

REFUGEE CHILDREN IN MALAYSIA: THE PAST, PRESENT AND FUTURE.*

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Abstract

There were not many changes to the situation of refugees and its protection in Malaysia ever since their first arrival in the 1970s. The legal framework for the protection of refugees and refugee children is incomplete, inadequate and has no special regards to children's rights. Despite ratifying the United Nations Convention On The Rights Of A Child (UNCRC), refugee children in Malaysia continue to struggle to enjoy their basic rights. This paper seeks to highlight the presence of diverse group of refugee in Malaysia in the past until today. It is argued in this paper that as a host country of refuge, Malaysia has contributed significantly to the protection of refugees in the Southeast Asian region despite glaring shortcomings. Next, analysis on the treatment of refugee children will be presented with special focus into the different treatment to different groups of refugee children. These various treatments will show whether the guiding principles of UNCRC are being respected and complied with. This paper also seeks to suggest that a proper incorporation of the UNCRC in domestic law will lead the authority to treat refugee children as children first regardless of the immigrant label attached to the group.

I Malaysia As A Destination Of Refuge

Cross- border migration occurs in every region and the number continues to rise. These movement could be motivated by the desire to search for better life and material prospects, thus, people voluntarily leave their home country for more flourishing land. Their willingness and reasons for leaving are void of the refugee definition in the 1951 Convention Relating to the Status of Refugee. There are others who are forced to flee from civil war, human rights violations and natural disaster and they unwillingly left home to escape threat to their life and freedom. They may technically recognised as refugee when they fully correspond to the criteria of refugee under Article 1A (2) of the 1951 Convention.¹ Nevertheless uprooted people escaping wars and natural disaster who are not technically defined as refugee under the refugee Convention are also commonly referred to as refugee.

As in other parts of the world, involuntary migrations of uprooted people in Southeast Asia are neither new nor unique, and there is no sign of coming to an end. The fact that state borders in Southeast Asia are only accessible with valid travel documents does not stop people from entering a state using alternative and illegal method. The Southeast Asia has witnessed continuous refugee² movement within and beyond the region. Interestingly, states affected by these movement are not parties to the 1951 Convention Relating to the Status of Refugee which is only ratified by one country in the region; the Philippines.

Since 1970s, Malaysia has attracted refugees of different origin, races and religion until today.³ Refugee exodus from Indochina, Myanmar, Indonesia and Philippines and voluntary

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¹ Article 1A (2): *any person who owing to a well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*

² The term refugee used throughout this study is not only limited to the definition in the 1951 Convention Relating to the Status of Refugees but also include asylum seekers and other forced migrants.

³ Migrant workers from India and China were brought into Malaya in 1940-50's by the British to work in plantation and mines and their number once exceeded the citizens in 1950.

migrants from various other regions have been arriving and seeking refuge in Malaysia in the last four decades. Many refugees were drawn to Malaysia for its close proximity and strategic location, stable economic, steady political climate and religious view. It is claimed that Malaysia has been friendly and more tolerant towards Muslim refugees as compared to non-Muslims such as the treatment rendered to Muslim Cambodian refugees, Bosnians and Filipinos.⁴

Being a peninsular in the west part of the country and an island on the east part, Malaysia has a porous border which is easily accessible from many points of unofficial entry.⁵ Whilst not a state party to the 1951 Convention Relating to the Status of Refugee and its protocol,⁶ Malaysia nonetheless has played a key role in hosting mass influx of refugees in the region especially during the famous Vietnamese refugee interlude, in collaboration with the office of United Nations High Commissioner for Refugees. However, its law, practice and standard of treatment have been subject to criticism and always badly rated.⁷ Refugee related issues in Malaysia particularly the adequacy of protection for refugee children is a continuous source for contention⁸ but no concrete solution has ever been reached. Even after many years of refugee presence on its soil and long experience of dealing with refugees, specific refugee protection including for refugee children is never part of Malaysian legal framework.⁹

Evidence showed that refugee children could be emotionally and psychologically affected.¹⁰ Hence, when they arrive in a host country, they have myriad needs. Generally, what has happened in their country of origin, the living standards and their experience during flight and how they are treated when they arrive at a safe country will affect their needs.¹¹ Refugee children are particularly in need of immigration documents, nutrition and immunisation, health and healthcare, psychology and mental support and care, education, financial support, family support and reunification, child care and social relationships and provision of social services.¹² These needs are not stand-alone need but instead are inter-related and have positive effect towards each other. For example, good health and nutrition are useful for positive development of a child's

⁴ See Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) p. 261; Vitit Muntarbohn, *The Status Of Refugees In Asia* (Clarendon Press, London 1992)

⁵ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) p. 261

⁶ After this referred to as CRSR or refugee convention.

⁷ See ALIRAN, Violence Against Refugees Continue

<http://www.aliran.com/index.php?option=com_content&view=article&id=534:violence-against-refugees-continues&catid=54:2008&Itemid=11 > accessed 2 January 2009, The Malaysian Bar, Malaysia's Treatment of Refugees <http://www.malaysianbar.org.my/press_statements/malaysias_treatment_of_refugees_.html> accessed 3 January 2009, The Malaysian Bar, Refugee Go Home- He Would If He Could

<http://www.malaysianbar.org.my/human_rights/refugee_go_home_he_would_if_he_could.html > accessed 2 January 2009, USCRI, USCR Condemns Malaysia's Arrest And Threat To Forcibly Return Acehnese Asylum Seekers (Press Release) < <http://www.refugees.org/newsroomsub.aspx?id=1051>> accessed 15 August 2008 and USCRI, *World Refugee Survey 2008* (USCRI, 2008) p. 6. USCRI rated Malaysia as the seventh worst place for refugees.

⁸ The disagreement is notably between the federal government and the state government for example, the state of Sabah which demanded serious involvement and commitment of the federal government to overcome the presence of refugees and asylum seekers in Sabah that it claimed to have posed social and economical problems. See for instance

⁹ As will be shown later, the word refugee has never appeared and used in any Malaysian legislation. In fact the Malaysian Immigration Act 1956 is totally silent about refugee.

¹⁰ McCallin, M., *The Psychological Well-being of Refugee Children: Research, Practice and Policy Issues* (2nd Ed, International Catholic Child Bureau, Geneva 1996); and M. Hodes, 'Psychologically Distressed Refugee Children in the UK' (2000) 5 Child Psychology and Psychiatry Review 57- 68.

¹¹ Burnett, A. and Peel, M., 'Health Needs of Asylum Seekers and Refugees' (2001)322 British Medical Journal 544-547; Day, M., 'Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone' (2002) 16 Geo. Immigr. L. J. 735-737; and Natalie Lummert, 'Children on the Move: The Plight of Immigrant and Refugee Children' (United States Catholic Conference, 2000)

¹² PG Fox, Cowell JM & AC Montgomery, 'Southeast Asian Refugee Children: Violence Experience and Depression' (1999) 5 Int J Psychiatr Nurs Res 589- 600.

social and psychosocial development.¹³ According to MacCallin in her discussion of the psychosocial needs of refugee children, every part of a refugee life can be persistently influenced by the unmet psychosocial needs.¹⁴ It is important to meet every aspect of refugee children's needs since any deficiency may have undesirable consequence on their development.¹⁵

Around the world, about 250,000 refugee children are separated from their families but no comprehensive statistical data is available and many of them are not appropriately dealt with by the authority. Refugee children in Malaysia are not in a better position. They are exposed to similar challenges and sometimes are at lower echelon than those seeking refuge in other countries. Despite strong evidence of their plight, Malaysia and many other sovereign states continue to treat refugee children similar to criminals and force them to live in an unsuitable condition for their development despite a long saga of children's rights advocacy. The fact that refugee children are normally associated with traumatizing experience during their flight¹⁶ and extremely vulnerable to hazardous environment; exploitation; and manipulation; has in consequence, made them an 'at risk' group. In an unsecured setting, refugee children are at particular risk of contracting HIV/AIDS,¹⁷ being forced to serve as soldiers¹⁸ and becoming victims of abuse and human trafficking.¹⁹ Due to their age and dependency, refugee children are considered vulnerable people but by comparison, unaccompanied and separated refugee children are more vulnerable than who are accompanied by their parents.

It is the objective of this study to highlight the protection of refugee children under the UNCRC. Relevant provisions of the UNCRC are discussed in Section II. Section III briefly discusses the history of refugee presence in Malaysia ever since the 'boat people' era to the current arrival and how they are generally accepted by the community and the authority. It focuses on four major refugee groups; the Indochinese, the Filipinos, the Acehnese and the Myanmarese. Section IV wishes to identify the current practice in handling and treating refugee children upon their arrival in Malaysian soil, access to asylum application procedures, the treatment while waiting for the determination process by UNHCR and how they are legally and practically dealt with after the determination is completed and while waiting for resettlement arrangement to be finalised. Discussion in Section III and IV helps to assess whether Malaysia's practice has violated the rights of children as provided under the UNCRC. It also shows the extent to which the special needs of refugee children are being considered in the whole process involving them.

II Protection Of Refugee Children Under The UNCRC

Guided by its four most important principles: non- discrimination; the principle of best interests; right to life, survival and development; and respect for the views of the child, many believe that provisions of the UNCRC can be steered to benefit refugee children in every stage of refugee cycle. A number of stipulations which deal among others with protection against abuse, neglect and exploitation of children in the CRC are seen as powerful safety cloaks for refugee children as well. Additionally, various applicable rights enshrined under the Convention will help refugee children to survive and further develop and achieve their potential.

¹³ McCallin, M., 'The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children' (1991) 3 IJRL 82- 99, at p. 86.

¹⁴ Ibid., McCallin, M., 'The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children', at p. 94.

¹⁵ Ibid., McCallin, M., at p. 86.

¹⁶ See for example Rousseau, C. & Drapeau, A., 'Are Refugee Children an at Risk Group? A Longitudinal Study of Cambodian Adolescents' (2003) 16 J. Refugee Stud. 67- 82 and Young, WA., 'Refugee Children at Risk' (2001) 28 Hum. Rts. 10-11.

¹⁷ Lawday, A. and Webb, D., 'HIV and Conflict: A Double Emergency', Save the Children, 2002, p. 5 available at <http://www.savethechildren.org.uk/en/docs/HIV_and_Conflict.pdf>.

¹⁸ Women's Refugee Commission, *Refugee Girls The Invisible Faces of War* (Pearson Foundation, 2009) 5.

¹⁹ Ibid., 6-8.

The high standard of protection and assistance for children under the UNCRC can be utilised in rendering rights to every children in a jurisdiction of a state party. The full application and implementation of the UNCRC by state parties could be a possible solution for the protection of refugee children. As explained in the Preamble of the UNCRC, “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration. Without doubt, internationally displaced children or the refugees are in such exceptional situation that warrants special protection. Their difficulties may generally include legal, social, personal and general and mental health issues.

2.1 Children As Subject of Rights

The novelty and concrete proclamation of the UNCRC has changed the position of children as right holders and not as possessions of their parents.²⁰ Children are no longer perceived as having needs only, now they are recognised to have protected legal rights and they may exercise these rights with the support of states.²¹ The provisions of the UNCRC are a good foundation to which to attach fundamental rights of refugee children,²² especially under the provisions of Article 2,²³ 3,²⁴ 4,²⁵ 6,²⁶ 19 and 22.²⁷ Especially in states which are not parties to the CRSR, the UNCRC may be employed as a primary basis for protecting refugee children and the standards set under the UNCRC should be applicable to all children regardless of their legal status.

2.2 Best Interests Of A Child

The principle of best interest of child is the paramount objective of the delegates of various countries who worked together in the drafting process of the UNCRC.²⁸ Under the UNCRC, it is also the duty of the authorities and decision makers to make the best interests of a child as their primary consideration in all their actions and decisions concerning children.²⁹ However, at the same time, since states are at liberty to interpret the UNCRC despite authentic interpretation issued by the Committee of the Rights of the Child, a state may legislate a law which complies with the UNCRC but introduces policies that discriminate or neglecting the best interests of the child and thus undermine the objective of the statute.³⁰

2.3 Non- Discrimination

It has been argued by Van Bueren that by virtue of Article 2³¹ of the UNCRC, a state party to the UNCRC is under the obligation to ensure that all children present in its territory, including

²⁰ Doek, J. E., ‘What Does the Children's Convention Require’ (2006) 20 Emory Int'l L. Rev. 199- 208, 200.

²¹ In fact states are obliged to ensure an environment suitable for the enjoyment of these rights.

²² See for example the argument made in Amer Hamzah Arshad, ‘The Protection of Refugee Children in Malaysia: Wishful Thinking or Reality’ (2004) INSAF XXXIII No. 4, p. 105- 125.

²³ Prohibition from all form of discrimination against children.

²⁴ Best interests of the child to be a primary consideration.

²⁵ States Parties to take appropriate measures to implement UNCRC.

²⁶ Right to life.

²⁷ States Parties to protect and assist refugee children and children seeking asylum.

²⁸ Secretary General Javier Perez de Cueller in his speech in the General Assembly Meeting of November 21, 1989.

²⁹ UNCRC: Art. 3.

³⁰ Ibid. Bueren, Note 44, p. 38.

³¹ UNCRC: Article 2:

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

refugee children, shall enjoy the rights provided under the UNCRC without discrimination.³² Children of different groups should be treated equally in such a way that every child may have access to education and healthcare. Even though other international instrument also guarantee against discrimination, Article 2 of the UNCRC which strongly emphasised on the principle of non- discrimination, should include the protection of refugee children from being discriminated contain better safeguard for children.

Under Article 2 of the UNCRC state parties undertake to respect and ensure the rights under the UNCRC to every child in their jurisdiction without discrimination. The principle of non-discrimination often associated with the principle of equality is a protected norm of international human rights law with a contentious scope and content.³³ The relation between the two principles is profound, because a person is said to be treated equally when he is not being discriminated and vice versa.³⁴

2.4 Comprehensive Protection

The spectrum of children's rights guaranteed under the UNCRC is comprehensive and should be applicable to any child in a state's territory. Furthermore, the four guiding principles in which the UNCRC is based have at the outset guarantee basic element of child protection including those of aliens especially in states which are not party to the Refugee Convention. However, it must be noted that the UNCRC is only concern with rights of children and the process of which the rights shall be implemented. It does not however, provide for sufficient protection in relation to developmental needs.³⁵

Other than the guiding principles,³⁶ the provisions of the UNCRC are mainly to protect the civil rights and freedom,³⁷ family environment and alternative care,³⁸ basic health and welfare,³⁹ education, social and cultural rights,⁴⁰ and the rights of children with special needs.⁴¹ Refugee children are correctly classified as children with special needs but only one provision is especially designed to directly address their situation. Obligations of state parties derived from the Convention may be able to address the specific vulnerability of refugee children especially those who are unaccompanied and separated from their parents or family or lawful guardians.

III Refugee Presence In Malaysia: Past And Present

The presence of refugee population in Malaysia is often associated with crimes and other social problems. Various sections of the community continue to blatantly blame refugees for criminal offences without concrete evidence leaving refugees as a scapegoat when something goes

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

³² See Van Bueren, p. 362 and Amer Hamzah Arshad.

³³ A. F. Bayefsky, "The Principle of Equality and Non- Discrimination in International Law" (1990) 11 Human Rights Law Journal 1- 34, 1.

³⁴ Samantha Besson, "The Principle of Non- Discrimination in the Convention on the Rights of the Child" (2005) 13 Intl. J. Of Children's Rights 433- 461, 434.

³⁵ Goodwin- Gill, "Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities" in Jaap Doek, Hans Van Loon and Paul Vlaardingerbroek (eds), Children on the Move How to Implement Their Right to Family Life (Martinus Nijhoff Publishers, 1996) 100.

³⁶ UNCRC: Article 2, 3, 6 and 12.

³⁷ Ibid., Arts. 7, 8, 13- 17 and 37(a).

³⁸ Ibid., Arts. 5, 18 (1) (2), 9- 11, 19- 21, 25, 27 (4) and 39.

³⁹ Ibid., Arts. 6, 18 (3), 23, 24, 26, 27 (1) (2) and (3).

⁴⁰ Ibid., Arts. 28, 29 and 31.

⁴¹ Ibid., Arts. 22, 32- 36, 37 (b) (c) (d), 38, 39 and 40.

wrong.⁴² Problems surrounding the arrival, acceptance and treatment of refugees remain an unresolved subject matter for almost four decades and this is probably an evidence of Malaysia's nonconformity to the international human rights standards. It is also further displayed in the statistics on migrants in Malaysia compiled by the Department of Immigration and the Department of Statistics, which do not include refugees in its list of international migrants. The gap in the statistics is due to the fact that refugees in Malaysia are not recognised and they are subsumed under 'unauthorised migrants', a figure kept by the Ministry of Home Affairs. There is no official printed figure of refugees but it will be released in response to Parliament questions time or in the Ministry's press release. Estimates of the number of refugees in Malaysia are released by the United Nations High Commissioner on Refugees.

Generally, refugee statistics in Malaysia fluctuated from 1993 to 1997, ranging from 154 persons to 5,285 persons⁴³ and there was a sudden increase from 1998, hitting more than 2002 are Myanmar and Philippines⁴⁴ and this was due to intensified political and military conflicts in these two countries throughout the period⁴⁵. In 2003, the number dropped to about 17,000 but doubled the next year to around 35,000.⁴⁶ The number of registered refugees and asylum seekers in Malaysia during 2005 were 44,531 persons.⁴⁷ This is an increase of 26% from 2004 which recorded 35,125 refugees and asylum seekers.⁴⁸ Out of 44,531, 43.8% or 19,523⁴⁹ are from Aceh, Indonesia and 11, 277 of Rohingyans from Myanmar.⁵⁰ The rest come from Thailand, Afghanistan, Cambodia and Nepal.⁵¹

It is surprising that Filipinos in Sabah were neither considered nor counted by UNHCR as refugees since 2003 regardless of their presence in large number. More than 45,000 Filipino refugees sought refuge in Malaysia from 1998 to 2002.⁵² At the end of 2004, there were 61, 300 Filipino Muslims in Malaysia.⁵³ The explanation for this disappearance trend is because they are now placed in the register as "others of concern" to UNHCR, a different group that do not fall under refugees, asylum seekers, internally displaced persons or stateless persons.⁵⁴ Currently Malaysia is hosting about 140,000⁵⁵ persons of concern to UNHCR of which 40,000⁵⁶ are declared as refugees and their condition and situation is far from desirable. From the various refugee groups that fled to Malaysia and discussed in this study, only the Indochinese refugee problems have been fully resolved while the rest are still ongoing.

⁴² Azizah Kassim, "Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future" (2009) 47 Southeast Asian Studies 52, 61-66

⁴³ UNHCR, *2002 UNHCR Statistical Yearbook* (UNHCR, 2004) p. 380.

⁴⁴ UNHCR, *1998 UNHCR Statistical Yearbook* (UNHCR, 2007) p. 16

⁴⁵ For summary of arm conflicts in Myanmar and Philippines, see Ploughshares, Burma (Arm Conflicts Report) <http://www.ploughshares.ca/libraries/ACRText/ACR-Burma.html>> accessed 22 December 2008, Ploughshares, Philippines-CPP/ NPA (Arm Conflicts Report) < <http://www.ploughshares.ca/libraries/ACRText/ACR-PhilippinesN.html>> accessed 12 January 2009 and Ploughshares, Philippines-Mindanao (Arm Conflicts Report) < <http://www.ploughshares.ca/libraries/ACRText/ACR-PhilippinesM.html>> accessed 12 January 2009

⁴⁶ UNHCR, *2004 UNHCR Statistical Yearbook* (UNHCR, 2006) p. 393

⁴⁷ UNHCR, *2005 UNHCR Statistical Yearbook* (UNHCR, 2007) p. 414

⁴⁸ UNHCR, *2004 UNHCR Statistical Yearbook* (UNHCR, 2006) p. 392

⁴⁹ UNHCR, *2005 UNHCR Statistical Yearbook* (UNHCR, 2007) p. 415

⁵⁰ Ibid. p. 415

⁵¹ Ibid.

⁵² UNHCR, *2002 UNHCR Statistical Yearbook* (UNHCR, 2004) p. 380

⁵³ UNHCR, *2004 UNHCR Statistical Yearbook* (UNHCR, 2006) p. 29

⁵⁴ UNHCR, *2004 UNHCR Statistical Yearbook* (UNHCR, 2006) p. 29

⁵⁵ UNHCR, *2007 UNHCR Statistical Yearbook* < <http://www.unhcr.org/statistics/STATISTICS/4981c3dc2.pdf>> accessed 20 November 2008, p. 65

⁵⁶ Ibid

In the attempt to describe the presence of refugees and the treatment granted to them in Malaysia, it is important to note that from the mixed literature that are referred to, only the Indochinese and Filipinos are widely and well documented in scholarly works, official reports and NGO reports. The presence and handling of other refugee groups receive less attention, and thus reliable and authentic sources are scarce. In these circumstances, references are also made to the websites of specific refugee group currently residing in Malaysia. However, the contents, claims and allegations made in these websites are not corroborated. Similarly, the research could not solely establish its analysis on the government's account and report and to rely on scholarly works alone is insufficient and some discrepancies of facts may occur. Thus, competing and contrasting account between refugee statement, government report, facts and figures from the UNHCR and scholarly works are inevitable. However, allegations made by the refugees can be taken as an indication of the standard of treatment towards refugees. To certain extent, the accusations which have never been denied but supported by UNHCR reports can be classified as unswerving.

3.1 Indochinese Refugees and Past Practice in Handling Refugees and Refugee Children

The most famous refugee departures and arrivals during 1970s, were the Indochinese refugees, also known as the boat people.⁵⁷ Malaysia was one of the countries most affected by the massive influx of the Vietnamese boat people⁵⁸ who fled Vietnam after the collapse of the democratic government of Saigon, South Vietnam to the communist's regime of the North Vietnam which was backed by China.⁵⁹ When they first flocked into Malaysia in May 1975, the refugees were accepted on humanitarian grounds⁶⁰ and Malaysia was initially concern and considerate towards the fate of the boatpeople. They were placed in several camps and were supported by the Red Crescent and UNHCR which provided material assistance for them. However, the government was deeply concern about security issues especially the influence and spread of communist ideology on the Vietnamese.⁶¹ Moreover, Malaysia had just experienced the fight against the communists and is still struggling to wipe out members of the Malayan Communist Party (PKM). Nevertheless, Malaysia gave them temporary refuge and acted as a country of transit before they were resettled in third countries.⁶² Their admission during the early stage however, was not depending on the guarantee of resettlement places. Nevertheless, when less resettlement places were offered by third countries while the number of refugees was increasing, under acute resources restraint and acting under pressure from the local people⁶³ the authorities started to send

⁵⁷ For detail account of the Indochinese refugee see Barry Wain, *The Refused: The Agony of the Indochinese Refugees* (Simon & Schuster, New York 1982); W C Robinson, *Terms of Refuge The Indochinese Exodus and The International Response* (Zed Books Limited, London 2000) ; Sutter, V.O., *The Indochinese refugee dilemma* (Louisiana State University Press, Baton Rouge 1990); Robinson, C., *Crisis In Asylum: Burmese And Indochinese Refugees In Southeast Asia, Testimony Before The House Of Representatives, Subcommittee On Asian And Pacific Affairs* (US Committee for Refugees , Washington 1990); and Robinson, C., *Testimony On The United States, The CPA, And Refugee Protection Problems In Southeast Asia Before The Senate Appropriations Committee, Subcommittee On Foreign Operations* (US Committee for Refugees , Washington 1990).

⁵⁸ Francoise Bory, 'Malaysia: the Flight Continues' (1988) 4 Red Cross, Red Crescent p. 15.

⁵⁹ UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (Oxford University Press, UK 2000) p. 80- 83, Barry Wain, *The Refused: The Agony of the Indochinese Refugees* (Simon & Schuster, New York 1982) p. 37- 64, W C Robinson, *Terms of Refuge The Indochinese Exodus and The International Response* (Zed Books Limited, London 2000) p. 10- 33.

⁶⁰ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) 253, 260 and Bahrin, T. S. And Rachagan, S. 'The status of Displaced Filipinos in Sabah: Some policy Considerations and Their Long Term Implications'. In Lim Joo- Jock Vani, S. , *Arm Separatism in Southeast Asia* (Institute of Southeast Asian Studies, Singapore 1984)190- 213.

⁶¹ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) 253, 260.

⁶² Majority of the refugee were resettled in America, Canada, Australia and the Europe.

⁶³ After three years following the first boatpeople departure from Vietnam, the rate of resettlement was slower and less place for resettlement were offered by third country, causing critical congestion in camps. The local accused refugees

the boat people away or redirect their boats to other destinations.⁶⁴ By this time, the local people living at the coast where the boats normally landed had started preventing refugees from getting off their boats.⁶⁵ These were partly motivated by the difficulties faced by the locals to get basic and essential items due to traders' preference to sell these items at black market rate or with organisations which catered for the refugee camps which buy in bulk.⁶⁶

The government was alarmed that hundreds of weapons were found among the Vietnamese including firearms and ammunitions.⁶⁷ Furthermore, the arrival of ethnic Chinese refugees in a large number raised the trepidation of communism which was a politically sensitive issue during that time.⁶⁸

The 'push back' incidents have led to an emergency international conference in 1979 concerning Indochinese refugees convened by UNHCR. Due to the pledges made by third countries to offer more resettlement places for the refugees during this conference, Malaysia agreed to continue offering temporary protection. This came with the expectation that the refugees will be resettled in a third country such as United States of America, Canada and Australia without delay. Malaysia constantly claims that the only feasible solution for the boat people is resettlement in third countries.⁶⁹

The arrangement made in the earlier conference started to fall apart when the number of arrivals rose again and almost reached 4,000 in four consecutive months at the end of 1987 while resettlement places were terribly low, causing several other problems including shortage of supplies, resources and shelter. Due to these, Malaysia started the 'push backs' again. Other Southeast Asian governments took the same approach. This again had called for another conference in which the Comprehensive Plan of Action (CPA) was endorsed with the view to easing the departure from Indochina and resettlement process.⁷⁰ Consequently, Malaysia started to accept Vietnamese refugees again and made some arrangements to speed up the local screening process.⁷¹

Malaysia's official stand in 1979 in relation to the boat people can be well deciphered from a reply by the then Prime Minister Datuk Hussein Onn on June 18, 1979 to the telegram he received from the United Nation Secretary General concerning reports that Malaysia had been

for causing price rise and supply and shortage of groceries because traders were more keen to sell to refugees for higher price and claimed that the authorities were neglecting the citizens who were also in need of state's attention and financial assistance. See Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) p. 261.

⁶⁴ Arthur C. Helton, 'The Comprehensive Plan of Action For Indo- Chinese Refugees: An Experiment in Refugee Protection and Control' (1990-1991) 8 N.Y.L. Sch. J. Hum. Rts . p. 138- 139.

⁶⁵ There were instances where refugee boats were bombarded with stones and shoved back to sea when trying to land in the east coast. See for example Barry Wain, *The Refused: The Agony of the Indochinese Refugees* (Simon & Schuster, New York 1982) p. 129- 130.

⁶⁶ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) 261, 262.

⁶⁷ Ibid., Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) 261, 262.

⁶⁸ Ibid. 262.

⁶⁹ Y. Zarjevski, *A Future Preserved* (Pergamon Press, Oxford 1988) p. 33.

⁷⁰ Richard Towle, 'Process and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden Sharing?' (2006) 18 Int'l J. Refugee L. 537 (537- 563).

⁷¹ Arthur C. Helton, 'The Comprehensive Plan of Action For Indo- Chinese Refugees: An Experiment in Refugee Protection and Control' (1990-1991) 8 N.Y.L. Sch. J. Hum. Rts . p. 123 (111- 148).

pushing back and towing the boat people from Malaysian coast.⁷² In the government's view, as a small developing country, Malaysia is not able to shoulder the burden of providing shelters for the boat people (in which it thought as a disproportionate share) particularly when resettlement places cannot be guaranteed. The government was also upset that the rate of departure to countries of resettlement had been well below the rate of new arrivals from Indochina.⁷³ The presence of Indochinese refugees was also claimed to have caused political, economic, social and security problem.⁷⁴ It openly pointed out that measures to prevent further arrivals such as towing out will be taken and that the only alternative to resettlement was to return the refugees to their country of origin.⁷⁵

It is odd that the Prime Minister continues to refer to the Indochinese refugees as 'the boat people' throughout his reply except at the end of the document. The term refugee was used only once⁷⁶ and this led to the conclusion that the government was trying to downplay the position of the boat people as refugees and to deny Malaysia's duty and responsibility towards them. By repeating that the boat people's only alternative is resettlement in third countries, and any residual should not remain in the camp,⁷⁷ the Prime Minister was impliedly ruling out local integration.

During their more than 20 years of accumulative stay in Malaysia, from 1975- 1999, the boatpeople were placed in three main refugee camps; in Pulau Bidong, Sungei Besi and Marang.⁷⁸ UNHCR funded the set up, management and operation of the three camps which are now closed. The protection and security of the camps was the responsibility of the government.⁷⁹ These camps usually housed triple the capacity of their infrastructure.⁸⁰ Treated as restricted areas, Indochinese refugees were confined to stay and live their life around this camp only. They had no right to work or to earn a livelihood and there was no freedom of movement.⁸¹ Nevertheless, their freedom of religion was not affected at all. Occupants of the Pulau Bidong camp and the Sungei Besi camp had the opportunity to attend schools and undertake vocational training.⁸² This includes dress making, carpentry and technical training. Refugees who were offered resettlement places were required to learn English as part of the preparation to be assimilated in a new society.⁸³

The Sungei Besi camp, situated in Klang Valley at the outskirts of Kuala Lumpur⁸⁴ was the last closed among the three and was described as an overcrowded and unsafe place.⁸⁵ As of 1991

⁷² Hussein Onn, 'Policy Towards Illegal Immigrants', (1979) Foreign Affairs Malaysia, 216.

⁷³ Hussein Onn, 'Policy Towards Illegal Immigrants', 216.

⁷⁴ Hussein Onn, 'Policy Towards Illegal Immigrants', 216, 217.

⁷⁵ Hussein Onn, 'Policy Towards Illegal Immigrants', 216, 218.

⁷⁶ Hussein Onn, 'Policy Towards Illegal Immigrants', 216, 219.

⁷⁷ Hussein Onn, 'Policy Towards Illegal Immigrants', 216, 217, 218.

⁷⁸ United State General Accounting, 'Refugees: Living Condition is Marginal', Report to the Chairman, Select Committee on Hunger, House of Representative (Washington DC 1991) GAO-NSAID 91- 258 , p. 40.

⁷⁹ Ibid.

⁸⁰ Francoise Bory, 'Malaysia: the Flight Continues' (1988) 4 Red Cross, Red Crescent p. 16 & United State General Accounting, 'Refugees: Living Condition is Marginal', Report to the Chairman, Select Committee on Hunger, House of Representative (Washington DC 1991) GAO-NSAID 91- 258 , p. 43.

⁸¹ Francoise Bory, 'Malaysia: the Flight Continues' (1988) 4 Red Cross, Red Crescent p. 16.

⁸² United State General Accounting, 'Refugees: Living Condition is Marginal', Report to the Chairman, Select Committee on Hunger, House of Representative (Washington DC 1991) GAO-NSAID 91- 258 , p. 45.

⁸³ Ibid. p. 45. This includes dress making, carpentry and technical training. Refugees who were offered resettlement places were required to learn English.

⁸⁴ Kuala Lumpur is the capital city of Malaysia.

⁸⁵ Huu Dinh Nguyen & Freeman, J.M., *Disrupted Childhood : Unaccompanied minors in Southeast Asian refugee camps* (Aid to Refugee Children Without Parents, San Jose 1992) p. 12. See also Carrington, U., 'Working with Indo-Chinese refugees in Malaysia: First asylum camps, a social work perspective' (1993) 6 Journal of Vietnamese studies,

when the Pulau Bidong camp was closed and all occupants were moved here, it housed 530 unaccompanied refugee minors.⁸⁶ The management and welfare of the occupants in the camps were limited by economic and political consideration. In Pulau Bidong camp, there were complaints about the quality and quantity of food⁸⁷ though a report to the Chairman, Select Committee on Hunger, House of Representatives, United States of America⁸⁸ recorded that refugees received plentiful food supplies, which were nutritional and sufficient and were given 10 litres of clean water for drinking every day. The other common problem that rose in the camp was the length of time taken by the authority to reach a decision on resettlement application⁸⁹ that caused anxiety and distress to the refugees.⁹⁰ Internees were also believed to be pressured to return to Vietnam by UNHCR officials.⁹¹ When the Pulau Bidong camp was closed in 1991, its internees were moved to Sungei Besi camp, causing the camp to be more crowded.⁹² However, there was no complaint of mistreatment recorded.

In an observation on the living condition of unaccompanied minors in Southeast Asia, Nguyen and Freeman made a conclusion that the officials of the primary support agency of the Sungei Besi camp seemed to be very committed about the care of unaccompanied minors.⁹³ The camp management officials gave great attention to community development; across-the-board professional counselling; and welfare.⁹⁴ They also demonstrated sympathy for the predicament of refugees⁹⁵ and were quite frank in discussing problems that arise in the camp.⁹⁶ Generally there was serious emphasize on education and the educational facilities provided in the camp were considered outstanding.⁹⁷ Moreover, minors were monitored closely by social workers that any absence from school will be inquired into and dealt with if there was any problem.⁹⁸ It is also interesting to note that the best interest of minors was taken into account in the making of decision affecting the minors.⁹⁹

Asylum applications for resettlement involved interviews and siblings consisting of adults and minors were interviewed together, as requested by many asylum seekers¹⁰⁰ and probably to enable the decision maker to obtain full account of the minor's refugee status claim. Many minors expressed keenness to live in the Sungei Besi camp as compared to Pulau Bidong.¹⁰¹ This was largely because internees did not have to cook, instead, they were given were given cooked food and the facilities were better.¹⁰²

79- 86 and Helton, A.C., *'The Comprehensive Plan Of Action For Indo-Chinese Refugees: An Experiment In Refugee Protection And Control'* (1990) 8 New York Law School Journal of Human Rights, p. 141.

⁸⁶ Ibid. p. 12.

⁸⁷ Ibid. p. 12.

⁸⁸ United States General Accounting Office, "Report to the Chairman, Select Committee on Hunger, House of Representatives. Refugees: Living Conditions Are Marginal" (Washington D.C. 1991)p. 39- 46.

⁸⁹ Ibid. p. 13.

⁹⁰ In Carrington, U., 'Working with Indo-Chinese refugees in Malaysia: First asylum camps, a social work perspective' (1993) 6 Journal of Vietnamese studies, 80- 82, Uyen described the psycho- social issues in the refugee camps.

⁹¹ Ibid. p. 13.

⁹² Ibid. p. 13.

⁹³ Ibid. p. 12.

⁹⁴ Ibid. p. 12.

⁹⁵ Ibid. p. 12.

⁹⁶ Ibid. p. 12.

⁹⁷ Ibid. p. 12.

⁹⁸ Ibid. p. 12.

⁹⁹ Ibid. p. 13.

¹⁰⁰ Ibid. p. 13.

¹⁰¹ Ibid. p. 13.

¹⁰² Ibid. p. 13.

Helton's report¹⁰³ on the refugee determination process and procedure for Vietnamese refugees implemented in Malaysia during 1993 showed that refugees were given several materials including on refugee status determination, special procedures for unaccompanied minors and voluntary repatriation when they arrive to prepare them for interviewing process or screening. UNHCR also held group counselling to allow refugees to ask questions¹⁰⁴. The screening process was conducted by military officers using lengthy questionnaires and the interview was fully observed by a UNHCR legal consultant. International interpreter was also provided throughout the screening process. Decisions on the application were made by a senior officer without giving reasons. Once provided with the decision, an asylum seeker was given seven days to file for review and thirty days to prepare for the ground of appeal.¹⁰⁵ The review decision is final, without reasons and there was no provision for judicial review.¹⁰⁶ In short, the refugee determination process involved two tiers routine; screening or interview and later a review session where necessary. As for children especially unaccompanied minors, they were subject to special procedures but the specific contents of that procedure cannot be determined as no such leaflet was available for scrutiny.¹⁰⁷

In 1996, the last Vietnamese refugee left Malaysia to return to his country. The period of boat people is over now, all the camps have been shut down and as of today there are no more boat people refugees staying in Malaysia. Problems concerning Indochinese refugees in Malaysia are considered resolved. In summary, the treatment accorded to the boat people was obviously affected and influenced by many factors including Malaysia's security concern of the communist threat, international pressure, pledges made by developed countries and hefty funding by the UNHCR that have made it possible to assist and protect refugees in those camps.

3.2 Filipino Refugees

The presence of Filipino refugees in Malaysia has attracted various and continuous controversies¹⁰⁸ and at present Filipino refugees have outnumbered native Sabahans in some areas.¹⁰⁹ The Filipinos fled from their homeland due to armed conflicts and civil wars that erupted and prolonged in Mindanao since late sixties. The clash between the government army and the Muslim secessionist group in the southern Philippines particularly the Mindanao National Liberation Front (MNLF) which fought for independence from the federal government has forced many of its population to seek refuge in Sabah, the nearest foreign land to the Southern Philippines but many of them entered Sabah without apparent intention to become refugees.¹¹⁰

Landed first time in late 1960's, in the coast of Sabah, the number of refugees was quick to accelerate. They were initially granted with the permission to remain in Sabah on humanitarian ground and were located in coastal areas in Sandakan, Tawau and Kota Kinabalu. There were also reports saying that the Filipinos were granted refugee status once arriving despite their illegal

¹⁰³ Helton, A.C., 'Refugee determination under the Comprehensive Plan of Action : overview and assessment' (1993) *International Journal of Refugee Law*, 544- 558.

¹⁰⁴ *Ibid.*, Helton, p. 549.

¹⁰⁵ *Ibid.*, p. 550.

¹⁰⁶ *Ibid.*, p. 550.

¹⁰⁷ *Ibid.*, p. 551.

¹⁰⁸ See for example *Refugees and Migrants not recognised*, *The Star*, 4 September 1999; *17, 580 Filipinos in school*, *Daily Express*, 18 April 2001; *UPKO puzzled over number of IMM13 holders*, *Daily Express*, 9 July 2004; *UPKO protests giving IMM13 holders PR*, *Daily Express*, 1 July 2007; and *Blitz on Illegal Immigrants in Sabah*, *New Straits Times*, 26 June 2008; for debate and argument on the status of Filipino refugees and the treatment that this group is receiving. The authorities are also reluctant to make a concrete statement about legal status of the Filipinos.

¹⁰⁹ Adnan, M. H., 'Refugee Issues in Malaysia: The Need for a Proactive, Human Rights Based Solution', *UNEAC Asia Papers 2007* at <http://www.une.edu.au/asiacentre/papers.php>. Accessed 12 January 2010.

¹¹⁰ Muntarhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) p. 115.

entry and documentations were supplied to them within 14 days of arrival. Renewable annual immigration passes were also given and no time limit to return to Philippines is imposed on the bearer. In fact, there is little effort to resettle the refugees in third countries or to restraint further arrival.¹¹¹

It was claimed that serious labour shortage was the real reason of permitting the Filipinos to stay because they could be recruited to work in logging and plantation sector.¹¹² It was also claimed that the Sabah state government led by Tun Mustapha, the Chief Minister was personally and politically motivated in admitting Muslim refugees in order to strengthen his political position. The integration of these Muslim refugees will help to increase the membership of United Sabah National Organisation (USNO) and will eventually bolster its political standing in Sabah.¹¹³

Filipino refugees were not only treated differently, but were also generously accepted by the government. In fact, a large number of them were even granted permanent resident status and citizenship.¹¹⁴ Since the Filipinos are willing to accept low wages, they easily found employment at local plantations, business premises and factories. The liberal support given to this group was also motivated by religious ties as most of them were Muslims.¹¹⁵ However, it should be highlighted that the Filipino refugees have been able to easily and quickly adapt to the local life because of the support, assistance and protection provided by the early Filipino economic migrants who are already settled in Sabah.¹¹⁶ The UNHCR was also present to assist them from 1976 to 1987. From 1987 the UNHCR closed its office in Sabah citing that the Filipinos are independent. This was not easily accepted by the state authority who accused the UNHCR office of merely washing their hands when everything became unmanageable and some even suggested that the action showed that the Filipinos are not genuine refugees who qualify for the help and assistance of the UNHCR.

The UNHCR with close cooperation from the Federal Government have relocated this group in 34 resettlement villages including six main sites in Kinarut, Tawau, Telipok, Sandakan, Labuan and Lahad Datu. The resettlement villages are consists of wooden huts, roads, mosques and schools. Nevertheless, occupants of all these resettlement sites are allowed to leave these sites and able to enjoy full freedom of movement and the right to work. Occupants of these sites were also allocated with plantation land, fishing boats and nets and trading facilities to help them earn a living.¹¹⁷ These settlements are still in operation until today but is often associated with various criminal activities especially drug abuse.¹¹⁸

The Federal Government issued Filipino refugees with a special pass (HF7 which was later replaced by IMM13) that allows the refugee to stay and work in Sabah without limit. In 1987, the

¹¹¹ See Gunggut, H. et al, 'Illegal Immigrant Entry Into Sabah: Policy Statements and Practices.

¹¹² Bahrin & Rachagan (1984).

¹¹³ Ibid.

¹¹⁴ Muntarbhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) p. 115.

¹¹⁵ Dorall RF, 'Muslim Refugees in Southeast Asia, the Malaysian Response' (1988) *Asian Migrant* 1 (3): 88- 93 , Muntarbhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) p. 113- 120 and Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) p. 257.

¹¹⁶ See for instance Halina Sandera Mohd Yakin, *Akultrasi Migran Filipina Generasi Pertama dan kedua di Sabah* (Universiti Malaysia Sabah, Kota Kinabalu 2003).

¹¹⁷ Bahrin and Rachagan.(1984)

¹¹⁸ See for instance 'Refugee settlement's special syabu service' Daily Express, 19 January 2005; 'Refugee Camp Drug Bust', Daily Express, 20 April 2005; *Filipino refugees and Syabu are the same*' Daily express, 25 August 2005; and 'Kinarut Drugs Due to refugees; needs police base, says MP', Daily Express, 12 August 2006.

UNHCR terminated its services in Sabah quoting that the Filipino refugees' standard of living had improved and is comparable to the locals and they are able to stand on their own feet.¹¹⁹

Sabah was later in the end of the eighties become suffused by economic migrants from Indonesia and Philippines whose large number has triggered concern over the security of the country. There were incidents of infiltration of the resettlement sites by illegal immigrants. Hence, the administration of the sites was taken over by the Federal Government under the Special Federal Task Force (Sabah and Labuan). Despite having two institutions to oversee the refugees, the sites are left in deplorable conditions, they are not well maintained, become overcrowded and social problems such as drug abuse and gambling continue to occur. The children also suffer from lack of access to formal education.¹²⁰

Change of state government in Sabah had great impact on the life of refugees. During the administration of USNO (1967- 75) and later Berjaya government (1976- 85), the refugees were generously supported but their rights are gradually wiped away. The Parti Bersatu Sabah (PBS) dominated by non- Muslims which ruled Sabah from 1986 started to show resentment and exclusion against the refugees.¹²¹ Proposals to legalise their status by granting them with Permanent Resident status is vehemently opposed by various parties.¹²² Today, the Filipino refugees are generally stereotyped as illegal immigrants; are often blamed for taking away jobs from the locals; and accused of becoming a source of social problems and threats to security. They are even blamed for causing strain on social services and public amenities.¹²³ In political related issue, the refugees are said to have been issued with fake identity cards to enable them to vote in election and this further escalate rejection and anger among the local community.¹²⁴ The ongoing conflict between Sabah state government and the federal government are basically concerning the liberal approach adopted by the federal government in granting permanent resident status and citizenship to the Filipinos.¹²⁵

The position of Filipino refugees is more complex than the other groups. Since they are now not counted as refugee under the UNHCR statistics, they remain in legal limbo and it will be an arduous task to make a case for their legal position and rights in the country.

3.3 Indonesian Refugees

Most Indonesian refugees came from the Aceh province, in the island of Sumatra separated from peninsular Malaysia by the straits of Malacca. During the counterinsurgency operation in 1990-1993 many Acehnese fled to Malaysia and again when the military offensive began in May 2003

¹¹⁹ Ong, Joshua. 'UHNCR's Role in Addressing the Issue of Stateless/ Undocumented Children in Sabah' in Tenaganita, Acting Today for Tomorrow's Generation. Proceedings of Regional Conference on Stateless/ Undocumented Children in Sabah. 16- 18 November 2005, Kota Kinabalu.

¹²⁰ Azizah Kassim, Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future (2009) 47 Southeast Asian Studies 52, 61-66.

¹²¹ Ibid.

¹²² *UPKO puzzled over number of IMM13 holders*, Daily Express, 9 July 2004; and *UPKO protests giving IMM13 holders PR*, Daily Express, 1 July 2007.

¹²³ Ibid., Azizah Kassim, 67-78; "The Illegals to Blame", Daily Express, 24 March 1982; and "Chief Minister: Aliens Straining Health Facilities", Borneo Mail, 2 August 1992.

¹²⁴ See discussion in Kamal Sadiq, 'When States Prefer Non- Citizens over Citizens: Conflict Over Illegal Immigration into Malaysia' (2005) 49 International Quarterly Studies 101- 122; Leon Coma, "No to 8,000 Holders of fake IC", Daily Express, 24 March 1990; and "Illegals as Voters: PBS Calls for a Probe", Sabah Times, 28 September 1992.

¹²⁵ See "UPKO Puzzled Over Number of IMM13 Holders", Daily Express, 9 July 2004; "UPKO Protests Giving IMM13 holders PR", Daily Express, 1 July 2007; and "Musa Rejects Call to Grant PR to Illegals", New Sunday Times, 6 July 2008.

against the members of Free Aceh Movement or *Gerakan Aceh Merdeka* (GAM)¹²⁶ due to widespread human rights violations including extra-judicial executions, forced disappearances, beatings, arbitrary arrests and detentions, extreme restriction on freedom of movement and the singling out of young men who the military claimed as supporters of GAM.¹²⁷

As compared to other nationals, Indonesian refugees and migrants are the most ‘suspected’ group and have a long history of being a source of controversy in Malaysia due to the large number of economic and illegal migrants from Indonesia that presence in the country.¹²⁸ Though Acehese refugees are mostly Muslims, they were not treated equally to the Muslim Filipinos and were subject to arrest, detention and deportation¹²⁹. There was no liberal or accommodating treatment for the Acehese but are treated as illegal immigrant despite clear persecution issues in their homeland.¹³⁰

The Acehese are continued to be neglected by the authorities though not entirely. They are forced to survive on their own; there are no special site for lodging and no freedom of movement and right to work. A proposal to grant every Acehese with the IMM13 pass has not been realised. However, they may approach UNHCR officers to apply for refugee status determination and to be resettled in the third country. If they were recognised as refugees and given the UNHCR identification papers, they are still subject to harsh enforcement by multiple authorities, the police, immigration officers and the Malaysian army. Indonesian children are not granted with any special treatment and they are not entitled to free elementary education, they have to pay before they can be enrolled in public schools and this proved to be too expensive for them. In a number of illegal immigrant crackdown, hundreds of Acehese were also detained and later deported to Indonesia even when they produced their IMM13 pass or UNHCR document.¹³¹

3.4 Refugee from Myanmar/ Burma.¹³²

Myanmar has been in continuous constitutional and political crisis for over five decades that lead to ethnic conflict and civil war¹³³ and resulted in dislocation and refugee migration. Two biggest refugee groups from Myanmar who came to Malaysia were the Rohingyans and the Chins. Both were minority ethnic groups, majority of the Rohingyans are Muslims while Christianity is the dominant religion of the Chins¹³⁴. Due to the ethnic and religious minority status in Myanmar,

¹²⁶ Human Rights Watch, ‘Aceh Under Martial Law: Problems Faced by Acehese Refugees in Malaysia’ (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 4.

¹²⁷ Human Rights Watch, ‘Aceh Under Martial Law: Problems Faced by Acehese Refugees in Malaysia’ (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 4.

¹²⁸ Human Rights Watch, ‘Aceh Under Martial Law: Problems Faced by Acehese Refugees in Malaysia’ (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 8.

¹²⁹ Human Rights Watch, ‘Aceh Under Martial Law: Problems Faced by Acehese Refugees in Malaysia’ (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 10-16; and UNHCR, ‘Malaysia Deports Asylum Seekers to Aceh Despite UNHCR Appeal’ 5 Sept 2003. <<http://www.unhcr.org/news/NEWS/3f58b05a4.html>> accessed 16 January 2009.

¹³⁰ Baradan Kuppasamy, ‘Acehese get Cold welcome in Malaysia’, Asia Times Online, 22 August 2003, available at <http://www.atimes.com>

¹³¹ Yante Ismail, ‘UNHCR urges Malaysia to protect refugees during crackdown’, UNHCR News Stories, 4 March 2005.

¹³² The name Burma was changed to Myanmar in 1989 by the military regime under the State Law and Order Restoration Council (SLORC) despite opposition from political opponents who perceived the change as illegitimate. UN and many other government recognised this new name and thus Myanmar is used in this writing. See Hazel Lang, ‘The Repatriation Predicament of Burmese Refugees in Thailand: A Preliminary Analysis’, UNHCR Working Paper No. 46, Canberra: Australian National University, July 2001; and International Crisis Group, ‘Myanmar: The Politics of Humanitarian Aid’, Asia Report No. 32, Brussels and Bangkok, April 2002.

¹³³ Salai Ngun Cung Lian, ‘Constitutional Crisis in Burma’, ‘Chin Human Rights Organisation’ <http://eng.chro.org/index.php?option=com_content&task=view&id=84&Itemid=27> accessed 12 January 2009.

¹³⁴ Chin Human Rights Organisation, ‘Seeking a Safe haven: Update on the Situation of the Chin in Malaysia’ <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 January 2009.

they were persecuted by the military government regime and are constantly subject to summary and extrajudicial killings, arbitrary arrest and imprisonment, torture, rape, forced relocation, forced labour and other violations of basic human rights.¹³⁵

They chose to flee to Malaysia because they believed that the risk of being directly deported back to Myanmar is lower than other destination.¹³⁶ The Rohingyas and Chins both live in precarious existence in Malaysia. Many are detained at the immigration detention centres and the conditions were described as overcrowded, unhygienic, insufficient food, absence of on-site medical services and frequent abuse by the guards or officers in charge¹³⁷ and many were deported too.¹³⁸ If they have the UNHCR identity papers, they are allowed to remain temporarily in Malaysia but they are not allowed to take up jobs. However, many managed to find work, which is dangerous, dirty and underpaid.¹³⁹

They were often hired by exploitative employers who would report them to immigration authorities to escape salary payment.¹⁴⁰ Because they are underpaid and sometimes cheated, it is difficult to make ends meet, they don't have enough nutritious food, extremely prone to health problems and had no choice but live in appalling conditions and have constant fear;¹⁴¹ sharing a flat with 20- 30 people or living in the jungle without access to clean water and appropriate sanitation systems.¹⁴² Access to health services for all refugees is relatively similar, they need to pay to go to government hospitals or private clinics but the cost is an obstacle.¹⁴³

The government has no provisions whatsoever to assist the Myanmarese refugees. Therefore the group relies on UNHCR and NGO's for support such as in education, free medical services, counselling and training.¹⁴⁴ They are always in the state of fear of raids and crackdown on illegal and undocumented migrants in the country which have often affected them due to deliberate failure and refusal of the Malaysian authority to recognise UNHCR identity papers and deported the refugees or asylum seekers in many reported cases.¹⁴⁵ As to the Rohingyas, the government

¹³⁵ See Chin Human Rights Organisation, Rhododendron News, Vol I No. I, July 1998 and Vol. IX No. IV December 2008 <http://eng.chro.org/index.php?option=com_content&task=section&id=3&Itemid=15> accessed 12 January 2009.

¹³⁶ Chin Human Rights Organisation, Seeking a Safe haven: Update on the Situation of the Chin in Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 January 2009 p. 1.

¹³⁷ Chin Human Rights Organisation, Seeking a Safe haven: Living in Insecurity: Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 January 2009 p. 4.

¹³⁸ Fauwaz A. Aziz, Refugee Treatment: A Big Fat F for Malaysia, Myanmar Ethnic Rohingyas Human Rights Organisation Malaysia <<http://merhrom.wordpress.com?2007/06/21/refugee-treatment-a-big-fat-f-for-malaysia>> accessed 14 January 2009.

¹³⁹ Chin Human Rights Organisation, Seeking a Safe haven: Living Conditions <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 January 2009 p. 6.

¹⁴⁰ Chin Human Rights Organisation, Seeking a Safe haven. Deportation: Malaysia to Thailand <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 January 2009 p. 5.

¹⁴¹ Yoges Palaniappan, Refugees Live in State of Fear, Myanmar Ethnic Rohingyas Human Rights Organisation Malaysia <<http://merhrom.wordpress.com?2007/06/21/refugees-live-in-state-of-fear>> accessed 14 January 2009.

¹⁴² Chin Human Rights Organisation, Seeking a Safe haven: Life for the Chins in Putra Jaya <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 January 2009 p. 7 and 8.

¹⁴³ Medecins Sans Frontieres (MSF), "We Are Worth Nothing: Refugee and Asylum Seeker Communities in Malaysia" <<http://www.msf.org/source/countries/asia/malaysia/2007/MSFbriefingpaper.pdf>> accessed 13 January 2009 p. 5- 9.

¹⁴⁴ Ibid.

¹⁴⁵ Refugees International, Malaysia: Government Must Stop Abuse of Burmese Refugees and Asylum Seekers, <<http://www.refugeesinternational.org/policy/field-report/malaysia-government-must-stop-abuse-burmese-refugees-and-asylum-seekers>> accessed 10 January 2009.

has agreed to grant Rohingya refugees and asylum seekers the IMM13 special pass¹⁴⁶ which allows the holder to remain in Malaysia for certain period but after 6 years, implementation of this has yet to be realised.¹⁴⁷

IV Current Treatment and Major Mistreatment of Refugee Children in Malaysia

It is fair to say that the current practice in handling and treating refugee children in Malaysia is not fully and well documented. Reference has to be made to reports of the UNHCR, independent bodies and international and national NGOs including the United States Committee on Refugee and Immigrants (USCRI), Human Rights Watch (HRW), Amnesty International (AI), Asia Pacific Migration Research Network (APRN), and Malaysian Human Rights Commission (SUHAKAM).

In 2002 a total of 117 children aged 17 years and below were recorded as persons of concern to UNHCR¹⁴⁸ in Malaysia. The figure rose by more than 100 percent in 2003 to a record of 1306 children.¹⁴⁹ An abrupt increase was logged in 2004 with a total of 4830¹⁵⁰ and continued to escalate to 7146 the next year.¹⁵¹ By the end of 2006, there are about 5,000 to 6,000 refugee children in Malaysia who are not entitled to education and healthcare.¹⁵² As of April 2010, UNHCR reported that there are around 19,000 (21.6%) refugee children in Malaysia from the total of 87,700 refugees and asylum seekers registered with the international body. It is estimated that the number of persons of concern to UNHCR who are not registered at around 10,000 people.¹⁵³ Global statistics shows that children below the age of 18, make up about 46 per cent of the total refugee and people in refugee- like situations.¹⁵⁴ These huge escalating numbers posed significant challenges to the Malaysia's administrative, legislative, judicial and financial capacity. International bodies such as UNHCR and NGOs are naturally expected not only to provide protection but also material assistance.

The treatment of refugee children in Malaysia can be classified in stages i.e upon arrival; during application process or during the refugee status determination; while waiting for resettlement and deportation; and throughout local integration. This segment is dedicated to highlight the contemporary and current treatment of refugee children in Malaysia namely from the Philippines, Myanmar and Indonesia. In all major refugee groups that previously and currently present in Malaysia; the Indochinese, Indonesian, Filipinos and Myanmar, a substantial number of refugee children can be identified though the proportion may not be accurately determined. The children are either accompanied by their parents, adult members of the family or simply guardians who are asked by their parents to take the children with them. Many of the refugee children are

¹⁴⁶ IMM13 is a special pass granted to foreigners either in the form of special document produced under Form 16 of the Malaysian Immigration Act 1969 or in the form of endorsement in the passport or travel document of an applicant. Previously, the Filipinos were granted with IMM13 but the practice has recently stopped.

¹⁴⁷ MERHROM, Rohingya Refugees' Dilemma Remains Unsolved, Myanmar Ethnic Rohingyas Human Rights Organisation Malaysia <http://merhrom.wordpress.com/2007/06/21/rohingya-refugees-dilemma-remains-unsolved> accessed 14 January 2009.

¹⁴⁸ This includes refugees, asylum seekers and other persons of concern but not necessarily reflect the total population of concern to UNHCR. See UNHCR, *2002 UNHCR Statistical Yearbook* (UNHCR, 2004) p. 380.

¹⁴⁹ UNHCR, *2003 UNHCR Statistical Yearbook* (UNHCR, 2005) p. 236.

¹⁵⁰ UNHCR, *2004 UNHCR Statistical Yearbook* (UNHCR, 2006) p. 392.

¹⁵¹ UNHCR, *2005 UNHCR Statistical Yearbook* (UNHCR, 2007) p. 414.

¹⁵² Andrew Ong, Newborn Baby Spend Two Weeks Behind Bars, Myanmar Ethnic Rohingyas Human Rights Organisation Malaysia <http://merhrom.wordpress.com/2007/06/21/newborn-baby-spends-two-weeks-behind-bars> accessed 14 January 2009.

¹⁵³ UNHCR, Factsheet Refugee in Malaysia.

¹⁵⁴ See UNHCR, *2007 Global Trends Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Person* (UNHCR Statistical Online Population Database) < <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf> > p. 12, accessed 17 December 2008.

unaccompanied; either from the beginning of their forced migration to Malaysia or due to unexpected separation from their family during the journey. In the case of Vietnamese refugees, many children were purposely sent unaccompanied by their parents because of financial constraint and with the hope that they will get a better life in a new place.¹⁵⁵

Like all refugee children across the globe, refugee children in Malaysia are extremely vulnerable, have special needs and require special assistance to survive. Available data and figures researched and maintained by various bodies could not precisely indicate the number of refugee children and the number of separated and unaccompanied children that arrive in Malaysia. Statistics provided and maintained by UNHCR do, however, give some indications of the number. In parallel to the provisions of UNCRC, refugee children refer to those refugees who are below the age of 18 years¹⁵⁶ but several issues surrounding the definition and determination of age are equally important in providing protection for refugee children and this will be discussed in subsequent article.

From various reports, several common features of treatment of refugees in Malaysia can be identified including arbitrary arrest, detention, denial of basic rights, discretionary permission in accessing public education and health services, penalisation, deportation and handing over to human traffickers. Nevertheless, there is lack of extensive research to sufficiently and authentically illustrate the current treatment of refugee children by the Malaysian authorities to all groups of refugees. The boat people were the most reported, recorded, researched and written in academic articles than other refugee groups. The second most documented refugee group is the Filipino refugee. As opposed to Vietnamese refugee children who all have left for resettlement countries or returned to Vietnam, Malaysia is still currently hosting a large number of Filipino, Myanmar and Indonesian refugee children in its jurisdiction. Discussion in the next part will examine the treatment of refugee children at present time to highlight its conformity and non conformity with international law.

4.1 Failure to treat Refugee Children as Children

It has been stressed that children should be perceived, assessed and treated as children at all times, even when they are refugees, asylum-seekers or illegal immigrants.¹⁵⁷ Children are rights holders and Article 2 of the CRC demands that every child should enjoy the applicable rights provided in the CRC wherever they are and regardless of their status. The failure to recognise refugee children as children first and refugees second has compounded problems relating to their entitlement to rights and legal protection in many parts of the world and in Malaysia specifically. Their entry to Malaysia without valid documents is being treated from the perspective of criminal penalisation; they are not viewed as children in need of documentation and are thus denied protection. They are not specially protected under Malaysian laws despite their status as vulnerable children. In fact all refugees, including refugee children, are considered 'illegal immigrants' who may be subject to detention and criminal charge, and in effect they are treated as criminals.¹⁵⁸ Those who are put in

¹⁵⁵ Francise Bory, "Malaysian: The Flight Continues" in Red Cross, Red Crescent (1988) Sep/ Dec p.16- 17.

Researcher also believed that refugee children are deliberately sent alone to become an anchor at the resettlement country who will then become their (parents and older siblings who would otherwise find it difficult to be resettled) reasons or supporting claim to apply for refugee status. See for instance.

¹⁵⁶ UNHCR Policy on Refugee Children (1993); and UNHCR Guidelines on Protection and Care of Refugee Children (1994).

¹⁵⁷ Heaven Crawley, 'Child First, Migrant second: Ensuring That Every Child Matters' ILPA Policy Paper (Immigration law Practitioners Association, 2006) 1-2.

¹⁵⁸ See for example Section 6 of the Malaysian Immigration Act 1959/1963. Refugee children are not exempted from criminal penalties: they are treated equally with adults and they are particularly vulnerable to abuse and violence when detained, or when living freely in society. Any positive protection and treatment rendered to refugee children in Malaysia are provided at the discretion of the authority and rampant discrimination is practised.

custody or detention are dealt with by the immigration officials or the police. They do not come to the attention of the Welfare Department responsible for the welfare of Malaysian children.¹⁵⁹ At various points refugee children are being assisted and cared for by charitable and voluntary bodies. There is no evidence showing that unaccompanied refugee children are taken into care or provided with the assistance that should be offered to them as children without family as required under Article 22 (2) of the United Nations Convention on the Rights of the Child. In a situation where refugee children are given for adoption there is no guarantee that legal principles governing adoptions are observed.

4.2 Problems of Access to Asylum Application and Registration

Asylum application and registration is the first step for refugee children towards the enjoyment of rights in Article 22 of the CRC and other applicable rights. The UNHCR office is permitted to process asylum applications in Malaysia and its remit includes registering all asylum-seekers and refugees; however, the process is held back by difficulties of access. Refugees in detention, people living far away from the UNHCR office and thus having problems travelling (which has financial implications) and those who are concerned with the possibility of arrest are unable to or will not come forward to register themselves and apply for asylum, and so continue to live in hiding. Severe penalties for illegal entry and stay or lack of travel documents under Malaysia's immigration law have forced many refugees including children to conceal themselves among the general population. These problems of access and the apprehension of the risk of detention and penalty are understandable, but they must be quickly surmounted because of the importance of registration in ensuring people's safety. The UNHCR keeps a register only of those refugees and asylum-seekers that have already accessed its service and it is believed that many more should have registered but the register remains in the sole possession of UNHCR. For administrative purposes, it is important for the Malaysian authorities to keep an updated register of the refugees.¹⁶⁰

If each individual asylum-seeker and refugee is registered, they will be counted as persons who exist in Malaysia, since registration is also a recognition and acknowledgement of the person's existence. Thus they will be taken seriously when they go missing or if any criminal act is committed against them. Failure to register may cause many refugee children to become invisible, and this invisibility will then contribute to lack of protection.¹⁶¹ As registration is the first step towards UNHCR documentation and later protection, it is paramount that the refugees are encouraged and not threatened with criminal penalties. In response to the difficulties faced by various refugees in reaching the office, the UNHCR has conducted mobile registration at isolated locations.¹⁶²

4.3 Detention

¹⁵⁹ There is no specific service created or available to provide for their specific needs and the government makes no effort to recognise their problems or to document them, leaving the issue of their rights and protection needs unattended to and neglected for years. Welfare provisions have never been arranged for refugee children living in peninsular Malaysia although the Filipinos and their children were initially aided by the Sabah Social Welfare Services which, depending on availability of funds, provides health services. See Rachagan, *op. cit.*, 257.

¹⁶⁰ Further discussion on the importance of sharing the refugee register will be discussed in Chapter 4 when dealing with UNHCR role in Malaysia and in Chapter 6 when recommending the framework for refugee protection in Malaysia.

¹⁶¹ See Women Refugee Commission, *op. cit.*, 1-31; UNHCR, 'UNHCR Handbook for Registration' (UNHCR, 2003) 7-9; and UNHCR ExCom Conclusion No. 91(LII) 'Registration of Refugees and Asylum Seekers' (2001).

¹⁶² UNHCR, 'Malaysia Jungle Camp Registration to Start' (UNHCR, 10 Dec 2004)

< <http://www.unhcr.org/my/cms/news-and-events/news-101204> > accessed 22 September 2009.

Like adult refugees, refugee children are not exempted from detention and deportation even when they are recognised as refugees by the UNHCR or possess the IMM13 document.¹⁶³ On many occasions enforcement agencies deliberately refuse to acknowledge the authority of UNHCR documents or papers that identify their bearers, including children, as refugees a procedure that can result in their detention¹⁶⁴ and neglecting CRC's provision that detention should be a measure of last resort and for the shortest appropriate period of time. As of November 2004, there were about 1000 foreign juvenile detainees in the country who are detained for immigration related offences.¹⁶⁵ Contrary to Article 37 (b), (c), and (d) of the CRC, detained refugee children are placed together with adults, without being informed of the duration of the detention and denied access to legal representation.¹⁶⁶ Detaining children with adults who are not their parents, guardians or siblings is particularly likely to happen when the immigration camps are crowded.¹⁶⁷ Moreover detainees at the immigration camps are lumped together, regardless of what offence they may have committed and the specific situation they are in, whether as asylum-seekers, refugees or victims of human trafficking.¹⁶⁸ The health and hygiene situation and the substandard state of the camps are equally relevant factors.¹⁶⁹ The imprisonment can last for years and is usually in an environment inappropriate for children.¹⁷⁰ Regardless of its cause and duration, detention has an adverse impact on children.¹⁷¹ Undocumented children in Sabah, many of whom are refugees and persons of concern to UNHCR, are particularly prone to arrest as many of them

¹⁶³ __ 'Children Among 60 Filipinos Detained' *Daily Express* (Sabah, 22 September 2004) <<http://www.dailyexpress.com.my/news.cfm?NewsID=29511>> accessed 15 March 2008 ; __, 'Children Among Illegals Detained' *Daily Express* (Sabah, 23 September 2004) <<http://www.dailyexpress.com.my/news.cfm?NewsID=29544>> accessed 15 March 2008 ; __, 'Suhakam Happy Children at Centre Separated' *Daily Express* (Sabah, 25 September 2004) <<http://www.dailyexpress.com.my/news.cfm?NewsID=29569>> accessed 15 March 2008; __, 'KL to Decide on 136 Street Children' *Daily Express* (Sabah, 14 November 2005) <<http://www.dailyexpress.com.my/news.cfm?NewsID=38326>> accessed 15 March 2008; and Renuka T. Balasundramaniam, Refugee Injustice Continues (*The Malaysian Bar*, 21 August 2007) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/refugee_injustice_continues.html> accessed 14 October 2009.

¹⁶⁴ __, 'Boys Held Despite Having Documents' *New Straits Times* (Kuala Lumpur, 21 June 2008) 21.

¹⁶⁵ Abdul Wahab bin Kassim, "Juveniles on remand: Trends and Practices in Malaysia" in UNAFEI, "Resource Material Series No 68 (The 129th International Senior Seminar, 11 January- 9 February 2005, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) 196, 199. <http://www.unafei.or.jp/english/pdf/RS_No68/No68_17PA_Kassim.pdf> accessed 10 April 2011.

¹⁶⁶ Adnan, M. H., 'Refugee Issues in Malaysia: The Need for a Proactive, Human Rights Based Solution', (2007) UNEAC Asia Papers , 5 <<http://www.une.edu.au/asiacentre/papers.php>> accessed 12 January 2010.

¹⁶⁷ The Human Rights Commission of Malaysia (SUHAKAM) found more than 40 children being detained in an immigration detention centre and after a complaint was lodged, 38 of them were reunited with their families. See Roy Goh, 'Educate Your Children, Azmi Tells Illegals' *News Straits Times* (Kuala Lumpur, 8 October 2004) 18.

¹⁶⁸ The unacceptable condition of the 12 detention facilities under the Malaysian Immigration Department which place detainees of immigration offences together with victims of human trafficking has been recently admitted by its director general. See __, 'The Places In Between' *New Straits Times* (Kuala Lumpur, 25 August 2010), 16. Also see Amnesty International, *op. cit.*

¹⁶⁹ *Ibid.* There are also ongoing allegations about the appalling condition of the immigration detention camp. See __ 'UNHCR: Most Detained Refugees End Hunger Strike' *Daily Express* (Sabah, 8 September 2004) <<http://www.dailyexpress.com.my/news.cfm?NewsID=29230>> accessed 15 March 2008; and Suara Rakyat Malaysia (SUARAM), 'Deaths and Conditions of Detention of Migrants and Refugees' (*SUARAM*, 28 April 2009) <<http://www.suaram.net/node/76>> accessed 20 January 2009.

¹⁷⁰ __ 'Indonesian Migrants Die in Holding Camp' (*BBC News*, 28 August 2002) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/2221039.stm>> accessed 5 January 2010; and __ 'Malaysia Mistreating Migrants' (*BBC News*, 27 August 2002) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/2219016.stm>> accessed 5 January 2010

¹⁷¹ Nicola Rogers, 'Children Refugees—First and Foremost Children' (2003) 4 Child and Family Law Quarterly 383, 387. In the case of Iskandar Abdul Hamid v PP [2005] 6 CLJ 505, a child with refugee status was charged under Section 6 (3) (c) of the Malaysian Immigration Act 1959 for illegal entry and if found guilty, he was liable to a fine not exceeding RM10, 000; or to imprisonment not exceeding five years, or to both, and would also be liable to whipping of not more than six strokes. Fortunately the charge was later dropped because of his refugee status.

have no guardian or proper documentation and the police have failed to consider the welfare of detained alien children.

4.4 Extortion, Deportation and Trafficking

Perhaps the worst form of treatment against refugees by the host country is when they are being extorted for money, and threatens with indefinite detention, harsh punishment and deportation by the person in power, for instance the immigration officers and the police. There have been substantiated allegations that migrants and asylum-seekers who came to Malaysia are being subjected to extortion by government officials who demanded money in return for freedom or to avoid being trafficked to Thailand.¹⁷² Burmese refugees who were arrested in Malaysia and ordered to be deported were reported to have been sold by the Malaysian immigration officer to Thai human traffickers and there is a particular concern about deported refugee children being victims of human trafficking.¹⁷³ Here the guarantee of rights under Article 19 (protection against all forms of abuse); Article 22 (protection and assistance for refugee children and asylum seeking children); and Article 35 (protection against child trafficking) are not respected.

4.5 Right to Education

The Universal Declaration of Human Rights (UDHR) proclaimed the right to free elementary and fundamental education for children, in Article 26,¹⁷⁴ emphasising that elementary education must be made obligatory, and should be provided by the authority and participated in by the children. The CRC declares that States Parties shall make primary education compulsory and free¹⁷⁵ and secondary education available and accessible to all children¹⁷⁶ without discrimination of any kind.¹⁷⁷ However, both Article 28 (a) and Article 2 were part of Malaysia's reservation when it first ratified the CRC in 1995. Articles 13 and 14 of the 1966 International Covenant on Economic and Social Cultural Rights (ICESCR)¹⁷⁸ similarly made it an obligation for States Parties to

¹⁷² A Report to the Committee on Foreign Relations U.S. Senate, 'Trafficking and Extortion of Burmese Migrants in Malaysia and Southern Thailand' (111th Congress 1st Session, April 3 2009); Pekwan, '9 Human Traffickers Nabbed' (Tenaganita, 21 July 2009)

<http://www.tenaganita.net/index.php?option=com_content&task=view&id=319&itemid=69> accessed 5 December 2009; and Julia Zappei, *op. cit.*

¹⁷³ Amnesty International, *op. cit.*, 8; and USCRI, 'World Refugee Survey' (2008) 6.

¹⁷⁴ UDHR, Article 26 (1):

'1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.'

¹⁷⁵ CRC, Article 28 (a).

¹⁷⁶ *Ibid.*, Article 28 (b).

¹⁷⁷ *Ibid.*, Article 2.

¹⁷⁸ ICESCR, Article 13:

'1. The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognise that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

ICESCR, Article 14:

'Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.'

provide free and compulsory primary education, while secondary education should be made available and accessible to everyone. The fact that Article 2 of the ICESCR¹⁷⁹ requires States Parties to guarantee the exercise of rights under the Covenant without discrimination of any kind extends the assurance that refugee children who present in a State Party's territory shall be entitled to enjoy the right to education as stipulated. Equal access to education by both refugee girls and boys is warranted under Article 10 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Despite a high level of school enrolment and gender parity in Malaysian educational institutions, the report to the Human Rights Council by the Special Rapporteur on the Right to Education highlighted a drawback in relation to access to education. Refugee children, children seeking asylum, stateless children, children of migrant workers, undocumented children, street children and indigenous children all share the same economic difficulties in accessing public education.¹⁸⁰ In Malaysia, the right to education of refugee children is hampered by the fact that they are not able to access public education for financial and documentation problems. Their rights cannot be secured because the national law interprets the rights in a way that is different from what is expected in international law, which emphasises accessibility, equality and non-discrimination.

Article 29A of the Malaysian Education Act 1996 makes it compulsory for parents who are Malaysian citizens to enrol their child or children in primary school. The school is however not entirely free, as the minister in charge may make regulations requiring a parent or guardian a child to pay a specified fee; and other education-related costs such as uniform, transportation and learning materials also affect access.¹⁸¹ It is also a condition for every child to enrol in a state-funded school with a birth certificate and for non-citizens an additional document is required. The act provides that three categories of foreign children may be admitted to a state school: a child of a foreign embassy staff, a child whose non-citizen parent has a valid working permit, or a child whose parent is a permanent resident of Malaysia. Unfortunately none of these is able to accommodate refugee children. Through a lack of documentation and identity papers, and financial constraints, refugee children are denied education. Because of the children's uncertain legal status, they are left out of the education system, which is in turn creating generations who are uneducated and may find it hard to make a living in future.¹⁸² Being undocumented, refugee children in Sabah who are of Filipino descent are excluded from state schooling.¹⁸³ Even where these children have documents, they can enrol only if there is a vacancy – or in other words, the locals are given priority.¹⁸⁴

¹⁷⁹ ICESCR, Article 2:

'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

¹⁸⁰ Vernon Munoz Villalobos, 'Report of the Special Rapporteur on the Right to Education, Addendum Mission To Malaysia', A/HRC/11/8/Add.2 (20 March 2009) 2,

< <http://www2.ohchr.org/english/issues/education/rapporteur/visits.htm> > accessed 21 January 2010

¹⁸¹ *Ibid.* 12, 14.

¹⁸² *Ibid.* 16. It is fair to note that there is no single refugee group that enjoys full access to formal education. The Filipinos were originally given access to primary state schools and up to level five of secondary school; beginning from 1995, school fees were imposed but this did not stop refugees from attending school. The major setback was the ruling that requires everyone, including alien children, to produce a birth certificate on enrolment. This has caused a significant decline in the number of refugees enrolled in state schools because many of them do not have birth certificates, which can be for any number of reasons. See Azizah Kassim, *op. cit.*, 52, 62.

¹⁸³ See for instance Jessica Lim, 'Only 13 And Already A Teacher', *New Straits Times* (Kuala Lumpur, 25 June 2006) 29.

¹⁸⁴ ___ 'Priority is For Local Children' *Daily Express* (Kota Kinabalu, 8 February 2006)

< <http://www.dailyexpress.com.my/news.cfm?NewsID=40001> > accessed 15 March 2008. The Rohingyans experience the same fate. As they cannot afford to pay the school fees in a lump sum and are unable to produce birth certificates to

4.6 Limited Access to Health Care

If refugee children are given no proper health care and services, they are exposed to the risk of common illnesses and highly contagious diseases such as HIV and AIDS.¹⁸⁵ Moreover, they will be excluded from the international scheme of immunisation for children, which is paramount for their wellbeing. In the 1990s, access to public health service for aliens and migrants was impeded by the imposition of higher fees for medical services. Refugees, along with other immigrants in the country, have to pay RM15.00 for outpatient treatment as compared to only RM1.00 for citizens. However, to reduce the burden, refugees with UNHCR document papers and holders of IMM13 are given a 50 per cent discount on the fee. Nevertheless this is still unaffordable for refugees who are not allowed to work and to earn their living. Many refugees, including expectant mothers, rely on the free medical clinic organised by the UNHCR and Médecins Sans Frontières.¹⁸⁶ It is unacceptable that refugee children are denied right to healthcare as guaranteed under Article 24 of the CRC.

4.7 Discrimination in the Permission to Stay

The treatment of the various refugee groups in Malaysia differs markedly. Depending on the background of the refugee group in general, its cultural and religious ties with Malaysia, its social and economic development, and the history of bilateral ties, refugees are granted different forms of permission to stay, and different collateral rights accompany the permission. For refugee children, the discrimination is a violation of Article 2 of the CRC.

The first type of permission is the temporary refuge granted to the Indochinese refugees. The Indochinese refugees were placed in closed camps and they were screened for the purpose of resettlement in a third country. Indirectly, such screening also determined their refugee status. This permission did not include the right to work or the right of movement. Second come those asylum-seekers recognised as refugees and granted a special immigration permit, IMM13, which is approved at the discretion of the Minister of Home Affairs.¹⁸⁷ Since it is a discretionary decision, the authority is at liberty to attach any condition that it wants. For example, the Filipino refugees are given the IMM13 pass and their lawful dependents are automatically registered under the pass as well. The pass is renewable every three years, and also gives them rights of multiple entries. There is no restriction on freedom to work. On the other hand, the Acehnese, who are granted a similar pass, need to renew it every year and are not permitted to work, and thus they are

register their children in schools, Rohingyaans' children have to turn to their own community, and charity bodies, for basic education. It is common for Rohingyaans to set up classes at home for their community with only the most basic facilities and even without qualified teachers. Some fortunate children are accepted to enrol and study for free at the Harvest Centre, which runs on public donations. As for refugee children from other groups, they too have to rely on education centres set up by voluntary and charity bodies. See Yante Ismail, 'Hope for Malaysia's Home- Learning Rohingya Refugees- The Harvest Centre' (UNHCR, 14 July 2006) < <http://www.unhcr.org.my/cms/news-and-events/news-140706> > accessed 28 July 2009; Loong Meng Yee, 'On the Run for a Better Life' *The Star Online* (Kuala Lumpur, 3 October 2007) < <http://thestar.com.my/metro/story.asp?file=/2007/10/3/central/1905713&sec=central> > accessed 25 June 2009. A number of independent, informal and voluntary schools are established in the city where most refugees are living. See Rachael Philip, 'Titled to Serve' *New Straits Time* (Kuala Lumpur, 14 June 2009) 10.

¹⁸⁵ UNHCR, 'Refugees, HIV and AIDS: UNHCR Strategic Plan 2005- 2007', 8-9
< <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=42f31d492&query=HIV> > accessed 23 May 2010.

¹⁸⁶ See for instance Yante Ismail, 'Czech Mission Funds Mobile Health Clinic Care Project For Refugees In Malaysia' (UNHCR, 25 Jun 2007) < <http://www.unhcr.org.my/cms/news-and-events/news-250607> > accessed 23 May 2010; and Yante Ismail, 'More Than 300 Make Use Of First Free Clinic For Refugee Women In Kuala Lumpur' (UNHCR, 17 September 2007) < <http://www.unhcr.org.my/cms/news-and-events/news-180907> > accessed 23 May 2010.

¹⁸⁷ In this respect, it is worth noting that some of the Filipinos are mandate refugees under the UNHCR while some are directly recognised as refugees by the state of Sabah, whereas in the case of the Acehnese, they are given a permit when they are recognised by the UNHCR.

likely to resort to illegal employment. Their pass was valid only up to 2007. The plan to grant the Rohingyans a similar pass was first announced in 2004, but this was later abandoned, among fears that this would lure more illegal immigrants.

Third comes permission to stay temporarily in Malaysia, based on the UNHCR documentation, and this might include a document that declares and recognises a person as a refugee, or makes it clear that the person has already applied for refugee status. It may also apply where the application has been rejected but the person in question falls into the category of 'person of concern' to UNHCR whose return is not yet possible. Holders of these documents are no better placed than their counterparts as they too are restricted from working.

The fourth group of refugees are those who are accepted wholeheartedly by the authority. This includes a group of Muslim Cambodian and the other one, Bosnian refugees who have been granted permanent resident status and are locally integrated with the Malaysian community. This group enjoys the same rights as other permanent residents.

The last group of refugees is difficult to trace as they are not holders of any documentation from the UNHCR, nor any special pass from the Immigration Department, and are thus in legal limbo. This minority remains invisible in order to stay away from the enforcement authorities, but unfortunately they continue to be the subject of raids, arrests and deportations. The Chins and Rohingyans for instance are commonly associated with this scenario. They might not have the courage to approach UNHCR and at the same time they know that the IMM13 pass is a blank hope. Hence they choose to hide but their willingness to take up very low-paid jobs have made them common targets of abuse and cheating among irresponsible employers.

4.8 Durable Solution Lacking Consideration of the Best Interests of the Child

The only durable solution that can be worked out for refugee children in Malaysia is repatriation, or return and resettlement. On one hand, however, voluntary repatriation is almost impossible as the conditions in the children's countries of origin – such as Myanmar – are not improving. On the other hand, local integration is never an option either, for it was only ever offered at the discretion of the government in highly exceptional circumstances and was never made into a precedent. The current group of refugee children is only considered for resettlement in a third country, without making the best interests of the child as a primary consideration, because it is not possible for the UNHCR to do so in the light of the circumstances in Malaysia. In fact, the principle of best interests of the child guaranteed under Article 3 is sadly not a primary consideration in every stage of refugee cycle in Malaysia.

Asylum-seekers who are recognised as refugees or persons of concern to the UNHCR are allowed to remain in the country pending voluntary return and resettlement. Those who fail will face the risk of being deported to their country of origin or the country of last transit. Many refugee children of the Filipinos and Indonesians in Sabah and Sarawak continue to exist in limbo, since Malaysia is unable to verify their identity and country of origin because they do not have valid documentation for that purpose.

V Conclusion

As one of the major players in the regional refugee affair since 1970s until today, Malaysia needs to reform its law, practice, and respond to refugee children. This shall include the recognition that refugees should be dealt with human rights principles and not simply as a token or charity work or humanitarian gestures. Malaysia's action have shown the world that it remains steadfast with the policy of treating refugees last and discriminate between Muslim and non Muslim refugees without giving due regards to refugee children whose best interest are not being taken as primary

consideration. The charity based approach in protecting refugees, as reflected and pointed out in Malaysia's many action and decision is not a sustainable tool, instead Malaysia needs to apply rights-based approach in ensuring that refugees as rights holders are able to exercise their rights. The adoption of rights-based approach will require that the process in exercising refugee rights are compatible to international standard and will promote better opportunities for rights holders to enjoy and exercise their rights. By identifying the standard of treatment that refugees are entitled to, the gap in the actual state of refugees can be scrutinised and appropriately addressed.

There is also nothing to suggest that the Malaysian authority is concern with the welfare of children once they arrive in the country. At the very least, as a state party to the UNCRC it is reasonable to expect that specific arrangement for children have been formulated to address the various complications that may arise when refugee children reach Malaysian shore. The absence of such arrangement can be construed as the manifestation of not making protection of alien children as a priority and if children are not given the protection at the first point of contact or entry, there is little hope that they will be protected in any way beyond that territory.

One significant problem surrounding refugee children is that they are constantly put in state of fear. Restrictions and detention warnings imposed on refugees have caused them to remain in hiding and become extremely cautious, and these results in their keeping their children indoors to avoid problems with the authorities and the locals. This is expected and unavoidable but an unhealthy practice, since many of these children are living in packed accommodation or in a place already unsuitable for their health, safety and development.

A more serious predicament is the denial to education by limiting access and imposing regulations that cannot be easily surmounted. At the very basic, denying refugee children the right to education will only perpetuate their poverty and destitution. It has been strongly advocated that it is through education that refugee children (mostly living in destitution) will be able to break the cycle by making themselves capable of acquiring ways to participate in the community. This is because education not only opens up opportunities for employment that enable individuals to obtain basic needs, but is also a tool for individuals to make a contribution to the society which then give them a sense of self worth. Seeing education for refugee children from a development perspective as well as the human rights perspective should help Malaysia realise this, as it has been using education to combat and reduce poverty for its own community. The authority should have foreseen that an uneducated generation that will be created by this marginalisation is what the national and international community want to avoid from building up.

While the Vietnamese, Acehnese and Rohingyans were often referred to as illegal immigrants, the Filipinos are usually called "displaced persons" and "refugees". The difference in the response of the government towards various refugee groups and the variation in the treatment can be linked to race, religious ties and most importantly political interest. Although the Acehnese and Rohingyans are Muslims, they were not granted the same freedom like the Filipinos whose presence have lent certain strength to the economic activities in Sabah and contribute to the forte of specific political parties.

The standard and the kind of treatment accorded to the Indochinese refugees was evidently different than the rest of refugee groups. While the Indochinese refugee children were kept confined in camps and provided with food, the Filipino refugees were given a special site for them to occupy and other group of refugee children were allowed to move freely but in destitution, without food and healthcare access. Ostensibly, the Indochinese refugee had enjoyed

at certain extent the right to standard of living adequate for health and wellbeing¹⁸⁸ though some reports concluded that refugees had less food than they should consume each day. Refugee children of the boat people received a limited special protection (though the specific procedures cannot be determined) and they were reasonably taken care and provided with the basic human rights; food, shelter and education.

The government should be aware that the deficiencies in the *status quo* of the refugees must be addressed to alleviate some of the problems faced by refugees especially regarding immigration laws to enable adult refugee to work and earn money for their living expenses. Despite the large number of refugee presence in the country Malaysia prefers to ignore the call to ratify and implement the main international instruments in refugee protection. Malaysia is of the view that it is not bound to adhere to any principles of refugee protection because of the non ratification. Calls made by various parties for Malaysia to respect and fulfil its obligation under customary international have fell onto deaf ears. Thus it will be shown in Article 3 that Malaysia owes a duty to protect refugees under the customary international law.

The utmost recommendation that this article has is for the government to devise a specific legal framework for the protection of refugee children. Legal protection of refugee children should be clearly and expressly envisaged in domestic legislation. Failure to enact domestic laws to safeguard refugee children from violence, abuse, harm and neglect is a sure way of disregarding the importance of protecting refugee children's rights. Hence, it is unfortunate that refugee children continue to be in limbo as Malaysia is not a party to both the refugee convention and its protocol while the rights protected under the UNCRC are not recognised. This means that the authorities are acting in legal vacuum, allowing them to take actions and decisions concerning refugee and refugee children on the basis of discretionary power. To make things worse, in spite of being a state party to the UNCRC, Malaysia fell short of implementing its provisions. In short, Malaysian authority is not upholding the provisions of the UNCRC. The gist of the UNCRC is the importance that children must be treated as children, first and foremost regardless of any label attached to them. In any action or decision, the primary consideration is the best interests of the child and this has not been secured.

¹⁸⁸ Article 25, Universal Declaration of Human Rights