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REFUGEE CHILDREN IN MALAYSIA AND THE CUSTOMARY INTERNATIONAL LAW

Prepared By

ISSE ALI ISSE

Somalia

GENERAL INTRODUCTION

1,1 INTRODUCTION

In an ideal setting, where the international protection regime for refugees is fully adopted or incorporated and then enforced by a state whose domestic laws provide sufficient safeguards, asylum-seeking children will not be detained[1] and their application for refugee status will be processed by a body set up by the authority, with the possibility of appeal. Once recognised as refugees, refugee children will be treated without discrimination[3] and issued with paperwork on their identity they will enjoy freedom of movement and equal treatment as nationals of the receiving country.

Therefore, there must be a reason why refugee children continue to find themselves in a complicated situation in Malaysia considering it has been hosting a large number of refugees since the 1970s and, thus, has vast experience. Notwithstanding the unrelenting criticism from many factions concerning its treatment of refugee children, Malaysia's authorities have been constantly defending their actions and decisions. This defence is further buttressed by vigorous claims regarding Malaysia's status as a non-contracting state to the 1951 Convention Relating to the Status of Refugees (CRSR) and the fact that Malaysia's domestic legal framework does not recognise refugee children. Instead, they are classified as illegal immigrants.

With a view to providing better protection for refugee children in the country, this study looks at the applicability of two principles of customary international law (CIL) relating to refugees, i.e. the *non-refoulement* rule and the principle of the best interests of the child. The CIL requires no state consent and, thus, should its customary status be proven, the rules would become binding on Malaysia provided that the Malaysian legal framework contained nothing to the contrary.

1.2 GENERAL SCENARIO

Malaysia is a sovereign state practicing constitutional monarchy system comprising of thirteen states and three federal territories. It is located at the heart of the Southeast Asian region. It consists of a peninsular also known as West Malaysia separated by the South China Sea from East Malaysia, an island, which is also referred to as the Borneo where Sabah and Sarawak is situated. The peninsular shares land border with the southern part of Thailand in the northern part, while Sabah and Sarawak share borders with Kalimantan, Indonesia; Brunei and Philippines. and protection from the Malaysian government, and since Malaysia has not acceded to or ratified the 1951 Convention Relating to the Status of Refugees, the office of the United Nations High Commissioner for Refugees (UNHCR) utilises its mandate to process and identify genuine refugees in Malaysia by issuing them with UNHCR identity papers.

Unfortunately, these documents do not fully safeguard them from an array of discriminatory treatment, abuse and violence because inherently, under Malaysian law, refugees are not legally distinguished from economic migrants and they constitute a group committing offences against the law, being categorised as ‘illegal immigrants’ under the Immigration Acts 1959/1963 if they are in breach of its provisions for valid entry and stay and thus subject to criminal penalties. Agencies such as the Immigration Department and the *Ikatan Relawan Rakyat Malaysia* (RELA), a community-based voluntary army acting in their power under the Essential (Emergency Service) (Volunteer Armed Forces) Regulations 1964, continue to arrest refugees who will then be detained at the Immigration Detention Depot, sometimes prior to deportation and sometimes indefinitely unless and until the UNHCR office intervenes.

These incidents are the reflection of a clear linkage between the non-existence of law, the exclusive dependence on the discretionary administrative powers of the authorities, such as policies introduced to deal with refugees, and the conflicting actions of the enforcement personnel against refugees. In response to negative reporting and comments, Malaysia has nevertheless shown the world that it continues to accept refugees and is able to respond well to emergency calls despite its vocal rejection of the Refugee Convention. The recent rescue of Rohingyan refugees whose boat was sinking in Malaysian waters is one of those humanitarian gestures consistent with the principle of *non-refoulement* shown by the government. Currently, there are also plans to register refugees, including refugee children, to keep their data in the government database. This move may protect UNHCR card holders from detention and deportation.

The condition of refugee children in Malaysia is a matter of concern for various parties who have argued that, as a strategy for the advancement of refugee rights and protection, Malaysia should first and foremost ratify the 1951 Convention Relating to the Status of Refugees (CRSR), the main legal instrument in the international protection regime for refugees. However, from the perspective of the Malaysian government, this call is contrary to its values: it is not in its economic and social interests; it raises various issues of security; and it is a threat to its sovereignty. After so many years, Malaysia continues to offer the same justifications and there is no indication of the possibility of ratification. Therefore, it is unrealistic to anticipate that Malaysia will become a contracting state to the CRSR in the near future. The other proposition is to prove Malaysia's obligation under the CIL, which requires no ratification or state consent.

The principle of *non-refoulement* and the best interests of the child are two rules that many believe have become international customs that might benefit refugee children. Based on time factors, the gravity of the refugee children's condition, and the need to

urgently improve their protection, the second suggestion is considered more reasonable and, most importantly, more feasible. Besides their capacity to provide protection for refugee children, the implementation and application of the two principles will perhaps indirectly benefit adult refugees. Moreover, the concern here is to protect refugee children - the most vulnerable group within the refugee community - as soon as is practicable to avoid any further detrimental effects. Nevertheless, it is of the utmost importance to examine whether or not the current legal framework in Malaysia will allow the application of the said rules in court.

1.3 WHY REFUGEE CHILDREN?

In a country where no specific law for refugee protection is available, the wellbeing of all refugees alike is at stake. Without any protection framework, asylum seekers and refugees are often at risk of being unfairly treated by the authorities and the community. However, within the refugee colony, there is one particular group of individuals who are affected more than others by any shortcomings in the law and other hardships: refugee children. The main reason for choosing refugee children as the subject of this study is their invisibility, not only within the refugee community but also within the community of the host country at large. They usually hide from the enforcement agencies and shy away from the local community to avoid arrest and unwanted attention. At the same time, lack of real protection has caused the authorities to ignore the important requirement to record refugee children and their families on an official register. In Malaysia, literature on refugee children is usually found only on the

UNHCR website but rarely in scholarly work. Children are either commonly mentioned as

“women and children” or left out entirely when the term “men and women” is used.

The other reason is their vulnerability compared to adult refugees and ordinary citizens' children. The invisibility of refugee children is linked to their vulnerability; for example, they are invisible because they are vulnerable to harsh enforcement of the law, and when they become invisible they become more vulnerable since they are not on the radar of protection. Studies have shown that refugee children are subject to additional traumatic conditions at all phases of forced migration. Their positions as children and refugees make them more

susceptible to various risks and dangers. Their vulnerability is also due to their naivety, dependency and inability to fend for themselves. Their dependence on their parents, guardians, and care-givers, and their lack of maturity and knowledge influence their ability to care for themselves or make informed decisions. Refugee children are indeed in need of continuous support from adults (parents and other family members) to deal with affairs affecting them and to exercise their rights. Their vulnerability, dependency and limited capacity expose them to child-specific persecution such as child military conscription, forced labour, trafficking, genital mutilation and sexual exploitation. Moreover, at any stage of the refugee cycle, children are at risk of exploitation, manipulation, harassment, neglect and abuse. As such, they are at further risk of suffering from mental and physical health problems.

By comparison, due to their limited capacity and ability to cope with agony and hardship, the effects of violation and denial of refugee rights are more severe on children than on adults, and other domestic circumstances will have a direct impact on them. For instance, serious repercussions can result from the denial of rights for parents, such as the ban on them taking up gainful employment, which will affect the survival of the refugee children and their families. Without sufficient resources, parents cannot bring food home for the family, and access to healthcare and education will be restricted. Consequently, their full development, welfare and enjoyment of rights, such as right to education and access to healthcare, will also be affected. When refugee children are denied access to education, they become more vulnerable, because education is a tool for restoring their hope and

dignity, and building their future; there are also scores of unaccompanied and separated refugee children who are more vulnerable than those who are accompanied by their parents, guardians or carers. The other challenges facing refugee children include the following: being accused of pretending to be children; being mistakenly identified as illegal immigrants who have violated the law of host states and are perceived as a threat to states' security and social stability; being seen as a burden on social and health services; and being denied international protection or refugee status because of their alleged role as combatants.

The conditions and challenges stated above lead to trepidation and concern for their survival and entitlements as children, especially when the number of refugee children continues to increase. Global statistics for 2007 show that children below the age of 18 years account for about 46 per cent of the total refugees and people in refugee-like situations. In 2012, the number of refugees stood at 10.4 million, with almost 7.4 million children below 18 years of age, which is more than 70% of the total refugee population. In Malaysia, the office of the United Nations High Commissioner for Refugees reports that, as of October 2010, children made up around 19,200 (21%) of the total of 91,100 refugees and asylum seekers registered with the Kuala Lumpur office, and it is estimated that the number of persons of concern to UNHCR in 2010 living within Malaysian borders who are not registered with the international body is around 10,000 people. By August 2013, around three years later, the number of refugees and asylum seekers had increased to 108, 336; around 25,000 of them were children below the age of 18, which is about 23%. Meanwhile, the number of unregistered asylum seekers was recorded at 49,000 people.

In short, refugee children are a grave concern in this study since they are not treated as children first and the way the authority treats many of them is detrimental, damaging to their development and contrary to the principle that children are rights holders.[52] Specific attention to refugee children in scholarly works shows the gravity of their condition that must be addressed as soon as possible.

1.4 WHY CUSTOMARY INTERNATIONAL LAW?

For many commentators, customary international law is a threat to state sovereignty due to its nature of compelling states to fulfil their obligations under international law involuntarily.

Firstly, were it to be proved that the two rules - the principle of *non-refoulement* and the best interests of the child - have become international custom, Malaysia would be automatically bound by the principles unless Malaysia's persistent objection could be shown. Despite being the subject of constant debate for its allegedly uncertain sources, premises, contents, uses and compliance, CIL retains its distinctive feature as a tool for binding states without consent, especially when there is a compelling need to induce states to act in accordance with international law as soon as possible.

Secondly, the ratification of the CRSR cannot single-handedly solve the problem of protection in Malaysia. This is mainly because records have shown that, as Malaysia is a dualist state, a very long time may elapse before the CRSR can be made domestically enforceable by the Parliament via incorporation by statute. The previous treaty, the UNCRC, was ratified in 1996 but only some of its provisions were incorporated in the Child Act 2001; the rest are not enforceable because they are not yet incorporated into any statute and no enabling statute has been enacted. Thus, it is illogical and impossible to imagine that the CRSR will be treated any differently from the UNCRC. Furthermore, the ratification of the CRSR will not necessarily improve the protection of refugees unless it is coupled with the authorities' full commitment to giving effect to state obligation accompanied by full and prompt implementation of the refugee convention. The third argument concerns the fact that Malaysia has no intention of ratifying the CRSR for various reasons; this is discussed in Chapter 3, which addresses Malaysia's rejection of the treaty. Consequently, it is totally impractical to wait for the ratification.

Based on the above argument, this study takes the view that it is more feasible to make the most of Malaysia's existing international obligations to persuade the country to remedy the harmful environment it offers refugee children and fill the legal vacuum,

rather than attempting to press for ratification, an effort that has been futile for the last four decades. A better approach would be to investigate Malaysia's international obligations under the customary international law relating to refugees, i.e. protection against return, or the principle of *non-refoulement*, and protection under the principle of the best interests of the child. This of course depends on whether the CIL can be applied in local courts. This question is dealt with in Chapter 7.

1.5 SCOPE OF RESEARCH

This study focuses on refugee children and two legal principles believed to have reached customary status: *non-refoulement* and the best interests of the child. The term 'refugee children' used in this study includes all internationally displaced children who are forced to leave their countries of origin or habitual residence and are currently seeking refuge in Malaysia.

Their background is irrelevant as long as their departure to Malaysia is not voluntary. In Malaysia the term 'refugee' has come to be used to refer to asylum seekers and recognised refugees under the UNHCR mandate. No distinction is made between children who are 'technically' refugees according to the CRSR and those who do not fall under the CRSR classification, such as environmental refugees and people escaping generalised violence, or between children who are currently under the mandate of the UNHCR office, those whose applications to the UNHCR are being considered, and those who have not applied for refugee status to the UNHCR. Such distinctions serve no purpose as Malaysia has not ratified the CRSR. The scope extends to all refugee and asylum-seeking children in Malaysia, be they accompanied or unaccompanied or separated children (children who are alone without their parents or adult care-givers). Such inclusion is justified because the researcher does not want any child to be disregarded as all refugee children share some form of common difficulties. For brevity, the term 'refugee children' is used to refer to children coming to Malaysia as a result of forced displacement, including a) those who have applied for refugee status with the UNHCR and are waiting for a decision, b) those who have been recognised as refugees or persons of concern by the UNHCR, and c)

those who have been refused refugee status but whose return is impossible for security reasons. Children in the first and second categories are currently relying on the mandate of the United Nations High Commissioner for Refugees

(UNHCR) office for protection.

1.6 AIM OF STUDY

The situation and predicament of refugee children under Malaysian jurisdiction and the pressing need to rectify the problems set out above have sparked the interest in conducting this research. Taking the concerns of the government and plights of the asylum seekers and refugees into consideration, this study aims to investigate potential ways of applying international standards for the protection of refugee children in Malaysia without the ratification of the CRSR. The investigation involves the examination of the applicability of

two customary international law rules, the principle of *non-refoulement* and the best interests of the child, from two perspectives, i.e. the international law and domestic law perspectives. This study argues that, if the two principles are in fact international custom, it is necessary to determine whether international custom is recognised as a source of law in Malaysia. Furthermore, the study seeks to confirm whether the customary international law might legally bind Malaysia and its domestic courts in order to compel the authorities to fulfil their duties in international law for the improvement of the protection of refugee children in its

territory.

1.6.1. Research Questions

The study is guided by the following research questions:

a. What is the treatment accorded by the authorities to refugee children in Malaysia?

b. Have the principles of *non-refoulement* and the best interests of the child become rules of customary international law and are they binding on Malaysia?
c. What are the state's obligation towards refugee children under the customary principles of *non-refoulement* and the best interests of the child?
d. If the two principles are indeed international customary law, are they legally applicable in the Malaysian courts?

1.6.2. Research Objectives:

a. To examine the extent to which refugee children are being protected under the

   Malaysian legal system;

b. To analyse the customary status of the principles of *non-refoulement* and the best interests of the child and the operation of the persistent objector rule;
c. To identify the duties of state under the customary rules of *non-refoulement* and the best interests of the child;
d. To examine the applicability of the principles of *non-refoulement* and the best interests of the child as international customs in Malaysian courts; and
e. To recommend improvements in the law and practice relating to the protection of refugee children.

1.7 SIGNIFICANCE OF STUDY

The significance of this study lies in its moderate approach to persuading the Malaysian government to improve the situation of refugee children in Malaysia by providing evidence of their predicament and Malaysia's violation of international law. This study believes that there is no 'one size fits all' approach to dealing with the refugee problem. While acknowledging that Malaysia is not in a position to ratify the CRSR, this study recommends that the country focus on the development of a protection mechanism operating outside the CRSR, i.e. the complementary protection that might be based on the CIL and the United Nations Convention on the Rights of the Child (CRC), to address the

critical needs of refugee children. This approach is taken because the ratification of the CRSR is not a single guarantee that refugee rights will be preserved and protected, as the commitment of the state is equally important to ensure meaningful implementation of the CRSR.

Studies on whether human rights treaties are effective in improving the human rights practices of a country have shown that state ratification of human rights treaties is not associated with better human rights practice. It has been suggested that countries that ratify human rights treaties are less likely to comply with treaty requirements than countries that do not. At this juncture, the CRSR cannot be viewed as the panacea to resolve the problem of protection. Considering that there is no indication of when Malaysia might ratify the CRSR, and that its ratification would provide no guarantee of Malaysia actually conforming to its requirements, it is proposed that promoting compliance with existing obligations under the CIL is a more practicable approach for Malaysia. The combination of Malaysia's international obligations under various sources of law would make a good protection framework for refugee children, but in this study the scope is limited to CIL.

This study is also timely and relevant as it seeks to suggest an improvement to the legal framework capable of ensuring that refugee children's temporary period of residence in Malaysia will contribute towards recognising their rights and meeting their needs. It is hoped that this study will add to our knowledge about alternative legal measures that might be employed by non-contracting states to safeguard the rights of refugee children seeking refuge in developing countries. Apart from that, this study will contribute towards finding the means to encourage other states to comply with international obligations. It is also hoped that the study will enrich our understanding of two other aspects: first, the risks that refugee children are facing in states without national legislation for refugees; and second, the long-term benefits of securing the rights of refugee children – benefits to the children themselves, the host country and indeed the whole world.

1.8 IMPACT OF THE STUDY ON PREVIOUS RESEARCH

This study is also current, as demonstrated by the number of papers presented from this research as listed below:

1. Dina Imam Supaat (2013) 'Refugee Children under the Malaysian Legal Framework' UUM 7th International Legal Conference, 13- 14 November 2013 (Putrajaya, Malaysia).
2. Dina Imam Supaat (2013) **"**Customary International Law for Refugees and Its Applicability in the Malaysian Courts**".** Syariah and Law Discourse 22 May 2013 (Nilai, Negeri Sembilan).
3. Dina Imam Supaat (2013) "Escaping the Principle of Non-Refoulement", Kuala Lumpur International Business, Economics and Law Conference, 8-9 April 2013 (Kuala Lumpur).
4. Dina Imam Supaat (2012) "The Principle of the Best Interests Of The Child as the Basis of State Obligation to Protect Refugee Children in Malaysia". Kuala Lumpur International Business, Economics and Law Conference, 3-4 December 2012 (Kuala Lumpur).
5. Dina Imam Supaat (2012) "The Rights and Legal Status of Refugee Children in Malaysia". FSU Academic Discourse, 28 November 2012 (Nilai, Negeri Sembilan)
6. Dina Imam Supaat (2012) "The Principle of the Best Interests Of The Child as the Basis to Protect Refugee Children in Malaysia". Syariah and Law Discourse, 13 September 2012 (Nilai, Negeri Sembilan).
7. Dina Imam Supaat (2012) "The Extent to which Refugee Children in Malaysia are being Treated as Children First", International Seminar on Syariah and Common Law, 3-6 March 2012 (Nilai, Negeri Sembilan).
8. Dina Imam Supaat (2009) "Challenges to Dignity, Pride and Self-Esteem: Refugee Women and Children in Refugee Camps and Temporary Host Country', ROLES Seminar, 9 December 2009 (Birmingham, UK).
9. Dina Imam Supaat (2009) 'Charting the Course for the Protection of Refugee Children's Rights: the Malaysian Experience', SLSA Annual Conference, 7-9 April 2009 (Leicester, UK).
10. Dina Imam Supaat (2008) 'Rights of Refugee Children in Malaysia: What We

Protect and What We Should Protect' Birmingham Law School Postgraduate Seminar**,** 31 Oct 2008 (Birmingham, UK).

1.9 RESEARCH METHODOLOGY

The research is in essence a qualitative legal study with the aim of proving that Malaysia cannot escape the duties imposed by the principles of *non-refoulement* and the best interests of the child. The main sources of this study are found in international and local literature and materials. The study is entirely library and document-based and depends on primary and secondary resources. Analysis is drawn from data, information and facts gathered from the multiple sources, and legal analysis is conducted based on local and international authorities.

1.10 RESEARCH LIMITATIONS

This research is interested in finding an alternative way of holding Malaysia responsible for refugee children using customary international law principles. The main agenda is to investigate the status of customary international law as a source of law. It attempts to show whether or not the principles come under the purview of 'law' as provided under the Federal Constitution and whether they might be applied in domestic courts. This research focuses on just two principles, the *non-refoulement* rule and the best interests of the child, regardless of any other principle that may also have been said to have attained customary status.

Although the research looks at state responsibility towards refugees under the customary rules, this study does not deal with any legal action that refugee children might take against the authorities in order to enforce their rights or the procedure for doing so, such as the procedure of applying to the court for leave to compel it to exercise its power to perform judicial review of a decision made by an authority. Remedies for the failure of the state to perform its duties in international law are also omitted from the scope of this research. In addition, it does not discuss the application of the BIC on the basis of legitimate expectation.

INTERNATIONALLEGAL FRAMEWORK FOR THE PROTECTION OF REFUGEE CHILDREN

2.0 INTRODUCTION

The primary objective of this chapter is to explain the international legal framework for the protection of refugee children including the complementary protection mechanism to show the extent to which they are protected under the international framework focusing on two international treaties: the 1951 Convention Relating to the Status of Refugees and the United Nations Convention on the Rights of the Child. It also examines the position of custom as a source of law in refugee protection. The discussion in this chapter begins with the definition of refugee children and the overview of the international legal setting for the protection of refugee children. The overview first shows that the main principle of the refugee protection regime only benefits refugee children currently seeking refuge in states that are parties to the CRSR, while children who arrive at non- contracting states have limited protection. It then explains complementary protection for refugees under the international human rights law (IHRL). In discussing IHRL, this study undertakes a specific analysis of the UNCRC especially the principle of the best interests of the child (thereafter BIC) and the principle of non- refoulement (thereafter NR) as they provide vital complementary protection for refugee children.

This chapter is also dedicated to a discussion of the role, status and creation of customary international law, as an alternative to making states accountable under the international law, especially when treaties and other written law cannot be applied in a state to protect refugees. It explains the creation of customary international law and its two basic components: state practice; and *opinio juris*, especially regarding a difference of opinion among international law writers on the importance of each element in establishing and

proving a rule. This part is the central theme of this chapter as it will show how customary international law operates to fill the gap that exists in situations where ratification of treaties cannot be expected and where a ratified treaty has not become law and lastly, it explains the justification for choosing to pursue Malaysia's obligation under customary international law rather than pushing for the ratification of the CRSR.

2.1 INTERNATIONAL PROTECTION FOR THE REFUGEE POPULATION IN GENERAL.

The primary duty to protect citizens' rights lies with the states, whose responsibility extends to the enacting of laws prohibiting conduct that encroaches upon liberty and human rights, and to the setting up of institutional mechanisms to enforce human rights and penalise violations. In many circumstances, states have failed to discharge this duty or have refused to protect citizens. Meanwhile, the evolution in international law has made it an obligation for states and the international community through the United Nations to protect foreigners and aliens, for example, in the case of refugees, wherever the person is outside the country of nationality or habitual residence.

International protection for the refugee population in general is intertwined with the

International Refugee Law (IRL), which provides the principal protection regime, and the International Human Rights Law (IHRL), International Humanitarian Law (IHL), and Customary International law (CIL), which make up the complementary protection mechanism. The laws primarily come from clear and well defined sources, such as treaties, but when custom is claimed as a source of law, its clarity and definitive form is always debated. Refugee protection includes admission of refugees to the country of asylum, the application and granting of asylum, protection against *refoulement* and the search for durable solutions for refugees.

2.2 INTERNATIONAL REFUGEE LAW

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, which addresses *'... the specific vulnerability of refugees that will not be fully addressed in the general human rights protection* provides the fundamental protection in International

Refugee Law. Refugee law not only describes who is entitled to protection under international law but also places duties and obligations on contracting states. At some points it also addresses the misconduct of states that leads to cross-border refugee flow and serious mass influxes, which pose a grave threat to international peace and security. Although backed by various sources, refugee law alone is unable to provide comprehensive safeguards for refugees, and it essentially relies on international human rights law and its treaties plus the international humanitarian law and international criminal law for complementary protection. This section looks at specific protection provided for refugee children under the CRSR and the role of its supervisory body, the UNHCR to protect the same.

2.2.1 The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

Discussion in this section looks at child specific issues in relation to the CRSR and the *non- refoulement* principle in general. The 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol are intended to safeguard refugees from persecution by requiring contracting states to accept and protect those who fall within its definition. For more than fifty years, the CRSR has been "the wall behind which refugees can shelter" even though states have claimed that the CRSR has become out dated, unworkable and irrelevant. Provisions that define who are refugees and who are not or have ceased to be refugees are used by contracting states to identify and recognise refugees in the refugee status determination process. However, some deficiencies in the CRSR have reduced its effectiveness in the protection of refugee and asylum seeking children. As with other treaties, the interpretation of the terms and provisions of the Convention is a primary source of contention, especially the definition of refugee.

The definition of refugee in the Convention and its Protocol has become the basic standard for the treatment of refugees and for establishing the requirements for being considered a refugee in other instruments. The limit imposed by the CRSR in terms of

grounds of persecution exclude those who are not persecuted on account of their race, religion, nationality, membership of particular social group and political opinion from the protection of the Convention. The definition of 'persecution' is: 'the sustained or systematic violation of human rights demonstrative of failure of state protection.

2.2.1.1. Child- Specific Persecution

Nevertheless, children's claim of asylum can be more challenging than adults. Children usually rely on the refugee status of the adults, such as their parents or other family members who travel with them. If they are unaccompanied, their claim of persecution could be problematic partly because it is difficult for them to prove the well- founded fear and also because the host states perceive the ground as not fulfilling the definition of refugee. Unfortunately, the definition of refugee does not include 'age' as a ground of persecution. Age is a unique condition of being characterised as a child and being a child is sometime a ground for which a child is specifically persecuted due to his/her age, lack of maturity or vulnerability. It is more problematic when states narrowly define and apply the term 'persecution' and simply rule that certain types of threat, abuse and human rights violation falls outside the definition that consists of only the five listed grounds of persecution.

Children, like women, can be persecuted in a particular way and this has been recognised by the UNHCR. The Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees (UNHCR Guidelines on Child Asylum Claims) highlight the importance of putting greater awareness and attentiveness to the unique persecution of children. Recognition of a child- specific persecution also comes from the EU Qualifications Directive (Council Directive 2004/83/EC, 29 April 2004 which requires Member States to consider the element of child- specific persecution in their assessment of a refugee claim of children. Article 9.2 of the Directive provides that an act of persecution can take the form of…*(f) acts of gender- specific or child specific nature*. The appalling acts of child specific persecution have urged a number of organisations

including the UNHCR, UNICEF, Amnesty International and Human Rights Watch to push for its express legal recognition. This implies that child specific persecution do exist and requires specific protection under the law.

2.2.1.2 Child- Specific Refugee Status Determination

One of the major setback of the CRSR relates to the non-differentiation in the requirements of proving 'well-founded fear of being persecuted' imposed on applications made by adults and children. In practice, states have interpreted 'persecution' to involve subjective and objective elements or, in other words, the requirement to prove a person's state of mind and the facts in relation to the fear and the persecution. Hathaway and Hicks however, argue that the CRSR contains no requirement of a subjective element. The applicant should only demonstrate fear from the perspective of expectation of risk. They agree with Grahl-Madsen's analysis that recognises a person's claim of well-founded fear of being persecuted regardless of whether he is nervous or feels agitated when thinking about his return to the country where the persecution takes place. This is argument however, is not what is being practiced.

2.2.1.3 Article 33: Non- Refoulement Principle

At the heart of the CRSR lies the protection against return also known as *non-refoulement,* a paramount protection for refugees. The rule of *non-refoulement* was applied and followed by states even before the adoption of the CRSR in 1951. Many states acknowledge their duty not to return refugees under the principle of *NR* but they do not necessarily concede the refugees' right to asylum. Such a concept of protection was first articulated in Article 3 of the 1933 Convention Relating to the International Status of Refugees. The principle of *NR* contained in Article 33 of the CRSR is one of the codified provisions of *NR* and is also considered the best form of expression apart from the provisions of other human treaties with similar effect. The provision reads as follows:

"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."

Under this principle, states are prohibited from rejecting, returning or removing refugees and asylum-seekers from their jurisdiction were this to expose them to a threat of persecution, or to a real risk of torture, cruel, inhuman or degrading treatment and punishment, or to a threat to life, physical integrity and freedomThe protection against return under Article covers recognized refugees and those who have not been formally recognized. The protection applies not specifically to refugees alone but in general; it exists to prohibit the removal, expulsion or extradition of any person to a territory where he/she is liable to face persecution, torture and a threat to life and liberty.

2.2.2 United Nations High Commissioner for Refugees (UNHCR)

The office of the United Nations High Commissioner for Refugees is part of the refugee protection framework. The office was established by the United Nations General Assembly in 1949 in the aftermath of World War II, and the Statute of the Office of the UNHCR was adopted in 1950. UNHCR's core mandate is to provide international protection to refugees, which is the primary duty, and this must be carried out on a non-political basis to seek permanent solutions for the refugee problem. UNHCR is a supervisory body and its work as described in its statute should be purely humanitarian and social. It is the only body ever established by the UN exclusively to supervise and oversee the implementation of a treaty, i.e. the refugee convention

2.2.2.1. The Role and Functions

Functions of the UNHCR office are enshrined under Article 8 of its statute and its responsibility has further developed through the UNGA and the ECOSOC provisions. These include, but are not limited to, the following: promoting the Conclusions of international conventions for the protection of refugees by supervising their application and proposing amendments; promoting through special agreements with governments the execution of measures to improve the situation of refugees and to reduce the number in need of protection; and promoting the admission of refugees to contracting states or to countries of temporary refuge. The office is also responsible for promoting activities relating to the application to national laws and regulations that would benefit refugees. UNGA and ECOSOC may, through their resolutions and policy directives, extend the functional responsibility of UNHCR but they cannot impose direct obligations on states.

As regards its duty under the 1951 Convention, UNHCR is empowered with a supervisory function to oversee exclusively the implementation of the Convention and its 1967 Protocol. This was earlier provided under Paragraph 8 of the UNHCR Statute. Its supervisory role is mainly concerned with promoting state compliance with the rules of the 1951 Convention in order to give effect to its provisions, but no enforcement powers are given. The supervision function involves gathering of information; analysis of the information and enforcement. Thus, to effectively exercise its supervisory function, the UNHCR is authorised to, among other things, monitor and report on the situation of refugees but not to monitor states. Under Article of the CRSR, states are obliged to provide information on refugees requested by the UNHCR. The UNHCR also follow up the implementation of the Convention by states, and gain unobstructed access to asylum applicants, asylum-seekers and returnees. This access allows it to intervene on behalf of the refugees and asylum seekers and hold discussion and dialogue with states or government. Such dealings and refugee women, is a testimony of its commitment to seriously protect refugee children.

The UNHCR plays an important role in many refugee crises the world over, especially where a large-scale influx occurs in states that are not party to the CRSR or where a state party does not have its own refugee status determination (RSD) mechanism. Hence, its work is relevant in filling the gap left by the state, or where an UNHCR representative is involved in the state's own RSD mechanism, or where a state is incapable of undertaking the screening process on its own due to the abrupt influx of refugees at borders and in camps. As a supervisory body of the CRSR, UNHCR is mainly an instrument functioning to collaborate with states in promoting refugee protection and protecting and assisting refugees during crises. Being the primary agency for refugee protection, the UNHCR is mandated to provide international protection to refugees on a non-political basis, and to seek permanent and durable solutions for refugee problems by assisting government and private organisations approved by the government. Its role originated from the Statute of the Office of the UNHCR (UNHCR Statute) and from the 1951 Convention. Further responsibilities have been assigned by the General Assembly.

2.2.2.2. The Mandate

In discharging its duties under the UNHCR statute, the agency is required to employ a non- political basis attitude and operate on strictly humanitarian and social grounds. By abiding by the directive, the UNHCR has been able to concentrate on improving conditions for refugees and avoiding taking sides with any particular parties in any crisis. Nonetheless, it is suggested that the 'non-political' disposition is almost impossible to maintain when dealing with today's sovereign states and highly sensitive issues. Paragraph 2 of the Annex to the Statute of the Office of the UNHCR provides that the work of UNHCR shall relate, as a rule, to groups and categories of refugees. This is in contrast to Paragraph 6, which provides that the competence of the High Commissioner extends to individual refugees. However, the practices of UHNCR have shown that both groups and individuals are persons of concern to UNHCR. Difficulty also arises when UNHCR's actions of treating groups of displaced persons are taken as a finding that the source state is persecuting the group. To ease the problem, reference to Paragraph 2 of the Statute is replaced by declaring certain situations to be 'of concern to the international

community', thus authorising the UNHCR to use his 'good office' in providing assistance and protection to the groups affected by the situations. UNHCR work is extended to displaced persons, apart from mandated refugees, and both are considered as groups within the competence and concern of the UNHCR.

2.2.3 UNHCR In Malaysia

External to the national legal framework is the office of the UNHCR that operates to provide international protection for refugees in Malaysia. The UNHCR has been present in Malaysia since the boat people era in 1970s. As Malaysia is not a party to the refugee convention, UNHCR plays a fundamental and crucial role of providing a broad spectrum of refugee protection, from refugee status determination to finding durable solutions. In fact, in Malaysia UNHCR is considered the main actor in safeguarding and assisting refugees by activities such as reception, registration, documentation, status determination and resettlement of refugees.

By the request of the Malaysian government, UNHCR took the responsibility to register refugees in Malaysia and to determine the individual's refugee status. Those who are recognised as refugees are given identification card/ papers and become persons of concern to UNHCR. The Malaysian authorities have agreed that those who hold the UNHCR

identification papers will not be charged with illegal entry or failure to produce valid travel documents but this is not a guarantee against possible detention and abuse by the enforcement

2.3 INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

The system of international human rights law has taken shape through the United Nations, and its focus is to preserve the dignity and wellbeing of every individual. Reference to the UN

Charter and Universal Declaration of Human Rights 1948 in the preamble of the 1951 Convention clearly indicates that the Convention and its Protocol shall not operate in isolation[178] and that the definition of refugee and his/her protection shall develop concurrently with human rights principles. In practice, the principles of IHRL are applied to enhance refugee protection in many areas, such as in setting the minimum standards for children's education and protection of family life. The minimum treatment offered by countries of asylum to refugees must meet basic human rights standards; otherwise, it will considered noncompliance with international law. Applying the 1951 Convention alone without reference to human rights instrument may lead to violation of minimum standards. There is general recognition of the role of IHRL in supporting, reinforcing and supplementing IRL specifically in relation to the 'grey areas' in refugee protection. Principles of human rights are being used, for instance to supplement the definitions of 'persecution', 'social group', and 'asylum'. Frequent reference to IHRL is also made to determine the application and content of the principle of *non-refoulement* and protection of refugee children. However, questions are raised about the differing standards between IRL and IHRL, particularly in relation to inconsistent provisions and the standard that shall prevail.

2.3.1 The United Nations Convention on the Rights of the Child

The only instrument that specifically provides for children is the UN Convention on the Rights of the Child 1989 (UNCRC). The limited safeguards and constraints in addressing the particular protection needs for refugee children in the refugee law and other human rights treaties in general has made it essential to rely on the provision of the UNCRC for exclusive and extended protection for children seeking refuge, although this will depend on whether the UNCRC has been made part of the domestic law of a particular state. The UNCRC makes protection of children a priority and ensure that an agenda for children will not be lost in other agendas of a nation. This can be achieved by protecting children's wellbeing and development from any risks. This study believes that reliance on the general effort of children protection to fulfil the distinct needs of refugee children may not deliver similar results. That is why the

UNCRC is a particularly vital legal tool for refugee children, since the 1951 Refugee Convention is weak in its provisions for and application to children. It has been argued by Van Bueren that, by virtue of Article of the UNCRC, a state party to the UNCRC is under an obligation to ensure that all children present in its territory, including refugee children,

shall enjoy the rights provided under the UNCRC without discrimination. Children of different groups should be treated equally in such a way that every child may have access to education and healthcare without discrimination. The principle of non- discrimination, often associated with the principle of equality, is a protected norm of international human rights law although its scope and content are still debatable. A person is said to be treated equally when he/she is not being discriminated against and vice versa.

2.3.2 *Specific Protection for Refugee Children under Article 22*

Article 22 of the UNCRC provides as follows:

'*1. States Parties shall take* ***appropriate measures*** *to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive* ***appropriate protection*** *and* ***humanitarian assistance*** *in the enjoyment of* ***applicable rights*** *set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or nongovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.'

The inclusion of an article dealing with refugee and migrant children into the UNCRC was originally proposed by the Women's International Democratic Federation and in

1981 the delegation of Denmark submitted a proposal to the working group responsible to consider the draft convention on the rights of the child which received strong support from many members the working group.

2.3.3.1. General Protection

The analysis of Concluding Observations of several countries has helped to identify the appropriate measures for general protection of asylum seeking and refugee children under Article 22. The analysis takes into account the observation made by the UN Committee on the Rights of the Child (CRC) of state practice relating to refugee children and the status of its legislation and legal framework. It also grasps the recommendations made the CRC to the respective state. The measures can be summarised as follows:

a Standard of protection of refugee children shall be guided by the CRSR, General Comment No.6, General Comment No. 12 (2009) The Right Of The Child To Be Heard, General Comment No 14 (2013) On The Rights Of The Child To Have His Or Her Best Interests Taken As Primary Consideration, the UNHCR Guidelines on Formal Determination of the BIC and the UNHCR's Guidelines on Protection and Care of Refugee Children Other relevant human rights instruments that can enhance the protection should be referred

b Incorporation of the principle of BIC in immigration legislation and the application of the BIC as a primary consideration in asylum process.

c Protection under the principle of NR including interception policy and push backs. Massive arrival also entitle to NR protection. The NR principle must be respected in making

d Prohibition of detention.Detention shall only be used as last resort and for the shortest time. There should be no automatic detention and all detention of refugee

2.3.3.2. Protection of Unaccompanied and Separated Asylum Seeking and Refugee Children.

One of the fundamental obligations under Article 22 is towards unaccompanied and separated children. States are required to give special attention to unaccompanied minors whose condition calls for special arrangement as reflected in the UNCRC General Comment No. 6

(2005): Treatment Of Unaccompanied And Separated Children Outside Their Country Of Origin. The objective of General Comment No. 6 is to draw attention to the vulnerability of unaccompanied and separated children and to create standards for their protection, care and States obligation in relation to unaccompanied and separated children comprised of enacting national legislation regulating refugee children with provisions pertaining to unaccompanied and separated refugee children; establishing administrative structure to implement the legislation and set up mechanism/ measures to identify unaccompanied and separated minors earliest possible such as at the borders, and prevention of separation; and to support such measures by research, information and data gathering. The ratification of other instruments dealing with unaccompanied and separated children and tracing activities for the purpose of reunification of families, if it is in the best interests of the child, should be carried out. To ensure respect for the BIC, a competent guardian should be appointed and a legal representative to be provided, and arrangement of alternative care with a periodic review of the child's placement should be made. On the basis of BIC, detention of unaccompanied and separated children is prohibited and if detention is exceptionally necessary, it must be governed by the BIC rule. Reunification with family members is subject to the BIC and so is durable solution i.e. the return to the country of origin, local integration, adoption, and resettlement in a third country. The other feature of protection is the right to education. Unaccompanied and separated children must granted be full access to education without discrimination at all displacement cycle and the right must be safeguarded by the guardian. Access to educational opportunities must be ensured regardless of the care

2.3.5 Right to Education

The right to education in Article 28 of the UNCR covers refugee children on the basis of non- discrimination and it is considered as a basic right for them This right is closely related to the principle of BIC. State parties to the UNCRC are required to make primary education compulsory and free of charge for everyone; secondary education available and accessible for everyone; and higher education accessible to all on the basis of capacity. As stated in Article 28 (1), different level of state duty is imposed on different level of education. All children are entitled to get and enjoy free primary or elementary education if the state is a party to the UNCRC. Providing free education means no charge should be imposed to enable children to attend school for primary or elementary education.

State party is responsible to provide quality education that would help children achieve the aim of education enshrined in Article 29. General Comments of the UNCRC shed some light on the link between the right to education and the principle of BIC. The structure, design, content, delivery, and administration of education as well as law and policy of education must be made based on the principle of BIC. Even the assessment of the BIC must take into account the educational needs of the child. Specifically, paragraph 79 of General Comment No. 14, is a testament of the importance of education in securing the BIC of children including refugee children:

*"It is in the **best interests of the child** to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge. All decisions on measures and actions concerning a specific child or a group of children must respect the **best interests of the child** or children, with regard to education. In order to promote education, or better quality education, for more children, States parties need to have well-trained teachers and other professionals working in different education- related settings, as well as a child-friendly environment and appropriate*

teaching and learning methods, taking into consideration that education is not only an investment in the future, but also an opportunity for joyful activities, respect, participation and fulfilment of ambitions. Responding to this requirement and enhancing children's responsibilities to overcome the limitations of their vulnerability of any kind, will be in their ***best interests.****" [Emphasis added]*

Education is seen as a tool to disseminate norms and values needed in ensuring social unity and reinforce the idea of homogeneity among the society for lasting survival. For most refugees, education may have been disrupted in their home country and when they were forced to leave their country of origin, education shall continue to be a priority. Education for refugee children is intended to provide them with a sense of normalcy; restore their hope in life by making progress in education; provide assistance for the refugees to overcome traumatic experience; and teach them skills for life and relevant knowledge to help them live in peace, with tolerance for differences, and appreciation of the environment.

The UNHCR reiterates the right of refugee children to gain full access to education in country of asylum in paragraph 7.12 of the Guideline on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997. It works to protect refugee's right that it requires states to coordinate information between agencies including on education in order to assist the refugee and to identify their education background. At the minimum, primary education must include literacy and numeracy. If it is not possible to allow refugee children to join the national education system, a separate scheme or special arrangement must be put in place so long it is provided for free. In cases where children need to work, the education should not be interfered. Even when refugee children are in detention, education must continue.

2.4 CUSTOMARY INTERNATIONAL LAW

The other component of complementary protection for refugees is Customary International Law, another important dimension of this research. The complementary

protection provided by the rules of customary international law (CIL) offers protection for internationally

displaced persons without the need for treaty ratification. Commentators argue that some principles of international law relating to refugee protection have become CIL, such as the prohibition of torture, which is also a *jus cogens* principle, the principle of *non-refoulement* or non-return, and the principle of the best interests of the child. The focus of this thesis is on the *non- refoulement* principle of best interests of the child and this part deals with the general rule in the formation of CIL while specific examination on the customary status of NR rule and BIC principle are dealt with in Chapter 5 and 6 respectively. The International Court of Justice, in *Nicaragua v. USA (merits),* confirms the position of the customary international law as the second most important source of international law after treaties, and the same can be said of the source of refugee rights. The ExCom of the UNHCR asserts that CIL is a vital foundation on which to establish the responsibilities and obligations of non-contracting states towards refugees.

Under CIL, states have an obligation to protect those within their jurisdiction and territory even if they are not their citizens or nationals. This obligation developed under the reciprocal diplomatic protection practised since the Middle Ages. However, there is no indication of how states should treat their own nationals/citizens under international law unless specified by an international treaty to which the state is a party. The granting of asylum to persons who have fled their country of origin can also be traced to an ancient state practice. In protecting aliens (non-nationals are usually referred to as aliens), states are required to grant them minimum rights, including equality before the law, but not to the extent of giving aliens equal rights as citizens. National laws that are inconsistent with the international law on protection of aliens or citizens of foreign states are not valid excuses for evading the responsibilities owed by states to persons who are not citizens. The spheres of international law and national legal order may have distinct characters but both function to protect aliens, either by general principles of law or by the municipal law itself. In this regard, refugees are aliens who are entitled to the same protection available to all other non-refugees while in host states.

2.4.1 The Formation of Customary International Law

The two components required for the construction of customary international law - general practice and acceptance as law or *opinio juris* - draw mixed opinions from scholars. Both sources of custom generate support for their importance, and there is a continuing debate over the weight that should be assigned to each requirement. Traditional and modern views place different importance on the sources. It has been established that, for a practice to become

'customary', it must be constant, uniform and considered mutually obligatory among states.

State practices that are counted in this regard can be classified into verbal and physical act and they must be official act or conduct of all organs of the state; the executive, legislative and judiciary constitute state practice, and the act must be made known/ communicate or disclosed to other states. Manuals on child protection published by the administrative agency, national legislation, case laws, diplomatic communications in time of refugee situation, diplomatic protests, opinion of official legal advisers relating to the matters at hand, decisions of the executive in respect of the children or refugee in general, submissions made to international courts, statement made in and at international organization or conference are examples of verbal acts. Official statement are considered as state practice in *Fisheries*

Jurisdiction Case (United Kingdom v. Iceland) Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) and *Case Concerning the Gabc̆íkovo-Nagymaros Project (Hungary v. Slovakia).* Support for considering verbal acts as state practice also come from the International Law Commission when it concluded statement of government representative as state practice.
Uniformity of the practice should be substantial, not absolute, and it has to be consistent without the presence of significant uncertainty, fluctuation, contradictory practice and discrepancy. The ICJ in the *Fisheries Case* (1951) stressed that claims made by states without assertive acts do not amount to practice as required. In relation to the generality

of practice, which is a relative concept, no specific number of states can be ascertained or determined but it shall take into account the participation of states including the reaction of other states towards such practice.

2.4.2 Choice of Approach to Determine CIL Appropriate for the Present Study.

In the presence of opposing views, one vital question needs to be answered. Is there a need to take a stand and choose a view to which the present study should adhere in order to determine the customary status of the *non-refoulement* principle? In deciding whether a particular rule has reached customary status, the present research will not adopt a single approach: choosing the traditional custom over the modern custom or vice versa. This is because each approach has its own strengths. This study takes the view that the application of two different approaches will be more beneficial that limiting our choice to only one. Studies have suggested that states adopt different attitudes to different rules and obligations. A state may consistently express its views on matters regarding its own interest and remain silent on other rules. In another situation, a state may be actively engaged in the practice of a certain rule but make no statement about its sense of obligation. Taking into account the possible circumstances, this study will adopt both approaches to accommodate diverse states' responses to separate rules.

Were we to adopt the modernist view, alert and active states would be prone to expressing their sense of obligation regarding certain rules (for various reasons and intentions) but would act in the opposite way. Conversely, if just the traditional custom view is to be adopted, we could be facing a phenomenon where acts of courtesy, acts carried out in the name of camaraderie among states in a region, and reciprocal acts performed out of gratitude or as political gestures are treated as acceptance of a practice. This study suggests that it is safer and fairer to employ both approaches, where possible, to determine a customary law, and where a rule is considered customary by at least one approach, it can be treated as such.

THE PROTECTION OF REFUGEE CHILDREN UNDER THE MALAYSIAN LEGAL FRAMEWORK

3.1 INTRODUCTION

Refugee children continue to find themselves in a complicated situation in Malaysia even though Malaysia has vast experience in hosting a large number of refugees since 1970s. The presence of refugee children and their community in Malaysia gives rise to protection issues for the group and have caused agitation to the authority and the society with regard to security and social issues. The legal status of refugee children remains unresolved and not sufficiently addressed. In Malaysia, news on 'problems' allegedly caused by refugee children are commonly reported and debated while effort for the advancement of refugee protection is seasonal and more frequent among the NGOs. It is important to identify the basis for refugee children to claim protection under Malaysian law even though the Malaysian legal framework does not expressly provide protection for children who are being persecuted.

The objective of this chapter is to examine the extent to which the rights of refugee children in international law are being protected under the Malaysian legal system. This chapter also looks at the implementation of UNCRC in domestic laws and discusses Malaysia's stand for not ratifying the CRSR. Discussion commences with the protection of basic rights of refugee children under the Federal Constitution; Child Act 2001; and Education Act 1996. Discussion then continues with the provisions of Immigration Act 1959/63 that affect the rights of refugee children. This is then followed by discussing Malaysia's perspectives of international law including the adamant rejection to ratify the CRSR; Malaysia's commitment as a state party to the UNCRC; state legal obligation in making the UNCRC part of national law; and Malaysia's participation in the Asian African Legal Consultative Council (AALCO).

3.2 PROTECTION OF CIVIL AND POLITICAL RIGHTS OF REFUGEE CHILDREN UNDER THE FEDERAL CONSTITUTION.

The protection of civil and political rights is found largely in the Federal Constitution that visibly pledges the fundamental liberties of individuals, adults and children alike. The guarantee of such rights are made under Article 5- 13 encompassing liberty of the person (Article 5); prohibition of slavery and forced labour (Article 6); protection against retrospective criminal laws and repeated trials (Article 7); equality before the law (Article 8); and prohibition of banishment and freedom of movement (Article 9); freedom of speech, assembly and association (Article 10); freedom of religion (Article 11); rights in respect to education (Article 12); and rights to property (Article 13). The fact that the term refugee does not exist in the basic legal instrument of the country does not exclude refugees from enjoying

the protection of the constitution. Where the word 'person' is used in the Federal Constitution, it should encompass citizens and non-citizens including refugees as in Article 5, 6, 7, 8, 11 and 13. As such, non-citizens are also entitled to personal liberty under Article 5. However, the protection of Article 5 is not absolute. Citizens and non-citizens can be deprived of the liberty in accordance with the law such as when a non-citizen is charged for an offence. The 'law' referred to in Article 5 must be specific and expressly provide for the deprivation and the provisions must be strictly complied with to ensure that it would not be misused and abused.

The provision of Article 8 on equality is of particular interest as it may be used to depict the applicability of legal protection for citizens on the refugees as well. The relevant provision: 'all persons are equal before the law and entitled to the equal protection of the law' lead to the comprehension that refugees should be treated equally like the citizens. Unfortunately, that is not the case. This provision makes every one subject to the same law and that no one is above the law. It also means that every person is shall enjoy the protection of the law. The case of *Ali Salih Khalaf v Taj Mahal Hotel*, an Industrial Court's case is illustrative of the point. Here, the Court agrees with the submission of the counsel that the claimant, a refugee who previously works at the hotel is protected under the Industrial Relations Act 1967 by virtue of Article 8 of the Constitution.

The word 'law' here includes procedural law and thus an unfair or arbitrary procedure shall be invalid. Furthermore, this provision is restricted by clause (2) that declares only

citizens are protected from discriminatory legislations which discriminate people on the ground of religion, race, descent or place of birth. These are legislation in relation to acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. Thus any legislation on this matter that discriminate non- citizens is allowed as there no such prohibition of discrimination against them. However, legislations not relating to the subject matters in Article 8 should not be discriminatory to everyone; citizens and non-citizens on any ground. Thus, legislations such as child protection applies similarly to children who are citizens and non- citizens such as refugee.

Equality in Article 8 does not mean that each and every citizen shall be treated equally. or that non- citizen and citizens should receive equal treatment. The approach is not simply to treat all citizens and refugees alike in all circumstances but to treat all citizens and refugees alike when they are in similar circumstances. This is so suggested in the case of *Datuk Harun Idris v Public Prosecutor [1977] 2 MLJ 155,* where Suffian LP explained the principles pertaining to equality under Article 8 as follows:

"1. Equality provision is not absolute which means that it does not mean all laws must apply uniformly to all persons in all circumstances everywhere.

2. *Equality provision is qualified as exemplified by Article 8 (5) and Article 153.*

3. *The prohibition on unequal treatment applies not only to the legislature but also to the executive as can be seen in the words of "public authority" in Article 8(4) and "practice" in Article 8(5)(b)*

4. *The prohibition applies to both substantive and procedural laws.*

5. *There may be lawful discrimination as specified by Article 8(5) such as Muslim as opposed to non-Muslims, residents in particular states as opposed to others and Malays and natives of Borneo as opposed to others*

6. *The first question to ask is whether the law is discriminatory and if it is not, is it a good law. If it is discriminatory one should see whether such discriminatory falls within the exception allowed by the constitution*

7. *The doctrine of classification is acceptable subject to the sixth principle above and the court retains the power to examine the reasonableness of classification by the legislature*

8. *In cases where the law is silent, the procedures that are more drastic and prejudicial are constitutional.*

9. There is a presumption that an impugned law is constitutional- ***a law must operate alike on all persons under like circumstances, not simply that is must operate alike on all persons on all circumstances."*** [emphasis added]

3.3 LAWS ON CHILD PROTECTION AND CHILD'S RIGHTS

Malaysian legal framework on the protection of children from abuse, violence, labour exploitation, protection of rights and juvenile justice lies in various statutes but each statute is far from providing enough safeguard for the protection of the rights of the child as guaranteed under the UNCRC. Discussion in this section will show the limit and constraint of Malaysian law in providing protection for children and refugee children as opposed to the rights warranted by the international law.

3.3.1 Child Act 2001

The Child Act 2001 (Act 611) is a milestone of child protection regime in Malaysia. It has consolidated and repealed three previous statutes: Child Protection Act 1991 meant to provide care and protection to child victims of abuse or at risk of abuse; and Women and Girls' Protection Act 1973 intended to protect women and children exposed and involved in immoral vices; and the Juvenile Courts Act 1947 which establish the Juvenile Court that deals with child offenders. The enactment of the Child Act 2001 was borne out of

Malaysia's obligation as a state party to the UNCRC from 1995. It is claimed that provisions of the Child Act are formulated based on the four core principles of the UNCRC: non-discrimination, best interest of the child, the right to life, survival and development and respect for the views of the child but this is easier claimed that proven.

A child is defined under the Act as a person under the age of eighteen years; and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act 574]. Under the Child Act 2001, children who are victims of abuse and children offenders are now dealt with under a single piece of legislation. The main contents of this Act provides for specific protection of children from abuse, neglect, and trafficking; provides for the care and rehabilitation for child victims and child offenders; and provides for the establishment of the Courts for Children. These provisions guarantees children's right to life, survival and development as enshrined in Article 3 and 6 of the UNCRC.

3.3.1.1 Protection for Refugee Children Under Child Act 2001

No doubt, on the principle of equality, refugee children are protected under this Act. A child refugee can be classified as a child in need of care and protection under the Act if he/she is subjected to abuse or risk of abuse; has been neglected or abandoned; in need of medical treatment; when he/she behave in harmful manner; or when he/she cannot be controlled by the parent or guardian; when family relationships are seriously disrupted; or when he/she is begging on the street. When a person is in need of care and protection, he/she can be taken into temporary custody if it is in the best interests of the child. If medical examination or treatment is required, he/she can be presented to a medical officer

Section 17 of the Act covers a wide range of situation that refugee children can find themselves in. However, various reasons can prevent them from coming forward and claim such protection. This includes lack of identify and travel document which caused their presence to be invalid and thus they choose to shy away from accessing the avenue to seek help and protection. Their invisibility from the community and the authority is another reason since their plight cannot be easily traced or identified. Refugee children

may be registered with the UNHCR office but not to the Malaysian authority; they are not in public school; and seldom access the public healthcare facilities. If refugee children are not recognised and registered, they become invisible from the authority and community. Their invisibility means that their condition and welfare cannot be monitored. There are high possibilities that their situation will remain undiscovered and hidden. If they are in school, teachers may be able to recognise the child in need of protection. So is the case with doctors. Furthermore, refugee community may not be exposed to the information.

3.3.2 Education Act 1996

Primary education is made compulsory in Malaysia under the Education (Compulsory Education) Order 2002, an order under section 29A of the Education Act 1996:

"(1) The Minister may, by order published in the Gazette, prescribe primary education to be compulsory education.
(2) Every parent who is a Malaysian citizen residing in Malaysia shall ensure that if his child has attained the age of six years on the first day of January of the current school year that child is enrolled as a pupil in a primary school in that year and remains a pupil in a primary school for the duration of the compulsory education."

The order only makes primary education compulsory but not free. Prior to 2012, it was a policy of the government to require students to pay a minimal fee or additional payment upon enrolment in primary and secondary school. This fee covers contribution for co-curriculum activities, preparation of internal question papers, annual sports day, religious activities, and insurance. As for secondary education, even though it is provided for free, it is not made compulsory. Even though they are not required to pay the above fee, school children attending public schools still have to pay a fee for school magazine, meal (if they are enrolled to boarding school), and to Parent Teacher Association. There is only a reduction of fee not fully free. Though the amount could be classified as nominal, as long as they are compulsory payment, it does not conform to the standard set by the UNCRC

in Article 28. However, only children who are citizens can enjoy primary and secondary education for free, whereas noncitizens will have to pay a charge. Again this is a non-compliance to the standard set by the UNCRC.

A child who has attained the age of six years on the first day of January of the current school year must be enrolled as a pupil in a primary school and remains a pupil in a primary school for the duration of the compulsory education which is 6 years and may also be completed in 5 or 7 years. Parents are obliged to enrol their children and keep them enrolled throughout the 5-7 years period. Those who violate the provision of this section by failing to enrol a child for the compulsory primary education shall be liable to a fine of not more than RM5000 or to an imprisonment of not more than six months or to both.

3.4 PROTECTION UNDER THE IMMIGRATION LAW

Immigration law in the country is fundamentally based on the Malaysian Immigration Act

1959/63, Passport Act 1966 and regulations made under these Acts such as the Immigration

Regulations 1963 and Immigration Regulations 1967 Discussion and deliberations on Malaysian immigration law as a branch of public law is not commonly found in academic journals, a position that is quite strange for a state that has been receiving a significant number of immigrants. One would expect that provisions regarding refugees could be found in the Malaysian Immigration Act 1959/63 (Act 155) but that is not the case in Malaysia as the Act neither mentions refugee in its provisions nor provide any procedure relating to refugee status.

In general, the provisions of the Immigration Act 1959/63 apply to every regular person entering Malaysia and refugees alike without exception. Thus, refugees are bound to

fulfil any legal requirement for the purpose of entering and remaining in the country as specified

under the Act and will be exposed to the risk of being detained, charged, convicted, fined, imprisoned, whipped and deported for any breach. In fact, the term refugee is nowhere to be found in the Act and thus no separate treatment will be granted than to other regular migrants. The Act is a device utilised to combat illegal entry and stay and not a tool to protect refugee or any person who claims to be victim of human rights violation and persecution that can tolerate illegal entry and stay by reason of seeking refugee from persecution.

The Act governs all entries; by land, sea and air into Malaysia and the requirement of valid permit and travel document for such entry and stay. Persons entering Malaysia without valid permit or pass are considered 'illegal immigrant' i.e. persons other than citizen who contravene the provisions of section 5, 6, 8, 9, or 15 of the Immigration Act 1959/63; and provisions of regulation 39 of the Immigration Regulations 1963.[46] This part discusses provisions of the Immigration Act that have negative impact on refugees. It also looks at the possibility of utilising certain provision of the Act to confer temporary protection to the group.

3.4.1 Prohibition Of Entry Through Unauthorized Point Of Entry and Entry Without Valid Permit

Section 5 of the Act makes it an offence for any person to enter Malaysia through nonprescribed or unauthorized points of entry. The use of unapproved route such as through the river which has been used by many people for many years falls under this section as shown in the case of *Lee Yee Kew v. United Oriental Assurance* (1998) CLJ 763 [47] Section 2 of the act define entry as:

(a) in the case of a person arriving by sea, disembarking in Malaysia from the vessel in which he arrives;

(b) in the case of a person arriving by air at an authorized airport, leaving the precincts of the airport;

(c) in the case of a person entering by land and proceeding to an immigration control post in accordance with section 26, leaving the precincts of the post for any purpose other than that of departing from Malaysia by an approved route; and . (d) in any other case, any entry into Malaysia by land, sea or air."

In the case of *PP v. Jagtar Singh & Ors*,[48] the fact that the accused did not proceed to immigration control post when they arrive from Thailand, instead they went to the Duty Free Zone, amount to 'entry' under this section. In refugee situation,[49] this offence can be penalised under section 57 with a fine not exceeding ten thousands ringgit and to imprisonment to a term not exceeding five years or to both.[50] This provision can easily catch refugees as it is a common knowledge that many of them travel without legal documents, and they are likely to travel i.e. leave their country of origin and enter another country clandestinely and through unauthorized point of entry to evade the authority. Things can

3.4.2 Prohibition of Entry Without Valid Permit

Under section 6 (1), entry without valid permit or pass is an offence.Such offence is punishable by a fine not exceeding ten thousands ringgit and to imprisonment up to five years or to both and shall be liable to whipping of not more than six strokes.[54] Records show that refugees have been charged for offences under this section. In *Tun Naing Oo v. PP*.[55] the appellant was charged under section 6 (1)(c) for entry to Malaysia without valid permit. He did not have a passport when he was arrested at his workplace and he had no valid working permit. However, he has registered himself to Alliance of Chin refugee, a community group which assisted him with the refugee status application to the UNHCR Kuala Lumpur. On conviction, the appellant was sentenced to 100 days imprisonment and two strokes of whipping and appealed against the sentence of whipping. In allowing the appeal the court pointed to the purpose of the whipping, which is reserved for immigration offence involving crime of violence and brutality, which was not present in

the arrest of the appellant. The court further added that refugees and asylum seekers in Malaysia are bound by all domestic laws

"In the present case the offenders are refugees who have escaped from their own country. They came not by choice. They are seeking asylum and shelter in Malaysia. However, in entering Malaysia without a valid entry permit they have committed an offence under Malaysian laws. This Court notes that the offenders have pleaded guilty at the first instance. It is trite law that a timeous plea of guilt is a mitigating factor in the assessment of sentence. The offenders are also first offenders. There is no evidence of any violence or brutality involved. In these circumstances the sentence of imprisonment of 1 month is appropriate.

The imposition of whipping under s 6(3) is, however, not mandatory. It is only imposed if the trial Magistrate is of the view that it is appropriate. Taking into consideration the aforesaid circumstances as a whole, this Court is of the view that the sentence of whipping would be harsh and impose undeserved hardship upon the offenders. Whipping would be an inappropriate sentence in these circumstances. For the above reasons, the sentence of imprisonment of 1 month is affirmed but the sentence of whipping of 1 stroke is hereby set aside."

3.4.3 Prohibition Of Specific Class Of Person From Entering Malaysia

Section 8 defines prohibited migrants: persons who are not permitted to enter or, and remain in Malaysia for reasons specified under the subsections 1-6. If a refugee falls into any of the category of prohibited migrant, he or she may be denied entry. This is a situation where asylum seekers attempt to enter the country through valid channel and possess valid travel document but denied entry for failure to show that they have means to support themselves or will likely become a charge on the public. Because it is the

discretion of the immigration authority whether or not to allow entry, asylum seekers can be refused entry for any reason under section 8. In practice, the power of the Director General to declare a person as prohibited migrant extends to making the declaration while the person is already in Malaysia. A Jemaah Islamiyyah suspect was detained in 2001 under the Internal Security Act 1960. He made an application of *habeas corpus*. However, days before the expiry of the detention period, the Director General of Immigration issued a declaration that made him a prohibited migrant and ordered him to be removed.

In Malaysia, it does not make any difference if a refused person presents himself to the immigration and declares that he wants to apply for asylum because there is no regulation or mechanism to deal with such a situation. He would be directed to approach the UNHCR office. Regardless of a person's claim about his persecution in his country of origin, he will be treated similarly like any other prohibited migrant. In this jurisdiction, persons denied entry will be deported and if deportation is not possible at that time, they will be detained until deportation can be arranged for them. This treatment of refugees is in complete contradiction than the practice of other jurisdiction, which ratified the CRSR such as the United Kingdom, whereby a mechanism is available at the point of entry or borders to deal with persons applying for asylum.

3.4.4 Criminal Penalty

Conviction under section 5, 6, 8 or 9 of the Immigration Act will make a person liable to removal from Malaysia and while waiting for the removal, a person may be detained in custody. Regrettably, the onus of proof that a person does not contravene the provisions of section 6 and 8 lies with that person not the authority or prosecution. This is contrary to the general principle of criminal law in proving one's guilt. Under the Malaysian Immigration Act 1959/63, all refugees and other types of illegal migrants are not distinguished between each other. Without valid documentation to remain and stay in Malaysia, illegal immigrants including refugees are subject to detention, deportation and whipping. Before removal from Malaysia, the court can order a non- citizen to be

detained. In the case of *Re Lang Za Thong; Ex P Jabatan Imigresen Malaysia* [2009] 1 CLJ 108, a Myanmar national is ordered to be detained for a period of two months for the purpose of effecting his deportation.

3.4.5 Inconsistency Of The Immigration Law With The Principle Of *Non- Refoulement* And The Best Interests Of The Child

In three significant aspects, Malaysian immigration law is inconsistent with refugee rights as recognised under the principle of NR and the BIC. First, it does not establish any means to screen refugee applicant or persons claiming to be asylum seekers causing them to be treated as illegal immigrant. Second, persons without legal travel document or valid permit of entry or to stay can be penalised and can be removed from Malaysian territory regardless of any justified reasons such as claim as refugee. Both situations may result in detention and deportation, which is contrary to the principle of *NR*. The third is the absence of BIC consideration in its provision. If it is not in the legal provision, then it will not be applied and implemented in practice. As such, the conduct of the immigration authority in relation to children will not be based on the principle of BIC. For example when a non- citizen who has family including young children in Malaysia is detained and ordered to be removed from the country, he would challenge the validity of the detention on various reason or claim that the authority has failed to consider the material facts in making the decision. However, he cannot rely on the principle of BIC to avoid the deportation such as applied in the UK courts because BIC is not part of the immigration law.

The case of *Mohd Iqbal Abdul Rahman* is an example where the NR principle and the rule of BIC could have been applied. Mohd Iqbal was a terror suspect detained without trial for two years, from 22 August 2001 to 21 August 2003. He was originally from Indonesia and was a permanent resident in Malaysia, whose wife is a Malaysian citizen and has small children. He made an application of the writ of *habeas corpus* to demand his release from Kamunting

3.5 HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

The Human Rights Commission of Malaysia (SUHAKAM), a national human rights institution was established under the Human Rights Commission of Malaysia Act 1999 (SUHAKAM Act) as a result of Malaysia's involvement in the United Nations Commission on Human Rights and the influence of the Principles Relating to the Status of National Institutions (The Paris Principles). Its primary role and function promotional, educative, advisory and investigative in nature. To enable SUHAKAM to carry out these functions, the institution is accorded with the power to conduct research activities, advise any government body of any complaint made in order to take appropriate measure, to investigate infringement of human rights, to visit places of detention, to make statement on human rights and other activities necessary in accordance with law. In addition to that, SUHAKAM shall have regard to the UDHR in fulfilling its duties under the Act so long as it is not inconsistent with the Federal Constitution. SUHAKAM is not empowered with real authority and it canadjudicate and grant remedy for human rights infringement. Many are of the view that SUHAKAM is a toothless tiger and thus cannot become an effective human rights defender. SUHAKAM admitted that refugee children are the most affected group of children since they have limited access to school or education and it makes several recommendations to the authority to improve the situation. The most valuable work of the Commission is its contribution to persuade the government agencies involved in dealing with refugees to provide the refugees with assistance and to respect the UNHCR identity card. Suhakam's concern on and effort for refugee children are also demonstrated in the following actions:

1. Roundtable Discussion on Asylum Seekers in Malaysia.
2. Visits to the immigration detention depot followed by recommendations for improvement.
3. Recommendation to the government the ratification of the ICCPR, ICESCR and CAT; and accession to the CRSR.

4. Response to numerous complaints on migrants in Sabah particularly the Filipino refugees by conducting roundtable discussion, field visit to refugee settlement sites and holding dialogue with local people.
5. Receipts and investigation of complaints from refugees and asylum seekers.
6. Research on right to education of vulnerable children including refugees and asylum seeking children and make recommendations to improve the access.
7. Workshop for People's Volunteer Corps (RELA) to help them understand human rights including the rights of immigrants and refugees.
8. Closed- door discussion and annual consultation on refugee issues with UNHCR.
9. Report on refugee issues in its annual report.
10. Press statement to voice its concern on refugee issues including the welfare of children.

3.6 MALAYSIA'S PERSPECTIVE OF THE 1951 CONVENTION RELATING TO STATUS OF REFUGEES AND ITS 1967 PROTOCOL

Although the concept of burden sharing in refugee protection is a familiar notion to Malaysia, the country will always bear in mind its two most extraordinary experience of refugee hosting. The first is the strain of hosting the mass influx of refugees during the Indochinese upheaval beginning from the 1970s until end of 1990s and the fear of residual problems related to it. Secondly is the inundated flow of Filipino refugees in Borneo and the tensions that built up at some stage between the state government of Sabah and the federal government in dealing with the Filipinos. Both prolonged refugee episodes were met with various unconstructive reactions from the local people. These corollaries are purportedly being used by the authority to justify the resistance against any call for Malaysia to ratify the 1951 Convention Relating to the Status of Refugee and its 1967 Protocol. Diverse grounds are being employed by the government to substantiate Malaysia's refusal to recognise refugees or to codify national laws on refugees. Firstly, to Malaysia, the recognition of refugees will be perceived as meddling with domestic

tribulation of its neighbouring countries, which is in contrast to the ASEAN stand. Next, Malaysia views the Convention as 'Eurocentric'; has no regards for developing countries and their particular experience in the region; contrary to Asian values; and entails a huge financial implication.

3.7 THE UNCRC AND PROTECTION OF REFUGEE CHILDREN IN MALAYSIA.

The principle of the BIC should be used as a framework to protect refugee children in Malaysia for three reasons. First, the absence of an express law to protect refugees has resulted in inconsistent treatment. The fact that the Malaysian authority has made no plan to devise a formal protection regime gives rise to the need to adopt a principle that could reasonably govern the conduct of the authority in handling and dealing with refugee and asylum-seeking children. The principle in question must be a basic norm that has been widely applied in matters involving children. The principle of the BIC fits the description as it does not impose specific and rigid procedures; instead, it allows the authority to exercise a certain degree of discretion while maintaining some consistency. For instance, the authority is required to consistently make the BIC a primary consideration but it is not bound to decide in the best interests of the child.

3.8 MALAYSIA'S MEMBERSHIP IN THE AALCO AND ITS PLEDGE UNDER THE BANGKOK PRINCIPLES

In 1970 Malaysia became a member of the Asian-Africa Legal Consultative Organisation

(AALCO) whose primary objective among others is to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern. As refugee is a common problem to many of its member states, in 2001 the organisation adopted the Bangkok Principles On Status and Treatment of Refugees (Bangkok Principles), a non- binding instrument. This document is merely a soft law, which has no legal effect but meant to guide state members in providing protection to refugees. The Bangkok Principles is part of the

regional initiatives taken to provide refugees who are present in the territory of member states with standard treatment.

Despite its non- binding status, the Bangkok Principles has widen the ground of refugee persecution to include colour, ethnic origin and gender while recognising every person who is compelled to leave his country of nationality or place of habitual residence and to seek refuge in another place due to external aggression, occupation, foreign domination or events seriously disturbing public order as refugees. It also recognised lawful dependants of refugees as refugees as well. Other provisions of the Bangkok Principles are a combination of the provisions of CRSR; the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; and the 1984 Cartagena Declaration on Refugees.

3.9 LEGAL STATUS OF REFUGEE CHILDREN AND GAP OF PROTECTION

Two important issues are apparent from the discussion above. Firstly, the legal position of refugee children in Malaysia is very clear: they are considered illegal immigrant if they have no permission to stay or have no legal travel document. Reliance on Child Act 2001 to protect refugees and guarantee their rights also failed as the Act does not address refugee children in its provisions and is silent regarding any substantive rights of children even though it is claimed that the Act was enacted in the spirit of the UNCRC. Constant refusal of Malaysian authorities to use the term refugee or to label refugees as refugees or to include refugee in the legislation is not peculiar. Malaysia's rejection can be explained from two points of view; first it does not want 'refugees' to have a solid legal basis to claim and demand protection from the authorities and, secondly, by acknowledging the legal category of refugees. It would be difficult for Malaysia to send them back or to return them because the term refugee will attach them to the principle of *non refoulement.* It should be noted however, that refugee children's entitlement to the protection of NR is not subject to the name given to them, it's their condition that make them eligible.

Secondly, without express law that recognise the existence and the status of refugees in Malaysia, they are unable to invoke and assert their rights. This situation shows that there

is a significant protection gap in the Malaysian legal framework. There is a hole that cannot be filled with the CRSR. Attempts to fill the hole with provisions of the Child Act 2001 and Education Act 1996 are futile efforts. It must be realised that the situation of legal vacuum can only be filled with hard law because refugee children are denied rights and protection using law. Therefore, a new law with express provision of protection must be adopted to prevent the existing law from having effect on refugees and refugee children.

CONCLUSION

4.1 INTRODUCTION

It is crucial to mention that this study has been launched from the pressing need to find out why is the condition of refugee children in Malaysia remains problematic and what can be done to improve the legal protection despite the legal impediments that exist. The following findings are pertinent in answering concerns about the deficiency of Malaysian laws in relation to refugee protection and Malaysia's responsibilities in the protection of refugee children in the country. This study is crucial for highlighting the plight of refugee children. It is also relevant in assisting the authority to devise a long term solution for protracted refugee problem. Most importantly, due to the scarcity of literature on these issues from Malaysia's point of view, it is believed that this study will contribute to the body of knowledge on refugee children and international law in Malaysia and contribute to any on-going studies on these areas. This chapter will point out four important aspects: first, the most significant finding of this study; second, how has the study contributed to the body of knowledge; thirdly, future research, and lastly how this study relates to the current situation of refugee children in Malaysia.

4.2 RESEARCH FINDING

4.2.1 Finding On The Treatment And Problem of Protection Of Refugee Children In Malaysia.

Generally, the authority has been tolerant to refugees and asylum seekers by allowing them to stay in Malaysia temporarily and enjoy some public services at discounted rate. Nevertheless, the condition of refugee children in Malaysia is clearly not as good as refugee children who found themselves in developed countries but in many ways, the treatment of refugee children in Malaysia can be improved if the authority is ready to commit to international obligations and thus comply with its requirement. Unfortunately, the yearning to see Malaysia to respect the rights of refugee children is being impeded by various causes including those claimed by the government as obstacles but which are not being tested or proven yet.

Regardless of the length of time that refugees have been present in Malaysia, from time to time, the authorities assert that Malaysia has no duty to accept and protect refugees and that it will only offer temporary refuge on humanitarian grounds and as part of its charitable consideration. This sentiment has resulted in a lack of appreciation of refugee rights and of how refugees can exercise and enjoy their rights, especially those rights that are granted and guaranteed under international law. By being admitted to Malaysian territory under various constraints, the refugees are in fact not granted meaningful rights and when the treatment of the parents and family has its inevitable impact on the children, this will lead to the further denial of those children's rights.

4.2.2 Findings On The Customary Status Of The Principles Of NR And The Best Interests Of The Child and Its Effect On Malaysia's Obligation.

It is claimed in some studies that states have a high regard for a good reputation in return for their compliance with their international obligations, and they consider reputation as a motivation to comply with international law along with the risk of sanctions for violating a rule. However, since sanctions in international law are to some degree restricted and very limited, breaches and violations do sometimes occur. It is also suggested that states' power or the ability of one state to influence, force, compel or pressure another state (through various means) has a certain impact on states' behaviour and the process of customary international law. As notably accepted, the binding effect of customary law is different from that of a treaty, which will only bind states that are party to it. However, a rule of customary law is applicable and binding even on states that never consented to the rule, or where no express consent has been given by a particular state to the rule, or where a state has had nothing to do with the precedents nor participated in establishing the rule. Therefore, for a non-contracting state to the CRSR, such as Malaysia, customary rules can be used to compel it to follow certain rules concerning refugees. In determining whether Malaysia is bound by certain customary rules, no express consent from the country will be needed.

4.2.3 Findings on the Improvement of Protection For Refugee Children.

The fact that there are profound evidence to support claims that Malaysia is indeed bound by the customary international law rule of *NR* and the BIC as discussed in the previous chapters will not guarantee that refugee children will enjoy better protection unless the rules are applied in courts. Significantly, there is a reluctance to apply customary international law in Malaysian courts. The application does not only involves simple application, it also demands the judges to interpret the norms of international law and inevitably, this will involve considering a specific context, native norms and legal traditions. It is also notable that the question of international law has only reached the bench for a number of times only as compared to other states.

Judicial application of the principles under study as shown in many jurisdictions will contribute towards the enforcement of the two principles as executives, administrators and legislators are persuaded to comply with the decision of the court. Domestic courts are a suitable forum to achieve the objective of refugee protection regime. They have the capacity to influence the way refugee children are treated by the authority. In fact, the success of applying the principles in courts will make Malaysia a better place for refugee children than it is today.

4.3 RECOMMENDATION

8.3.1 Strategic Approach and National Policy

Malaysia should plan a strategic approach to the reception, handling and care of asylum seeking and refugee children with particular attention to those who are unaccompanied and separated from their parents or adult carer. To improve the overall support for refugee children, there is a need to devise a specific national policy that can be implemented nationwide. But then again, policy is not hard law and it can be changed very easily or ignored without legal implication

4.3.2 Enact Specific Statute

An express law is always better than a policy because it will be able to guide the people clearly and expressly. If we were to abide ourselves to the rule of law, then the written law is most appropriate because it will not easily changed and the protection is clear without too much ambiguity as in policies. This study realises that law alone is not sufficient to correct everything which is not right about how refugee children are being treated in Malaysia.

4.3.3 Improve Cooperation with UNHCR

The UNHCR should be respected for what it already achieved for refugees and should not be perceived as a meddler. With better cooperation and mutual understanding, UNHCR can avoid doing unnecessary work such as intervention in court when a mandate refugee is charged for illegal stay. The authorities must realise that any attempt to discredit UNHCR work will not make the protection effective. Harmonious cooperation can lead to more transparent handling of refugee.

4.3.4 Set Up a Screening Mechanism

As refugee screening has been proved to be a state duty and one of the elements is to have an independent refugee screening body that is subject to appeal and judicial review. This can

help the government to put away any suspicion that UNHCR is not working according to the procedures or against Malaysian Law. The refugee screening is the first step towards nonrefoulement protection without which

4.3.5 Treat Children and Children First

It must be borne in mind that the utmost emphasis should be placed on improving the protection of refugee children by treating them as children first and refugee second. By subscribing to the principle, refugee children will be better treated as we are able to see their needs rather than identifying the problems the posed with their presence. The application of the *NR* principle and the BIC is among the first step towards treating refugee children as children. By applying the principle of the BIC we will arrive to a conclusion that all children in Malaysia are entitled to the same protection no matter what their immigration and citizenship status. Conferring similar protection and rights to all children will minimise the possibility of mistreating refugee children and other marginalised children because there is no need to differentiate between legal and illegal immigrant.

4.3.6 Adoption Of The UNCRC Through Enabling Act

The complexities in dealing with the status of refugee under Malaysian law could be partly alleviated if ratified international treaties can be directly applied on local circumstances. However, that is not the case here as reference to international law for the protection of refugee children is only viable through the incorporation of international treaties into national law by way of an enabling act adopted by the legislature for that purpose. Unfortunately for the CRC, this is very slow to take effect. Such sluggishness is the result of Malaysia's preference to incorporate provisions of the CRC into various laws and not adopting a specific legislation or provision to adopt the whole CRC simultaneously. Hence, the court is only able to apply provisions of national laws contain selected provisions of the CRC without being able to observe the CRC provisions in full. Malaysia's position as a dualist state in relation to the rule of transformation of international law into national law together with the courts hesitation in applying the rule of customary international law have contributed towards the failure in giving effect to international treaties, and in relation to this study the Convention on the Rights of a Child and customary rules that could provide protection for refugee children. In fact, Malaysia's reservations to the CRC are indicators that it cannot fully conform to the CRC provisions.

4.4 CONTRIBUTION TO KNOWLEDGE

Various issues analysed in this study have led to important contribution to the body of knowledge on the protection of refugee children in Malaysia. It is contended that the findings made so far may bridge some of the gaps left by the literature that I reviewed on Malaysia's obligation with respect to refugee children. Nevertheless I must note that issues on refugee children in Malaysia are not well represented in academic publication but its account in informal and non-academic publication is easier to locate.

4.5 FUTURE STUDIES

With due limit in this study, a number of crucial issues still need to be addressed. Further study will help enhance the body of knowledge and lend support to refugee claim for protection.

4.5.1 The Cause of Action

It is interesting to find out the legal basis for children to take action against the authority. For example, how can children invoke their rights in the court or what is their cause of action?

Can a child apply for a judicial review when he or she is denied from going to public school without birth certificates? Further research on this area will enable refugee children to identify ways to seek redress and to protect their rights.

4.5.2 The UNCRC and Legitimate Expectation of Children

Issues of whether refugee children can claim 'legitimate expectation' should be researched further. Under the administrative law principle of legitimate expectation, a person can legitimately expect that the authority or the administrator is going to implement and enforce an international treaty that it ratifies or at the very least, the state is not going to perform a conduct which is contrary to the ratified treaties when the said treaty is not yet incorporated into national law. Even though legitimate expectation is not part of the argument to support the application of the customary principle of best interests of the child, this study contends that it is a useful argument to utilise the CRC and its guiding principles including the best interests rule. Other than claiming that the authority is bound by customary international law, and thus must apply the principle of the best interests of the child, legitimate expectation can provide a *locus standi* for asylum seeking children.

Under this presumption of legitimate expectation, the state's ratification of a treaty is said to have given rise to a legitimate expectation which can be relied on by the public,

especially refugee and asylum seeking children. In this regards, a person has a legitimate expectation, based on Malaysia's ratification of the CRC, that he or she will be treated in accordance with the principle of the BIC as provided under the CRC. The question that follows is, does the 'legitimate expectation' a legitimate argument to claim protection and rights under the CRC?

4.5.3 The Implementation Of The Principle By The Administrative Agencies.

The integration and assimilation of the principle of the BIC in every legal provisions, executive and administrative action and decision and judicial decision will require the adoption of appropriate measures by states and should be carried out continuously. Further studies on how the administrative agencies should implement two principles are important too. This will include argument on how authorities with relevant power and relevant services for refugee and refugee children can better serve the community.

4.6 CONCLUDING REMARKS

In conclusion, based on overall analysis, the researcher is able to conclude that the protection of refugee children in Malaysia can be characterised by inconsistency and uncertainty. The inconsistency is seen in the way different refugee group are treated while the uncertainty is found in the way the policies relating to refugees are implemented. Without doubt, children are affected not only because they are refugee but also because their parents are also refugees, thus refugee children are not able to rely on the protection from the family as well. It is clear that the initial step of protection for refugee children should begin by treating the gap in law since written law is more stable and can guide the affected individuals better than introducing and relying on policies, which is tend to be abused, not recognised, cancelled and not consistently implemented.

Checked by the Special Committee

Linda Charlie

j.phiri

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