



Refugees / Migrants

Refugee Mobility, Recognition and Rights

Refugee Recognition Regime Country Profile: Malaysia

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Working Paper No. 06



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This research covers the period until September 2022 and does not include any developments thereafter. This research was conducted under the Refugees / Migrants: Refugee Mobility, Recognition and Rights (RefMig) Project. The project is a Horizon 2020 award funded by the European Research Council and runs from January 2018 to December 2023 (grant number 716968).

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PLEASE CITE AS: Alice M. Nah, 'Refugee Recognition Regime Country Profile: Malaysia' (RefMig Working Paper No. 6/2023), doi: <https://doi.org/10.48462/opus4-5175>

About RefMig Project

The RefMig project aims to examine the global refugee regime, with a particular focus on the institutionalisation of the refugee/migrant binary globally. The project is divided into two strands: Recognising Refugees and Organisations of Protection. This report falls under the Recognising Refugees strand, which examines the institutional practices that seek to distinguish refugees from migrants. We take a purposefully broad conception of refugee recognition, encompassing not only individual refugee status determination (RSD) but also the institutional processes that determine access to RSD, as well as various forms of group determination. We examine the role of state institutions in this context (bureaucracies, legislatures, and the judiciary), as well as UNHCR's mandate RSD practices, and its handovers to state authorities.

The project lead is Professor Cathryn Costello. During the RefMig project, she held the positions of Andrew W. Mellon Professor of International Refugee and Migration Law, Refugee Studies Centre, University of Oxford and Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, Berlin. RefMig obtained ethics clearance from the Central University Research Ethics Committee (CUREC) of the University of Oxford (Ref No: R61177/RE001) and the European Research Council.

RefMig Working Papers are available to download at: <https://www.refmig.org/working-papers>

Acknowledgements

I thank Sebastien Moretti, Brian Gorlick, and Kirsten McConnachie for their thoughtful feedback on earlier versions of this report, and to James Lewis for his research assistance. All errors remain my own.

Executive Summary

Malaysia is a ‘mixed migration’ context that is a key destination for refugees and asylum seekers in Southeast Asia. This report focuses primarily on the actions of the United Nations High Commissioner for Refugees (UNHCR) because of its central and contested role in refugee protection. Drawing on primary and secondary data, it reviews how UNHCR has developed a range of protection interventions, some non-ideal, in response to the actions of state and non-state actors who maintain a hostile environment for migrants with irregular status.

Norms: Malaysia is neither signatory to international refugee law treaties nor has it enacted domestic legislation recognising the legal status and rights of refugees and asylum seekers. Nevertheless, Malaysia is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).

Institutions: Malaysia permits UNHCR to operate in Malaysia, albeit in the absence of a formal Memorandum of Understanding. UNHCR engages in a range of protection activities, including registration, refugee status determination (RSD), detention monitoring, resettlement, and community outreach. It works in partnership with civil society groups to provide healthcare, education, and social services to refugee communities. It seeks collaboration with the Malaysian government concerning refugee protection, with mixed outcomes.

Modes of Recognition: As present, UNHCR registers and conducts RSD for all asylum seekers regardless of their nationality, ethnicity, or religion. It prioritises those with vulnerabilities, specific needs, and those at higher protection risk, including those detained and at risk of forcible return to their country of origin. Civil society groups who are part of UNHCR’s Partner Referral Network can identify and refer cases of vulnerable refugees for expedited protection intervention and assistance. In the past, UNHCR used different types of case processing modalities to manage large numbers of refugees and asylum seekers with similar profiles and strong protection needs, applying these mainly to persons of concern from Myanmar. After years of refusing to register refugees and asylum seekers, in 2017 the Malaysian government approved a mandatory registration system called the Tracking Refugees Information System (TRIS) which captures detailed biometric data of refugees.

Quality of Recognition Processes: Accessibility to UNHCR registration and RSD has been a perpetual challenge for refugees and asylum seekers over the years; thousands remain unregistered. UNHCR struggles to cope with large caseloads and has adopted different types of case processing modalities over the years to deal with this and its backlog of cases. There isn’t sufficient data available publicly to assess the accuracy of registration and RSD in Malaysia. Refugees and asylum seekers are concerned that the data collected in the Malaysian government’s TRIS will be used against them, resulting in their arrest, detention, and deportation.

Quality of Protection: Refugees and asylum seekers face significant challenges to their protection, in terms of arrest, detention, deportation; vulnerability to violence, trafficking, and exploitation; labour rights; the right to health; and the right to education. Holding a UNHCR card provides them with some level of protection, but in general, refugees and asylum seekers live with fear, insecurity, and economic precarity. In recent years, the Malaysian government has engaged in interception and pushbacks at sea, and there have been occasional incidents of refoulement.

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List of Acronyms

CBO	Community-based organisation
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CPA	Comprehensive Plan of Action
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHO	European Civil Protection and Humanitarian Aid Operations
EMCO	Enhanced Movement Control Order
JIM	Malaysian Immigration Department, <i>Jabatan Imigresen Malaysia</i>
JTF	Joint Task Force
MCO	Movement Control Order
MKN	Malaysian National Security Council, <i>Majlis Keselamatan Negara Malaysia</i>
RSD	Refugee status determination
PDRM	Royal Malaysian Police, <i>Polis DiRaja Malaysia</i>
REMEDI	Refugee Medical Insurance
TRIS	Tracking Refugees Information System
UNHCR	United Nations High Commissioner for Human Rights

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I. Introduction

Malaysia is a key destination for refugees and asylum seekers in Southeast Asia. It is a dynamic ‘mixed migration’ context¹ in which an estimated 2 million documented migrant workers reside with around 2-4 million migrants with irregular status. Malaysia is neither signatory to international refugee law treaties nor has it enacted domestic legislation recognising the legal status and rights of refugees and asylum seekers. The refugee recognition regime in Malaysia is shaped largely by the efforts of United Nations High Commissioner for Refugees (UNHCR) to create a ‘protection space’ for refugees and asylum seekers.

At the end of January 2022, there were 181,510 asylum seekers and refugees registered with UNHCR.² Of these, 155,610 (86 percent) originated from Myanmar, comprising 103,560 Rohingyas (57 percent of the total number), 22,580 (12 percent) Chins and 29,470 (16 percent) from other ethnic groups. 25,900 (14 percent) more come from over 50 countries, with the largest numbers from Pakistan, Yemen, Syria, Somalia, Afghanistan, Sri Lanka, Iraq, and Palestine. Of these, 67 percent are men, 33 percent are women, and 45,630 are children under 18. However, thousands remain unregistered.

While Malaysia itself has offered protection to specific groups of refugees over the years on an *ad hoc* basis and has allowed UNHCR to operate in Malaysia for over four decades, in general, its position is that it only accommodates refugees temporarily ‘on humanitarian grounds’³ and the only acceptable durable solutions for refugees are resettlement and return – not local integration.⁴ Malaysia remains reluctant to take on refugee protection in a comprehensive, systematic and consistent way. As such, refugees and asylum seekers are in danger of being treated as migrants with irregular status and being subject to punishment under Malaysia’s immigration laws, which includes long-term immigration detention and forcible removal from the country. Malaysian authorities have been publicly stigmatising and criminalising migrants with irregular status, sanctioning the use of violence (whipping) as punishment for some immigration offences, including irregular entry. Refugees and asylum seekers, particularly those living with irregular status, have been vulnerable to trafficking, forced labour, and exploitation.⁵

¹ Nicholas Van Hear and colleagues define ‘mixed migration’ as being “where refugees and other migrants move alongside each other, making use of the same routes and means of transport and engaging the services of the same smugglers”. In a similar vein, UNHCR defines ‘mixed movements’ as movements where “people with different objectives move alongside each other using the same routes and means of transport, or engaging the services of the same smugglers”. Nicholas Van Hear, Rebecca Brubaker, and Thais Bessa, ‘Managing Mobility for Human Development: The Growing Salience of Mixed Migration, Munich Personal RePEc Archive, 1 June 2009, 10 <https://mpr.ub.uni-muenchen.de/19202/1/MPPA_paper_19202.pdf> accessed 1 April 2022; UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action* (UNHCR 2011) 8.

² UNHCR Malaysia, ‘Figures at a Glance in Malaysia’ (*UNHCR Malaysia*, 1 April 2022) <<https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>> accessed 1 April 2022.

³ Jera Beah H. Lego, ‘Protecting and Assisting Refugees and Asylum-seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the ‘Humanitarian Exception’’, (2012) 17 *Journal of Political Science and Sociology* 75; Sebastien Moretti, ‘Protection in the Context of Mixed Migratory Movements by Sea: The Case of the Bay of Bengal and Andaman Sea Crisis’ (2018) 22 *The International Journal of Human Rights* 237.

⁴ See for example, Government of Malaysia, ‘Statement by Malaysia’ (Virtual Donor Conference on Sustaining Support for the Rohingya Refugee Response, 22 October 2020) <<https://rohingyaconference.org/doc/rohingya-conference-statement-malaysia.pdf?v=2>> accessed 1 April 2022.

⁵ Andika A Wahab, ‘The Colours of Exploitation: Smuggling of Rohingyas from Myanmar to Malaysia’ (2018) 88 *Akademika* 5; Health Equity Initiatives, *Human Trafficking, Forced Labour, and Mental Health: The Experiences of Refugees and Asylum Seekers in Malaysia* (Health Equity Initiatives 2012); Amy A. Smith, *In Search of Survival and Sanctuary in the City. Refugees from Myanmar / Burma in Kuala Lumpur, Malaysia*

UNHCR's registration and refugee status determination (RSD) activities – although questioned and contested – have become critical to the identification and separation of refugees and asylum seekers as people in need of international protection. Registration and RSD are also necessary steps for UNHCR's referral of a refugee for resettlement, the only foreseeable durable solution for many. Although UNHCR Malaysia has been having one of the busiest RSD operations in the world⁶, access to registration and RSD remains limited. As such, a perpetual problem is that thousands of refugees and asylum seekers are unregistered and subject to immigration enforcement.

Malaysian law enforcement authorities recognise UNHCR identity documents to a certain extent, but these documents neither provide absolute nor consistent protection. The role of UNHCR and the extent of its authority in Malaysia has been ambiguous, due in part to the absence of a formal agreement between UNHCR and the government. Hence, the 'protection space' for refugees and asylum seekers shifts and changes, contracts, and expands, based on the assumptions, actions, political positions, and negotiations of Malaysian government officials, UNHCR officials, refugees, and civil society actors.⁷

Over the years, civil society actors – in particular, refugee community-based organisations (CBOs) – have played an important role in strengthening refugee protection through the provision of services, the mobilisation of resources, and advocacy. Civil society actors have been the strongest allies – and critics – of the Malaysian government and UNHCR. However, the protection needs of refugees remain significant and far outstrip the capacity of UNHCR and civil society actors to respond. In recent years, Malaysia has also engaged in some unlawful practices, such as the interception and pushbacks of boats bearing Rohingya refugees from Bangladesh and Myanmar to prevent them from reaching Malaysia. The onset of Covid-19 in 2020 also resulted in higher levels of xenophobia and greater destitution amongst refugees as they lost their access to work, education, and health services.⁸

This Country Profile covers the past two decades and focuses primarily on the actions of UNHCR because of its central role in creating and shaping Malaysia's refugee recognition regime. It traces the rise of UNHCR Malaysia from a quiet office with relatively small caseloads to one of the largest and busiest urban operations in the world. This report highlights how UNHCR faces challenges in its negotiations with state and civil society actors as it tries to advance refugee protection. It reviews how UNHCR has developed a range of protection interventions, some non-ideal, in response to the actions of state and non-state actors who create and maintain a hostile environment for migrants with irregular status.

In relation to registration and RSD specifically, UNHCR has used different tactics and strategies for managing large caseloads over time, sometimes with unintended effects. UNHCR's efforts have also been hampered by chronically insufficient resources and the absence of adequate support by and reliable partnership with the Malaysian government. The

(International Rescue Committee 2012); Tenaganita, *The Revolving Door: Modern Day Slavery Refugees* (Tenaganita 2008).

⁶ UNHCR, *Global Trends - Forced Displacement in 2019* (UNHCR 2020) 44.

⁷ Alice M. Nah, 'The Ambiguous Authority of the 'Surrogate State': UNHCR's Negotiation of Asylum in the Complexities of Migration in Southeast Asia' (2019) 35 *Revue Européenne des Migrations Internationales* 63.

⁸ Thomas Daniel and Puteri Nor Ariane Yasmin, 'The impact of Covid-19 on Refugees and Asylum Seekers in Malaysia' (*LSE Blogs*, 8 October 2020) <<https://blogs.lse.ac.uk/seac/2020/10/08/the-impact-of-covid-19-on-refugees-and-asylum-seekers-in-malaysia/>> accessed 1 April 2022.

government has imposed limits on UNHCR's activities, for example, by barring access to immigration detention depots. UNHCR has been publicly criticised by Malaysian politicians and government officials, which has negatively impacted its standing and negotiating power. After decades of not documenting refugees, in 2017, the Malaysian government introduced a parallel registration system called the Tracking Refugees Information System (TRIS) which captures biometric data of asylum seekers and refugees. However, as elaborated in section VI below, this system is viewed with suspicion by those whose details are recorded through it.

II. Literature Review

i. Historical background

Numerous populations have sought refuge in Malaysia over the years, most notably from territories in Southeast Asia. Those who arrived in the Peninsula before the independence of Malaya in 1957 were integrated as Malaysian citizens – such as the Acehnese from Sumatra. In the 1970s, Malaysia gained prominence through its role as a 'country of first asylum' for Indochinese refugees. Between 1975-1995, around three million people left Cambodia, Laos, and Vietnam over land and on boats, seeking refuge in Hong Kong, Thailand, Malaysia, Indonesia, and the Philippines.⁹ Malaysia's approach to Indochinese refugees changed over time. Initially, groups were placed in refugee camps and provided with assistance. However, from 1977 onwards, fearing the arrival of overwhelming numbers, the government began to classify them as 'illegal immigrants', and pushed boats back out to sea unless UNHCR intervened in time.¹⁰ The (then) Deputy Prime Minister Mahathir Mohammad attracted negative media attention when he announced that the government would adopt a 'shoot on sight' policy, which was subsequently retracted and repositioned as a 'shoo on sight' policy.¹¹ However, through negotiations with other states and through its participation in the intergovernmental Comprehensive Plan of Action (CPA), Malaysia eventually hosted around 258,500 Vietnamese refugees in temporary closed camps. By 1998, 249,132 refugees had been resettled to third countries and 9,365 had returned to Vietnam.¹² This 'country of first asylum' approach to refugee protection has had a legacy in Malaysia – in general, politicians and government officials see refugees as an 'international problem', the UNHCR as a facilitator in an international response, and resettlement or repatriation as durable solutions, not local integration.¹³

Malaysia's response to refugees has been *ad hoc* and highly dependent on the identities of refugees, the geo-political dimensions of their displacement, and the political interests of the

⁹ Sara Ellen Davies, 'Saving Refugees or Saving Borders? Southeast Asian States and the Indochinese Refugee Crisis' (2006) 18 *Global Change, Peace & Security* 3; W. Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998).

¹⁰ UNHCR, *Special Report: Comprehensive Plan of Action. The Indo-Chinese Exodus and the CPA* (UNHCR 1996).

¹¹ Cheah Boon Kheng, *Malaysia: The Making of a Nation* (Institute of Southeast Asian Studies 2002).

¹² UNHCR, *Malaysia Factsheet* (UNHCR 1998). The last Vietnamese refugee from this period in history reportedly departed Malaysia in August 2005. See: Bram Steenhuisen, 'Last Vietnamese Boat Refugee Leaves Malaysia' (*UNHCR*, 30 August 2005) <<https://www.unhcr.org/43141e9d4.html>> accessed 1 April 2022.

¹³ Sara Ellen Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff Publishers 2008); Samuel Cheung, 'Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience' (2011) 25 *Journal of Refugee Studies* 50, 64; Alice M Nah 'Networks and Norm Entrepreneurship Amongst Local Civil Society Actors: Advancing Refugee Protection in the Asia Pacific Region' (2016) 20 *The International Journal of Human Rights* 223, 230.

government in power. As a general pattern over the years, Malaysia has been more sympathetic to the plight of Muslim refugees. In the 1970s, Malaysia was a place of refuge for around 120,000 Muslim refugees from the southern Philippines who settled in Sabah¹⁴, some of whom remain and whose children have become stateless. From 1975 onwards, Malaysia gave refuge to Khmer Muslims from Cambodia, some of whom arrived on its shores and some of whom were resettled from Thailand.¹⁵ By 1993, 12,627 of them had been registered with the help of UNHCR and over 50 percent had been given citizenship.¹⁶ In 1994, in a public demonstration of Islamic solidarity and rising Asian economic strength during a global crisis, Malaysia offered asylum to 350 Bosnian Muslims fleeing the collapse of Yugoslavia.¹⁷ In December 2004, Malaysia issued around 32,000 to 35,000 temporary time-limited passes for work (known as the IMM13) to Acehese Muslim refugees after the devastating Asian Tsunami.¹⁸ In October 2004, the Malaysian government announced that it would give IMM13 passes to Rohingyas, a Muslim ethnic minority from Myanmar, but the implementation of this failed, with accusations of corruption made against Rohingya community leaders and government officials engaged in facilitating these procedures.¹⁹ Until now, the Malaysian government has not regularised Rohingyas although some have been living in Malaysia for decades. In 2015, Malaysia announced that it would accept 3,000 refugees from Syria over a three-year period.²⁰

ii. Malaysia and the international refugee regime

Legal scholars have debated about the role and significance of international refugee law in Southeast Asia. Sarah Davies has argued that many states in Southeast Asia, including Malaysia, have ‘rejected’ refugee law, because they did not participate in the drafting of the 1951 Convention Relating to the Status of Refugees (henceforth, the 1951 Convention) and its 1967 Protocol.²¹ She also argued that they continued to reject refugee law during the Indochinese refugee crisis because they did not want to lose material assistance from Western countries.²² Scholars who refute her claim, such as Susan Kneebone, have argued that non-accession does not equate to the ‘rejection’ of these instruments.²³ Sebastien Moretti argues for the importance of examining state practice, and points out that Malaysia (along with Indonesia and Thailand) has treated refugees as being in need of some sort of protection, for example, protection from

¹⁴ Judith Strauch, *The Chinese Exodus from Vietnam : Implications for the Southeast Asian Chinese* (Cultural Survival 1980).

¹⁵ Robinson (n 9); UNHCR (n 10).

¹⁶ UNHCR (n 12).

¹⁷ Maggie Farley, ‘Displaced Bosnians Try to Cope, Malaysia Gives Refugees Haven’ *Dallas Morning News* (Dallas, 21 April 1994).

¹⁸ Alice M Nah and Tim Bunnell, ‘Ripples Of Hope: Acehese Refugees In Post-tsunami Malaysia’ (2005) 26 *Singapore Journal of Tropical Geography* 249.

¹⁹ Lego (n 3); Alice M Nah, ‘Struggling with (Il)legality: The Indeterminate Functioning of Malaysia’s Borders for Asylum Seekers, Refugees and Stateless Persons’ in Prem Kumar Rajaram and Carl Grundy-Warr (eds) *Borderscapes: Hidden Geographies and Politics at Territory’s Edge, Borderlines* (University of Minnesota Press, 2007).

²⁰ Mokhtar Hussein and Bernama, ‘Najib: Malaysia to Accept 3,000 Syrian Refugees’ *Malaysiakini* (Kuala Lumpur 2 October 2015) <<https://www.malaysiakini.com/news/314238>> accessed 1 April 2022.

²¹ Sara Ellen Davies, ‘The Asian Rejection?: International Refugee Law in Asia’ (2006) 52 *Australian Journal of Politics & History* 562.

²² Davies (n 9).

²³ Susan Kneebone, ‘Legitimizing Rejection: International Refugee Law in South East Asia. By Sara E. Davies’ (2009) 22 *Journal of Refugee Studies* 243.

refoulement, even if this protection is granted explicitly ‘on humanitarian grounds’ rather than because of a sense of legal obligation.²⁴

Scholars and practitioners have also analysed the role of UNHCR in Malaysia in refugee protection. Martin Jones highlights that unlike its role in other regions, UNHCR’s approach in Southeast Asia of negotiating for humanitarian protection space “privileges international interests, fora, and the UNHCR as the negotiator, and that it belies a developing bedrock of legal norms that offers protection to refugees in the region.”²⁵ He calls for greater attention to how domestic laws, legal institutions and the legal profession offer protection to refugees in practice, even in jurisdictions that have not made a formal commitment to the norms of refugee law.²⁶ I have argued that UNHCR Malaysia has taken on properties of a “surrogate state”²⁷ but that it does so without sovereignty, operating with ambiguous authority that “arises from the lack of clarity over its role and powers as an international organization operating in the territory of a state.”²⁸ As has been highlighted in other contexts where UNHCR plays a ‘domesticated’ role, UNHCR cannot be as openly critical as it should be, as protection outcomes are dependent on its relationship with the government.²⁹

iii. Border practices and the meaning of refugee status

Scholarship on refugees in Malaysia has focused on the (un)freedoms experienced by refugee communities as a result of their ‘(il)legality’, the “uncertain and unresolved socio-legal location in which they are possibly legal – through practices of exception – but remain illegal by default”.³⁰ Examining Malaysia’s focus on internal border control practices, Anja Franck highlights that the “architecture of immigration control is neither stable nor necessarily ‘visible’ throughout the urban landscape. As such, it is not recognisable through fixed infrastructure... but rather through its momentary presence and continuously shifting location.”³¹ She observes that migrants practice ‘street politics’ as they negotiate landscapes of fear, bargaining with the police, paying bribes, and dodging roadblocks to live, work, and socialize in Malaysia. Corruption enables migrants and refugees to survive in Malaysia; it is an institutionalized practice through which “seemingly (and officially) impermeable borders can become temporarily porous or semi-porous in the everyday encounters between migrants and

²⁴ Sebastien Moretti, ‘Keeping Up Appearances: State Sovereignty and the Protection of Refugees in Southeast Asia’ (2018) 17 *European Journal of East Asian Studies* 3.

²⁵ Martin Jones, ‘Moving Beyond Protection Space: Developing a Law of Asylum in South East Asia’, in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014) 254.

²⁶ Martin Jones, ‘Expanding the Frontiers of Refugee Law: Developing a Broader Law of Asylum in the Middle East and Europe’ (2017) 9 *Journal of Human Rights Practice* 212.

²⁷ Amy Slaughter and Jeff Crisp, ‘A Surrogate State? The role of UNHCR in Protracted Refugee Situations’ (2009) *New Issues in Refugee Research*, Research Paper No. 168, UNHCR

<<https://www.unhcr.org/uk/research/working/4981cb432/surrogate-state-role-unhcr-protracted-refugee-situations-amy-slaughter.html>> accessed 1 April 2022; Michael Kagan, “We live in a Country of UNHCR” *The UN Surrogate State and Refugee Policy in the Middle East* (2012) *New Issues in Refugee Research*, Research Paper No. 201, UNHCR <<https://www.unhcr.org/uk/research/working/4d5a8cde9/live-country-unhcr-un-surrogate-state-refugee-policy-middle-east-michael.html>> accessed 1 April 2022; Sarah Deardorff Miller, *UNHCR as a Surrogate State: Protracted Refugee Situations* (Routledge, 2018).

²⁸ Nah (n 7) 65.

²⁹ Miller (n 27).

³⁰ Nah (n 19).

³¹ Anja K. Franck, ‘The ‘Street Politics’ of Migrant Il/legality: Navigating Malaysia's Urban Borderscape’ (2019) 60 *Asia Pacific Viewpoint* 14, 15.

enforcement officers.”³² Eva-Lotta Hedman notes how the (controversial) involvement of citizen volunteers in immigration raids constitute performances of nationalism in a context where she observes “considerable anxiety, lack and incompleteness in terms of national and ethnic identity formation in this ‘plural society’”.³³ Kirsten McConnachie provides insightful analysis as to the ways in which Chin refugees protect themselves through establishing self-help CBOs in precarious, insecure environments, noting the complexities involved in constructing Chin identity, forming ‘communities’, and navigating ambivalent relationships with UNHCR.³⁴

III. Methodology

This Country Profile draws upon desk-based research as well as interview and participant observation data from two research projects, ‘The Law of Asylum in the Middle East and Asia: Developing Legal Engagement at the Frontiers of the International Refugee Regime’³⁵ and ‘Access to Justice in Displacement’, both of which received ethics approval from the University of York.³⁶ This report covers the past two decades with greater emphasis on more recent events over the past five years. It focuses primarily on refugees from Myanmar, which constitute the majority of those registered with UNHCR. This group is of particular interest because UNHCR has adopted different registration and RSD practices with them over the years aimed at processing large numbers of cases quickly. While refugees and civil society groups have been open about their experiences of UNHCR’s registration and RSD activities, the accuracy and fairness of RSD decisions has been difficult to assess externally.

IV. Norms

While Malaysia is signatory neither to the 1951 Convention nor its 1967 Protocol, it is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). Despite recommendations by the CEDAW and CRC Committees for Malaysia to enact domestic legislation recognising the status of refugees and asylum seekers³⁷ and similar calls by states through the review of Malaysia in the Universal Periodic Review Process³⁸, it has not done so. The National Security Council Directive No. 23 on the Mechanism for Managing Unauthorised Immigrants Holding the UNHCR Card issued in 2009

³² Anja K. Franck, ‘Corrupt(ing) Borders: Navigating Urban Immigration Policing in Malaysia’ (2018) *Geopolitics* 15.

³³ Eva-Lotta E. Hedman, ‘Refuge, Governmentality and Citizenship: Capturing ‘Illegal Migrants’ in Malaysia and Thailand’ (2008) 43 *Government and Opposition* 358, 383.

³⁴ Kirsten McConnachie, ‘Securitization and Community-Based Protection Among Chin Refugees in Kuala Lumpur’ (2019) 28 *Social and Legal Studies* 158.

³⁵ Martin Jones, ‘Law of Asylum’ (*Frontier of Asylum*, 1 April 2022) <<https://frontierofasylum.net/>> accessed 1 April 2022.

³⁶ Martin Jones, ‘Access to Justice in Displacement’ (*Frontier of Asylum*, 1 April 2022) <<https://frontierofasylum.net/>> accessed 1 April 2022.

³⁷ UN Committee on the Elimination of Discrimination Against Women, ‘Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia’ (2006), CEDAW/C/MYS/CO/2, paragraph 45.

³⁸ See for example: UN General Assembly, Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Malaysia’ (7 January 2019) A/HRC/40/11.

is the main basis for refugee management in Malaysia³⁹ – however, this document is not available to the public.

i. The Immigration Act 1959/63

The Immigration Act 1959/63 (as amended) *inter alia* regulates entry into and departure from Malaysia; it contains for example, procedures on arrival and the removal of persons from Malaysia, the powers and duties of immigration officers, immigration offences and penalties, as well as the judicial review of immigration decisions, and limited rights to an oral hearing. The Act neither defines nor distinguishes refugees, asylum seekers and stateless persons from other “illegal immigrants” (Section 55E(7)). As such, these categories of people seeking international protection are liable for immigration offences such as irregular entry and working without authorisation.

The Act further empowers the Minister of Home Affairs to specify authorised points of entry and exit to and from Malaysia (Section 5(1)). The Act states that no person other than a citizen shall enter Malaysia without a valid Entry Permit (Section 6(1)). Those who contravene this provision are guilty of an offence punishable by a fine not exceeding 10,000 Malaysian Ringgit (MYR) and/or imprisonment of up to five years, and “shall also be liable to whipping of not more than six strokes” (Section 6(3)). After whipping was introduced as a form of punishment under the Immigration Act in 2002, 34,923 non-citizens were whipped for immigration offences between 2002-2008, of whom 60.2 percent were from Indonesia, 14.1 percent from the Philippines, 13.9 percent from Myanmar, 3.6 percent from Bangladesh, 2.8 percent from Thailand, and 5.4 percent from other countries.⁴⁰ Over the past decade, refugees and asylum seekers have been sentenced to imprisonment and whipping for immigration offences, more often when they were not registered by UNHCR (further discussed below).

The Act empowers the Director General of Immigration to prohibit the entry or re-entry of any person or class of persons as well as to cancel at any time with absolute discretion, and with immediate effect, any Pass or Permit (Section 9). The holder of a cancelled Permit or expired Permit has no right to remain in Malaysia, is liable for removal, and is prohibited from entering Malaysia afterward (Section 9(4)). Anyone who does so is guilty of an offence, punishable by a fine of not less than RM10,000 and/or imprisonment of up to five years under Section (15(1,4)).

The Act also states that it is an offence to employ a person other than a citizen or an Entry Permit holder (i.e., a permanent resident) without a valid Pass (Section 55B(1)). This is punishable by a fine of at least RM10,000 but not more than RM50,000 and/or to imprisonment of up to twelve months for each person hired. It is also an offence to forge or alter immigration passes, endorsements, and documents used as visas. This is punishable by a fine of at least RM30,000 but not more than RM100,000, imprisonment of at least five years but not more than ten years, and the offender “shall also be punished with whipping of not more than six strokes” (Section 55D). Furthermore, it is an offence for an ‘occupier’ – a person in charge of premises – to permit an illegal immigrant to enter and remain at any premises. This is punishable by a fine of not less than RM5,000 and not more than RM30,000, and/or to

³⁹ Dewan Negara (Senate) ‘Oral Answers to Questions’, 23 September 2020, 19.

⁴⁰ Alice M Nah, ‘Legitimizing Violence: The Impact of Public ‘Crackdowns’ on Migrant Workers and Refugees in Malaysia’ (2011) 17 Australian Journal of Human Rights 131, 139.

imprisonment not exceeding 12 months for each ‘illegal’ immigrant, with higher punishments for subsequent convictions (Section 55E).

The Act provides for the removal of a prohibited immigrant to a place of embarkation or to the country of their birth or citizenship (Section 31). It also provides for the removal of illegal immigrants (Section 32) and persons unlawfully remaining in Malaysia (Section 33) without stating any specific location for their return. The Act further provides for the detention in custody of these persons “for such period as may be necessary for the purpose of making arrangements for his (sic) removal” (Section 34). It also provides for the arrest without warrant of a person “believed to be a person liable to removal from Malaysia under this Act” by any immigration officer or senior police officer and for their detention for up to 30 days pending a decision (Section 35).

ii. Court cases involving refugees

The courts of Malaysia have considered the meaning of refugee protection and the role of UNHCR within Malaysia’s immigration control regime. Several cases have dealt with the appropriateness of the punishment meted to refugees for immigration offences, in particular, the whipping of refugees, usually based on an appeal. In *Kya Hliang & Ors v Pendakwa Raya* [2009] MLJU 18, the High Court reviewed a judgement in which 11 people were sentenced to one month imprisonment and whipping of one stroke for irregular entry under section 6(1) of the Immigration Act. The judge affirmed the sentence of imprisonment but set aside the sentence of whipping. Similarly, in *Tun Naing Oo v Public Prosecutor* [2009] 5 MLJ 680, High Court reviewed a judgement in which an asylum seeker from Myanmar was sentenced to 100 days of imprisonment and two strokes of the cane. The judge overturned the sentence of whipping, finding it to be “manifestly excessive”, observing: “Asylum-seekers and refugees, if they have not committed acts of violence or brutality, or were habitual offenders, or have threatened our public order, should not be punished with whipping”.⁴¹ On 22 June 2020, the Alor Setar High Court set aside a sentence of caning for 27 Rohingya men on the basis that they were in need of international protection and ruled that they could not be returned to Myanmar in line with the principle of *non-refoulement*.⁴² However, there are refugees and asylum seekers whose cases have not been appealed, and it is unknown how many of them have been subject to whipping.

The courts have also considered the specific circumstances of refugee children in Malaysia with reference to the Convention on the Rights of the Child and The Child Act 2001. In *Iskandar Abdul Hamid v. Public Prosecutor* [2005] 6 CLJ 505, where a child from Indonesia was charged for irregular entry under the Immigration Act, the judge recognised that a UNHCR officer was a person “directly concerned” for the child and a “responsible person” within the meaning of the Child Act 2001. As such, a UNHCR officer can be present at any sitting of such a child before the Court for Children, can be allowed to assist the child in the child’s defence, and can intervene to provide extenuating or mitigating circumstances where a child is found guilty of an offence.

⁴¹ *Tun Naing Oo v Public Prosecutor* (2009) 5 MLJ 680, 681.

⁴² Amnesty International, ‘Malaysia: Court Ruling Against Whipping Must Be First Step Towards Protecting Rohingya Refugees’ (22 July 2020) <<https://www.amnesty.org/en/latest/news/2020/07/malaysia-court-ruling-against-whipping-must-be-first-step-toward-protecting-rohingya-refugees/>> accessed 1 April 2022.

In 2018, the High Court in Alor Setar, Kedah, ruled against the continued immigration detention of seven Rohingya children who entered Malaysia by boat to seek asylum and were detained in an immigration detention centre. The judge ruled that the detention order was valid as they did not have permission to enter and remain in Malaysia but stated that,

the continued detention of the Applicants at the Belantik Immigration Detention Centre is a direct violation of their rights as a child pursuant to the Convention of the Rights of the Child and the Child Act 2001 which guarantees protection and assistance to be given to children in all circumstances without regard to race, colour, gender, language, religion or distinction of any kind...⁴³

The judge ruled that the children would be allowed to be placed in a shelter which would protect them and provide for their welfare. They would be placed on bail bond of RM500 each (around GBP90) with a Malaysian surety and made available to the authorities if required.⁴⁴

V. Institutions

UNHCR began operations in Malaysia in 1975, assisting the government in its response to Vietnamese refugees until 1996.⁴⁵ In the 1990s, caseloads under UNHCR's mandate were small, with new applications numbering only in the hundreds.⁴⁶ In 2002, Human Rights Watch noted that "UNHCR in Kuala Lumpur, Malaysia had a small office with chronic staff shortages, so that only one or two officers were doing refugee status determinations and reviewing one another's work if a refugee appealed a rejection".⁴⁷ They noted that asylum seekers in Malaysia did not go to UNHCR for various reasons – some were unaware of UNHCR's presence, some were concerned that they would be arrested along the way, and some thought it would be futile. The relative invisibility of these 'urban refugees' at that time perpetuated a lack of proactive response from UNHCR and from Malaysian civil society groups. Aside from the Indochinese refugees, then in camps, the dominant myth at that time was that very few, if any, refugees existed in Malaysia.

As mentioned earlier, in 2002, the Malaysian government amended the Immigration Act to introduce whipping for some immigration offences and announced repeatedly that it would crackdown on irregular migrants on a massive scale. This prompted large numbers of people to seek asylum with UNHCR as a means of avoiding arrest, punishment and forced deportation.⁴⁸ At that time, there was growing awareness about the role of UNHCR in Malaysia and the efficacy of UNHCR documents. In 2003, UNHCR Malaysia registered the highest number of new asylum claims submitted to UNHCR in the world, an increase from 2,100

⁴³ Ruwaida @ Royeda binti Muhammad Siddiq & Anor v. Commandant, Immigration Depot Belantik, Kedah & Anor, KA-44-81-09/2018, Malaysia: High Court of Malaya, September 2018, paragraph 10k.

⁴⁴ In domestic legislation, three types of alternatives to detention are possible, though seldom applied for refugees and asylum seekers – reporting conditions, release on bail/ bond, and the provision of a guarantor / surety. Some NGOs provide shelters for unaccompanied and separated children. UNHCR Malaysia, 'Malaysia - Progress Under The Global Strategy Beyond Detention 2014-2019, Mid-2016' (UNHCR Malaysia 2016).

⁴⁵ UNHCR Malaysia, 'UNHCR Representation in Malaysia' (UNHCR, 1 April 2022).

⁴⁶ <https://www.unhcr.org/uk/unhcr-in-malaysia.html> accessed 1 April 2022.

⁴⁷ More specifically, it received 208 new applications in 1996, 231 in 1997, 1,207 in 1998, 1,853 in 1999, 453 in 2000, and 964 in 2001. See UNHCR, *UNHCR Statistical Yearbook 2002* (UNHCR 2004) 380.

⁴⁸ Human Rights Watch, "By Invitation Only": *Australian Asylum Policy* (Human Rights Watch 2002), 34-35.

⁴⁹ Nah (n 40), Cheung (n 13).

applications in the previous year to 18,600, thus becoming the tenth largest recipient of asylum seekers worldwide.⁴⁹

UNHCR has ambiguous legal status in Malaysia and does not have a designated interlocuter in the Malaysian government.⁵⁰ UNHCR has tried to secure a Memorandum of Understanding with the government numerous times, with drafts sent to different ministries such as the Ministry of Home Affairs and the Ministry of Foreign Affairs, but these actors have not responded despite multiple reminders.⁵¹ The scope of UNHCR's protection activities are diverse. It identifies, separates, and 'rescues' refugees from arrest, detention, punishment for immigration offences, and deportation. It verifies the identities of UNHCR card holders with law enforcement agencies when the former are arrested, trying to secure their release. With prior permission of the Malaysian authorities, UNHCR officers visit asylum seekers and refugees in immigration detention depots, prisons, police, and immigration lock-up facilities, registering and conducting RSD with detainees.

UNHCR works in partnership with civil society groups to provide healthcare, education, and social services to refugee communities. Refugees and asylum seekers go to UNHCR to get support and help for a range of daily problems. As a UNHCR report from May 2012 observes, quoting a UNHCR Malaysia staff member,

Because the support for refugees is so limited here, we also find ourselves dealing with a lot of individual problems – women whose husbands have gone missing, refugees who want to find out about burial arrangements for deceased relatives and workers who have not received their wages, for example. This all places extra pressure on the office.⁵²

A UNHCR report in 2020 highlighted that its reception centre received 600-1,000 people of concern a day.⁵³

Nevertheless, the scope and volume of protection needs of refugees and asylum seekers far outweigh the collective capacity and response of UNHCR and civil society actors and as such, the impact of their efforts may not be experienced by many refugees and asylum seekers. As noted earlier, UNHCR Malaysia suffers from chronic under-funding, which hampers its effectiveness at protecting refugees. Figure 1 highlights how UNHCR's actual expenditure has been consistently far below its projected needs year on year.

⁴⁹ UNHCR, *UNHCR Statistical Yearbook 2003* (UNHCR 2005) 38, 44.

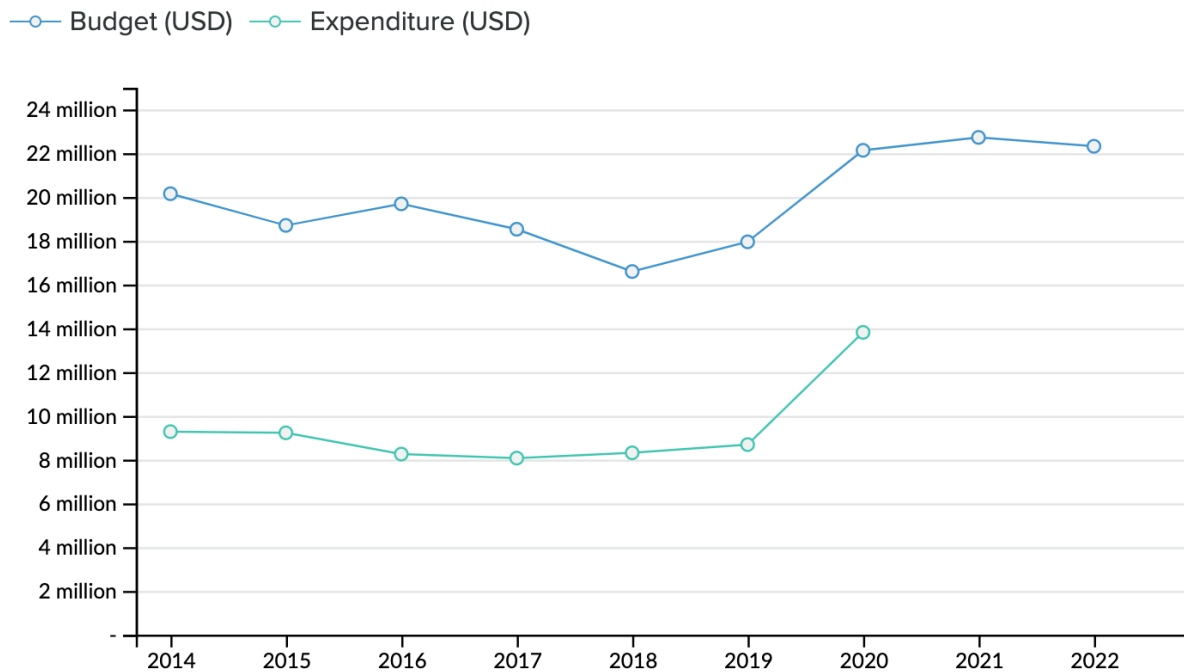
⁵⁰ UNHCR, *But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia* (UNHCR 2012) PDES/2012/02, 17.

⁵¹ Personal communication with Brian Gorlick, UNHCR Malaysia Deputy Representative from 2015-2018 (14 July 2021).

⁵² UNHCR (n 50) 17.

⁵³ UNHCR, 'Malaysia: Year-End Report 2020' (*UNHCR Global Focus*, 1 April 2022) <<https://reporting.unhcr.org/malaysia?year=2020>> accessed 1 April 2022.

Figure 1: Budgets and Expenditure for UNHCR Operations in Malaysia (2014-2022)⁵⁴



Source: 2022 current budget as approved by the High Commissioner as of February 2022; pending presentation to the ExCom's Standing Committee.
 2021 Provisional final budget as approved by the High Commissioner; which will be reported at ExCom's next Standing Committee.
 All other years are considered final for budget and expenditure data.

UNHCR's role in resettlement has also changed significantly over the past two decades. As Figure 2 indicates, UNHCR submitted 778 refugees for resettlement in 2003. This rose to a peak of 15,813 refugees in 2012, which gradually reduced to 2,529 refugees in 2019 (before Covid-19 impacted operations worldwide) and to 1,143 and 2,647 refugees in 2020 and 2021 respectively. Similarly, as Figure 3 indicates, UNHCR's facilitation of resettlement departures rose from 495 refugees in 2003 to a peak of 12,547 refugees in 2015. Annual numbers have dropped significantly since, down to 2,850 departures in 2019 (pre-Covid-19) and further down to 971 and 977 in 2020 and 2021 respectively. One of the key reasons for the reduction in resettlement numbers over time was the change in resettlement policy in the United States of America under Donald Trump, a country that has always been the largest recipient of UNHCR-recognised refugees from Malaysia.⁵⁵ Covid-19 has also impacted negatively on resettlement globally, including from Malaysia.

⁵⁴ Ibid.

⁵⁵ Gorlick (n 51).

Figure 2: UNHCR Malaysia Resettlement – Submissions 2003-2022⁵⁶

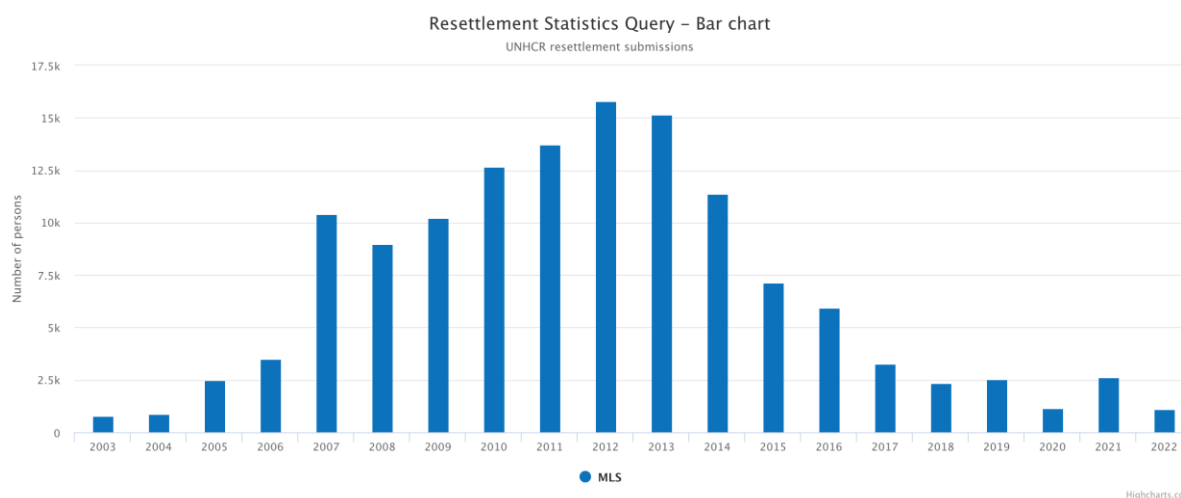
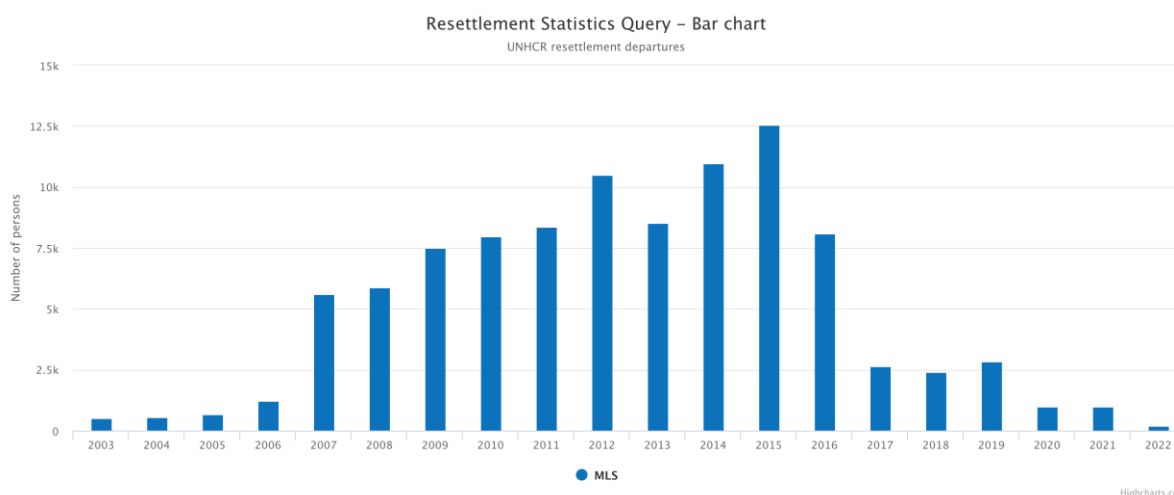


Figure 3: UNHCR Malaysia Resettlement – Departures 2003-2022⁵⁷



The relationship between UNHCR and government agencies changes over time and varies between agencies. In 2016, UNHCR established a Joint Task Force (JTF) with government ministries and departments, covering protection and programme areas such as health, education, labour migration, registration and RSD.⁵⁸ While the work of the JTF has not resulted in radical changes of approach or attitude by the Malaysian authorities towards refugees and asylum seekers, it provides a forum for the exchange of views between UNHCR and senior Malaysian government officials across a range of ministries and departments.⁵⁹ At time of writing, there is some positive collaboration between government authorities and UNHCR on

⁵⁶ UNHCR, ‘Malaysia: Submissions 2003-2022’ (*UNHCR Resettlement Data Finder*, 1 April 2022) <<https://rsq.unhcr.org/en>> accessed 1 April 2022.

⁵⁷ UNHCR, ‘Malaysia: Departures 2003-2022’ (*UNHCR Resettlement Data Finder*, 1 April 2022) <<https://rsq.unhcr.org/en>> accessed 1 April 2022.

⁵⁸ UNHCR, ‘Malaysia: Year-End Report 2017’ (*UNHCR Global Focus*, 1 April 2022) <<https://reporting.unhcr.org/malaysia?year=2017>> (accessed 1 April 2022).

⁵⁹ Gorlick (n 51).

issues such as healthcare and education; however, there are tensions between them with regards to registration and RSD, as government authorities question why and how these decisions are made.⁶⁰

Malaysia's commitment to refugee protection has also been shaped by political change. In 2018, the opposition coalition, Pakatan Harapan, committed in its Manifesto to ratify the 1951 Convention, legalise the status of refugees with UNHCR cards, and ensure they have the right to work with the same labour rights as locals.⁶¹ The Manifesto stated:

Recognising that Malaysia is hosting more than 150,000 refugees, including Rohingyas and Syrians, the Pakatan Harapan Government will legitimise their status by providing them with UNHCR cards and ensuring their legal right to work. Their labour rights will be at par with locals and this initiative will reduce the country's need for foreign workers and lower the risk of refugees from becoming involved in criminal activities and underground economies. Providing them with jobs will help refugees to build new lives and without subjecting them to oppression.⁶²

However, these promises did not materialize during the 22 months when Pakatan Harapan was in power. The coalition was replaced by the previous government in March 2020, which took a harsher position on UNHCR and the situation of refugees.

At certain moments in time, the Malaysian government has publicly questioned UNHCR's credibility and its role in refugee protection. As an example, in 2016, when a news report highlighted concerns about UNHCR's cards being sold by trafficking and criminal syndicates, the Deputy Home Minister questioned the authenticity of UNHCR cards and whether UNHCR was issuing it to refugees alone.⁶³ Similarly, in June 2021, the Home Affairs Minister criticised UNHCR for not being "sincere" in its offer to share information on card holders for Covid-19 vaccination, alleging that UNHCR imposed a condition for releasing this information – that refugees, including those whose documents had expired, would not be arrested.⁶⁴ UNHCR refuted this allegation, clarifying that it did not impose any condition for information sharing, but that it does advocate for refugees and asylum seekers not to be arrested, including those with expired documents and those not yet issued with UNHCR documents.⁶⁵ Earlier that month, the Minister also publicly rejected calls for UNHCR to be granted access to immigration detention depots, questioning why they needed access when those detained had committed offences in the Immigration Act.⁶⁶

Nevertheless, UNHCR continues to engage with the Malaysian government to develop a national asylum system and to introduce a refugee policy that allows refugees and asylum seekers to stay in Malaysia temporarily and to work. UNHCR is also advocating for refugees

⁶⁰ Interview with Lilianne Fan, Co-Founder, Geutanyoe Malaysia (online, 15 March 2022).

⁶¹ Pakatan Harapan, *Buku Harapan: Rebuilding Our Nation, Fulfilling Our Hopes* (Pakatan Harapan, 2018) 78.

⁶² Ibid.

⁶³ Tasnim Lokman, 'Battling UNHCR Card Fraud' *New Straits Times* (17 March 2016) <<https://www.nst.com.my/news/2016/03/133277/battling-unhcr-card-fraud>> accessed 1 April 2022.

⁶⁴ Audrey Dermawan, 'Hamzah to UNHCR: Where is Your Sincerity?' *New Straits Times* (Seberang Jaya, 15 June 2021) <<https://www.nst.com.my/news/nation/2021/06/698993/hamzah-unhcr-where-your-sincerity>> accessed 1 April 2022.

⁶⁵ Predeep Nambia, 'We Set No Conditions for Our Assistance, UNHCR tells Hamzah' *Free Malaysia Today* (George Town, 16 June 2021) <<https://www.freemalaysiatoday.com/category/nation/2021/06/16/we-set-no-conditions-for-our-assistance-unhcr-tells-hamzah/>> accessed 1 April 2022.

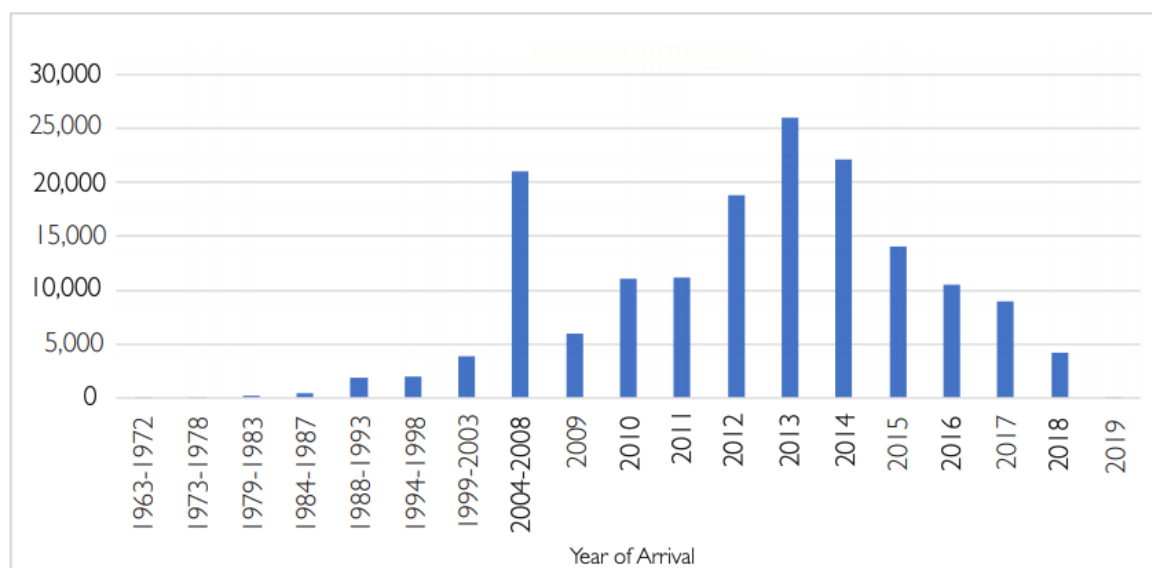
⁶⁶ Rashvinjeet S. Bedi, 'Home Ministry Rejects Calls for UNHCR to be Given Access to Immigration Depots' *The Star* (Petaling Jaya, 5 June 2021) <<https://www.thestar.com.my/news/nation/2021/06/05/home-ministry-rejects-calls-for-unhcr-to-be-given-access-to-immigration-depots>> accessed 1 April 2022.

and asylum seekers to be included in the 12th Malaysia Plan 2021-2025, in line with the Sustainable Development Goal target of “leaving no one behind”.⁶⁷ At time of writing, however, positive protection outcomes from these discussions have yet to materialize.

VI. Modes of Recognition

In its 2019 Global Trends report, UNHCR observed that its office in Malaysia had over a quarter of the one million new asylum applications in the Asia and Pacific region over the past decade – around 257,000 applications, 36 percent more than Australia, which had the second highest number.⁶⁸ Figure 4 shows how the number of new registrations has changed over time, with peaks in the years 2004-2008 and then again in 2013. In 2020, registration activities were reduced due to restrictions of movement related to Covid-19.

Figure 4: UNHCR-registered refugees and asylum seekers in Malaysia by year of registration as of January 2019⁶⁹



In this section, I first describe UNHCR Malaysia’s procedures for registration and RSD at the time of writing. I then highlight the different processes and practices through which UNHCR Malaysia has tried to manage high caseloads and backlogs over the past two decades. The terms it has used for ‘differentiated case processing modalities’ in earlier reports sometimes differ from the terms outlined in its August 2020 version of the Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, which defines and clarifies the meaning of ‘regular RSD’, ‘accelerated RSD’, ‘merged registration-RSD’ and ‘merged RSD-resettlement’.⁷⁰

⁶⁷ UNHCR (n 53).

⁶⁸ UNHCR (n 6) 39.

⁶⁹ Laurence Todd, Adli Amirullah, and Ya Shin Wan, *The Economic Impact of Granting Refugees in Malaysia the Right to Work* (Institute for Democracy and Economic Affairs, 2019) 7.

⁷⁰ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate* (UNHCR, 2020).

i. Current procedures for registration and RSD

At the time of writing, UNHCR instructs asylum seekers to first make a request for an appointment to register with UNHCR Malaysia online through a New Registration Form on its website dedicated to refugees.⁷¹ They are told to wait until UNHCR contacts them individually for an appointment. At their appointment, they are instructed to come with all family members and dependents and to bring all documents relevant to their case. Upon registration, each individual is issued a UNHCR card or a time-limited Under Consideration letter indicating that they are seeking asylum, which they will need to renew at the UNHCR office close to the expiry date. At present, UNHCR prioritises registration for asylum seekers with vulnerabilities, specific needs, and those at higher protection risk, including those detained and at risk of forcible return to their country of origin.⁷² NGOs who are part of UNHCR's Partner Referral Network can identify and refer cases of vulnerable refugees for expedited protection intervention and assistance.

UNHCR Malaysia clarifies that:

A person is considered a refugee if they meet the following conditions under UNHCR's mandate:

- Outside their country of nationality / country of habitual residence; AND
- Has a well-founded fear of being persecuted because of their race, religion, nationality, membership of a particular social group or political opinion; AND
- Because of their fear of persecution, is unable or unwilling to avail themselves protection in their country

OR

- Is unable to return to their country because of generalised violence (such war or conflict) or other events seriously disturbing public order⁷³

This definition of a refugee – which includes those fleeing generalised violence and conflict – is based on UNHCR's Statute and extended through various UN General Assembly resolutions; it is broader than the one in the 1951 Convention.

UNHCR's website also informs asylum seekers that RSD interviews are not scheduled based on when they register, which country they are from, or which religion or ethnicity they have. Each adult is interviewed individually and has the right to rely on the services of a UNHCR-provided interpreter. The interpreters may themselves be registered refugees with UNHCR or be foreign students or other individuals including Malaysian nationals who possess the requisite language skills and experience.⁷⁴ Applicants can also be assisted by a "legal representative who qualifies under UNHCR's established procedures".⁷⁵ Those whose claim to refugee status is rejected at first instance can submit an appeal within 30 days. A different UNHCR officer reviews the appeal. If the appeal is rejected, their file is closed.

⁷¹ UNHCR Malaysia, 'Information For Refugees and Asylum-Seekers' (UNHCR Malaysia 1 April 2022) <<https://www.refugee-malaysia.org/unhcr-registration/>> accessed 1 April 2022.

⁷² Ibid. Previously, UNHCR's instructions on this website to asylum seekers about RSD stated, "Refugee status determination (RSD) interviews will only be conducted for certain categories of cases with specific protection needs or concerns. You will be specifically advised by UNHCR if you need to go through a full RSD interview" (text accessed 27 April 2021).

⁷³ Ibid.

⁷⁴ Gorlick (n 51).

⁷⁵ UNHCR Malaysia (n 71).

In 2020, the Malaysian government introduced Movement Control Orders (MCOs) that restricted population movements to reduce the spread of Covid-19. UNHCR Malaysia continued essential operations during the implementation of MCOs. However, it closed its offices to visitors and non-essential staff, asking refugees not to approach the office without an appointment to avoid large crowds.⁷⁶ UNHCR initiated remote RSD interviews from May 2020 onwards. These took place over the phone or through a video call using Signal or Microsoft Teams. Asylum seekers are instructed to ensure that they are in a “confidential and private space” and that “other people cannot be in the same room when you are being interviewed” and that family members included in their file should be ready in case they need to be interviewed.⁷⁷ They are instructed not to record the interview for confidentiality reasons and that “if UNHCR discovers that you have recorded a call or an interview, this will be noted in your file”.⁷⁸

ii. Diversified case processing modalities: Evolving practices from 2003 to 2022

Over the past two decades or so, UNHCR Malaysia has used different types of case processing modalities to manage large numbers of refugees and asylum seekers with similar profiles and strong protection needs, applying these mainly to persons of concern from Myanmar. With some minor exceptions (such as Acehnese refugees who were also processed on a group basis between 2002 and 2004), refugees from other countries have been registered and processed through regular RSD.

As noted earlier, in 2003, UNHCR Malaysia received the highest number of new applications in the world. In 2004, UNHCR Malaysia introduced a “new, integrated registration and eligibility system” through which they made 19,536 decisions, recognised 18,039 persons as having mandate refugee status, 8.3 percent through individualised RSD and 91.7 percent through “group-based temporary protection approaches” reserved for Acehnese and Rohingya refugees.⁷⁹ At that time, UNHCR was dealing with a significant RSD backlog of 10,322 cases; it had one of the highest pending caseloads to be processed worldwide.⁸⁰ That year, its “expedited RSD processes” reportedly led to reduced waiting periods from 18 months to 10 months over a one-year period.⁸¹

In 2009 and 2010, an independent evaluation noted UNHCR Malaysia’s continued attempts to address the backlog of cases.⁸² It highlighted that UNHCR Malaysia took around 60,000 RSD decisions over these two years, reducing the average time from the first instance interview to the notification of results from 250 days for non-Myanmar refugees and 100 days for Myanmar refugees to less than 75 days for both groups. The report noted that: “New eligibility guidelines, including the use of the ‘presumption of eligibility’ principle for ethnic minorities from Myanmar, combined with new scheduling strategies and case management tools, have contributed to such positive results”.⁸³ At the end of 2013, UNHCR Malaysia’s caseload increased by 38 percent; it had 44,114 registered asylum seekers compared to 11,871 at the end

⁷⁶ UNHCR Malaysia, ‘FAQs: How We’re Standing with Refugees Through Covid-19’ (2020) 4 With You 5.

⁷⁷ UNHCR Malaysia (n 71).

⁷⁸ Ibid.

⁷⁹ UNHCR Malaysia, ‘Country Operations Plan, Malaysia: Planning Year 2006’ (UNHCR Malaysia, 2006).

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² UNHCR (n 50).

⁸³ Ibid 23.

of 2012.⁸⁴ This number included the registration of 26,551 from Myanmar through a mobile registration exercise, all of whom were not processed for RSD unless they had added vulnerabilities.⁸⁵ At the end of 2013, the RSD backlog consisted of 15,598 individuals.⁸⁶

UNHCR Malaysia's 2016 Operation Plan announced a change of approach to registration and RSD, stating:

To ensure integrity and the quality of RSD procedures in a mixed migration context in 2015, UNHCR will move away from a generalized presumption of eligibility and recalibrate its registration, detention, and RSD processes and introduce differentiated processing to more efficiently and effectively identify specific groups and individuals in need of international protection for both non-Myanmar and Myanmar individuals at the point of registration. As part of this new strategy, only individuals with exclusion triggers and those who meet resettlement criteria will be processed for RSD. In addition, an abridged assessment of those in need of international protection will be conducted by RSD staff at the point of registration.⁸⁷

UNHCR aimed for this "recalibrated process" to "better identify and prioritize the protection needs of specific groups and individuals who face a demonstrable risk of persecution or serious human rights violations in their countries of origin or who, for their personal circumstances have a heightened vulnerability and require special humanitarian support."⁸⁸ With this new approach to protection, UNHCR adjusted the target for RSD decisions to 1,500 cases.⁸⁹

In 2016 and 2017, with the support of the European Civil Protection and Humanitarian Aid Operations (ECHO), UNHCR accelerated its RSD processes, aiming to reduce its backlog.⁹⁰ UNHCR introduced 'simplified RSD' for caseloads from Myanmar, which involved a short interview and assessment.⁹¹ RSD Associates hired to conduct simplified RSD in Malaysia in 2017 were expected to conduct three RSD interviews and to draft three RSD assessments on the same day, and recommend whether the person be granted refugee status under international law.⁹² In practice, according to accounts by refugees from Myanmar, these interviews lasted only for around 15 minutes, prompting anger against RSD officers as they did not listen to their specific circumstances more comprehensively.⁹³ RSD Associates were also expected to

⁸⁴ UNHCR, 'Malaysia: Plan 2016' (*UNHCR Global Focus*, 1 April 2022) <<https://reporting.unhcr.org/malaysia?year=2016>> accessed 1 April 2022.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ European Civil Protection and Humanitarian Aid Operations (ECHO), 'Thailand, Malaysia, and Indonesia Factsheet' (European Commission, 1 April 2022) <https://ec.europa.eu/echo/thailand-malaysia-and-indonesia_en> accessed 1 April 2022.

⁹¹ The Star, 'UNHCR: They're Asylum Seekers' (The Star, 21 October 2018) <<https://www.thestar.com.my/news/nation/2018/10/21/unhcr-theyre-asylum-seekers-myanmar-chin-featured-in-rage-report-dont-meet-international-definition/>> accessed 1 April 2022. UNHCR defined 'simplified RSD' as "procedures in which one or more elements of the regular RSD procedure are simplified, allowing for increased efficiency in processing, but which still involve a substantive examination of the applicant's claim". Simplified procedures may include focusing on the key core issues of the claim during interviews, recording interviews (rather than producing verbatim transcripts), or using decision assessment templates with pre-populated information and legal analysis. According to this guide, "applicants whose claims raise credibility concerns and/or exclusion triggers should be referred to regular RSD". See: UNHCR (n 1) 168.

⁹² UNHCR Malaysia, 'Memorandum: Internal/External Vacancy Notice (VN/005/17)' (UNHCR Malaysia, 8 May 2017) <<https://www.unhcr.org/en-my/591189d64.pdf>> accessed 1 April 2022.

⁹³ Ibid.

conduct appeal file reviews and appeal interviews for those rejected at first instance, and to provide rejection counselling to those rejected for refugee status. As a result of this additional funding, UNHCR was able to adjudicate RSD decisions of almost 6,000 individuals from July 2016 to June 2017.⁹⁴ In 2020, UNHCR clarified that simplified RSD “remains a full individual RSD procedure, which includes an individual examination of the merits of the claim and affords applicants all the procedural safeguards in accordance with the RSD Procedural Safeguards”.⁹⁵ Some resettlement countries require regular RSD as a precursor to resettlement.

iii. Tracking Refugees Information System (TRIS)

After years of refusing to register refugees and asylum seekers, in April 2017 the Malaysian government introduced the Tracking Refugees Information System (TRIS) which captures detailed biometric data of persons registered with UNHCR.⁹⁶ When it was launched, (then) Deputy Home Minister Datuk Nur Jazlan Mohamed stated that having the biometric data of refugees would help the government to address transnational crimes, terrorist activities, and human trafficking, thus demonstrating the securisation rationale that undergirds this system.⁹⁷ Officially, the aim of this programme is to “assist the Government [to] monitor and track refugees that is [sic] currently residing in Malaysia” and is a collaboration between the Ministry of Home Affairs, the Malaysian Immigration Department (*Jabatan Imigresen Malaysia*, JIM), the Royal Malaysian Police (*Polis DiRaja Malaysia*, PDRM) and Malaysian National Security Council (*Majlis Keselamatan Negara Malaysia*, MKN).⁹⁸ The registration process involves collecting personal information, UNHCR information, a photograph for facial recognition, biometric fingerprints, vocal recording, and employer details. Upon registration, refugees are issued an identity card, called MyRC, which contains personal data. This system is run by a private company appointed by the Home Ministry, Barisan Mahamega Sdn Bhd, that is chaired by a former head of the Special Branch, the Malaysian police intelligence unit.⁹⁹

In July 2022, the Malaysian Cabinet formally approved the TRIS programme, and Home Minister Hamzah Zainuddin renewed calls for all refugees to register on this system, suggesting that those who registered would be given access to healthcare, education, and job opportunities and training, particularly in the plantation, manufacturing, and construction sectors.¹⁰⁰ However, refugees and asylum seekers expressed concern that this data will be used against them. Refugee groups highlight that the card did not protect them from arrest; it also did not give them the right to work, to education, to apply for a driver’s licence, and to obtain a bank account, which were promised as early as 2017.¹⁰¹

⁹⁴ ECHO (n 90).

⁹⁵ UNHCR, *Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to RSD Under UNHCR’s Mandate* (UNHCR, 2020) 9.

⁹⁶ Premalatha Jayaraman, ‘Malaysia to gather refugees’ data via TRIS’ (The ASEAN Post, 2 August 2017), <https://theaseanpost.com/article/malaysia-gather-refugees-data-tris> accessed 30 September 2022.

⁹⁷ Aina Nasa, ‘Gov’t introduces Tracking Refugee Information System to update, gather data on refugees’ (New Straits Times, 2 August 2017), <https://www.nst.com.my/news/nation/2017/08/263348/govt-introduces-tracking-refugee-information-system-update-gather-data> accessed 30 September 2022.

⁹⁸ ‘Why TRIS?’ (TRIS MyRC, undated), <<https://myrc.my/>> accessed 30 September 2022.

⁹⁹ Wael Qarssifi, ‘Refugees in Malaysia worry government tracking system a ‘trap’ (Aljazeera, 11 August 2022), <https://www.aljazeera.com/news/2022/8/11/refugees-in-malaysia-worry-refugee-tracking-system-a-trap> accessed 30 September 2022.

¹⁰⁰ FMT Reporters, ‘UNHCR cardholders urged to register with gov’t’s TRIS to get benefits’ (Free Malaysia Today, 7 September 2022), <https://www.freemalaysiatoday.com/category/nation/2022/09/07/unhcr-cardholders-urged-to-register-with-govts-tris-to-get-benefits/> accessed 30 September 2022.

¹⁰¹ Ibid.

VII. Quality of the Recognition Process

i. Accessibility

Accessibility to registration and RSD has been a perpetual challenge for refugees and asylum seekers. For example, in 2016, UNHCR indicated that there were around 50,000-70,000 unregistered Rohingyas – numbers estimated prior to the large-scale movement of Rohingyas into Bangladesh and states in Southeast Asia in 2016 and 2017.¹⁰² That year, UNHCR Malaysia estimated that 30,000 people would approach its office for registration.¹⁰³

In the past, UNHCR maintained (unofficial) limits on the number of cases it registered. Between 2004-2008, it kept the number of registered asylum seekers and refugees at around 40,000-50,000, but from 2009 onwards, steadily increased numbers until the present level of around 180,000 (see Appendix A).¹⁰⁴ I have argued elsewhere that these limits were managed in order to forestall criticisms from the Malaysian government as to the rigour of UNHCR's processes in differentiating between refugees and other migrants, as well as to keep caseloads manageable.¹⁰⁵

Accessibility to registration and RSD depends on several factors. The first is the Malaysian government's refusal to register and recognise refugees; the second is UNHCR's limited capacities and resources in relation to the perpetually large number of people seeking asylum. Thirdly, UNHCR does most of its registration and RSD activities in its office in Kuala Lumpur, with just some 'out of station' registration and RSD work taking place on mission to other cities, towns, and immigration detention depots.¹⁰⁶ Refugees and asylum seekers have had difficulties travelling to UNHCR's office, especially if they live outside of Kuala Lumpur and lack identity documents. There have been occasions where refugees and asylum seekers have been arrested on their way to and from UNHCR's office – even some arrested just outside the office itself.¹⁰⁷

At various times over the past two decades, when resources permit, UNHCR Malaysia has conducted mobile registration exercises to mitigate the problem of geographical access to registration and RSD. UNHCR defines mobile registration as "a time-bound registration activity taking place outside the usual operational base, site or UNHCR office... to facilitate access to UNHCR registration and protection activities for persons of concern who are unable to approach the Office or registration site".¹⁰⁸ For example, in 2004, in anticipation of another large scale crackdown on irregular migrants, it sent mobile teams to 'jungle camps' where asylum seekers lived in makeshift shelters as well to Penang.¹⁰⁹ UNHCR also conducted large

¹⁰² UNHCR Regional Office in Bangkok, 'Call for Expression of Interest No. 001/2017, NGO Partner Identification and Support: Thailand' (UNHCR, 2016).

¹⁰³ UNHCR (n 84).

¹⁰⁴ These do not include the 'stateless persons' and 'others of concern' who are documented in different ways in Malaysia.

¹⁰⁵ Nah (n 7).

¹⁰⁶ Gorlick (n 51).

¹⁰⁷ Nah (n 19).

¹⁰⁸ UNHCR, *Guidance on Registration and Identity Management* (UNHCR, 1 April 2022).

¹⁰⁹ Jennifer Pagonis, 'UNHCR to Start Mobile Registration in Malaysia's Jungle Camps' (UNHCR, 10 December 2004) <<https://www.unhcr.org/uk/news/latest/2004/12/41b9b7c84/unhcr-start-mobile-registration-malaysias-jungle-camps.html>> accessed 1 April 2022.

scale mobile registration exercises in 2009-10 and 2013-14 with the support of refugee community leaders, enabling it to register thousands of people.

In the 2000s, instead of registering new asylum seekers from Myanmar directly, UNHCR referred them to selected refugee CBOs in the first instance who issued them with membership cards and maintained lists of names of people waiting to be formally registered with UNHCR. Under this “community-based protection” approach, which has since been discontinued, UNHCR would collect membership lists periodically from these CBOs as the basis for mobile registration exercises. Some CBOs charged monthly membership fees of around 10-15 Malaysian ringgit a month,¹¹⁰ which helped them to self-organise and to provide practical assistance to members. CBOs kept their members updated as to changes in UNHCR’s policies and practices and helped their members with a range of issues including access to healthcare and problems with work.¹¹¹ However this community-based registration system resulted in refugee community leaders being placed under a lot of pressure to deliver protection outcomes over which they had little control. Community members blamed the leaders for long, indefinite periods of uncertainty as they waited for formal registration. UNHCR also only applied this approach to ethnic minorities from Myanmar (other than Rohingyas, who did not have a representative CBO who they and UNHCR trusted to fulfil such a role), which led ethnic minorities from Myanmar to think that UNHCR was discriminating against them through this practice.¹¹²

While well-meaning, this approach was deeply flawed in design and implementation.¹¹³ An independent evaluation by UNHCR in 2012 highlighted a number of concerns, amongst them that these arrangements risked facilitating corrupt practices and that this approach to registration potentially excluded persons of concern who did not have access to such CBOs.¹¹⁴ Indeed, shortly afterwards, an investigative report by Al Jazeera in 2014 highlighted corrupt practices, with allegations that local UNHCR officials colluded with refugees to sell UNHCR cards for around RM1,700 to RM3,500 per card (around GBP307 to GBP632).¹¹⁵ People fraudulently assumed the identities of those on the CBO pre-registration membership lists in order to get formally registered with UNHCR. According to Al Jazeera, UNHCR confirmed that there were around 3,000 such cases, with about third of the people resettled to other countries such as the USA, Canada, and Australia. This led to resettlement being suspended as investigations were conducted. UNHCR publicly stated that it had a ‘zero tolerance’ policy on corruption¹¹⁶ and took several fraud prevention measures, including the introduction of security-enhanced identity cards with biometric data (further described in Section VIII below).

ii. Accuracy

¹¹⁰ Jesuit Refugee Service Asia Pacific, *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (JRS 2012).

¹¹¹ Alice M. Nah, ‘Seeking Refuge in Kuala Lumpur: Self-help Strategies to Reduce Vulnerability Amongst Refugees’, in Seng Guan Yeoh (ed) *The Other Kuala Lumpur: Living in the Shadows of a Globalising Southeast Asian City* (Routledge, 2014).

¹¹² McConnachie (n 34).

¹¹³ Jesuit Refugee Service Asia Pacific (n 110).

¹¹⁴ UNHCR (n 50).

¹¹⁵ Steve Chao, ‘Malaysia’s Unwanted’ (Al Jazeera, 21 November 2014)

<<https://www.aljazeera.com/program/101-east/2014/11/21/malaysias-unwanted>> accessed 1 April 2022.

¹¹⁶ UNHCR Malaysia, ‘UNHCR Statement on Recent Allegations Regarding Fraud, Detention Conditions’ (24 November 2014) <<https://www.unhcr.org/en-my/news/latest/2014/11/591263087/unhcr-statement-on-recent-allegations-regarding-fraud-detention-conditions.html>> accessed 1 April 2022.

There is little data publicly available on the accuracy of registration and RSD in Malaysia. In this section, I will focus instead on a recent controversy related to the cessation of Chin refugee status. In June 2018, UNHCR announced that it would cease considering Chin as refugees, a decision met with deep concern and anxiety by Chin refugees and civil society organisations. Avoiding the use of the term “cessation”, UNHCR referred to this policy as “ending refugee status” and facilitating “voluntary repatriation” on the basis that conditions had improved in Chin state since a nominally civilian government took power in 2010.¹¹⁷ This decision would affect around 30,140 Chin refugees in Malaysia and a further 3,000 Chins in India.¹¹⁸

In a letter to Chin communities in Malaysia dated 13 June, UNHCR stated that those who went to UNHCR after 1 August to renew their UNHCR cards would be given two options. If they accepted that they no longer needed international protection, their UNHCR card would be extended until 31 December after which their individual refugee status would cease. If they did not accept this, their UNHCR card would be revoked and replaced with an Under Consideration letter and they would be interviewed to assess if they still needed international protection.¹¹⁹ In summary, they would lose refugee status in Malaysia.

In a public statement in October, UNHCR clarified that this interview did not constitute RSD, and was instead a “new scheme that would allow approximately 15,000 Chin refugees (as opposed to asylum seekers) to have their personal circumstances assessed to see if they still needed UNHCR’s protection as a refugees”.¹²⁰ Critics pointed out that the criteria for cessation under Article 1C(5) and (6) of the 1951 Convention had not been met. Referring to the Guidelines on Cessation, they noted that UNHCR contradicted its own guidance, which stated that “[d]evelopments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made”.¹²¹ They noted that conflicts and military activity continued in Chin state and that political change in Myanmar could not be considered durable or stable. The Guidelines further state that “changes in the refugee’s country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status”.¹²²

UNHCR eventually reviewed and reversed its decision in March 2019, announcing that “Chin refugees might still require international protection due to the worsening security situation in southern Chin State in Myanmar, which has resulted in new displacement”.¹²³ The press statement clarified that no Chin had lost their refugee status because of the changes to the processing of their cases started in 2018. However, this period of uncertainty was deeply troubling for Chin refugees in India and Malaysia.

¹¹⁷ Hamsa Vijayaraghavan and Pallavi Saxena, ‘A Premature Attempt at Cessation’ (*Forced Migration Review*, 2019) <<https://www.fmreview.org/return/vijayaraghavan-saxena>> accessed 1 April 2022.

¹¹⁸ Asia Pacific Refugee Rights Network, ‘Suspend Policy to End Refugee Status of Chin Refugees from Myanmar’ (4 September 2018) <<https://reliefweb.int/report/myanmar/suspend-policy-end-refugee-status-chin-refugees-myanmar>> accessed 1 April 2022.

¹¹⁹ The Star (n 91).

¹²⁰ Ibid.

¹²¹ UNHCR, ‘Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the “Ceased Circumstances” Clauses)’ (10 February 2003) UN Doc HCR/GIP/03/03.

¹²² Ibid, paragraph 17.

¹²³ UNHCR, ‘UNHCR says Ethnic Chin Refugees May Require Continued International Protection as Security Situation Worsens in Myanmar’ (14 March 2019) <<https://www.unhcr.org/news/press/2019/3/5c8a31984/unhcr-says-ethnic-chin-refugees-require-continued-international-protection>> accessed 1 April 2022.

iii. Efficiency

As noted in Section VI above, UNHCR Malaysia has been struggling to manage its caseloads and has adopted and changed case processing modalities several times to cope with these. When the number of new refugee asylum claims increased dramatically in 2002, the backlog of undecided cases increased by 523 percent.¹²⁴ In 2003, the number of pending cases increased from 1,600 at the start of the year to 9,200 at the end of the year, an increase of 475 percent.¹²⁵ Some Rohingyas arriving before 2003 reported waiting for about one year before being registered or interviewed for RSD, while those arriving after 2004 reported delays of several years.¹²⁶ A report in 2012 highlighted that asylum seekers waited three to four months for a first instance decision.¹²⁷

A UNHCR operations report from 2016 recognised that, “[d]espite the current use of caseload management techniques, waiting periods for registration/RSD far exceed the recommended time indicated in RSD procedural standards.”¹²⁸ Table 1 provides data on UNHCR’s impact indicators for status determination that year. These indicators show a significant improvement in waiting times from the first instance interview to the notification of first instance decision, from 165 days in 2015 to 21 days. Similarly, there was a significant improvement in waiting times from registration to first instance interviews, from 536 days in 2015 to 366.8 days, although this still fell far short of the target of 120 days. However, the appeals process was much slower, with waiting times from submission of appeal to a notification of an appeal decision increasing from 335 days in 2015 to 452.2 days, far short of the target of 120 days. More data from 2014 and 2015 is available in Appendix B and C.

¹²⁴ UNHCR (n 46) 45.

¹²⁵ UNHCR (n 49) 40.

¹²⁶ The Equal Rights Trust and The Institute of Human Rights and Peace Studies Mahidol University, *Equal Only in Name: The Human Rights of Stateless Rohingyas in Malaysia* (Equal Rights Trust, October 2014), 35.

¹²⁷ Jesuit Refugee Service Asia Pacific (n 110) 42.

¹²⁸ UNHCR (n 84).

Table 1: UNHCR Malaysia’s 2016 Plan: Impact Indicators for Status Determination¹²⁹

Impact Indicator	Baseline	Year-End	Target
Average # of days from first instance interview to notification of first instance decision	165	21.1	120
Average # of days from registration to first instance interview	536	366.8	120
Average # of days from submission of appeal to notification of appeal decision	335	452.5	110
Extent applicants have access to status determination procedure	45	90	80
Extent status determination procedure meets minimum procedural standards advocated by UNHCR	95	95	100
Output	Performance Indicator	Year-End	Target
Analysis of substantive decisions undertaken	# of substantive status determination decisions analyzed	6,511	4,000
UNHCR status determination procedure implemented	UNHCR status determination procedure implemented (yes/no)	100	100

iv. Fairness

Refugees and asylum seekers have felt frustrated by UNHCR Malaysia’s different registration and RSD processes for refugees from different countries and ethnic groups, as well as the different processing times for each person. As an example, in the 2000s, it was easier to resettle Chins, and as a result UNHCR prioritised them for registration and RSD, while UNHCR perceived that local integration was a more viable durable solution for Rohingyas.¹³⁰ As mentioned earlier, UNHCR permits civil society organisations and lawyers to provide legal aid to asylum seekers going through RSD.

VIII. Quality of Protection

While there has been debate about whether being registered with UNHCR and having mandate refugee status is a benefit, what is clear is that holding a UNHCR card provides some level of protection to refugees and asylum seekers, helping them to mitigate the worst, punitive impacts of life as a migrant with irregular status in Malaysia. In this section, I discuss the quality of protection that refugees and asylum seekers experience in terms of the significance of UNHCR documentation; protection from arrest; immigration detention; deportation, interception and refoulement; the right to work and livelihoods; healthcare; and education.

¹²⁹ Ibid.

¹³⁰ The Equal Rights Trust and The Institute of Human Rights and Peace Studies Mahidol University (n 126) 36.

i. The significance of UNHCR documentation

UNHCR has used technology to enhance the protection outcomes of its cards. In June 2016, UNHCR launched a programme to issue security-enhanced identity cards to persons of concern, training the police, immigration, and public prosecutor's office to use smart phone apps to verify the identity of card holders. Specifically, these UNHCR cards contain security features such as 3D holograms, bar codes, and a Secure Quick Response (SQR) Code that include biometric data collected through iris and 10-finger scanning.¹³¹ Law enforcement officers can download and use UNHCR's Verify-MY App to determine the authenticity of the card by scanning the SQR code imprinted on it.

According to UNHCR, the introduction of this system has resulted in fewer arrests and prosecutions, and greater confidence in the government of UNHCR's processing arrangements and documents, although this confidence is shaken periodically.¹³² Possession of a UNHCR card provides refugees with a measure of freedom of mobility in Malaysia – for some, such as the Rohingya, more freedom than they experienced at home in Myanmar.¹³³ Card holders have some room to negotiate their way out of arrest, even without UNHCR's help. However, cases of fraud emerge from time to time, for example, with people holding UNHCR-issued cards that do not bear their identity and the creation of fake UNHCR documents.

ii. Protection from arrest

Over the past two decades, refugees and asylum seekers have remained at risk of arrest, detention, punishment for immigration offences and deportation. Levels of risk change depending on political and economic developments as well as the policies and practices of law enforcement agencies. Risks increase significantly during public crackdowns, announced every three years or so.¹³⁴ Risks reduce when the government introduces amnesties and programmes to regularise undocumented workers, such as the '6P Programme' in 2011.¹³⁵ However, amnesty periods are often followed by mass immigration raids.

In 2005, the Attorney General of Malaysia issued an instruction to the Heads of the Prosecution Unit to avoid detaining UNHCR-registered individuals after they confirm the identity and status of the person.¹³⁶ However, asylum seekers and refugees are regularly extorted by the Police who threaten them with arrest. They may also be caught up in immigration operations and sent to immigration detention facilities, police lockups or prisons. Unless UNHCR intervenes successfully, they are charged with immigration offences, sentenced to imprisonment (and whipping), and risk being deported.

¹³¹ UNHCR Malaysia, 'UNHCR Responds to Allegations of Fraudulent UNHCR cards' (UNHCR Malaysia 7 August 2020) <<https://www.unhcr.org/en-my/news/latest/2020/8/5f2d0da54/unhcr-responds-to-allegations-of-fraudulent-unhcr-cards.html>> accessed 1 April 2022.

¹³² UNHCR (n 58).

¹³³ Nursyazwani, 'Mobile Refugee: Rohingya Refugees' Practices of Imaginary Citizenship in Klang Valley, Malaysia' (2020) 64 *American Behavioral Scientist* 1444.

¹³⁴ Nah (n 40).

¹³⁵ Jesuit Refugee Service Asia Pacific (n 110). Ministry of Home Affairs, 'Kenyataan Media Setiausaha Bahagian Hal Ehwal Imigresen' (8 June 2011) <<https://web.archive.org/web/20110611014344/http://portal.ikdn.gov.my/2011/06/kenyataan-media-setiausaha-bahagian-hal-ehwal-imigresen/>> accessed 1 April 2022.

¹³⁶ UNHCR, *Options Paper 2: Options for Governments on Open Reception and Alternatives to Detention* (UNHCR 2020).

As stated earlier, in 2020, Malaysia imposed strict measures to restrict movement during the pandemic. As a result, many migrants and refugees lost their jobs, which were often in the informal sector without social security and access to government assistance.¹³⁷ In the early stages of the pandemic, government officials promised to provide free testing and treatment for any foreigners with Covid-19 symptoms, reassuring those with undocumented status that they would not be arrested by immigration offences.¹³⁸ However, these promises were not kept. In May 2020, immigration authorities conducted several raids in Enhanced Movement Control Order (EMCO) areas – that is, where lockdown measures were in place and Covid-19 clusters emerged – arresting over two thousand undocumented migrants, including approximately one hundred children.¹³⁹ Within weeks of these raids, the number of Covid-19 cases in immigration detention centres surged, reported by the Ministry of Health at being 776 cases as of 19 June 2020, 83 percent of which were from one immigration detention centre in Bukit Jalil.¹⁴⁰ Under Covid-19 restrictions, migrants have suffered from labour rights violations, such as unfair termination of employment, unpaid wages, and poor conditions in accommodation.¹⁴¹ Migrants and refugees were also blamed for the spread of Covid-19.¹⁴² With movement restrictions in place, refugee communities struggled to gain employment, pay their rent, and buy food. Refugees have been arrested for committing MCO offences, such as not wearing a mask, and then simultaneously charged with immigration offences. Those unable to pay the fines have been jailed and then transferred to immigration detention depots.¹⁴³

iii. Immigration detention

UNHCR Malaysia's interventions in immigration detention facilities have been a critical part of its protection activities because it allows them to protect unregistered refugees and asylum seekers at imminent risk of deportation. As an indication of numbers, between 2014 and mid-2016, it secured the release of 13,829 persons of concern from detention, following interventions.¹⁴⁴ Of these, 1,491 were children who were prioritised for registration. Between January and May of 2018, UNHCR Malaysia registered 969 persons of concern in detention

¹³⁷ Daniel Thomas and Ariane Jeffrey, 'The Impact of COVID-19 on Refugees and Asylum Seekers in Malaysia', *Institute of Strategic and International Studies Malaysia* (8 October 2020)

<<https://www.isis.org.my/2020/10/08/the-impact-of-covid-19-on-refugees-and-asylum-seekers-in-malaysia/>> accessed 1 April 2022.

¹³⁸ UNHCR Malaysia, 'UNHCR-GoM Joint Action to Prevent, Manage Covid-19 Infections Among Refugees' (*UNHCR Malaysia* 13 April 2020) <<https://www.unhcr.org/en-my/news/stories/2020/4/5e94189d4/unhcr-gom-joint-action-to-prevent-manage-covid-19-infections-among-refugees.html>> accessed 1 April 2022.

¹³⁹ Vivienne Chew, 'Covid-19 Outbreaks in Malaysia's Detention Centres' (International Detention Coalition, 26 June 2020) <<https://idcoalition.org/news/covid-19-outbreaks-in-malaysias-immigration-detention-centres/>> accessed 1 April 2022.

¹⁴⁰ Ministry Of Health, 'Updates On The Coronavirus Disease 2019 (Covid-19) Situation In Malaysia' (19 June 2020) <[http://covid-19.moh.gov.my/terkini/062020/situasi-terkini-19-jun-2020/Kenyataan%20Akhbar%20KPK%20COVID-19%20\(19%20Jun%202020\)%20-%20EN.pdf](http://covid-19.moh.gov.my/terkini/062020/situasi-terkini-19-jun-2020/Kenyataan%20Akhbar%20KPK%20COVID-19%20(19%20Jun%202020)%20-%20EN.pdf)> accessed 1 April 2022.

¹⁴¹ Andika Wahab, 'Covid-19 in Malaysia: Pushing Migrant Workers Further at the Margin', in Vivienne Chew and Min Yamada Park (eds), *Covid-19 Impacts on Immigration Detention: Global Responses* (International Detention Coalition, 2020) 37.

¹⁴² Emily Ding, 'Malaysia's Coronavirus Scapegoats' *Foreign Policy* (19 June 2020) <<https://foreignpolicy.com/2020/06/19/malaysia-coronavirus-scapegoats/>> accessed 1 April 2022.

¹⁴³ Interview with a civil society actor delivering services in Malaysia (online, 14 March 2022).

¹⁴⁴ UNHCR Malaysia (n 45).

facilities and secured the release of 1,858 people.¹⁴⁵ However, these interventions are resource- and time-intensive, and success is dependent on the goodwill and cooperation of federal and state authorities. As such, protection outcomes can be limited, partial and temporary.

Access to detention facilities is also fragile. Since August 2019, UNHCR's access to immigration detention centres has been suspended.¹⁴⁶ This leaves unregistered refugees in detention at risk of *refoulement*. In June 2021, the Ministry of Home Affairs rejected calls for the reinstatement of UNHCR's access to detention depots, questioning the need for such access when they said they would release UNHCR cardholders.¹⁴⁷ This does not recognise that some refugees in detention were yet to be documented by UNHCR.

UNHCR Malaysia reports that the numbers of registered refugee and asylum seeking children detained in immigration detention facilities have reduced over time, from 1,669 in 2013, to 1,143 in 2014, to 912 in 2015.¹⁴⁸ In terms of the availability of alternatives to detention, UNHCR Malaysia reports that in 2014 there were approximately 20 places in care arrangements in NGO shelters for unaccompanied and separated children released from detention in 2014 and 30 places in 2015.¹⁴⁹ However, the detention of children remains an issue of concern. As of 26 October 2020, 756 children were held in immigration detention centres in Malaysia, of whom 405 were unaccompanied.¹⁵⁰ Troublingly, a report by the Human Rights Commission of Malaysia (SUHAKAM) noted that they were held in "overcrowded cells and inhumane conditions", with some detained with adults, putting them at risk of violence and abuse.¹⁵¹

iv. Deportation, interception, and refoulement

Over the past two decades, Malaysia has occasionally deported refugees back to their home countries, where there is a risk of persecution – contrary to the principle of *non-refoulement*. As an example, on 23 February 2021, Malaysia deported 1,086 Myanmar nationals to Myanmar on Myanmar military ships.¹⁵² This deportation was particularly worrisome as it occurred just weeks after the military *junta* seized power in Myanmar on 1 February. According to Malaysian immigration officials, the deportees agreed to return 'voluntarily'. The removal occurred in violation of a court order temporarily halting their repatriation, to hear a case for judicial review of their repatriation lodged by Amnesty International and Asylum Access. According to Amnesty International, UNHCR was not given access to this group and amongst the deportees

¹⁴⁵ UNHCR Malaysia, 'Figures at a Glance in Malaysia' (*UNHCR Malaysia*, 1 April 2022) <<https://www.unhcr.org/en-my/protection-in-malaysia-591401344.html>> accessed 1 April 2022.

¹⁴⁶ UNHCR, 'Malaysia: Year-End Report 2019' (*UNHCR Global Focus*, 1 April 2022) <<https://reporting.unhcr.org/malaysia?year=2019>> accessed 1 April 2022.

¹⁴⁷ Bedi (n 66).

¹⁴⁸ UNHCR Malaysia (n 45).

¹⁴⁹ *Ibid.*

¹⁵⁰ Tarrence Tan, Hemananthani Sivanandam And Rahimy Rahim, 'Home Ministry: 756 children held at immigration detention centres nationwide as of Oct 26' *The Star* (Petaling Jaya, 4 November 2020) <<https://www.thestar.com.my/news/nation/2020/11/04/home-ministry-756-children-held-at-immigration-detention-centres-nationwide-as-of-oct-26>> accessed 1 April 2022.

¹⁵¹ Asia Pacific Refugee Rights Network, 'Malaysia Must Pursue Alternatives to Immigration Detention for Children Immediately' (8 December 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/APRRN-Statement-on-Malaysia-Immigration-Detention-of-Children.pdf>> accessed 1 April 2022.

¹⁵² Aljazeera, 'Malaysia Deports 1,086 Myanmar Nationals Despite Court Order' *Aljazeera* (23 February 2021) <<https://www.aljazeera.com/news/2021/2/23/malaysia-deports-1200-people-to-myanmar>> accessed 1 April 2022.

were three UNHCR card holders and 17 minors who has at least one parent in Malaysia.¹⁵³ Another example is the infamous case of the Malaysian authorities *refouling* Turkish nationals who had been lawfully residing in Malaysia for years and teaching at an elite private school in Kuala Lumpur.¹⁵⁴

As numerous reports indicate, over the years, immigration officials have also handed deportees to ‘agents’, criminal gangs, and traffickers at the Thai-Malaysia border. Deportees able to raise money for their ransom have been released, while those who cannot have been either killed, forced to perform sex work, or subject to forced labour, including in the offshore fishing industry.¹⁵⁵ In 2015, Police in Malaysia found 23 ‘trafficking camps’ and 139 mass graves near the Thai border, with the largest camp having the capacity to hold 300 people and one grave holding nearly 100 bodies.¹⁵⁶ Thai Police also found such sites and graves in Thailand, and launched a crackdown which resulted in traffickers abandoning people at sea who later washed ashore in Indonesia, Thailand and Malaysia.¹⁵⁷ They suspected that the camps had been in use for at least five years.¹⁵⁸

Of significant concern at time of writing is Malaysia’s practice of intercepting boats with migrants and refugees, and either turning them back out to sea, or arresting them and subjecting them to punishment for immigration offences. As an example, in April 2020, Médecins Sans Frontières reported that around 500 Rohingyas from refugee camps in Bangladesh tried to reach Malaysia by boat but were denied permission to land.¹⁵⁹ Eventually rescued by the Bangladeshi coastguard on 15 April, survivors described how they became malnourished and dehydrated, some beaten by the smugglers. Around a hundred people died on that journey. UNHCR reports that in the first nine months of 2020, over 2,300 Rohingyas have attempted maritime journeys, mostly from Cox’s Bazaar to Malaysia, with around 200 perished or missing.¹⁶⁰

v. The right to work and to livelihoods

Refugees and asylum seekers do not have the right to work in Malaysia. However, many secure work in the informal labour market, particularly, in the construction, services, and agriculture

¹⁵³ Amnesty International, ‘Malaysia: Deportation of 1,086 People to Myanmar in Defiance of Court Order ‘Inhumane and Devastating’ (23 February 2021) <<https://www.amnesty.org.uk/press-releases/malaysia-deportation-1086-people-myanmar-defiance-court-order-inhumane-and>> accessed 1 April 2022.

¹⁵⁴ Stockholm Center for Freedom, ‘Karaman and Özçelik, Turkish Nationals Deported Illegally by Malaysian Gov’t, Arrested by Ankara Court’ (SCF 24 May 2017) <<https://stockholmcf.org/karaman-and-ozcelik-turkish-nationals-deported-illegally-by-malaysian-govt-arrested-by-ankara-court/>> accessed 1 April 2022.

¹⁵⁵ Human Rights Watch, ‘Letter to UNHCR Regarding the Refugee / Asylum Seeker Exchange Agreement between Australia and Malaysia’ (13 June 2011) <https://www.hrw.org/news/2011/06/13/letter-unhcr-regarding-refugee/asylum-seeker-exchange-agreement-between-australia#_ftnref4> accessed 1 April 2022; Tenaganita (n 5).

¹⁵⁶ ABC News, ‘Malaysia Confirms Discovery of 23 Trafficking Camps, 139 Grave Sites Believed to Contain Migrants’ *ABC News* (25 May 2015) <<https://www.abc.net.au/news/2015-05-25/malaysia-mass-graves-of-suspected-migrants-deeply-concerning/6494908>> accessed 1 April 2022.

¹⁵⁷ *Ibid.*

¹⁵⁸ ABC News, ‘Migrant Crisis: Mass Graves of Suspected Trafficking Victims Found in Malaysia Near Thai Border’ *ABC News* (24 May 2015) <<https://www.abc.net.au/news/2015-05-24/mass-graves-of-suspected-trafficking-victims-found-in-malaysia/6493400>> accessed 1 April 2022.

¹⁵⁹ Hanadi Katerji, ‘Rohingya Refugees Left to Starve at Sea’ (*Médecins Sans Frontières* 22 April 2020) <<https://www.msf.org/rohingya-refugees-left-starve-sea>> accessed 1 April 2022.

¹⁶⁰ Executive Committee of the High Commissioner’s Programme, ‘Update on UNHCR’s operations in Asia and the Pacific’ (UNHCR, 25 September 2020).

sectors.¹⁶¹ A study suggested that about 60-65 percent of refugee men and 29-45 percent of refugee women participate in the labour force, much lower than Malaysians.¹⁶² These jobs are often dangerous, difficult, and insecure; studies show that refugees and asylum seekers are often subject to labour exploitation, with problems such as unpaid wages, long hours of work, and poor conditions of work.¹⁶³

A report by the Institute of Democracy and Economic Affairs in 2019 projected that if refugees were allowed to work legally, they would contribute up to RM 3 billion (around GBP 541 million) to Malaysia's Gross Domestic Product by 2024 through higher spending as well as over RM 50 million (around GBP 9 million) in taxes annually.¹⁶⁴ In March 2016, the Malaysian Cabinet agreed to let 300 Rohingyas registered with the UNHCR to work legally in the plantation and manufacturing sectors, a programme implemented in March 2017.¹⁶⁵ In December 2019, the government confirmed that it was in the process of finalising arrangements to allow UNHCR-documented Rohingyas to work in some sectors.¹⁶⁶ At time of writing, however, this has not been implemented, although civil society actors are hopeful that a policy enabling this is forthcoming. From 2020 onwards, Covid-19 restrictions led to many refugees losing their employment and experiencing destitution.

In March 2022, the Minister of Human Resources stated that the government, led by the Ministry of Human Resources, was working on guidelines on the permission for refugees to work in Malaysia.¹⁶⁷ He clarified that the Ministry would examine the sectors that refugees would be allowed to work in, and would ensure that this permission to work would not put them in competition with local Malaysians for jobs. He said: "Currently, refugees who hold UNHCR cards are only allowed to work in the informal sector such as self-employment for subsistence purposes." At time of writing, these guidelines have yet to be released.

vi. Healthcare

Civil society organisations deliver primary health care and mental health services to refugees and asylum seekers. Based on data collected in 2016-17, UNHCR suggests that 92.9 percent of persons of concern were able to access primary health care services when needed.¹⁶⁸ However, they also noted three main barriers to primary health care – 50 percent "can hardly

¹⁶¹ Todd et al (n 69) 8.

¹⁶² Ibid 9.

¹⁶³ Health Equity Initiatives (n 5).

¹⁶⁴ Todd et al (n 69).

¹⁶⁵ Rick Towle, 'Challenges and Way Forward in Handling Rohingya Refugees in Malaysia' (27 March 2017) <<https://reliefweb.int/report/malaysia/challenges-and-way-forward-handling-rohingya-refugees-malaysia>> accessed 1 April 2022.

¹⁶⁶ Government of Malaysia, 'Statement by HE Ambassador Dato' Dr. Ahmad Faisal Muhamad, Permanent Representative of Malaysia to the United Nations and other International Organisations' (Global Refugee Forum, Geneva, Switzerland, 17-18 December 2019) <<https://www.unhcr.org/uk/events/conferences/5dfa3d294/statement-from-malaysia.html?query=Malaysia>> accessed 1 April 2022.

¹⁶⁷ Free Malaysia Today Reporters, 'Kerajaan Rangka Garis Panduan Benar Pelarian Bekerja, Kata Saravanan', *Free Malaysia Today* (Petaling Jaya, 24 March 2022) <<https://www.freemalaysiatoday.com/category/bahasa/tempatan/2022/03/24/kerajaan-usahakan-garis-panduan-untuk-pelarian-bekerja-kata-saravanan/>> accessed 1 April 2022.

¹⁶⁸ UNHCR Malaysia, 'Public Health in Malaysia' (*UNHCR Malaysia* 1 April 2022) <<https://www.unhcr.org/en-my/public-health-in-malaysia.html>> accessed 1 April 2022.

afford user fees”, 16.7 percent had transportation issues, and 33.3 percent were refused services by health care centres due to payment issues.¹⁶⁹

Refugees and asylum seekers are charged foreigner rates at government healthcare facilities, which are significantly higher than rates for citizens. UNHCR card holders are provided with a 50 percent discount on these rates, but the fees are still unaffordable for many.¹⁷⁰ In 2017, the Malaysian government raised foreigner rates at government hospitals further by another 130 to 230 percent, making access to secondary treatment even more difficult.¹⁷¹ Refugees and asylum seekers also face cultural and language barriers when accessing healthcare¹⁷², and are often concerned that they will be reported to immigration authorities and arrested while seeking treatment.

The Malaysian government reported that between 2015-2018 it subsidised around USD 7 million in medical treatment by healthcare providers for UNHCR refugee card holders.¹⁷³ Civil society groups and individuals have also raised thousands of ringgit to contribute to the healthcare costs of desperate asylum seekers and refugees. Studies on refugee mental health indicate the high prevalence of common mental disorders, including depression, generalised anxiety, post-traumatic stress disorder, and complicated grief, linked with experiences of premigration traumatic events, postmigration living difficulties and psychological disruptions.¹⁷⁴ Symptoms associated with adverse mental health coincide with traumatic and/or stressful life events such as abuse during detention.¹⁷⁵

In 2014, UNHCR started the REMEDI health insurance programme for UNHCR card holders. However, there is a low enrolment rate for this programme and it does not include outpatient treatment.¹⁷⁶ In February 2021, Malaysia announced that foreigners, including refugees and undocumented workers, would be given the Covid-19 vaccine free of charge; however, Malaysians would be prioritised over non-citizens in the vaccine roll-out.¹⁷⁷ However, refugees

¹⁶⁹ Ibid.

¹⁷⁰ Xavier Pereira, Sharuna Verghis, Cheng Kah Hoe, Asma Binti Zahir Ahmed, Shasvini Naidu Nagiah and Leo Fernandez, 'Mental Health of Rohingya Refugees and Asylum Seekers: Case Studies from Malaysia' (2019) 17 *Intervention* 181; Sharuna Verghis, 'Access to Chin and Rohingya Refugees and Asylum Seekers to Maternal Health Services in the Klang Valley' (PhD Thesis, Monash University Malaysia 2013).

¹⁷¹ Malay Mail, 'Health Ministry Hikes Up Hospital Fees for Foreigners Up to 230pc' *Malay Mail* (Kuala Lumpur, 8 April 2017) <<https://www.malaymail.com/news/malaysia/2017/04/08/health-ministry-hikes-up-hospital-fees-for-foreigners-up-to-230pc/1351929#:~:text=From%20now%20on%2C%20foreign%20patients,RM900%20and%20RM1%2C500%20respectively>> accessed 1 April 2022.

¹⁷² Fiona Leh Hoon Chuah, Sok Teng Tan, Jason Yeo, and Helen Legido-Quigley, 'Health System Responses to the Health Needs of Refugees and Asylum-seekers in Malaysia: A Qualitative Study', 16 *International Journal of Environmental Research and Public Health* 1584.

¹⁷³ Government of Malaysia, 'Statement By His Excellency Dato' Dr. Ahmad Faisal Muhamad Ambassador And Permanent Representative Of Malaysia To The United Nations And Other International Organisations at Geneva' (Virtual High-level Pledging Event For The Humanitarian Crisis In Yemen, 1 March 2021) <<https://www.unocha.org/sites/unocha/files/MALAYSIA.pdf>> accessed 1 April 2022.

¹⁷⁴ Alvin Kuowei Tay, Mohammed Mosin, Khat Mung Hau, Mohammad Badrudduza, Susheela Balasundaram, Karen Morgan, Nirmalatiban Parthiban, Derrick Silove, 'Variations in prevalence and risk profiles for Common Mental Disorders amongst Rohingya, Chin and Kachin refugees from Myanmar' (2020) *Psychological Medicine* 1.

¹⁷⁵ Pereira et al (n 170) 184.

¹⁷⁶ Thomas and Jeffrey (n 137).

¹⁷⁷ Malay Mail, 'Vaccinating Migrant Community Crucial to Malaysia's Bid to Wrest Control of Covid-19 Pandemic, Say Experts' *Malay Mail* (Kuala Lumpur 28 April 2021) <<https://www.malaymail.com/news/malaysia/2021/04/28/vaccinating-migrant-community-crucial-to-malaysias-bid-to-wrest-control-of/1969987>> accessed 1 April 2022.

and asylum seekers have been afraid to present themselves for Covid-19 testing for fear of arrest. UNHCR and NGOs have been coordinating with the government's Crisis Preparedness and Response Centre to ensure that refugee and asylum-seeking communities are included in national public health responses, distributed information about treatment, testing and government movement orders in multiple languages, and established hotlines in multiple languages for those unable to access national crisis hotlines. UNHCR also made their interpreters available at public hospitals to provide translation services.

vii. Education

Asylum-seeking and refugee children are not permitted access to government schools as a right. The Malaysian government permits NGOs and communities to run Alternative Learning Centres and Community Learning Centres, and is considering accrediting them.¹⁷⁸ In 2014, there were around 130 such learning centres serving over 5,4000 refugee children, providing primary and secondary education.¹⁷⁹ UNHCR has signed Memorandums of Understanding with tertiary education institutions to provide higher education for refugee youth.¹⁸⁰ However, these arrangements only benefit a small number of refugees. There are no plans to include refugee children into the national education system.

IX. Conclusion

Overall, refugees and asylum seekers live precarious and uncertain lives in Malaysia. UNHCR's registration and RSD activities differentiate refugees and asylum seekers from the much larger population of migrants in Malaysia's 'mixed migration' context. Registration and RSD protects refugees and asylum seekers from the full force of punitive action against migrants with irregular status. However, UNHCR continues to struggle to manage its caseloads and backlogs, recognising that it falls short of its own procedural standards. Thousands of refugees and asylum seekers also remain outside of such protection year on year. As a result, over the past two decades, UNHCR has tried different types of case processing modalities that have led to refugees and asylum seekers from different countries being recognised at different rates, and to some nationalities and ethnicities of refugees being documented more comprehensively than others. UNHCR has now moved away from the presumption of eligibility approach that it applied to refugees from Myanmar, and thus all refugees go through RSD, with priority given to refugees with vulnerabilities.

I have previously argued that UNHCR plays the role of a 'surrogate state', but without sovereignty and with ambiguous authority. In a mixed migration context where migrants with irregular status are criminalised and punished, there is a lot of pressure on UNHCR in terms of its registration and RSD activities – from refugees and asylum seekers desperate for protection, civil society actors keen for UNHCR to do more, and government authorities who see UNHCR as an impediment. Over the past two decades, civil society actors (including refugees) have responded to the health, education, work, and food security needs of refugees and asylum seekers, intervening case-by-case, where they can. Malaysian lawyers have also been

¹⁷⁸ Government of Malaysia (n 166).

¹⁷⁹ UNHCR Malaysia, 'Malaysia Factsheet September 2014' (UNHCR Malaysia, 2014) 3.

¹⁸⁰ Yojana Sharma, The New Access Challenge is for Refugees, says UNHCR *University World News* (9 October 2015) <<https://www.universityworldnews.com/post.php?story=20151009190843472>> accessed 1 April 2022.

instrumental in building greater recognition of the situation of refugees through the courts, protecting refugees from the worst impacts of immigration control practices – in particular, adults from whipping and children from indefinite detention. However, until the Malaysian government accepts responsibility for the protection of refugees and asylum seekers, whether it becomes signatory to the 1951 Convention and the 1967 Protocol or not, UNHCR will have to continue performing its domesticated role with all its attendant challenges, alongside lawyers and civil society actors who advocate for the protection of refugees and asylum seekers in multiple domains.

X. Appendices

Appendix A: Persons of Concern to UNHCR in Malaysia, 2000-2021								
Year	Refugees under UNHCR's mandate			Asylum-seekers			Stateless persons	Others of concern
	All	From Myanmar	% from Myanmar	All	From Myanmar	% from Myanmar	All	All
2000	50,477	5,134	10%	21	5	24%	0	0
2001	50,456	5,151	10%	238	106	45%	0	0
2002	50,614	5,247	10%	1,574	298	19%	0	0
2003	7,422	4,152	56%	9,199	6,990	76%	0	62,053
2004	24,900	9,601	39%	10,313	8,857	86%	0	62,311
2005	33,684	14,208	42%	10,829	8,267	76%	0	61,550
2006	37,158	21,544	58%	9,173	6,754	74%	0	61,314
2007	32,657	29,474	90%	6,834	3,832	56%	40,001	61,314
2008	36,667	33,781	92%	9,322	6,730	72%	40,001	61,314
2009	66,127	61,412	93%	10,253	8,261	81%	40,001	61,326
2010	81,518	76,120	93%	11,317	8,553	76%	40,001	80,000
2011	86,675	81,146	94%	10,918	7,348	67%	40,001	80,000
2012	90,173	84,671	94%	11,623	7,764	67%	40,001	80,000
2013	97,504	92,287	95%	43,007	38,282	89%	40,000	80,000
2014	99,373	93,866	94%	51,217	45,743	89%	40,000	80,000
2015	94,161	88,637	94%	60,393	53,598	89%	11,689	80,000
2016	92,259	87,036	94%	56,313	48,352	86%	10,931	80,000
2017	103,837	98,041	94%	47,509	33,656	71%	10,068	80,000
2018	121,305	114,227	94%	41,801	26,448	63%	9,631	80,000
2019	129,107	119,230	92%	50,730	34,592	68%	108,332	55,000
2020	129,909	119,579	92%	49,667	34,459	69%	111,298	0
2021	131,101	120,126	92%	52,012	36,581	70%	112,003	0

Source: UNHCR, 'Malaysia: Population Figures, 2000-2021' (UNHCR Refugee Data Finder, 1 April 2022) <<https://rsq.unhcr.org/en>> accessed 1 April 2022.

Appendix B: UNHCR Data on Registration and Profiling and Status Determination, 2014 – 2016

2014

Impact Indicator	Baseline	Year-End	Target
% of persons of concern registered on an individual basis	91	93.6	96
Output	Performance Indicator	Year-End	Target
Outreach registration targeting dispersed population conducted	# of PoC registered through registration outreach methods	-	32,000
Eligible cases identified and registered	# of eligible persons registered	25,703	36,335

2015

Impact Indicator	Baseline	Year-End	Target
% of persons of concern registered on an individual basis	93.6	84.0	100
Output	Performance Indicator	Year-End	Target
Outreach registration targeting dispersed population conducted	# of PoC registered through registration outreach methods	-	15,000
Eligible cases identified and registered	# of eligible persons registered	19,669	30,000

2016

Impact Indicator	Baseline	Year-End	Target
% of persons of concern registered on an individual basis	84.0	76.9	91
Output	Performance Indicator	Year-End	Target
Eligible cases identified and registered	# of eligible persons registered	16,943	29,000

Source: UNHCR, 'Malaysia' (*UNHCR Global Focus*, 1 April 2022) <<https://reporting.unhcr.org/malaysia>> accessed 1 April 2022.

Appendix C: UNHCR Data on Status Determination, 2014 – 2015

2014

Impact Indicator	Baseline	Year-End	Target
Average # of days from first instance interview to notification of first instance decision	150	113	70
Average # of days from registration to first instance interview	390	411	180
Average # of days from submission of appeal to notification of appeal decision	384.3	411	110
Extent applicants have access to status determination procedure	70	70	90
Extent status determination procedure meets minimum procedural standards advocated by UNHCR	95	95	100
Output	Performance Indicator	Year-End	Target
Analysis of substantive decisions undertaken	# of substantive status determination decisions analyzed	4,051	16,000

2015

Impact Indicator	Baseline	Year-End	Target
Average # of days from first instance interview to notification of first instance decision	113	165.1	90
Average # of days from registration to first instance interview	411	535.8	180
Average # of days from submission of appeal to notification of appeal decision	411	334.8	180
Extent applicants have access to status determination procedure	70	44	60
Extent status determination procedure meets minimum procedural standards advocated by UNHCR	95	95	100
Output	Performance Indicator	Year-End	Target
Analysis of substantive decisions undertaken	# of substantive status determination decisions analyzed	1,241	3,000

Source: UNHCR, 'Malaysia' (*UNHCR Global Focus*, 1 April 2022) <<https://reporting.unhcr.org/malaysia>> accessed 1 April 2022.

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