Refugees, Asylum Seekers and the Law

by Dato’ Seri Mohd Hishamudin Yunus

The modern international law on refugees has its origins in the aftermath of the Second World War as well as the refugee crises of the inter-war years that preceded it. Article 14(1) of the Universal Declaration of Human Rights 1948 guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the “right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions”.

1951 Convention

The foundation of international refugee law is the 1951 Convention Relating to the Status of Refugees (also known as the 1951 Refugee Convention) and its 1967 Optional Protocol Relating to the Status of Refugees (“the 1967 Protocol”). The 1951 Convention defines the term “refugee” and sets minimum standards for the treatment of persons who are found to qualify for refugee status. The 1951 Convention also establishes the principle of non-refoulement.

The 1951 Convention does not prescribe how States Parties are to determine whether or not an individual satisfies the definition of a “refugee”. Instead, the Convention leaves it to the State Party to formulate the rules on asylum proceedings and the determination of refugee status. This, however, has resulted in disparities among different States as each State will formulate the laws on asylum based on its own resources, national security concerns, and experiences with forced migration movements. Despite differences at the national and regional levels, the overriding objective of the modern legal regime on refugees is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

1967 Protocol

Whenever we refer to the 1951 Convention, in the same breath we also refer to the 1967 Optional Protocol relating to the Status of Refugees. Originally, the Refugee Convention was of limited scope. Its scope was confined only to refugees in Europe and to events occurring before 1 January 1951.

The 1967 Protocol, a supplementary treaty to the 1951 Convention, removes the geographical and time limitations written into the original Convention. In other words, this supplementary treaty (the 1967 Protocol) turned the 1951 Convention into a truly universal instrument that could benefit refugees everywhere.

Who is a refugee?

On the definition of the term “refugee”, Art 1(A)(2) of the Refugee Convention states that a refugee is an individual outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group.

Although the Refugee Convention definition of “refugee” remains the dominant definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

Countries in the Americas and Africa experiencing large-scale displacement as the result of armed conflicts found that the Refugee Convention definition of “refugee” did not go far enough in addressing the protection needs of populations. Consequently, both Art 3 of the Cartagena Declaration and Art 1(2) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa have

3 American Convention on Human Rights, Art 22(7); African [Banjul] Charter on Human and People’s Rights, Art 12(3)
extended the definition of "refugee". For example, the latter, that is to say, the 1969 African Convention, extends refugee status to an individual who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

Today, there are 145 State Parties to the 1951 Convention and 142 to both the 1951 Convention and the 1967 Protocol. The only Asean parties to the 1951 Convention and the 1967 Protocol are Cambodia and the Philippines.

Malaysia, unfortunately, is not a State Party to the 1951 Convention and its Protocol.

**Principle of non-refoulement**

The principle of non-refoulement is expressed thus:4

“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.”

As this principle of non-refoulement is generally accepted as a principle of customary international law, this principle is binding on all nations regardless whether the State is a party or not to the 1951 Convention. This means that Malaysia, although not a party to the Refugee Convention, is, nevertheless, bound by this important principle of international law.

**Internally displaced persons**

Applying the definition of “refugee” under the 1951 Convention, internally displaced persons, or IDPs, are not considered refugees under the Convention.

Like refugees, IDPs have fled from their homes because of compelling circumstances (such as armed conflict, generalised violence and human rights violations) but unlike refugees, IDPs have not crossed an international border to find sanctuary but have remained inside their home countries.

It is estimated that at the end of 2014, there were 38.2 million IDPs around the world. Currently, the country with the largest number of IDPs is Syria (with an estimated 7.6 million), followed by Colombia (six million) and Iraq (3.6 million).5

**United Nations High Commissioner for Refugees**

Established on 14 December 1950, the Office of the United Nations High Commissioner for Refugees ("the UNHCR") is a United Nations agency with its headquarters in Geneva, Switzerland. Considered the guardian of the 1951 Convention, the agency is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide.

The UNHCR’s mandate has today been expanded to include protecting and providing humanitarian assistance to persons whom it describes as “other persons of concern”, including IDPs.

For its contribution in the field of human rights, the UNHCR has been conferred the Nobel Peace Prize twice, in 1954 and in 1981.

**The UNHCR in Malaysia**

According to the UNHCR website, it commenced operations here in 1975 when Vietnamese refugees began to arrive by the boat loads to our shores and other countries in the region. From 1975 until 1996, the UNHCR assisted the Malaysian government in providing protection and assistance for the Vietnamese

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4 1951 Convention, Art 33(1)
boat people. Over these two decades, as part of an international burden sharing effort, the UNHCR resettled more than 240,000 Vietnamese to countries including the US, Canada, Australia, France, New Zealand, Sweden, Finland, Denmark and Norway. During that same period, more than 9,000 persons returned home to Vietnam with the support of the UNHCR.6

During the 1970s and 1980s, the UNHCR assisted the Malaysian government in receiving and locally settling over 50,000 Filipino Muslims from Mindanao who fled to Sabah. It also supported the Malaysian government in locally settling several thousand Muslim Chams from Cambodia in the 1980s, and several hundred Bosnian refugees in the 1990s.7

During the last 10 years alone, the UNHCR in Malaysia has resettled more than 100,000 refugees.8

Although Malaysia is not a State Party to the 1951 Convention and its Protocol Relating to the Status of Refugees, the Malaysian government is nevertheless a member of the United Nations. That being so, Malaysia is obligated to co-operate — and she does — with the UNHCR in addressing refugee issues on humanitarian grounds.

It must be mentioned here that Malaysia is a party to the Convention on the Rights of the Child and to the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”). Thus in dealing with refugees, Malaysia must give effect to her obligations under these two Conventions, where the issues involved women and children.

There are currently no legislative or administrative provisions in Malaysia to deal with the situation of asylum seekers or refugees. The UNHCR undertakes all activities pertaining to the reception, registration, documentation and status determination of asylum-seekers and refugees.9

**Refugee and asylum seeker**

An asylum seeker is someone who claims to be a refugee, but whose claim has not yet been definitively evaluated by the state authority of the country in which the claim to refugee status is made.

The UNHCR, in collaboration with various bodies/partners such as government agencies, non-government organisations and volunteers, carries out, among others, the following activities:

- to provide assistance for refugees and asylum seekers in a variety of areas such as healthcare, education, shelter, counselling and other welfare needs;
- to carry out detention monitoring and intervention;
- to provide legal representation in court for offences under the Immigration Act;
- to support long-term solutions for refugees, such as resettlement in countries willing to accept them.10

**Refugee policy in Malaysia**

Malaysia’s current policy towards refugees has its roots in its experience with Indochinese refugees in the 1970s and 1980s. After the fall in 1975 of the South Vietnamese government which had been supported by the US military, hundreds of thousands of Vietnamese began to leave the country. Most fled by boat to other countries in Southeast Asia, and, for a time, Malaysia was their principal first stop. These refugees were placed in camps under the auspices of

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6 UNHCR in Malaysia <http://www.unhcr.org.my/About_Us-@-UNHCR_in_Malaysia.aspx>
7 UNHCR Factsheet-Malaysia <http://www.unhcr.org/protection/operations/561676b6/malaysia-fact-sheet.html>
9 UNHCR in Malaysia, supra, n 6
10 Ibid
the Malaysian Red Crescent Society in co-ordination with the UNHCR.

Malaysia does not recognise refugees as such, and only allows asylum seekers to remain in the country on a temporary basis, after which they must return to their country of origin or be resettled in a third country.\(^\text{11}\)

Malaysia lacks any institutionalised protection for refugees. Under its general immigration law, refugees are not distinguished from other undocumented workers. In other words, refugees are considered illegal immigrants.

### Fact sheet on refugees

In Malaysia, there were a total of 156,342 refugees and asylum seekers registered with the UNHCR as at end-January 2016.\(^\text{12}\) Some 70% of refugees and asylum seekers are men, while 30% are women.

<table>
<thead>
<tr>
<th>Country</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>Myanmar</td>
<td>143,669</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>3,278</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1,476</td>
</tr>
<tr>
<td>Somalia</td>
<td>1,412</td>
</tr>
<tr>
<td>Other countries*</td>
<td>6,507</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>156,342</strong></td>
</tr>
</tbody>
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Of the 143,669 refugees and asylum seekers from Myanmar, some 52,570 are Rohingya, 45,380 are Chin and some 12,200 are Myanmar Muslims. The rest are Rakhine, Arakanese and of other ethnicities.

* Syria, Iraq, Yemen, State of Palestine and Iran

### Living as a refugee (and asylum seeker) in Malaysia

As Malaysian law makes no distinction between refugees and undocumented migrants, refugees are at risk of being arrested and detained for immigration offences.

Refugees and asylum seekers in Malaysia have no access to legal employment. They tend to work in jobs that the local population do not wish to take (what has come to be known as “3D” jobs: dirty, dangerous and difficult). Some employers exploit their dire situation by paying extremely low or no wages at all.

They are also at risk of being the victims of human traffickers.

Refugee children are denied access to the formal education system in the country. However, some children are able to attend community-run learning centres and learning centres set up by the UNHCR and NGO partners. At present, there are 124 community-based learning centres — 11 of which are operated by six NGO partners, and 113 by the communities themselves with support from NGOs, faith-based organisations and other stakeholders. Currently, some 6,100 (29%) registered refugee children aged three to 17 are enrolled in early childhood, primary and secondary level education at these learning centres.

The UNHCR provides financial and material support to the learning centres. It has also signed memoranda of understanding with five private tertiary institutions: namely, the HELP University, the University of Nottingham Malaysia Campus, the Limkokwing University of Creative Technology, the International University Malaya-Wales, and Brickfields Asia College (BAC), all of which have collectively enrolled some 45 refugee youths in their foundation and undergraduate programmes.

\[^\text{11}\] However, Malaysia has, on an ad hoc basis, voluntarily hosted certain groups of refugees, such as the Khmer Muslims from Cambodia, Filipino Muslims and Bosnians

\[^\text{12}\] *Ibid*
Refugees and asylum seekers in Malaysia who are UNHCR document holders have access to healthcare facilities at a reduced rate, but the cost of treatment and irregular income render healthcare unaffordable to many refugees and asylum seekers.\(^{13}\)

Unlike migrants, refugees and asylum seekers do not choose to leave their countries; they are compelled to do so because of serious discrimination in their home countries, armed conflict, serious public disorder and other complex human rights issues.

Migrants, on the other hand, leave their countries to seek material improvements in their lives. The key difference between migrants and refugees is that migrants enjoy the protection of their home countries; refugees do not.

Migrants do not fall within the criteria for refugee status and therefore not entitled to benefit from international protection as refugees.

**Possible improvements**

Although Malaysia is not a party to the 1951 Convention, there are certain measures that could be taken to alleviate the hardship faced by refugees and asylum seekers.

The first is the formal registration of all refugees and asylum seekers by the government. It is true that refugees and asylum seekers registered with the UNHCR are issued with the UNHCR refugee cards; and these act as identification documents for refugees in Malaysia and are meant to protect them from arrest. However, it is often reported that refugees are still vulnerable to arrest and detention as illegal immigrants even though they hold these cards. This is because, strictly in law, the UNHCR refugee cards have no legal standing; and, furthermore, many enforcement officers have yet to be familiarised with these cards.

From the refugees’ standpoint, having proper documentation and identification means a lot to them, especially if they have never been recognised as citizens in their own country, like the Rohingya in Myanmar.

Apart from the issuance of the identification cards, the refugees and asylum seekers should also be accorded access to basic needs like employment, healthcare and education.

With this system of registration, refugees and asylum seekers in this country would no longer need to live in fear of arrest and detention; at the same time, enforcement agencies could monitor and enforce immigration rules more easily.

Another measure that could be taken towards helping the refugee problem is to formally permit them to work. If permitted to work and given proper training, refugees and asylum seekers could make a better contribution to Malaysia’s economy than what they could at the moment. If refugees and asylum seekers were to be given employment rights, they would become financially independent. They would no longer have to rely on charity, and would be able to live with dignity.\(^{14}\)  

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**About the author**

Dato’ Seri Mohd Hishamuddin Yunus (mhy@lh-ag.com) served 23 years on the Bench and wrote close to 750 judgements in the High Court and the Court of Appeal before retiring in 2015. He is a consultant with Lee Hishammuddin Allen & Gledhill.

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\(^{13}\) UNHCR Factsheet-Malaysia, supra n 7