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# The ambiguous authority of a ‘surrogate state’: UNHCR’s negotiation of asylum in the complexities of migration in Southeast Asia

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## Abstract

Scholars have criticized the ways in which policymakers, decision-makers and practitioners treat ‘refugees’ and ‘migrants’ as given categories, thus justifying the exclusion and containment of some people who move across borders. However, in places where ‘refugees’ are not recognized in domestic law and where there is little public understanding about their circumstances, actors concerned about their protection have had to invest tremendous effort into signifying ‘refugees’ as a legitimate type of non-citizen in need of protection. Focusing on Southeast Asia, and the case of Malaysia specifically, this paper examines how an international organisation with field presence, the United Nations High Commission for Refugees (UNHCR), reinforces the distinction between ‘refugees’ and ‘migrants’ through regular, practices of identification, intervention, and advocacy. Conducted in environments hostile to migrants with irregular status, these resource-intensive practices have resulted in the partial, impermanent protection of some refugees. This article argues that in complex migration contexts, UNHCR may take on properties of a ‘surrogate state’ but it does so without sovereignty. Instead, it negotiates the domestic level protection of refugees in urban and rural areas with ambiguous authority vis-à-vis state authorities. This ambiguity results from the lack of clarity over its role and its powers as an international organization operating at the domestic level within a state. This ambiguity has resulted in protection gains for some refugees, but also causes uncertainty about the strength of UNHCR’s negotiating position. Regional political developments shape the willingness of state authorities to cooperate with UNHCR. Especially since 2017, Rohingyas have become the archetypal refugee in Southeast Asia, easily recognised as deserving of protection. To the consternation of civil society actors, however, UNHCR has argued that other refugees in protracted situations – in particular, Chins from Myanmar – are no longer considered in need international protection. This article argues that contemporary constructions of ‘refugees’ fail to address the complexities of migration but has become necessary in convincing states of the need to protect a certain ‘ideal type’ of non-citizen. Alternative ways are needed to recognize and address the precarity of diverse mobile subjects living in the Southeast Asian region.

## Keywords

UNHCR; surrogate state; protracted refugee situations; refugees in urban areas; mixed migration; Malaysia; Southeast Asia

## Introduction

In December 2018, a majority of the member states of the United Nations adopted the Global Compact for Safe, Orderly and Regular Migration as well as the Global Compact on Refugees, the latter proposed by the United Nations High Commissioner for Refugees (UNHCR). While the impact of these Global Compacts is yet uncertain, what is clear is that this dual-track approach has reinforced the distinction between ‘refugees’ and ‘migrants’ rather than problematizing it. In Southeast Asia, people who are displaced across borders are likely to be more affected by the Global Compact on Migration than by the Global Compact on Refugees, since many of them are not legally recognized as refugees. Even when a subset of actors such as UNHCR and local civil society groups try to identify, protect and assist them, as such asylum-seeking populations experience the insecurity, instability and uncertainty that come with living as non-citizens with irregular status.

The way that human mobility is understood and managed is shaped fundamentally by the formation of states, borders, and national imaginaries. The forming of postcolonial states in Southeast Asia has resulted in varied relationships between people and state authorities. People have been included unevenly as citizens based on their ethnic identity and proximity to political and economic power. Postcolonial nation building has required ideological investment, with political leaders actively (re)constructing national identities. The quest to form coherent identities has not been bloodless – internal strife, armed conflicts, and secessionist movements have marked struggles for power (Brown, 1994; Snitwongse and Thompson, 2005; Oishi, 2016). However, nation-building discourses have also succeeded in fueling strong and instinctive nationalist pride, which normalizes and legitimizes the perspective that citizens should get preferential treatment over non-citizens.

In Southeast Asia, state borders bisect customary travel routes and territories. Modern immigration control regimes – consolidated in the 20<sup>th</sup> century through decolonization – set the terms for ‘legal’ movement across territorial borders. Despite efforts to regulate entry and exit, borders in Southeast Asia have been porous, weakened by prevalent corruption (Franck, 2018) and the inability of states to maintain comprehensive border controls. Well-developed smuggling and trafficking networks cut through Southeast Asian states, often involving chains of agents in different countries (Larsen 2010; Lindquist, 2010).

Historically, the most renowned refugee movement in Southeast Asia was the Indochinese refugee crisis. Between 1975-1995, close to two million people left Cambodia, Laos and Vietnam overland and on boats, seeking refuge in Thailand, Malaysia, Indonesia and the Philippines amongst other countries in Asia (Frost, 1980). States in Southeast Asia grappled with the complexities of protecting Indochinese refugees in various ways. The international community developed multilateral agreements to find durable solutions, finally enacting the Comprehensive Plan of Action for Indochinese Refugees (CPA) in 1989 (Robinson, 1998). In this Plan, states in Southeast Asia agreed to hold refugees temporarily until they were resettled or repatriated home, voluntarily or not. A legacy of this international response is that states in Southeast Asia presume that refugees are a *temporary* ‘international (or UNHCR) problem’ that is ‘solved’ through resettlement or repatriation – not local integration.<sup>1</sup>

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<sup>1</sup> See for example, perspectives of Malaysian government officials as reported in the report by Equal Rights Trust and the Institute of Human Rights and Peace Studies (2014).

At present, UNHCR projects the presence of 1,102,441 refugees and 55,658 asylum seekers in Southeast Asia in 2019 (UNHCR, 2019a).<sup>2</sup> Most of the people seeking asylum in Southeast Asia originate from Myanmar. Since August 2017, over 723,000 Rohingyas have fled to Bangladesh (UNHCR, 2019b), adding to the 276,200 refugees from Myanmar already there at the end of 2016 (Executive Committee of the High Commissioner's Programme, 2017). One of the key challenges of refugee protection in Southeast Asia is the reluctance of states to legally recognize the status of refugees and to enable their enjoyment of rights. Only three states – Cambodia, the Philippines, and Timor Leste – are state parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Importantly, countries hosting the largest numbers of refugees – Thailand, Malaysia and Indonesia – are not.<sup>3</sup> The Association of Southeast Asian Nations (ASEAN) has not committed to any forms of regional protection for people displaced across borders.

The case of Malaysia is of interest to scholars and practitioners for several reasons. First, it hosts refugees in protracted situations<sup>4</sup> in urban and rural areas – they are not camp-based. Refugees mingle and live with citizens and other non-citizens; they are not kept geographically separate. Secondly, Malaysia is a key destination in the region for regular and irregular migration. It simultaneously creates legal channels for temporary labour migration while taking a hostile and punitive approach to irregular migration. Malaysia's immigration control mechanisms are a significant cause of the dangers and risks that refugees experience. Thirdly, Malaysia is a classic example of how UNHCR must advocate for refugee protection within the complexities of migration. Key to the protection of refugees is the recognition that they are a specific type of non-citizen in legitimate need of international protection. UNHCR actively constructs refugees as being *different* from other 'types' of non-citizens, a category that is conceptually and practically kept *limited* so that 'others' – 'non-refugees' – are unable to access the rights associated with this identification and so that refugees are perceived as a 'much smaller' and therefore 'less threatening' group of people, requiring fewer resources to protect.

Drawing upon interactions with UNHCR officials, refugees, and civil society actors in Malaysia over the past 15 years or so as a civil society refugee rights advocate and as a researcher<sup>5</sup> – I examine how UNHCR, along with local civil society actors, create and expand 'protection space' for people who seek asylum through the construction and reification of this category. This article adds to a gap in international relations literature about how international organisations such as UNHCR interact, act, and advocate for refugees at the domestic level. It argues that UNHCR may take on properties of a 'surrogate state' (Slaughter and Crisp, 2009; Kagan, 2012; Miller, 2018) but it does so without sovereignty, operating with ambiguous authority. This ambiguity arises from the lack of clarity over its role and powers as an international organization operating in the territory of a state. This ambiguity has resulted in UNHCR gaining ground in refugee protection, but also causes confusion amongst state

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<sup>2</sup> It projects a further 1,135,808 stateless persons, 18,050 returned refugees, 332,483 returned internally displaced persons, 515,943 internally displaced persons, and 80,120 'others of concern'. For UNHCR, Southeast Asia includes Bangladesh.

<sup>3</sup> While President Joko Widodo passed the landmark Presidential Decree 125 of 2016 Concerning the Handling of Foreign Refugees thus defining and recognizing the status of refugees, this decree only recognizes only two durable solutions for refugees – resettlement or repatriation –not integration, even on a temporary basis.

<sup>4</sup> UNHCR defines a protracted refugee situation' as a situation where "a refugee population of 25,000 persons or more has been living in exile for five years or longer in a developing country" (Executive Committee of the High Commissioner's Programme, 2004: 5).

<sup>5</sup> I volunteered for the National Human Rights Society of Malaysia (HAKAM) from 2002-2008, and was one of the founders of the Migration Working Group of Malaysia. I completed a doctoral dissertation at the National University of Singapore examining immigration control practices in Malaysia in 2012. I am a co-investigator of an international research project entitled 'The law of asylum in the Middle East and Asia: Developing legal engagement at the frontiers of the international refugee regime', led by Martin Jones and funded by the UK's Economic and Social Research Council (2016-2019).

authorities – and UNHCR officials – about the legitimacy and limits of their authority. The need to cooperate with Malaysian authorities for specific cases of refugees also means that UNHCR cannot be as openly critical as it might want to be.

Troublingly, this approach – of identification, separation and the ‘rescue’ of refugees from arrest, detention, and deportation – embeds UNHCR in domestic immigration control regimes. Refugees are only protected through UNHCR’s continuous intervention and their practices thus become grafted into state immigration control practices, without an exit strategy. Critically, this approach also focuses on creating exceptions for a small number of people. A broader, more inclusive approach is required to address the precarity of mobile subjects in Southeast Asia – one that recognizes their rights and their need for protection regardless of the circumstances of their movement.

### **The violence of categories**

Scholars on migration have pointed out that the terms used to describe people who cross borders – such as ‘refugee’ and ‘migrant’ – are insufficient in capturing the complexities of their experiences (Crawley and Skleparis, 2018; Karatani, 2005; Zetter, 2015). Such terms are often used to identify and separate different ‘types’ of people who move, but these terms rely on simplified understandings of migration journeys. State authorities tend to assume that people choose when and how they move, begin a unidirectional journey from one place to another, and enter a country of destination with a clear motive.

Immigration control regimes operate on this logic. State authorities classify people who move based on why they enter a country and from where, assigning rights accordingly. However, people who move across borders can often fit in more than one immigration category (for example, a refugee could simultaneously be an international student and the foreign spouse of a citizen), and can change between categories relatively easily (Koser and Martin, 2011; Collyer and de Haas, 2012). While these categories appear self-evident and ‘timeless’, they are social and political constructions with specific histories (Zetter, 2007; Long, 2013). Decision-making authorities can be stricter or more lenient in the classification of people into these categories, and the meaning of these categories change over time.

Similarly, scholars have been critical of the commonly expressed distinction between ‘forced’ and ‘voluntary’ migration, noting that people who move make choices on their journeys – choices that are constrained to a greater or lesser degree (Castles, de Haas, and Miller, 2014; Richmond, 1994; Van Hear, 1998). There are also involuntary aspects of movement in so-called ‘voluntary migration’, which some scholars suggest should be analyzed as ‘forced economic migration’ (Withers and Piper, 2018). Moreover, voluntariness in a decision to leave a place depends on the availability of ‘acceptable alternatives’ (Erdal and Oeppen, 2018). Scholars have also highlighted problems with concepts such as ‘transit migration’, which presumes that migration begins in one place and ends in another, when such journeys can be erratic, interrupted, and unpredictable (Collyer, 2007; Collyer and de Haas, 2012; Crawley et al, 2016; Sampson et al, 2016). Those who move across borders may not know where to go, may be forced to find alternative destinations, and may spend interminably long periods in places they thought to be temporary (Missbach, 2014; Moutnz, 2011).

In the 1990s, scholars and practitioners working on forced displacement engaged considerably on the topic of ‘mixed migration’. This body of work arose out of the recognition that refugee movements were often ‘mixed’ with other types of movements, that people who moved can

have a ‘mix’ of motivations that could change over time, and that it was therefore difficult to identify refugees (Van Hear et al, 2009). From this viewpoint, migration movements complicated the protection of refugees, as states tended to perceive them as migrants (with irregular status) rather than people in need of asylum. The worry by state officials was that those who sought asylum were ‘really’ ‘economic migrants’ abusing asylum systems. The task at hand was therefore to identify, classify, and ‘separate out’ a smaller sub-set of people from larger movements – that is, to “protect refugees within broader migration movements” (Executive Committee of the High Commissioner’s Programme, 2002:10). This approach reinforces the salience and importance of distinguishing between ‘refugees’ and ‘migrants’. However, some scholars are critical of this approach to ‘mixed migration’, pointing out that people migrate with different degrees of volition and for diverse reasons, and that ‘migrants’ should not be considered ‘less deserving’ of protection when they need it (Erdal and Oeppen 2018; Bakewell, 2011).

‘Mixed movements’ continue to be a cause for concern for policymakers and practitioners. In Europe’s ‘migration crisis’ (or ‘refugee crisis’) from 2015 onwards, political and popular discourse focused on whether the people who moved ‘deserved’ a place in Europe based on their background, countries of origin, and reasons for movement (Holmes and Castañeda, 2016). Again, attention was placed on whether they were (genuine) refugees to which European states had legal obligations to grant asylum or (merely) ‘migrants’ who should be deterred (Goodman, Sirriyeh, McMahon, 2017). Scholars have referred to this as ‘categorical fetishism’ (Apostolova, 2015; Crawley and Slepatis 2018), that is “treat(ing) the categories ‘refugee’ and ‘migrant’ as if they simply exist, out there, as empty vessels into which people can be placed in some neutral ordering process like a small child putting bricks into a series of coloured buckets” (Crawley and Slepatis 2018: 49).

Indeed, categories and the categorization of people as refugees has been the cornerstone of the international refugee protection regime. States and UNHCR have invested significant effort in building refugee status determination processes (RSD) to determine if a person is a refugee under international and domestic law. In countries that do not have domestic systems for this, UNHCR conducts RSD. Over time, UNHCR’s RSD caseload worldwide has grown significantly, even exceeding those of states. However, this task is difficult, time-consuming, and resource-intensive. Studies show that states and UNHCR struggle to make RSD decisions in a timely, accurate, and consistent manner (Kagan, 2006; Simeon, 2010, 2017). UNHCR has recognized that it faces a ‘crisis’ in RSD – it is unable to manage its overwhelming caseloads around the world and to meet the protection needs of people of its concern.

### **The changing role of UNHCR in protracted refugee situations**

The role of UNHCR in relation to forced displacement has evolved significantly over time (Betts et al, 2008). The international refugee protection regime is based on the principle of burden- or responsibility-sharing – that states need to work together to address forced displacement. UNHCR supervises state practice in relation to international obligations towards asylum seekers and refugees. However, as Volker Türk, the Assistant High Commissioner for Protection (and previous Representative of the High Commissioner to Malaysia from 2004-2008) observes, UNHCR plays an unusual role for a UN agency, “interceding directly on behalf of distinct individuals and groups of people” (Türk 2010:3). As Türk points out, there are contexts in which UNHCR plays a “*de facto* state substitution role” (p. 11), with “strong operational involvement” (p. 15). In such contexts, UNHCR gets directly involved in the daily

lives of refugees, rather than just engaging in general policy and legal advocacy towards governments.

Reflecting on UNHCR's role in protracted refugee situations, Slaughter and Crisp (2009) put forward the idea that in some contexts, UNHCR effectively becomes a 'surrogate state' to refugees, "complete with its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation, etc.) and even ideology (community participation, gender equality)" (p.8). Slaughter and Crisp observes that this creates serious dilemmas for UNHCR, for while this approach enables them to protect refugees it also absolves host states of their responsibilities.

Examining UNHCR's interventions in Kenya, Tanzania, and Uganda, Miller argues that "[international organisations] that take on more surrogate state properties tend to have less influence on the states in which they work" (2018:6). According to Miller, this occurs because of the marginalization of the state from refugee protection operations and responsibility shifting. Miller argues that marginalized states are incentivized to maintain the status quo, and benefit from letting UNHCR to assume the costs and work of protecting and caring for refugees. Miller argues that in contexts when UNHCR plays a stronger surrogate state role, UNHCR can find it difficult to influence states for several reasons. As states abdicate their responsibilities, UNHCR steps in to fill the void but also takes the blame for whatever goes wrong. States become disinterested in refugee affairs, and UNHCR is forced to hold back its criticism to maintain access to refugees.

A logical solution to the problem of responsibility shifting is therefore to refocus attention on state responsibility. However, as Kagan (2012) points out, this is not a viable option in many countries. As he observes, "Even if fully committed in principle to state responsibility, UNHCR is often trapped into accepting quasi-government functions indefinitely, fearful that if it pulls back, refugees would simply be abandoned because host governments would be unwilling to step in" (p.317). Focusing on refugee protection in Arab countries in the Middle East, Kagan then argues in favour of UNHCR's role as a 'surrogate state', highlighting that this offers symbolic and material benefits to governments. He argues that the state-to-UN 'responsibility shift' can be used strategically, in a limited way, with clear lines of accountability and realistic expectations.

However, Kagan's analysis rests on states 'ignoring' refugees, or protecting their negative liberties by 'doing nothing' while UNHCR takes on the tasks of registration and the provision of services. In some cases, as in Malaysia, the state actively pursues and punished migrants with irregular status, and UNHCR must intervene to protect refugees from such state actions. Kagan's analysis also presumes that UNHCR has the resources, infrastructure and the goodwill of host states for such 'shared responsibility', and that UNHCR can manage the functions and services of a state efficiently and effectively. As this article shows, despite UNHCR's significant efforts, its protective reach is limited and it remains chronically under-resourced. Furthermore, UNHCR's adoption of the surrogate state role in Malaysia emerged over time, as its own response to unfolding events and the protection needs of refugees – it was not by invitation of the Malaysian state, and the lines of accountability, responsibility and authority for refugees are continuously blurred and renegotiated.

In contrast to UNHCR, there is no other international organisation that deals with other forms of migration in a similar way, leading to a significant gap in the protection of people on the move (Hollifield, 2000). While the International Organisation for Migration is perceived as a

leading inter-governmental organization dealing with migration and became a ‘related organization of the UN’ in 2016, it is explicitly ‘non-normative’ (Guild and Grant, 2017). Significantly, it does not have the rights-based protection mandate that UNHCR does. As critics point out, IOM’s funding model also means that it often takes on projects funded by states that focus on border control and the implementation of state migration policies rather than the rights of people who move across borders (Brachet 2015). In contrast, while the International Labour Organisation has played a critical role in developing labour standards and rights for people on the move, its mandate and structure does not lend itself to a broad spectrum of migration management activities (Hughes and Haworth, 2013). Its field presence is also limited. As a result, there is a lacuna in the protection of people experiencing precarity as they move within and across borders.

### **Protecting asylum seekers and refugees in Malaysia<sup>6</sup>**

At the end of December 2018, there were 163,860 asylum seekers and refugees registered with UNHCR, of whom 67 percent were men and 33 percent were women (UNHCR, 2019c). 86.5 percent originate from Myanmar – comprising 88,880 Rohingyas, 26,180 Chins, 9,800 Myanmar Muslims, 4,000 Rakhines and Arakanese, and other ethnicities from Myanmar. 22,070 asylum seekers and refugees come from other countries, mainly from South Asia and the Middle East. In Peninsular Malaysia, most asylum seekers and refugees live in urban areas, with the highest concentrations in Selangor, Kuala Lumpur and Penang. These groups live in two broad types of places – what civil society groups and UNHCR term ‘urban sites’ or ‘urban areas’ – typically run-down, low-cost flats and houses in inner-city neighbourhoods – and ‘jungle sites’ – typically plantation, jungle, or construction areas (Nah 2010). The former tends to be spaces of urban decay, while the latter tend to be frontiers of urban expansion – places where they can live relatively cheaply and find informal work.

According to Malaysian law, asylum seekers and refugees are not distinguished from migrants with irregular status, and are therefore at risk of arrest, detention and deportation. The Immigration Act 1959/1963 provides the police and immigration authorities with widespread powers to arrest anyone they suspect of committing an immigration offence. Entry into Malaysia without authorization is punishable by a fine of up to RM10,000 and/or imprisonment of up to five years, and possible whipping of not more than six strokes (Section 6(3)). Those who stay beyond the period of their permits are liable for the same level of fines and imprisonment (Section 15 (1, 4)). Their lack of status in domestic law is the primary source of insecurity for asylum-seeking populations.

Malaysia was a country of first asylum for Indochinese refugees. Through negotiations with other states and through its participation in the CPA, Malaysia eventually hosted around 258,500 Vietnamese refugees in temporary, isolated, closed camps. By 1998, 249,132 had been resettled to third countries and 9,365 returned to Vietnam (UNHCR Malaysia 1998). The last Vietnamese refugee from this period in history departed Malaysia in August 2005 (Steenhuisen 2005). Over the past few decades, Malaysia has also voluntarily and formally offered asylum to different groups of Muslim refugees, such as the Khmer Muslims from Cambodia and Muslim refugees from the Southern Philippines in the 1970s (Robinson 1998; Strauch 1980); Bosnian Muslims fleeing the collapse of Yugoslavia in the 1990s (Farley 1994), and Acehese

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<sup>6</sup> While I have highlighted the politics and complexities of using terms such as ‘refugee’ and ‘migrant’, it is impossible to move away from using these terms. When using the term ‘refugee’ in this paper, I refer not only to people who have gone through UNHCR’s RSD processes and have been formally recognized as refugees but include those who would like to seek asylum but have not been able to.

refugees from Indonesia in the 2000s (Nah and Bunnell, 2005). In October 2015, Malaysia offered protection to around 3,000 refugees from Syria under a Temporary Relocation Programme for Syrian Migrants. In 2017, it launched a pilot work scheme for UNHCR-registered Rohingyas, permitting around 300 of them to work in the agricultural and manufacturing sectors.

In the 1990s, there were small movements of groups seeking asylum in Peninsular Malaysia – far less visible than the heavily publicized Indochinese refugees. UNHCR registered around 200-250 new arrivals a year who originated from different countries in Asia, the Middle East and Africa (UNHCR Malaysia 1998). The relative invisibility of these ‘urban refugees’ perpetuated a lack of proactive response from UNHCR and from Malaysian civil society groups. Aside from the Indochinese refugees (then sequestered in camps), the dominant myth until 2003 was that very few, if any, refugees existed in Malaysia.

Asylum-seeking and migrant populations are attracted to Malaysia for several reasons. Firstly, it is relatively easy to gain access into its territories. Robust networks of smugglers, often in collusion with Malaysian immigration border control officials, have constructed numerous routes over land and sea from Thailand, Indonesia, and the Philippines (Ananta and Arifin 2004; Battistella and Asis 2003; Spaan, Naerssen, and Kohl, 2002). Malaysia is also a hub for international air travel, with flights coming in from all over the world. It is relatively easy for most travelers to get a tourist visa to visit Malaysia. Asylum-seeking populations can enter Malaysia through several legal means – as migrant workers, tourists, and students – staying on beyond the terms of their visas to mount asylum claims with UNHCR.

Secondly, Malaysia is a relatively affluent country with low unemployment. It is possible to get informal work, particularly in the construction, agriculture and service sectors – albeit with associated vulnerabilities to exploitation (Franck, 2016; HEI, 2011). The availability of work is crucial for the avoidance of poverty, as asylum-seeking populations usually live in Malaysia for years. Thirdly, as numbers grow, refugees have been better able to receive social and material support from members of their own communities in Malaysia (McConnachie 2018; Nah, 2014). Fourthly, refugees from Myanmar are not deported directly to Myanmar but to Thailand, which gives them a sense – false or not – that they would be ‘better protected’ in Malaysia. Asylum seekers have also been drawn to Malaysia because it is perceived as a moderate Muslim nation and has had, historically, high rates of UNHCR-facilitated resettlement.

### **Distinguishing refugees: UNHCR’s evolving practices**

Malaysia has permitted UNHCR to maintain an office in Kuala Lumpur since 1975, when it assisted the government in responding to the Indochinese refugee crisis. There is only one UNHCR office in Malaysia, located in the exclusive residential area of Bukit Petaling. All who seek asylum and international protection come to this office eventually – it is where they go to be registered with UNHCR; attend refugee status determination interviews; seek financial assistance; return when released from immigration detention depots; make appeals for help; mount collective protest to express grievances; and from where they depart for resettlement to other countries. As a result, Kuala Lumpur has become a unique node for populations seeking refuge in Malaysia – it is where they mingle, find work, pool resources, establish communities, and seek international protection (Hoffstaedter, 2014; Nah, 2014).

The scope of UNHCR’s work has changed over time. It maintained a relatively quiet operation from 1996 to 2001, receiving an average of 820 new applications for asylum each year

(UNHCR 2004). From 2002 onwards however, UNHCR received significantly larger numbers of new claims for asylum, primarily from nationals from Indonesia (mostly Acehnese) and Myanmar. In 2002, the Malaysian government amended the Immigration Act 1959/1963 to include whipping as a punishment for irregular entry. This, and the ensuing public ‘crackdown’ on migrants with irregular status, prompted many non-citizens to seek asylum as a means for forestalling arrest, punishment and forced deportation (Nah, 2011). In 2003, UNHCR in Malaysia registered a significant increase in new asylum claims, from 2,131 applications in the previous year to 18,626 (UNHCR 2005). Since then, Malaysia has been one of UNHCR’s busiest RSD operations in the world.

### ***Practices of identification***

To protect asylum seekers and refugees as such, it is necessary to identify them. UNHCR performs this function through registration and RSD activities.<sup>7</sup> The ways it conducts these activities changes over time, in response to caseload pressures as well as understandings of which refugee groups should be given priority. At present, refugees from Myanmar are treated differently from refugees from other countries (further elaborated below). Typically, non-Myanmar asylum seekers approach UNHCR in their office, and their basic details are taken down. After potentially long periods of waiting in uncertainty, UNHCR calls them for registration, issuing them with a paper document. The length of the waiting period depends on their nationality and vulnerability. They are then given dates for RSD interviews, which can be scheduled for several weeks or months ahead of time depending on caseloads.

Some asylum seekers are given a decision after the first interview, while others attend several interviews before a decision is made. In many cases, the process of registration and status determination is protracted, lasting for years, much to the frustration of asylum seekers. Those who are rejected after the RSD interview can appeal the decision made. Those who rejected again following their appeal can ask for their case to be re-opened based on their ability to provide new information to support their claim. Those recognised as refugees are issued a plastic, tamper-proof, biometric identity card with security features. The asylum seeker letters and the refugee identity cards are time-specific documents with expiry dates that need to be renewed periodically. The renewal of these identity documents allows UNHCR to maintain updated records of the populations under its purview.

Aside from Rohingyas, UNHCR considered refugees from Myanmar to be at the ‘end of their refugee cycle’ and thus not as a high priority. UNHCR restricts registration to those identified as ‘vulnerable’ – either by themselves or by civil society partners through a Partner Referral Network process established by UNHCR – and to those in detention. Although Rohingyas are considered as needing protection as refugees, access to registration is still limited to those identified as vulnerable and to those who are detained, due to the large numbers of Rohingyas in Malaysia.

Between 2004-2008, UNHCR maintained registration levels at around 47,000 persons of concern. In 2009, it increased these numbers, which have now settled to around 140,000-170,000 persons of concern. Year upon year, thousands of asylum seekers and refugees remain unregistered despite their great desire to seek UNHCR assistance. Difficulties in getting registered and getting their status determined has been one of the most frequent complaints

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<sup>7</sup> In 2017, the Malaysian government launched a refugee monitoring and tracking system called Tracking Refugees Information Systems (TRIS) through which it would issue ‘MyRC’ cards to refugees. However, the government has not clarified what rights cardholders will have and only a small number have been registered to date.

voiced by asylum seekers and refugees. UNHCR restricts registration for several reasons. One is a concern that high registration numbers will invite criticisms by the Malaysian government that UNHCR is not sufficiently rigorous in differentiating between irregular migrants and refugees. Another is that they do not have the resources to register, manage and care for large numbers of people. However, these restrictions have also resulted in negative outcomes, such as the failure of UNHCR to accurately identify and protect particularly vulnerable refugees such as unaccompanied minors and survivors of sexual and gender-based violence.

### *Practices of intervention and advocacy*

Another very significant way in which UNHCR protects registered refugees is intervening when they are arrested, detained, and charged in court. Since the 2005 crackdown on irregular immigrants, UNHCR has maintained a ‘hotline’ through which it receives emergency calls for assistance. When responding to an arrest, UNHCR records as many details as possible, including the name of the arrested person, their location, the UNHCR reference number (as recorded on their UNHCR documents or cards), and, when they are detained in immigration detention depots, their ‘body number’. UNHCR then contacts the relevant authority to request for their release and/or makes an appointment to see the person in detention. The Police usually release those who hold refugee identity cards after verifying their documents with UNHCR, if they were detained solely for committing an immigration offence. Such releases were more commonplace after UNHCR launched a new mobile app in 2016 (the UNHCR My Verify App) that enabled law enforcement agents to check the authenticity of UNHCR cards held by refugees immediately.

Those that are not released by the Police are typically kept in police lock-ups and transferred to immigration detention depots within several days, while those that are arrested by Immigration are either kept in immigration holding facilities or taken directly to immigration detention depots. All non-citizens who are arrested can be legally subject to 14 days of remand before they must be presented before a magistrate. Often, those under remand are not allowed to make any outside contact, which makes it difficult for them to seek assistance.

In 2005, in response to advocacy by UNHCR and civil society groups, the Attorney General’s Chambers agreed to waive prosecution for immigration offences for recognized refugees registered with UNHCR. However, if a refugee is charged with immigration offences and brought to court, UNHCR makes an application to the Attorney General’s Office for these charges to be dropped and arranges for a Malaysian lawyer to provide legal aid.<sup>8</sup> UNHCR’s support of legal aid has produced significant results. Importantly, its legal interventions have helped to establish the precedent that refugees should be exempt from the punishment of whipping for immigration offences.

In the case of *Tun Naing Oo vs Public Prosecutor* [2009] 6 CLJ 490, the High Court reviewed a judgement by a sessions court judge of an asylum seeker from Burma charged and convicted under section 6(1)(c) of the Immigration Act 1959/63 and sentenced to 100 days of imprisonment and 2 strokes of the cane. In this case, the judge considered whether whipping was a sentence that was “manifestly excessive” and whether the applicant should be spared “on humanitarian grounds” (p. 490). The judge stated,

...it is inhumane and serves no purpose to impose the sentence of whipping upon an asylum-seeker or refugee. If asylum seekers or refugees: (a) have not committed acts

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<sup>8</sup> However, UNHCR does not intervene if the individual is charged with criminal offences.

of violence or brutality; (b) are not habitual offenders; or (c) have not threatened public order, they should not be punished with whipping (p. 491).

The judge observed that asylum seekers and refugees *were* subject to domestic laws including the Immigration Act 1959/63 and were therefore liable for immigration offences. However, the judge also stated that sentencing must be ‘appropriate’ to their circumstances rather than excessive. Using this legal precedent, Malaysian lawyers have succeeded in ensuring that other refugees are not whipped.

UNHCR also visits asylum seekers and refugees in prisons and immigration detention depots across the Peninsula, monitoring conditions of detention. UNHCR writes to the Immigration Department to request for the release of individual detainees and at different points in time, immigration officials have permitted the release of refugees on different grounds. At present, Rohingyas (and sporadically, other groups) are released, but other Myanmar nationals are almost never released. UNHCR’s interventions for asylum seekers and refugees in detention are significant. In 2018, over a five-month period, UNHCR registered (and conducted RSD) for 969 persons, and secured the release of 1,858 persons of whom 68 were children (UNHCR, 2019d).

However, not all asylum seekers and refugees are able to obtain comprehensive assistance from UNHCR, and as such, have faced the full brunt of arrest, punishment for immigration offences, indefinite detention and forced deportation (sometimes leading to *refoulement*). This occurs for several reasons. As stated, some are unable to call UNHCR when they are arrested or to keep UNHCR updated as to their whereabouts when they are transferred from one detention facility to another. Secondly, law enforcement officers sometimes give UNHCR misleading information, stating that the person they enquire after is not present in their detention facility. This makes it difficult for UNHCR to establish contact with persons of concern in detention. Thirdly, immigration officers exercise discretion in relation to the release of detainees. An officer can reject or delay decisions on applications by UNHCR for the release of individuals depending on his/her mood and foibles. As mentioned above, they also favour the release of some nationalities – such as Rohingyas – over others. Fourthly, it is more difficult for UNHCR to intervene on behalf of asylum seekers and refugees who were not registered with them at the time of their arrest.

The inability of refugees to integrate locally or to return home makes resettlement to a third country the only viable ‘durable solution’. Historically, UNHCR has been able to negotiate many resettlement places for refugees, making Malaysia a key node in Asia for the dispersal of refugees to developed countries. From facilitating the resettlement of less than 100 people in 2002 (UNHCR, 2002), it facilitated 12,547 in 2015 (UNHCR, 2019e). However, annual numbers have dropped significantly since, down to 2,407 in 2018 (UNHCR, 2019e).

### ***Perspectives of UNHCR from those who seek refuge***

While UNHCR faces political and economic challenges in fulfilling its mandate, it still wields considerable power over the lives of people who seek protection from persecution and conflict (Hyndman, 2000; Moulin and Nyers, 2007) – UNHCR shapes their daily routines, their relationships, their families, and their imagination of their futures. Asylum seekers and refugees who come to Malaysia have some pre-conceptions of what to expect when they arrive, formed based on the stories told by their friends and family, and sometimes, the smugglers who try to attract their business. However, much more intense ‘learning’ occurs as they deal with

the practicalities of living and surviving in Malaysia (McConnachie, 2018). Many of the opinions they hold are shaped through formal interactions with community-based organisations, Malaysian NGOs, and UNHCR, as well as through informal interactions with other refugees.

New arrivals often find it difficult to trust authority figures. Some feel afraid of UNHCR personnel, seeing the UN system as a form of bureaucratic control that liaises uncomfortably closely with the government of Malaysia and their own governments. They are afraid that their biographical information and their narratives of resistance to state repression collected by UNHCR during RSD interviews will be shared with their own governments without their knowledge. They distrust bureaucracy. Some refugees, especially those who have been arrested in their countries of origin, are instinctively afraid of UNHCR security guards – their uniforms and manners remind them of the military and police at home who mistreated them and/or their families and friends. The reassurance of civil society groups and fellow community members as well as the witnessing of practical assistance and outcomes of asylum claims helps to counter this distrust, but in some cases, it is never fully overcome. Some refugees remain ambivalent about UNHCR, seeing it as a quasi-government entity that may or may not be trustworthy, that may or may not be truly committed to their personal protection, and which wields significant power over their lives.

Those who have been arrested and have had their deportation halted by UNHCR have spent indefinite periods in detention. Sometimes, they have done so after serving prisons sentences and being whipped for immigration offences. Detention conditions vary, but in many immigration detention depots, detainees suffer from overcrowding, poor sanitation, insufficient food, water, clothing and bedding, as well as poor access to health services and exposure to violence from fellow detainees and guards (Nah, 2015). Afraid of deportation, many have opted to live for long periods in these stark circumstances, sometimes for years. Some, unable to bear the uncertainty of indefinite detention, have opted for ‘voluntary deportation’. To mitigate the risks involved, some detainees from Myanmar have paid bribes to get deported to the Thai-Malaysia border at specific times and into the hands of specific smugglers. They have preferred to risk the dangers faced at border zones with the possibility of freedom afterward than to face the bleakness of continued indefinite detention. However, opting for deportation has been risky. Refugees have been handed over to traffickers at the Thai-Malaysia border, who have held them for ransom and extorted them for exorbitant payments (Aziz 2014). The price of these transactions has increased over the years, depending on the location of deportation and smuggler involved. Those who failed to pay have been sold – men to fishing boats as forced labourers, and women to brothels and other private businesses.

### **The role of civil society actors: Malaysian civil society groups and refugee community-based organisations**

Civil society actors in Malaysia – non-governmental organisations (NGOs), faith-based groups, lawyers, and volunteers – have played a critical role in providing services to asylum-seeking populations and providing avenues for advocacy. They have repeatedly called upon the Malaysian government to recognize the specific circumstances of asylum seekers and refugees and to protect their rights for example in submissions to the Human Rights Council’s University Periodic Review Process and the Committee on the Elimination of All Forms of Discrimination Against Women. Some NGOs publish reports that highlight specific challenges faced by refugee communities, such as difficulties of access to healthcare and the high incidence of forced labour and exploitation (HEI, 2010; 2011). The Bar Council of Malaysia often hold seminars, roundtables and conferences to build more awareness about the situation

of asylum-seeking populations.

Civil society actors usually coordinate their actions with UNHCR. However, relations with UNHCR can be tricky to navigate. UNHCR's opinion of their work can be influential; some funders make it an explicit requirement that their grantees collaborate with UNHCR. However civil society groups can have very strong differences of opinion with UNHCR officers on its policies and practices. As a Malaysian lawyer providing legal aid to refugees observed,

... we never operate under the assumption that UNHCR is doing everything right and I don't think they do, as well [...] They really try to balance a lot of things: not being shut down – which they have been threatened with before – but also dealing with a very hostile government [and] dealing with NGOs that are pushing them.<sup>9</sup>

A small but growing number of Malaysian lawyers have been more involved in legal aid to refugees. In some cases, they have aided refugees in appealing rejections in UNHCR's RSD process. A lawyer involved in the case of a female survivor of trafficking who had been rejected twice stated,

... they basically wanted legal representation because she was very traumatized... and she revealed it, like little bits and bobs here and there that... her husband had basically trafficked her and this... really horrible trafficking syndicate led to her arriving in Malaysia. This was really important information that UNHCR didn't have before. So, with that, we just kind of went all in and provided representation and she actually got accepted.... that was a really important case to know the value of legal representation.<sup>10</sup>

A controversial issue at time of writing is UNHCR's decision that Chin refugees no longer need protection based on their analysis that the situation in Chin state in Myanmar is now stable and secure. In India and Malaysia, Chin refugees have been informed that their refugee status will end on 31 December 2019; they have been strongly encouraged to return voluntarily. Civil society groups dispute UNHCR's analysis, noting that the situation in Chin state has not been fully stabilized despite some progress in recent years. In June 2018, hundreds of Chin refugees demonstrated at the UNHCR office in Malaysia, protesting this decision. Chin refugee groups remain unconvinced that it is safe to return and are worried that their loss of refugee status would result in greater precarity. The cessation of the status of Chin refugees highlights the significance of distinguishing refugees from migrants and how such acts are often contested, even amongst actors motivated to protect refugees.

It is important to note that asylum-seeking populations themselves have developed strategies to reduce their precarity. They have developed localized, contingent, negotiated arrangements with law enforcement officers that enable them to live with a greater security. They have been able to plead with police officers for the release of their friends or family members – often facilitated with the payment of a bribe. They have been able to visit friends and family in some detention centres, and to arrange for food and goods to be given to, or bought for, detainees. Some asylum-seeking groups have organized themselves into community-based organisations (CBOs), usually formed based on ethnic and/or territorial identity in their country of origin (McConnachie 2018; Nah, 2014). Through these organisations, refugees run programmes that help their members' access healthcare, education, and emergency donations (such as food and clothing). They often work in collaboration with Malaysian civil society actors. These self-help

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<sup>9</sup> Interview with a Malaysian lawyer for the Law of Asylum project, conducted in Kuala Lumpur on 25 November 2017.

<sup>10</sup> Interview with a Malaysian lawyer for the Law of Asylum project, conducted in Kuala Lumpur on 30 November 2017.

groups have also organised collective action – expressing political discontent outside of the embassies of their own countries, or, as mentioned above, protesting their treatment outside the gates of UNHCR.

A notable protection strategy that refugee CBOs have adopted are their own registration systems. The community cards they issue to their members have been given some recognition by the police, who sometimes accept them as a basis for identifying an individual as an asylum seeker. In the past, community registration cards were also accepted by UNHCR as a way of ‘pre-screening’ individuals as being genuine asylum seekers. Community registration has also been given recognition by the judiciary. In the case of *Tun Naing Oo vv PP*, mentioned above, the High Court judge advised asylum seekers and refugees to show their registration with their community as proof of their status to avoid a sentence of whipping. These are daily practices enacted by asylum-seeking groups to signify themselves as being different from other people on the move.

### **UNHCR’s ambiguous authority**

UNHCR’s efforts at identifying, protecting and assisting asylum-seeking populations have resulted in the emergence of an alternative regime of regulation aimed at minimizing the negative impacts of Malaysia’s immigration control mechanisms on them. Asylum-seeking populations place great importance on UNHCR registration and recognition of status; it is their only hope of avoiding arrest, detention, whipping and *refoulement* as well as of getting resettled. However, these interventions require the attentiveness of UNHCR staff; it places great pressure on them to respond to each case reported to them. There have been instances where UNHCR officers have not intervened on time, or at all; there are times when their interventions have been unsuccessful.

The creation of ‘protection space’ for refugees involves political sense-making in situations of uncertainty, in the face of occasional hostility from government officials. UNHCR officers often find themselves make strategic and operational decisions without being able to predict the outcomes of these decisions. In the eyes of civil society groups, they sometimes do not go far enough to protect the rights of refugees, while in the eyes of government authorities they sometimes overstep their mandate (for example, by protecting non-citizens who are not ‘really’ refugees) or fail to fulfill their role (for example, by not resettling refugees as quickly as they ‘should’). There are also key weaknesses in adopting the ‘protection space’ approach. As Jones (2014: 257) observes critically, this non-binding, non-legal approach,

privileges international interests, fora, and UNHCR as the negotiator; devalues the normative strength of obligations towards refugees; and, allows the underlying responsibility for the provision of refugee protection to drift from the state to UNHCR.

The impact of UNHCR field presences are also directly affected by funding. Since 2014, UNHCR’s average annual expenditure in Malaysia has been around 40-47 percent of its average annual budget (UNHCR, 2019f). UNHCR has become embedded in intervening and ‘rescuing’ refugees from Malaysia’s punitive immigration control regime, a role for which there seems no end. This state of affairs is unlikely to change unless Malaysia introduces a formal legal and administrative framework for the protection of asylum-seeking populations. To date, there are no signs that it intends to do so, despite repeated calls for this to happen from Malaysian civil society groups, UNHCR, and the international diplomatic community.

To perform its role of protection, UNHCR ‘mimics’ the approach of state authorities in regulating individuals – it documents individual identity and issues identity cards and letters. It regulates this population, requiring individuals to report themselves periodically to get their time-limited identity cards renewed. However, UNHCR’s reach is not comprehensive. There are thousands of asylum seekers and refugees who remain unregistered. A strategic question that confronts every UNHCR operation at the country level – and from which UNHCR in Malaysia is not exempt – is how far they are able to act for the protection of asylum-seeking populations before they ‘cross the line’. UNHCR is concerned about pushing too much, and thus reducing their ‘protection space’ – the space they are given to intercede for and provide services to populations in need. UNHCR officials express concern about being declared *persona non-grata*, being kicked out of the country, and having their country operations shut down. As UNHCR often operates with ambiguity, especially when they respond to unfolding crises and when they try out new initiatives, their fear leads them to be conservative in the interpretation of their mandate and cautious in their advocacy and actions. Two other beliefs shape the nature, quality and boldness of UNHCR’s advocacy and actions for refugees – first, the idea that such protection activities are not really their responsibility but the responsibility of host states (perhaps the psychological rejection by UNHCR officials of their role as ‘surrogate state’ officials), and relatedly, that whatever they manage to do is better than nothing at all.

UNHCR’s interventions demonstrate the interest of the international community in protecting a certain type of vulnerable non-citizen. UNHCR invokes a global governance regime for their protection, using whatever resources it can to compel Malaysia to recognise the special circumstances of asylum seekers and refugees. Cautious of its international image, Malaysia has tempered its exercise of sovereign power, allowing UNHCR to influence the behaviour of its law enforcement authorities. In documenting individual identity, UNHCR provides state authorities with a system for their individual regulation. UNHCR takes on properties of a ‘surrogate state’, but without sovereignty and with ambiguous authority.

## **Conclusion**

Despite the significant efforts at protection mentioned above, life is difficult for most, if not all, asylum-seeking populations in Malaysia. A large proportion suffers from extraordinarily high levels of stress, anxiety, post-traumatic stress disorder, and depression (HEI, 2010; 2011). Some struggle with traumas from the past, particularly if they were raped or tortured. Many live in, or very close to, poverty. Nevertheless, exile in Malaysia is also a time for re-constituting meaning, involvement, and achievement. Community leaders and workers have felt a deep sense of fulfilment when assisting their ‘own people’ (McConnachie, 2018; Nah, 2014). Refugees have become more connected to their own extended kin and to ethnic groups as they try to lead ‘normal’ lives in Malaysia, speaking familiar dialects, getting married, raising children, celebrating cultural identity, and enjoying their own food (Aziz, 2014; Hoffstaedter, 2014). They have also formed unexpected friendships with members of other ethnic groups from their country of origin. However, they are also vulnerable to high levels of violence and exploitation.

This article advances the argument that UNHCR’s approximation of a ‘surrogate state’ in complex migration contexts models to states the daily practices needed to protect asylum seekers and refugees. However, UNHCR’s presence and interventions at the domestic level are contingent on the cooperation and goodwill of states and their efforts are complicated by their ambiguous authority. Their focus on persons of their concern can result in the privileging of refugees over other mobile subjects, the exclusion of those ‘de-categorised’ as refugees, and

the neglect of many other non-citizens living with precarity. More comprehensive, integrated, rights-based measures are needed to attend to the specific circumstances of precarious mobile subjects in Southeast Asia to ensure that their rights are respected, protected, and fulfilled.

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