right is supported by

many universal conventions, including the regional ones.

According to Article 33 of the Refugee Convention, the principle of *non-refoulement* dictates that “[n]o 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”. Besides, Article 3 of the Convention Against Torture 1984 writes that “[n]o state shall expel, return or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture”. While Article 3(1) of the United Nations Declaration on Territorial 1967, provides that “[n]o person [...], shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”

In order for particular rules to become custom, it has to fulfil specific requirements. The first is that significant numbers of states have observed such rule; second, the observance has to be related to state's own belief (*opinio juris*) that the rule must be observed as a matter of legal obligation (Rosenne, 1984). Many international conventions have adopted this principle as part of their sacred rules. These include major international covenants as well as regional ones, as stated earlier. These treaties were ratified by large numbers

of states worldwide. Besides, the *non-refoulement* principle has been considered as *jus cogens* norm, that is, the norm in which no derogation is allowed regardless of how emergency the situation may be. (Costello & Foster, 2016). It is safe to say that this rule has been, as of now, already a part of customary international law.

As far as the limitation of the rule is concerned, it is of limited scope. It is as provided under Article 33(2) of the 1951 Refugee Convention, when it explicitly said that the *non-refoulement* “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 judgement of a particularly serious crime, constitutes a danger to the community of that country.” It is a particular provision that has a very narrow application. It is a question of fact and must be determined with proper due diligence standard (Lawyers Committee For Human Rights, 2000).

On July 25, 2011, an agreement entitled “Arrangement Between the Government of Australia and the Government of Malaysia on Transfer and Resettlement” had been signed in Kuala Lumpur known as refugee “swap” deal between Malaysia and Australia. (BBC News, 2011) This agreement will allow the transfer of 800 asylum seekers from Australia to Malaysia and 4000 registered refugees under UNHCR to Australia. However, this agreement did not proceed any further due to the decision laid down by the Australian High Court that such arrangement was unlawful under

the Australian law as Malaysia is not a signatory to the Refugee Convention and has no domestic legal framework that can protect the refugees’ rights (Siegel, 2011).

However, in the Memorandum of Understanding concerning this swap deal which was initially being kept confidential between these two countries, Malaysia had pledged to respect the *non-refoulement* principle (Government of Australia, 2011). Clause 10 of this Memorandum states that “[t]he Government of Malaysia will provide Transferees with the opportunity to have their asylum claims considered by the UNHCR and will respect the principle of *non-refoulement*.” This bilateral agreement thus proves Malaysia’s *opinio juris* regarding *non-refoulement*, namely, that Malaysia feels legally obligated to observe the *non-refoulement* principle as part of the established law of nations.

Nonetheless, in 2015, during the influx of Rohingya’s asylum-seekers, the Malaysian coast guard known as the Malaysian Maritime Enforcement Agency (MMEA) has violated this rule by committing pushback of boats trying to enter the territory in search for a place of refuge (Ghráinne, 2017). It took the government a long time to finally admit that such rule constituted customary international law that bound Malaysia even in the absence of an explicit treaty that required this. However, one major obstacle would be the *Immigration Act 1959/63*, which contains provisions contrary to the rule of *non-refoulement*. It follows, therefore, that the amalgamation of the right to seek asylum

and the rule of *non-refoulement*, has become a *de facto* right for the asylum-seekers to enter state's territory (Hathaway, 2005).

THE MALAYSIAN LAW POSITION

Immigration Act 1959/63

The power to regulate the entry of persons into the country falls within the competence of the Federal government as provided by the Federal Constitution, Ninth Schedule, List I. Unlike countries who have ratified the core refugee conventions, Malaysia has no specific laws that govern these asylum seekers. The main legislative acts that deal with the entry of non-citizens into the country are the *Immigration Act 1959/63* and *Passport Act 1966*, whereas the subsidiary legislation is the Immigration (Exemption) Orders which is issued under the Federal Government Gazette. With regard to the *Immigration Act 1959/63*, Section 6 (Control of entry into Malaysia) provides that no person other than a citizen shall enter Malaysia unless he or she possessed the required documentation such as a passport. Whereas, the term "entry" is defined under Section 2(1). Section 8 of the Act provides for types of immigrants that are considered as "prohibited". The determiner "any" is used for the noun "person", which means that this provision refers to anyone other than the citizens.

Those who arrive in Malaysia and fall within the definition and the scope of this provision may be issued an order known as "Not-To-Land Notice" (NTL). It will naturally also include asylum-seekers and

refugees. Since Malaysia does not have domestic asylum laws or policies that specifically guide how the asylum-seekers should be treated upon entry, the asylum-seekers including minors are not treated differently than other non-citizens within the scope of Section 8 above (Nordin et al., 2015). Therefore, in principle, these asylum-seekers are at risk of being detained and arrested by the local authorities if they ever set their foot into the country or denied entry completely at the entry points. Detention of the asylum-seekers can be for an indefinite period since the decision to detain is not subject to judicial review as provided by Section 59A of the Act. The burden of proof lies on the person claiming that he enters the country lawfully.

A section of the same Act goes on to say that "[a]ny person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes. However, despite the existence of these provisions, Section 55(1) of the Act provides an exemption of this rule. It states that "[n]otwithstanding anything contained in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto."

Immigration (Exemption) (Asylum Seekers) Order 2011 and Passport (Exemption) (Asylum Seekers) Order 2011

It is to be noted that there are two federal government gazettes in the form of orders that provide for the exemption to the asylum-seekers arriving in Malaysia. However, these orders were made back in 2011 to accommodate the incoming of asylum-seekers from Australia under the specific programme known as “Arrangement Between the Government of Australia and the Government of Malaysia on Transfer and Resettlement”. These orders are valid for three years which is from August 8, 2011 until August 7, 2013. These gazettes prove that giving exemption to asylum-seekers to enter the country legally is not unprecedented, and it is possible as long as there is a will to do so on the part of the government.

Right to Seek Asylum and Non-Refoulement in Malaysian Law

The *Human Rights Commission of Malaysia Act 1999*, under Section 4(4) provides that “[f]or the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.” (italics added by authors). This provision and the Act as a whole should stand with the Federal Constitution as the Declaration provides for the right to seek asylum under its Article 14. Thus, this article would argue that such right and the rule of *non-refoulement* are not inconsistent with

the Federal Constitution. Since these two notions are meant to protect the right to life, this can be seen squarely through the lense of Article 5(1). This Article provides that “[n]o person shall be deprived of his life or personal liberty save in accordance with the law”. This vital provision guarantees that human life must not be deprived unless it is allowed by the law in force (Das, 2002). Due to the wording of the provision, such a constitutional guarantee is interpreted as not just restricted only to citizens of the country, but also extended to the non-citizens as well (Masum, 2008).

The *non-refoulement* is, in fact, the protection of the right to life in essence. The *raison d'être* of this rule can be traced back to Article 33 of the Refugee Convention 1951 which provides that state shall not “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”. The rule of *non-refoulement* existed in the first place in order to protect the right to life of the refugees who have to cross international borders to search for a place of refuge. A review of the *travaux préparatoires* of the 1951 Refugee Convention shows that the prohibition from refouling the asylum-seekers are for the sake of protecting their right to life (UNHCR, 1990).

Besides, in December 2017, a Minister in the Prime Minister’s Department, Datuk Seri Dr Shahidan Kassim had admitted that the Malaysian government had always

respected the principle of *non-refoulement* (BERNAMA, 2017). This admission has cleared an ambiguous position that has clouded the issue of *non-refoulement* for so many years. It is to be noted that Malaysia's position concerning this rule was not direct and clear and has been a subject of academic speculation. The government has generally observed the rule, but in 2011 and 2012, despite a protest, it had deported a total of 17 ethnic Uighur asylum-seekers registered with UNHCR in Malaysia back to China.

Additionally, the rule on *non-refoulement* exists in Malaysian law *in principle* in the *Geneva Conventions Act 1962* (Act 512). It can be observed under the Fourth Schedule (Geneva Convention Relative to the Protection of Civilian Persons in Time of War), Article 45 which states “[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.” This paragraph is, in fact, describing a *non-refoulement* rule, bearing in mind that this Act is an enacting statute that transformed the four Geneva Conventions concerning the treatment of persons at the time of war into an enforceable Malaysian law. Consequently, the rule on *non-refoulement* had also been transformed into Malaysian law itself. However, the intention and the purpose of the Act was for the civilian persons within a specific situation, that is, during a war which is a *lex specialis* law. Thus, the application of this rule towards the asylum-seekers can be considered as a part of mechanism to remedy the existing

legal loophole. Taking into consideration also Article 8(1) which provides that “[a]ll persons are equal before the law and entitled to the equal protection of the law”. A creative interpretation of these various provisions by the Court will usher in a new era of promising legal protection of asylum-seekers and refugees in Malaysia.

DEPORTATION OF ASYLUM-SEEKERS ALREADY RESIDING IN MALAYSIA

This article argues that the very nature of asylum-seekers who are among the most vulnerable types of human beings and as discussed earlier that Malaysia has no legal framework governing the treatment of their entry into the country, it necessitates a creative interpretation of the legal sources. A literature review on the protection of asylum-seekers in Malaysia through the application of *non-refoulement* rule revealed a pattern of arguments that are based on the incorporation of customary international law within the definition of the scope of the common law of England. Supaat (2017) argued that *non-refoulement* was part and parcel of international law, but it is not part of the Malaysian law. As Malaysia is a dualist state, the Malaysian courts are not bound to apply laws which are not part of the law of the land (Ismail, 2010) and thus may disregard *non-refoulement* in its consideration. It is as provided by the *Civil Law Act 1956*, Section 3(1).

Therefore, Supaat argued that such rule was applicable in the Malaysian courts because the *non-refoulement* rule was a

part of the common law of England then, as reflected by the current United Kingdom's *Human Rights Act, 1998*, Article 3. As already stated by Supaat, the bindingness of the rule on Malaysia is indisputable (Supaat, 2013). However, a review of courts' jurisprudence showed that the judiciary was generally reluctant to accept this in their consideration. It can be observed in *PP v Narogne Sookpavit* 2 MLJ 100 (High Court of Johor Bharu, 1987) where Shanker, J. said "[t]he customary law to which Article 14 of the Convention on the Territorial Sea is said to correspond may be the customary law of England, or it may be customary international law. In the Court below me, Defence Counsel seemed to suggest that it was self-evident that such customary law was part and parcel of Malaysian law. I am far from satisfied that this is the case.... Section 13 and 14 of the *Evidence Act, 1950* require evidence to be given of a custom before the Court can reach a positive conclusion as to its existence... No such evidence was led in the Court below." Hamid thought that the learned judge in the case above had strictly rejected customary international law. (Hamid, 2005). However, this author believes that was not the case. The decision not to acknowledge the existence of customary international law was because of lack of evidence before the Court. It shows that proving a particular rule of international law as a custom is difficult to succeed before Malaysian courts. The alternative argument should be made instead in order to achieve the same goal.

As argued earlier, therefore, the best course of action in arguing the *non-refoulement* rule in Malaysian courts should be based on Article 5(1) in combination with Article 8(1) concerning the right to equality as well as the Article 45 of the Fourth Schedule under *Geneva Conventions Act 1962* (Act 512), as it is much easier to argue a provision of local written law in Malaysian courts rather than to argue on unwritten law of the international source. This provision is dynamic enough to be making a convincing argument on behalf of the asylum-seekers in Malaysia facing the deportation by pleading to the Court for an expansive reading of the provision (Hashim, 2013), bearing in mind that states owed under international law negative and positive obligations to protect the right to life of all persons within its jurisdiction (Sicilianos, 2014).

Besides, the *Civil Law Act 1956*, Section 3(1) made it clear that if there is law in force that can have the same effect as foreign law, the local law should be relied on, not the other way around (Shuaib, 2009). In order to stop the deportation of an asylum-seeker, it is advisable that a legal suit should be brought before the competent Court and application should be made to stop such deportation by applying for the writ of *certiorari* through the invocation of those provisions as argued earlier and in addition to this, to plead for the Court to compel the Minister to exercise his power to exempt that asylum-seeker under Section 55 of the *Immigration Acts 1959/1963*.

To conclude this part, the dicta of *Bugdacay v. Sec. of State for Home* [1987] AC 514 at 531 in which the Lord Bridge observed that: “The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis for the decision must call for the most anxious scrutiny.” There is no reason why the Malaysian Court cannot act as the last protector of these asylum-seekers’ right not to be returned to places of danger. The Court is duty-bound to make sure this critical right is not imprudently affected by the state’s administrative oversight.

FINDINGS AND DISCUSSION

To address the first question, it is to be noted that the asylum-seekers have not fulfilled any of the requirements to enter Malaysia legally per local legislation. Malaysian law never distinguishes between asylum-seekers and illegal migrants without proper documentation. They are at risk of being arrested and may be charged for immigration law violations. The deportation or denial of entry will put them at risk of torture and even death upon return which directly violated the rule of *non-refoulement*. These provisions in the *Immigration Act 1959/63* and the *Passports Act 1966* if strictly followed would amount to a violation of Malaysia’s international responsibility. The best step to take is by the Minister in charge of immigration affairs to invoke Section 55 of the *Immigration Act 1959/63* as well as Section 4 of the *Passports Act*

1966 and to declare that those who enter the country to seek asylum would be exempted from the requirement under both Sections. The Minister should also make relevant regulations regarding asylum-seekers proper entry into the country as provided under Section 54 of the *Immigration Act 1959/63* and Section 11 under the *Passports Act 1966*. Malaysia is called upon to amend the provision in the *Immigration Acts 1959/1963*, of Section 6 which has a minimal scope of types of people who may enter into the country, as well as the provision in the *Passports Act 1966* concerning the entry with a passport under Section 2. If the amendments to these Sections are not practical, this Article proposes that the Minister in charge of immigration affairs makes an order of exemption to the asylum-seekers so that their entry would not be denied. It can be best achieved by invoking Section 55 of the *Immigration Acts 1959/1963* as well as Section 4 of the *Passports Act 1966*, as the asylum-seekers are considered as “a class of persons”.

With regards to the second question, it is to be noted that the principle of *non-refoulement* as in treaties and customs could be said as asylum-seekers first line of defence. Asylum-seekers leave their countries because of the threats to life that they faced in their country of origin. The refusal of Malaysia to allow these asylum seekers to enter its territory in seeking for refuge, at least for a temporary period violates established rules of international law *vis-à-vis non-refoulement* (Helton, 1992). Malaysia should not expel asylum-seekers

seeking access into its territory to seek safety as the principle of *non-refoulement* explicitly forbids this. This Article strongly believes that it is a naïve standpoint to accept the notion that the right to seek asylum and the rule on *non-refoulement* as engraved in the treaty cannot be construed as to entitle the asylum-seekers to enter state's territory. It just does not make any sense as far as the right to seek asylum is concerned if states were to be given unfettered power to push the asylum-seekers away (Gkliati, 2011). Since treaties were born out of international politics, obviously it was not possible to construct this implicit entitlement explicitly.

CONCLUSION

Therefore, Malaysia must be cognizant about the existence of UNHCR as the agency with the authority to determine the refugee status in Malaysia. Asylum-seekers should be allowed access to UNHCR, which is located in the country as they have no other international protection to guarantee their safety—blocking access to its territory, which in turn, stopping the asylum-seekers from getting to UNHCR is utterly unacceptable given the history of the existence of the agency which was founded back in 1978 in this country to deal with the influx of Vietnamese asylum-seekers to Malaysia. It is Malaysia's responsibility to allow these persecuted people access to institutional protection available.

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