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Malaysian Policy towards Refugees and Asylum Seekers: A Case Study of Rohingya Refugees

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Abstract

In Southeast Asia, the protection space that available for refugees and asylum seekers are very limited due to the lack of national legal framework in most of these countries. In fact, some of countries had introduced restrictive policies such as denying access to airport. The paper offer a discussion regarding to the Malaysian policy toward refugees and asylum seeker specifically related to the issue of Rohingya refugees. The study will illustrate the both nature and dimension of Malaysian policy in dealing with Rohingya refugees. Generally, Malaysia did not have any responsibility towards refugee who migrate into state of Malaysia as Malaysia is a non-signatory state to 1951 UN Convention relating to the status of refugee and its 1967 Protocol. However, UNHCR has been mandated to ensure refugees receive same protections in Malaysia. The paper highlights though Malaysia did not have any legal responsibility towards Rohingya refugees, however the country has given substantial cooperation to UNHCR in helping Rohingya refugees.

Keywords: Malaysian Policy, Refugees, Asylum Seekers, Rohingyas

Introduction

The rights of all persons irrespective on their citizenship or nationality are clearly mentioned in the 1948 Universal Declaration of Human Rights (Naima Haider, 2002). According to the principle of non-refoulement, a customary international law, states are obliged not to return any person to a country where the life or safety of that person would be seriously endangered. States that are even not parties to the United Nations instruments are bound to respect non-refoulement as a fundamental principle of customary international law (Aoife Duffy, 2008). The United Nations General Assembly Resolutions calls upon all states to uphold asylum as an indispensable instrument for international protection of refugees and to respect the fundamental principle of non-refoulement (UN General Assembly Resolution , 2006). Hence, Malaysia are obliged to preserve the refugee rights under this domestic principles stated by customary international law. The movement of Rohingya refugees from Myanmar to neighboring countries is not a new phenomenon. Historically, the Rohingyas have been fleeing to Bangladesh,

Malaysia and Thailand in order to escape serious repressions in their country of origin, Myanmar. Myanmar's Military Government had launched an attack towards its population and killed almost thousands of citizens and led thousands of refugees to flee into neighboring countries. A large number of Rohingyas arrived in Malaysia in the year of 1991, 1992 and 2012 after experiencing various forms of persecution from their own government.

The 1951 Geneva Convention is the main international instrument of refugee law. The Convention clearly spells out who a refugee is and the kind of legal protection, other assistance and social rights refugees should receive from host countries. The Convention also defines a refugee's obligations towards host countries. It also describes certain categories of people such as war criminal who are not qualified for refugee status (Hathaway, 2002).

Asylum Seekers and Refugees

In 2010, the office of the United Nations High Commissioner for Refugee in Malaysia received 25,600 new refugee status applications, the largest number of applications to any UNHCR office in the world for the third straight year and the seventh largest to any refugee status determining body including states such as South Africa and United States (United Nations High Commissioner for Refugees, 2010). According to UNHCR in Malaysia, as the end of March 2012, there were some 97,400 registered refugees and asylum seekers in the country. Some 8,200 refugees and asylum seekers are from other countries like Sri Lanka, Somalis, Iraqis and Afghans. From the entire refugee population, some 200 are children below the age of 18. In addition, another 10,000 unregistered refugees and asylum seekers are believed living in Malaysia.

There is great deal confusion about the different between as asylum seeker and a refugee. A refugee is someone who has been recognized under the 1951 Convention Relating to the Status of Refugees to be a refugee.

As stated in the 1951 Convention Relating to the Status of Refugees, a refugee is defined as a person who owing to a well founded fear of being prosecuted 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, or owing to such fear, unwilling to avail himself of the protection of that country (Melander, 1987). In other words, a refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in particular social group. Most likely they cannot return to their home country or they were afraid to do so. War and ethnic, tribal and religious violence are the main causes of refugees fleeing their countries. In comparison to economic migrants, they have freedom of protection by their home country and are free to go back as they please to do so. Refugees only have the right to safe asylum outside of their country's borders. Malaysia has taken in a significant number of refugees and asylum seekers under its care, despite not being a signatory to the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol.

The definition of refugee does not cover other individuals or groups of people who leave their country only because of war or other civil disturbance, famine, natural disasters or in order to seek a better life. According to UNHCR, refugees flee because of the threat of persecution and cannot safely return to their homes in the prevailing circumstances. An economic migrant

normally leaves a country voluntarily to seek a better life. Should they elect to return home, they would continue to receive the protection of their government (UNHCR, 2010).

While asylum seeker is someone who is seeking international protection but whose claim for refugee status has not yet been determined. Generally, illegal immigrants are the people who enter a country without meeting the legal requirements for entry. However, under Article 14 of the 1948 Universal Declaration of Human Rights stated that everyone has the right to seek asylum and the 1951 Refugee Convention prohibits states from imposing penalties on those entering illegally who come directly from a territory where their life or freedom is threatened (UN, The Universal Declaration of Human Rights, 1948). The UNHCR emphasizes that a person who has a well founded fear of persecution should be viewed as a refugee and not be labeled as an illegal immigrant as the very nature of persecution means that their only means of escape may be via illegal entry or use false documentation.

Legal Status of Rohingya in Malaysia

The Rohingya, a persecuted minority, has faced decades of harsh treatment from their government (Myanmar). To escape from that, most of Rohingya flee to Bangladesh, Thailand and Malaysia. In Malaysia, this community has been living invisibly for more than three decades. Just like other refugee. Rohingyas also are not allowed to work legally and do not have access to free healthcare, education and many rights in country of Malaysia.

Despite the huge number of refugees and refugee status application, Malaysia is not a signatory state to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. As a result, there is no legal framework for distinguishing a refugee or an asylum seeker from any other undocumented migrant. Thus, Malaysian Law viewed refugees and asylum seekers no differently from an illegal immigrant who is subject to fines, arrest, detention, imprisonment, corporal punishment and deportation. Exemption from such penalties is only possible through the grating of special permits known as IMM13 permits, issued by the Ministry of Immigration. In general, refugees and asylum seekers have to contend with Malaysia's harsh immigration rules just like any other undocumented migrant. Another way that a refugee may find reprieve from Malaysian Immigration Law is through the intervention of the UNHCR. It is difficult to ascertain why the Malaysian Government allows UNHCR to operate in Malaysia and implement its activities related to refugees and asylum seekers. What could be ascertained is that in the public discourse, the Malaysian Government allows the presence of UNHCR on the basis of humanitarian reasons.

In a press release issued on December 16, 2008 regarding the presentation of the letter of appointment of Alan Vernon, the current UNHCR Representative to Malaysia, the Ministry of Foreign Affairs stated:

Although Malaysia is not a State Party to the 1951 Convention and its Protocol, it has not prevented Malaysia from cooperating with the UNHCR in addressing international refugee issues in humanitarian grounds (Malaysian Minister of Foreign Affairs, 2008).

Case Study

As a result of the continued persecution and discrimination against Rohingya in Myanmar, Rohingya risked their live by crossing international borders in order to seek asylum in

neighboring countries like Thailand, Bangladesh and Malaysia (Ullah 2011; Azharuddin & Azlinariah 2012; Equal Rights Trust 2014). Despite the diversity of their background such as their dialects, township, locality, culture and ancestry back in Myanmar, there are commonalities among Malaysia who migrate into Malaysia (Suan, 2006). These include their migration, experiences and immigration statuses as refugees and stateless people in Malaysia.

The historical refugee in Malaysia began as early as 1970s (Kassim, 2015). Other studies indicated that the first Rohingyas' arrival may be between late 1970s and early 1980s (Suan, 2006) (Letchamanan, 2013) (Irish Centre for Human Rights, 2010). Despite their historical presence in Malaysia has been a subject of contestation, the number of Rohingyas in Malaysia increased more than 10 fold over the past 15 years, from 5,151 (2001) to 50,030 (2015) (United Nations High Commissioner for Refugees, 2015). This does not include the Rohingyas whose applications were yet to be approved or processed by the UNHCR (as of 2015). It is difficult to have actual number of Rohingya population in Malaysia given the clandestine nature of their existence in the country.

A group of refugees that the Malaysian Government has offered IMM13 permits to are the Rohingya refugees who have been arriving in Malaysia as early as the 1980s and in larger number starting in 1992 (Human Rights Watch, 2000). The Rohingyas are a stateless Muslim minority of South Asian descent, originating from Myanmar's North Arakan (Rakhine) State, adjacent to Bangladesh. Abuses suffered by the Rohingyas under the military junta for decades including severe restrictions on their movement, forced labor, arbitrary confiscation of property, systematic rape and religious persecution are well documented. By 1993, the UNHCR had registered and issued certificates to some 5,100 Rohingyas but Malaysian authorities often did not honor these certificates. As such, the Rohingyas were subjected to arrest, detention, punishment, and deportation to the Thai-Malaysia border. However in October 2004, Malaysian Government announced its decision to regularize the residency of the Rohingyas and from August 1, 2006 the government started the process of registration of approximately 12,000 Rohingya refugees with a view to granting them IMM13 permits. The Immigration Authorities did not rely on UNHCR registration records or engage with the UNHCR in the identification and registration process. They relied instead on a few Rohingya community representatives to perform the registration.

Findings

Finding of this study were derive partly from a yearlong research study in 2015 engaging Rohingya refugees and asylum seekers as well as Rohingya community leaders and activist in Peninsular Malaysia. The research was undertaken as part of the completion of doctoral thesis which was submitted to National University of Malaysia (Universiti Kebangsaan Malaysia – UKM) in March 2017. The yearlong research study did not touch on how Malaysian Government deals with Rohingya refugees as Malaysia is non signatory state to 1951 Refugee Convention. On that reason, this study intended to explain on how Malaysian Government deals with this issue.

On the basis on humanitarian ground, UNHCR has been mandated to ensure that the refugees and asylum seeker receive same protection in the host country. The first step towards providing protection for asylum seekers is for the UNHCR to become aware about the presence of refugees and asylum seekers through registration. Not all of them know about the UNHCR and

the possibility of seeking asylum: some have lived in the country for years before they learned about the UNHCR. As a matter of organizing the large number of applications, asylum seekers from different countries of origin are allocated a particular day of the week to register. Once registered, asylum seekers are issued a document proving that the bearer is applying for refugee status and is a person of concern for the UNHCR. The appearance and name of this document issued upon initial registration have varied over time. For example in early 1992, the UNHCR issue letters to the Rohingya stating that they were applying for recognition of refugee status under High Commissioner's mandate. Later that year, these letters were replaced with periodically renewable certificates listing family members with their photographs, declaring that the individual was a Rohingya Muslim from Myanmar (Equal Rights Trust). Renewal of these certificates stopped in 1998 and the UNHCR began screening Rohingyas individually to determine if they were genuine refugees. In 2002, the UNHCR began to issue temporary protection letters to the Rohingya. These temporary protection letters were in the form of a letter, printed with black ink on white paper while recognized refugees were given blue letters with colored photo of the bearer affixed.

UNHCR documentation affords some informal protection but even those who become recognized refugees are still vulnerable to arrest, detention, corporal punishment and deportation. Malaysia's National Human Rights Commission (SUHAKAM), in its 2009 Annual Report admits, "refugees or asylum seekers are vulnerable to arrest even they possess a UNHCR card (Human Rights Commission of Malaysia (SUHAKAM) , 2009). To improve protection of all persons of concerns, the UNHCR has a division called Office of Protection and Intervention (OPI). OPI will monitors reports of arrests and detention and when necessary visits detention centers to claim detained persons of concern. According to Amnesty International, police would typically contact the UNHCR by phone or in person when persons claiming to be under the protection of UNHCR are arrested. If only a few people are arrested, their registration status can be confirmed immediately and the individuals released. If the number is larger, the detainees are taken to police lockup, the verification process takes longer and those arrested must remain in detention until the process is complete (Amnesty International, 2010).

Conclusion

To answer the question raised at the beginning of this paper, protection and assistances of refugees and asylum seekers in Malaysia is implemented through informal mechanisms established by UNHCR in cooperation with NGOS and made possible through a state of exception justified on the ground of humanitarianism. In allowing certain exceptions for refugees, Malaysian Government is in no way acquiescing any of its sovereignty. Rather, it is asserting it. To be fair, humanitarianism makes small in roads in the effort to provide much needed assistance to refugees. The UNHCR's existence in Malaysia is justified, service oriented NGOs are allowed to function and Muslim refugees especially are tolerated and sometimes even accepted into society. Acknowledging the limits of the Malaysian Government's humanitarianism then becomes the starting point for recognizing that while a humanitarian approach is helpful, the cause of protecting and assisting refugees has to be premised on their rights guaranteed in International Law if it is to be meaningful and just.

Despite to the assistance given by Malaysian Government towards Rohingya refugees, this paper suggested that the primary responsibility to protect the rights of Muslim population lies on the Myanmar Government itself. Avoidance of the issue or insistence that the term 'Rohingya' is not used because it is controversial is not tenable. Years of conflict and violence in Rakhine State, which has attracted press coverage despite tight government control of the region, have sapped international goodwill. As Rohingya Muslims have fled to neighboring countries, Myanmar can no longer insist that this is internal issue and instead they must work with Malaysia and other ASEAN countries to address the situation. A distinctive principle of ASEAN Charter is that of "non-interference in the internal affairs of the ASEAN member states". Despite this principle, due to increased tension in the region following the 2015 Rohingya refugee crisis, Malaysia began to take a stronger stance on the protection of the Rohingya Muslims. The continuing crisis has shown how ill-prepared the region in dealing with the issue. The meeting that undertaken by member of ASEAN to discuss the crisis are a good start but the situation needs close monitoring if better regional cooperation is lead to improved protection for its refugees.

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