

CONFINED SPACES



**Legal Protections for Rohingya
in Bangladesh, Malaysia and Thailand**

Equal Rights Trust

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in Bangladesh, Malaysia and Thailand**

Equal Rights Trust

The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

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Charity number 1113288.

Yes I am a Rohingya
Yes I am from Myanmar
But I too am Human (...)

Somewhere I am restricted
Somewhere my rights are denied
Somewhere I am discriminated
Somewhere my rights are delayed (...)

Yes I am a Rohingya
Somewhere I do rag picking
Somewhere I am starving (...)
Somewhere I am in a cage
Somewhere I am simply helpless

Yes I am a Rohingya
Yes I am from Myanmar
I too am Human
I too am part of this world
I too wanna have a life just like you

Ali Jonah

Contents

Acknowledgments

Acronyms

Foreword

1 Introduction

13 International Legal Framework

National Law Papers

- | | | |
|------------|--|--|
| 57 | <i>Ashraful Azad</i> | Legal Status of the Rohingya in Bangladesh:
Refugee, Stateless or Status Less |
| 88 | <i>Asylum Access Malaysia,
Helen Brunt and
an anonymous third author</i> | The Rohingya in Malaysia |
| 164 | <i>Nussara Meesen,
Bongkot Napaumporn and
Sripapha Petcharamesree</i> | Legal Analysis: Holes and Hopes for Rohingya
in Thailand |
| 219 | Recommendations | |
| 230 | Bibliography | |

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Acronyms

AALCC	Asian-African Legal Consultative Committee
AALCO	Asian-African Legal Consultative Organisation
ACWC	ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
APC	Asia-Pacific Consultations
APRRN	Asia Pacific Refugee Rights Network
ASEAN	Association of Southeast Asian Nations
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDP	Internally Displaced Persons
ILO	International Labour Organization
MAS	Malaysia Airlines System
MoH	Ministry of Health
MOI	Ministry of Interior
NaSaKa	Nay-Sat Kut-kwey Ye (Inter-agency Border Force in Rakhine State)
NCPO	National Council for Peace and Order
NGO	Non-Governmental Organisation

NRD	National Registration Department
RRRC	Refugee Relief and Repatriation Commissioner
UDHR	Universal Declaration of Human Rights
UMN	Undocumented Myanmar Nationals
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs

Foreword



“Anwara” with a photograph of her stepfather. Anwara’s stepfather tried to rape her on three occasions but on each attempt her mother saved her.

Foreword

In the years to come, when future generations reflect on the history of the Rohingya, will the world be condemned as a spectator? This is our present trajectory. For decades, the Rohingya have been subjected to a perpetual state of uncertainty and despair, piqued by extreme violence and tragedy. They are victims of one of the most serious and sustained campaigns of ethno-religious discrimination in the world today. Just between October 2016 and April 2017 a reported 90,000 Rohingya fled their homeland in Myanmar, an escalation in previous rates of flight, rapidly adding to the hundreds of thousands of Rohingya who have fled to seek refuge in Bangladesh and other states before them.

Despite the efforts of many, the Rohingya's story has been quietly told. Every so often, reports of mass casualties during their flight at sea or the burning of their villages catch our attention and we shout into a void "more should be done". But all too soon, our collective consternation and demands for action dissipate. While Myanmar restricts access to the Rohingya's native home, Rakhine state (the center stage of the story), testimony which escapes indicates that the atrocities taking place are on such a catastrophic scale that it will not only be Myanmar which will be judged. If there is not a significant change in political will and the level of commitment from the international community, our sons and daughters will rightly ask us: where were you?

The focus of this collection of papers is on the responsibilities of states to which Rohingya have fled in their thousands, notably Bangladesh, Malaysia and Thailand. But before focusing our attention there, it would be a serious omission to fail first to visit Rakhine, Myanmar, the place from which these thousands feel forced to flee. And in so doing, we glimpse the scale of the current crisis, and the need for all to raise a strong and condemnatory voice against the deteriorating situation and a call to action, comes into sharp focus. Future generations are judging our next move.

As Part 1 of this volume expounds, the Rohingya have been subjected to decades of ethno-religious discrimination and statelessness which they suffer both in Myanmar and in the countries to which they flee. The latest chapter in their history, and arguably the most gruesome to date, began in October 2016 with new violence erupting in their native Rakhine. During this time, which continues to the present day, the brutality has taken a horrifying form. Atrocities credibly reported include unlawful killing, gang rape, infanticide and the mass destruction of property. Thus, the flight of the Rohingya accelerates. Last month, Rohingya activist, award-win-

ning photographer and partner of the Equal Rights Trust, Saiful Huq Omi spoke with some of those who have fled Myanmar and are now seeking refuge in Bangladesh. Abdur Rahim, originally from Chotogazobil village of Rakhine, depicted a chilling scene shortly before he fled. What he describes as happening to his neighbours is both horrifying and indelible.

"Some people had been shot and some killed with machetes. Some had burnt bodies, in some you could see their burnt bones and in others you could see half their skulls. The smell was so bad that nobody could get close to them. I knew some of those who had suffered and I went from one neighbourhood to another, collecting the remains of the dead bodies. I buried them all."

The response of the government to atrocities like these has been so far from adequate as to indicate complicity. *De facto* leader of the ruling National League for Democracy, Aung San Suu Kyi, praised by the international community for spearheading the struggle for human rights and the rule of law in Myanmar, continues to indicate that these values do not apply to Rakhine and the Rohingya. Suu Kyi continually and very publicly plays down events in Rakhine. In April, the world heard her refute that ethnic cleansing was taking place, in an interview with the BBC. She continues to deny a UN investigation into the violence and access to deliver humanitarian assistance and journalists are refused the right to enter Rakhine to report. Saiful Huq Omi reflects on his meetings with refugees: "Previously the state was a silent engineer in the background, but its involvement now is clearly more direct. It is not possible to burn every house and shoot every Rohingya, so the authorities are promoting a culture of fear and rumour and driving people out."

All eyes must turn to politicians and the international community. How are we going to respond? Quietly pretending this is not happening in order to work with Suu Kyi to push through other aspects of the democracy agenda in Myanmar is simply not an option in the face of the crimes reported and their catastrophic scale.

As to the focus of this collection of papers: the countries to which the Rohingya flee. What fate meets them there? Those who flee Myanmar usually begin by crossing the border to Bangladesh. Many seek refuge there, with some travelling further to Malaysia and Thailand and other countries. On their arrival, they, like many who have fled before them, meet a harsh reality, burdened by their statelessness and gaps in the national legal frameworks of these countries, they continue to suffer serious human rights violations and stigmatisation.

This collection of papers shines a light on the inadequacies in the national legal frameworks of Bangladesh, Malaysia and Thailand and identifies that none of the states are currently meeting their international obligations to protect, respect and fulfil the rights of Rohingyas who travel to or are born in their jurisdiction. Recent reports of violations of Rohingya rights in receiving states continue to trickle briefly but quietly onto the public stage. In May 2017, for example, the UNHCR reported 24 deaths in Malaysia's refugee detention centers since 2015, the majority of whom were from Myanmar. The escalation in the number of Rohingya seeking refuge, particularly in Bangladesh, since the outbreak of further violence in October, is exacerbating the problems. As Saiful Huq Omi observes: "Bangladesh is slowly losing its control, if it ever had any, completely. This actually encourages Bangladesh to completely blame others for the situation and deny its obligations as a civil state. But as we all know, its obligations don't go away."

So what must be done? First and foremost, we must persist in holding the NLD and Suu Kyi to account. We must continue to insist on a UN investigation and the resumption of permission for humanitarian assistance and freedom of the press in Rakhine. But, whilst doing so, we must not forget the large populations of Rohingya refugees living outside Myanmar. For too long countries in which Rohingya seek refuge have been abrogating and even denying their responsibilities.

As thousands make their way to Bangladesh, Malaysia and Thailand and other countries, there is great urgency for these governments not only to pressure Myanmar to uphold the rights of Rohingya, but to themselves enact and implement laws and policies to protect Rohingya. We must pressure them to do so.

So let us not tell the Rohingya story quietly. Let us not wait for the tragedy to further worsen before the Rohingya are pushed to centre stage. We must act now to expand the spaces of safety for Rohingya. We must act now to save lives.

Charlotte Broyd and Joanna Whiteman

This Foreword was updated in June 2017 in light of recent events relating to the ongoing violence in Rakhine State, Myanmar.

Introduction



A Rohingya girl plays hide and seek. Kuala Lumpur, Malaysia.

Introduction

The Rohingya are among the most vulnerable ethno-religious groups in the world. Seeking to escape the persecution and abuses they face in their native Myanmar, they flee to neighbouring states. Many Rohingya, having sought refuge in Bangladesh, Malaysia, Thailand and other countries, are stateless and find themselves subject to discrimination in all areas of life in the countries from which they seek protection. The situation of the Rohingya persists against the backdrop of an international legal framework designed to protect such individuals. To date, there has been no detailed examination of the extent to which the national legal frameworks in destination countries provide adequate protection to enable Rohingya to realise their rights. This publication seeks to address this gap in respect of three destination countries: Bangladesh, Malaysia and Thailand.

1. The Rohingya

a) Origins and Ethnic Identity

The Rohingya are an ethno-religious group from the Rakhine region, which is today encompassed within the borders of Myanmar and Bangladesh. They have historic connections to Rakhine State in Myanmar which significantly pre-date the existence of the present-day state of Myanmar.¹ According to the Minister of Immigration and Population in Myanmar, there were approximately 1.08 million Rohingya in Rakhine State in 2013.² However, the number is likely to be larger as Myanmar has been criticised for not accounting for a considerable number of people living in Rakhine state in its nationwide census.³ The term Rohingya is derived from the word “Rohang”, the ancient name of Rakhine State.⁴ Both the government

1 Grundy-Warr, C., and Wong, E., “Sanctuary under a Plastic Sheet –The Unresolved Problem of Rohingya Refugees”, *IBRU Boundary and Security Bulletin*, 1997, pp. 79–80.

2 Szep, J. and Marshall, A., “Myanmar minister backs two-child policy for Rohingya minority”, *Reuters*, 11 June 2013.

3 Heijmans, P., “Myanmar criticised for excluding Rohingyas from census”, *Al Jazeera*, 29 May 2015.

4 *Ibid.*; Charney, M.W., *Buddhism in Arakan: Theories and Histioriography of the Religious Basis of Ethnonyms*, 2005, available at: <http://www.kala danpress.org/index.php/scholar-column-main-menu-36/58-arakan-historicalseminar/718-buddhism-in-arakantheories-and-historiography-of-the-religiousbasis-of-ethnonyms.html>.

and the majority of the population in Myanmar deny the connections between the Rohingya and Myanmar and assert that the Rohingya are “illegal immigrants” from Bangladesh and thus refer to them as “Bengali”.⁵ The term “Rohingya” is not used by the government of Myanmar. For example, the 2014 census prevented Rohingya from identifying as such, resulting in their effective exclusion from the official results;⁶ at the time, the UN Population Fund issued a statement noting that the Government’s decision not to allow individuals to self-identify their ethnicity was a “departure from international census standards, human rights principles and agreed procedures” and was inconsistent with the guarantees the government of Myanmar had previously given the UN in relation to the census.⁷

b) Deprivation of Nationality

Following Myanmar’s independence from Britain in 1948, the Rohingya received National Registration Cards.⁸ The Rohingya were recognised as a separate ethnic group by the government of Prime Minister U Nu in the 1950s.⁹ However, after a military coup in 1962, this recognition was systematically withdrawn and the process of stripping the Rohingya of their identity and rights began.¹⁰

In 1982, Myanmar passed the Citizenship Act which specifies the 135 national ethnic groups entitled to citizenship; Rohingya are not included on this list and as a result are not explicitly entitled to citizenship.¹¹ However, there is scope under

5 Human Rights Watch, *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State*, 22 April 2013, available at: <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/32/18, 29 June 2016, Para 10.

6 *Ibid.*, Human Rights Council, Para 4.

7 UN Population Fund Myanmar, *Statement: UNFPA concerned about decision not to allow census respondents to self-identify as Rohingya*, 1 April 2014, available at: <http://myanmar.unfpa.org/news/statement-unfpa-concerned-about-decision-not-allow-census-respondents-self-identify-rohingya>.

8 Residents of Myanmar Registration Act, 1949.

9 Song, J. and Cook, A., *Irregular Migration and Human Security in East Asia*, Routledge, 2014, p. 71.

10 *Ibid.*

11 Burma Citizenship Law, 1982.

the Act for the Rohingya to have a legitimate claim to citizenship. Section 6 provides that all persons who were citizens at the time the Act came into force would continue to be so; moreover, the Act provides for “associate” citizenship, which allows those who had applied at the time of the Act entering into force to claim citizenship, and “naturalised” citizenship, which allows those who have roots in Myanmar prior to independence to claim citizenship.¹² Although Rohingya have a long-standing connection with Myanmar which pre-dates independence, many lack adequate documentation, meaning that they are not able to claim citizenship under the Act despite being technically eligible.

The problem of lack of documentation was exacerbated in 1989 when many Rohingya submitted their National Registration Cards to the authorities as part of their application for Citizenship Scrutiny Cards.¹³ Their applications for new Citizenship Scrutiny Cards were denied and the old National Registration Cards were not returned.¹⁴

c) Situation in Rakhine State

The Rohingya have faced successive waves of severe violence and human rights abuses in Rakhine state. In 1978, the government of Myanmar implemented Operation *Nagamin* (Dragon King) which aimed to “scrutinize each individual living in the State, designating citizens and foreigners in accordance with the law and taking action against foreigners who have filtered into the country illegally”.¹⁵ This operation targeted Rohingya living in Rakhine State and there were reports of “brutalities and atrocities waged against the Muslim population”.¹⁶ As a result, more than 200,000 Rohingya reportedly fled to Bangladesh seeking refuge.¹⁷

12 *Ibid.*, Sections 6, 23 and 42.

13 Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?*, 1 September 1996, available at: <http://www.refworld.org/docid/3ae6a84a2.html>; Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, October 2014, p. 10, available at: <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Thailand%20-%20Part%201.pdf>.

14 *Ibid.*, Equal Rights Trust.

15 See Human Rights Watch above, note 13. The statement was made by the Ministry of Home and Religious Affairs, 16 November 1977.

16 Scully, W.L. and Trager, F.N., “A survey of Asia in 1978 Part II (Feb 1979) Burma 1978: The thirteenth year of independence”, *Asian Survey*, Vol. 19, No. 2, 1979, p. 153.

17 Van Hear, N., *New Diasporas*, Routledge, 1998, p. 96.

In 1992, the Nay-Sat Kut-kwey Ye (NaSaKa) was established as an inter-agency border force in Rakhine State.¹⁸ The NaSaKa imposed a number of restrictions on the rights of Rohingya, such as requiring that they either perform forced manual labour or pay a weekly fee.¹⁹ More recently, there have been reports of the NaSaKa imposing arbitrary detention; Human Rights Watch has indicated that in 2011 the NaSaKa detained between 2,000 to 2,500 Rohingya for offences such as “repairing homes without permission”.²⁰ In addition, Rohingya women and girls have been the victims of sexual violence by NaSaKa members.²¹ Other human rights violations include the restriction of freedom of movement and the imposition of marriage restrictions upon Rohingya.²² Under Regional Order No. 1/2009, Rohingya must provide the authorities with one week’s notice before travelling within Rakhine state.²³ Rohingya must “follow costly and arduous administrative procedures to secure marriage permission”; non-compliance is a criminal offence which carries a maximum sentence of ten years’ imprisonment.²⁴

In June 2012, mass violence broke out in Rakhine State following reports of the rape and killing of a Buddhist woman by three Muslim men.²⁵ Initially, both Rohingya and ethnic Arakan groups were involved in the violence;²⁶ according to Human Rights Watch members of both groups were “storming neighbourhoods,

18 See Equal Rights Trust above, note 13, p. 10.

19 Irish Centre for Human Rights, *Crimes Against Humanity in Western Burma: The Situation of the Rohingyas*, 2010, pp. 41–49, available at: http://burmaactionireland.org/images/uploads/ICHR_Rohingya_Report_2010.pdf.

20 Human Rights Watch, “The Government Could Have Stopped This” – Sectarian Violence and Ensuing Abuses in Burma’s Arakan State, 31 July 2012, available at: <https://www.hrw.org/report/2012/07/31/government-could-have-stopped/sectarian-violence-and-ensuing-abuses-burmas-arakan>.

21 See above, note 19, pp. 74–75.

22 See Equal Rights Trust above, note 13, p. 10; Allard K. Lowenstein International Human Rights Clinic: Yale Law School, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State?*, October 2015, pp. 16–17.

23 Regional Order No. 1/2009; see also Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar*, February 2014, p. 33.

24 See Human Rights Council above, note 5, Para 44.

25 See Fortify Rights above, note 23, p. 17.

26 Equal Rights Trust, *Burning Homes, Sinking Lives: A situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh*, 2012, p. 9.

pillaging and setting fire to homes and other buildings and beating those they found".²⁷ However, this violence soon developed into "sustained and targeted attacks by Rakhine civilians and state security forces against Muslims, predominantly Rohingya Muslims".²⁸ This was followed by another wave of violence in October 2012.²⁹ The UN High Commissioner for Human Rights estimated that the 2012 violence led to the displacement of 140,000 people in Rakhine state.³⁰ The number of displaced persons remains very high, and according to the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), as of December 2016 there are 120,000 internally displaced people in Rakhine state.³¹

There is evidence that following the 2012 events, the Rohingya have been subjected to further human rights abuses. In a 2016 report to the Human Rights Council, the High Commissioner for Human Rights noted that restrictions on freedom of movement have been tightened and that "restrictions on movement in [IDP] camps are severe and many are under extreme security measures".³² The High Commissioner suggested that "many camps could be considered as places of deprivation of liberty under international law"³³ and further noted that:

*Following the 2012 violence, OHCHR received credible reports of the arbitrary arrest and detention of hundreds of Rohingya, including women and children and consistent allegations of torture and ill-treatment. This included severe beating, burning by cigarettes, burning of beards, forced labour, sexual humiliation and abuse, denial of medical treatment, degrading conditions of detention and deaths in custody.*³⁴

In November 2016, reports emerged of another outbreak of violence in Rakhine State following attacks on border guard posts that resulted in the killing of nine po-

27 See above, note 20.

28 *Ibid.*

29 See Allard K. Lowenstein International Human Rights Clinic above, note 22, p. 24.

30 See Human Rights Council above, note 5, Para 10.

31 UNOCHA Myanmar, "Key Figures", accessed January 2017, available at: <http://www.unocha.org/myanmar>.

32 See Human Rights Council above, note 5, Paras 29–30.

33 *Ibid.*

34 *Ibid.*, Para 33.

lice officers.³⁵ Despite government claims to the contrary,³⁶ access to Rakhine state for humanitarian workers and the media remains restricted and so reporting from the region is limited.³⁷ However, since these attacks, it has been reported that the government has launched security operations in Rakhine state and that security services are responsible for unlawful killings, sexual violence, and the burning down of houses and entire villages of Rohingya.³⁸ Furthermore, as a result of ongoing violence in Rakhine state, the humanitarian situation dramatically deteriorated for Rohingya, both within the IDP camps and across Rakhine state, with humanitarian agencies experiencing restrictions which hamper their ability to deliver aid.³⁹

The worsening of the situation of Rohingya in Rakhine state over the past years has attracted widespread condemnation. In light of the most recent violence, the Myanmar government is coming under increasing pressure and some organisations have gone so far as to allege that the abuses suffered by the Rohingya in Rakhine State constitute genocide under international law.⁴⁰

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- 35 France-Presse, A., "Myanmar violence: dozens killed as army clashes with Rohingya in Rakhine state", *The Guardian*, 14 November 2016, available at: <https://www.theguardian.com/world/2016/nov/14/myanmar-rohingya-violence-dozens-killed-army-clashes>.
 - 36 Phyto, P.T., "Govt claims media not restricted in Rakhine State conflict zone", *Myanmar Times*, 18 October 2016, available at: <http://www.mmtimes.com/index.php/national-news/23156-govt-claims-media-not-restricted-in-rakhine-state-conflict-zone.html>.
 - 37 US Embassy in Burma, *Joint Statement on Humanitarian Access to northern part of Rakhine State*, 9 December 2016, available at: <https://mm.usembassy.gov/joint-statement-humanitarian-access-northern-part-rakhine-state>; Slow, O., "Two months on, renewed humanitarian access call in northern Rakhine", *Frontier Myanmar*, 12 December 2016, available at: <http://frontiermyanmar.net/en/two-months-on-renewed-humanitarian-access-call-in-northern-rakhine>; Amnesty International, "Myanmar: Lift restrictions immediately on humanitarian aid", *Amnesty International*, 20 October 2016, available at: <https://www.amnesty.org/en/latest/news/2016/10/myanmar-lift-restrictions-immediately-on-humanitarian-aid>; Human Rights Watch, "Burma: Aid Blocked to Rakhine State", *Human Rights Watch*, 21 October 2016, available at: <https://www.hrw.org/news/2016/10/21/burma-aid-blocked-rakhine-state>.
 - 38 Amnesty International, "*We are at breaking point*" – *Rohingya: Persecuted in Myanmar, Neglected in Bangladesh*, 19 December 2016, pp. 8–9, available at: <https://www.amnesty.org/en/documents/asa16/5362/2016/en>.
 - 39 Kyodo News, "Myanmar asks Malaysia to block aid to Rohingya", *Bangkok Post*, 7 January 2017, available at: <http://www.bangkokpost.com/news/general/1175945/aid-to-rohingya-may-be-blocked>; United Nations World Food Programme, *WFP Myanmar Country Brief*, 2016, p. 2, available at: <http://documents.wfp.org/stellent/groups/public/documents/ep/wfp273246.pdf>; see Amnesty International above, note 37.
 - 40 International State Crime Initiative, *Countdown to Annihilation: Genocide in Myanmar*, 2015, available at: <http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VER>

2. Equal Rights Trust Work to Date

The Equal Rights Trust has had a long-term interest in the issue of statelessness. In 2010, we published a report titled “Unravelling Anomaly” which examined discrimination in the context of statelessness. Since that time we have been involved in working specifically on the situation of Rohingya in Bangladesh, Malaysia, Myanmar and Thailand. The objective of our work in the region is to strengthen the right to a nationality, legal stay rights and the human rights of stateless Rohingya and we have conducted a range of activities. Among other activities pursuing this objective, we have commissioned and conducted research and documentation. In 2012 we published two situation reports on the violence in Myanmar and the treatment of Rohingya in Bangladesh; and in 2014 we published two reports on the situation of the Rohingya in Thailand and Malaysia. We have commissioned photographic documentation of the lives of Rohingya in Bangladesh and other destination countries, and have provided grants to journalists to collect information and publish stories on the situation of the Rohingya.

Recognising the importance of exploring the legal protection available to Rohingya whose families have, at some point, fled Myanmar, the Trust also commissioned research on the national legal situation in relation to the Rohingya in Bangladesh, Malaysia and Thailand. This publication publishes the conclusions of that research, as well as an analysis into the international legal framework regulating the treatment of the Rohingya.

3. Purpose and Structure of Publication

The purpose of this publication is to analyse the legal framework relevant to the situation of the Rohingya in Bangladesh, Malaysia and Thailand. It is intended to

SION.pdf; see Allard K. Lowenstein International Human Rights Clinic above, note 22. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 1948, Article II defines genocide as: *any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

- (a) *Killing members of the group;*
- (b) *Causing serious bodily or mental harm to members of the group;*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) *Imposing measures intended to prevent births within the group;*
- (e) *Forcibly transferring children of the group to another group.*

complement the Trust's existing literature on the plight of the Rohingya,⁴¹ and that produced by other organisations. The publication first explores rights protected under the international legal framework and the extent of Rohingya rights under this framework. The three commissioned papers then explore the national legal framework in each of Bangladesh, Malaysia and Thailand and, in so doing, identify protection gaps.

The publication is comprised of four parts. **Part 1** provides an introduction. **Part 2** contains an overview and analysis of the international legal framework relevant to the discrimination, inequality and related human rights violations and challenges faced by the Rohingya. **Part 3** contains three research papers one on each of Bangladesh, Malaysia and Thailand and each focusing on the extent to which the national legal framework in the country of focus adequately protects the rights of Rohingya living there and **Part 4** sets out some overarching recommendations.

4. Methodology

a) International Legal Framework

The Equal Rights Trust conducted desk-based research on the international legal framework in relation to the rights of the Rohingya under international human rights, refugee and statelessness law. On the basis of this research, the Trust drafted Part 2 on the International Legal Framework. Peer review comments were provided by Amal de Chickera and Stefanie Grant.

b) National Law Papers

In 2015 the Trust commissioned a series of papers exploring the position of Rohingya under law in Bangladesh, Malaysia and Thailand. While the Trust assisted the authors by commenting on the papers, procuring and sharing peer review comments and providing editorial assistance, any views expressed in the papers are the respective authors' own.

41 Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010; Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, 2010; Equal Rights Trust and Institute of Human Rights and Peace Studies, Mahidol University, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, 2014; see above, note 26; see also Equal rights Trust above, note 13.

i) Bangladesh Paper

The Bangladesh paper was prepared by Ashraful Azad (the Bangladesh paper author) who conducted a desk-based analysis of legal instruments, academic literature and media reports to assess the compliance of Bangladesh with its international commitments in relation to the protection of the Rohingya. The research was also supported primary research in the form of interviews with key stakeholders in Bangladesh. The Bangladesh paper author presented a draft of the paper at two events attended by civil society representatives, experts and journalists which were held in Bangkok and in Dhaka. UNHCR contributed background information to this paper and the paper was subjected to peer review by Dr Ridwanul Hoque.

The paper contains four sections. Section 1 sets out an introduction to the issues faced by the Rohingya in Bangladesh. Section 2 examines Bangladesh's international and regional legal obligations and the status of international law in Bangladesh. Section 3 examines the relevant national law framework and considers the Constitution as well as other specific laws relevant to the Rohingya. Section 4 examines the right of Rohingya in Bangladesh to freedom of movement and Section 5 considers the rights of birth and marriage registration. Section 6 sets out the conclusions of the paper and Section 7 presents recommendations to the Bangladeshi government on the basis of the legal analysis in the paper.

ii) Malaysia Paper

In preparation of the Malaysia research paper, Helen Brunt, Asylum Access Malaysia, and a third author who wished to remain anonymous (the Malaysia paper authors) conducted research and analysis of how the law and policy framework of Malaysia relates to the human rights of stateless Rohingya in the country. The Malaysia paper was drafted on the basis of this research. The research was a desk-based analysis of existing published sources which assessed the situation of stateless Rohingya in Malaysia. A draft of this paper was subject to a peer review process by parties with expert knowledge of the issues faced by the Rohingya including: Caitlin Wake and Chris Lewa. These experts critically evaluated the paper, and their feedback, comments, criticisms were incorporated into the draft. In addition, UNHCR provided some background information which informed the content of the final paper.

The paper contains seven sections. Section 1 introduces the issue. Section 2 analyses the Malaysian legal system and key legislation. In particular, it sets out the sta-

tus of international law in Malaysia, provides a brief overview of the development of Malaysia's legal system and the role of the courts. This section also provides a general introduction to the relevant domestic laws that are discussed throughout the paper. Section 3 focuses on Malaysia's citizenship and nationality laws, policies and practices, and the legal status of Rohingya in Malaysia. This section also includes a discussion on the judicial interpretation and analysis of provisions related to acquisition of citizenship, particularly for the Rohingya. Section 4 focuses on the right of the Rohingya in Malaysia to liberty and security of person, Section 5 examines the right to work. Section 4 and 5 provide an overview of the relevant government policies and legislation for each human right, as well as identifying potential opportunities within the law for advocacy around increased protection for Rohingya in Malaysia. Section 6 presents other developments in relation to both the right to liberty and security of the person and the right to work and Section 7 sets out recommendations drawn from an analysis of the legal and policy framework for citizenship and nationality, right to work and liberty and security of persons specifically related to Rohingya in Malaysia.

iii) Thailand Paper

For the Thailand research paper, Sriprapha Petcharamesree, Nussra Meesen and Bongkot Napaumpor (the Thailand paper authors) conducted a desk-based literature review of both legal and non-legal sources. On the basis of this research, the Thailand paper authors prepared a draft of this paper which was then presented for consideration at three events in Thailand attended by civil society representatives and experts. Feedback and information received through these events was incorporated into the draft. UNHCR contributed background information to this paper and the paper was subjected to peer review by Dr Darunee.

The paper on the Rohingya in Thailand contains 6 sections. Section 1 introduces the issues of the Rohingya and nationality. Section 2 provides an overview of statelessness and stateless persons in Thailand, including the situation of Rohingya. Sections 3 and 4 focus on the concepts, development and analysis of Thailand's nationality and immigration laws with regards to impact on the protection of the rights of Rohingya, and opportunity and challenges applied to them. Section 5 explores the right to birth registration and Section 6 explores the right to work. Finally, Section 7 contains conclusions and recommendations.

5. Recommendations

In addition to the recommendations made to national governments by the authors, the Equal Rights Trust has developed a set of overarching recommendations for key stakeholders at the international, regional and national levels. These appear in Part 4 of the publication. These recommendations were subjected to peer review by the authors of the national law papers, together with Caitlin Wake, Chris Lewa and Dr Ridwanul Hoque.

International Legal Framework



Abul Kalam, a Rohingya man from Rakhine State who now resides in Bangladesh points towards “home” (Myanmar) on the other side of the River Naf.

International Legal Framework

1. Introduction

This section provides an overview of the international legal framework relevant to the Rohingya in Bangladesh, Malaysia, and Thailand. The international framework consists of binding obligations which are set out in international treaties and customary international law, and non-binding exhortative principles which are set out in various regional agreements and declarations. This section seeks to examine the relationship between these different forms of law to paint a picture of the rights to which Rohingya are, or in some cases, should be, entitled to.

None of the countries addressed by this report have ratified the treaties which are most directly relevant to the Rohingya – namely the Refugee Convention and the two Statelessness Conventions. Although this is regrettable, it does not leave the Rohingya, or indeed any refugees or stateless persons in Bangladesh, Malaysia and Thailand, without rights.

First, as is discussed further below, certain obligations set out in international refugee law and statelessness law have the status of “customary international law” and are therefore binding on all the states in question.

Second, each of the three states in question has ratified, to varying degrees, several of the “core” human rights treaties. Although none of these treaties are specifically directed at the statelessness or refugee context, they contain a number of rights which are directly relevant to the Rohingya, including the rights to legal status, rights to equality and non-discrimination, right to work, the right to be free from arbitrary detention, the right to freedom of movement and the right to family life. This report introduces these rights and explores the ways in which these rights are particularly important to the Rohingya.

Finally, treaties which have not been ratified have an important interpretative function, as they can be used to elucidate: (i) obligations under treaties to which a state is party, to the extent that the treaties to which it is not a party can explain concepts which are also found in those treaties to which it is a party; and (ii) the content of the right to equality and non-discrimination for persons covered by the ratified treaties who are vulnerable to multiple discrimination on grounds

which include those protected by other treaties or in areas of life covered by other treaties.

Similarly, there are certain principles of international law which are formally non-binding. These are nevertheless important, as by signing up to a declaration, agreement or set of principles, a state has made a public commitment to uphold the values expressed therein.

2. International Legal Framework: Sources

a. *International and Regional Human Rights Treaty Obligations*

i. *International Human Rights Treaties*

It is a well-established principle of international law that states are obliged to protect the rights of all individuals within their territory and jurisdiction. This obligation can be found in a number of international human rights instruments,¹ and applies to every individual irrespective of their nationality or statelessness.² States are also subject to specific obligations by virtue of their ratification of international legal instruments, such as the International Covenant on Civil and Political Rights (ICCPR). These treaty obligations are supplemented by both the jurisprudence and general comments of international treaty bodies, such as the Human Rights Committee.

While human rights are universal, as a matter of international human rights law states have slightly fewer obligations to non-nationals (including stateless persons) than to nationals. However, other than in the case of developing states, permissible distinctions are very limited. In the core human rights treaties, for example, only a small handful of political rights in relation to voting, access public service and the

1 See, for example, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1966, Article 2(1). Under the object and purpose test, the Human Rights Committee has noted that any reservation to the obligation to ensure and respect Convention Rights, and to do so on a non-discriminatory basis, would not be acceptable. See Human Rights Committee, *General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 1994, Para 9.

2 Human Rights Committee, *General Comment 15, The position of aliens under the Covenant*, 1986, Para 1.

ability to stand for election, are reserved to citizens.³ States may also justify different treatment of nationals and non-nationals provided any such differences pursue a legitimate aim and do not go beyond what is necessary to achieve that aim, i.e. are proportionate.⁴ In addition, under Article 2(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) developing states are expressly permitted to “determine to what extent they would guarantee economic rights...to non-nationals” under the Covenant. This provision is applicable to Bangladesh but not to Malaysia or Thailand.⁵ Collectively, these distinctions result in a protection gap for non-nationals, including stateless persons. For example, as a result of the reservation of a handful of political rights to citizens, disenfranchisement is a common problem for stateless persons.⁶ Where it applies, Article 2(3) of ICESCR can result in the “economic disempowerment of stateless persons”⁷

The table below sets out which of the core international human rights treaties Bangladesh, Malaysia and Thailand have ratified or acceded to. The cells shaded grey indicate that the relevant country has entered a declaration or reservation in respect of certain of the obligations under that treaty.

Relevant Treaty Obligations	Bangladesh	Malaysia	Thailand
Convention Against Torture (CAT) ⁸	05/10/1998 ⁹	X	02/10/2007 ¹⁰

3 International Covenant on Civil and Political Rights, Article 25.

4 Committee on the Elimination of Racial Discrimination, *General Recommendation XXX on Discrimination Against Non Citizens*, 1 October 2002, Para 4.

5 Only Bangladesh features on the latest review of the least developed countries. See, Department of Economic and Social Affairs of the UN Secretariat, *The least developed country category 2015 country snapshots*, 2015, available at: http://www.un.org/en/development/desa/policy/cdp/cdp_publications/2015_ldc_factsheet_all.pdf.

6 Institute on Stateless and Inclusion, *The World's Stateless*, December 2014, p. 28, available at: <http://www.institutesi.org/worldsstateless.pdf>.

7 *Ibid*, p. 29.

8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. 39/46, 1984.

9 Bangladesh has entered a reservation in respect of Article 14(1) stating that the right to redress will be applied “In consonance with the existing laws and legislation in the country.”

10 Thailand entered a reservation to Article 30(1) which allows parties to refer disputes to the International Court of Justice and a declaration on the object and purpose of the Convention. Thailand also entered an interpretative declaration on the definition of torture under Article 1, the offence under Article 4, and the jurisdiction clause under Article 5.

Relevant Treaty Obligations	Bangladesh	Malaysia	Thailand
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ¹¹	06/11/1984 ¹²	05/07/1995 ¹³	09/08/1985 ¹⁴
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) ¹⁵	24/08/2011	X	X
Convention on the Rights of the Child (CRC) ¹⁶	03/08/1990 ¹⁷	17/02/1995 ¹⁸	27/03/1992 ¹⁹

- 11 Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, 1979.
- 12 Bangladesh has entered a reservation noting that it is not bound by Articles 2 (the requirement to undertake measures to eliminate discrimination against women), 13(a) (the right to family benefits on an equal basis), 16(1)(c) (equality during marriage and at its dissolution) and 16(1)(f) (equality in relation to guardianship or adoption of children) as these provisions conflict with *Sharia* law.
- 13 Malaysia has entered a reservation noting that it does not consider itself bound by Article 9(2) (equality of rights in respect of nationality of children), 16(1)(a) (the same right to enter marriage), 16(1)(c) (equality during marriage and at its dissolution) and 16(1)(f) (equality in relation to guardianship or adoption of children), and 16(1)(g) (equality in personal rights as husband and wife).
- 14 Thailand entered a reservation in respect of Article 29(1) which allows parties to refer disputes to the International Court of Justice and a declaration on the object and purpose of the Convention.
- 15 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 U.N.T.S. 3, 1990.
- 16 Convention on the Rights of the Child, 1577 U.N.T.S. 3, 1989.
- 17 Bangladesh entered a reservation to Article 14(1) (the right of the child to freedom of thought, conscience and religion) and notes that Article 21 (on the system of adoption) applies subject to national law.
- 18 Malaysia entered reservations to Article 2 (the requirement to guarantee all the rights in the Convention without discrimination), 7 (the right to birth registration), 14 (the right of the child to freedom of thought, conscience and religion), 28(1)(a) (the right of all to free, compulsory primary education) and 37 (obligation on states to ensure that children are not subject to torture, inhuman or degrading treatment, deprived of their liberty unlawfully or arbitrarily, ensure the right to prompt legal access and that any deprivation of liberty takes account of the child's age) noting that such provisions are applicable only to the extent that they are consistent with the Constitution and national law.
- 19 Thailand entered a reservation to Article 22 (rights of children seeking refugee status) such that it only applies subject to national law.

Relevant Treaty Obligations	Bangladesh	Malaysia	Thailand
Convention on the Rights of Persons with Disabilities (CRPD) ²⁰	30/11/2007	19/07/2010 ²¹	29/07/2008
International Covenant on Civil and Political Rights (ICCPR) ²²	06/09/2000 ²³	X	29/10/1996 ²⁴
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) ²⁵	11/06/1979	X	28/01/2003 ²⁶
International Covenant on Economic, Social and Cultural Rights (ICESCR) ²⁷	05/10/1998 ²⁸	X	05/09/1999 ²⁹

20 Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S 3, 2006.

21 Malaysia has entered a reservation in respect of Articles 15 (freedom from torture) and 18 (liberty of movement and nationality). It also entered a declaration that the interpretation of the Constitutional principles of equality and non-discrimination shall not contravene the guarantees of equality and non-discrimination in the Convention and interprets the rights to participation in cultural life under Article 30 as a matter for national law.

22 International Covenant on Civil and Political Rights.

23 Bangladesh has entered a reservation in respect of Article 14 about trials in absentia and declarations in respect of Articles 10 noting its lack of financial capacity in relation to the reformation and social rehabilitation of prisoners,¹¹ noting exceptional circumstances under national law allowing for civil imprisonment for breach of contract and 14 noting its limited resources to implement the Article 14(3)(d) on the provision of legal assistance to persons charged with criminal offences.

24 Thailand has entered interpretive declarations in respect of the definition of “self-determination” in Article 1 and “war” in Article 20.

25 International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 1965.

26 Thailand has entered a reservation to Article 22 (which allows parties to refer disputes to the International Court of Justice and a declaration on the object and purpose of the Convention) and an interpretive declaration that the provisions of ICERD only apply to the extent they are consistent with national law.

27 International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 1966.

28 Bangladesh entered a declaration on the interpretation of self-determination under Article 1. It also noted that it would implement Articles 2 and 3 (in relation to gender equality) and Articles 7 (the right to just and favourable conditions of work) and 8 (in relation to trade union rights) consistently with national law. Finally, it noted that its implementation of Articles 10 (on protection of the family) and 13 (right to education) progressively.

29 Thailand entered an interpretative declaration on self-determination in Article 1.

Relevant Treaty Obligations	Bangladesh	Malaysia	Thailand
1951 Refugee Convention ³⁰	X	X	X
1967 Refugee Convention Optional Protocol ³¹	X	X	X
1954 Convention relating to the Status of Stateless Persons ³²	X	X	X
1961 Convention on the Reduction of Statelessness ³³	X	X	X

As the table above shows, each of the states covered has a number of reservations to the treaties ratified. Several of these reservations directly impact on the rights of the Rohingya, most notably:

- Malaysia's reservations under:
 - CRPD in relation to the Article 18 right to freedom of movement,
 - CRC in relation to the Article 2 requirement on non-discrimination, Article 7 on birth registration and Article 28(1)(a) on the right to primary education.
 - CEDAW in relation to Article 9(2) on equal rights between men and women in respect of the nationality of children.
- Thailand's reservations under:
 - CRC in relation to Article 22 on the rights of children seeking refugee status.

Both Malaysia and Thailand have been encouraged to consider removing their reservations and to accede to those treaties to which they are not party.³⁴ However, there has been no progress on those reservations which relate to the rights of

30 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 1954.

31 Convention relating to the Status of Refugees, Optional Protocol, 606 U.N.T.S. 267, 1967.

32 Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, 1954.

33 Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, 1961.

34 Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Malaysia*, UN Doc. A/HRC/25/10, 4 December 2013, Para 146.6; Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Thailand*, UN Doc. A/HRC/19/8, 8 December 2011, Para 89.1.

stateless Rohingya beyond a broad commitment from Thailand to review all reservations “on a regular basis”.³⁵

None of the countries addressed in this report are party to the Convention Relating to the Status of Refugees (Refugee Convention), its Protocol Relating to the Status of Refugees adopted in 1967, or either of the statelessness conventions: the Convention relating to the Status of Stateless Persons (1954 Convention) or the Convention on the Reduction of Statelessness (1961 Conventions). As a result, unless a relevant provision of the Conventions has attained the status of customary international law, Bangladesh, Malaysia and Thailand are not bound by the specific obligations under international law in relation to stateless persons and refugees as set out in these Conventions.

In addition to obligations under international human rights treaties, as Member States of the United Nations, all states are obligated by the UN Charter to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.³⁶

ii. Relevant Regional Human Rights Treaties

Malaysia and Thailand are Member States of the Association of South East Asian Nations (ASEAN). Malaysia took up the Chairmanship of ASEAN in 1977, 1997, 2005 and most recently in 2015; Thailand was Chair in 1995, 2008 and 2009.³⁷ Under the auspices of their membership of ASEAN, Malaysia and Thailand have also appointed one representative each to the ASEAN Inter-governmental Commission on Human Rights (AICHR)³⁸ and to the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).

35 Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Malaysia – Addendum*, UN Doc. A/HRC/25/10/Add.1, 4 March 2014, Para 10; Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Thailand – Addendum*, UN Doc. A/HRC/19/8/Add.1, 6 March 2012, Para 4.

36 United Nations, *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S XVI, Article 55(c).

37 Association of South East Asian Nations, *ASEAN Chair*, accessed December 2016, available at: <http://asean.org/asean/asean-chair>.

38 Association of South East Asian Nations Intergovernmental Commission on Human Rights, *AICHR Representatives*, available at: <http://aichr.org/about/aichr-representatives>.

On 18 December 2012, the ASEAN Heads of State adopted the ASEAN Human Rights Declaration (AHRD).³⁹ The AHRD, whilst non-binding, demonstrates a regional commitment to the protection of human rights without discrimination; including of stateless minorities such as the Rohingya. Under Article 18 of the AHRD: “Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.” The right to nationality under Article 18 is “as prescribed by law”; this could be interpreted as a limitation on the right to nationality such that it is to subject the right to nationality to nationality;⁴⁰ however, “law” can and should include norms of international law under both ratified international human rights treaties and customary international law.⁴¹

The AHRD also imposes upon Member States, including Malaysia and Thailand “the primary responsibility (...) to promote and protect all human rights and fundamental freedoms”⁴² without distinction.⁴³ Most recently, a Declaration on Strengthening Education for Out-of-School Children and Youth was adopted by ASEAN heads of state, including Malaysia and Thailand, which, *inter alia*, reaffirms the importance of the right of *every person* to an education, including compulsory free primary education, and secondary education to be made available through every appropriate means.⁴⁴

ASEAN Member States have also declared through the AHRD⁴⁵ that:

39 Association of South East Asian Nations, *Human Rights Declaration*, 13 February 2013, available at: http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

40 American Bar Association Rule of Law Initiative, *The ASEAN Human Rights Declaration: A Legal Analysis*, 2014, p. 47, available at: <http://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>.

41 *Ibid.*

42 See above, note 39, Article 6.

43 *Ibid.*, Article 2. It should be noted, whilst Bangladesh is not a member of the Association of Southeast Asian Nations, it is a member of the Association of South East Asian Nations regional forum.

44 Association of South East Asian Nations, *Declaration on Strengthening Education for Out-of-School Children and Youth*, 6 September 2016, available at: http://asean.org/storage/2016/09/ASEAN-Declaration-on-OOSCY_ADOPTED.pdf.

45 See above, note 39, Article 4.

*The rights of women, children, the elderly, persons with disabilities, migrant workers, and **vulnerable and marginalised groups** are an inalienable, integral and indivisible part of human rights and fundamental freedoms (emphasis added).*⁴⁶

Article 16 of the AHRD provides that “every person has the **right to seek and receive asylum** in another State in accordance with the laws of such State and applicable international agreements (emphasis added).”⁴⁷

Malaysia, Thailand and Bangladesh are all members of the Asian-African Legal Consultative Organization (AALCO) which adopted the non-binding Bangkok Principles on Status and Treatment of Refugees in 1966 (Bangkok Principles).⁴⁸ The Bangkok Principles provide a definition of “refugee”⁴⁹ and also set out the following non-binding obligations on signatories: *non-refoulement* of asylum seekers,⁵⁰ to provide treatment to refugees which is no less favourable than that provided generally to aliens,⁵¹ to treat all refugees in non-discriminatory way,⁵² to adopt effective measures to improve the protection of refugee women,⁵³ not to deport or return a refugee to a country where his life and liberty would be threatened⁵⁴ and respect the voluntary nature of repatriation.⁵⁵

b. International Refugee Law

In 1951 Refugee Convention was adopted, bringing with it the first real regime for the protection of the refugee rights. In 1954 the Convention came into force,

46 *Ibid.*, Article 4.

47 *Ibid.*, Article 16.

48 Asian-African Legal Consultative Organisation, *Bangkok Principles on the Status and Treatment of Refugees*, 31 December 1966, available at: <http://www.unhcr.org/455c71de2.pdf>.

49 *Ibid.*, Article I.

50 *Ibid.*, Article III(1).

51 *Ibid.*, Article IV(1).

52 *Ibid.*, Article IV(5).

53 *Ibid.*, Article IV(6).

54 *Ibid.*, Article V(3).

55 *Ibid.*, Article VII(1).

whilst an amending Protocol Relating to the Status of Refugees was adopted in 1967. None of the states examined by this report are party to either the Refugee Convention or its Protocol.

During the most recent Universal Periodic Review process,⁵⁶ Bangladesh in response to recommendations to ratify the Refugee Convention simply noted that it “has always adhered to the core principles of the international protection regime, including the principle of *non-refoulement*” and “the issue of considering ratification to the concerned Conventions needs to be considered in view of the realities on the ground”;⁵⁷ Malaysia, failed to commit to accession of these instruments in its most recent performances at the Universal Periodic Review.⁵⁸ Thailand committed to “consider ratifying” the 1951 Refugee Convention and its Protocol.⁵⁹

Bangladesh and Thailand are both members of the UNHCR Executive Committee⁶⁰ which has appealed to Governments to “follow, or continue to follow, liberal practices in granting permanent or at least temporary asylum to refugees who have come directly to their territory”.⁶¹ Bangladesh and Thailand can be expected to adhere to the high standards which they, as members of the Executive Committee, call upon other States to comply with.

Although Bangladesh, Malaysia and Thailand have not ratified the Refugee Convention, certain principles of the Convention have the status of customary international law and bind Bangladesh, Malaysia and Thailand. The Convention also provides a benchmark against which a State’s protection of refugees may be measured.

⁵⁶ Universal Periodic Review is a state-led review of the compliance with international human rights law of all UN Member States. See, Office of the High Commissioner of Human Rights, “Basic Facts about the UPR”, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

⁵⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Bangladesh*, Addendum, UN Doc. A/HRC/24/12/Add.1, 23 July 2013, Recommendation 130.7.

⁵⁸ See above, note 35, Para 9.

⁵⁹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Thailand – Addendum*, UN Doc. A/HRC.19/8/Add.1, 6 March 2012, Recommendation 89.5.

⁶⁰ UNHCR, *UNHCR Executive Committee of the High Commissioner’s Programme Composition for the period October 2016 – October 2017*, 7 October 2016, available at: <http://www.unhcr.org/uk/excom/scaf/5748082a4/list-members-observers-2016-2017.html>.

⁶¹ UN High Commissioner for Refugees, *Asylum*, Conclusion No. 5 (XXVI), adopted by the Executive Committee on the International Protection of Refugees, 1977.

Article 1 of the Refugee Convention defines the term refugee as any person who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶²

This definition is well established under international law. It is important to note that stateless persons may not meet this definition, as to be stateless means an individual is not considered a national by any state⁶³ whereas a refugee is a person who, in accordance with the definition in Article 1 above, has fled his or her country owing to a well-founded fear of persecution. Although refugee status and statelessness are distinct, there may be connections between the two. For example, the children of refugees who are born abroad may not be able to inherit their parent's nationality or the nationality of the country in which they are born, resulting in their statelessness.⁶⁴ It is possible to be both a refugee and stateless, and to the extent that stateless persons meet the definition under Article 1 above, they are refugees under international law.⁶⁵

To the extent that Rohingya in Bangladesh, Malaysia and Thailand meet the definition under Article 1, they are refugees regardless of whether they have been granted formal recognition as refugees.⁶⁶ However, Rohingya fleeing Myanmar are frequently deemed to be "economic migrants" largely because these countries are more likely to perceive refugee flows from an immigration control lens and not a protection one. Although economic migrants are not refugees, UNHCR has noted

⁶² Convention Relating to the Status of Refugees, Article 1(A)(2).

⁶³ Convention Relating to the Status of Stateless Persons, Article 1.

⁶⁴ Institute on Statelessness and Inclusion, *Understanding statelessness in the Syria refugee context*, 2016, p. 11, available at: <http://www.syrianationality.org/pdf/report.pdf>.

⁶⁵ UN High Commissioner for Refugees, *Handbook and guidelines on Procedures and Criteria for Determining Refugee Status*, December 2011, Para 102, available at: <http://www.unhcr.org/3d58e13b4.html>.

⁶⁶ The recognition of refugee status is a declaratory act and the rights of refugees are invoked before their status is formally recognised by a decision-maker.

that where economic measures “destroy the economic existence of a particular section of the population”, victims may become refugees upon leaving the country.⁶⁷ Moreover, to the extent that Rohingya leave Myanmar to escape violence or other persecution that they experience for reasons related to their ethnicity, they qualify as refugees. A number of international and regional NGOs have recognised that Rohingya in Bangladesh, Malaysia and Thailand are refugees.⁶⁸

The Refugee Convention governs various aspects of the rights of refugees, including personal status, employment, welfare and expulsion and requires that all its provisions be applied without discrimination as to race, religion or country of origin.⁶⁹ Certain rights under the Refugee Convention can be found elsewhere in international human rights law, for example the right under Article 16 of the Refugee Convention to have free access to the courts, has been recognised as a fundamental right⁷⁰ and there is some evidence that this right has the status of customary international law.⁷¹

67 See above, note 65, Para 63.

68 Asia Pacific Refugee Rights Network, “July 2016 Country Update Newsletter”, APRRN, 21 July 2016, available at: <http://aprrn.info/july-2016-issue/>; Fortify Rights, *Everywhere is Trouble: An Update on the Situation of Rohingya Refugees in Thailand, Malaysia and Indonesia*, March 2016, p. 3, available at: <http://www.fortifyrights.org/downloads/EverywhereisTrouble.pdf>; Wake, C., Cheung, T., *Livelihood strategies of Rohingya refugees in Malaysia*, June 2016, available at: <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10649.pdf>; Amnesty International, “Bangladesh pushed back Rohingya refugees amid collective punishment in Myanmar”, *Amnesty International*, 24 November 2016, available at: <https://www.amnesty.org/en/latest/news/2016/11/bangladesh-pushes-back-rohingya-refugees-amid-collective-punishment-in-myanmar/>; Equal Rights Trust, *Equal Only In Name: The Human Rights of Stateless Rohingya in Malaysia*, October 2014, p. 13, available at: <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>.

69 Convention Relating to the Status of Refugees, Article 3.

70 Universal Declaration of Human Rights, Article 8; Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI., 1950, Articles 6(1) and 13; Organisation of American States, American Convention on Human Rights, 22 November 1969, Article 25; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981, Article 7(1); International Covenant on Civil and Political Rights, Article 2(3); Convention on the Rights of Persons with Disabilities, Article 13, Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 2007, Para 9.

71 See, for example, Mazzeschi, R.P., “Access to Justice in Constitutional and International Law: the Recent Judgment of the Italian Constitutional Court”, *Italian Yearbook of International Law*, Vol.1, 2015, p. 7; Kane, M., “Reassessing Customary Law Systems as A Vehicle For Providing Equitable Access to Justice for The Poor Arusha Conference”, *New Frontiers of Social Policy*, December 12–15, 2005; Beqiraq, J and McNamara, L, *International Access to Justice: Legal Aid for the Accused and Redress for Victims of Violence, A Report by the Bingham Centre for the Rule of Law*, October 2015.

There are a number of provisions in the Refugee Convention which require the receiving state to provide refugees with “at least as favourable treatment” as nationals in respect of a number of the core human rights freedom of religion,⁷² the right of association,⁷³ artistic and industrial property rights,⁷⁴ primary education,⁷⁵ public relief and labour protections,⁷⁶ and subject to certain conditions, social security.⁷⁷

In other cases, the receiving state is required to treat refugees as favourably as possible and no less favourably than aliens in similar circumstances – this is true, in relation to property rights,⁷⁸ wage-earning employment, self-employment and those practicing a liberal profession,⁷⁹ housing,⁸⁰ secondary education,⁸¹ and freedom of movement.⁸²

It is important to note that a number of these provisions mirror rights set out in the core human rights treaties and that, importantly, rights in the core human rights treaties are in fact stronger than those set out in the Refugee Convention as they are guaranteed to everyone and not just those lawfully within the territory of the state. For example, under the ICCPR states are required to guarantee the rights of everyone to freedom of religion and association and the right to liberty of movement.⁸³ Moreover, the ICESCR guarantees the right of everyone to work, the right to favourable conditions of work, and the right to education including free and compulsory primary education.⁸⁴ Critically, the rights in the core human treaties are of far great-

72 Convention Relating to the Status of Refugees, Article 4.

73 *Ibid.*, Article 15.

74 *Ibid.*, Article 14.

75 *Ibid.*, Article 22.

76 *Ibid.*, Articles 23 and 24(a).

77 *Ibid.*, Article 27.

78 *Ibid.*, Article 13.

79 *Ibid.*, Articles 17 and 19.

80 *Ibid.*, Article 21.

81 *Ibid.*, Article 22.

82 *Ibid.*, Article 26.

83 International Covenant on Civil and Political Rights, Articles 12, 18 and 22.

84 International Covenant on Economic, Social and Cultural Rights, Articles 6, 7 and 13.

er relevance to the Rohingya. Bangladesh, Malaysia and Thailand have not ratified the Refugee Convention but both Bangladesh and Thailand are party to the ICCPR and ICESCR and are required to guarantee the rights contained therein.

Other rights are specific to the Refugee Convention. For example and of particular importance, the state is required to issue identity papers;⁸⁵ and travel documents (except in the interest of national security or public order).⁸⁶ States must, as far as possible, facilitate the assimilation and naturalisation of refugees.⁸⁷

Article 28 is of particular importance to the Rohingya as it provides that states shall not impose penalties on refugees coming from a territory where their life or freedom was threatened for illegal entry or presence, provided they present themselves without delay to authorities and show good cause for their illegal entry or presence.⁸⁸ As is discussed in each of the research papers on Bangladesh, Malaysia and Thailand, Rohingya leaving Myanmar are often treated as “illegal entrants” in the countries to which they flee.⁸⁹ As such, they are vulnerable to arrest, detention and deportation in clear contravention of Article 28 of the Refugee Convention.

The Refugee Convention sets out clear obligations in relation to the expulsion of refugees: lawful refugees may only be expelled if there are compelling reasons of “national security or public order” and only then in “pursuance of a decision reached in accordance with the requirements of procedural justice”; such refugees must be allowed reasonable time to seek legal admission into another country.⁹⁰ However, the most significant obligation in relation to the removal of refugees is the *non-refoulement* obligation under Article 33 which provides that:

No Contracting State shall expel or return (“refoulé”) a refugee in any manner whatsoever to the frontiers of territories where his life or free-

⁸⁵ Convention Relating to the Status of Refugees, Article 27.

⁸⁶ *Ibid.*, Article 28.

⁸⁷ *Ibid.*, Article 34.

⁸⁸ *Ibid.*, Article 31.

⁸⁹ See Ashraful, A, *Legal status of the Rohingya in Bangladesh: refugee, stateless or status less*, December 2016; Nussara, M, Petcharamesree, S and Napaumporn, B., *Legal Analysis: Holes and Hopes for Rohingya in Thailand*, December 2016; Nambia, D, Brunt, H and Anon *The Rohingya in Malaysia*, December 2016.

⁹⁰ Convention Relating to the Status of Refugees, Article 32.

dom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This principle of *non-refoulement* has attained the status of customary international law⁹¹ and references to the principle may be found in various forms in numerous international Conventions.⁹² As is indicated above, the obligation of *non-refoulement* prohibits states from returning a refugee to situation where his or her life or freedom are at risk or where he or she faces a real risk of torture or inhuman or degrading treatment. As a result, “[p]ushing back Rohingya refugees...in boats that are not seaworthy, to a situation where they are at heightened risk of being killed” is both *refoulement* and a violation of the right to life.⁹³

Whilst the Refugee Convention provides for derogation where there are reasonable grounds for considering that a refugee may prove “a danger to the security of the country”,⁹⁴ the Committee against Torture has found that the right is absolute. In *Gorki Ernesto Tapia Paez v. Sweden*, the Committee stated:

It appears from the State party's submission and from the decisions by the immigration authorities in the instant case, that the refusal to grant the author asylum in Sweden is based on the exception clause of article 1 F. of the 1951 Convention relating to the Status of Refugees. This is illustrated by the fact that the author's mother and sisters were granted de facto asylum in Sweden, since it was feared that they may be subjected to persecution because they belong to a family which is connected to Sende-

91 UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at: <http://www.refworld.org/docid/437b6db64.html>.

92 See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465, U.N.T.S. 85, 1984, Article 3; International Covenant on Civil and Political Rights (ICCPR), Article 7; The Human Rights Committee has also declared the principle implicit in Article 2 of the ICCPR. See Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, Para 12.

93 Equal Rights Trust, *Burning Homes, Sinking Lives: A situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh*, June 2012, p. 21, available at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20-%20Burning%20Homes%20Sinking%20Lives.pdf>.

94 Convention Relating to the Status of Refugees, Article 33(2).

*ro Luminoso. (...) The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.*⁹⁵

Moreover, the UNHCR has made clear that the derogation clause contained in Article 33(2) is limited to “extreme cases” and only concerns a “capital or very grave punishable act”. Minor offences are not grounds for exclusion and the persecution the refugee could face if returned must be taken into consideration.⁹⁶

c. International Statelessness Law

As noted above, there are two primary Conventions relating to the rights of stateless persons in international law. The first, the 1954 Convention, came into force the same year as the Refugee Convention came into force. The second, the 1961 Convention, focuses on the prevention and reduction of statelessness.⁹⁷ As already noted, Bangladesh, Malaysia and Thailand are not party to either Convention, and only Bangladesh has committed to even considering its ratification.⁹⁸

A stateless person is defined in Article 1 of the 1954 Convention as “a person not considered as a national by any state under the operation of its law”,⁹⁹ As recognised by UNHCR, this definition is accepted under customary international law, and therefore applies to all countries.¹⁰⁰

95 *Gorki Ernesto Tapia Paez v. Sweden*, Communication No. 39/1996, UN Doc. CAT/C/18/D/39/1996, 1997, Paras 14.4–14.5.

96 See above, note 65, Paras 154–158.

97 UNHCR, *Guidelines on Statelessness No. 4*, UN Doc. HCR/GS/12/04, 21 December 2012, Para 1, available at: <http://www.refworld.org/docid/50d460c72.html>.

98 Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Bangladesh*, UN Doc. A/HRC/24/12, 8 July 2013, Para 129; Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Thailand – Addendum*, UN Doc. A/HRC.19/8/Add.1, 6 March 2012, Recommendation 89.5.

99 Convention Relating to the Status of Stateless Persons, Article 1(1).

100 UNHCR, *Handbook on Protection of Stateless Persons*, 2014, p. 9, available at: <http://www.unhcr.org/uk/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html>.

The 1954 Convention follows broadly the same structure as the Refugee Convention and sets out the minimum rights and obligations of stateless persons.¹⁰¹ Article 1 sets out the definition of statelessness.¹⁰² Article 2 considers the general obligations of stateless persons; Article 3 provides for the right to non-discrimination on account of race, religion or country of origin; whilst Article 4 protects freedom of religion. Chapters Two to Five of the Convention set out a broad range of rights which states are required to accord stateless persons. Chapter Two of the Convention sets out juridical status including personal status;¹⁰³ moveable and immovable property;¹⁰⁴ Artistic Rights and Industrial Property;¹⁰⁵ the right of association¹⁰⁶ and the right of access to the courts.¹⁰⁷ Chapter Three of the Convention concerns employment rights, whilst Chapter Four contains provisions on welfare. Chapter Five concerns administrative measures, and includes the prohibition of expulsion of stateless persons lawfully in the state territory except on grounds of national security or public order.¹⁰⁸

As with the Refugee Convention, a number of the rights articulated in the 1954 Convention are also set out in the core human rights treaties and indeed, in many cases, are stronger in the latter treaties. As indicated above, these “mirrored” rights are particularly important to Rohingya in Bangladesh and Thailand as although neither state has ratified either of the statelessness Conventions, both are party to the ICCPR, ICESCR and ICERD. For example, as indicated above Article 18 of the ICCPR guarantees the right of everyone to freedom of religion and Article 22 the right to freedom of association. The ICCPR, ICESCR and ICERD set out the right of everyone to non-discrimination on a variety of grounds including race, religion

See also, International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, 58th session, 2006, p. 49, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

101 *Ibid.* UNHCR, Para 125.

102 See *ibid.* for greater detail on applying the definition under Article 1(1).

103 Convention relating to the Status of Stateless Persons, Article 12.

104 *Ibid.*, Article 13.

105 *Ibid.*, Article 14.

106 *Ibid.*, Article 15.

107 *Ibid.*, Article 16.

108 *Ibid.*, Article 31.

and origin.¹⁰⁹ In addition, ICESCR guarantees everyone the right to work and to social security.¹¹⁰

As discussed above, the 1961 Convention is more specifically focused on the right of nationality. As noted by the Office of the High Commissioner for Refugees in an introductory note to the Convention:

*Underlying the 1961 Convention is the notion that while States maintain the right to elaborate the content of their nationality laws, they must do so in compliance with international norms relating to nationality, including the principle that statelessness should be avoided.*¹¹¹

Articles 1–4 of the 1961 Convention primarily consider protecting children against statelessness.¹¹² Reservations to these Articles are not permitted,¹¹³ and the obligations under these provisions are also captured in various international human rights conventions and declarations, including the Universal Declaration of Human Rights, and the ASEAN Human Rights Declaration.¹¹⁴

Articles 5 and 6 of the 1961 Convention concern loss of nationality; while under Article 7, renunciation of nationality is dependent upon acquisition of another. Article 8 of the 1961 Convention contains the most explicit provision regarding the loss of nationality: “a Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless”,¹¹⁵ whilst Article 9

109 International Covenant on Civil and Political Rights, Article 2(1) and 26; International Covenant on Economic, Social and Cultural Rights, Article 2(2); Convention on the Elimination of Racial Discrimination, Articles 2 and 5.

110 International Covenant on Economic, Social and Cultural Rights, Articles 6, 7, and 9.

111 Convention on the Reduction of Statelessness, *Introductory Note by the Office of the United Nations High Commissioner for Refugees*, May 2014, p. 3, available at: <http://www.unhcr.org/3bbb286d8.html>.

112 See UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness*, HCR/GS/12/04, 21 December 2012, available at: <http://www.refworld.org/docid/50d460c72.html>.

113 Convention on the Reduction of Statelessness, Article 17.

114 Convention on the Rights of the Child, Article 7; Universal Declaration of Human Rights, Article 15; see above, note 39, Article 18.

115 Articles 8(2) and 8(3) of the 1961 Convention sets out a limited set of circumstances in which loss or deprivation of nationality may serve a legitimate purpose.

ensures that no deprivation may occur on account of “racial, ethnic, religious or political grounds”.¹¹⁶

The Human Rights Council has issued a number of resolutions on the arbitrary deprivation of nationality;¹¹⁷ in its most recent resolution it reaffirmed the importance of the Statelessness Conventions and stressed that the discriminatory deprivation of nationality is a violation of human rights.¹¹⁸ It went on to emphasise that “that the statelessness of a person resulting from the arbitrary deprivation of his or her nationality cannot be invoked by states as a justification for the denial of other human rights” and urged states to “adopt and implement nationality legislation with a view to avoiding statelessness”.¹¹⁹

The UNHCR has stated that Articles 1–4 of the 1961 Convention ought to be considered in light of the CRC; in particular, the obligation under Article 2 to ensure all the rights within the CRC “without discrimination of any kind”, Article 3 which requires states to consider the “best interest of the child” as a primary consideration, Article 7 which sets out the right to birth registration to a nationality, and Article 8 which requires States Parties to “respect the right of the child to preserve his or her identity, including nationality.”¹²⁰ These articles safeguard the right of a child to identity and to nationality. Indeed, Article 8 goes even further and requires states to remedy the illegal deprivation of child of his or her identity or elements thereof.

In addition to the express right to birth registration and nationality under Article 7, the obligation under Article 2 is particularly important for Rohingya children as it sets out a right to acquire a nationality regardless of the child or his or her parents’ or guardians’ race, ethnic, national or social origin (among other things). In a report to the Human Rights Council the Secretary General has indicated that

¹¹⁶ This echoes other international law provisions on the right to equality and non-discrimination discussed below in Section 3b.

¹¹⁷ Human Rights Council, *Resolution on Human Rights and Arbitrary Deprivation of Nationality*, UN Doc. A/HRC/RES/26/14, 11 July 2014; Human Rights Council, *Resolution on Human Rights and Arbitrary Deprivation of Nationality*, UN Doc. A/HRC/RES/20/5, 16 July 2012; Human Rights Council, *Resolution on Human Rights and Arbitrary Deprivation of Nationality*, UN Doc. A/HRC/RES/13/2, 14 April 2010.

¹¹⁸ Human Rights Council, *Resolution on Human Rights and Arbitrary Deprivation of Nationality*, UN Doc. A/HRC/RES/32/5, 15 July 2016, Para 2.

¹¹⁹ *Ibid.*, Paras 2 and 5.

¹²⁰ See above, note 112, Para 10.

"[w]here a child is precluded from obtaining a nationality on discriminatory grounds, this amounts to arbitrary deprivation of nationality".¹²¹

Similarly, the Secretary General has emphasised that the principle of the "best interests of the child" as set out in Article 3 "must be respected by States in legislative and administrative acts in the area of nationality, including in the implementation of safeguards for the avoidance of statelessness among children."¹²²

UNHCR has observed that under the 1961 Convention the obligation to protect children from statelessness extends not only to "the State of birth of a child, but to all countries with which a child has a relevant link".¹²³ UNHCR has also noted that under the CRC and ICCPR States are required to grant nationality to all children born in its territory who cannot acquire any other nationality.¹²⁴

Bangladesh, Malaysia and Thailand have all ratified the CRC and are bound by Articles 3 and 8. Both Bangladesh and Thailand are also bound by Articles 2 and 7 which sets out the right of children to non-discrimination in accessing their rights under the CRC and the right to a nationality. Malaysia has entered a reservation in respect of these provisions.

The Committee on the Rights of Children has made recommendations regarding stateless children in respect of Bangladesh, Malaysia, and Thailand which fail to adequately address the situation of Rohingya children.¹²⁵

¹²¹ Human Rights Council, *Report of the Secretary General on the Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, UN Doc. A/HRC/31/29, 16 December 2015, Para 8.

¹²² *Ibid.* Para 9.

¹²³ See above, note 112.

¹²⁴ UNHCR, *Global Action Plan to End Statelessness 2014–2024*, November 2014, p. 10, available at: <http://www.unhcr.org/uk/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>.

¹²⁵ See Committee on the Rights of the Child, *Concluding Observations: Bangladesh*, UN Doc. CRC/C/BGD/CO/4, 26 June 2009, Paras 78-79; Committee on the Rights of the Child, *Concluding Observations: Malaysia*, UN Doc. CRC/C/MYS/CO/1, 25 June 2007, Paras 82-83; and Committee on the Rights of the Child, *Concluding Observations: Thailand*, UN Doc. CRC/C/THA/CO/3-4, 14 February 2012, Paras 41-42.

As indicated above, there is a clear link between the rights in the 1961 Statelessness Convention and the core human rights treaties, in particular the CRC. In addition, ICERD, the CRPD and CEDAW have provisions relevant to stateless persons. Articles 2 and 5 of the ICERD sets out a clear prohibition on discrimination on the grounds of race, colour, national or ethnic origin in relation to the right to nationality. The Committee on the Elimination of Racial Discrimination has also called upon states to reduce statelessness.¹²⁶ Article 18 of the CRPD requires that States do not apply their nationality laws in a way which discriminates against persons with disabilities. Article 9 of the CEDAW requires States to ensure that upon marriage to foreign nationals, women are not deprived of their nationality rendering them stateless and to ensure the equality of women and men with respect to the nationality of their children.¹²⁷ Additionally, the rights under the ICESCR apply “to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and international trafficking, regardless of legal status and documentation.”¹²⁸

d. Customary international law

Customary international law is derived primarily from the common practice of States. Unlike treaties, customary international law is not in written form and is not formally negotiated; rather it is created and develops incrementally.¹²⁹ It consists of rules, norms and principles which apply to all States¹³⁰ and which become binding when the States carrying out a common practice are doing so because they believe it to be a legal obligation.¹³¹ The International Court of Justice therefore states that there are two conditions required for an act to become customary international law: firstly, there must exist a settled practice (a practice which is frequent and habitual), and secondly, the practice must be motivated by a sense of legal duty (*opinio juris*).¹³²

126 See above, note 4, Para 16.

127 Note that Malaysia has entered a reservation to this Article.

128 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 30.

129 Byers, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, 1999, p. 3.

130 Anthony D'Amato, “The Concept of Special Custom in International Law”, *American Journal of International Law*, Vol. 63, 1969, p. 212.

131 International Court of Justice, *North Sea Continental Shelf Cases*, 20 February 1969, Para 77.

132 *Ibid.*

As both of these conditions are highly variable, customary law is not static and its rules may change or lose their status as customary law over time.¹³³

Unlike treaty law, customary international law binds all states with no requirement of formal consent unless an individual state is a “persistent objector” meaning it has “persistently rejected a new rule even before it emerged as such to avoid its application”¹³⁴ As discussed above, the principle of *non-refoulement* and the definition of a stateless person both have the status of customary international law. In addition, all states have obligations under customary international law which require them to protect all people who are on their territory and subject to their jurisdiction, regardless of whether they are citizens, stateless persons, asylum seekers or refugees.

There are certain obligations under international law which are regarded as peremptory norms from which no derogation is permitted – these are called *jus cogens* norms.¹³⁵ These norms have been interpreted as being founded in customary law,¹³⁶ however, *jus cogens* norms cannot be derogated from meaning there is no “persistent objector” exception to their application. Furthermore, a *jus cogens* norm can only be modified by a subsequent norm of the same character;¹³⁷ should a *jus cogens* norm come into conflict with treaty law or “ordinary” customary law, the *jus cogens* norm takes precedence.¹³⁸ Some examples include the prohibition on the use of force; the law of genocide; crimes against humanity; and the rules prohibiting trade in slaves or human trafficking.¹³⁹ The prohibition of systemic racial discrimination has also attained *jus cogens* status.¹⁴⁰

133 Verdier, P. and Voeten, E., “How does Customary International Law Change? The Case of State Immunity”, *International Studies Quarterly*, 2014, pp. 1–2.

134 Greenwood, C., *Sources of International Law: An Introduction*, 2008, p. 2, available at: http://legal.un.org/avl/ls/Greenwood_outline.pdf.

135 *Ibid.*, p. 1.

136 Nieto-Navia, R., “International Peremptory Norms (*JUS COGENS*) and International Humanitarian Law”, in Chand Vohra , L. et al (eds), *Man’s Inhumanity to Man*, Kluwer Law International, 2003, p. 612.

137 Vienna Convention on the Law of Treaties, 500 U.N.T.S. 95, 1961, Article 53.

138 *Prosecutor v Furundzija*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-95-17/1-T, 10 December 1998, Para 153.

139 Cornell University Law School Legal Information Institute, *Jus cogens*, available at: https://www.law.cornell.edu/wex/jus_cogens.

140 Brownlie, I., *Principles of Public International Law*, Clarendon Press, 1979, pp. 596–598; International Court of Justice, *South West Africa*, Second Phase, 18 July 1966, p. 298; International Court of Justice, *Barcelona Traction*, Second Phase, 5 February 1970, p. 304.

3. International Legal Framework: Specific Obligations

The rights of stateless persons have been recognised across the UN human rights treaty body system. The right to nationality has been recognised in the ICCPR,¹⁴¹ CRC,¹⁴² CEDAW,¹⁴³ ICMW,¹⁴⁴ CRPD,¹⁴⁵ and ICERD,¹⁴⁶ whilst the rights and obligations contained in those documents comprise part of the corpus of international statelessness law. International human rights law and statelessness law offer complementary protection to refugees and stateless persons, and given the breadth of accessible rights, international human rights law may be better placed in certain situations to provide protection in situations not envisaged by the core Refugee and Statelessness Conventions.

a. Denial of legal status and legal identity

i. Legal Status

A significant problem faced by the Rohingya is the denial of their right to legal status. As Bangladesh, Malaysia and Thailand have not ratified the Refugee or Statelessness Conventions, Rohingya refugees face difficulties securing recognition of their refugee status and are frequently considered economic migrants by the States in which they seek refuge.

The lack of legal status impacts on the ability of Rohingya to access other rights including the rights to education, employment and healthcare.¹⁴⁷ Employment op-

¹⁴¹ Under Article 24 “Every child has the right to acquire a nationality”.

¹⁴² Convention on the Rights of the Child, Article 7.

¹⁴³ Convention on the Elimination of All Forms of Discrimination against Women, Article 9. Note that the Convention on the Elimination of all Forms of Discrimination Against Women provisions merely require states parties to grant women equal rights to acquire, change or retain their nationality and the nationality of their children. As such, if equivalent men do not have the right to acquire a nationality, then CEDAW does not require that women are given such a right.

¹⁴⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 29.

¹⁴⁵ Convention on the Rights of Persons with Disabilities, Article 18.

¹⁴⁶ Convention on the Elimination of All Forms of Racial Discrimination, Article 5.

¹⁴⁷ See Equal Rights Trust above, note 68, p. 17; see also Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, October 2014, p. 17.

portunities for Rohingya are limited, and undocumented Rohingya face criminal and civil charges in Malaysia¹⁴⁸ and harassment in Thailand.¹⁴⁹ The Committee on the Rights of the Child has recommended that Bangladesh provide access to "basic rights, such as health and education, for all undocumented Rohingya children".¹⁵⁰

ii. Legal Identity

An important component of legal identity is the right to nationality. As indicated above, Article 1 of the 1961 Convention requires the grant of nationality to persons who would otherwise be stateless. There are also provisions in the CRC, ICERD, CRPD and AHRD which also emphasise the right to a nationality.¹⁵¹ Recognition as a stateless person and providing the accompanying rights in international law is fundamental as this ensures a degree of stability and dignified life for the person who has hitherto been denied a legal identity.¹⁵²

Stateless individuals, by definition without nationality, are not granted access to legal rights relied upon by citizens. As was noted by the Inter-American Court of Human Rights:

The importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights (...) States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbit-

148 *Ibid., Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, p. 30.

149 *Ibid., Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, p. 71.

150 Committee on the Rights of the Child, *Concluding Observations: Bangladesh*, UN Doc. CRC/C/BGD/CO/5, 30 October 2015, Para 72.

151 Convention on the Rights of the Children, Article 7; Convention on the Elimination of Racial Discrimination, Article 5; Convention on the Rights of Persons with Disabilities, Article 18, see above, note 151, Article 18.

152 Edwards, A. and Ferstman, C., *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge University Press, 2010, pp. 53–55.

*trary deprivation or the granting of a nationality that, in actual fact, is not effective. Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability.*¹⁵³

Although states are obligated to guarantee all rights, with the exception of certain political rights, to all on their territory, in practice, “those who enjoy the right to a nationality have greater access to the enjoyment of various other human rights” and the invisibility of stateless persons can mean that violations of their rights go unnoticed.¹⁵⁴ The denial of nationality has a particular impact on Rohingya children in Malaysia, as although there is almost universal primary education for Malaysian citizens, access to education for migrant children is very limited as they are not permitted to register in state-funded schools.¹⁵⁵

Birth Registration

Birth registration is accepted internationally and regionally as a child protection tool which can facilitate the realisation of other human rights and is a crucial element of the right to legal identity.¹⁵⁶ The right to birth registration is set out in several international treaties. Article 24(2) of the ICCPR provides that “every child shall be registered immediately after birth”. This is reinforced by Article 7 of the CRC which states that “the child should be registered immediately after birth”. Article 29 of the ICMW and Article 18(2) of the CRPD also provide for a right to birth registration.

The Secretary General, in his report to the Human Rights Council, noted that:

Universal birth registration is important to promote the realization of children's right to a nationality. The right of every child to be registered at birth is recognized as a fundamental human right, to be

¹⁵³ *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACtHR), 8 September 2005, Paras 137 and 142.

¹⁵⁴ See above, note 121, Paras 27–28.

¹⁵⁵ See Equal Rights Trust above, note 68, p. 69.

¹⁵⁶ Institute on Statelessness and Inclusion, *Addressing the right to a nationality through the Convention on the Rights of the Child: a toolkit for civil society*, June 2016, available at: http://www.statelessnessandhumanrights.org/CRC_Toolkit.

*fulfilled irrespective of the question of acquisition of a nationality. By documenting the parental affiliation and place and time of birth of a child, birth registration also provides an important function in helping children to assert their right to nationality. In some cases, the lack of access to birth registration directly hampers recognition by a State of a child as a nationality.*¹⁵⁷

The Human Rights Council has also issued a resolution reminding states of “their obligation to undertake birth registration without discrimination of any kind”.¹⁵⁸ The need for universal birth registration is also emphasised in Goal 16.9 of the Sustainable Development Goals which aims to “provide legal identity for all, including birth registration” by 2030.

The process of registering a child and issuing a birth certificate is an important first step in establishing a child’s legal identify and safeguarding against statelessness.¹⁵⁹ Moreover, birth registration “provides proof of a person’s identity and... failure to register a child’s birth may impair or nullify the child’s effective enjoyment of a range of rights, including the right to nationality, to a name and identity, to equality before the law and to recognition of legal capacity.”¹⁶⁰

b. Equality and Non-Discrimination

A number of the problems faced by the Rohingya are rooted in the discriminatory treatment they face both from the state itself and from other individuals. Discrimination is both a key cause of the statelessness of Rohingya and a reality of their lived experience both in Myanmar itself and in Bangladesh, Malaysia, Thailand and other countries to which they have fled.¹⁶¹ Accordingly the rights

157 See above, note 121, Para 15.

158 Human Rights Council, *Resolution 19/9: Birth registration and the right of everyone to recognition everywhere as a person before the law*, 3 April 2012, UN Doc. A/HRC/RES/19/9, Para 2.

159 UNHCR, *Report of the Regional Workshop on Good Practices in Birth Registration*, 7 December 2012, Bangkok, Thailand, 2012, p. 5.

160 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, UN Doc. CEDAW/C/GC/32, 14 November 2014, Para 56.

161 For a more detailed discussion of the nexus between discrimination and statelessness, please see De Chickera, A., and Whiteman, J., “Addressing statelessness through the rights to

to equality and non-discrimination are of central importance to the protection of stateless Rohingya.

The rights to equality and non-discrimination are pivotal rights in international human rights law and are explicitly guaranteed in a number of international¹⁶² and regional¹⁶³ human rights instruments. At the international level, the Declaration of Principles on Equality, which was adopted in 2008 and has been signed by thousands of experts and activists on equality and human rights from all over the world, is a document of international best practice which consolidates the most essential elements of international law related to equality. Principle 1 of the Declaration provides that:

The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.¹⁶⁴

Discrimination is prohibited under international law and occurs when an individual or group of individuals who possess a 'protected characteristic' are subjected to a disadvantage, detriment or less favourable treatment.¹⁶⁵ Protected grounds

equality and non-discrimination", in Waas, L. and Khanna, M. (eds) *Solving Statelessness*, Wolf Legal Publishers, 2017, pp. 100–107.

162 See, for example, the International Covenant on Civil and Political Rights, Articles 2 (guarantee of rights without discrimination), 3 (equal protection of civil and political rights), 14 (equality of arms and access to justice in criminal proceedings), 23 (equal rights of spouses in marriage), 25 (equal suffrage), and 26 (equality before the law and freedom from discrimination); the International Covenant on Economic, Social and Cultural Rights: Arts 3 (equal protection of economic, social and cultural rights), 7 (equal pay and opportunities of employment), and 13 (equal access to education); the Convention on the Elimination of Racial Discrimination (as concerns racial equality); the Convention on the Elimination of Discrimination against Women (as concerns gender parity); the Convention on the Rights of Persons with Disabilities (as concerns equality of persons with disabilities); and the Convention on the Rights of Migrant Worker (as concerns equal rights for migrant workers and their families.).

163 See, for example, the African Charter on Human and Peoples Rights, Articles 2 (freedom from discrimination), 3 (equality before, and equal protection of, the law), 13 (equal access to public services), 15 (equal remuneration), 19 (equality of people and equal protection of rights); the American Convention on Human Rights: Articles 1 (obligation to respect rights without discrimination), 8 (equality of arms and a fair trial), 17 (equality of spouses and children born out of wedlock) 23 (equal suffrage and access to public services), 24 (equality before the law); and the European Convention on Human Rights, Article 14, and Article 1 of Protocol 12 (general prohibition of discrimination).

164 *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008, Principle 1, p. 5.

165 *Ibid.*, Principle 5, p. 6–7.

include “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁶⁶ Whilst not all differential treatment may constitute discrimination, the criteria for such differentiation must be reasonable and objective and the aim must be achieve a purpose which is legitimate under international human rights standards.¹⁶⁷ The Equal Rights Trust’s *Unravelling Anomaly*, which provides a more detailed exploration of the application of the rights to equality and non-discrimination to stateless people, notes:

*As the UN Committee on the Elimination of Racial Discrimination (CERD) has stated, even though a nation is permitted to distinguish between citizens and non-citizens, this must be seen as an exception to the principle of equality and consequently, ‘must be construed so as to avoid undermining the basic prohibition of discrimination’.*¹⁶⁸

Non-discrimination on the grounds of race has become a “peremptory norm” under international law.¹⁶⁹

At the regional level, Article 3 of the AHRD provides that “every person is entitled without discrimination to equal protection of the law” and Article IV(5) of the Bangkok Principles provides that the rights under the Principles shall be applied “without discrimination as to race, religion, nationality, ethnic origin, gender, membership of a particular social group or political opinion”.

c. Employment Rights

International human rights law recognises the right to work; under Article 6 of the ICESCR, State Parties must:

*[R]ecognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and (...) take appropriate steps to safeguard this right.*¹⁷⁰

166 Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10 November 1989, Para 7.

167 See above, note 164, Principle 5, pp. 6–7.

168 Equal Rights Trust, *Unravelling Anomaly*, July 2010, pp. 35–36.

169 See Equal Rights Trust above, note 68, p. 24.

170 International Covenant on Economic, Social and Cultural Rights, Article 6.

Article 7 of the Covenant further provides that every person has the right to “just and favourable conditions of work” which includes fair wages and equal remuneration for equal work without distinction; a decent living for individuals and their families; safe working conditions; equal opportunity; and the reasonable limitation of working hours.¹⁷¹

Furthermore, at the regional level, according to Article 26 of the AHRD:

ASEAN member states affirm all the economic, social and cultural rights in the Universal Declaration of Human Rights. Specifically, ASEAN member states affirm the following: 27. (1) Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed (emphasis added).¹⁷²

The right to work is also provided for in both the Statelessness and Refugee Conventions.¹⁷³ States have also accepted the right to work and working conditions through various treaties of the International Labour Organisation – Malaysia has ratified all the fundamental International Labour Organization (ILO) Conventions, with the exception of the Abolition of Forced Labour Convention and the Freedom of Association Convention.¹⁷⁴ Bangladesh has ratified seven of eight fundamental ILO Conventions, omitting the Minimum Age Convention,¹⁷⁵ whilst Thailand has ratified five of eight fundamental ILO Conventions.¹⁷⁶

171 *Ibid.*

172 See above, note 39, Articles 26 and 27(1).

173 See above, part 2b.

174 Malaysia has ratified 17 ILO Conventions, of which 15 are currently in force, one is to be enforced and one was denounced in 1990. See, International Labour Organization, *ILO Ratifications for Malaysia*, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102960.

175 Bangladesh has ratified 35 ILO Conventions, 33 of which are in force, and two have been denounced. See International Labour Organisation, *ILO Ratifications for Bangladesh*, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::p11200_country_id:103500.

176 Thailand has ratified a total of 17 ILO Conventions. Of the fundamental conventions, it has not ratified the Freedom of Association and Protection of the Right to Organise Convention, the Right to Organise and Collective Bargaining Convention, and the Discrimination (Employment and Occupation) Convention. See International Labour Organisation, *ILO Ratifications for Thailand*, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:11200:0::NO::P11200_COUNTRY_ID:102843.

In 2007, ASEAN heads of state collectively agreed to afford better protection to migrant workers in the region by issuing a Declaration on the Protection and Promotion of the Rights of Migrant Workers.¹⁷⁷ States are broadly defined as “sending” or “receiving” in the context of migrant workers: countries from which migrant workers leave to find work are sending member states and countries to which migrant workers travel in order to work are receiving member states. The International Labour Organisation (ILO) defines both Malaysia and Thailand as predominantly receiving countries or member states.¹⁷⁸ Receiving Member States party to the declaration declared that they would “intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers.”¹⁷⁹ The ASEAN Declaration calls for both sending and receiving states to consider the “fundamental rights and dignity of migrant workers and family members already residing with them.”¹⁸⁰ However, this consideration needs only to be made “without undermining the application by the receiving states of their laws, regulations and policies.”¹⁸¹ Furthermore, the Declaration states that it “does not imply the regularisation of the situation for migrant workers who are undocumented”.¹⁸²

The right to work has further been recognised by the UNHCR as “integral to protection and durable solutions”.¹⁸³ Refugees have to work in order to afford food and provide housing for themselves and their families. The majority of urban refugees are forced to work in the informal economy, “competing with many local

¹⁷⁷ Association of Southeast Asian Nations, *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, January 2007, available at: <http://www.asean.org/index.php/communities/asean-political-security-community/item/asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers-2>.

¹⁷⁸ ILO Tripartite Action for the Protection and Promotion of the Rights of Migrant Workers and the ILO Decent Work Technical Team Bangkok, *Assessment of the readiness of ASEAN Member States for implementation of the commitment to the free flow of skilled labour within the ASEAN Economic Community from 2015*, 2015, p. 48 and p. 78, available at: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_310231.pdf.

¹⁷⁹ See above, note 177, Principle 5.

¹⁸⁰ *Ibid.*, Principle 3.

¹⁸¹ *Ibid.*, Principle 3.

¹⁸² *Ibid.*, Principle 4.

¹⁸³ UNHCR, *The State of the World's Refugees, In Search of Solidarity: A Synthesis*, 2012, p. 24, available at: <http://www.unhcr.org/4fc5ceca9.html>.

people for poorly-paid and hazardous manual labour jobs".¹⁸⁴ As has been noted in past Equal Rights Trust publications, and documented below, refugees and the stateless Rohingya have faced and continue to face tremendous difficulties in accessing work; arising, *inter alia*, through procedures for verifying nationality¹⁸⁵ and the lack of domestic legal provisions extending the right to work to refugees and asylum seekers.¹⁸⁶ Where refugees and stateless individuals are not granted legal status, their work as irregular economic migrants creates problems in gaining lawful employment, and may result in the infringement of those employment rights extended to nationals, including remedies for unfair dismissal.¹⁸⁷ As has been recognised by the Office of the United Nations High Commissioner for Human Rights:

*In general, it is difficult for them to assert their rights or seek redress for abuses because they are in an irregular situation and usually afraid of detection and expulsion. In addition, they may be subject to discrimination and barriers in relation to their access to justice and ability to seek remedies.*¹⁸⁸

The right to seek work is inherently connected to the discharge of other human rights obligations.¹⁸⁹ Even for those persons formally recognised as refugees, the right to work has been limited through poor enforcement, limited opportunities, and extortion by state officials.¹⁹⁰

184 *Ibid.*

185 See above, note 147, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, p. 69.

186 *Ibid. Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, p. 75.

187 Office of the High Commissioner for Human Rights, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, 2014, p. 113, available at: http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf.

188 *Ibid.*

189 According to the Committee on Economic, Social and Cultural Rights, "the enjoyment of the right to just and favourable conditions of work is also a pre requisite for, and result of, the enjoyment of other Covenant rights". See Committee on Economic, Social and Cultural Rights, *Right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2015, UN Doc. E/C.12/54/R.2, Para 2.

190 See above, note 147, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, p. 71.

Under the ICESCR, the Committee on Economic, Social and Cultural Rights has made clear that the right to work does not equate to “an absolute and unconditional right to obtain employment”.¹⁹¹ Rather, it includes the right of every human being to accept or reject employment, protection from forced labour, and the right not to be “unfairly deprived of employment”.¹⁹² The principle of non-discrimination is engaged in respect to the rights of migrant workers and their families under the Convention,¹⁹³ as is equality of access to employment.¹⁹⁴

d. Arrest and Detention

Under Article 12 of the AHRD, “Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.”¹⁹⁵ A similar formulation of the principle against arbitrary detention may be found in both the ICCPR at Article 9.¹⁹⁶

The presumption against arbitrary detention has long been established in international law and is regarded as fundamental in ensuring the enjoyment of other established rights. As the Human Rights Committee noticed in its most recent General Comment on the scope of Article 9 of the ICCPR:

In the Universal Declaration of Human Rights, article 3 proclaims that everyone has the right to life, liberty and security of person. That is the first substantive right protected by the Universal Declaration, which indicates the profound importance of article 9 of the Covenant both for individuals and for society as a whole. Liberty and security of person are precious for their own sake, and also because the deprivation of

¹⁹¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 18, The Right to Work: Article 6 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/18, 6 February 2006, Para 6.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*, Para 18.

¹⁹⁴ *Ibid.*, Para 19 and 31. It has been noted that this right “merely requires that where non-nationals are granted access to employment, this should be on the basis of non-discrimination”.

¹⁹⁵ See above, note 39, Article 12.

¹⁹⁶ International Covenant on Civil and Political Rights, Article 9.

*liberty and security of person have historically been principal means for impairing the enjoyment of other rights.*¹⁹⁷

Similarly, Article 37 (2) of the CRC provides:

*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*¹⁹⁸

Article 37 also states that when a child is deprived of his or her liberty, they must be treated with dignity and respect, in accordance with their age and in their best interest.¹⁹⁹ A child must also have access to legal representation and be given the opportunity to challenge the legitimacy of detention before a court.²⁰⁰

In order to ensure the protection of refugees and asylum seekers from unlawful arrest and detention, a wealth of international jurisprudence has developed; whilst reports and guidelines have been established to provide safeguards for both states and affected individuals in refugee and asylum procedures. UNHCR has developed Detention Guidelines which make it clear that detention of asylum-seekers is to be considered a measure of last resort.²⁰¹ Seeking asylum is not illegal in international law, and therefore any procedure providing for the detention or arrest of asylum seekers must be carefully drafted, with established procedures for review.²⁰² The Equal Rights Trust has drafted guidelines which are specifically directed at the protection of stateless persons from arbitrary detention. These guidelines, established on the basis of international law, are of specific relevance to the Rohingya, focusing not only on their asylum status,

¹⁹⁷ Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16 December 2014.

¹⁹⁸ Malaysia has entered a reservation to this Article.

¹⁹⁹ Convention on the Rights of the Child, Article 37(c).

²⁰⁰ *Ibid.*, Article 37(b).

²⁰¹ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 6.

²⁰² *Ibid.*

but crucially on their statelessness.²⁰³ These guidelines emphasise that the detention of stateless persons must not be arbitrary which requires detention to be in accordance with national law carried out in pursuit of a legitimate objective, non-discriminatory, necessary, proportionate and reasonable and carried out in accordance with the procedural safeguards and substantive safeguards of international law.²⁰⁴ Further, the “imposition of detention as a deterrent against or punishment for irregular migration is not lawful under international law”.²⁰⁵ Moreover, the Guidelines emphasise that detention should be a measure of last resort, and conditions of detention must comply with international human rights law.²⁰⁶

e. Education

The right to education is a fundamental human right. Due to their protracted situation of statelessness, Rohingya children are unable to satisfy registration requirements and have particular difficulties in gaining access to formal education. Stateless children are excluded from the education system and do not have the opportunity to undertake relevant examinations meaning that they “rarely go on to secondary education” and are further subject to exploitation.²⁰⁷ UNHCR has expressly recognised the relationship between the lack of access to education and child labour.²⁰⁸

Under the CRC, to which Bangladesh, Malaysia and Thailand are party, “States Parties recognise the right of the child to education on the basis of equal opportunity”.²⁰⁹ States are also required to provide free primary education to all; as well as different forms of secondary education; higher education; educational and vo-

203 Equal Rights Trust, *Guidelines to Protect Stateless Persons from Arbitrary Detention*, 2012, available at: <http://www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf>.

204 *Ibid.*, Principle 25.

205 *Ibid.*, Principle 27.

206 *Ibid.*, Principles 31 and 43.

207 UNHCR, *Under the Radar and Under Protected: The Urgent Need to Address Stateless Children’s Rights*, June 2012, p. 9.

208 *Ibid.*

209 Convention on the Rights of the Child, Article 28. Malaysia has entered a reservation to the obligation under Article 28(1)(a) to universal free primary education.

cational guidance; and measures to encourage regular school attendance.²¹⁰ Although Malaysia has entered a reservation to the right of children to education without discrimination,²¹¹ the provisions of the CRC are supplemented by other international legal documents. The AHRD and the ASEAN Declaration on Strengthening Education for Out-of-School Children and Youth provide that every person has the right to an education;²¹² as does the ICESCR.²¹³ Finally, both the Statelessness and Refugee conventions contain educational rights.²¹⁴

The Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights have found that the right to education is not dependent on citizenship.²¹⁵ Although these observations were not specifically made in relation to Bangladesh, Malaysia or Thailand, they reflect international best practice on the rights to education and non-discrimination.

There is also international jurisprudence on this issue which is instructive on the best practice application of the right to education; the African Committee of Experts on the Rights and Welfare of the Child considered the case of *Nubian Minors v. Kenya*. The case concerned the citizenship status of the Kenyan Nubians. Despite residing in Kenya for hundreds of years, Nubian children are not traditionally registered as Kenyan at birth. According to the Court there existed a “*de facto* inequality” in accessing educational services, which came as a result of the Nubian children’s’ uncertain legal status as nationals of Kenya. The Court found that those children:

210 *Ibid.*, Article 28.

211 *Ibid.*, Article 2.

212 See above, note 39, Article 31.

213 International Covenant on Economic, Social and Cultural Rights, Article 13.

214 See Sections 2a and 2b above.

215 In its Concluding Observations on Iran, the Committee on the Rights of the Child recommended: “that all children, including refugee children, have equal educational opportunities on all levels of the educational system without discrimination based on gender, religion, ethnic origin, nationality or statelessness”. See Committee on the Rights of the Child, *Concluding Observations: Iran*, UN Doc. CRC/C/14619, 19 July 2005, Para 496. In its 2004 concluding observations on Azerbaijan, the Committee on Economic, Social and Cultural Rights noted its concern regarding the “persistent *de facto* discrimination against foreign citizens, ethnic minorities and stateless persons in the fields of housing, employment and education”; whilst also expressing concern that the Azerbaijani law concerning stateless persons “does not provide free compulsory education to non-Azerbaijani children”. See Committee on Economic, Social and Cultural Rights, *Concluding Observations: Azerbaijan*, UN Doc. E/C.12/1/Add.104, 14 December 2004, Paras 15 and 33.

[H]ave been provided with fewer schools and a disproportionately lower share of available resources in the sphere of education, as the de facto discriminatory system of resource distribution in education has resulted in their educational needs being systematically overlooked over an extended period of time. Their right to education has not been effectively recognised and adequately provided for, even in the context of the resources available for this fulfilment of this right.²¹⁶

Similarly, in the Case of *Yean and Bosico Children v. The Dominican Republic* the Inter-American Court found that the Dominican Republic "should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children."²¹⁷

f. Freedom of Movement

Freedom of movement is crucial in securing other rights of refugees and stateless persons, and has been recognised by a number of international legal instruments. Under Article 15 of the AHRD,

Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.²¹⁸

Similar provisions may be found under the ICCPR;²¹⁹ and the ICERD.²²⁰ Under Article 26 of the 1954 Statelessness Convention, stateless persons lawfully residing in a states' territory are guaranteed the right to free movement subject to any restrictions applicable to aliens generally.²²¹ The same provision may be found under

²¹⁶ African Committee of Experts on the Rights and Welfare of the Child, *Nubian Minors v. Kenya*, 22 March 2011, Communication No. Com/002/2009, Para 65.

²¹⁷ *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, Para 244.

²¹⁸ See above, note 39, Article 15.

²¹⁹ International Covenant on Civil and Political Rights, Article 12.

²²⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Article 5.

²²¹ Convention Relating to the Status of Stateless Persons, Article 26.

Article 26 of the Refugee Convention.²²² The wording of these latter two provisions has been the cause of some concern in international discourse. The requirement of lawful residency poses problems to the stateless Rohingya community who face considerable difficulties in regularising their status; whilst the qualification “subject to any regulations applicable to aliens generally” may further impinge upon the right to freedom of movement.

The importance of the right to freedom of movement cannot be underestimated. Without freedom to travel, both internally and beyond state borders, the capacity of an individual to exercise other protected rights may be severely affected. In its General Comment No. 27, the Human Rights Committee recognised the interaction of the right with other fundamental rights, declaring liberty of movement as “an indispensable condition for the free development of a person”.²²³ Where the right is denied to an individual, the health and livelihood of that person may be endangered. Restrictions on the right can herald consequences for access to work and property; access to public services (including healthcare and education); and family rights, particularly where a family has been separated.²²⁴ According to the UNHCR, a lack of freedom of movement may increase poverty and marginalisation; as well as dependency on humanitarian aid.²²⁵

The right to freedom of movement has three dimensions. The first concerns freedom to leave a state, and is of particular relevance to the situation of refugees. Under Article 12(2) of the ICCPR, “Everyone shall be free to leave any country, including his own”. The Committee has made clear, that as the scope of Article 12 is not limited to those persons lawfully residing within a states territory, an individual being expelled from the country is “entitled to elect the State of destination”, subject to that state’s acceptance.²²⁶

The second-dimension concerns freedom to travel within a state. As with the requirement of the Statelessness and Refugee Conventions, the ICCPR limits the

222 Convention Relating to the Status of Refugees, Article 26.

223 Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, Para 1.

224 UNHCR, *Handbook for the Protection of Internally Displaced Persons, Action Sheet 8*, p. 224, available at: <http://www.unhcr.org/4794b4702.pdf>.

225 *Ibid.*

226 See above, note 223, Para 8.

scope of this right to individuals residing “lawfully within the territory”. Whilst this automatically includes state citizens,²²⁷ whether aliens may be regarded as lawful citizens is dependent on domestic legislation. The Committee have however made clear that where an individual who entered the country illegally, but whose status has become regularised, that individual “must be considered lawful for the purposes of Article 12”.²²⁸ Any subsequent restrictions on the right must be grounded on the basis of Article 12(3) of the Covenant, which provides an increased standard of protection than either the Statelessness or Refugee Conventions, allowing justifiable limitations only to protect national security, public order, public health and morals, or to protect the rights and freedoms of others.²²⁹ Any such restriction justified under one of the above headings must conform to international requirements of proportionality, be the “least intrusive” means of achieving the objective, and cannot impair the essence of the right.²³⁰ Permissible limitations “must not nullify the principle of liberty of movement”.²³¹

The final dimension, as expressed in the final sentence of the AHRD, set out above, includes the right of an individual to “return to his or her country”. A similar provision can be found in Article 12(4) of the ICCPR. The interpretation of this provision has caused some disagreement between human rights treaty bodies and respective state governments.²³² The Human Rights Committee has emphasised that this provision is not limited to state nationals and may include “an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien”.²³³ In *Stewart v Canada*, the Committee gave examples of individuals who may be included under the

²²⁷ *Ibid.*, Para 4.

²²⁸ *Ibid.*

²²⁹ International Covenant on Civil and Political Rights, Article 12(3).

²³⁰ See above, note 223, Paras 13–15.

²³¹ *Ibid.*, Para 2.

²³² See Australian Government, Response of the Australian Government to the Views of the Committee in Communication No 1557/2007, *Nystrom et al v Australia* (18 July 2011), Para 14, available at: <http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralia-AustralianGovernmentResponse.pdf>. See also, Maria-Teresa Gil-Bazo, “Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship”, *Refugee Survey Quarterly*, 5 January 2015, p. 37.

²³³ *Stewart v Canada*, Human Rights Committee, Communication No. 538/1993, 16 December 1996, UN Doc. CCPR/C/58/D/538/1993, Para 12.4.

above approach, including those stripped of or denied their nationality contrary to international law:

In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.²³⁴

The HRC have stated the high threshold of this right, expressing their view that there exist very few circumstances in which a deprivation of the right to return to one's home country could be considered reasonable.²³⁵

g. Family Rights and Marriage

The right to marriage and family life are widely protected in international law. Under Article 19 of the ADHR:

[T]he family as the natural and fundamental unit of society is entitled to protection by society and each ASEAN Member State. Men and women of full age have the right to marry on the basis of their free and full consent, to found a family and to dissolve a marriage, as prescribed by law.²³⁶

Article 21 further prohibits arbitrary interference in family life. Similar provisions can be found under the ICCPR,²³⁷ the ICESCR,²³⁸ the CERD,²³⁹ and the CEDAW (on an equal basis with men).²⁴⁰ Under Article 12 of the Convention on the Status of

234 *Ibid.*

235 *Nystrom v Australia*, Human Rights Committee, Communication No. 1557/2007, 18 August 2011, UN Doc. CCPR/C/102/D/1557/2007, Para 7.6.

236 See above, note 39, Article 19.

237 International Covenant on Civil and Political Rights, Articles 23 and 17.

238 International Covenant on Economic, Social and Cultural Rights, Article 10.

239 Convention on the Elimination of Racial Discrimination, Article 5.

240 Convention on the Elimination of Discrimination against Women, Article 16. Additionally, the Convention on the Rights of the Child contains a number of provisions on a child's family rights.

Stateless Persons, the personal status (including marriage rights and legal capacity) of an individual are to be governed by the laws of the country of his or her domicile or residence and previously acquired marriage rights are to be recognised by the State.²⁴¹

i. Marriage

International law protects the right to marriage and to found a family. Article 23(2) of the ICCPR provides that “the right of men and women of marriageable age to marry and to found a family shall be recognised”. This right is echoed in Article 19 of the AHRD.

Article 16(2) of CEDAW imposes an obligation of marriage registration providing that “all necessary action, including legislation, shall be taken to...make the registration of marriages in an official registry compulsory”. This is primarily a mechanism to prevent child marriage, as elaborated by the Committee on the Elimination of Discrimination Against Women in its General Recommendation No. 21:

*States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.*²⁴²

Marriage registration is also very important as it “protects the rights of spouses with regard to property issues upon dissolution by death or divorce.”²⁴³ As a result:

States parties should establish a legal requirement of marriage registration and conduct effective awareness-raising activities to that effect. They must provide for implementation through education about the requirements and provide infrastructure to make registration accessible to all persons within their jurisdiction. States parties should provide for

²⁴¹ Convention Relating to the Status of Stateless Persons, Article 12.

²⁴² Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in marriage and family relations*, UN Doc. A/49/38, 1994, Para 39.

²⁴³ Committee on the Elimination of Discrimination Against Women, *General Recommendation on Article 16 of the Convention*, UN Doc. CEDAW/C/GC/29, 2013, Para 25.

*establishing proof of marriage by means other than registration where circumstances warrant. The State must protect the rights of women in such marriages, regardless of their registration status.*²⁴⁴

The Human Rights Committee have expanded on the right to found a family in their General Comment on Article 23:

*The right to found a family implies, in principle, the possibility to pro-create and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.*²⁴⁵

International law also provides the right to marry or found a family without “any limitation due to race, nationality or religion”.²⁴⁶ This means that States should not impose nationality based restrictions on the ability of stateless persons or refugees to marriage based on their nationality. As explored, in previous publications, the Equal Rights Trust has noted the difficulties faced by Rohingya in accessing equal rights to marriage as they are unable to obtain formal recognition by the State of any marriages and that migrant workers face the risk of deportation if they are discovered to have married or had children.²⁴⁷

ii. Divorce

As many Rohingya are not able to secure official formal recognition of marriages, this impacts on their ability to conduct formal divorce proceedings. The ICCPR provides that states should take appropriate steps to ensure equality of rights and

244 *Ibid*, Para 26.

245 Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990.

246 Universal Declaration of Human Rights, Article 16.

247 See Equal Rights Trust above, note 68, p. 80.

responsibilities of spouses at the dissolution of marriage.²⁴⁸ States should prohibit discriminatory treatment in relation to the grounds and procedures for divorce, including discrimination in the division of property.²⁴⁹ Furthermore, both spouses should have equal rights and responsibilities in respect of their children regardless of their marital status.²⁵⁰

iii. Custody Rights

As noted above, the lack of official recognition of marriages for Rohingya impacts on birth registration, divorce and custody rights in relation to children. International law requires that spouses have equal rights and responsibilities in the family; such equal rights extend to legal separation or the end of a marriage. Therefore, states must ensure discriminatory treatment in respect of the grounds and procedures for child custody, visiting rights or parental authority is prohibited.²⁵¹ Provisions must be made for the protection of any children at the end of a marriage or upon separation.²⁵² It should be noted that preserving family unity is a key principle in child protective measures, except in instances where it would be contrary to the best interests of the child to do so.²⁵³ Therefore, a child who has been separated from one or both parents is entitled to "maintain personal relations and direct contact with both parents on a regular basis."²⁵⁴

4. Conclusion

There is a comprehensive framework under international law which aims to protect the rights of vulnerable groups such as the Rohingya. As standalone bodies of law, neither refugee, nor statelessness, nor human rights law provides comprehensive protection; however through the combination of the refugee, stateless-

248 International Covenant on Civil and Political Rights, Article 23(4).

249 See above, note 242, Para 28.

250 *Ibid.* Para 20.

251 See above, note 245, Para 9.

252 *Ibid.*

253 Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* UN Doc. CRC/C/GC/14, 2013, Para 60.

254 Convention on the Rights of the Child, Article 9(3).

ness and international human rights law frameworks, if properly accepted and implemented in Bangladesh, Malaysia and Thailand, could provide considerable protection to Rohingya in all spheres of life. At the regional level, the AHRD also contains a number of relevant provisions.

Notwithstanding the failure of each of Bangladesh, Malaysia and Thailand to ratify the Statelessness and Refugee Conventions, each country is still obligated to provide Rohingya within their territory a number of rights under international human rights law. In particular, the right to birth registration and nationality under the CRC have tremendous power to transform the lives of undocumented and unregistered Rohingya refugees.

Each of the states covered by this report is encouraged to respect, protect and fulfil its obligations under ratified treaties. It is also hoped that the exploration of overlap between different areas of law will serve as encouragement to Bangladesh, Malaysia and Thailand to ratify all the core human rights treaties without reservation and accede to the Refugee Convention and both the Statelessness Conventions.

National Law Papers



A Rohingya man ploughing wheat in Bangladesh. Without documentation Rohingya are restricted from working in official employment, consequently, they often work in manual labour for long days, in harsh conditions and for low pay.

Legal Status of the Rohingya in Bangladesh: Refugee, Stateless or Status Less

Ashraful Azad¹

1. Introduction

a. Context

The Rohingya are an ethno-linguistic-religious minority group originating from the Northern Rakhine State of Myanmar. Although the Rohingya can trace their origin to Rakhine State back several hundred years,² the majority of Rohingya in Myanmar have been denied nationality under the 1982 Citizenship Law.³ Since 1978, the Rohingya have been subjected to various atrocities including forced labour, arbitrary arrest, indefinite detention, torture, killings, sexual abuse, destruction of property and mosques, restricted freedom of movement, internal displacement, education bans, denial of medical treatment and family size limitations.⁴ Facing persecution by Buddhist majority groups and the state authorities, many Rohingya have fled to neighbouring Bangladesh.

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2 Karim, A., *Rohingyas: A Short Account of their History and Culture*, Arakan Historical Society, 2000; Siddiqui, M. M., *Arakaner Musalman*, Arakan Historical Society, undated.

3 Parker, L., "Access to citizenship in transitional Myanmar: Seeking Rohingya rights the wrong way?", *Refugee Law Initiative*, Working Paper No. 13, 2015.

4 *Ibid.* See also Zarni, M. and Cowley, A., "The Slow Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, Vol. 23, No. 3; Fortify Rights, *Polices of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar*, February 2014.

Under the international legal framework, Rohingya in Bangladesh are both refugees and stateless.⁵ However, the majority of Rohingya in Bangladesh are denied any legal status.

Bangladesh has not ratified the 1951 Refugee Convention (the Refugee Convention),⁶ nor either of the two Statelessness Conventions;⁷ nor does it have any domestic law governing refugee status or the grant of asylum. Consequently, the legal status of Rohingya is governed by the national law on the entry and residence of foreign aliens, rather than laws which cater for their particular vulnerabilities. Although the Constitution of Bangladesh provides some protections for all persons, in practice Rohingya in Bangladesh face a number human rights violations including arbitrary arrest and detention, restrictions on movement and livelihood opportunities, physical and verbal harassment, denial of documentation and access to justice.

i. Objectives and Research Design

In this context, this paper provides an overview of the legal status of Rohingya in Bangladesh. The primary objective of this paper is to analyse national and international legal obligations and practices of Bangladesh which particularly apply to the Rohingya people living in the country. Also, the paper critically discusses selected human rights of Rohingya in Bangladesh in comparison with legal standards.

Although there have been some studies on the legal status of Rohingya in Bangladesh, these mostly cover the general aspects superficially. This paper analyses the laws in more detail in its proper context and substantially focuses on the impact of the legal status in everyday life. Some of the important questions this paper answers include: whether Bangladesh is obliged to provide certain human rights to Rohingya and to what extent; whether or not some Rohingya are entitled to claim Bangladeshi citizenship and why; how the lack of legal status impacts on important aspects of the life of Rohingya, such as freedom of movement and birth registration. In this way, we can gain a better understanding of how Bangladeshi laws apply to Rohingya in theory and practice.

5 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 1954, Article 1(A)(2); Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, 1954, Article 1(1).

6 *Ibid.*, Convention relating to the Status of Refugees.

7 See Convention relating to the Status of Stateless Persons, above, note 5; Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, 1961.

ii. Methodology

The paper is mainly based on analysis of legal instruments. Moreover, published literature and media reports have also been thoroughly reviewed for comparison with legal standards. The paper greatly benefitted from the feedback of participants in two workshops held in Bangkok and Dhaka, where preliminary findings were presented. In addition, a small number of key informant interviews have been conducted in Bangladesh to clarify some aspects of law and practice.

b. Background: exodus of Rohingya People to Bangladesh

The history of migration between Rakhine State (formerly Arakan) and Bangladesh (formerly Bengal) dates back to at least 1404 when the King of Arakan was forced to flee his country and took asylum in Gaur, the capital of the Bengal Sultanate.⁸ Significant numbers of refugees from Arakan moved to neighbouring Bengal after the annexation of Arakan by the Burmese King in 1785⁹ and during the Second World War inter-communal conflict in 1942–43.¹⁰

In 1978, driven by the *Operation Nagamin* (Dragon King), which was an attempt by the Burmese Army to clear out alleged “illegal migrants”, approximately 222,000 Rohingya people from Northern Arakan fled to neighbouring Bangladeshi territories.¹¹ Negotiations between the Burmese and Bangladeshi governments resulted in 187,250 refugees being returned to Burma by December 1979.¹²

In 1991–92, following the increased military presence in frontier areas, there was widespread forced labour, torture, rape and killing of Rohingya resulting in around

8 Yegar, M., *The Muslims of Burma: A Study of a Minority Group*, Otto Harasowirz, 1972, p. 18.

9 *Ibid.*, p. 24.

10 Grundy-Warr, C., and Wong, E., “Sanctuary under a Plastic Sheet –The Unresolved Problem of Rohingya Refugees”, *IBRU Boundary and Security Bulletin*, 1997, pp. 81–85; Ahmed, I. (ed.), *The Plight of the Stateless Rohingyas: Responses of the State, Society & the International Community*, The University Press Limited, 2010.

11 Maudood, E. K., “The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences”, in Rogge, R. J. (ed.), *Refugees: A Third World Dilemma*, Rowman & Littlefield, 1987.

12 Abrar, C. R., *Repatriation of Rohingya Refugees*, Refugee and Migratory Movements Research Unit, 1996.

250,000 Rohingya Muslims seeking asylum in Bangladesh.¹³ Between 1992 and 2008, 236,599 refugees were repatriated to Myanmar.¹⁴ In 1997, it was noted that the process of repatriation did not follow due process, with reports of forced repatriation.¹⁵

c. Registration of refugees

Currently, there are 31,958 registered Rohingya refugees in Bangladesh, living in two official camps, Nayapara and Kutupalong, in the district of Cox's Bazar administered by the Government of Bangladesh with the assistance of the United Nations High Commissioner for Refugees (UNHCR).¹⁶

As noted, there are concerns about the repatriation process. In particular, it has been noted that many refugees were repatriated without their free informed consent.¹⁷ Moreover, there have been no effective changes to the situation in Rakhine State¹⁸ resulting in many of the repatriated Rohingya once again crossing the border back to Bangladesh. On re-entry, many of these Rohingya were refused registration, or they did not seek it at all.¹⁹ Lacking any formal legal status, these Rohingya built their makeshift huts or mingled with local Bangladeshi people in villages and slums. These Rohingya people, together with new arrivals are the so-called “unregistered” refugees.

There are estimated to be between 200,000 to 500,000 unregistered Rohingya people²⁰ who do not have any legal status in Bangladesh. This number continues

13 See Grundy-Warr and Wong above, note 10.

14 See Ahmed above, note 10, p. 101. See also Pagonis, J. “Rohingya refugees living in tough conditions in Bangladesh camps”, UNHCR, 21 September 2005, available at: <http://www.unhcr.org/uk/news/latest/2005/9/43316f084/rohingya-refugees-living-tough-conditions-bangladesh-camps.html>.

15 See Grundy-Warr and Wong above, note 10.

16 United Nations High Commissioner for Refugees (UNHCR), *Bangladesh*, available at: http://reporting.unhcr.org/node/2539#_ga=1.61544044.1179433784.1481963632.

17 See Grundy-Warr and Wong above, note 10; see also above, note 12.

18 For information on the recent situation in the Rakhine State, see Fortify Rights above, note 4.

19 Lewa, C, *Invisible Refugees: Study on the Self-settled Burmese Rohingyas in Bangladesh*, Embassy of the Kingdom of the Netherlands, Dhaka, 2008.

20 UNHCR, *Bangladesh – Factsheet*, September 2014. The Government of Bangladesh has recently conducted a census to determine the actual number of people classified as “Undocumented Myanmar National” (UMN) living in the country. However, the outcome of the census

to increase as the Rohingya continue to flee Myanmar. For example, following ethnic violence in Myanmar in 2012, there was another influx. Moreover, in response to the recent violence since November 2016, it is believed that several thousand Rohingya have fled to Bangladesh.²¹ As of 30 November 2016, UNHCR claimed at least 10,000 new Rohingya had entered Bangladesh fleeing violence in Rakhine State.²²

Some unregistered Rohingya live in visible camps in Cox's Bazar; there are two such camps: one is on the fringes of the official Kutupalong camp, which hosts 22,000 people and another in Leda area, seven kilometres from Nayapara camp, which hosts 14,000 people.²³ However, the numbers could be much higher after the arrival of more Rohingya following the 2016 violence in Rakhine State. Outside these camps, other unregistered Rohingya are less visible, as they live alongside Bangladeshi citizens, and some came many years ago and have now integrated into Bangladeshi society.²⁴

d. Attitude towards Rohingya People in Bangladesh

While the government of Bangladesh has expressed sympathy for the plight of the Rohingya, it has always been reluctant to offer asylum.²⁵ As one of the countries with the highest population densities in the world and a complex border

has not yet been published. See, Zaman, S.S., "Final Rohingya census report by Nov", *Dhaka Tribune*, 20 June 2016, available at: <http://archive.dhakatribune.com/bangladesh/2016/jun/20/final-rohingya-census-report-nov>.

- 21 Sherwood, H., "Rohingya Muslims fleeing Myanmar 'turned away by Bangladesh'", *Guardian*, 25 November 2016, available at: <https://www.theguardian.com/world/2016/nov/25/rohingya-muslims-fleeing-myanmar-turned-away-by-bangladesh>; Amnesty International, "Bangladesh pushes back Rohingya refugees amid collective punishment in Myanmar", 24 November 2016, available at: <https://www.amnesty.org/en/latest/news/2016/11/bangladesh-pushes-back-rohingya-refugees-amid-collective-punishment-in-myanmar>.
- 22 The Daily Star, "At Least 10,000 Rohingya have fled to Bangladesh: UN", *The Daily Star*, 30 November 2016, available at: <http://www.thestar.com.my/news/regional/2016/11/30/at-least-10000-rohingya-have-fled-to-bangladesh-un>.
- 23 Kiragu, E., Rosi, A. L. and Morris, T, *States of Denial: A Review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh*, UNHCR, 2011, p. 8.
- 24 See Lewa above, note 19; see also Ahmed above, note 10.
- 25 Ganguly, S. and Miliate, B., "Refugees and Neighbors: Rohingya in Bangladesh", *The Diplomat*, 14 October 2015, available at: <http://thediplomat.com/2015/10/refugees-and-neighbors-rohingya-in-bangladesh>.

with Myanmar, it is wary of accepting more people.²⁶ Nevertheless, during the major influxes of Rohingya in 1978 and 1992, Bangladesh accepted the refugees and allowed them to stay in official camps. There are similarities between the Rohingya and the people of Bangladesh: many share a religion (Sunni Islam) and those living in the Bangladesh-Myanmar border also area share language and culture.

However, in recent years, the government has adopted a tougher stance. First of all, the Bangladesh government has been keen to solve the “problem” as quickly as possible by any means necessary, for example through forced repatriation. Secondly, in mid-1992 the government ceased registering newly arriving refugees²⁷ meaning that any refugees who arrived after this time were never formally accepted by the government. Thirdly, the government stopped the resettlement process in 2010.²⁸ Finally, after the 2012 ethnic violence in Rakhine state, Bangladeshi border guards, under direction from the government, refused entry to Rohingya without assessment, violating the principle of *non-refoulement*.²⁹ Similarly, during the spate of arrivals since November 2016, the government expressed its unwillingness to offer asylum; though many Rohingya managed to cross the porous border.³⁰

The attitudes of the Bangladeshi people towards the Rohingya have also become increasingly negative. Initially, Rohingya were welcomed and assisted by the host community,³¹ however, anti-Rohingya sentiment has risen.³² Rohingya are

26 *Ibid.*

27 See Ahmed above, note 10.

28 See above, note 23.

29 As the crisis was going on, Bangladeshi Foreign Minister said that, “the recent Rohingya influx does not help our interests. We’re in consultation with Myanmar, to send back the Rohingya refugees to their homeland (...) The presence of Rohingyas is taking its toll on society, environment and the law and order situation”. The Independent, “Dhaka takes firm stance over Rohingya influx”, *The Independent*, 13 June 2012, accessed December 2016 at: <http://www.theindependentbd.com/paper-edition/frontpage/129-frontpage/115054-dhaka-takes-firm-stand-over-rohingya-influx.html>.

30 See above, note 21 and 22.

31 See Ahmed above, note 10, p. 28.

32 Chowdhury, R. “Rethinking Bangladesh’s Stance on Rohingya Refugees” *The Daily Star*, 26 November 2016, available at: <http://www.thedailystar.net/opinion/human-rights/re-thinking-bangladesh-s-stance-rohingya-refugees-1320430>.

widely associated with drugs and human trafficking, petty theft and robbery; some local people see them as a threat to the local job market; intermarriage between Rohingya and Bangladeshis is often seen as disrupting traditional community structures.³³ A Rohingya community news outlet has reported that Rohingya Resistance Committees have been formed in the sub-districts of Ukihya and Teknaf upazilla of Cox's Bazar where camps are located.³⁴ However, it should also be noted that during periods of heightened persecution in Myanmar, such as in late 2016, many social and religious groups in Bangladesh express support and solidarity for the Rohingya.³⁵

i. Protection Gaps of the Rohingya in Bangladesh

Both registered and unregistered Rohingya refugees in Bangladesh face problems in Bangladesh which impact almost all aspects of their life. Mark Isaacs, a freelance writer, commented after visiting the camps in 2015, that:

*There is no freedom of movement and constant fear of being arrested; many local people intimidate and exert power over the refugees and they rob and physically attack them. In addition, vulnerable refugee women are often raped by the locals.*³⁶

The camps are usually overpopulated and unhygienic. In December 2016, a Rohingya woman (56) in the Leda Makeshift Camp, which is populated by unregistered refugees, told a reporter that "[l]iving outside your own home is always hard.

33 Telephone interview with several people of host community in Cox's Bazar, November 2015. See also, Guhathakurta, M and Begum, S., *Protection Assessment for the Unregistered Rohingya and Vulnerable Local Population in Selected Areas of Cox's Bazaar District*, Bangladesh National Women's Lawyers Association (BNWLA), May 2016, p. 30; Uddin, N. (ed), *To Host or To Hurt: Counter-narratives of Rohingya Refugee Issues in Bangladesh*, Institute of Culture & Development Research (ICDR), 2012.

34 Kaladan Press, "Local's antipathy towards lack of solution to Rohingya problems", *Kaladan Press Network*, 18 January 2010, available at: http://www.kaladanpress.org/v3/index.php?option=com_content&view=article&id=2370%3Alocals-antipathy-towards-lack-of-solution-to-rohingya-problems&catid=115%3Ajanuary-2010&Itemid=2&limitstart=40.

35 The Daily Star, "Atrocities on Rohingyas protested", *The Daily Star*, 26 November 2016, available at: <http://www.thedailystar.net/city/repression-against-rohingyas-ptotested-country-wide-1320568>.

36 Isaacs, M., "Stories from the Rohingya Camps in Bangladesh", 5 September 2016, available at: <http://markjisaacs.com/displaced-people-of-asia/stories-rohingya-camps-bangladesh>.

And when eleven members of a family live in a ten-feet-by-seven-feet room, you can easily understand the situation".³⁷

There is no recent systematic study on the protection gaps in the camps. However, UNHCR conducted an evaluation in 2007 and identified a number of problems in the camps including:

- wife-beating and wife abandonment;
- rape, and a lack of safe shelters for the victims of rape;
- early and non-consensual marriage;
- child labour and trafficking;
- detention for illegal presence;
- restrictions on freedom of movement; and
- extortion and exploitation.³⁸

In 2010, Physicians for Human Rights expressed serious concerns for unregistered people living in makeshift camps. The organisation noted that Rohingya are at risk of a number of harms including arbitrary arrest, detention and expulsion; the report documented the following issues experienced by unregistered Rohingya:

- living in camp like "open air prison" without the ability to look for livelihood outside and in the prohibition of any aid inside the camp;
- severe malnutrition of children;
- official obstruction of humanitarian relief; and
- hate propaganda and incitement by the local authority, police, border guards and ruling political elite.³⁹

A study by Lewa on the unregistered refugees at Kutupalong makeshift site had similar findings. When asked to mention three main problems affecting them, the refugees at the makeshift site provided the following response almost unanimously:

³⁷ Roy, R. K., "Life inside a Rohingya refugee camp in Bangladesh" *The Daily Sun*, 1 December 2016, available at: <http://www.daily-sun.com/magazine/details/188448/Life-inside-a-Rohingya-refugee-camp-in-Bangladesh>.

³⁸ See above, note 23, p. 13. See also UNHCR, *Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees*, 2007.

³⁹ Physicians for Human Rights, *Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh*, March 2010, pp. 6–7.

- Lack of protection, especially fear of arrest/attack/insecurity (when going out of the site);
- Lack of access to livelihoods and, as a consequence, chronic food insecurity; and
- Housing problems (broken or leaking huts, repeated evictions).⁴⁰

Access to justice is extremely challenging for unregistered Rohingya in Bangladesh. Although the law affords them some rights, as a result of their status as “illegal entrants” under the Foreigners Act 1946 (discussed in detail below) they cannot access those rights. For instance, if an unregistered Rohingya is a victim of rape or any other crime, they are effectively unable to report the crime to the police or a court despite being entitled to the protection of law, as they risk being arrested as an “illegal foreigner” before their complaint is registered. This has created a culture of impunity for crimes against unregistered Rohingya.⁴¹

2. The International Law Framework

a. International and Regional Legal Obligations

i. International Refugee and Statelessness Law

As Bangladesh is not a signatory to the Statelessness and Refugee Conventions, it is subject only to the provisions of those Conventions which have attained the status of customary international law.⁴² The principle of *non-refoulement* and the definition of a stateless person both have the status of customary international law.⁴³ In addition, all states have obligations under customary international law which require them to protect all people in their territory and subject to their jurisdiction, regardless of whether they are citizens, stateless persons, asylum seekers or refugees.⁴⁴ Therefore, Bangladesh is obliged not to forcefully send back any Rohingya asylum seeker fleeing persecution, to recognise the status of

⁴⁰ Lewa, C., *Unregistered Rohingya Refugees and the Kutupalong Makeshift Site*, Canadian High Commission, Dhaka, February 2011.

⁴¹ Interview with UNHCR staff members, 10 October 2015, Dhaka.

⁴² Equal Rights Trust, See, *International Legal Framework* within this publication.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

stateless persons in its territory and ensure protection of all Rohingya, regardless of legal status.

It should be noted that Bangladesh considers its recognition of the small numbers of refugees which it has recognised as a “special administrative measure” and not the implementation of a treaty obligation.⁴⁵ However, as discussed above, a number of the core international human rights obligations are also relevant to the situation and treatment of the Rohingya, giving rise to obligations which apply in Bangladesh.

ii. International Human Rights Law

Bangladesh has ratified or acceded to most of the United Nations (UN) human rights instruments. It is a party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW), and the Convention on the Rights of Persons with Disabilities (CRPD). However, it should be noted that the state has placed a number of reservations and declarations against these instruments.⁴⁶ Bangladesh has not ratified the Optional Protocols to the ICCPR, the ICESCR or the CAT. It has, however, ratified the Optional Protocols to the CEDAW, the CRPD and two of the Optional Protocols to the CRC.

As discussed in greater detail above, there are a number of obligations under international law which are particularly relevant to the protection of the Rohingya.⁴⁷ Specifically, as a result of its ratification of international human rights treaties, Bangladesh is under an obligation to guarantee the following general rights (among others) to all people, irrespective of citizenship or nationality:

45 *Ibid.*

46 For specific reservations and declarations of Bangladesh, see, *International Legal Framework* within this publication.

47 *Ibid.*

- The right to non-discrimination;⁴⁸
- The right to life and protection against arbitrary deprivation of life;⁴⁹
- Freedom from torture, cruel, inhuman or degrading treatment or punishment;⁵⁰
- Freedom from slavery, servitude and forced labour;⁵¹
- The right to liberty and security of persons and protection from arbitrary arrest and detention;⁵²
- The right to equality before courts and tribunals;⁵³
- The prohibition of arbitrary interference in family life;⁵⁴
- Freedom of thought, conscience and religion;⁵⁵
- Freedom of association;⁵⁶
- The right to work;⁵⁷
- The right to education.⁵⁸

In addition, Bangladesh is under an obligation to secure the following rights which are of particular relevance to refugees and stateless persons:

- The right to liberty of movement and freedom to choose residence;⁵⁹
- The right to leave the country;⁶⁰

48 International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, 1966, Article 2(1) and Article 26; International Covenant on Economic, Social and Cultural Rights, (ICESCR), 993 U.N.T.S. 3, 1966, Article 2(2).

49 ICCPR, Article 6; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), 2220 U.N.T.S. 3, 1990, Article 9.

50 ICCPR, Article 7; ICMW, Article 10.

51 ICCPR, Article 8; ICMW, Article 11.

52 ICCPR, Article 9; ICMW, Article 16.

53 ICCPR, Article 14; ICMW, Article 18.

54 ICCPR, Article 17; ICESCR, Article 10; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 U.N.T.S. 195, 1965, Article 5.

55 ICCPR, Article 18; ICMW, Article 12.

56 ICCPR, Article 22.

57 ICESCR, Article 6.

58 Convention on the Rights of the Child (CRC), 1577 U.N.T.S. 3, 1989, Article 28; ICESCR, Article 13.

59 ICCPR, Article 12(1); ICERD, Article 5.

60 ICCPR, Article 12 (2); ICMW, Article 8.

- The right to marry (for men and women of marriageable age) and found family;⁶¹
- The right to have a name, to be registered and to acquire nationality for children;⁶²
- The right to be protected against forcible return or *refoulement* to a country where an individual faces a real risk of irreparable harm;⁶³
- The right of children to nationality and birth registration;⁶⁴
- The right of children seeking refugee status to receive appropriate protection and humanitarian assistance;⁶⁵
- The right of children of migrants to registration and nationality.⁶⁶

Under international law, Bangladesh is obliged to ensure these and many other rights for every person in its territory, irrespective of legal status.

In its final part, this paper particularly focuses on the enjoyment of the right to freedom of movement, and rights associated with birth registration and access to nationality by Rohingya in Bangladesh. These rights impact on other rights; for instance, freedom movement is essential for looking for livelihood opportunities.

iii. Other Human Rights Standards

Bangladesh is an active participant of the Asian-African Legal Consultative Committee (AALCC), the Asia-Pacific Consultations (APC) and the UNHCR Executive Committee Meetings (ExCom). Bangladesh is also a member of the Asian-African Legal Consultative Organization (AALCO) which adopted the non-binding Bangkok Principles on Status and Treatment of Refugees in 1966 (Bangkok Principles).⁶⁷ The Bangkok Principles define a refugee as:

61 ICCPR, Article 23.

62 *Ibid.*, Article 24.

63 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465, U.N.T.S. 85, 1984, Article 3; ICCPR, Article 7; Human Rights Committee, *General Comment 3: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, Para 12.

64 CRC, Article 7(1).

65 CRC, Article 22.

66 ICMW, Article 29.

67 Asian-African Legal Consultative Organisation, *Bangkok Principles on the Status and Treatment of Refugees*, 31 December 1966.

[A] person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group:

- (a) *leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or,*
- (b) *being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.*⁶⁸

Rohingya in Bangladesh are refugees under this definition, as they suffer persecution in Myanmar on the grounds of their “religion, nationality and ethnic origin”, they left their country of their habitual residence (Myanmar), and would continue to face such persecution on their return.⁶⁹ The Bangkok Principles also set out the following non-binding obligations:

- Non-refoulement;⁷⁰
- The provision of treatment to refugees no less favourable than that provided generally to aliens;⁷¹
- The requirement to treat all refugees in a non-discriminatory manner;⁷²
- The adoption of effective measures to improve the protection of refugee women;⁷³
- The requirement not to deport or return a refugee to a country where his life and liberty would be threatened;⁷⁴ and
- The requirement to respect the voluntary nature of repatriation.⁷⁵

68 *Ibid.*, Article 1.

69 For information on continued persecution of Rohingyas in Myanmar, see Fortify Rights above, note 4.

70 See above, note 66, Article III(1).

71 *Ibid.*, Article IV(1).

72 *Ibid.*, Article IV(5).

73 *Ibid.*, Article IV(6).

74 *Ibid.*, Article V(3).

75 *Ibid.*, Article VII(1).

a. Implementation of International Human Rights Instruments in Bangladesh

Article 25 of the Constitution of Bangladesh affirms respect for international law and the UN Charter:

The State shall base its international relations on the principles of respect for national sovereignty and equality, non interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter (emphasis added).⁷⁶

Bangladesh is a dualist country and international treaties must be incorporated into domestic law to be enforceable.⁷⁷ Article 145A of the Constitution sets out the process for the incorporation of international treaties into national law and provides that “[a]ll treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament”. This has been interpreted in the Supreme Court decision of *Hussain Muhammad Ershad v Bangladesh and others*.⁷⁸ The Supreme Court held that:

Universal Human Rights norms, whether given in the Universal Declarations or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated into domestic law, they are enforceable in national courts. The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not [...] straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principle incorporated in the international instruments. But in the cases where the domestic laws are clear and inconstant with the international obligations of the state concerned, the national courts will be obliged to

76 The Constitution of the People's Republic of Bangladesh, 1972, Article 25.

77 Alam, M. S. *Enforcement of International Human Rights law by Domestic Courts*, New Warsi Book Corporation, 2007, p. 108. See also Noman, A. B. M. A., “National Human Rights Protection Mechanisms in Bangladesh: An Overview” *The Chittagong University Journal of Law*, Vol. XIII, 2011. p. 151.

78 *Hussain Muhammad Ershad v Bangladesh and others*, 21 BLD (AD) (2001) 69.

*respect the national laws, but shall draw attention of the law-makers to such inconsistencies.*⁷⁹

Thus, in Bangladesh, international legal obligations of Bangladesh are applicable in national courts only when compatible with domestic laws. If there is no provision in Bangladeshi national law on any particular issue, then the relevant international law is applicable. However, in the cases of incompatibilities between national and international law, it is the responsibility of Members of Parliament to bring necessary amendments.

3. National Legal Framework

There is no national framework regulating the status of refugees or stateless persons. However, there are some constitutional provisions applicable to non-citizens including refugees and stateless people.

a. Constitution

Article 7(2) of the Constitution states:

*This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.*⁸⁰

Article 6(1) of the Constitution states that “the citizenship of Bangladesh shall be determined and regulated by law”. Article 6(2) provides that the “people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshis”.

Part III of the Constitution sets out fundamental rights. Certain of the fundamental rights in the Constitution are reserved only to citizens; others apply to all persons in Bangladesh. Some of the rights particularly reserved for citizens include the

79 *Ibid.*

80 See above, note 75, Article 7(2).

right to vote and to run as candidates in general election⁸¹ and to obtain a Bangladeshi passport.⁸²

Article 11 ensures fundamental human rights for all human beings and provides: “[t]he Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the **human person** shall be guaranteed (emphasis added).”⁸³ Article 14 states that: “[i]t shall be a fundamental responsibility of the State to emancipate the toiling masses the peasants and workers and backward sections of the people from all forms of exploitation.”⁸⁴

Article 31 is an important confirmation of the right to protection of the law for all persons in Bangladesh:

*To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of **every other person for the time being within Bangladesh**, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law (emphasis added).*⁸⁵

Every individual is guaranteed the right to life and personal liberty in Article 32: “No person shall be deprived of life or personal liberty save in accordance with law”. Article 33 of the Constitution provides safeguards in relation to arrest and detention:

- (1) *No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.*
- (2) *Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the*

81 *Ibid.*, Article 122(2).

82 The Bangladesh Passport Order 1973 (President's Order No. 9 of 1973).

83 See above, note 75, Article 11.

84 *Ibid.*, Article 14.

85 *Ibid.*, Article 31.

*journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate. (emphasis added).*⁸⁶

Under Article 34(1), the prohibition of forced labour⁸⁷ is guaranteed to all persons: “[a]ll forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.”⁸⁸ Finally, Article 44 guarantees the right to enforce one’s fundamental rights.

As these fundamental rights are guaranteed for “persons” irrespective of citizenship and legal status, Rohingya refugees and stateless people in Bangladesh are entitled to the benefit of these rights.

i. *Laws Governing the Status of Rohingya*

This section focuses on the legal and administrative procedures of Bangladesh which are practised in the case of Rohingya. In the absence of any legal regime on refugees and stateless persons, the vast majority of Rohingya are dealt under the general law applicable to all non-citizens, and many aspects of their life are controlled through administrative measures rather than standard legal procedures.

Registered Rohingya Population

The only Rohingya in Bangladesh who have secured official recognition are those living in the two official camps. These are the Rohingya who entered Bangladesh during the 1991–92 influx and were accepted as refugee on *prima facie* basis⁸⁹ under executive decisions.⁹⁰

86 *Ibid.*, Article 33.

87 Prevention and Suppression of Human Trafficking Act, 2012 (Act No III of 2012), Article 2(4), which defines forced labour or services as “any work or service that is exacted from a person under the threat to loss or damage to life, liberty, right, property or reputation of the person”.

88 See above, note 75, Article 34.

89 Phiri, P. P., “Rohingyas and Refugee Status in Bangladesh”, *Forced Migration Review*, Vol. 30, 2008, p. 34.

90 Das, U. K., “Legal Protection for Refugees: Bangladesh Perspective”, *ELCOP Journal on Human Rights and Good Governance*, 2004. See also Mizan, A. S., *Analyzing the Legislative Gaps in the Detention Scheme of the Foreigners in Bangladesh: The Released Prisoners*, National Human Rights Commission, Bangladesh, 2014.

The Refugee Relief and Repatriation Commissioner (RRRC) under the Ministry of Disaster Management and Relief of Bangladesh is responsible for administering the registered refugee operation, while UN agencies such as the World Food Programme and UNHCR coordinate humanitarian assistance. Each camp has a “Camp-In-Charge” (CiC), the civil service cadres of the Bangladeshi government under the auspices of the RRRC, who live in and administer the camp.

Registered refugees living in the camps typically prove their legal residency through UNHCR photo-identity cards which are issued to all refugees above the age of five. Though these cards do not grant immunity from arrest or allow the cardholders the right to freedom of movement, refugees in possession of a card stand a better chance of being released and/or granted bail once arrested.⁹¹ The CiC is the legal and administrative guardian of the refugees in his assigned camp: for example, the issue of refugee ration books and travel passes, permission to file a police case, marriage and divorce all are authorised by the CiC.⁹² The Ministry of Health (MoH), with funding from UNHCR, conducts free health clinics in camps.⁹³ Two other ministries have an influential decision-making role in relation to refugee issues: any projects on refugees, however modest, have to be authorised by the Finance Ministry’s Economic Relations Division; additionally, the Ministry of Foreign Affairs has been increasingly taking a leading role in refugee-related decision-making processes.⁹⁴ In the absence of any legal standards, the protection is provided in an “ad hoc, arbitrary and discretionary system”.⁹⁵

Unregistered Rohingya Population and the Foreigners Act

In addition to the Rohingya living in the camps, there are between 200,000 and 500,000 unregistered Rohingya living in villages and towns across Bangladesh who do not have any legal status.⁹⁶ The government typically categorises such per-

91 *Ibid.*

92 Interview with UNHCR staff members, 10 October 2015, Dhaka.

93 See Ahmed above, note 10 and above, note 23.

94 See above, note 23.

95 See above, note 88.

96 See Zaman above, note 20.

sons as: “illegal foreigners”, “illegal Burmese”, “undocumented Myanmar nationals (UMN)”, and “economic migrants”.⁹⁷

In the absence of domestic law specifically regulating the status of the Rohingya, the rights of Rohingya to enter and remain in Bangladesh are set out in the Foreigners Act 1946,⁹⁸ the Foreigners Order 1951,⁹⁹ the Foreigners (Parolees) Order 1965,¹⁰⁰ the Registration of Foreigners Act 1939,¹⁰¹ the Registration of Foreigners Rules 1966,¹⁰² the Control of Entry Act 1952,¹⁰³ and the Passport Act 1920.¹⁰⁴

Entry, exit and stay of non-citizens in Bangladesh are mainly determined by the Foreigners Act. The Act regulates all foreigners staying in Bangladesh, irrespective of the individual grounds for such stay. For example, it does not differentiate between a foreigner who entered Bangladesh for business purposes and a persecuted asylum seeker. The Act was enacted during the British colonial era for the purpose of managing migration movements initiated by the British plantation owners.¹⁰⁵ Both India and Bangladesh use the law, and it has been a source of constant constitutional debate in the sub-continent.¹⁰⁶

Article 2(a) of the Foreigners Act defines a “foreigner” as “a person who is not a citizen of Bangladesh”. In accordance with this Act, Rohingya are treated as “illegal foreigners” as the Act requires that any foreigner “shall not enter Bangladesh, or shall enter Bangladesh only at such times and by such route and at such port or

97 In the National Strategy Paper, the government has officially used the term undocumented Myanmar nationals (UMN).

98 Foreigners Act 1946, 23 November 1946, Act No. XXXI of 1946.

99 Foreigners Order 1951, 22 October 1951.

100 Foreigners (Parolees) Order 1965, 10 November 1965.

101 Registration of Foreigners Act 1939, 8 April 1939, Act No. XVI of 1939.

102 Registration of Foreigners Rules 1966, 6 December 1966.

103 Control of Entry Act 1952, 14 December 1952, Act No. LV of 1952.

104 Passport Act 1920, 9 September 1920, Act No. XXXIV of 1920.

105 Indian Law Commission, *175th Report of the Indian Law Commission on the Foreigners (Amendment) Bill, 2000*, September 2000, available at: <http://lawcommissionofindia.nic.in/reports/175thReport.pdf>.

106 Aju John, “Foreigners Act Defective”, *mylaw.net*, 30 May 2012, available at: <http://blog.mylaw.net/foreigners-act-defective>.

place and subject to the observance of such conditions on arrival as may be prescribed".¹⁰⁷ Under the Act, the government may also require a foreigner to reside in a particular place, impose restrictions on movement and prohibit him from engaging in specific activities.¹⁰⁸ The Foreigners Act also authorises a police officer "to take such steps and use such force as may in his opinion, be reasonably necessary for securing compliance" with the provisions of the Act.¹⁰⁹

Breach of the provisions of the Foreigners Act is punishable by a prison term of up to five years or a fine.¹¹⁰ Although the government does not arrest all unregistered Rohingya under the Foreigners Act for their "illegal entry" into Bangladesh, as evidenced by the presence of a large number of unregistered Rohingya concentrated in specific areas, some people are arrested and sentenced under this Act. Moreover, some individuals prosecuted and convicted under the Act are not released after having served the full five year term, as they are required to be transferred to authorities of his/her country of nationality or habitual residence. As Myanmar refuses to recognise any Rohingya, Rohingya individuals may remain in detention notwithstanding the expiry of his or her sentence. As of 2012, there were 90 prisoners whose sentence had expired in four district prisons among whom 83 persons were identified as "Burmese" suggesting they may be Rohingya.¹¹¹ This practice clearly amounts to arbitrary detention and "undoubtedly amounts to violation of the constitution".¹¹² Further, should an individual prosecuted under Article 3 of the Foreigners Act be released, he is liable to immediate re-arrest for the same offence.¹¹³

Importantly, Article 10 of the Foreigners Act also provides that the government may exempt individuals from liability under the Act by passing an order:

The Government may by order declare that any or all of the provisions of this Act or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be

107 See above, note 23, Article 3(2a).

108 *Ibid.*

109 *Ibid.*, Article 11(2).

110 *Ibid.*, Article 14.

111 See Mizan above, note 89, p. 20.

112 *Ibid.*, p. 17.

113 *Ibid.*

*specified, to or in relation to any individual foreigner or any class or description of foreigner.*¹¹⁴

Thus, although Bangladesh does not have a legal regime on refugees, the government has scope under Article 10 of the Foreigners Act to exempt Rohingya refugees from the provisions of the Act (particularly the provision of detention for illegal entry into and stay in Bangladesh).

On 9 September 2013, the Bangladeshi government developed a “National Strategy Paper on Addressing the Issue of Myanmar Refugees and Undocumented Myanmar Nationals in Bangladesh”. This was the first official government acknowledgement of the presence of the undocumented population. The strategy paper, which is not publicly available, includes five key elements: listing unregistered refugees, providing temporary basic humanitarian relief, strengthening border management, diplomatic engagement with the government of Myanmar, and increasing national level coordination.¹¹⁵ As part of the strategy paper, the government signed an agreement with the International Organization for Migration allowing the organisation to provide basic services including health, water, sanitation and hygiene to “undocumented Myanmar nationals”.¹¹⁶ The government has reportedly also completed a census of the unregistered refugees which is not yet published.¹¹⁷

Nationality Law

Nationality creates a legal connection between a citizen and a state. In many states, rights derive from the fact of citizenship. Indeed, the role of citizenship in accessing rights is so dominant that the right to citizenship has been called “the right to have rights”.¹¹⁸ Nationality protects individuals internationally as well as domestically, as it allows a state to intervene in favour of individual in international law.¹¹⁹

114 See above, note 97, Article 10.

115 See Ganguly and Miliate above, note 25.

116 IOM, “IOM Signs Agreement with Government to Provide Humanitarian Services in Cox’s Bazar District”, *IOM Bangladesh Newsletter*, Issue 1, March 2015.

117 See Zaman above, note 20.

118 Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C., dissenting); see also Weissbrodt, D and Collins, C., “The Human Rights of Stateless Persons” *Human Rights Quarterly*, Vol. 28, 2006, p. 248.

119 *Ibid.* Weissbrodt and Collins.

As discussed in greater detail in part 2 above, international human rights law affirms the right to nationality as a human right. Bangladesh is under several obligations as a result of its ratification of the ICCPR, CRC, CEDAW and ICERD. Article 24 of the ICCPR provides for the right of every child to acquire a nationality, to be registered following birth and to a name. Article 7 of the CRC provides for the right of children to a name, birth registration and a nationality. Article 9 of the CEDAW requires states to “grant women equal rights with men to acquire, change or retain their nationality” and to “grant women equal rights with men with respect to the nationality of their children”. It also emphasises that marriage shall not impact on a woman’s rights to nationality. Finally under Article 5 of the ICERD Bangladesh is required to guarantee the right to nationality “without distinction as to race, colour or national or ethnic origin”. However, as discussed below most of these rights are not accorded to the Rohingya in Bangladesh.

As noted above, Article 6 of the Constitution of Bangladesh states that “the citizenship of Bangladesh shall be determined and regulated by law” and “the people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies”.¹²⁰ Nationality or citizenship in Bangladesh is mainly regulated by the Citizenship Act of 1951,¹²¹ and the Rules of 1952, the 1972 Citizenship Order and Rules of 1978; together with the Naturalization Act of 1926¹²² and the Rules of 1961. The Naturalisation Act of 1926 was adopted during the British colonial period and Citizenship Act of 1951 was adopted during the period when Bangladesh was part of Pakistan. After independence from Pakistan, Bangladesh adopted all of the then laws of Pakistan with the promulgation of Presidential Order No. 48 of 1972.¹²³ Later, by the Bangladesh Citizenship (Temporary Provisions) Order of 15 December 1972, people who were living in Bangladesh at the time of independence of Bangladesh became *ipso facto* citizens of Bangladesh.¹²⁴

120 See above, note 75, Article 6.

121 Citizenship Act, 1951, 13 April 1951, Act No. II of 1951. This Act has been amended by the Citizenship (Amendment) Act, 2009, 5 March 2009, Act No. XVII of 2009.

122 Naturalization Act, 1926, 26 February 1926, Act No. VII of 1926.

123 Presidential Order No. 48 of 1972, Bangladesh Gazette, Extraordinary, Part IIIA, 22 May 1972.

124 President’s Order No. 149 of 1972, Bangladesh Gazette, Extraordinary, Part III A, 15 December 1972; also in 25 DLR (1973) p. 57. This Order has been amended several times including by the Bangladesh Citizenship (Temporary Provisions) Rules, 1978, President’s Order No. 149 of 1972, 15 December 1972.

The government is currently in the process of enacting a new citizenship law which would repeal the 1951 Act and 1972 Order. The draft law has already been approved by the Cabinet in February 2016. Though the government has not yet made the law public, possibly intentionally, jurists and rights activists are in agreement that the new law would result in increased statelessness, among other negative consequences.¹²⁵

Citizenship by Descent and Impact on the Rohingya

Jus soli and *jus sanguinis* are the two traditional paths to acquiring citizenship. *Jus sanguinis* is citizenship based upon descent and *jus soli* is citizenship based upon place of birth. As noted, Bangladesh historically recognised the principle of *jus soli* in only a very limited fashion, as people who were residing in the territory of Bangladesh on 26 March 1972 (when Bangladesh declared independence) became citizens of Bangladesh.¹²⁶

Since that time, the country has largely followed the *jus sanguinis* principle in determining citizenship. Until 2008, only children born of a Bangladeshi father could acquire Bangladeshi citizenship *ipso facto*, “irrespective of whether the child is born at home or abroad, and irrespective of the legitimacy of the child”¹²⁷. The Citizenship (Amendment) Act of 2009 replaced the word “father” with “father or mother”, with the result that a child can acquire citizenship provided it has at least one parent who is a Bangladeshi citizen. Thus, the country follows the *jus sanguinis* principle in determining citizenship at birth.

Bangladeshi citizenship laws based on the principle of *jus sanguinis* have made generations of Rohingya people living in Bangladesh – the vast majority of whom arrived in the country after 1972 – effectively stateless. As of 2011, refugee children accounted for 59% of the refugee camp population, with over half of those children born in Bangladesh.¹²⁸ The result of exclusively following this principle is that:

125 Abrar, C. R., “The curious contents of the Citizenship Law”, *The Daily Star*, 4 June 2016, available at: <http://www.thedailystar.net/op-ed/politics/the-curious-contents-the-citizenship-law-1233943>.

126 Islam, M. R., “The Nationality Law and Practice of Bangladesh” in Ko S. S. (ed.), *Nationality and International Law in Asian Perspective*, Martinus Nijhoff Publishers, 1990.

127 See above, note 120, Articles 4 and 5; see also *ibid.*, pp. 8–9.

128 See above note 23, p. 3.

*Statelessness is inherited, passed from generation to generation regardless of place of birth, number of years of residency, cultural ties, or the fact that in some cases the individuals concerned have neither entered nor resided in another state.*¹²⁹

Children Born to Mixed Marriages

A child born in Bangladesh to alien parents cannot be a citizen of Bangladesh by birth or by descent. Consequently, a Rohingya child born to two Rohingya parents cannot be Bangladeshi citizen. However, if a child is born to parents at least one of whom is a Bangladeshi citizen, he or she can acquire Bangladeshi citizenship. In such a situation, it is unclear whether the grant of citizenship is automatic or must be granted by the government.¹³⁰ Although such a child has an entitlement under law to nationality, in practice, Bangladeshi authorities are reluctant to register and provide nationality to children with a Rohingya parent. There are no known cases where a child born of one Bangladeshi parent and one Rohingya parent (so-called “mixed-marriages”) acquired Bangladeshi citizenship using this legal provision.¹³¹ This practice results in the children of mixed-marriages becoming *de facto* stateless.

Marriage as a Route to Nationality

Another possible route to acquiring citizenship open to Rohingya women is marriage to a Bangladeshi citizen. In accordance with the Citizenship Act 1951, a female non-citizen can be a citizen of Bangladesh if her husband has Bangladeshi citizenship. Art 10(2) of the Act states that:

A woman who has been married to a citizen of Bangladesh or to a person who but for his death would have been a citizen of Bangladesh under sections 3, 4 or 5 shall be entitled, on making application therefore to the Government in the prescribed manner, and, if she is an alien, on obtaining a certificate of domicile and taking the oath of allegiance in

129 Batchelor, C. A., “UNHCR and Issues Related to Nationality”, *Refugee Studies Quarterly*, Vol. 14, 1995, p. 104.

130 Interview with UNHCR staff members, 10 October 2015, Dhaka. The UNHCR thinks this process is automatic while the government thinks it needs to be granted.

131 *Ibid.*

*the form set out in the Schedule to this Act, to be registered as a citizen of Bangladesh.*¹³²

To note, a Bangladeshi woman cannot confer citizenship on her husband if she marries an alien man. This provision violates gender equality and appears to be unconstitutional as Article 28 of the Constitution states that “[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth” and “women shall have equal rights with men in all spheres of the State and of public life”.¹³³

A recent study claims marriage between Bangladeshis and Rohingya are quite common in the areas hosting refugees. Such marriages are often used by the Rohingya as an “integration strategy”.¹³⁴ There is no official data on the number mixed marriages between Rohingya and Bangladeshi and number of children born in such marriages. However, after the first phase of the census on unregistered Rohingya¹³⁵ completed, a news report which claims its source is in the Cox’s Bazar District Statistics Office, mentions that among the 37,000 Rohingya families covered in the census, 17,000 consist of mixed marriages between Rohingya and Bangladeshis.¹³⁶ If these statistics are representative, almost half of all unregistered Rohingya are married to local Bangladeshis.

However, there is no data on whether any Rohingya woman acquired Bangladeshi citizenship using the marriage relationship. It has been reported that such marriages are often not registered officially.¹³⁷ Without official proof of marriage, acquisition of citizenship would not be possible.

132 See above, note 120, Article 10(2).

133 See above, note 75, Article 28 (1) and (2).

134 See Guhathakurta and Begum, above note 33, p. 20.

135 See Zaman above, note 20.

136 Zinnat, M. A., “3 lakh Rohingyas staying illegally”, *The Daily Star*, 18 June 2016, available at: <http://www.thedailystar.net/frontpage/three-lakh-illegal-roHINGYAS-1241512>.

137 See above, note 131.

4. Other Human Rights Relevant to Rohingya in Bangladesh: Freedom of Movement

As noted in Section 2, freedom of movement is recognised in several international instruments, including the ICCPR.¹³⁸ The Human Rights Committee has emphasised that aliens whose status has been regularised are entitled to enjoy the right to move freely.¹³⁹

Registered Rohingya in Bangladesh face considerable restrictions on their freedom of movement. The restriction on freedom of movement impacts on other rights, most importantly the right to seek a livelihood. In 1993, the Bangladesh government signed a Memorandum of Understanding (MoU) with UNHCR; amongst the conditions in this MoU were that refugees should be restricted to the area of the camps and that refugees should refrain from engaging in economic activities.¹⁴⁰ Refugees can apply for a one-day pass from the Camp in Charge (CiC) to travel to seek medical care or to visit other refugees living in another camp; passes for more than one day are issued infrequently and while passes are free of charge in principle, in practice, refugees are often required to pay for them.¹⁴¹

For the unregistered stateless Rohingya, there is no official permission or prohibition on their freedom of movement. However, for those living in the makeshift camps, stepping outside of the camp places them at risk of arrest and detention under the Foreigners Act. There is no income-generating activity available in the camps, and the majority of unregistered Rohingya are not in receipt of aid.¹⁴² As a result, many Rohingya seek informal employment in Cox's Bazar. The risk of being arrested results in them living in a constant state of fear and some unscrupulous employers take advantage of the situation by paying them less.¹⁴³ In addition to

¹³⁸ ICCPR, Article 12.

¹³⁹ Human Rights Committee, *General Comment No. 27, Freedom of Movement (Art.12)*, U.N. Doc CCPR/C/21/Rev.1/Add.9, 1999.

¹⁴⁰ See above, note 23, p. 9.

¹⁴¹ *Ibid.*

¹⁴² See above, note 39 and above, note 40.

¹⁴³ Azad, A. and Jakea, T. A., "Employment and Integration of the Stateless: The case of Rohingyas in Cox's Bazar" *The Chittagong University Journal of Social Sciences*, Vol. XXVII, 2013. This study was based on qualitative interviews with unregistered people in Cox's Bazar in 2012. Unregistered people often settle in areas where there are opportunities for livelihood, see

arrest and detention by the police, Rohingya are at risk of being bullied, harassed and beaten by the local population. As they are harassed as “kalar” and “Bengali” in Myanmar,¹⁴⁴ in Bangladesh “Burmay” is a derogatory term for the Rohingya frequently used in the streets of Cox’s Bazar. The “Rohingya Resistance Committees” in different areas of Cox’s Bazar lead hate campaigns against Rohingya.¹⁴⁵ As a result of the stigmatisation faced by Rohingya, they generally keep a low profile and do not expose their identity.¹⁴⁶ All of these factors contribute to the sense that freedom of movement is severely restricted.

If Rohingya wish to travel internationally, they must seek assistance from human traffickers or bribe corrupt officials to obtain a Bangladeshi passport.¹⁴⁷ The UNHCR estimates that 170,000 people moved from the coasts of Myanmar and Bangladesh to Thailand, Malaysia and Indonesia by boat in from 2012 to 2015.¹⁴⁸ The majority of those seeking to undertake such a perilous journey are from Northern Myanmar or Southern Bangladesh. The ultimate destination for these individuals is Malaysia which hosts a large number of Rohingya and Bangladeshi people.

During the perilous journey around 2000 people died because of hunger, dehydration, drowning and beating by the smugglers or traffickers.¹⁴⁹ Following a long arduous journey through the Bay of Bengal and Andaman Sea, passengers are taken to camps in the jungles of Thailand near the Malaysia border. These camps are essentially used as prisons where the passengers are detained and tortured until their relatives pay ransom money to the traffickers. People in these camps die from a variety of causes including beatings, illness and starvation. Hundreds are suspected to have died in the transit camps in Thailand: indeed, there has been

also above, note 19, p. 21. Moreover, it is commonly reported by the media that the Rohingya are dominating the labour market in the district of Cox’s Bazar, see *The Daily Observer*, “Rohingyas dominate labour market in C’Bazar”, *The Daily Observer*, 1 May 2015, available at: <http://www.observerbd.com/2015/05/01/86504.php>.

144 See Fortify Rights above, note 4, p. 16.

145 Lewa, C., *Unregistered Rohingya refugees in Bangladesh: Crackdown, forced displacement and hunger*, Arakan Project, 11 February 2010, p. 7.

146 See above, note 40.

147 Telephone interview with several people of host community in Cox’s Bazar, November 2015.

148 UNHCR, *Mixed maritime movements in South-East Asia*, 2015, available at: <https://unhcrata-vist.com/mmm2015>.

149 *Ibid.*

significant media coverage of the discovery of mass graves in the Thai jungle.¹⁵⁰ The trafficking of Rohingya is a hugely profitable business for “transnational criminal networks”. UNHCR estimates that this illegal business generated as much as US \$100 million in revenues at its peak.¹⁵¹

If Rohingya seek to move to Saudi Arabia¹⁵² or other Gulf states, they must obtain “legal” documents as they must travel by air. As they are stateless, the only option available is to procure fake or forged documents from corrupt officials. There is no reliable data available on the number of Rohingya who have obtained Bangladeshi passports for this purpose. Nevertheless, the Expatriates Welfare and Overseas Employment minister estimates that there are 50,000 Rohingya living abroad on Bangladeshi passports.¹⁵³ Bangladeshi police have also arrested Rohingya who attempt to pass through the airport on a Bangladeshi passport.¹⁵⁴

Rohingya people are not entitled to move freely under Bangladeshi law. Registered Rohingya living in the camps are “lawfully within territory” and therefore have a right to freedom of movement under the ICCPR. Furthermore, as Rohingya qualify as both refugees and stateless, they should benefit from the protection of the right to freedom of movement. Restricting a large number of people does not serve the “national interest” of Bangladesh; it only serves to exacerbate their suffering and forces them into illegal activity to survive. A simple solution to the problem of irregular movement may be issue a legal “travel document” which will allow stateless Rohingya to move legally.

150 Guardian, “Thailand human trafficking death toll far greater than feared, claims rights group”, *The Guardian*, 6 May 2015, available at: <http://www.theguardian.com/global-development/2015/may/06/thailand-human-trafficking-mass-grave-burma-rohingya-people>.

151 UNHCR, *Mixed Maritime Movements in South-East Asia*, 2015, p. 5, available at: <https://unhcr-atavist.com/mmm2015>.

152 According to a news report, there are a staggering four million “Burmese Muslims” in Saudi Arabia and 170,000 have already obtained *iqama* (residence permit issued to expatriates), Arab News, “Four million Burmese entitled to get iqama” *Arab News*, March 16, 2015, available at: <http://www.arabnews.com/saudi-arabia/news/718891>.

153 Chittagong Bureau, “50,000 Rohingya people of Myanmar staying abroad with Bangladeshi passports, says minister”, *Bdnews24.com*, 13 August 2015, available at: <http://bdnews24.com/bangladesh/2015/08/13/50000-rohingya-people-of-myanmar-staying-abroad-with-bangladeshi-passports-says-minister>. See also, Chowdhury, K. R., “Rohingyas in KSA must forgo Bangladeshi passports” *Dhaka Tribune*, 20 July 2013, available at: <http://www.dhakatribune.com/bangladesh/2013/jul/20/rohingyas-living-saudi-arabia-must-forego-bangladeshi-passports>.

154 The Daily Star, “Rohingyas with green passports”, *The Daily Star*, 12 August 2012, available at: <http://archive.thedailystar.net/newDesign/news-details.php?nid=245812>.

5. Other Human Rights Relevant to Rohingya in Bangladesh: Birth Registration

Having ratified the CRC, Bangladesh is under an obligation to register the births of all children.¹⁵⁵ The Births and Deaths Registration Act 2004 requires birth and death registration of everyone, including refugees.¹⁵⁶ Under Article 6 it is the duty of the registrar “to register births and deaths of all the persons” and “to issue births or deaths certificate (sic)”.¹⁵⁷ A person is defined as including “any Bangladeshi or any foreigner living in Bangladesh and also any refugee taking shelter in Bangladesh”.¹⁵⁸ This is the only law in Bangladesh which contains the word “refugee”.

Thus according to Bangladeshi law, Rohingya children born in Bangladesh are entitled to have a birth registration certificate. Refusal on the part of the registrar is appealable¹⁵⁹ and punishable under the Act by a fine or up to two months’ imprisonment.¹⁶⁰

The birth registration certificate is the primary evidence of age and birth related information of a person for an office, court, educational establishment, government or non-governmental organisation.¹⁶¹ For instance, it is a requirement for admission to any educational institution to produce a birth registration certificate within 45 days of admission.¹⁶² Ideally, if a Rohingya child would like to get admitted in a local Bangladeshi school, he/she needs to submit a birth registration certificate.

In the registered camps, the government has agreed in principle to issue birth registration certificates and has already started registration of children born in Bangladesh.¹⁶³ However, the children of unregistered Rohingya people are una-

¹⁵⁵ CRC, Article 7(1).

¹⁵⁶ Births and Deaths Registration Act, 2004, dated 7 December 2004, Act No. 29 of 2004.

¹⁵⁷ *Ibid.* Article 6.

¹⁵⁸ *Ibid.*, Article 2(n).

¹⁵⁹ *Ibid.*, Article 20.

¹⁶⁰ *Ibid.*, Article 21.

¹⁶¹ *Ibid.*, Article 18(1).

¹⁶² *Ibid.*, Article 18(4).

¹⁶³ Interview with UNHCR staff members, 10 October 2015, Dhaka.

ble to register births.¹⁶⁴ This practice is a clear violation of the Births and Deaths Registration Act 2004 and of Bangladesh's obligations under the CRC. Without the certificate, the children are unable to enter local schools.

6. Conclusion

Except for the small number of Rohingya who have obtained registered refugee status, most of the unregistered Rohingya people in Bangladesh live without any legal status. It is true that the Rohingya are safer in Bangladesh than in Myanmar. However, they still face harsh challenges in everyday life, namely restrictions on movement, livelihood opportunities, education, birth registration and the right to citizenship. The government of Bangladesh and the host community have tolerated the presence of a large number of refugees despite the lack of resources; however a system wherein human beings cannot enjoy basic rights and dignity cannot be acceptable.

7. Recommendations to the Bangladeshi Government

1. Respect the principle of *non-refoulement* at all times. Bangladesh has an obligation not to return Rohingya to a country where they face persecution.
2. Ensure access to justice for all regardless of legal status, particularly for the unregistered Rohingya.
3. Provide basic services to unregistered Rohingya people in urgent need and take measures to develop the self-reliance of such persons through the development of livelihood opportunities.
4. Ensure birth registration of all Rohingya children born in the country in accordance with Bangladeshi law.
5. Provide citizenship to eligible children whose father or mother is a Bangladeshi citizen in accordance with Bangladeshi law.
6. Authorise the issue of a "travel pass" to Rohingya for local and international travel in accordance with the right to freedom of movement.

¹⁶⁴ *Ibid.* See also Kiragu, Rosi and Morris above, note 23, p. 14.

7. Allow Rohingya refugees to work, where Bangladesh is in need of labour. Alternatively, international investors could be invited to establish labour-intensive industries (for instance, ready-made garments which Bangladesh specialises in) around refugee camps and settlements under the practise of Corporate Social Responsibility. The creation of work opportunities would be beneficial both for the refugees and host community.
8. Cease the arrest and detention of unregistered Rohingya for breach of the Foreigners Act 1946.
9. Take immediate steps to release those who remain in prison despite having served their full sentence.
10. Allow access to education and training for all children irrespective of legal status.
11. Remove the ban on and facilitate resettlement of refugees.
12. Adopt measures, including awareness raising programmes, to counter anti-Rohingya hate campaigns.

The Rohingya in Malaysia

Asylum Access Malaysia, Helen Brunt and
an anonymous third author¹

1. Introduction

The presence of non-citizens in Malaysia is a highly politicised and sensitive issue. Nevertheless, migration flows through the region have existed for hundreds of years – certainly long before the introduction of present day nation-state boundaries. The legacy of such migration has contributed to the complexities around documentation which are now being faced by both individuals and states.

Arbitrarily deprived of citizenship in Myanmar, most Rohingya are stateless and most Rohingya outside of Myanmar are also refugees. It is estimated that there are over one million Rohingya living outside of Myanmar, many as refugees and asylum seekers with no legal status.² There are multi-generational populations of stateless Rohingya in Malaysia, as well as in Bangladesh, Indonesia, Thailand and other countries. Malaysia has a long history of providing temporary asylum to groups of refugees and asylum seekers, and Malaysia currently hosts one of the largest urban refugee populations in the world. Many Rohingya have been in Malaysia for as long as 30 years, arriving as refugees after the mass violence in Myanmar in 1978 and the forced repatriation of Rohingya from Bangladesh in the mid-1990s.

No reliable estimate of population numbers exists due to the clandestine existence of asylum seekers in Malaysia, inconsistent reporting, variable data collection methods and conflicting definitions of who to count. As at the end of October 2016, there were some 54,846 Rohingya refugees and asylum seekers registered

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2 Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, October 2014, p. 13.

with the United Nations High Commissioner for Refugees (UNHCR) Malaysia as “people of concern”.³ This is an increase from the 37,850 Rohingya registered at 30 June 2014.⁴ There are also a significant number of unregistered Rohingya asylum seekers in Malaysia, though the precise figure is unknown. The number of unregistered asylum seekers is likely to have increased from an estimated 35,000 people in May 2014 to between 40,000 to 60,000 people in December 2015 (according to anecdotal information provided to UNHCR from community representatives), especially in light of the influx of over a thousand asylum seekers arriving in Malaysia by sea during May and June of 2015.⁵ Of the registered refugees and asylum seekers, of whom approximately 77% are adults aged 18 or above, approximately 68% are men and 32% are women.⁶

The Malaysian Prime Minister has recently publically condemned Myanmar’s military for launching attacks on the Rohingya in Rakhine, calling it “genocide” and urging the rest of the world to put pressure on the Myanmar government to stop the violence.⁷ Although it is true that the root causes of the persecution of the Rohingya lie in Myanmar, Malaysia (as both a refugee transit and destination country) has fallen short of its obligation to uphold the right to seek and to enjoy asylum, and the right to liberty and freedom from arbitrary arrest and detention. Under Malaysia’s immigration laws, refugees and asylum seekers are treated as undocumented or irregular migrants.

2. The Malaysian Legal System and Key Legislation

a. Application of International Law in Malaysia

In general, international law may be applied within national legal systems either via the doctrine of incorporation (under monist systems) or the doctrine

3 UNHCR Malaysia, “Figures at a glance for October 2016”, available at: http://www.unhcr.org.my/About_Us-@-Figures_At_A_Glance.aspx.

4 See above, note 2, p. 14.

5 There are estimated to be at least 2,500 Rohingya in detention in Malaysia as at February 2016 (Chris Lewa, pers. comm.).

6 See above, note 3.

7 Guardian, “Malaysia PM urges world to act against ‘genocide’ of Myanmar’s Rohingya”, *Guardian*, 4 December 2016, available at: <https://www.theguardian.com/world/2016/dec/04/malaysia-pm-urges-world-to-act-against-genocide-of-myanmars-rohingya>.

of transformation (under dualist systems). The doctrine of incorporation provides that international law is automatically incorporated in domestic law unless there is a pre-existing provision under domestic law which precludes such incorporation. The doctrine of transformation requires international law to be adopted within domestic law via a statute or an Act of Parliament before it may be applied by the courts.

Prior to its independence, the application of international law by Malaya's court system was in line with the system in England and Wales; ratified treaties required a domestic legal act incorporating them into national law to be effective under national law, whereas customary international law automatically formed part of national law.⁸ Following independence, the application of ratified international treaties by Malaysia's courts appears to remain the same; however, customary international law is inconsistently applied by the courts.⁹

i. Treaties

The Federal Constitution of Malaysia does not contain provisions on the automatic incorporation of obligations under international treaties into domestic law. However, Article 74(1) of the Constitution does provide some guidance on the capacity of Parliament to codify treaties into legislation. More specifically, the article states that laws may be enacted in respect of:

- (a) *Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries;*
- (b) *Implementation of treaties, agreements and conventions with other countries¹⁰*

Based on the doctrine of transformation, even though Malaysia has ratified a treaty and is bound by it under international law, it has no legal effect unless adopted

⁸ Hamid, A.G. & Khin, M.S., *Judicial Application of International Law in Malaysia: An Analysis*, 2008, available at: http://www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html#f2.

⁹ *Ibid.*

¹⁰ Federal Constitution of Malaysia, 1957, Federal List, 9th Schedule.

into domestic law by an Act of Parliament.¹¹ Examples of treaties that have been given this legal effect in Malaysia include the Geneva Convention for the Protection of the Victims of War of 1949 and the Vienna Convention on Diplomatic Relations 1961. The Government of Malaysia has also stated that the application of the core human rights Conventions is subject to their compatibility with the Federal Constitution,¹² and for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) a further compatibility with Sharia (Islamic) Law.¹³ The courts have decided that for a treaty to be applicable in Malaysia, it must be enacted into legislation. In the absence of a domestic statute, Malaysia's judiciary tends to be reluctant to give effect to Malaysia's obligations under international law. Section 4(4) of the Human Rights Commission Act 1999 states that:

*[R]egard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.*¹⁴

The Federal Court in *Mohd Ezam Mohd Noor v Ketua Polis Negara*¹⁵ ("Mohd Ezam"), chose to interpret this section narrowly saying that it:

*[C]an only mean an invitation to look at the 1948 Declaration if one was disposed to do so and to consider the principles stated therein and be persuaded by them if need be. Beyond that, one was not obliged or compelled to adhere to the 1948 Declaration. This was further emphasized by the qualifying provisions of s 4(4) of the Human Rights Commission of Malaysia Act which provided that regard to the 1948 Declaration was subject to the extent that it was not inconsistent with the Constitution.*¹⁶

11 See above, note 8.

12 See above, note 2, p. 23.

13 UN Women, "Convention on the Elimination of All Forms of Discrimination against Women: Declarations, Reservations and Objections to CEDAW", available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

14 Human Rights Commission Act 1999, Section 4(4).

15 *Mohd Ezam Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449.

16 *Ibid.*, Para 11.

A similar approach towards international obligations can also be seen in the recent Court of Appeal decision of *AirAsia Berhad v Rafizah Shima binti Mohamed Aris*¹⁷ ("Rafizah"). In this case, the courts ruled on the extent to which the Malaysian Federal Constitution applies in an employment contract between private parties and the applicability of CEDAW in Malaysia. The case involved an airline company, AirAsia Bhd, that was being sued by a female employee pursuant to a training agreement that was part of her employment contract. The training agreement contained a clause prohibiting the respondent from becoming pregnant during the four-year training period. The respondent, who faced termination upon becoming pregnant during that period, challenged the clause as illegal, null and void, as the said clause has the effect of discriminating against the respondent's rights as a married woman,¹⁸ thereby contravening her right to equality under Article 8 of the Federal Constitution, as well as provisions under the CEDAW.

The Court of Appeal followed the Federal Court case of *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor*¹⁹ and held that constitutional safeguards such as the right to equality fell within the domain of public law, therefore applying only to the contravention of individual rights by a public authority and not to private entities. The Court of Appeal went further and held that despite the fact that Malaysia has long acceded to the CEDAW,²⁰ it has no force of law. The Court of Appeal observed as follows:

The learned author, Tunku Sofiah Jewa, in her book Public International Law A Malaysian Perspective, Vol. I Pacific Publication, 1996 stated at p. 35:

Treaties to which Malaysia is a party may either require subsequent legislation, in which case they become the law of the land as soon as the necessary laws are enacted or, they may not in which case they

17 *AirAsia Berhad v Rafizah Shima binti Mohamed Aris* [2014] 5 MLJ 318.

18 *Ibid.*, Para 3.

19 *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713. This case concerned the terms and conditions a collective agreement between Malaysia Airlines System (MAS) and the MAS Employees Union. One clause required a female flight attendant to resign if she became pregnant, or face termination. The Federal Court held that the applicant's constitutional right was not engaged when MAS, a private employer, terminated her service on ground of pregnancy.

20 Malaysia became a signatory to the said Convention on 5 July 1995.

remain within a special category of Malaysia's international law, binding only herself vis-à-vis the other parties to the treaties but having no effect as such on Malaysian subjects. (Emphasis added by the Court).

Further, Kevil YL Tan and Thio Li-Ann in *Constitutional Law in Malaysia and Singapore* wrote:

Although CEDAW contemplates taking appropriate measure, including legal measure, against private parties which commit gender discrimination, the treaty is not self-executing and needs to be given effect by a domestic statute which confers a horizontal reach upon treaty norms.²¹

The Court of Appeal went on to assert that:

[I]n Malaysia, unless a treaty is domesticated, it cannot be enforced. In other words, without express incorporation into domestic law by an act of parliament following ratification of CEDAW, the provisions of the international obligations in the said convention do not have any binding effect. In sum, insofar as Malaysia is concerned, treaties are only domestically enforceable where they have been incorporated by statute. Ratification alone does not make the provisions of treaties applicable for municipal law.²²

There have been instances where the courts have put Malaysian law on par with international human rights standards, as was the case in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*.²³ This case involved the acquisition of land from a group of indigenous Temuan people. Holding that the Temuan people were not only entitled by custom to the use of their ancestral land, but that they also enjoyed proprietary right to it, the High Court quoted with approval the Australian decision of *Mabo v Queensland (No. 2)*²⁴ where Judge Brennan said:

21 See above, note 19, Paras 47–48.

22 See above, note 19, Para 49 (emphasis added).

23 *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591.

24 *Mabo v Queensland (No. 2)* [1991–1992] 175 CLR 1.

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.

Subsequently the Court of Appeal affirmed the High Court ruling that the *Temuan* people did have native title rights over their customary lands and therefore were entitled to be compensated by the state.²⁵ However, the Court of Appeal did not make specific reference to the position and importance of international law as highlighted by the High Court.

More recently, in October 2015, the Court of Appeal in the judgment of *PP v Yuneswaran A/L Ramaraj*²⁶ made express reference to international human rights laws when reviewing whether or not the requirement under the Peaceful Assembly Act 2012 for organisers to give the police 10 days prior notice of a gathering was valid and enforceable. Raus Sharif PCA cited, amongst others, a decision by the United Nations Human Rights Committee whereby a pre-notification requirement was held justifiable, as Article 21 of the International Covenant on Civil and Political Rights (ICCPR) provides that the freedom of peaceable assembly may be limited for reasons of national security and public order. His Lordship continued to make an important statement as follows:

*As a general rule, no State can be bound by a treaty without having given its consent to be bound. Malaysia is not a signatory to the IC-CPR, but such principles can be used to assist in the interpretation of the relevant Malaysian law. (Emphasis added)*²⁷

The courts have also been prepared to invoke international conventions and treaties in order to fill a void in domestic law where circumstances so merit, as seen

25 *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (CA).

26 *PP v Yuneswaran A/L Ramaraj* [2015] 6 MLJ 47.

27 *Ibid.*, Para 43.

in the case of *Lee Lai Ching v Lim Hooi Teik*.²⁸ This case involved a plaintiff seeking to compel the putative father of a child to undergo DNA testing, relying *inter alia* on Article 3(1) of the Convention on the Rights of the Child (CRC). To its credit, the High Court was not deterred by the absence of a specific provision of statute in Malaysia to order a DNA testing under such situations. Zamani A Rahim J in this instance instead considered how legal issues concerning parental testing were managed in other jurisdictions, such as the UK, US, France and Germany. Noting that courts in these jurisdictions were entitled to order paternity testing, albeit in varying instances in the different jurisdictions, Judge Zamani A Rahim opined that the judiciary in Malaysia must take a robust approach lest it "lag behind".²⁹ Accordingly, in exercising its discretionary power, the High Court, having regard to Article 3(1) of the CRC, held that it was in the best interests of the child to know the identity of his biological father and thus the defendant was ordered to undergo DNA testing.

Upon ratification of the CRC, Malaysia enacted the Child Act 2001 to give effect to international obligations under the Convention. Although the 2001 Act does not expressly refer to the CRC, it has been rooted in the core principles of the Convention, namely the best interests of the child and non-discrimination.³⁰ However, the courts are not in agreement and have been inconsistent in their application of the CRC, in particular in cases involving juvenile justice³¹ and child custody.³² In the case of *Kok Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan*,³³ the High Court noted that although the Child Act was enacted to generally implement the CRC, certain provisions in the CRC had not been fully implemented within domestic law, and it was not within the realm of the judiciary to imply the implementation of these provisions. Judge Heliliah stated:

The provisions of the Convention on the Rights of the Child have not been incorporated into the municipal laws of Malaysia. The full regime

²⁸ *Lee Lai Ching v Lim Hooi Teik* [2013] 4 MLJ 272.

²⁹ *Ibid.*, Para 49.

³⁰ UNICEF, *Child Rights in Malaysia*, 2012, available at: http://www.unicef.org/malaysia/childrights_malaysia-overview.html.

³¹ *Kok Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan* [2004] 4 LRC 395.

³² *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552.

³³ See above, note 31.

of the Convention on the Rights of the Child still remain within the purview of the Executive in the area of treaties and external affairs. It is not open therefore for the High Court to imply such a provision for that will not be interpretation. It may amount to judicial vandalism or judicial trespass.³⁴

On appeal, the Court of Appeal³⁵ and the Federal Court³⁶ unfortunately made no reference to the CRC or international law.

Conversely, in the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*,³⁷ the learned Judicial Commissioner Lee Swee Seng was very supportive of a liberal approach to construing the domestic provisions, especially where human rights were at stake. He asserted:

[A]n interpretation of the Fundamental Liberties provisions that best promote our commitments to the international community is to be enjoined. An interpretation of arts 12(4) and 8(1)–(2) of the Federal Constitution vesting equal rights in both the parents to decide on a minor child's religious upbringing and religion would be falling in tandem with such international human rights principle and would place beyond a pale of doubt that there is no discrimination on ground of race, religion or gender. To that extent as provided for in art. 75 of the Federal Constitution any state law that is inconsistent with any federal legislation is void to the extent of the inconsistency.

Then there are the Convention on the Rights of the Child ('CRC') and the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), both of which were ratified by Malaysia on 17 February 1995 and 5 July 1996 respectively. The principles propounded in these conventions are highly persuasive and should provide that guiding light to help us interpret the fundamental liberties enshrined in our Constitution taking into consideration accepted norms of international law in these international con-

34 *Ibid.*, Para 93.

35 *Kok Wah Kuan v PP* [2007] 5 MLJ 174.

36 *PP v Kok Wah Kuan* [2008] 1 MLJ 1.

37 See above, note 32.

*ventions that have been widely accepted and ratified by countries across the world.*³⁸

In this case, the High Court ruled that the conversion of the applicant's three children by her estranged husband was not in accordance with the Constitution, holding *inter alia* that interpreting the word "parent" in Article 12(4) of the Constitution as requiring a single parent's consent with respect to a minor child's conversion to Islam such that the rights of the non-converting parent could be effectively disregarded would fall foul of Article 8 of the Constitution. Further, the learned Judicial Commissioner noted that the principles in the CRC and CEDAW were "highly persuasive" and where there are two possible interpretations of a norm, courts should select the interpretation that "best promotes [Malaysia's] commitment to international norms and enhance[s] basic human rights and dignity". The High Court asserted that international conventions should provide "that guiding light to help us interpret the fundamental liberties enshrined in our Constitution."³⁹

However, by a two-to-one majority, the Court of Appeal on 30 December 2015 set aside the order granted by the High Court which quashed the issuance of the certificates of conversion issued in respect of the children.⁴⁰ The Court of Appeal maintained that it was bound by a Federal Court decision of 2014 where the issues of whether a person professes Islam, and of whether the conversion of a minor into Islam is valid, were held to be solely within the jurisdiction of the Sharia Court.⁴¹ While the Court of Appeal was indeed bound to follow the decision of the Federal Court, it was regrettable to note that Balia Yusof bin Hj. Wahi JCA (with whom Badariah binti Sahamid JCA agreed) went on to say:

*In our view, the approach taken by the learned JC in imposing upon himself the burden of sticking very closely to the standard of international norms in interpreting the Federal Constitution is not in tandem with the accepted principles of constitutional interpretation.*⁴²

38 *Ibid.*, Paras 91–92.

39 *Ibid.*, Para 92.

40 However, the Court of Appeal did not interfere with the order quashing the certificate of conversion in respect of the eldest child who has since turned 18 years' old.

41 *Haji Raimi b. Abdullah v Siti Hasnah Vangarama b. Abdullah & another appeal* [2014] 3 MLJ 757.

42 *Pathmanathan a/l Krishnan v Indira Gandhi a/p Mutho*, Civil Appeals No A-02-1826-08/2013, 30 December 2015, Court of Appeal, Para 71.

The majority reinforced the position that international treaties do not form part of Malaysian law unless those provisions have been incorporated into Malaysian law, citing with approval the Federal Court judgment in *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal*,⁴³ the House of Lords judgment in *Regina v Secretary of State for the Home Department, Ex parte Brind and Ors*⁴⁴ and the *Rafizah* case.⁴⁵

The dissenting judge, Hamid Sultan Abu Bakar JCA, considered that the conversion was purely an administrative matter as it was the Registrar of Conversion who failed to follow the proper procedure. At the time of writing, an application for leave to appeal against the Court of Appeal's decision has been filed.

ii. Customary international Law

Similarly to treaty obligations, the Federal Constitution does not provide for the specific application of customary international law within the Malaysian legal system. The courts have in generally applied customary international law inconsistently where there is no statutory authority within domestic legislation. Under section 3(1) of the Civil Law Act 1956 customary international law, as applied in England, is applicable in Malaysia to the extent that it does not conflict with Malaysian law or public policy:

*Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Act.*⁴⁶

The principle under section 3(1) application is commonly seen in cases involving the immunity of foreign heads of States.⁴⁷ Under Article 160 of the Federal Constit-

43 *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 8 CLJ 766. Their Lordships in that case stated that, "We should not use international norms as a guide to interpret our Federal Constitution".

44 *Regina v Secretary of State for the Home Department, Ex parte Brind and Ors* [1991] IAC 696.

45 See above, note 17.

46 Civil Law Act 1956, Section 3(1).

47 *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd.* [1990] 1 CLJ 878, [1990] 1 MLJ 475 (Supreme Court of Malaysia); *Public Prosecutor v Oie Hee Koi* [1968] AC 829.

tution, law is defined as “written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof”⁴⁸ There is an argument that this provision of the Federal Constitution is authority that customary international law, which does not conflict with existing domestic law, falls under the scope of “common law” and as such forms part of Malaysian law.⁴⁹

As outlined above, states are only exempted from the binding effect of customary law if the persistent objector rule is invoked. If a state is able to show that it has persistently objected to a rule during formation and after the completion of its creation, that state may be exempted from the binding effect of a customary law.⁵⁰ It must be clear that the state in question disagrees with the rule when compared with other states in order for this to take effect.⁵¹ Specifically in relation to Malaysia, the question arises as to whether the persistent objector rule applies to the principle of *non-refoulement*.

The Malaysian government has historically allowed refugees and asylum seekers to remain in the country pending resettlement to a third country but maintains that it does not have the resources to host large numbers of refugees and asylum seekers for indefinite periods.⁵² Although Malaysia is not party to the Refugee Conventions,⁵³ it is a member of the Asian-African Legal Consultative Organization which adopted the 1966 Bangkok Principles on Status and Treatment of Refugees in 2001. These principles recognise that states owe a duty to protect refugees against forced return.⁵⁴

48 See above, note 10, Article 160.

49 Hamid A.G., and Sein K.M., *Judicial Application of International Law in Malaysia: An Analysis*, 31 March 2006, available at: http://www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html#f2.

50 Supaat, D.I., “Escaping the Principle of Non-Refoulement”, *International Journal of Business, Economics and Law*, Vol. 2, Issue 3, 2013.

51 *Ibid.*

52 *Ibid.*

53 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 1954; Convention relating to the Status of Stateless Persons; 360 U.N.T.S. 117, 1954; Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, 1961.

54 Asian-African Legal Consultative Organisation, *Final text of the AALCO’s 1966 Bangkok Principles on status and treatment of refugees*, 14 June 2001, available at: <http://www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf>.

However, contrary to these principles, since 2001 Malaysia has forcibly returned refugees and asylum seekers.⁵⁵ In the recent past, there have been reports of Rohingya (including refugees registered with UNHCR) being deported to Thailand,⁵⁶ although this practice was reported to have stopped in mid-2009.⁵⁷ In May 2015, Malaysian authorities attempted to push onwards boats of Rohingya and Bangladeshi persons who were attempting to disembark in the island of Langkawi in Malaysia.⁵⁸ Following international pressure, Malaysia eventually allowed subsequent boats to disembark but held those who had disembarked from the boats in immigration detention and confirmed that Bangladeshi irregular migrants on board those vessels would be deported back to Bangladesh.⁵⁹ The majority of Bangladeshis have since been repatriated, and in July 2016 all those who were identified as Rohingya (save for 13 individuals who remain in immigration detention) were resettled to a third country from the immigration detention centre in Belantik, Kedah.⁶⁰

Despite certain instances of forcible return of refugees and asylum seekers, there appears to be no clear evidence to show that Malaysia has persistently objected to the principle of *non-refoulement*. Malaysia has also, on multiple occasions, allowed refugees and asylum seekers to remain in the country pending a durable solution. Despite maintaining that Malaysia is not party to the Convention Relating to the Status of Refugees (hereafter 1951 Refugee Convention), the government remains silent on its obligation under the principle of *non-refoulement* in international customary law. It is arguable that Malaysia should be responsible under international law for violating the principle of *non-refoulement* in instances where a refugee is

55 See United States Committee for Refugees and Immigrants, *U.S. Committee for Refugees and Immigrants World Refugee Survey 2006 – Malaysia*, 14 June 2006; and Amnesty International, *Amnesty International Report 2013, 2014/15 – Malaysia*, 25 February 2015.

56 Human Rights Watch, *Malaysia's Treatment of Undocumented Rohingya*, August 2000, available at: https://www.hrw.org/reports/2000/malaysia/maybr008-02.htm#P376_79005.

57 See above, note 2, p. 58.

58 Ng, E., "Malaysia to pushback Rohingya unless boats are sinking", *The Jakarta Post*, 12 May 2015, available at: <http://www.thejakartapost.com/news/2015/05/12/malaysia-push-back-rohingya-unless-boats-are-sinking.html>.

59 Zahid S., "Malaysia, Indonesia agree to provide 'boat people' temporary shelter", *Malay Mail*, 20 May 2015, available at: <http://www.themalaymailonline.com/malaysia/article/malaysia-and-indonesia-agree-to-provide-boat-people-temporary-shelter>.

60 Asia Pacific Refugee Rights Network, "July 2016 Country Update Newsletter", 21 July 2016, available at: <http://aprrn.info/july-2016-issue/#AAM>.

forcibly returned. However, due to the circumstances of such situations, there is no known case law on the violation of the principle of *non-refoulement* brought before Malaysian courts to date.

Most recently, when the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Bill 2015 was tabled before the Malaysian House of Representatives (*Dewan Rakyat*) in June 2015, Dr Michael, Jeyakumar Devaraj, an Opposition MP proposed two amendments to the draft Bill that would have afforded some measure of protection to refugees who have been trafficked or smuggled, in particular the Rohingya. Dr Devaraj called for:

- (i) an express recognition and distinct treatment of refugees (as opposed to economic migrants) by adopting into the Bill the definition of “refugees”, as found in the 1951 Refugee Convention;⁶¹

Specifically relating to the principle of *non-refoulement*, Dr Deveraj also called for:

- (ii) a provision to the effect that upon expiry of the Protection Order period, an undocumented foreign national/trafficked person will not be returned to his country of origin if the said person has applied for status as a refugee or if such person has been determined by the UNHCR to be a refugee.⁶²

The then Deputy Home Minister, whilst acknowledging that there was a “very strong and powerful argument” for treating the Rohingya differently as a result of their lack of documentation and persecution they experience in Myanmar, declined to afford additional protection by including the proposed definition of “refugees” in the Bill.⁶³ He argued that to do so would be “putting the cart before the horse” since Malaysia has yet to ratify the 1951 Refugee Convention.⁶⁴ The then Deputy Home Minister refused to address the issue, stating that it was precisely the fact that Malaysia had not ratified the 1951 Refugee Convention which gave rise to the present need to make provisions under domestic law that would safeguard persecuted groups, particularly the Rohingya. He went on to say that

⁶¹ Hansard Malaysia, *Parliamentary Debate*, 16 June 2015, available at: <http://www.parlimen.gov.my/files/hindex/pdf/DR-16062015.pdf>.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

Members of Parliament who felt strongly about refugee issues must first urge and support the Government to ratify the 1951 Refugee Convention, prior to which it would be “quite premature” to amend Malaysia’s existing laws.⁶⁵

Regrettably, the House of Representatives (*Dewan Rakyat*) passed the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Bill 2015 on 16 June 2015 without any of the aforesaid amendments. Further, the government of Malaysia in recent Parliamentary sittings has once again reiterated its stance that Malaysia has no intention of ratifying the 1951 Refugee Convention, nor its 1967 Protocol, but will continue to allow refugees and asylum seekers to remain in the country on humanitarian grounds pending resettlement to a third country.⁶⁶

b. Development of Malaysia’s Legal System

Malaysia’s legal system, a legacy of colonisation by the British, is modelled on the English common law system and specific laws from other Commonwealth countries, including India⁶⁷ and Australia.⁶⁸ Following Malaya’s independence from British colonial rule in 1957, the Federal Constitution became the supreme law of the land.⁶⁹ In 1963, Sabah, Sarawak, Singapore and the Malaya Federation formed the Federation of Malaysia, although two years later Singapore broke away from Malaysia, resulting in the Federation of Malaysia as it is known today.⁷⁰

There are three periods in the development of Malaysian law: (i) Pre-war law during the era of the decentralised states of Malaya (1866–1942), (ii) Post-war law following unification of the Malay States (1946–1957), and (iii) Post-Independence laws following the formation of the Federation (from 1957 onwards).⁷¹ The Malaysian legal system is comprised of civil or secular law, with Islamic (Shar-

65 *Ibid.*

66 Hansard Malaysia, *House of Representatives – 13th Parliament Sitting*, 4 November 2015.

67 Malaysia’s Criminal Procedure Code, Contract Law and Labour Laws are largely based on equivalent laws in India.

68 Malaysia’s Land Law is largely based on equivalent law in Australia.

69 Noordin, S.M. & Lim, P. K., *An Overview of Malaysian Legal System and Research*, 2013, available at: <http://www.nyulawglobal.org/globalex/Malaysia1.html>.

70 *Ibid.*

71 *Ibid.*

ia) law applicable to Muslims for personal matters. Malaysia is a federal country: federal laws are enacted by the Parliament of Malaysia and apply throughout the land; state laws govern local governments, and Islamic law is enacted by the state legislative assembly and applies in particular states.⁷²

i. The Hierarchy of Courts and Doctrine of Judicial Precedent

Malaysia's courts are comprised of a hierarchical structure; the Federal Court, which is Malaysia's highest and apex court,⁷³ followed by the Court of Appeal, and finally the High Court,⁷⁴ which is usually the court of first instance. Each lower court must accept the decision of higher courts.⁷⁵ This is commonly known as the doctrine of *stare decisis* which means "to stand by the decision". Other subordinate courts include the Session Court, Magistrates' Courts, Native Court, and the Court for Children.⁷⁶

A precedent is a judicial decision which serves as a rule for future determination in similar or analogous cases in order to ensure consistency and predictability in the law. It establishes a principle that a court must follow when deciding in subsequent cases with similar issues or facts. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases.⁷⁷

As the highest court of the land, the Federal Court has the final say in the interpretation of the Constitution of Malaysia. One of the main functions of the Federal Court is to determine or interpret the validity of laws enacted by Parliament or the State government. The Federal Court also has jurisdiction to resolve disputes between states or between the Federal and State governments.⁷⁸ As the highest

72 *Ibid.*

73 See above, note 10, Article 121(2).

74 There are differences between the High Court of Malaya and the High Court of Sabah & Sarawak. Aziz, S.A., "The Malaysian Legal System: The Roots, The Influence and The Future" *Malayan Law Journal*, Vol. 3, 2009, xcii.

75 *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276 (Federal Court).

76 Subordinate Courts Act 1948.

77 *Kerajaan Malaysia & Tay Chai Huat* [2012] 3 MLJ 149.

78 Office of the Chief Registrar, *History of the Malaysian Judiciary*, 25 May 2011, available at: <http://www.kehakiman.gov.my/en/node/410>.

court of the land, the Federal Court binds all courts subordinate to it, but it is not bound by its own decisions.

The Court of Appeal is bound by its own decisions subject to three exceptions as laid down in the case of *Young v Bristol Aeroplane Co Ltd*.⁷⁹ These exceptions apply where there is a conflict between previous decisions made by the same court, where a previous decision is made without reference to a statutory provision or judgment which would have been relevant (*per incuriam*), and where a decision on its own cannot stand with a decision of the Federal Court even though this decision has not been expressly overruled. In Malaysia, the list of exceptions laid down in *Young v Bristol Aeroplane Co Ltd* is widely accepted as part of the common law by virtue of Section 3 of the Civil Law Act 1956. There are of course further possible exceptions so long as they do not run against the established principles laid down in that case.⁸⁰ Below the Court of Appeal is the High Court, whose decisions are not binding on another High Court, but bind all courts subordinate to it.⁸¹ Decisions of subordinate courts will only bind that particular court.

ii. Islamic Law

Islam is the official religion of Malaysia.⁸² Article 74 of the Federal Constitution, read together with List II (State List),⁸³ states that Islamic Law (including the establishment of Sharia courts) falls under the jurisdiction of individual states. This includes matters governing personal and family law of persons professing the religion of Islam, including Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, and

79 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

80 Mohamed, A.A., "Recent Decisions Offending Stare Decisis in Malaysia", *Malayan Law Journal*, Vol.3, 2008, xcvi.

81 Ismail, I., "Judicial Certainty and Creativity: An Evaluation of Stare Decisis" *Jurnal Undang-Undang dan Masyarakat*, Vol. 8(79), 2004, p. 82.

82 See above, note 10, Article 3.

83 Individual states may pass laws on Islamic law, and personal and family law of persons professing the religion of Islam as set out in the Federal Constitution in item 1 of the State List. The article provides that, "*Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship....*" See above, note 10, List II, State List, Ninth Schedule, Article 95B(1)(a).

guardianship between Muslims. Each state of Malaysia has its own Sharia Court as well as statutes to govern the implementation of matters pertaining to family law which governs Muslims.⁸⁴ Article 121(1A) excludes the jurisdiction of the High Court in respect of any matter within the jurisdiction of the Sharia court.⁸⁵

iii. Reporting of Case Law

Cases heard in courts in Malaysia may either be “reported” or “unreported”. “Reported” cases are those that have been published in official law reports, whereas “unreported” cases are those that have not. A law report is a record of a judicial decision on a point of law which sets a precedent. The vast majority of the cases heard in court will be unreported. In general, a case is only reported if it raises a new or significant principle of law, or changes or clarifies the existing law. In Malaysia there is no difference between an unreported and reported case, save for publication in the respective law journals. An unreported case may be verified by the Courts if it has been cited or followed in a judgment. In any event, unreported cases remain good law unless overruled in an appeal or in a court of similar jurisdiction.

c. Domestic Laws

i. The Federal Constitution

The Federal Constitution is the product of the social, economic and political developments in the evolution of Malaysia as a country. It provides for the constitutional

⁸⁴ Muslim personal law (including family matters such as marriage, divorce and inheritance) and native personal law and custom are under the jurisdiction of the States and Legislatures. Generally the Islamic Family Law Act of the states in Malaysia can be divided into two categories. First, those states which follow the model of Islamic Family Law (Federal Territory) Act, 1984 but with slight modifications, namely the states of Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak and Sabah. The second category is those states that made significant changes to the original draft agreed to by the Council of Rulers. The differences are particularly in the arrangement of sections, the law and the procedures, namely the states of Kelantan, Johor, Malacca and Kedah. Currently, there is an effort to synchronise Islamic Family Law across all states of Malaysia. See Hak, N.A., *Role of the Conciliatory Committee and Hakam (Arbitrator): the practice and provisions of the Islamic Family Law in Malaysia*, 2005, available at: https://law.nus.edu.sg/asli/2nd_asli_conf/pdf/nora2005_01.pdf.

⁸⁵ See above, note 10, Article 121(1a). See also, Dahlan, R. and Faudzi, F., “The position of the Shariah Court in the Malaysian legal system”, *Malay Mail*, 15 May 2015, <http://www.themalaymailonline.com/what-you-think/article/the-position-of-the-shariah-court-in-the-malaysian-legal-system-rosli-dahla>.

monarch, separation of powers between the executive, legislature and judiciary, and governs fundamental liberties and provisions on acquisition of citizenship in Malaysia.⁸⁶ Constitutional matters are determined by the highest civil court, the Federal Court. Article 4 of the Constitution provides that any law passed after Independence (31 August 1957) which is inconsistent with the Constitution, shall be void.⁸⁷

The Constitution provides for a list of Federal laws that may only be enacted by Parliament; these include Federal citizenship and naturalisation, issues related to immigration and preventive detention, and labour and social security.⁸⁸ The State legislature may enact laws under specified circumstances and to be applied only within individual states. These include matters pertaining to Islamic law and local state administration. The Constitution may be amended following Federal law and under special considerations. There have been 675 individual amendments to the Constitution, largely due to territorial changes, creation of Federal courts, and changes in terminology over time.⁸⁹

Although the Federal Constitution provides for the acquisition of citizenship, on a practical level, matters such as marriage and birth registration as well as adoption affect the citizenship status of an individual. As Muslims, Rohingya who intend to marry or adopt children in Malaysia (or Rohingya children who are adopted by Malaysians) fall under the jurisdiction of Sharia law. The relevant provisions will be considered below.

ii. The Immigration Act

The first immigration law enacted during Britain's colonial rule over Malaya was the Passenger Restriction Ordinance 1922 that regulated entry into the country.⁹⁰ The Aliens Immigration Restriction Ordinance was enacted in 1930 to regulate the arrivals of labourers into British Malaya via a quota system.⁹¹ Following a state

⁸⁶ Vohrah, K.C., Toh P, Ling P, *Sheridan & Groves – The Constitution of Malaysia*, LexisNexis, 2004, p. 113.

⁸⁷ See above, note 10, Article 4.

⁸⁸ See above, note 86, p. 114.

⁸⁹ *Ibid.*

⁹⁰ Immigration Department of Malaysia, *History*, 2012, available at: <http://www.imi.gov.my/index.php/en/corporate-profiles/history.html>.

⁹¹ *Ibid.*

of emergency, a series of immigration and passport laws were enacted which included the Emergency (Travel Restriction) Regulation 1948 and the Passport Ordinance and Regulations 1949.⁹² During this time, the Immigration Ordinance of 1952 was the primary piece of legislation used to regulate and monitor the entry of persons including, but not limited to, British nationals and persons under the British colony.⁹³ The Ordinance was also used to regulate and monitor “aliens” to the federated Malay states.

Prior to independence and following World War II, immigration matters were handled by the Refugees and Disposal Persons Bureau which was based in Kuala Lumpur.⁹⁴ The Bureau, led by a British Military Administration Officer, was established with the purpose of bringing people who were stranded in other countries after World War II back to Malaysia.⁹⁵ Following the state of emergency, immigration matters were handled by the Ministry of Foreign Affairs.

Post-independence, the Immigration Ordinance and Regulations of 1959 and the Passport Ordinance 1960 were enacted.⁹⁶ The Immigration Act 1959/63 (Act No. 155) and the Passport Act 1966 (Act No. 150) apply nationwide, although Sabah maintains autonomy over its immigration and has the power to control who enters the state’s borders.⁹⁷ In 1964, the management of immigration matters was transferred to and remains with the Ministry of Home Affairs.

The Immigration Act 1959/63 also applies to refugee and asylum seekers in Malaysia. This was provided for in the case of *Subramaniyam Subakaran v PP*, where the Court found that the Immigration Act in general, particularly its provisions relating to unlawful entry, are applicable to asylum seekers and refugees.⁹⁸ The specific provisions of the Immigration Act under which asylum seekers and refugees are prosecuted are set out below in Part 4. Yet, as will be discussed in Part 4 there are exceptions whereby refugees and asylum seekers registered

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Subramaniyam Subakaran v PP* [2007] 1 CLJ 470 (HC), Para 24.

with UNHCR have been exempted from charges of unlawful entry under the Immigration Act.

d. Conclusion

The application of international law by the courts in Malaysia has been inconsistent. The Federal Constitution of Malaysia does not contain provisions on the automatic incorporation of obligations under international law into domestic law. In respect of treaty obligations and customary law, the courts have been cautious in giving effect to Malaysia's obligations under international law. The courts have argued that for a treaty to be applicable in Malaysia, it must be enacted into legislation, as was seen in the cases of *Rafizah and Beatrice*. However, exceptions to this have been noted in the cases of *Lee Lai Ching* and the High Court decision of *Kok Wah Kuan*. In a recent decision by the Court of Appeal in the case of *Indira* however, the courts held that international treaties do not form part of Malaysian law unless they have been incorporated into domestic legislation.

Similar inconsistencies in application are evident with regards to customary international law, specifically in reference to the principle of *non-refoulement*. Malaysia is only exempt from obligations if it has persistently objected to the customary rule since its inception. There appears to be no evidence of such consistent objection, based on Malaysia's general practice of allowing refugees and asylum seekers to remain in the country, and its silence on obligations under the principle of *non-refoulement*. Therefore, Malaysia should be held responsible under international law for violating the principle of *non-refoulement* in instances where a Rohingya refugee is forcibly returned. However, initiating action against the state for violation of this principle will be a challenge.

Furthermore, as Malaysia has not ratified the Refugee or Statelessness Conventions, refugees and asylum seekers are subject to the provisions on unlawful entry, although, as discussed below there are certain exceptions which may apply to those Rohingya who are registered with UNHCR.

3. Citizenship and Nationality Laws

a. Legal Status of Rohingya in Malaysia

Over the past four decades, thousands of Rohingya children have been born in Malaysia, although the National Registration Department (NRD) does not have a record of the number of Rohingya births which have been registered. However, both

community leaders and the NRD have confirmed that some Rohingya have registered the birth of their children with the NRD, and have managed to acquire birth certificates, although these children are usually categorised on birth certificates as “non-citizens” if both of their parents are stateless Rohingya.⁹⁹ For Rohingya in Malaysia, despite the fact that women usually give birth in a hospital, access to birth registration is a significant challenge for several practical reasons, which are outlined in Section 3c below.¹⁰⁰

Similarly, although there are reports and anecdotal accounts of Rohingya who are married to Malaysians,¹⁰¹ and one individual who subsequently applied for residency in Malaysia,¹⁰² information on the number of Rohingya who have been granted permanent residency or naturalised citizenship through marriage is difficult to obtain. In general, Rohingya in Malaysia are not aware of the process (and perhaps the importance) of civil registration and acquisition of citizenship, which can be complex, time-consuming, and fraught with practical and legal obstacles.

In the context of Rohingya living in Malaysia, the sections below will discuss the legal framework, the Malaysian government’s policies, and the judicial interpretation of provisions and policies relating to citizenship. It will conclude with an analysis of the opportunities and challenges for the acquisition of Malaysian citizenship for Rohingya.

b. Legislation on the Acquisition of Citizenship

i. The Federal Constitution of Malaysia

The Federal Constitution of Malaysia provides for three types of citizenship: citizenship by operation of law, citizenship by registration and citizenship by natu-

99 See above, note 2, p. 67.

100 Upon registration, an application can be made by an eligible applicant to obtain a copy of the birth register by paying a prescribed fee. Extract of a birth certificate may be made at any NRD office in Peninsular Malaysia. See Ministry of Home Affairs, *Official Portal of the National Registration Department of Malaysia*, available at: <http://www.jpn.gov.my/en/perkhidmatan/cabutan-sijil-kelahiran>.

101 Ng C., and Sen, T., “Married to a Refugee”, *Astro Awani*, 12 June 2014, available at: <http://english.astroawani.com/news/show/married-refugee-36185>.

102 FMT Reporters, “Rohingya marrying old widows for a new start”, *Free Malaysia Today*, 7 June 2015, available at: <http://www.freemalaysiatoday.com/category/nation/2015/06/07/rohingya-marrying-old-widows-to-get-a-new-start>.

ralisation.¹⁰³ The provisions which could be considered for the purposes of acquisition of citizenship by stateless Rohingya in Malaysia are Article 14(1)(b) Part II Second Schedule paragraphs (a) and (e) (citizenship by operation of law); Articles 15(1), (2) and 15A (citizenship by registration), and Article 19 (citizenship by naturalisation).

Article 14(1)(b) of the Federal Constitution provides that a child born in Malaysia is a citizen by operation of law if: (i) at least one of his or her parents is at the time of birth either a citizen or permanently resident in Malaysia (Part II(1)(a) Second Schedule), or (ii) where he or she is not born a citizen of any other country and cannot acquire citizenship of any other country by registration within one year (Part II(1)(e) Second Schedule).¹⁰⁴ The latter section could provide a safeguard against statelessness in Malaysia.¹⁰⁵

Articles 15(1), 15(2) and 15A of the Federal Constitution provide for the acquisition of citizenship by registration. The Federal Government may register a woman who is the wife of a citizen if her husband was a citizen on 1 October 1962, and the marriage was subsisting at the time of the application, provided she satisfies the following conditions: two years of continuous residency prior to the application, is of good character, and is officially married according to Malaysian law).¹⁰⁶ This right does not apply to husbands of female citizens of Malaysia. The Federal Government may also register the children of citizens who are under the age of 21, and where at least one parent or guardian is (or was at the time of their death) a citizen.¹⁰⁷ The Government also may, in such special circumstances as it thinks fit, cause any person under the age of 21 years to be registered as citizen.¹⁰⁸

103 See above, note 10, Articles 14–19.

104 *Ibid.*, Article 14(1)(b). Section 2(3) provides: “Every person who is not born a citizen of any country and who cannot acquire citizenship of another country within 1 year of birth.” However, an exception is provided in section 2(1), which provides that an envoy of a sovereign power or the father is an enemy alien.

105 *Ibid.*, Part II Second Schedule (a), and Article 14(1)(b) Part II Second Schedule (e). See also UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: Malaysia*, March 2013, available at: <http://www.refworld.org/pdfid/513d9a0e2.pdf>.

106 *Ibid.*, Article 15(1).

107 *Ibid.*, Article 15(2).

108 *Ibid.*, Article 15A.

Individuals can also apply for naturalised citizenship. Upon the application of any person over the age of 21 who is not a citizen, the Government may grant a certificate of naturalisation to that person if he or she is of good character, has adequate knowledge of the Malay language and has had a total period of residence of not less than 10 years within the 12 years preceding the date of the application, including the 12 months immediately before the application.¹⁰⁹ Citizenship by naturalisation is a discretionary grant.¹¹⁰

The Federal Constitution also has an important safeguard for abandoned babies (foundlings). Any newborn child found exposed in any place shall be presumed, until contrary as shown to have been born in that place to a mother permanently resident there (Second Schedule, Article 19B). However, this right only applies for newborns. In all other cases, the provisions of Part II(1)(e) Second Schedule of the Federal Constitution on stateless children should apply.¹¹¹ In determining whether a person is born a citizen of Malaysia, the Government may decide whether or not a person is “born a citizen of another country,” and can issue a certificate of citizenship upon submission of an application by any person whose citizenship is in doubt (Article 30).¹¹²

Part III also contains an important provision that has often been cited in case law, regarding the citizenship of illegitimate children. According to Section 17, Part III Second Schedule of the Federal Constitution, in cases where a father and a mother are not legally married, references to a child’s father, to his/her parent, or to one of his/her parents are to be construed as references to his/her *mother*. Article 31 of the Federal Constitution provides that the supplementary provisions in Part III

¹⁰⁹ *Ibid*, Article 19.

¹¹⁰ The case of *Public Prosecutor v Munusamy* [1967] 1 MLJ 238 discussed the nature of citizenship by naturalisation: “Citizenship by naturalisation is a discretionary grant. Under art 19(1) of the Constitution of Malaysia, such a grant may be made to a person over the age of 21 years if the Government is satisfied: (a) that he has resided in the Federation for the required periods and intends, if the certificate is granted, to do so permanently; (b) that he is of good character; and (c) that he has an adequate knowledge of the Malay language.”

¹¹¹ Mohd A., “Abandoned Child’s Right to Identity Protection in Malaysia”, *US-China Law Review*, Vol 8:389, 2011, p. 394.

¹¹² At present, there is a lack of clarity around whether or not the Malaysian government considers the Rohingya to be citizens of Myanmar, or without citizenship of any state (i.e. stateless). Inconsistent and inaccurate usage of the word ‘stateless’ in the media, by politicians and by civil society actors, further add to the confusion around the citizenship status (or lack thereof) of the Rohingya in Malaysia.

of the Second Schedule have effect for the purpose of Part III of the Federal Constitution, the provision relating to citizenship.¹¹³

The functions of the Government under Part III of the Federal Constitution (on supplementary provisions relating to citizenship), are to be exercised by a Minister as directed by the Ruler of the State (*Yang di-Pertuan Agong*),¹¹⁴ and the Minister may delegate these functions relating to citizenship by registration, the keeping of registers and relating to deprivation of citizenship by registration or by naturalisation to any officer of the Federal Government or (with the Ruler of the State's consent) any officer of the Government of the State.¹¹⁵

A decision by the Federal Government, under Part III of the Constitution, cannot be appealed or reviewed in any court,¹¹⁶ however a person aggrieved by the decision of the person whom the functions of the Minister are so delegated may appeal to the Minister.¹¹⁷

ii. Birth and Deaths Registration Act 1957

The Birth and Deaths Registration Act 1957 provides for mandatory registration of every child born in Malaysia.¹¹⁸ However birth registration in and of itself does not normally confer nationality upon a child.¹¹⁹

iii. Islamic Family Law (Federal Territories) Act 1984

Most Malaysian states are governed by State Enactments with provisions equivalent to the ones in the Islamic Family Law (Federal Territories) Act 1984. Mus-

113 See above, note 10, Article 31.

114 *Ibid.*, Article 31, Second Schedule Part III Section 1.

115 *Ibid.*, Article 31, Second Schedule Part III Section 4(1).

116 *Ibid.*, Article 31, Second Schedule Part III Section 2.

117 *Ibid.*, Article 31, Second Schedule Part III Section 4(1).

118 Births and Deaths Registration Act 1957, Section 7(1).

119 The Malaysian Minister of Home Affairs has said that the issuance of birth certificates does not entitle one to automatic citizenship as it only serves as a record that the birth took place in Malaysia, whereas citizenship comes under the purview of Part III of the Federal Constitution. See Daily Express, "No Stateless People, Says Zahid", *Daily Express Newspaper Online*, 20 April 2015, available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=99073>.

lims in the Federal Territories are regulated by the Act. According to section 4, the provisions of the Act applies to all Muslims living in the Federal Territory, and to all Muslims resident in the Federal Territory who are living outside the Federal Territory.¹²⁰ The applicability of the Act therefore is not limited to Muslim citizens. Under the Act a marriage must be solemnised in the presence of, or with permission of a Registrar as appointed by the Ruler of the State (Yang di-Pertuan Agong).¹²¹ A marriage will also not be registered or recognised under the Act unless the wali¹²² of the woman has given his consent, or the Syariah judge sitting in the place where the woman resides or someone authorised by the judge gives his consent to the marriage.

As a general position for Muslims, an illegitimate child is one who is born out of wedlock as well as one who is born less than six months from the date of the mother's marriage to the child's father.¹²³ If there is no certificate of the marriage, if the marriage is considered to be unregistered, or if the marriage is less than six months from the date of birth of the child, the father's name will not be entered on the birth certificate and the child will be ineligible to acquire the nationality of the father.¹²⁴

iv. Registration of Adoption Act 1952

There are two Acts that govern the adoption process in Malaysia. The Registration of Adoptions Act 1952 governs the adoption of a Muslim child in Ma-

120 Islamic Family Law (Federal Territories) Act 1984, Section 4.

121 *Ibid*, Section 7(1)

122 *Ibid*, Section 2. "Wali Mujbir" means the father or paternal grandfather and above. "Wali Raja" means a wali authorized by the Yang di-Pertuan Agong (in the case of the Federal Territories, Malacca, Penang, Sabah and Sarawak), or by the Ruler (in the case of any other States), to give away in marriage a woman who has no wali from nasab.

123 See above, note 120, Section 110; Malaysian Bar, "NRD explains the Fatwa Council Ruling", available at: http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=34300.

124 National Fatwa Council decision which was gazetted on 28 January 1981. However, this fatwa ruling conflicts with Section 13 of the Birth and Deaths Registration Act 1957 which provides for the father's particulars to be entered into the register of births if there is a joint application between the mother and the person claiming to be the father of the child, and Section 3(1) and 4 of the Birth and Death Registration Act 1957 which provides for marriages which may legitimise a child. See above, note 123.

laysia, and the Adoption Act 1952 governs the adoption of non-Muslims.¹²⁵ The Adoption Act 1952 stipulates that a Muslim child cannot be adopted by non-Muslim adoptive parents,¹²⁶ whereas the Registration of Adoption Act was enacted to provide for Muslims whose personal laws are considered repugnant to adoption.¹²⁷

A Muslim parent or parents can legally adopt a child through a “registrar adoption” under the Registration of Adoption Act 1952. The process of adoption under the Registration of Adoptions Act is commonly referred to as “departmental adoption” as the application is made to and processed by the NRD, as opposed to a court order.¹²⁸

However, both Acts are silent on the question of citizenship of adopted children. Section 9 of Adoption Act 1952 provides that all rights, duties, obligations and liabilities shall be vested in and be exercisable by and enforceable against the applicants as though the child was a child born to them in lawful wedlock.¹²⁹ In contrast, the Registration of Adoption Act does not provide for any form of legal status for the adopted child. It merely provides for registration of the *de facto* adoption and recognises indirectly the right to custody of the adopted child.¹³⁰ The distinction between the two Acts is important in the analysis of the courts’ interpretation of citizenship provisions under the Federal Constitution, which will be discussed below.

125 *Sean O’ Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137 (FC).

126 See above, note 100.

127 See above, note 125, Para 63. One reason for the different provisions is that Islam requires that the child’s original identity and the identity of his birth parents be kept on record for disclosure to the child at a suitable age. In addition, the religion does not recognize any change to a child’s inheritance rights despite the adoption, and therefore a child adopted under the Registration of Adoptions Act inherits from the birth parents and not the adoptive parents. See MahWengKwai & Associates, *Adoption in Malaysia*, available at: <http://www.mahwengkwai.com/adoption-malaysia>.

128 *Ibid.* If the application for a departmental adoption is allowed, an entry will be made in the Registration of Adoptions Register and a certificate of adoption will be issued.

129 Adoption Act 1952, Section 25A. According to Section 25A (read with Section 9) the child’s new birth certificate shall be issued by the respondent as though the child is a child born to the applicant’s lawful wedlock.

130 *Halsbury’s Laws of Malaysia*, LexisNexis, Vol. 8, Para 140.073. See also above, note 125.

c. Government Policies Affecting Citizenship for Rohingya

i. Policies on Birth Registration

Birth registration is vital for realising the right to acquire a nationality as it can help establish a child's legal link to the state and is a prerequisite for official identification as a citizen.¹³¹ The NRD is responsible for the registration of all births in Malaysia,¹³² whereas the Ministry of Home Affairs is responsible for matters relating to the acquisition of, and retention of citizenship.¹³³ However, the official website of the NRD states that it is also responsible for determining citizenship status and issuance of identity cards to eligible individuals.¹³⁴

In order for the child of refugee parents to be issued with a Malaysian birth certificate, the parents are required to produce documents which may include: proof of the birth issued by the hospital or attending doctor or midwife, the parents' marriage certificate, the parents' UNHCR cards, and a completed form for the NRD (form number JPN.LM01). Both parents should also be present at the NRD office during the registration of their child's birth.¹³⁵ The application for birth registration is free of charge, provided that the application is made within 14 days of the child's birth.¹³⁶

Asylum seekers and refugees who are registered with UNHCR in Malaysia are generally able to register their children's births, as the NRD normally accepts UNHCR

131 See above, note 111, p. 392.

132 National Registration Department of the Ministry of Home Affairs, Official Portal, available at: <http://www.jpn.gov.my/en/maklumatkorporat/pengenalan>.

133 Ministry of Home Affairs, Security Collective Responsibility, *Citizenship*, available at: <http://www.moha.gov.my/index.php/en/maklumat-perkhidmatan/hal-ehwal-pendaftaran-negara/kewarganegaraan>. This is in accordance with the supplementary provisions in Part III of the Federal Constitution.

134 See above, note 132.

135 UNHCR, "Birth Registration", available at: http://www.unhcr.org.my/upload/Brochure_BirthRegistration.pdf.

136 See National Registration Department of the Ministry of Home Affairs, *Normal Registration of Birth*, available at: <http://www.jpn.gov.my/en/perkhidmatan/pendaftaran-kelahiran-biasa-2>. Applicants will be charged MYR5 (US\$1.12) if they register after 14 days but within 42 days, and MYR55 (US\$12.29) after 42 days. See a revision of this policy (now extended from 42 to 60 days) here: The Rakyat Post, "Birth Registration Period Extended to 60 days", *Rakyat Post*, 24 November 2016, available at: <http://www.therakyatpost.com/news/2016/11/24/birth-registration-period-extended-to-60-days>.

asylum seeker or refugee cards in support of applications for a birth certificate in lieu of the standard documents required from non-Malaysian citizens (namely a passport, entry permit, or identity card). While some Rohingya who hold UNHCR-issued cards have been able to obtain a birth certificate for their children born in Malaysia, refugee community leaders have reported that people without a UNHCR card (i.e. those who are not registered with UNHCR) can face significant difficulties in obtaining birth certificates.¹³⁷ Furthermore, difficulties in obtaining a birth certificate for a child often arise if the parents do not have a valid marriage certificate. However, community leaders have reported that NRD offices have accepted marriage certificates issued by an *ulama* in the Rohingya community for the purposes of registration of births.¹³⁸

Families have also reported barriers to accessing the NRD, and particularly onerous documentation requirements.¹³⁹ In such cases, applicants who are unable to meet the evidentiary requirements imposed by the NRD can face difficulties and significant delays to their applications. The lack of standardised procedures between NRD offices across the country also results in the inconsistent application of policies and practices. For example, while the production of a certain set of documents may be sufficient for the issuance of a birth certificate in one NRD office, the production of the exact same set of documents may be treated as insufficient in another NRD office, resulting in refusals to issue birth certificates. In other cases a police report has been required as part of an application for a birth certificate for the child of a refugee.¹⁴⁰ Children whose parents are undocumented, have died,

137 Child Rights Coalition Malaysia, *Status Report on Children's Rights*, December 2012. Current reports from the Rohingya community suggest that the challenges in having their children's births registered remain unchanged since this report was published in 2012.

138 Interview with a leader of the Rohingya community organisation, 15 December 2016.

139 Child Rights Coalition Malaysia, *Universal Periodic Review – October 2013: Recommendations for the Government of Malaysia*, October 2013, available at: [http://wao.org.my/file/file/Child%20Rights%20Coalition%20Malaysia%20UPR/CRCM_Key%20Issues_Final_2013%20UPR%20\(with%20title\).pdf](http://wao.org.my/file/file/Child%20Rights%20Coalition%20Malaysia%20UPR/CRCM_Key%20Issues_Final_2013%20UPR%20(with%20title).pdf). The Malaysian Home Minister (now Deputy Prime Minister) Datuk Dr. Zahid Ahmad Hamidi once said that the burden of proof lies on the applicants to "prove their worthiness of citizenship. See Malaysian Insider, "300,000 – that's the number of red IC holders in Malaysia, says Zahid Hamidi", *Yahoo!*, 23 October 2013, available at: <https://uk.movies.yahoo.com/300-000-number-red-ic-holders-malaysia-says-100909143.html>.

140 Subramaniam, P., "Born into the shadows – Malaysia's stateless children", *Malay Mail Online*, 9 August 2014, available at: <http://www.themalaymailonline.com/print/malaysia/born-into-the-shadows-malaysias-stateless-children>.

or cannot be traced also have significant difficulties providing the documentation required by the NRD.

The challenges faced by Rohingya in Malaysia with regards to registering the birth of a child may be related to rigid procedures and/or the particular circumstances of the individual applicant. For example, whilst registration of a birth is free of charge within 60 days, the application for birth registration requires a set of documents in support of the registration application, some of which incur a fee, such as the prenatal card (maternity examination book), and the confirmation of the birth from the hospital where the child was born, or a certificate of home birth from a midwife or doctor. Therefore, possible factors contributing to the lack of birth registration among Rohingya in Malaysia may include:

- **Difficulties in accessing NRD offices** both in terms of location or proximity, and transport costs involved in reaching the NRD office.
- **Fear of arrest due to a lack of documentation.** The Immigration Department has counters at some public hospitals in Malaysia and, if the mother does not possess a UNHCR card, it is reported that some Rohingya mothers and their new-born children have been arrested.
- **No access/limited access to NRD offices for asylum seekers and refugees detained in immigration detention centres.** In cases where an asylum seeker or refugee gives birth in detention, there are inconsistent approaches taken by the immigration authorities. In some instances, immigration officers will assist in obtaining the birth certificate of a child by bringing the child to the nearest NRD office, however in these cases the registration process is done in the absence of the parents. As a result, only the child's mother's name is listed on the birth certificate, while the father's name is not listed. In other instances, no assistance is rendered to the detained parent(s), leading to a delayed or late registration of the child, as the parents would only be able to approach the NRD office after their release from detention.
- **Linguistic and literacy challenges.** Applicants often experience language difficulties due to a lack of Rohingya interpreters, and literacy levels amongst Rohingya are often low.
- **Additional fees and documentation/corroboration required for late birth registration.** This may include having two witnesses/sponsors with

knowledge of the birth produce a Statutory Declaration, which can be a further hindrance especially where applicants are have low literacy levels, limited understanding of the procedures, and/or are unable to finance the acquisition of such documentation.¹⁴¹

- **Bureaucratic/administrative challenges.** Applicants often do not have a sufficient understanding of how to navigate the birth registration process in Malaysia.

According to Malaysia's domestic law, one of two types of birth certificate may be issued upon the birth of a child on the territory. Green birth certificates are issued to children who fulfill the criteria for Malaysian citizenship; whereas red birth certificates are issued to children who do not fulfill the criteria for Malaysian citizenship or whose citizenship is "not yet determined". Whether a child is issued with a green or a red birth certificate can have important consequences in terms of the child's nationality or legal status in Malaysia, particularly as birth certificates act as a gateway to the acquisition of other identity documents. The provisions on the registration of births are set out in Part II of the Births and Deaths Registration Act 1957.

Furthermore, whilst both men and women can confer their Malaysian nationality to their children born in wedlock in the territory, children born out of wedlock to Malaysian fathers can only acquire Malaysian nationality through discretionary citizenship by registration procedures.¹⁴² This can create statelessness in cases where a child cannot acquire a nationality from their mother. This can occur (i) where the mother is stateless; (ii) where the laws of the mother's country do not permit her to confer nationality in certain circumstances; (iii) where a mother is unknown. In such a case, only the mother's details will be passed on to the child and if the mother is herself of "undetermined nationality" or missing, the child will receive a red birth certificate stating the child's nationality as "*bukan warganegara*" (non-national).

The details of the father will not be registered unless the parents make a joint application. A joint application requires both parents to be present during the reg-

¹⁴¹ On 24 November 2016 the period for late birth registration was extended from 42 to 60 days to "allow parents or single mothers in confinement to care for the baby prior to appearing before the registrar of births". The matter was cited in the Births and Deaths Registration (Amendment) Act 2016 tabled by Deputy Home Minister Datuk Nur Jazlan Mohamed at the Dewan Rakyat. See above, note 136, *The Rakyat Post*.

¹⁴² See above, note 10, Article 15(2).

istration to sign the birth register. In this particular case, the father's details will be entered on the birth certificate. Children whose birth certificate contains the father's details (through joint application), can apply for Malaysian citizenship following DNA test results as a supplementary document/or through a court application under Article 15A of the Federal Constitution. A green birth certificate will be issued to children born out of wedlock to a Malaysian mother who is present at the time of the birth registration. Over and above the citizenship requirements stipulated in the Federal Constitution, the Ministry of Home Affairs also sets out other "basic considerations for a citizenship application" many of which are broad and vague.¹⁴³

ii. Policies on Marriage Registration

The Malaysian government has taken the position in the past that one factor in determining the citizenship status of children in Malaysia was the marital status of their parents.¹⁴⁴ This has also been reflected in the judicial interpretations of relevant citizenship provisions, as will be seen below. Rohingya community leaders have asserted that they are unaware of any local religious authorities which are willing to authorise Rohingya marriages in Malaysia.¹⁴⁵ Therefore, most Rohingya marriages are conducted within their community, and are not formally recognised by the Malaysian state. There are however two exceptions. The Selangor state government has provided guidelines on the registration of marriages between Muslims who are UNHCR cardholders in the state.¹⁴⁶ These guidelines set out the documents required for marriage registration,¹⁴⁷ including the application form

¹⁴³ The criteria include having good behaviour and no criminal record, resided in Malaysia for a long time, high commitment and deep-rooted in the country, understand the language, culture and fulfil the Nation's needs, contribute to the society and Nation, faithful and loyal to the nation. See above, note 133.

¹⁴⁴ See above, note 119.

¹⁴⁵ See above, note 2, p. 79.

¹⁴⁶ Islamic Family Law (State of Selangor) Enactment 2003 (Enactment 2/2003) for persons residing in the state of Selangor.

¹⁴⁷ *Ibid.* Documents includes: UNHCR card, conversion certificate if born a non-Muslim, marital consent from UNHCR Malaysia and the Selangor Chief Registrar, HIV test from any government clinic, length of stay verification, verification of parents' marriage, pre-nuptial course certificate if any, and for female applicants death certificate/divorce letter of previous spouse/marriage. Whether any condition will be possible for exemption will be considered on a case-to-case basis.

and details of the relevant Islamic Affairs Offices where application for marriage registration may be made.¹⁴⁸ Upon submission of the required documents, a marriage certificate may then be issued (although there is no record of any Rohingya marriage being registered in Selangor so far). The religious department in the state of Perak reportedly approved the marriage between a Rohingya man and a Malaysian woman in 2014.¹⁴⁹ However, there has been no indication so far that other Malaysian states will follow suit.

There have been reports of Rohingya men marrying elderly, widowed Malaysian women in the hope of obtaining permanent residency, and subsequently Malaysian citizenship.¹⁵⁰ In practice, there are few procedural steps for an individual to acquire permanent residency and eventually apply for citizenship by registration or naturalization.¹⁵¹ The requirements for application for permanent residency are that the applicant must be married to a Malaysian citizen, be issued with a Long Term Visit Pass and have stayed continuously in Malaysia for a period of five years, and submit a “*Surat Akuan Perkahwinan*” (Marriage Verification Letter).¹⁵² After the application, the applicants are required to be interviewed by the Immigration Department and are subject to police vetting before being issued an Entry Permit. Once the Entry Permit is issued, the application for Permanent Residency (MyPR) can then be made.¹⁵³ However, in addition to an Entry Permit, the applicant must also submit a valid international passport and marriage certificate – which is a barrier for undocumented Rohingya.

Upon the issuance of MyPR, there is the requirement of a minimum of 2 years continuous residency for wives of Malaysian men, for citizenship by registration (Article 15 of the Federal Constitution), and a minimum of 10 years continuous

¹⁴⁸ This is not as a right, as an application will be made for the due consideration of the registrar before registering the marriage.

¹⁴⁹ See above, note 101.

¹⁵⁰ See above, note 102.

¹⁵¹ Email correspondence with UNHCR’s Regional Protection Officer (Statelessness) on 2 February 2016.

¹⁵² Immigration Department of Malaysia, *Entry Permit*, available at: <http://www.imi.gov.my/index.php/en/main-services/entry-passes.html>.

¹⁵³ National Registration Department of the Ministry of Home Affairs, *Application for Identity Card (MyPR) for children aged 12 or for first time for non-citizens*, available at: <http://www.jpn.gov.my/en/perkhidmatan/permohonan-kad-pengenalan-mypr-kanak-kanak-12-tahun-atau-kali-pertama-bukan-warganegara>.

residency is required for (Article 19 of the Federal Constitution) citizenship by naturalization. In the absence of a valid international passport, NRD will not process the application for MyPR.¹⁵⁴

iii. Policies on Adoption

As the Federal Constitution, the Adoption Act 1952 and the Registration of Adoption Act 1952 are all silent with regard to the citizenship of adopted children in Malaysia, it falls to the NRD to determine the citizenship of adopted children. Prior to 2011, the practice was that a child would be registered by the NRD as a "Permanent Resident". However, this practice was halted due to a directive issued by the Home Minister, and later cases indicate that a child is required to register as a "Non-Citizen".¹⁵⁵ Parents of adopted children, whose application for citizenship is denied, may appeal to the Minister of Home Affairs, whose decision is discretionary and beyond judicial review.¹⁵⁶

d. Judicial Interpretation and Analysis of Legislative Provisions on the Acquisition of Citizenship

The Federal Constitution is considered a living document. Courts have held that when interpreting it, judges should keep in tandem with national ethos and adopt a liberal approach in order to implement the true intention of the framers of the Constitution.¹⁵⁷ They have also held that the Federal Constitution should be interpreted liberally, meaning with less rigidity and more generosity.¹⁵⁸

Malaysian courts have recognised the following basic principles in relation to Article 14 of the Federal Constitution (citizenship by operation of law): (i) that this is a question of fact;¹⁵⁹ (ii) there is no room for discretion or policy considerations

¹⁵⁴ National Registration Department at the Ministry of Home Affairs, *Official Portal: MyPR*, available at: <http://www.jpn.gov.my/en/mypr/#1458638408777-32041fc5-0ba3>.

¹⁵⁵ Lin, G.S., "Citizenship issues and the Adopted Child", 2012, available at: <http://legally-touched.blogspot.com/2012/09/citizenship-issues-and-adopted-child.html>.

¹⁵⁶ See above, note 10, Part III, Section 2.

¹⁵⁷ See above, note 43.

¹⁵⁸ See *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi Bin Syed Idrus* [1981] 1 MLJ 29; *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697.

¹⁵⁹ *Yong Lee Hua @ Piang Lin v Director of National Registration Sabah & Anor* [2011] 3 MLJ 684.

(much less the opportunity to fetter that discretion by rigidly applying a set of rules or criteria),¹⁶⁰ (iii) that a substantive right conferred by the Federal Constitution can never be taken away by mere procedural irregularity.¹⁶¹ The effect of Article 14 is to make those who, by virtue of the Federal Constitution, are citizens “without volition on their part, without a choice in the matter by the government and without oath or (in most cases) formality.”¹⁶²

As for the discretionary provisions for applications for citizenship by registration or naturalisation, Article 31 and Section 2 of Part III of the Second Schedule of the Federal Constitution provides that the decision of the Minister is not subject to review or appeal.¹⁶³ The position of the court that matters of citizenship and immigration are questions of public policy to be solely decided by the Government has been affirmed in several cases.¹⁶⁴ However, the courts have held that the discretionary powers of the Government can be subject to judicial review in certain

160 See *Foo Toon Aik v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573, Para 25: “There is no room for an exercise of discretion under Article 14. Hence the argument of learned counsel that the Respondent should weigh conflict of consideration between immigration policy and the welfare of a child simply cannot arise here, since there is no room for any discretion to be employed under Article 14. The test to be applied is whether a person qualifies all the necessary requirements of Article 14. Once the requisite conditions under these provisions are met it is automatic that a person is a citizen by operation of law.” (emphasis added).

161 See *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1 on birth records. The Court held that an irregularity in birth records could never be a bar to a substantive claim for citizenship under Article 14 of the Federal Constitution. See *Goh Liew Kee v C. Moosa B. Abdullah* [1993] 1 CLJ 410 on marriage. “On this point, I believe the testimony of the applicant and the two witnesses called on her behalf ... any event, at the material time, in the case of a Hindu customary marriage in this country, registration of the marriage was not an essential requirement for its validity...The only requirement of the Common Law which I hold applied to the question whether the applicant was the legal wife of the deceased was the basic essence of marriage, namely, an agreement between the parties.” See further above, note 159.

162 See above, note 86, pp. 131–135.

163 See above, note 10, Article 31, which provides “until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.” Part III of the Second Schedule provides that “2. A decision by the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court”.

164 *Yu Sheng Meng & Anor v Ketua Pengarah Pendaftaran Negara & Ors, Malaysia* [2016] 1 CLJ 336, *Andrew s/o Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156, and *Re Menaal W/O Muniyandi* [1980] 2 MLJ 299.

cases.¹⁶⁵ In *Kuluwante (an Infant) v Government of Malaysia & Anor* it was held that the court is not precluded by reason of the 'ouster provision' only (which purports to preclude the jurisdiction of the court), to entertain a claim for a declaration that an individual is a citizen.¹⁶⁶ In the recent case of *Navin a/l Moorthy v Ketua Pengarah Pendaftaran Negara & Ors, Malaysia* ("Navin"), involving an application for citizenship by registration under Article 15A, the court reaffirmed that the Executive's decisions can be subject to challenge in court, particularly where there is a lack of jurisdiction, error of law on the face of the record, or manifest fraud.¹⁶⁷

However, the courts have refused to entertain a claim for review of discretionary provisions under citizenship laws where the applicant had failed to exhaust all options before applying for relief from the court. In *Yu Sheng Meng & Anor v Ketua Pengarah Pendaftaran Negara & Ors* ("Yu Sheng Meng"),¹⁶⁸ the High Court held that the decision to refuse an application under Article 15A by the Secretary General of the Ministry of Home Affairs can still be appealed to the Minister of Home Affairs based on Article 31, Second Schedule Part III section 4(1). The court held that the case was an abuse of court process as it was a non-justiciable matter which the court had no jurisdiction to hear.¹⁶⁹

There are currently no reported or unreported citizenship cases in courts involving a Rohingya refugee. However, there have been several cases brought to court by parents aggrieved by the decisions of the NRD to refuse the granting of citizenship to their adopted or biological children under Articles 14 and 15 of the Federal Constitution, which are now considered below.

¹⁶⁵ In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 FC (not a citizenship case), Raja Azlan Shah FJ stressed that "every legal power must have legal limits, otherwise there is dictatorship...the courts are the only defence of the liberty of the subject against departmental aggression". See also *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 at 320H, "And it is an elementary principle of constitutional law that no Act of Parliament may authorize a public decision-maker to act contrary to the supreme law."

¹⁶⁶ The effect of Section 2 of Part III of the Second Schedule of the Federal Constitution (ouster provision) has been decided in a series of cases beginning with *Soon Kok Leong v Minister of Interior, Malaysia* [1968] 2 MLJ 88 and *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 (which dealt exhaustively with relevant authorities), *Kuluwante (an Infant) v Government Of Malaysia & Anor* [1978] 1 MLJ 92 ("Kuluwante"), *Durayappah v Fernando* [1967] 2 AC 337.

¹⁶⁷ *Navin a/l Moorthy v Ketua Pengarah Pendaftaran Negara & Ors, Malaysia* Kuala Lumpur High Court Originating Summons No. 24NCVC-2011-12/2013.

¹⁶⁸ See above, note 164, *Yu Sheng Meng & Anor v Ketua Pengarah Pendaftaran Negara & Ors, Malaysia*.

¹⁶⁹ *Ibid.*

i. Article 14(a)

Judicial Interpretation of Article 14(a)(b) Part II Second Schedule paragraph (a) ("Article 14(a)")

Cases involving citizenship by operation of law under Article 14 (a) have been argued in cases involving children born to at least one parent who has achieved permanent resident or citizen status at the time of birth, or where a child has been adopted by Malaysian parents.

In the landmark case of *Lee Chin Pon & Anor v Registrar-General of Births and Deaths, Malaysia* ("Lee Chin Pon"),¹⁷⁰ the High Court held that the NRD did not have jurisdiction to refuse to register the undocumented child adopted by Malaysian parents as a citizen pursuant to Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution and/or alternatively by reason of his lawful adoption pursuant to Sections 9 and 25A of the Adoption Act 1952.¹⁷¹ The court also held that the NRD committed an error of law by taking into account that the child's

170 *Lee Chin Pon & Anor v Registrar-General of Births and Deaths, Malaysia [2010]* (Unreported).

Although this case was not reported and therefore is of limited applicability in terms of precedent, lawyers representing the applicants have produced an in depth case summary and analysis of the decision, noting that "[t]he decision is also authority for the more general and widely applicable principle that any child who is born in Malaysia on or after Malaysia Day has the constitutional right to be recognised as a citizen of Malaysia, provided he or she is not born a citizen of any other country".

171 See above, note 129, Section 9, Section 25A. Section 9 of the Adoption Act 1952 in effect provides that all rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the applicants as though the child was a child born to them in lawful wedlock. Further, Section 25A (read with Section 9) of the Adoption Act 1952, the child's new birth certificate shall be issued by the respondent as though the child is a child born to the applicants in lawful wedlock. In the absence of any authorities supporting the above proposition due to the novelty of the issue, reliance was placed on the purposive approach to the interpretation of statute and the application of the Adoption Act 1952, namely, the submission that the child is a citizen by operation of law is consistent with the purpose of the amendments to the Adoption Act 1952. The Explanatory Statement to the Bill explains the purpose of the new Section 25A: "Under paragraph 25A(l)(a), the Court shall, in an adoption order, direct the Registrar-General to ensure that the word "adopted", "adopter" or "adoptive" or similar words shall not appear in the Certificate of Birth. The omission of such words in the Certificate of Birth is considered necessary to prevent the possibility that knowledge of the fact of being adopted would have adverse psychological effect on an adopted child who is unprepared to learn of his actual background or status." It was thus argued that the respondent's decision to record the child as a "permanent resident" while the applicants are "citizens" contradicts the purpose of the amendments and is not in the best interests of the child as it implies that the child is adopted.

natural parents were not known, and in excess of its jurisdiction by rendering the child stateless.

However, in *Foo Toon Aik v Ketua Pendaftar Kelahiran dan Kematian, Malaysia*¹⁷² (“*Foo Toon Aik*”) which was followed in *Yu Sheng Meng*,¹⁷³ the court did not follow the purposive interpretation of in *Lee Chin Pon* on the effect of the Adoption Act (read together with Article 14 of the Federal Constitution), and held that it would be inappropriate to infer or imply that an adoption order also deems an adopted child to be a “birth child” for the purpose of citizenship, given that both the Adoption Act and Article 14 of the Federal Constitution are silent on the same.

However, *Foo Toon Aik* and *Yu Sheng Meng* can be distinguished from *Lee Chin Pon* in that they involved a child born out of wedlock. The courts held that in these instances, Section 17 of Part III would apply and any reference to the child’s parent would be construed as references to his mother.¹⁷⁴

Analysis of Article 14(a)

Where a marriage between a Rohingya and a Malaysian is a marriage recognized under Malaysian Sharia law, any child born in wedlock should be considered a citizen by operation of law pursuant to Article 14(a). Information about Rohingya-Malaysian marriages is anecdotal. However, with only two states so far having registered the marriages of Rohingya, most Rohingya are likely to assume that they are unable to legally marry in Malaysia, and therefore choose to marry within their community. It is also likely that Rohingya will face significant barriers in obtaining the documentation needed to register their marriages, including UNHCR documentation.

There is so far no official record available on the adoption of Rohingya children in Malaysia. However, Muslim parents who wish to adopt a Rohingya child would

¹⁷² See above, note 160. In *Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 4 CLJ 613, [2012] 4 AMR 35, [2012] 2 MLRH 548, a baby was born (in Malaysia) out of wedlock between a Malaysian father and a Thai mother. The father obtained an Adoption Order of the baby pursuant to the Adoption Act 1952 and applied for a new birth certificate pursuant to Section 25 of the Adoption Act 1952. The new birth certificate stated that the baby was a “non-citizen”.

¹⁷³ See above, note 164, *Yu Sheng Meng & Anor v Ketua Pengarah Pendaftaran Negara & Ors, Malaysia*.

¹⁷⁴ See above, note 167.

have to do so under the Registration of the Adoption Act 1952. As adoption under this Act is *de facto* adoption, and does not confer any legal status on the child¹⁷⁵ (unlike the Adoption Act),¹⁷⁶ it is more difficult to argue that the child is a Malaysian citizen by operation of law, as was successfully argued by the applicants in *Lee Chin Pon*.

Where a child is born out of wedlock to Malaysian–Rohingya parents (including where the parents are unable to obtain permission to marry from the religious department, and/or are unable register their marriage with the NRD), the child's citizenship would depend on which parent has Malaysian nationality. If the mother were a Malaysian, the child would obtain the mother's Malaysian citizenship by operation of law under this provision.¹⁷⁷ However, where a child's father is a Malaysian, the child would be unable to obtain the father's Malaysian nationality pursuant to the National Fatwa Council decision gazetted on 28 January 1981,¹⁷⁸ which prohibits the name of the father from being on the birth certificate. If the father successfully managed to adopt the child, the courts would be unlikely to declare that the child is a Malaysian citizen by operation of law, based on Section 17 Part III of the Federal Constitution as in the cases of *Foo Toon Aik* and *Yu Sheng Meng*. In this scenario, an application for citizenship would have to be made under the discretionary provisions of the Federal Constitution.

ii. Article 14(e)

Judicial Interpretation of Article 14(1)(b) Part II Second Schedule paragraph (e) ("Article 14(e)")

Cases involving citizenship by operation of law under Article 14(e) have been argued when the applicants' children are born in Malaysia to foreign unmarried mothers (and thus are not citizens under Article 14(a)), and where the applicant was born in Malaysia and was not granted citizenship herself, resulting in her children not being granted citizenship upon birth.

175 See above, note 125.

176 See above, section iv.

177 See above, note 10, Part III (Article 31) Section 17.

178 See above, note 123.

In *Letchumy Suppiah & Ors v JPN & Ors* ("Letchumy"),¹⁷⁹ Ms Letchumy and her adult daughters sought a court order to compel the NRD to issue them blue identity cards ('MyKad'),¹⁸⁰ after a series of rejections based on claims that the trio were not citizens by law. Ms Letchumy was a single mother who was issued with MyPR in 2008. The applicants sought a declaration for citizenship under Articles 14(1)(b) Part II Section (1)(a) and (e). The arguments raised by counsel for the Plaintiff were that (a) all three were born and raised in Malaysia and identified with no other country as home; and (b) the NRD requirements of documentation to clarify Ms Lecthumi's father's status, and for a valid marriage certificate, were inherently implausible for an undocumented person, and were also not a requirement under the Federal Constitution.¹⁸¹ However, the matter was settled out of court and the NRD issued the applicants with birth certificates stating that they were Malaysian citizens.

In *Tan Siew Beng vs NRD*,¹⁸² Tan Siew Beng and his wife adopted a son when he was 12 years of age. The court rejected the application for their son to acquire nationality through Article 14(1)(b) Part 2 Second Schedule Section 1(e) on the basis that the efforts made to prove the legal status of the child were not enough, and that the courts needed to have access to clear proof that the biological mother was not traceable.¹⁸³ The Judge advised the family to apply for citizenship under Article 15A.

179 *Letchumy Suppiah & Ors v JPN & Ors* 25-256-12/2012.

180 Subramaniam, P., "30-year-old stateless battle comes to an end for Letchumy", *FZ.com*, 6 September 2015, available at: <http://www.lawyersforliberty.org/30-year-old-stateless-battle-comes-to-an-end-for-leetchumy>.

181 Gomez, J., "When will Putrajaya take notice of the plight of stateless children, ask activists" *The Malaysian Insider*, 23 February 2014, available at <http://www.mahwengkwai.com/will-putrajaya-take-notice-plight-stateless-children-ask-activists>. See also Bernama, "Three born in Malaysia finally get citizenship", *Bernama*, 18 September 2013, available at: <http://www.lawyersforliberty.org/three-born-in-malaysia-finally-get-citizenship>.

182 *Tan Siew Beng v NRD*, the Home Ministry and the Federal Government (unreported). His adoptive parents are identified as his parents in his birth certificate, and his nationality status on his birth certificate is currently stated as "no citizenship". The lawyers for the applicant have appealed against this decision. See Chi M, "High Court rejects stateless child's attempt at citizenship", *Malay Mail*, 21 May 2015 available at: <http://www.themalaymailonline.com/malaysia/article/high-court-rejects-stateless-childs-attempt-at-citizenship>; and Yen H., "High Court dismisses teenager's claim to citizenship", *Free Malaysia Today*, 21 May 2015, available at: <http://www.freemalaysiatoday.com/category/nation/2015/05/21/high-court-dismisses-teenagers-claim-to-citizenship>.

183 The only information the court was provided with were records from the hospital, which was considered inadequate.

In *Lim Jen Hsian and another v Ketua Pengarah Jabatan Pendaftar Negara, Kementerian Dalam Negeri dan Kerajaan Malaysia* ("Lim Jen Hsian"),¹⁸⁴ the Malaysian father tried to argue for citizenship under the statelessness provision of Article 14(1) (b) Part II Second Schedule section 1(e). The mother, a Thai national, disappeared when the baby was six months old and attempts to locate her had been unsuccessful. The father attempted to argue that the child was a citizen by operation of law pursuant to 14(1)(b) Second Schedule Part 2, Section 1(e) as the child was born in Malaysia to a Malaysian father and was not born a citizen of any other country. The application was dismissed on the basis that the applicant did not produce a marriage certificate in court and that the child could apply for Thai nationality.¹⁸⁵ In *Navin*, the Malaysian father of a 16-year old boy brought legal action for (i) a declaration that he is the citizen of Malaysia under Article 14 and/or 15A of the Federal Constitution, and (ii) an Order that Navin be issued a Birth Certificate and MyKad stating he is a "Warganegara" (citizen).¹⁸⁶ Navin was born to a Filipino mother who was not married to his father. His birth certificate originally stated that he was a citizen; however a later search showed that it was changed to non-citizen. Prior to bringing this application, the Ministry of Home Affairs twice rejected Navin's father's application for his citizenship.

In relation to Article 14(e), the High Court held that all references to "parent" or "father" must be a reference to the biological mother in accordance with Article 31 and Section 17 of Part III, and therefore the constitutional requirements under (e) were not met. The High Court however provided helpful guidance on the interpretation of Article 15A, which is discussed below.

Analysis of Article 14(e)

The safeguard provision against statelessness enshrined in Articles 14(1)(b) Part II Section (1)(e) should, in theory, ensure that a stateless child born in Malaysia is a citizen by operation of law. However, the courts have generally held a restrictive view on citizenship under this provision, in particular by applying Section 17 Part

¹⁸⁴ *Lim Jen Hsian and another v Ketua Pengarah Jabatan Pendaftar Negara, Kementerian Dalam Negeri dan Kerajaan Malaysia*, [2015] R2-25-87-04/2014.

¹⁸⁵ It is noteworthy that in contrast to *Lim Jen Hsian*, the High Court in *Navin* held that it was not shown that the Plaintiff was entitled to Filipino citizenship. However the application under 14(1)(b) Second Schedule Part 2, Section 1((e)) was ultimately dismissed and only allowed on Article 15A, and the Court of Appeal subsequently remitted the matter back to the NRD.

¹⁸⁶ See above, note 167.

III and Article 31 of the Federal Constitution to impose the requirement of the applicant having to produce a marriage certificate (as seen in the cases of *Navin* and *Lim Jen Hsien*) and by setting a high burden of proof for the applicants to show that the child is unable to obtain the citizenship of their foreign birth mother (as seen in the cases of *Lim Jen Hsien* and *Tan Siew Beng*). Decisions such as these, particularly where there is no evidence of mother's nationality, are problematic as they effectively leave the child stateless.

Although *Letchumy* was settled out of court,¹⁸⁷ the arguments raised in *Letchumy* could be used to justify citizenship by operation of law under Articles 14(1)(b) Part II Section (1)(a) and (e) for the many Rohingya children whose parents have lived in Malaysia for decades, who do not know any other home, and whose parents are without documentation and at risk of statelessness. The facts of *Tan Siew Beng* and *Lim Jen Hsien* can be distinguished from those of Rohingya children born in Malaysia on the basis that, unlike nationals from most countries, there has been ample research and analysis conducted on the statelessness of Rohingya and their inability to obtain recognition as citizens by the government of Myanmar. This also makes it implausible for them to be able to obtain marriage certificates in the vast majority of cases. This argument is yet to be tested in court, and there may be evidentiary challenges for individual cases in proving these assertions.¹⁸⁸ However, applications made both by Rohingya parents for their children born in Malaysia, as well as by Malaysian parents adopting a Rohingya child under (e), can be made based on these arguments.

Nevertheless, with thousands of Rohingya in Malaysia, there may be public policy concerns around creating a binding precedent in a case involving several generations of Rohingya. The courts have held that that there is no room for discretion or public policy considerations under Article 14,¹⁸⁹ and therefore any arguments that it would open up opportunities to review applications by Rohingya should therefore not hold any strength. Regardless, if an application is made under this provision it is likely to be settled out of court to avoid setting a precedent.

¹⁸⁷ See above, note 179.

¹⁸⁸ In particular the lack of clarity around whether or not the government of Malaysia considers the Rohingya to be citizens of Myanmar, or not citizens of any country, and therefore "stateless".

¹⁸⁹ See above, note 160, Para 25.

iii. Article 15(2)

Judicial Interpretation of Article 15(2)

15.(2) Subject to Art 18, the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian.

High Court cases on this interpretation, for example the cases of *Navin* and *Yu Sheng Meng*, have held that Section 17 of Part III applies for applications for citizenship under Article 15(2), and therefore all references to “parent” or “father” must be references to the natural mother. This provision should allow for applications for registration in cases of adoption by Malaysian parents, or for a child born out of wedlock to a Rohingya man and Malaysian woman, although there have been no cases of this nature reported so far.

iv. Article 15(A)

Judicial Interpretation of Article 15(A)’ Special power to register children’

5.A Subject to Art 8, the Federal Government may in such special circumstances as it thinks fit, cause any person under the age of 21 years to be registered as a citizen.

There have been two High Court cases that discussed this provision. In *Yanesha v NRD Director General, Home Ministry Secretary General, and the Government* (“*Yanesha*”),¹⁹⁰ and *Navin*, the applicants brought a civil suit under Article 15A. The courts made clear that the NRD was responsible for the decision to grant citizenship in respect of this provision. However, in referring the decision back to the NRD, the court gave specific guidance to the NRD on factors to consider when making the determination of the application.

¹⁹⁰ *Yanesha v NRD Director General, Home Ministry Secretary General, and the Government* (2013) (unreported). The applicant was born to a Malaysian father and Filipina mother; The Star “14-year-old girl gets Malaysian citizenship after DNA test”, *The Star*, 31 July 2013, available at: <http://www.thestar.com.my/news/nation/2013/07/31/courts-yanesha-dna>.

In *Yanesha*,¹⁹¹ the applicant was born to a Malaysian father and Filipina mother. The applicant underwent a DNA test upon the request of the government, which confirmed that her father was Malaysian. The NRD then issued a Malaysian Identity Card (“MyKad”) and changed her status to “citizen” in her birth certificate, following a court direction to the NRD to settle the issue by providing citizenship based on the DNA results.

In *Navin*, the High Court held that Article 15A is a stand-alone provision, and that there is no need to look at the status of the parents. The only consideration would be “special circumstances,” which are not defined by the Federal Constitution. However, the court held that the compelling factor in making a determination on the citizenship application would be the best interests of the child.¹⁹² The High Court ordered the NRD to issue the applicant with Malaysian citizenship. It stated that the NRD’s decision could be challenged in court because the NRD had erred in law by taking into account irrelevant considerations.

The Court of Appeal subsequently dismissed the government’s appeal and ordered the NRD to reconsider the application and provide a decision within six months. In doing so, the Court of Appeal instructed the NRD to look at four considerations: (a) a person under the age of 21 years without parents, (b) whether such a person has an attachment to the country, (c) any cases of hardship, and (d) the best interest of the child. The court also said that it was not in a position to grant citizenship to the boy and asked the respondent (the father) to resubmit the application to NRD attaching the DNA report that proved the relationship between the father and the child.

However, on 4 February 2016 (over six months after the court’s decision), the NRD in Putrajaya declared that Navin’s application for citizenship, pursuant to the Order of the Court of Appeal dated 29 July 2015, could not be processed and a Citizenship Certificate and MyKad could not be issued. The NRD informed Navin’s father that a new (third) application for citizenship under article 15A of the Federal Constitution must be re-submitted, together with the same supporting documents including the DNA report. Following this, the plaintiff re-submitted his application, for the third time and was verbally informed by NRD officers that his application

¹⁹¹ *Ibid.*

¹⁹² The Court looked at Articles 3 (not reserved by the Malaysian Government) and 7 (reserved) of the Convention of the Rights of the Child to which Malaysia is a signatory.

for citizenship would be considered within a period of three months.¹⁹³ In March 2016, the Home Ministry approved his application for citizenship and issued a temporary Citizenship Certificate.¹⁹⁴

Analysis of Article 15A

Where an application is made under Article 15A, the court will intervene where it is determined that the NRD erred in law, and will likely provide guidance to the NRD to review the decision based on the considerations in *Navin*. Although the courts have indicated that applicants should apply for citizenship through Article 15A, instead in many of these cases (which would fall within the jurisdiction of the NRD), they have signalled their willingness to intervene by encouraging an out-of-court settlement and remitting the matter back to the NRD with guidance, as in the cases of *Yanesha* and *Navin* respectively. This is particularly the case where DNA evidence is provided to confirm the relationship of a child to a Malaysian father, and where the circumstances of the case can be argued to be in the best interest of the child. Based on the current approach of the court, an application under Article 15A appears to be the most feasible route to citizenship for children born out of wedlock to a Rohingya mother and Malaysian father.

e. Conclusion

There are challenges for Rohingya refugees at all stages of the process of acquiring and applying citizenship. The process of birth registration for Rohingya, crucial for acquiring citizenship, is arbitrary, cumbersome and complex. Many Rohingya in Malaysia are unlikely to have the necessary documents needed to register the birth of their child, such as a marriage certificate and a UNHCR-issued card. Even if they do, applicants are subject to inconsistent procedures across NRD offices and face additional practical barriers such as the inability to pay for the cost of late registration and travel, and a lack of information.

The Rohingya also have significant barriers in registering their marriages. Only one state has provided guidelines on Rohingya marriages, and it appears that

193 Email update from M. Navin's lawyer, Annou Xavier dated 18 February 2016.

194 See: Yen, H., "Teen Navin Moorthy gets an identity at last", *Free Malaysia Today*, 6 April 2016, available at: <http://www.freemalaysiatoday.com/category/nation/2016/04/06/teen-navin-moorthy-gets-an-identity-at-last/>; Kaos, J., "Teen finally gets citizenship", *The Star*, 7 April 2016, available at: <http://www.thestar.com.my/news/nation/2016/04/07/teen-finally-gets-citizenship-boy-a-malaysian-after-17year-wait>.

the majority of marriages take place within their community. The inability to legally marry has two important consequences. The first is that children born to parents who are not lawfully married will only be able to inherit the citizenship of their mother. This will result in the child becoming stateless if the mother is a Rohingya. Secondly, a Marriage Verification Letter is also required to obtain permanent residency – a pre-requisite for the application of citizenship by registration and naturalization.

Judicial interpretation of provisions on citizenship by operation of law is also restrictive. The courts have consistently referred to Section 17 of Part III in holding that a child born out of wedlock will obtain the citizenship of the mother, which can lead to stateless in cases where the identity of the mother is unknown, or if the child is unable to locate the mother. The Registration of Adoption Act, which applies to Muslims, does not confer legal status on the adopted child either. The courts however have encouraged applicants to make applications for citizenship by registration under Article 15A, even going so far as to refer cases under this section back to the NRD, with specific criteria for the NRD to consider, such as DNA evidence. However, as can be seen above, the decision of the NRD under this Article is discretionary and arbitrary, and in the event of a negative decision, applicants must appeal to the Minister of Home Affairs before filing an application for review by the courts. This process is costly and time-consuming.

In conclusion, although there are domestic laws to safeguard against statelessness, the issue is with the implementation of these laws by the courts and the NRD, and practical challenges in birth and marriage registration. Binding precedents by the higher courts in Malaysia would be most instructive. However, before pursuing legal challenges in support of nationality for any Rohingya, the risks to the applicant as well as risks of setting negative precedent must be thoroughly examined. It is also imperative that the views of the Rohingya community on obtaining Malaysian nationality, any resistance to local integration, and potential consequences of advocating for Malaysian citizenship for Rohingya without the root causes in Myanmar having been addressed first and foremost, are both understood and considered.

4. Other Human Rights Issues Relevant to Rohingya in Malaysia: Liberty and Security of Person

In addition to the right to a nationality, the right to liberty and security of person has particular relevance to Rohingya in Malaysia. This section will discuss relevant legal frameworks, government policies, and possible opportunities for the protection of the right to liberty and security.

As highlighted in Part 2 above, the fundamental human right of liberty and security is generally seen as providing protection against arbitrary arrest and detention, and avoidance of arbitrary detention. Arrest and detention for the violation of immigration laws is a significant restriction on the liberty and security of Rohingya in Malaysia. The following section will focus on restrictions on liberty and security with regards to arrest and immigration detention.

a. Liberty and Security of Rohingya in Malaysia

Data on the number of people being detained for immigration offences is not publicly available; the Immigration Department do not release figures, and numbers tend to fluctuate due to frequent immigration raids, arrests and deportations. In January 2014, the then Deputy Minister of Home Affairs reported that 68,000 “irregular migrants” were detained in ten detention centres in West Malaysia and Sarawak, during 2013.¹⁹⁵ Responses to a recent parliamentary question revealed that until September 2015, there were 71,362 detainees being held in 13 detention centres in West Malaysia and Sarawak, of whom 1,918 were children.¹⁹⁶ The exact number of Rohingya in detention is unknown, however as of 31 December 2015 there were reportedly 2,498 Rohingya in detention in Malaysia.¹⁹⁷

The average period of immigration detention varies considerably. There is no maximum period of detention for people who are awaiting deportation under domestic law. Most asylum seekers and refugees, including Rohingya, will be held for indefinite periods pending an application for their release by UNHCR Malaysia. In addition, those who cannot be deported, such as stateless people or those whose country of origin is unknown may also remain in detention for indefinite periods of time.

In June 2010, the UN Working Group on Arbitrary Detention conducted a country mission to Malaysia. Following the mission, the Working Group raised several concerns related to detention conditions, preventive laws, and detention in relation

¹⁹⁵ Yuan, G., “Government spends RM2m a day to feed illegal immigrants, says deputy minister” *Malay Mail*, 6 January 2014, available at: <http://www.themalaymailonline.com/malaysia/article/government-spends-rm2m-a-day-to-feed-illegal-immigrants>.

¹⁹⁶ Malaysiakini, “Close to 2,000 Kids in Detention, MP wants an Inspection”, *Malaysiakini*, 21 October 2015, , available at <http://www.malaysiakini.com/news/316587>.

¹⁹⁷ UNHCR, *Mixed Maritime Movements in South-East Asia*, 2015, available at: <https://unhcrata-vist.com/mmm2015>.

to immigration powers.¹⁹⁸ Specifically, the concerns around immigration detention included the long and indefinite periods of pre-trial detention, the failure of the police to inform detainees about their right to contact family members and to consult a lawyer of their choosing, the treatment of refugees, asylum seekers and other people of concern, and the inconsistencies between immigration detention practices and international human rights law.¹⁹⁹

b. Government Policies Affecting Liberty and Security of Refugees

Malaysia's immigration laws do not distinguish between refugees, asylum seekers, irregular migrants and undocumented persons. However, refugees and asylum seekers who are registered with UNHCR, hold a form of *de facto* status that may afford some informal protection from arrest, detention, and deportation, though this is not consistently applied. This protection is derived from a written directive issued by the Attorney General's Chambers in 2005²⁰⁰ not to prosecute holders of a UNHCR document, as well as standing operating procedures issued by the immigration department which include a directive that, upon verification of authenticity of a UNHCR card, the card holder may be released.²⁰¹ Following these government policies the Malaysian government maintains an uneasy exception to its otherwise hostile policy to refugees, and affords refugees registered with UNHCR some protection from arrest and detention on humanitarian grounds.²⁰² However, these sources have not been codified into law nor made publicly available, resulting in inconsistent application and directives that are subject to change

198 Working Group on Arbitrary Detention, *Report on Mission to Malaysia*, UN Doc. A/HRC/16/47/Add.2, 11 February 2011, available at: <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx>.

199 *Ibid.*

200 International Federation for Human Rights (FIDH) and SUARAM, *Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination*, March 2008, p. 9.

201 See above, note 2. In June 2016, the UNHCR rolled out new cards with enhanced security features to enable law enforcement to easily verify the authenticity of the card, and to better combat identity fraud and counterfeiting. See, Lokman T., "UNHCR rolls out new ID card for refugees with increased security features", *New Straits Times*, 21 June 2016, available at: <http://www.nst.com.my/news/2016/06/153416/unhcr-rolls-out-new-id-card-refugees-increased-security-features>.

202 Lego, J. B. H., "Protecting and assisting refugees and asylum-seekers in Malaysia: the role of the UNHCR, informal mechanisms, and the 'Humanitarian exception'", *Journal of Political Science and Sociology*, Vol. 17, 2012, p. 77.

at the government's discretion.²⁰³ Such exceptions on humanitarian grounds appear to provide "a noble role for the Malaysian government while simultaneously distancing itself from the language of human rights or the rights of refugees and any obligation that the language of rights invokes."²⁰⁴

In an announcement to the United Nations General Assembly in September 2015, Malaysia's Prime Minister referred to the government's policy on refugees, specifically that Malaysia would accept 3,000 Syrian refugees in stages over the subsequent three years. The Prime Minister stated that Malaysia would provide Syrian refugees with (amongst other things), "government issued identity cards and temporary jobs."²⁰⁵ However, there has been no further information on the legislative mechanisms involved or an indication that similar programmes would be extended to other refugees residing in Malaysia, including Rohingya.

c. Legislation on Liberty and Security of Non-Citizens

The Acts of Parliament which govern liberty and security of person are the Federal Constitution of Malaysia, the Immigration Act 1959/63, and the Passports Act 1966.

i. The Federal Constitution

Article 5 of the Federal Constitution expressly safeguards the liberty of a person provided it is in accordance with the law. Article 5(3) states:

*"Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."*²⁰⁶

Article 5(4) makes a distinction between "citizens" and "non-citizens", specifically with regards to the timeframe within which an arrested person must be brought

203 See above, note 2.

204 See above, note 202, pp. 75–99.

205 Shagar L., "Syrian refugees in Malaysia will get special ID card", *The Star*, 2 October 2015, available at: <http://www.thestar.com.my/News/Nation/2015/10/02/special-card-syrian-refugees>.

206 See above, note 10, Article 5(3).

to court. Under this sub-section, non-citizens arrested for violating immigration laws must be brought before a court within fourteen days, whereas for citizens this must be done "without unreasonable delay and within 24 hours."²⁰⁷

ii. The Immigration Act 1959/63

Grounds for arresting and detaining non-citizens for immigration-related offences are provided within the Immigration Act. Section 6(1)(c) of the Immigration Act provides that "no person other than a citizen shall enter Malaysia unless [...] he is in possession of a valid Pass lawfully issued to him to enter Malaysia".²⁰⁸ Section 6(3) states that "Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand [Malaysian] Ringgit (US\$ 2,234) or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes."²⁰⁹

In Malaysia, asylum seekers and refugees are commonly arrested and charged under Section 6(1)(c) and Section 15 of the Immigration Act 1959/63, and provisions under the Immigration Regulations 1963. It is accepted that the punishment of whipping is a discretionary power vested with the courts and it is usually applied in cases involving crimes of violence and brutality.

In the case of *Tun Naing Oo v Public Prosecutor* the applicant was an asylum seeker who was charged for entering Malaysia without a valid visa.²¹⁰ The Sessions Court had convicted the asylum seeker and sentenced him to 100 days imprisonment and two strokes of the cane (whipping). The High Court exercised its powers of revision and set aside the sentence of whipping on humanitarian grounds, particularly as the applicant was an asylum seeker and had committed no act of violence. Nevertheless, the court found that the facts clearly showed that the applicant had entered Malaysia without a valid visa and therefore had committed the offence for which he was charged, and should be lawfully subjected to an imprisonment term under the Immigration Act.

207 *Ibid.*, Article 5(4).

208 Immigration Act 1959/63, Section 6(1)(c).

209 The imposition of whipping as punishment for violation of section 6(1)(c) is discretionary. It is usually only applied in cases involving crimes of violence and brutality.

210 *Tun Naing Oo v Public Prosecutor* [2009] 5 MLJ 680 (HC), Para 28.

People defined as “prohibited immigrants” or “persons of a prohibited class” under Section 8(3) of the Immigration Act are not allowed to enter and/or remain in Malaysia. This is of concern in respect of stateless Rohingya, as the definition may include:

[A]ny person who is required by law to possess a valid travel document and is not in possession of these documents or is in possession of forged/altered documents,²¹¹ persons deemed to be “undesirable immigrants,”²¹² any person who is unable to show that he has the means of supporting himself and his dependants (if any) or that he has definite employment awaiting him.²¹³

After a lawful cancellation, cessation or expiry of a valid pass or permit, no persons shall remain in Malaysia unless otherwise authorised under the Act.²¹⁴ Detention may also occur for administrative reasons, pending arrangements for the deportation or removal from Malaysia of an individual,²¹⁵ and for those remanded pending investigation, trial or sentencing for immigration-related offences.²¹⁶ For such administrative detention, people may be detained in any prison, police station or immigration detention centre as appointed by the Director General.²¹⁷

iii. Length of Detention under the Immigration Act

There is no maximum period of detention for people who are awaiting removal from the country under the Immigration Act. Section 34(1) provides that people may be detained for “such period as may be necessary” pending removal.²¹⁸ People believed to be liable for removal but who are yet to receive an order for such removal, may be arrested without a warrant and held in any designated place of detention for no more than 30 days pending a removal order.²¹⁹

211 See above, note 208, Section 8(3)(m).

212 *Ibid.*, Section 8(3)(k,l).

213 *Ibid.*, Section 8(3)(k,l).

214 *Ibid.*, Section 15(1).

215 *Ibid.*, Section 34(1).

216 Prisons Act 1995, Section 7(1); Criminal Procedure Code 2012, Sections 173A(7) and 117(1).

217 See above, note 208, Section 34(3).

218 *Ibid.*, Section 34(1).

219 *Ibid.*, Section 35.

Non-citizens who have not been charged or who are not being held under Section 34 or 35 of the Immigration Act must be brought before a Magistrate within 14 days of the date of their arrest or detention.²²⁰ The Magistrate may then issue an order to detain them for an additional 14 days, pursuant to Section 117 of the Criminal Procedure Code, pending investigation or inquiries into removal, provided such an order does not exceed the maximum period of time within which the said person may be detained.²²¹ A non-citizen may therefore be detained for a maximum period of up to 28 days for the purpose of inquiry or investigation.

Detention pending deportation may therefore be indefinite. Authorities have the power to arrest and detain an individual for a maximum of 30 days pending a removal decision; following the 30-day period, most Rohingya continue to be held for indefinite periods under Section 34(1) of the Act, pending registration and an application for their release by UNHCR. There are no specific provisions regarding the treatment of non-citizens who have reached the maximum period in detention (30 days). Non-citizens who cannot be deported (for example, stateless people) or who should not be deported (such as recognised refugees) often remain in detention for indefinite periods of time.

Section 59 further provides that non-citizens have no right to be heard before the Minister or Director General when an order is made against them. Section 59A(1) specifically reads:

*No judicial review in any court of any act done or any decision made by the Minister or the Director General...except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.*²²²

It is unclear how frequently detention decisions are reviewed. However, for people who are detained for more than six months, the respective immigration detention centre Commandant is required to report to the Director General of the Immigration Department to justify the prolonged detention.²²³ Outcomes from this report-

220 *Ibid.*, Section 51(5)(b).

221 *Ibid.*, Section 51(5).

222 *Ibid.*, Section 59A(1).

223 SUHAKAM, *Report on Alternatives to Immigration Detention*, November 2013, available at: <http://www.suhakam.org.my/wp-content/uploads/2013/12/Report-on-Roundtable-on-ATD-Malaysia.pdf>.

ing process are unclear. There is no published information on the longest instance of immigration detention in Malaysia. The average period of detention varies considerably and can range from two months to two years. People whose country of origin is unknown, and those who cannot be deported (such as stateless people), may remain in detention for even longer periods.

iv. Passport Act 1966

The Passports Act provides further provisions relating to the requirement to possess and produce (upon request) valid travel documents for Malaysia. Section 2(1) of the Act provides:

Every person entering Malaysia from any place beyond Malaysia shall produce to an immigration officer a passport; and that passport shall, in the case of a non-citizen, have a valid visa for Malaysia issued on the authority of and by or on behalf of the Government of Malaysia.²²⁴

Section 12(1) outlines offences under the Act, which include, amongst others, the forging, altering, or tampering with relevant travel documents/passports, falsely misrepresenting or being in possession of travel documents without lawful authority.²²⁵

c. Opportunities within existing Legislation to protect Liberty and Security of persons

There are specific provisions and mechanisms within current domestic law that may afford some protection for the liberty and security of Rohingya in Malaysia.

i. Discretionary Powers

Section 55 of the Immigration Act gives the Minister²²⁶ discretionary power to exempt any person or class of person from the application of the Immigration Act.²²⁷

224 Passports Act 1966, Section 2(1).

225 *Ibid*, Section 12(1).

226 “Minister” is not specifically defined under the interpretation section of the Immigration Act. However, the Immigration Department of Malaysia which enforces the Immigration Act is under the purview of the Ministry of Home Affairs that is governed by the Home Minister.

227 See above, note 208, Section 55.

Notwithstanding anything contained in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto(...)

Every order made under this section, which relates to a class of persons, shall be published in the Gazette.

Section 4 of the Passports Act 1966 also provides the Minister with discretionary powers to exempt any person or a class of persons from Section 2 of the Passports Act.

ii. Specific Discretionary powers to release people currently being held in immigration detention

Where the right to enter Malaysia is in doubt, Section 27(1)(ii) of the Immigration Act states:

The Director General may, in his discretion, and pending the completion of inquiries regarding the said person, release the person from the immigration depot on such terms and conditions as the Director General may deem fit, and for that purpose the Director General may issue to the person a Pass in the prescribed form.²²⁸

The above provisions are significant. If the Minister exercises his or her discretion in exempting Rohingya as a ‘class of persons’ from Section 8 of the Immigration Act or Section 2 of the Passports Act, it is possible that Rohingya will not be considered as “prohibited immigrants”, and therefore be afforded protection from arrest and detention. There are several examples of exemptions from the powers conferred by Section 55 of the Immigration Act and Section 4 of the Passports Act 1966, details of which are given below. However, none of these exemptions are related specifically to Rohingya.

Further, following the discretionary power under Section 27(1)(ii) of the Immigration Act, Rohingya (particularly those arrested following their arrival by boat into Malaysia and those currently being held in immigration detention facilities), may be released from immigration detention centres under prescribed conditions and pend-

228 *Ibid.*, Section 27(1)(ii).

ing completion of screening and assessment conducted by UNHCR or a relevant government agency. This alternative to detention will grant some freedom of movement, protection of liberty and security of the said person, and afford better access to other basic rights such as food and healthcare for recent arrivals. Similarly to Section 55 however, this discretionary power has yet to be applied specifically to Rohingya.

iii. Exemption Orders

In applying the above provision on discretionary powers, the Minister of Home Affairs may put in place exemption orders to waive the enforcement of the Immigration Act for a particular group of people under prescribed conditions. Following such an exemption order, that particular group of persons may be exempted from violations under the Immigration Act, particularly in relation to Section 6 for unlawful entry and provides protection from arrest and detention. The Minister of Home Affairs has made several exemption orders in relation to unlawful entry for specific groups of non-citizens.

One such example is the Immigration and Passports (Exemption) Order 1997, which came into force on 1 March 1997. The order exempted nationals of Indonesia and the Philippines who were residing in Sabah from Section 6(1) of the Immigration Act under specific conditions. These conditions included such persons who "have entered the state of Sabah or the Federal Territory of Labuan, registered with the Federal Task Force within the period commencing from 1 March 1997 to 31 August 1997, and are issued with an IMM13 permit".²²⁹ The order also only ap-

229 Immigration and Passports (Exemption) Order 1997. IMM13 permits are a type of temporary residence permit issued under the discretion of the Minister under section 55 of the Immigration Act. Originally issued as a HIF22 pass to Filipino Muslim refugees at a fee RM20.00 for one year through an amendment under the Passport Order (Exemption) (No. 2) (Amendment) Order 1972, the pass was issued on humanitarian grounds aimed at enabling the holders of the document to move, stay, study and work in Sabah, and also as a way of regularising the status of immigrants in Sabah. See Deputy Home Minister Datuk Dr Wan Junaidi Tuanku Jaafar in Dewan Rakyat in October 2013, as reported in the Daily Express, "Why UNHCR holders cannot buy IMM13 can?", *Daily Express*, 27 June 2015, available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=100996>. The HIF22 pass soon became a social visit pass called 'IMM13'. There was a RM90.00 annual fee, and the pass could be renewed. The renewal of the pass was in line with a recommendation by UNHCR that such a pass should take into account the situation in the country of origin of the refugee, which would not allow them to be deported. See Kahar, A.A., *Apakah Pas IMM 13?*, Official Blog of the Attorney General Chambers, 11 July 2012, available at: <http://agc-blog.agc.gov.my/agc-blog/?p=1402>. The permit has also been given to refugees from Aceh who sought refuge in Malaysia in the early 2000s; see also above, note 2.

plied to nationals of Indonesia and the Philippines who were currently at that time “employed in the plantation/agriculture, logging, construction, fishing, manufacturing, mining/quarrying and services sectors (housemaids, shop or restaurant assistants, cleaner or petrol pump attendants)”.²³⁰ The Minister also extended this order to cover wives and dependent children of such persons. Although this order applied only to the state of Sabah and the Federal Territory of Labuan, a similar order under prescribed conditions may be applied to Rohingya refugees and asylum seekers in West Malaysia.

Another example is the Immigration and Passports (Exemption) (No.2) Order 1992, which came into force on 27 October 1992. It exempts any national of Bosnia-Herzegovina permitted to enter West Malaysia under the “Bosnian Refugees Temporary Shelter Programme”, from the provisions of Section 6(1) of the Immigration Act and Section 2(1) of the Passports Act 1966 (paragraph 3).²³¹

More recently, the Immigration (Exemption) (Asylum Seekers) Order of 2011,²³² and the Passport (Exemption) (Asylum Seekers) Order of 2011,²³³ were created to allow people within a specific class (asylum seekers were under consideration as part of the controversial “Malaysia-Australia refugee swap”) to reside in West Malaysia and be exempted from prosecution under Section 6(1) of the Immigration Act pending resettlement to Australia. However, this order was never implemented as the “swap” did not materialise and negotiations were abandoned.

Although none of these orders specifically apply only to Rohingya, exemption orders have in the past been applied to specific refugee and asylum seeking populations such as under the “Bosnian Refugees Temporary Shelter Programme”. An extension of such an order to the Rohingya would protect their liberty and security as it could allow them to remain in Malaysia lawfully under prescribed conditions. This exemption order would also provide access to other rights such as the right to work (see Part 5 below).

²³⁰ *Ibid.*, Immigration and Passports (Exemption) Order 1997.

²³¹ Immigration and Passports (Exemption) (No. 2) Order 1992.

²³² Immigration (Exemption) (Asylum Seekers) Order [P.U.(A) 267], 8 August 2011, available at: [http://www.federalgazette.agc.gov.my/outputp/pua_20110808_PU.%20\(A\)%20267-%20AKTA%20IMIGRESEN.pdf](http://www.federalgazette.agc.gov.my/outputp/pua_20110808_PU.%20(A)%20267-%20AKTA%20IMIGRESEN.pdf).

²³³ Passport (Exemption) (Asylum Seekers) Order [P.U.(A) 268], 8 August 2011, available at: [http://www.federalgazette.agc.gov.my/outputp/pua_20110808_P.U.%20\(A\)%20268-AKTA%20PASPORT.pdf](http://www.federalgazette.agc.gov.my/outputp/pua_20110808_P.U.%20(A)%20268-AKTA%20PASPORT.pdf).

iv. Issuance of Special Pass to reside in Malaysia

Regulation 14(1) of the Immigration Regulations 1963 provides that a Special Pass may be issued by the Controller²³⁴ to any person if the issuance of such a Pass is desirable “*for any other special reason.*”²³⁵ This is based entirely upon the discretion of the Controller. If such a Special Pass were issued to Rohingya, it would permit them to enter West Malaysia, Sabah or Sarawak (as the case requires) or remain therein for such period, not exceeding one month (Regulation 14(2), Immigration Regulations 1963).²³⁶ The Controller may, from time to time, extend such period (proviso to Regulation 14(2), Immigration Regulations 1963).²³⁷ If Rohingya are holders of such a Special Pass recognised by the Immigration Act, an employer would therefore not be in breach of the Immigration Act by employing such people, nor would it be an offence for holders of this pass to live and move freely around Malaysia.²³⁸

5. Other Human Rights Issues Relevant to Rohingya in Malaysia: The Right to Work

In addition to the right to liberty and security of person, the right to work has particular relevance to Rohingya in Malaysia. This section will discuss relevant legal frameworks, government policies, and possible opportunities for the protection of the right to work.

234 Immigration Regulations 1963, Regulation 14(1). A Controller is defined as an immigration officer or any other person authorised by that immigration officer to act on his behalf.

235 *Ibid.*, Regulation 14(1)(c), which provides that “a Special Pass may be issued by the Controller to any person if the Controller considers the issue of such a Pass desirable-(a) in order to afford an opportunity of making enquiry for the purpose of determining whether such person is entitled to an Entry Permit or is otherwise entitled to enter the Federation, Sabah or Sarawak under the provisions of the Ordinance or of these Regulations, or whether such person is a prohibited immigrant; or (b) in order to afford such person a reasonable opportunity of prosecuting an appeal under the provisions of the Ordinance against any decision of the Controller; or (c) for any other special reason.

236 *Ibid.*, Regulation 14(2).

237 *Ibid.*, proviso to Regulation 14(2).

238 The research team have been unable to verify whether any Rohingya are in possession of such a Special Pass as recognised by the Immigration Act.

a. Rohingya in the Workforce

As of 2012, it is estimated that over 60,000 refugees are working irregularly in Malaysia,²³⁹ although (as will be seen below), refugees are not legally permitted to work according to Malaysian law. Rohingya refugees registered with UNHCR, and who possess a valid UNHCR “refugee card” are often more likely to gain informal employment, although this card does not equate to a valid work permit under Malaysian law.²⁴⁰ A recent socio-economic baseline survey conducted by UNHCR revealed that 52.1% of Rohingya respondents are employed, and 11.3% noted being self-employed. For male Rohingya, the top three sectors for employment are food and beverage (F&B), construction and cleaning. For women, the top responses were F&B, cleaning and tailoring.²⁴¹ The majority of Rohingya who are working informally²⁴² receive a mean monthly income of RM1,017 (US\$227).²⁴³ Working in the informal sector renders them vulnerable to exploitation as they have no protection under the Employment Act 1955 against the withholding of wages, the absence of social security/insurance, and protection from arbitrary arrest and detention.²⁴⁴

b. Government Policies on the Right to Work for Refugees

The Government has made contradictory statements regarding its position on the right of refugees to work in Malaysia. In 2006 an attempt was made to regularise the status of Rohingya refugees in Malaysia through the ministerial discretion enshrined in Section 55(1) of the Immigration Act by the issuance of IMM13 passes. This would have enabled pass-holders to engage in lawful employment and the freedom of movement. However, the process was administered without the engagement of UNHCR and was abandoned after allegations

²³⁹ UNHCR, *But when will our turn come? A review of the implementation of UNHCR's urban refugee policy in Malaysia*, May 2012, Para 38.

²⁴⁰ Irene Pang Mei Fang v PP [2015] 6 CLJ 634 (HC).

²⁴¹ UNHCR, *Socioeconomic Baseline Survey*, June 2016.

²⁴² Reynolds, S. & Hollingsworth, A., *Refugees International: Malaysia: Rohingya Refugees Hope for Little and Receive Less*, 17 November 2015.

²⁴³ The survey found that 9% of Rohingya households earn no income, 14% earn below RM460 a month, 20% earn between RM461-760, 53% earn between RM761 and RM2,299, 5% earn 2,300 and more. See above, note 241.

²⁴⁴ Bar Council Malaysia, *Developing a Comprehensive Framework for Refugees and Asylum-Seekers in Malaysia*, 20 June 2011.

of corruption and fraud.²⁴⁵ A further study on residence and work permits for Rohingya refugees was commissioned by the Government, however subsequent reports have suggested that the Government has no intention of issuing the IMM13 pass to Rohingya.²⁴⁶

In July 2013 the then Home Minister was reported as saying that “[n]inety per cent of the workforce at [sic] the markets consist of Myanmar[e]s[e] whose services are badly needed because locals do not want to do this type of work.” He confirmed that the Ministry was continuing to liaise with UNHCR on the right of refugees to work, and that the Immigration Department would issue work permits to those individuals who were officially recognised as refugees.²⁴⁷ It was further reported that plans are underway to provide refugees with training for employment in Malaysia.²⁴⁸

This position was reiterated by the Deputy Home Minister in early 2015, in saying that UNHCR refugee card-holders could be employed legally in Malaysia. However, just one week later, on 20 June 2015, it was reported that the Home Minister had said, “No, they have no right to work here, not even with the UN card. They are not allowed to work here, by right.”²⁴⁹ The article goes on to report that the Home Minister also said that the “*government will not consider allowing refugees to work while on Malaysian soil.*”²⁵⁰ It is unclear what prompted the Home Minister and the government to backtrack on their decision.

On 18 November 2015, the Malaysian Reserve reported that, “Thousands of Rohingya refugees in Malaysia will be able to work in the country soon, as the gov-

245 Equal Rights Trust, *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia*, London, November 2012, p. 158.

246 Ali, S.A.S., “Isu Pelarian Rohingya; Tidak Rancang Keluar IMM13”, *Berita Harian*, 13 September 2013.

247 Bernama, “UNHCR Card In Malaysia Will Be Upgraded – Ahmad Zahid”, 11 July 2013, available at: <http://www.bernama.com/bernama/v8/newsindex.php?id=962677>.

248 Tariq, Q., “Plan to let refugees get jobs”, *The Star*, 12 July 2013, available at: <http://www.thestar.com.my/News/Nation/2013/07/12/Plan-to-let-refugees-get-jobs>.

249 Chi, M., “Refugees caught in cross winds as Putrajaya dithers over right to work policy”, *Malay Mail*, 20 June 2015, available at: <http://www.themalaymailonline.com/malaysia/article/refugees-caught-in-cross-winds-as-putrajaya-dithers-over-right-to-work-poli>; this article is also republished by the UNHCR, *Refugees Daily*, 21 June 2015, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6fb5&id=5587a7b15>.

250 *Ibid.*

ernment mulls allowing them to be legally employed.”²⁵¹ It was reported on 14 November 2016 that the government were running a pilot project which would run for around three years, and would allow approximately 300 Rohingya refugees in the country to seek employment.²⁵²

Furthermore, as highlighted above (see section b), the Prime Minister of Malaysia has announced the government’s intention to accept and provide temporary jobs for Syrian refugees in stages over the next three years. It is unclear which particular legislative mechanisms would apply for this policy, in the case of either the Syrians or the Rohingya.

c. Legislation on the Right to Work and Fair Labour Practices for Non-citizens

The Acts of Parliament that covers the right to work of non-citizens are the Federal Constitution, the Employment (Restriction) Act 1968 and the Immigration Act 1959/63. The right to fair labour practices, which applies to both citizens and non-citizens, is set out in the Employment Act 1955 and the Industrial Relations Act 1967.

i. The Federal Constitution

Part II of the Federal Constitution of Malaysia provides for the protection of core fundamental liberties. Under Article 5(1) of the Federal Constitution there is a constitutional right to life and personal liberty. Article 5(1) of the Federal Constitution states that “No person shall be deprived of his life or personal liberty save in accordance with law”.²⁵³

In the Federal Court (Malaysia’s apex court) decision of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*,²⁵⁴ it was held that the “life” appearing in

251 Malaysian Reserve, “Malaysia Mulls Opening Jobs Sector”, *Malaysian Reserve*, 18 November 2015, <http://themalaysianreserve.com/new/story/malaysia-mulls-opening-jobs-sector-rohingya-refugees>.

252 See: Kumar, P., “Malaysia begins pilot job project for Rohingya refugees”, *Anadolu Agency*, 14 November 2016, available at: <http://aa.com.tr/en/asia-pacific/malaysia-begins-pilot-job-project-for-rohingya-refugees/685382> and Yi, B., “Malaysia in pilot scheme to allow Rohingya refugees to work”, *Thomson Reuters*, 24 November 2016, available at: <http://reliefweb.int/report/malaysia/malaysia-pilot-scheme-allow-rohingya-refugees-work>.

253 See above, note 10, Article 5(1).

254 *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

Article 5 does not refer to mere existence, but incorporates all those matters that go to form the quality of life, including the right to seek and be engaged in lawful and gainful employment.

Further, Article 8(1) provides for the constitutional right of equality. It reads: “All persons are equal before the law and entitled to the equal protection of the law”.²⁵⁵ This guarantee of equality appears to extend to all people, including migrant workers, and regardless of whether or not a person is documented. The Industrial Court has held that both documented and undocumented workers are equal before the law pursuant to Article 8(1) as the provision uses the word “person” and not “citizen”.²⁵⁶

ii. Employment (Restriction) Act 1968

Section 5(1)(a) of the Employment (Restriction) Act 1968 states that only those persons holding a valid employment permit may be employed or accept employment in any business in Malaysia.²⁵⁷ The Schedule to the Act elaborates on such “persons” meaning “every person *not being a citizen* employed in any business, industry or undertaking whatsoever including any Department of the Federal Government or State Government, any local authority and any statutory body”.²⁵⁸ Correspondingly, employers are also prohibited from employing non-citizens.²⁵⁹ A breach of Section 5 is a criminal offence.²⁶⁰

It follows that Rohingya who are not citizens of Malaysia, are barred from being employed unless they hold valid employment permits under the Act. Non-citizens are allowed to make an application for a valid employment permit under the

255 See above, note 10, Article 8(1).

256 *Ali Salih Khalaf v Taj Mahal Hotel* [2014] 4 ILJ 15. It is noted that six of the 13 articles under Part II of the Federal Constitution entitled “Fundamental Liberties” uses the words “persons” as opposed to the word “citizens”. The right of non-discrimination under Article 8(2) only applies to citizens.

257 Employment (Restriction) Act 1968, Section 5(1)(a).

258 *Ibid.*, Schedule (emphasis added).

259 *Ibid.*, Section 5(1)(b), which generally prohibits employers from employing foreigners: “No person shall employ in Malaysia any person not being a citizen referred to in the Schedule unless there has been issued in respect of that latter person a valid employment permit.”

260 *Ibid.*, Section 18. The person, on conviction, shall be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding one year or both.

Act,²⁶¹ however, in order to do so they may be required to produce a valid identity card or other form of identification such as a passport, upon request.²⁶²

iii. Immigration Act 1959/63

Section 55B(1) of the Immigration Act provides that it is an offence for any person to employ one or more persons, *other than a citizen* or a holder of an Entry Permit, *who is not in possession of a valid Pass*. If convicted, the employer shall be liable to a fine of not less than RM10,000 (US\$ 2,425 but not more than RM50,000 (US\$ 12,126) or to imprisonment for a term not exceeding 12 months or to both for each such employee.²⁶³ Section 55B(4) of the Immigration Act further provides that “a person performing any act normally performed by an employee in a place of employment whether or not for payment shall be presumed, unless the contrary is proved, to have been employed”.²⁶⁴

In *Irene Pang Mei Fang v PP* (“Irene Pang”), the court made a finding that two non-citizens, including one in possession of a UNHCR-issued refugee card, were employed without a valid work permits under Section 6(1)(c) of the Immigration Act.²⁶⁵ It can therefore be inferred that a UNHCR refugee card does not amount to a valid Pass under the Act. As such, in consideration of Section 55B (1), and as the case of *Irene Pang* would suggest, a refugee can only be employed if the refugee is a holder of a valid “pass”.²⁶⁶ The Employment Pass and Special Pass, in the context of the Rohingya in Malaysia will be discussed further below.

261 In order to obtain a valid employment permit, a non-citizen would have to make an application in duplicate to the Commissioner in Form ASK 1, and shall, if required, produce the identity card issued to him under the National Registration Act 1959 or the identity card issued to him under any written law relating to national registration in Sabah or Singapore (see above, note 257, Section 6(1); Employment (Restriction) (Employment Permit) Regulations 1969, Regulation 2(1) and (2)).

262 An “identity card” for the purposes of the National Registration Act 1959 is defined in regulation 2 of the National Registration Regulations 1990: “means an identity card or a Government multi-purpose card issued under regulation 5(1), any temporary identity document issued under sub-regulation 5(5) and paragraph 7(3)(b), and includes replacement identity card issued under regulations 13, 14, 15 and 18, as the case may be, and any identity card issued before the operation of these Regulations”.

263 See above, note 208, Section 55B(1).

264 *Ibid.*, Section 55B(4).

265 See above, note 240.

266 See above, note 208, Section 2, ““Pass” means any Pass issued under any regulations made under this Act entitling the holder thereof to enter and remain temporarily in Malaysia.”

iv. The Employment Act 1995

The Employment Act 1995 provides minimum terms and conditions of services for all workers in West Malaysia and the Federal Territory of Labuan. The Act applies to all workers, irrespective of whether the person is a Malaysian citizen or a foreign worker.²⁶⁷ Section 60L of the Employment Act further supports the notion of equality between foreign and Malaysian workers, by providing all workers with the right to complain about discrimination.²⁶⁸ This concept of equality is also found in the Workmen's Compensation Act 1952.²⁶⁹ Based on these provisions, the benefits and rights given to workers, including social security,²⁷⁰ minimum wages,²⁷¹ hours of work,²⁷² rest days,²⁷³

267 Employment Act 1955, Section 2, which defines "employee" to mean "any person or class of persons (a) included in any category in the First Schedule to the extent specified therein; or in respect of whom the Minister makes an order under subsection (3) or section 2A". In the First Schedule, item 1 describes the first category of workers as "any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed [RM1500] a month". Item 2 of the First Schedule describes the second category of workers as "any person, who irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer" where, for example, "(1) he is engaged in manual labour [...]"; (2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes" or where he is engaged as a domestic servant.

268 The Director General may inquire into any complaint from a local employee that he is being discriminated against in relation to a foreign employee, or from a foreign employee that he is being discriminated against in relation to a local employee, by his employer in respect of the terms and conditions of his employment; and the Director General may issue to the employer such directives as may be necessary or expedient to resolve the matter.

269 Workmen's Compensation Act 1952. Section 2(1) provides the following: "In this Act, unless the context otherwise requires, the expression "workman", subject to the proviso to this subsection, means *any person* who has, either before or after the commencement of this Act, entered into or works under a contract of service or of apprenticeship with an employer, whether by way of manual labour or otherwise, whether the contract is expressed or implied or is oral or in writing, whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period".

270 *Ibid.*, Section 4(1) and 7(1); Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 1998.

271 Minimum Wages Order 2012.

272 See above, note 267, 60A(7), Section 60A(1), and 60A(3)(a). Notwithstanding the above, section 60A(2) of the Employment Act 1955 provides that "an employee may be required by his employer to exceed the limit of hours prescribed in [s 60(1)] and to work on a rest day" in specified cases.

273 *Ibid.*, Section 59(1).

holidays,²⁷⁴ annual²⁷⁵ and sick²⁷⁶ leave, and the right to join trade unions,²⁷⁷ should also apply equally to undocumented workers in Malaysia.

v. The Industrial Relations Act 1967

The Industrial Relations Act provides ways for the settlement of trade disputes between employees and employers. It contains provisions that protect the rights of workers from unjust dismissal,²⁷⁸ and protects their rights to join trade unions and for collective bargaining. The Act applies to all workers and all migrant workers; and has been interpreted to provide that both documented and undocumented workers have a right to pursue any infringement of their rights through the Industrial Court.²⁷⁹

d. Opportunities within existing Legislation on the Right to Work for non-citizens

There are specific provisions and mechanisms within current domestic law that may afford access to work rights for Rohingya in Malaysia.

i. Discretionary Powers

Where Rohingya are not considered “prohibited immigrants” in the context of the Immigration Act, (see section c above), an Employment Pass may be issued following Regulation 9(1) of the Immigration Regulations 1963. The Regulation provides issuance of an employment pass to “any person other than a prohibited immigrant” who wishes to “take up employment in Malaysia under a contract for a minimum period of [two] years with an approved company and for which the salary would be a minimum of RM1,200 per month.”²⁸⁰ Following this, it would not be an offence under Section 55B of the Immigration Act for an employer to employ

274 *Ibid.*, Section 60D(1).

275 *Ibid.*, Section 60E(1).

276 *Ibid.*, Section 60F(1).

277 Industrial Relations Act 1967, Section 4(1).

278 *Ibid.*, section 20(1).

279 See above, note 256.

280 See above, note 234, Regulation 9(1).

a Rohingya person with such an Employment Pass, although there are no records of this happening so far.

ii. Exemption Orders

In relation to right to work, exemptions to the Employment (Restriction) Act 1968²⁸¹ have been applied. The Employment (Restriction) (Exemption) Order 1972 exempts “persons not being citizens [from] holding employment or work passes issued under the provisions of the Immigration Regulations 1963 and persons not being citizens who are members of the armed forces”.²⁸² The Employment (Restriction) (Exemption) (No. 2) Order 1972, exempts “[d]omestic servants as defined under the Employment Ordinance 1955” from the application of the Act.²⁸³ An exemption order pursuant to section 20(3) of the Employment (Restriction) Act 1968 could lift the prohibition on employment of non-citizen Rohingya, thereby giving the Rohingya the right to work in Malaysia under the Act.

iii. Issuance of Employment Pass to Work in Malaysia

Regulation 8 of the Immigration Regulations 1963 provides that an Employment Pass or, for work or employment in Sabah a Work Pass, can be issued at the discretion of the Controller to entitle a person to enter and remain temporarily within the Federation of Malaysia or within Sabah or Sarawak.²⁸⁴ Any Pass shall be subject to special conditions which may be imposed by the Controller.²⁸⁵ Regulation 9(1) generally provides that an Employment Pass may be issued to any person other than a prohibited immigrant who wishes to enter Malaysia, either to take up employment under a contract of service with the public service, or to take up employment in Malaysia under a contract for a minimum period of two years with an approved company and for which the salary would be a minimum of RM1,200 (US\$291) per month.²⁸⁶

281 See above, note 257, Section 20(3), which provides that the “Yang di-Pertuan Agong may by Order exempt any person or class of persons from any or all of the provisions of this Act.”

282 Employment (Restriction) (Exemption) Order 1972, Para 2.

283 *Ibid.*, Para 2.

284 See above, note 235, Regulation 8(1)(a) and (2).

285 *Ibid.*, Regulation 8(3).

286 *Ibid.*, Regulation 9(1).

iv. Right to Fair Labour Practices

The equality provision in Article 8(1) of the Federal Constitution is also reflected in the Employment Act 1995, the Industrial Relations Act 1967 and has also been recognised by the courts.

In *Nacap Asia Pacific Sdn Bhd*,²⁸⁷ the court held that even in circumstances where continued employment of a non-citizen constitutes a breach of national immigration law, the non-citizen may still enjoy the right to fair labour practices and access to the statutory dispute resolution mechanism. The High Court noted the significance of Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 (1975) (to which Malaysia is a party), which expressly provides that in cases where laws and regulations controlling the movement of migrants for employment (such as the Immigration Act) have not been respected, a migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment.²⁸⁸ The court dismissed the employer's application and held that "even assuming that the contract of Employment between the Claimant and the Applicant is void [...] the Applicant is entitled to the protection from unfair dismissal provided under the Industrial Relations Act 1967."²⁸⁹

In *Ali Salih Khalaf v Taj Mahal Hotel*, the claimant – a recognised refugee who was in possession of a UNHCR-issued refugee card – was employed by the Taj Mahal Hotel

²⁸⁷ *Nacap Asia Pacific Sdn Bhd v Jeffrey Ronald Pearce and Anor* [2011] 5 CLJ 791 (HC). The High Court noted a judgment in the Labour Court of the Africa, which explained the policy rationale behind adopting a construction of that does not limit the right to fair labour practices: "[t]his is particularly so when persons without the required authorization accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them."

²⁸⁸ *Ibid.* The High Court referred to Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 which states: "Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits" ... (4): "Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment".

²⁸⁹ *Ibid.*, Paras 24 and 25.

and his employment was subsequently terminated.²⁹⁰ The claimant then brought a claim to the Industrial Court for unjust dismissal under Section 20(3) of the Industrial Relations Act. The court held that even in the absence of the recognition of the right to work,²⁹¹ refugees such as the claimant could seek gainful employment and could avail themselves of the protection of the Employment Act 1955 and Industrial Relations Act 1967 if they were unlawfully dismissed. The court held that all workers, including those who are undocumented,²⁹² are equal before the law under Article 8 of the Federal Constitution and the Employment Act.

However, the Industrial Court (being a tribunal) does not bind the courts in the same way as the High Court, Court of Appeal and Federal Court. Section 32(1) of the Industrial Relations Act 1967 provides that an Industrial Court award shall only be binding on these parties:

- i. all parties to the dispute or the reference to the Court under section 20 (3) appearing or represented before the Court and all parties joined or substituted or summoned to appear or be represented before the Court as parties to the dispute or the reference to the Court under section 20 (3);
- ii. any successor, assignee or transferee of any employer or trade union of employers and any successor to any trade union of workmen who are parties to the dispute as aforesaid;
- iii. all workmen who were employed in the undertaking or part of the undertaking to which the dispute relates on the date of the dispute and all workmen who subsequently became employed in that undertaking or part thereof; and
- iv. all members of a trade union of employers to whom the dispute relates and to which dispute the trade union is a party and the successors, assignees or transferees of such members.²⁹³

290 See above, note 256.

291 Note that the Industrial court also referred to a decision made by the Government in mid-2013 that refugees have the right to work legally. The defendant in this case was unrepresented.

292 “Undocumented” is generally used in Malaysia to mean without valid documentation under the law. As such, the UNHCR ‘refugee card’ does not amount to a valid form of documentation.

293 Industrial Relations Act 1967, Section 32(1).

6. Other Developments related to both Liberty and Security of Persons and the Right to Work

a. Regulation 5(3) of the National Registration Regulations 1990

Regulation 5(3) states that the Director-General shall cause the words “*pemastautin sementara*” (temporary resident) to be included in an identity card issued to “(i) a person [who] lawfully enters Malaysia under a valid immigration pass or permit and is allowed to reside in Malaysia for a period of twelve months and above; or (ii) a person born in Malaysia but whose citizenship status cannot be determined.”²⁹⁴ There is no indication whether this provision has ever been applied in respect of stateless people in Malaysia for the purposes of issuing a “temporary resident” identity card. However, the wording of Regulation 5(3) provides an opportunity for such an identity card to be issued to Rohingya who were born in Malaysia.

If such identity cards were to be issued, Rohingya would in theory face fewer obstacles in obtaining a valid employment permit issued under the Employment (Restriction) Act 1968,²⁹⁵ and would have more freedom of movement in Malaysia. However, the burden of proof to provide evidence of birth in Malaysia would rest with the applicant. As with other stateless populations in Malaysia, this may be a challenge for Rohingya who were not born in a hospital and were never issued with a birth certificate by the NRD.

b. The Anti-Trafficking of Persons and Anti-Smuggling of Migrants Act (Amendments) 2015²⁹⁶

Recent amendments to the Anti-Trafficking of Persons and Anti-Smuggling of Migrants Act include permission to work and freedom of movement for:

294 See above, note 262, National Registration Regulations 1990, Regulation 5(3).

295 An employment permit would be valid only in respect of the particular type of employment and a named employer specified in the permit. In addition, an employment permit shall unless sooner cancelled or suspended be valid for a period of not exceeding 2 years (See above, note 257, Section 11). Any holder of employment permit intending to leave Malaysia permanently shall within 7 days of his intended departure surrender his employment permit to the Commissioner or any authorised person (See Employment (Restriction) (Employment Permit) Regulations 1969, above, note 261, Regulation 11).

296 Amendments to the Act came into force on 18 November 2015.

[A]ny person to whom an interim protection order has been granted, or any trafficked person to whom a Protection Order has been granted.²⁹⁷

This permission is subject to regulations under Section 66 of the same Act. Subsection 2 of the same provision specifies that:

[A] foreign national who is granted permission to work under subsection (1) shall be subject to any restrictions and conditions as may be imposed by the relevant authorities relating to employment of foreign nationals in Malaysia."

In May 2016, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Permission to Move Freely and to Work) (Foreign National) Regulations 2016 was passed. These Regulations provide for the Council for Anti-Trafficking in Person and Anti-Smuggling of Migrants to grant permission to move freely²⁹⁸ and to work²⁹⁹ to any foreign person to whom an Interim Protection Order has been granted, or any foreign trafficked person to whom a Protection Order has been granted, subject to certain conditions.

It is unclear whether or not the term “foreign national” would apply to stateless Rohingya. Application of this provision is also dependent on whether a Rohingya person has been found by the State to be trafficked.³⁰⁰ It remains to be seen if a case may be made for Rohingya who have been trafficked, to be afforded a protection order, freedom of movement and work rights.

7. Conclusions in Respect of the rights to Liberty and Security of the Person and the Right to Work

In addition to the right to a nationality, the liberty and security of person, and the right to work were identified as having particular relevance to Rohingya in Malaysia.

297 Anti Trafficking of Persons and Anti Smuggling of Migrants Act (Amendments) 2015, Section 51A(1).

298 Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Permission to Move Freely and to Work) (Foreign National) Regulations 2016, Section 3(1).

299 *Ibid.*, Section 5(1).

300 There are cases where victims of trafficking have been brought to court and are then placed in government shelters, but details are unavailable.

A significant restriction on the liberty and security of Rohingya in Malaysia has been arrest and detention for violation of immigration laws. Data on the number of Rohingya currently being held for immigration offences is not publicly available. It is reported however that a large number of detainees currently in immigration detention originate from Myanmar. Most Rohingya, who cannot be deported, may remain in detention for indefinite periods of time pending an application for their release by UNHCR Malaysia. Refugees and asylum seekers are not legally permitted to work in the country according to Malaysian law. As a result, refugees and asylum seekers work irregularly primarily in restaurants or food stalls, factories, on construction sites and plantations, and at the market. Working under these conditions renders them vulnerable to exploitation, as they have no protection against abuse, exploitation or protection from arbitrary arrest and detention.

Based on the legal analysis above, it would appear that there is opportunity within existing laws to provide some protection for the liberty and security and right to work for Rohingya. The discretionary power of the Minister under Section 55 of the Immigration Act means that Rohingya may be exempted as a class of persons from any provision under the same Act, including provisions on categories of “prohibited immigrants.” An exemption order may be created via these discretionary powers to further exempt Rohingya from prosecution under the Immigration Act for entry without a valid permit,³⁰¹ and prohibition of employment of non-citizens. To regularise the status of Rohingya under these Orders, special passes or employment passes may be issued accordingly with prescribed conditions. The Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Permission to Move Freely and to Work) (Foreign National) Regulations 2016 may also be applicable to Rohingya in Malaysia who satisfy the requirements under the Regulations.

301 See above, note 208, Section 6(1).

8. Recommendations

After analysing the findings presented in this report, the following recommendations for action by relevant stakeholders are duly made.

a. *Recommendations to the Malaysian Government*

Legal Reform

Malaysia should review its national laws and international obligations to:

- i. Ensure its domestic legal framework is in line with the relevant international standards for human rights and the protection of stateless persons and refugees, applying such changes retroactively.
- ii. Amend discriminatory nationality laws. Although both men and women nationals can confer nationality upon children born in the territory, children born out of wedlock can only acquire Malaysian nationality through discretionary citizenship by registration procedures if their father is a national of Malaysia. This can create statelessness where children cannot acquire nationality from their mothers. It is recommended that Malaysia revised the nationality laws to allow for the conferring of nationality to all children by either parents, and regardless of their parents marital status, or lack thereof.
- iii. Lift its remaining reservations to the Convention on the Rights of the Child, in particular Articles 7 on the right to name and nationality, and Article 37 on freedom from torture and deprivation of liberty.

Policy Reform

In addition to amending its legal framework, Malaysia should adopt policies which enhance the status of Rohingya within the country, including the following:

- i. **Identity verification:** Malaysia is encouraged to expeditiously seek appropriate solutions for people, especially Rohingya, who are known to be at a heightened risk of statelessness because their travel or other identity documents have been lost, forfeited or destroyed. In particular, the NRD should use statutory declarations to verify origins of stateless Malaysians when documentation is not available.

- ii. **Birth registration:** Malaysia is encouraged, in accordance with its obligations under the Convention on the Rights of the Child, to register the births of all children born on its territory, including “asylum-seeking, refugee or migrant children – irrespective of their nationality, immigration status or statelessness”.³⁰² Malaysia should also seek to simplify this procedure and to raise awareness about the importance of birth registration among vulnerable communities. The lack of birth registration leads to a number of difficulties in later life, and can adversely affect a later claim for citizenship.
- iii. **Marriage registration:** Malaysia should enhance access to marriage registration procedures (including under Sharia law). The government should also conduct outreach and awareness activities to inform people (particularly Rohingya communities) of existing procedures to legally register marriages under Sharia law, including directing them to Sharia offices in the relevant states that register marriages of Muslims. It is also recommended that outreach and awareness activities are carried out in collaboration with Sharia offices in other states of Malaysia to encourage these offices to provide for the registration of Rohingya marriages throughout the country. This is of particular importance as both the Federal Constitution and relevant jurisprudence emphasise the importance of the marital status of parents whose children are applying for Malaysian citizenship.
- iv. **Training:** The relevant government bodies should provide training to and facilitate discussions with judges on the interpretation of relevant provisions in the Federal Constitution.

b. Recommendations to Civil Society

Civil society plays a key role in advocating for reform and should seek to engage in the following activities:

- i. Advocacy, training and outreach activities with the NRD to remove requirements such as marriage certificates for the purposes of birth registration;

³⁰² Committee on the Rights of the Child, *General Comment no. 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/GC/2005/6, 2005, Para 12. This viewpoint has been repeated in numerous responses of the Committee to state practice in the context of the consideration of periodic state party reports.

- ii. Engage the Rohingya communities directly to educate them on the requirements for birth and marriage registration, and empower them with information and support to obtain documentation from the respective government departments;
- iii. Identify opportunities for strategic litigation to enforce the rights to nationality, protection from arbitrary arrest and detention, and to fair labour practices for stateless Rohingya.
- iv. Sensitise the media in Malaysia to international protection frameworks, Malaysia's legal obligations under domestic and international law, and accurate usage of terms such as "stateless", "refugee" and "asylum seeker".
- v. Build partnerships within the Coalition on Rohingya Rights formed at a Conference convened by the Equal Rights Trust in Bangkok in September 2015.
- vi. Align national level efforts and activities with the advocacy efforts of regional networks such as the Asia Pacific Refugee Rights Network (APRRN).
- vii. In light of the Malaysian Prime Minister's public condemnation of Myanmar's military launched attacks on Rohingya in Rakhine state, identify opportunities for advocacy towards the Malaysian Government for the improvement of Rohingya rights in Malaysia.
- viii. Campaign to regularise the status of refugees and asylum seekers in Malaysia, via Section 55 of the Immigration Act.

c. *Recommendations that remain relevant from a 2014 Equal Rights Trust Report*

Recommendations made in the report on the situation of the Rohingya in Malaysia published in 2014 by the Equal Rights Trust also remain relevant.³⁰³ These recommendations are as follows:

- i. **Statelessness and lack of legal status** – The statelessness of the Rohingya and their resultant lack of a legal status in Malaysia is a core problem that

303 See above, note 2.

impacts generally on the enjoyment of their human rights. While the statelessness of the Rohingya is the result of discrimination in Myanmar, the resultant lack of legal status in Malaysia is largely because the country does not have a protection framework in place for stateless persons. Although the punitive provisions of the Immigration Act and the lack of a domestic framework for the protection of refugees and asylum seekers place all UNHCR persons of concern at risk, the statelessness of the Rohingya places them at an even greater disadvantage. Consequently, it is recommended that Malaysia should implement a protective framework for stateless Rohingya. This framework should provide legal stay rights for stateless Rohingya, ensure that statelessness does not result in further disadvantage and protect the rights of stateless Rohingya children born in its territory, including ultimately, through access to nationality in accordance with the provisions of the Federal Constitution.

- ii. **Refugees and Asylum Seekers** – Malaysian refugee and immigration policy should distinguish between asylum seekers, refugees, stateless persons and irregular migrants, and respond to each group according to their specific protection needs, within a wider framework of immigration control. In the absence of specific laws recognizing the rights and protection needs of refugees, asylum seekers and stateless persons, the discretion contained in Section 55 of the Immigration Act should be utilised to enhance the stay rights of these groups. In particular, they should benefit from the rights to work and education, which are essential for their long-term survival and development in a manner that is conducive to individual dignity and not burdensome to the state.
- iii. **Liberty and security of the person** – The irregular status of the Rohingya in Malaysia has a significant impact on their enjoyment of the right to liberty and security of the person as they are vulnerable to arbitrary arrest and prolonged detention in damaging conditions that fall far below minimum international standards. Although standard operating procedures and directives have been issued clarifying that UNHCR card holders should not be arrested or detained when the authenticity of their cards have been verified, these are not codified into law and as a result, have not been uniformly or consistently applied. Rohingya and other asylum seekers who are not registered with UNHCR are at particular risk of arrest, prolonged detention and deportation.

Consequently, it is recommended that Malaysia's immigration detention policies are reviewed and brought in line with international law. The Immigration Act should be revised to recognise the specific rights and protection needs of

refugees and asylum seekers, including the right to liberty and security of the person. Whipping of all irregular migrants should be abolished as a matter of urgency. The government should establish a screening process to ensure that refugees and asylum seekers, including their children, are rapidly identified. Detention should be a measure of last resort and only used where necessary, justified and proportionate, and alternatives to immigration detention should be considered in the first instance. If detention is necessary and justifiable, then it should be for the shortest time possible and in conditions that at the very least meet international minimum standards. The Equal Rights Trust's Guidelines to Protect Stateless Persons from Arbitrary Detention which are based on existing international standards may be a useful resource in this regard.

- iv. **The right to work** – The challenges faced by Rohingya in accessing formal labour markets has a significant impact on their lives, including access to basic rights. These challenges have also increased Rohingya vulnerabilities to abuse and exploitation as they are forced to pursue informal work as a means of making an income to survive. It is recommended that the Malaysian government effectively address this by developing a comprehensive labour policy that enables Rohingya and other refugees and asylum seekers to obtain work permits to work legally without fear of arrest and exploitation. This policy should also put in place protective mechanisms that provide for basic labour rights according to international standards, pending a final durable solution to their case. This initiative would also assist Malaysia in addressing its labour shortages and benefit the country in its drive to achieve developed nation status by 2020.
- v. **Accession to statelessness and refugee treaties** – A significant step to improving the protection of refugees and stateless people in the country – including the Rohingya, would be to accede to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. These treaties require states parties to protect the rights of refugees and stateless persons and to reduce statelessness. Furthermore, they provide the legal basis for UNHCR to exercise its protection mandate. Accession to these treaties and the introduction of domestic law and policy mechanisms for their implementation would be a significant step forwards in the protection of refugees and stateless persons in Malaysia. Furthermore, such a move would be likely to have a positive impact not only in Malaysia, but also throughout the ASEAN region, which at present has a poor ratifica-

tion record of these treaties. In addition to benefiting individual stateless people, asylum seekers and refugees, accession will also bring benefits to Malaysia as these treaties promote “responsibility sharing”, which can help Malaysia handle the perceived burden of accommodating people in need of international protection.

- vi. **Regional approach** – As has been made evident throughout this report, the plight of Rohingya is a regional issue which affects multiple countries. It is recommended that states in the region foster more collaboration and seek to collectively address the issue, whilst also acknowledging their individual responsibility in this regard. Importantly, any regional approach should be grounded in a human rights-based approach, upholding the rights to equality, non-discrimination and protection and the humanitarian principles of humanity, neutrality, impartiality and independence. Malaysia is well placed to take a leadership role in promoting such an approach and should use its place on regional mechanisms including Association of Southeast Asian Nations (ASEAN), ASEAN Intergovernmental Commission on Human Rights (AICHR), ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children (ACWC) and the Bali Process to good effect in this regard. Strategically, the rights of Rohingya children may be a useful entry-point, and Malaysia is in a position to lead by example though implementing its existing policies on universal birth registration and access to education more effectively, and also giving effect to the provisions in the Federal Constitution that already provide for the possibility of acquisition of nationality for Rohingya children born in the country.

Legal Analysis: Holes and Hopes for Rohingya in Thailand

Nussara Meesen, Bongkot Napaumporn and Sriprapha Petcharamesree¹

1. Introduction

a. *On Nationality*

As discussed in Part 2 above, nationality is not simply a tool to protect the nation-state's interest, but it is also a right for individuals. Under the principles set forth in the international human rights instruments, every person shall have a right to a nationality. Article 15 of the Universal Declaration of Human Rights (UDHR) sets out that "everyone has a right to a nationality, and no one shall be arbitrarily deprived of his nationality". The right to a nationality has also been affirmed by Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR)² and Article 7(1) of the Convention on the Rights of the Child (CRC).³ Article 5 (d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁴ and Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵ stipulate that the right to nationality shall be guaranteed without discrimination.

1 The research for this paper was conducted and by Nussara Meesen, freelance researcher and Bongkot Napaumporn, UNHCR Southeast Asia Regional Office, under the supervision of Sriprapha Petcharamesree, the Institute of Human Rights and Peace Studies, Mahidol University.

2 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1966, Article 24(3).

3 Convention on the Rights of the Child, 1577 U.N.T.S. 3, 1989, Article 7(1).

4 International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 1965, Article 5(d).

5 Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, 1979, Article 9.

According to international human rights law, rights are inherent to humans and are not conditional upon a person's nationality, other than in exceptional cases such as voting and standing for election.⁶ In practice, however, nationality is a pre-requisite for the enjoyment of other rights at the national level, including the right of an individual to remain in his or her country, the right to re-enter from abroad, the right to vote and the right to participate fully in public affairs. Further, nationality is the basis on which a state extends protection to individuals abroad in other states through the mechanism of consular assistance. Without recognition of the right to nationality, in many cases, regardless of the state's international obligations, individuals may face denial of other human rights such as political participation, freedom of movement, formal employment, education and healthcare.

Used as pre-condition for the enjoyment of rights, nationality has been part of an instrument of state and state authorities to deprive those who are not considered citizens of their rights. The situation of stateless Rohingya, the biggest stateless group in the world, is known.⁷ They are facing serious discriminatory treatment as well as other human rights violations both in their own country and countries of destination. This paper is aimed at assessing national legislation in Thailand to evaluate whether, and the extent to which stateless Rohingya can access the rights which are crucial for their survival and well-being.

b. Background of the Project and its Objectives

In Thailand, there are a number of groups including those who identify themselves as Rohingya: some of whom came to Thailand decades ago and some of whom have recently entered the country fleeing violence, discrimination and persecution. Some of them have registered as migrant workers, some are seeking asylum and some were identified as Persons of Concern by United Nations High Commissioner For Refugees (UNHCR). They are all considered to be "illegal migrants" by the Thai authorities because they entered into Thailand without proper documents. It has been estimated that there are 3,000 Rohingya living in Thailand, some of whom have been found to have lived in the country for decades.⁸ In recent years, the

6 Universal Declaration of Human Rights, G.A. Res. 217 A(III), 1948, Article 2.

7 European Parliament, Committee on Foreign Affairs, *Draft Report on Statelessness in South and South East Asia*, 2016, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-593.827&format=PDF&language=EN&secondRef=01>.

8 Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, October 2014, p. 8.

smuggling and trafficking of Rohingya fleeing Myanmar has attracted the attention of the international and the Thai public. UNHCR has estimated that from 2012 to 2015 as many as 170,000 refugees and migrants from Bangladesh and Myanmar, including 30,700 in the first half of 2015, were bound for Thailand and Malaysia, though the exact number of Rohingya making these journeys is unknown.⁹ Since 2015, it is estimated that there was a significant increase in the number of people fleeing Myanmar by boat,, with 25,000 Rohingya and Bangladeshis departing in the first quarter of 2015 alone.¹⁰ Approximately 40–60% of these people were originally from Rakhine State, and the remainder were from Bangladesh.¹¹ Many of those travelling from Bangladesh were also Rohingya, leaving refugee camps.¹² It has been recorded that a number of refugees and migrants died during this passage, largely due to starvation, dehydration and beatings by boat crews.¹³

The situation of the Rohingya must be examined from two angles: first, whether Rohingya have the right to live and make a living while in Thailand and second, the extent to which statelessness affects the second and third generations of Rohingya migrants.

This research builds on research published by the Equal Rights Trust in 2014 on the human rights of stateless Rohingya in Thailand, to focus on the legislative framework relevant to the Rohingya in Thailand.¹⁴ This framework includes: civil registration law, immigration law and nationality law. This paper chooses to focus on nationality and immigration regimes which have direct impacts on the situation of the Rohingya as stateless persons and as aliens in Thailand. This paper examines the core principles of nationality and immigration law and evaluates to what extent stateless Rohingya who are identified by the Thai government as a national security concern are entitled to relevant protections under the law. Finally,

9 UNHCR, *Mixed Maritime Movements in South-East Asia*, 2015, p. 1, available at: <https://unhcr.atavist.com/mmm2015>.

10 UNHCR estimate that since 2012, a total of over 150,000 Rohingya and Bangladeshis have fled Myanmar by boat. See Forum Asia et al, *Maritime movements of the Rohingya and recommendations to improve human rights protection for Rohingya refugees*, 2016, p. 2, available at: <https://www.forum-asia.org/?p=20563>.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

14 See above, note 8.

this paper explores the impact of the legislative framework on the quality of life of Rohingya in Thailand.

In addition to analysis of the legislative framework, this paper helps to establish an understanding and explore the possibilities for further advocacy for the promotion and protection of the rights of Rohingya. It focuses in particular on the right to work as it is a prerequisite for other rights to ensure independence, the ability to make a living and look after one's family. The ability to work also facilitates access to education for children and health care. This study also explores the right to birth registration, as birth registration paves the way for stateless children of Rohingya and children of other undocumented migrant workers to a regularised legal status.

c. Objectives of the Paper

This paper has four objectives, namely;

- i. To provide a legal and policy analysis of the nationality framework with a view to understanding why Rohingya are likely to remain stateless and what routes to nationality or other legal status may be available to them;
- ii. To examine provisions within the existing law and policy framework of Thailand's immigration laws to understand the historical context and impact on the protection of the rights of Rohingya;
- iii. To examine the right to work and the right to birth registration, to determine the accessibility of these rights to Rohingya within the existing law and policy framework, and suggest improvements;
- iv. To identify gaps between international standards and national legislation and propose possible amendments to narrow or eradicate those gaps and / or possible alternatives to improve the protection and the promotion of the rights of Rohingya in Thailand.

d. Methodology

The research was undertaken largely through literature review. The findings of a draft of the paper were considered at three events: a national workshop attended

by approximately 20 participants;¹⁵ a legal research roundtable;¹⁶ and an international forum on “Strengthening the protection of the Rights of Stateless Rohingya” with relevant stakeholders.¹⁷ The third event had the aims of both seeking views and gathering information, and starting the advocacy process to strengthen the protection of Rohingya in the region.

In addition, the authors carried out some field research in different sites in Thailand with key stakeholders including members of civil society and other organisations working with Rohingya. Finally, interviews with stakeholders including members of the Rohingya community which were undertaken for other reports have informed some of this paper’s conclusions. However, for reasons of the security of interviewees or due to individuals only speaking on condition of anonymity, names of interviewees have deliberately not been revealed. This presents some limitations to this paper.

e. Structure

The paper comprises seven sections. Section 1 sets out the introduction of the research project. Section 2 provides an overview of statelessness and stateless persons in Thailand, including the situation of Rohingya. Sections 3 and 4 focus on the concepts, development and analysis of Thailand’s nationality and immigration laws with regards to impact on the protection of the rights of Rohingya, and opportunity and challenges applied to them. Section 5 explores the right to birth registration and Section 6 explores the right to work. Finally, Section 7 contains the conclusions and recommendations.

15 Institute of Human Rights and Peace Studies, Mahidol University and the Equal Rights Trust, National Workshop on the Promotion and Protection of Stateless Rohingya, Bangkok, 29 January 2016.

16 Institute of Human Rights and Peace Studies, Mahidol University and the Equal Rights Trust, Legal Research Roundtable on the Protection of the Rights of Stateless Rohingya, Bangkok, 16 September 2015. Researchers from Bangladesh, Malaysia, Myanmar and Thailand participated.

17 Institute of Human Rights and Peace Studies, Mahidol University and the Equal Rights Trust, International Forum on Strengthening the Protection of the Rights of Stateless Rohingya, Bangkok, 14–15 September, 2015. More than 50 international and regional participants including researchers from Bangladesh, Malaysia, Myanmar and Thailand participated.

2. Statelessness and Stateless Persons in Thailand

a. An Overview of Stateless Persons in Thailand

Under Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, a stateless person is “a person who is not considered as a national by any State under the operation of its law”.¹⁸ In accordance with this definition, there are two categories of stateless persons in Thailand.

The first category is of **unregistered stateless persons**. This group of stateless persons are not nationals of any states and their existence has not been recognised or recorded by the Thai State. These persons are in the most vulnerable situation as they face difficulties both in relation to civil registration and the acquisition of nationality. Unregistered statelessness may occur when a person was not registered at birth or when a child was abandoned at birth without any information about his/her parent(s). Notably, research undertaken by the authors for this paper indicated that unregistered or undocumented persons found in the country may not always be stateless persons; some are nationals of neighbouring countries who “illegally” entered Thailand, while others are stateless minorities from other countries. There is no official data on the number of unregistered stateless persons in Thailand.

The second category is of **registered stateless persons**. These registered stateless persons are not nationals of any State. However, they are granted legal recognition, recorded in Thailand’s civil registration database and issued an ID card with a 13-digit number as an identity document. As registered stateless persons, they can access basic fundamental rights including the right to health insurance¹⁹ and other rights that the Thai citizens enjoy.²⁰ These registered individuals are the target of “statelessness solutions” by the government.²¹ Registered stateless

18 Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, 1954.

19 Cabinet Resolution, “Right to health care to people with legal status problems and right to access to health services to stateless persons”, 20 April 2015.

20 The Permanent Secretary of the Ministry of Interior stated in an interview that stateless persons in Thailand should enjoy the same rights as the Thai citizens. Interview given by the Permanent Secretary of Ministry of Interior, 10 May 2016, available at: <http://www.thaigov.go.th/index.php/th/news-ministry/2012-08-15-09-42-33/item/102956-id-102956>.

21 Cabinet Resolution, “Strategies to Address the Problem of Legal Status and Rights of Stateless Persons”, 18 January 2005; see also Cabinet Resolution “on addressing legal status of students and stateless persons born in Thailand”, 7 December 2016.

persons include: (1) former Thai nationals (Displaced Thais) who have lost Thai nationality as result of border changes during the colonial period;²² (2) indigenous hill tribes;²³ and (3) displaced persons who fled conflict and persecution in their own country.²⁴

The question of whether persons who have been registered are considered stateless is important; because stateless persons experience multiple vulnerabilities and practical difficulties, recognition of their status is an essential first step to ensuring their needs are addressed. As of December 2014, some 493,958 residual stateless persons were recorded by the Thailand's database registration of Ministry of Interior.²⁵

From 2005 until 2009, by virtue of the “2005 National Strategy to Address Legal Status and Rights of Persons” the government started to count all persons living in Thailand without any nationality or citizenship documents, in particular focusing on those who were missed by previous registrations between 1970 and 1999. The aim of this process was to grant such persons proper legal status and to protect

- 22 These former Thai nationals lost their nationality as a result of border changes which resulted in them living in Myanmar and Cambodia. However, they were not able to acquire the nationality of these countries. Such persons have migrated back to Thailand. The Nationality Act (No.5) BE 2555 (2012) was enacted to tackle the issue of these former Thais and to reinstate their nationality, but the process of reinstatement for these people has been delayed. This legislation is discussed further in section 3 below.
- 23 The indigenous hill tribes consider that they have lived in Thailand for many generations. Due to their culture as well as the fact that they live in very remote areas, the majority of these people cannot produce evidence (e.g. a birth certificate) to prove that their entitlement to Thai nationality. In 2000, a regulation was passed to resolve the statelessness of such persons, but many remain stateless.
- 24 At first Thailand permitted many groups of displaced persons to temporarily reside in the country for humanitarian reasons. These people have not been able to return to their own country due to the protracted conflicts, meaning many have stayed for generations, raised their families and assimilated into Thai society. Moreover, they are not considered as citizens of their own countries.
- 25 As of May 2016, some 487,483 residual stateless persons were in the record of the civil registration database of the Ministry of Interior, and were classified into three broad groups: (1) 294,689 persons who entered into Thailand without proper travel documents; (2) 109,979 persons born in Thailand whose father or mother who entered into Thailand illegally (3) 88,815 persons who are currently students in the Thai education system but have no legal status, or have been abandoned or have unidentified parents. See Ministry of Interior, *Press Conference by the Permanent Secretary of Ministry of Interior*, 10 May 2016, available at <http://www.thaigov.go.th/index.php/th/news-ministry/2012-08-15-09-42-33/item/102956-id-102956>.

their basic rights. They were granted temporary residence in Thailand and the right of freedom of movement within a designated area. The below table details the number of registered stateless persons in Thailand under the old system of registration (before 1999) and under the new system (from 2005).

Table 1: Detailed Figures of Registered Stateless Persons in Thailand as of December 2014²⁶

Details of registered stateless persons	Number (persons)
Targets of the survey and registration under the policies adopted before 1999	
Highlanders	24,168
Former Kuomintang members (KMT) "Chinese Nationalist Party"	718
Persons from China/Ethnic Haw (migrated before 1961)	384
Persons from China/Ethnic Haw (migrated after 1961)	1,556
Displaced Persons from Myanmar	4,245
Persons entering Thailand irregularly from Myanmar (long-term residents)	15,018
Persons entering Thailand irregularly from Myanmar (stayed with employers in Thailand)	8,262
Immigrants from Vietnam	614
Immigrants from Lao PDR	3,467
Immigrants from Nepal	10
Former Malaya Communists of Chinese ethnicity	0
Thai Lue (an ethnic hill tribe with Thai descent)	1,658
Highlander (Mlabri People)	0
Displaced Thais from Kong Island, Cambodia (migrated before 1977)	1,222
Displaced Thais from Kong Island, Cambodia (migrated after 1977)	1,683
Persons entering Thailand irregularly from Cambodia	1,010
Displaced Thais from Myanmar (migrated before 9 March 1976)	317
Displaced Thais from Myanmar (migrated after 9 March 1976)	754
Hmong from Thamkrabok, Sara Buri Province	888
Persons in Highland Communities (among 9 groups of hill tribes)	25,948
Persons in Highlands Community (not hill tribes)	59,000

26 Bureau of Registration Administration, Ministry of Interior, December 2014. An MOI Officer provided these statistics unofficially on the condition of confidentiality; they were not released officially.

Details of registered stateless persons	Number (persons)
Indigenous Moken people	0
Children of the 22-categories above and reportedly born in Thailand	85,579
<i>Sub-total</i>	236,681
Targets of the survey and registration under the 2005 National Strategy to Address Legal Status and Rights of Persons	
Stateless persons and their children who were not present or missed previous registrations (1970–1999) ²⁷	166,280
Stateless students ²⁸	81,811
Rootless persons ²⁹	9,158
Stateless “Good-Deed persons” ³⁰	28
Registered migrant workers from Cambodia, Lao P.D.R. and Myanmar who were denied nationals (through the nationality verification process) by their respective countries of origin	This group was not surveyed and registered. Therefore, their legal status problem has never been resolved.
Other groups of persons with undetermined nationality who cannot return to their country of origin due to the threat of persecution.	This group was not surveyed and registered. Therefore, their legal status problem has never been resolved.
<i>Sub-total</i>	257,277
TOTAL	493,958

27 Having realised that a substantial number of stateless persons were not accounted for as they had missed previous registration drives between 1970–1999, Thailand's Ministry of Interior started registering these people from 2005 to 2009.

28 See above, note 22. According to Thailand's 2005 Strategy, “stateless students” means those stateless persons who are studying or have already graduated from a Thai educational institution. These surveys were conducted by the schools every semester from 2005 to 2009.

29 *Ibid.* According to Thailand's 2005 Strategy, “rootless persons” are orphans who were abandoned by their (unknown) parents in early childhood. They have no documentary history such as information on their parents, birth place, or any identification papers. The surveys were conducted from 2007 to 2009.

30 *Ibid.* According to Thailand's 2005 Strategy, “Good-deed persons” are those whose work proved to be beneficial to Thailand in areas including education, arts and culture, science and technology, sport and/or other areas approved by the Minister of Interior.

Research conducted for this paper revealed that stateless persons and their children, who were surveyed and registered between 1970 and 1999, were issued “coloured-cards” to certify that they had temporary residence in Thailand, that they did not have Thai nationality and that they were permitted restricted movement within designated areas. In accordance with the classification in Table 1 above, Rohingya who left Myanmar before 1999 could have been surveyed and registered as “Displaced Persons from Myanmar”, “Persons entering Thailand irregularly from Myanmar (who have been in Thailand for a long time)” and “Persons entering Thailand irregularly from Myanmar (stayed with employers in Thailand)”. However, in an interview the authors an anonymous source form within the Ministry of the Interior (MOI) stated that there is limited evidence that any Rohingya were registered as stateless persons during this time.

In 2004, the MOI started a general registration scheme for migrant workers from Cambodia, Lao People’s Democratic Republic (PDR) and Myanmar, following bilateral agreements with these three countries with a view to regularising the migrants who already lived and worked in Thailand without proper documents.³¹ Since 2004, a number of Rohingya were reportedly registered as migrant workers from Myanmar.³² Research conducted for this paper indicates that for some time, these registered Rohingya were granted work permits while awaiting a so-called “Nationality Verification” process.³³ Through the nationality verification process, unauthorised migrants will obtain work permit. However, most of these registered Rohingya have not undergone verification while some of those who tried were rejected as not being nationals of their country of origin.³⁴

As elaborated in Table 1 above, groups of stateless persons who were surveyed and registered from 2005–2009 under the 2005 Strategy include: (1) Stateless persons and their children who were not present or missed previous registrations; (2) Stateless students; (3) Rootless persons; (4) Stateless “Good-Deed” persons; (5) Registered migrant workers from Cambodia, Lao PDR. and Myanmar who were denied nationality (through the nationality verification process) by their respective coun-

31 Cabinet Resolution, “Strategy on Management of Migrant Workers from Cambodia, Lao PDR and Myanmar”, 27 April 2004.

32 Based on the information obtained from Office of Foreign Workers Administration, Ministry of Labour.

33 The nationality verification process is explained in section 2d below.

34 *Ibid.*

tries of origin; and (6) Other groups of persons with undetermined nationality who cannot return to their country of origin due to the threat of persecution. Rohingya typically fell into categories (5) and (6). However, the Thai government has delayed the registration of groups (5) and (6) and did not further develop any specific solution for them. It was also possible for Rohingya to be registered into group (1) if they could prove that they had been in the country since at least 1995, as provided for by an amendment to the Civil Registration Act in 2008³⁵ and an MOI directive issued in January 2015.³⁶ In accordance with the 2015 MOI Directive, any aliens who are undocumented, have a habitual residence in Thailand, and who do not have any evidence of possessing a nationality, can request to be registered in the civil registration system. Moreover, Rohingya children who were sent to school should have been registered as stateless students in group (2) under the 2005 Strategy.

Despite the government's efforts to grant proper legal status to individuals who live in Thailand without any nationality or citizenship documents, research conducted by the authors of this paper indicates there are still many of undocumented/unregistered stateless persons who are living in the country, especially in rural areas, highland or border areas, without being accounted for in the Ministry of Interior civil registration database.

b. Stateless Rohingya in Thailand – A Brief History

For decades, Rohingya have entered Thailand both by land and by sea. While the majority of Rohingya transit through Thailand with the end destination of Malaysia and Indonesia, Thailand is the final destination for some. The situation of the Rohingya first came into the public consciousness in Thailand in 2009, when the Royal Thai Navy was condemned for pushing Rohingya on boats back out to sea.³⁷

As mentioned above, apart from the so-called “boat people”, it is estimated that there are at least 3,000 Rohingya living in Thailand, some of whom were found

35 Civil Registration Act 1991 as amended by the Act No.2 in 2008, Section 38(2).

36 Director of Central Registration Bureau, Department of Provincial Administration, *MOI Directive No.0309.1/ Wor 3 on birth acknowledgement and profile registration*, issued on 22 January 2015.

37 See above, note 8, p.8; Irin News, “Government, Army to investigate claims of Rohingya abuse”, *Irin News*, 20 January 2009, available at: <http://www.irinnews.org/news/2009/01/20/government-army-investigate-claims-rohingya-abuse>.

to have entered the country more than 30 years ago.³⁸ This figure is based on a 2008 survey by the Thai National Human Rights Commission, though unofficial statistics range between 3,000 and 20,000 (the latter being criticised as an exaggerated estimate).³⁹ However, according to a leader of the Rohingya Association of Thailand, there could be as many as 2,300 Rohingya families, or 8,000–10,000 Rohingya residing in Thailand.⁴⁰

The majority of Rohingya fled persecution and acute poverty in Myanmar; many had come over land, and entered the country through Mae Sot or other border towns located along the Thai-Myanmar borders.⁴¹ Many Rohingya are self-employed in informal sectors, working as money lenders and Roti-selling vendors.

Unfortunately, the Rohingya are not classified as non-camp-based refugees or urban-based migrant workers, but treated as irregular immigrants; the Equal Rights Trust, in its publication *Equal Only in Name* drew the following conclusion from its research in Thailand:

*The irregular status of the Rohingya has a significant impact on their enjoyment of the right to liberty and security of the person, due to the likelihood of them being detained and/or deported. Such detention is discriminatory and arbitrary if it fails to consider their vulnerabilities(...)*⁴²

c. Recent Situation of the Flow of Rohingya into Thailand

Since 2012, there has been a significant increase in the number of Rohingya fleeing Myanmar by boat bound for Malaysia via Thailand. Between June 2012 and 2014,

38 *Ibid.*, Equal Rights Trust, p. 17; Thai Action Committee for Democracy in Burma and Sub-Committee on the Human Rights, Stateless Persons and Migrant Workers, *Lawyer Council of Thailand, Rohingyas: Stateless & Forgotten People: Fact-finding Report and Recommendations from the Roundtable Discussion on the Inhumane Push-Back of the Rohingya Boat People*, 2009.

39 Cole, C., *Siamese Arabesques*, Booksmango, 2016, p. 37.

40 Institute of Human Rights and Peace Studies, Mahidol University and the Equal Rights Trust, National workshop on the promotion and protection of human rights of stateless Rohingya, 26 January 2016.

41 See above, note 8, p. 40.

42 *Ibid.*, p. 79.

it was estimated that 94,000 people left northern Rakhine, Sittwe and the Bangladesh borders to undertake this journey.⁴³ In 2014 alone, the UNHCR reported that an estimated 63,000 people from Bangladesh and Myanmar were bound for Thailand and Malaysia, approximately 10% of whom were women.⁴⁴ The number of Rohingya journeying by boat from the Bay of Bengal saw a significant increase in 2014, with the UNHCR stating that “21,000 Rohingya and Bangladeshis have set sail [between October and December 2014]... a 37-per cent increase over the same period [in 2013].”⁴⁵ There was a surge in irregular movements of persons in the Bay of Bengal and Andaman Sea in the first half of 2015. This “unprecedented” level of displacement and mobility was recognised by Ministers who participated in the Sixth Ministerial Conference of the Bali process on people smuggling, trafficking in persons and related transnational crime.⁴⁶ Moreover, approximately 2,000 people were estimated to have died in this passage from 2012 to 2015, largely due to starvation, dehydration and beatings by boat crews.⁴⁷ This was acknowledged during the 6th Meeting of Bali Process that there was a “high fatality rates recorded”.⁴⁸

Lacking documentation and being restricted from travelling within Myanmar and abroad, the majority of Rohingya rely on smugglers to assist them in fleeing persecution in Myanmar and making the risky boat journey.⁴⁹ According to a 2014 report by the UNHCR, Rohingya disembark on the coast of Thailand and are taken to camps located in or around hills, jungles, and plantations, isolated by wooden fences and under plastic sheeting, in preparation for departure to Malaysia.⁵⁰

43 UNHCR, *Southeast Asia Mixed Maritime Movements April-June 2015*, 2015, <http://www.unhcr.org/53f1c5fc9.pdf>.

44 UNHCR, *Irregular Maritime Movements in South-East Asia*, 2014, available at: <http://story-builder.jumpstart.ge/en/unhcr-imm>.

45 UNHCR, “More people risk lives across Indian Ocean despite abuse, deterrence”, *UNHCR*, 5 December 2014, available at: <http://www.unhcr.org/uk/news/briefing/2014/12/5481b0666/people-risk-lives-across-indian-ocean-despite-abuse-deterrence.html>.

46 Government of Indonesia, Government of Australia, *Sixth Ministerial Conference of the Bali process on people smuggling, trafficking in persons and related transnational crime – Co-chairs’ statement*, 23 March 2016, available at: <http://reliefweb.int/report/world/sixth-ministerial-conference-bali-process-people-smuggling-trafficking-persons-and>.

47 See above, note 9.

48 See above, note 47.

49 Amnesty International, *Deadly Journeys: The Refugee and Trafficking Crisis in Southeast Asia*, 2015, p. 9.

50 See above, note 45.

Their ability to continue to Malaysia depends on whether their relatives are able to pay the smugglers' ransom demands.⁵¹ The smugglers' demands for further payments are reportedly accompanied by threats, beatings, and other acts of torture, including being forced into stress positions for long periods of time and having chilli powder rubbed into eyes.⁵² The total cost demanded by smugglers was reported to be between US \$1,600 and \$2,400 per person. Hundreds of people were alleged to have died in smuggling camps for illness, starvation, dehydration, or have been killed by smugglers for attempting to escape or were unable to pay.⁵³ The most recent violence in Rakhine State which erupted on 9 October 2016 and continues until today may contribute to another wave of movements of Rohingya from Myanmar.

In early May 2015, news broke that a joint Thai military-police task force had discovered at least 26 bodies at a smuggling-trafficking camp in the Sadao district of Songkhla province close to the Thai-Malaysian border.⁵⁴ It was reported that the dead were ethnic Rohingya Muslims from Myanmar and Bangladeshis who had starved to death or died of disease.⁵⁵ Later in the same month, the Malaysian government authorities announced the discovery of 139 graves in a series of 28 camps on the Malaysian side of the border.⁵⁶ The practice of the Thai and Malaysian governments of pushing back boats of Rohingya migrants and asylum seekers was widely publicised in the media, and in response to the mounting pressure from the international community, senior ministers from Indonesia, Malaysia and Thailand held an ad-hoc meeting on 20 May 2015 in Malaysia to discuss the issue.⁵⁷ This resulted in the regional meeting on "Irregular Migration in the Indian Ocean" being convened by the

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 Lefevre, A., "Thai mass grave held bodies of 26 suspected trafficking victims", *Reuters*, 2 May 2015, available at: <http://www.reuters.com/article/us-thailand-myanmar-rohingya-idUSKBN0NNOC520150502>.

55 BBC News, "Thailand police 'recover 26 bodies' from jungle camp", *BBC News*, 2 May 2015, available at: <http://www.bbc.co.uk/news/world-asia-32562105>.

56 BBC News, Asia, *Malaysian police find 139 suspected migrant graves*, *BBC News*, 25 May 2015, available at <http://www.bbc.com/news/world-asia-32872815>.

57 See, for example, Channel 4, "Pushed back out to sea: clock ticking for Rohingya migrants", *Channel 4 News*, 19 May 2015, available at: <https://www.channel4.com/news/migrants-boats-sea-stranded-indonesia-thailand-malaysia>. See also Newland, K., *Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation*, IOM and MPI, July 2015, Issue No.3, http://publications.iom.int/system/files/pdf/mpi-iom_brief_no_13.pdf.

Thai government on 29 May 2015 in Bangkok, which was attended by the leaders of Bangladesh, Thailand, Malaysia, Myanmar and Indonesia as well as representatives from 16 other countries in the region and key international organisations.⁵⁸ At the end of the meeting, the five most affected countries, namely Bangladesh, Indonesia, Malaysia, Myanmar and Thailand reaffirmed their commitment to providing humanitarian assistance to the irregular migrants, while Indonesia and Malaysia in particular agreed to provide shelter to 7,000 people on the conditions that resettlement and repatriation would be completed within one year.⁵⁹ The participants of the meeting also adopted a wide-ranging list of recommendations for immediate responses including search and rescue operations at sea, preventive measures and measures to address root-causes by improving the livelihood of the “at-risk communities”.⁶⁰ Importantly, the term Rohingya was not used once during the meeting.⁶¹ Two other meetings were organised after May 2015, in July and December 2015.⁶²

d. Thai policies Vis-à-Vis Rohingya

As discussed above, the Thai government recognises the existence of irregular migrants and migrant workers from neighbouring countries. In 2004, as a result of Cabinet Resolutions⁶³ and bilateral agreements⁶⁴ with the neighbouring

58 Ministry of Foreign Affairs of the Kingdom of Thailand, *Summary: Special Meeting on Irregular Migration in the Indian Ocean*, 29 May 2015, available at: <http://www.mfa.go.th/main/en/media-center/14/56880-Summary-Special-Meeting-on-Irregular-Migration-in.html>.

59 See Newland above, note 58.

60 See above, note 59.

61 *Ibid.*

62 After 29 May 2015, two other meetings were held: Emergency ASEAN Ministerial Meeting On Transnational Crime (AMMTC) Concerning Irregular Movement of Persons in Southeast Asia held in Kuala Lumpur on 2 July 2015, and the 2nd Special Meeting on Irregular Migration in the Indian Ocean held in Bangkok on 3 December 2015.

63 On 2 March and later 27 April 2004, the Thai Cabinet adopted a special measure of the Ministry of Labour on the Management of Migrant Workers from Cambodia, Lao PDR and Myanmar.

64 Thailand signed Memorandums of Understanding (MOUs) on “Cooperation in the Employment of Workers” with Lao People’s Democratic Republic in 2002 and in 2003 with Cambodia and Myanmar. See Government of Lao People’s Democratic Republic and Government of the Kingdom of Thailand *Memorandum of Understanding between the Royal Thai Government and the Government of Lao PDR on Employment Cooperation*, 2002; Government of the Kingdom of Cambodia and Government of the Kingdom of Thailand, *Memorandum of Understanding between Cambodia and Thailand on cooperation in the employment of workers*, 2003; Government of the Kingdom of Thailand and Government of the Union of Myanmar, *Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on cooperation in the employment of workers*, 2003.

countries, the Thai government employed a regularisation policy⁶⁵ which required irregular migrant workers, particularly those from Cambodia, Lao PDR and Myanmar to register and obtain a temporary work permit for a period of one-to-two years. Under the Strategy adopted in 2004, a policy setting out a nationality verification process was implemented from 2009 onwards. Under this policy registered migrants are required to submit their personal data so that their nationality can be verified by their country of origin. Once the verification has been completed, individuals are issued a travel document which grants them legal status and permission to remain for two years with the possibility of a two-year extension, and entitles them to social security, work accident compensation, and unrestricted travel within Thailand and to their home countries.⁶⁶ In mid-2015, Thailand and Vietnam signed a Memorandum of Understanding to allow Vietnamese workers to work in Thailand. Later in the same year, the Thai government also allowed Vietnamese migrant workers already in the country to apply for a visa and a one-year work permit.⁶⁷

It is clear that in recent years, all cabinet resolutions dealing with migrant workers apply only to those registered migrant workers who are required to pass the national verification process. Interviews revealed that although the registration and verification process also applies to Rohingya, those Rohingya who were registered as migrant workers reportedly failed to complete the verification process as Myanmar denied that they were Myanmar nationals.⁶⁸

In addition, in 2012, the National Security Council of Thailand issued a policy entitled “Comprehensive Strategy on Resolving the Problems of Irregular Migrants” which superseded the 2005 National Strategy to Address Legal Status and Rights of Persons.⁶⁹ The Comprehensive Strategy attempts to create an integrated and systematic approach to solve the problems of irregular migrants,

65 See above, note 32.

66 Napaumporn, B., “Analysis of Nationality Verification of Migrant Workers in Thailand: The Case of Workers from Cambodia, Lao PDR and Myanmar”, *Institute of Human Rights and Peace Studies, Mahidol University*, 2012.

67 International Organization for Migration, *Migration Information Notes No. 28*, December 2015, available at: <http://bit.ly/2gi4Ncl>.

68 Interview with Rohingya and officers of the Office of Foreign Workers Administration, Ministry of Labour (Confidential).

69 National Security Council, *Comprehensive Strategy on Resolving the Problems of Irregular Migrants*, 2012.

whose numbers are estimated to be as high as 3 million, and to prevent any further irregular migration.⁷⁰

Table 2: Categories of Irregular Immigrants in Thailand⁷¹

Categories of Irregular Immigrants in Thailand	Policy Framework
<p>1. Ethnic minority groups granted status and permanent residence by obtaining Thai nationality or permanent residence (approx. 560,000 persons)</p>	<p>a. Long-stay stateless ethnic minority groups who were surveyed and registered from 1970–1999;</p> <p>b. Stateless students;</p> <p>c. Rootless persons; and</p> <p>d. Stateless good-deed persons</p>
<p>2. Ethnic minority groups and their children granted temporary stay (pending other solutions) (approx. 120,000 persons)</p>	<p>a. Ethnic minority groups and their children surveyed and registered under the 2007–2009 MOI scheme;</p> <p>This group includes people with undetermined nationality who:</p> <ul style="list-style-type: none"> - Claim that they are relatives or offspring of the 1st group, but missed the previous survey and registration; - Have no connection with or cannot return to the country of origin; and - Have been under the investigation of Ministry of Interior

70 *Ibid.*, See also Committee on the Elimination of Racial Discrimination, *Consideration of reports, comments and information submitted by States parties under article 9 of the Convention*, UN Doc. CERD/C/SR.2173 2 January 2013, p. 2; Thailand Development Research Institute, *Study Weighs Costs and Benefits of Wage Increase*, 2013.

71 National Security Council, *Current Migration Challenges in Thailand*, 13 June 2012, available at: http://www.eeas.europa.eu/archives/delegations/thailand/documents/thailande_eu_coop/migration_management/3_4current_migration_challenges_in_thailand_en.pdf.

Categories of Irregular Immigrants in Thailand	Policy Framework	
3. Special groups with specific policies due to national security problems (over 2,100,000 persons)	a. Irregular migrant workers from Cambodia, Lao PDR and Myanmar	Strategy on Comprehensive Administration of Migrant Workers and Comprehensive Measures on Resolving Irregular Migrant Workers Problems (according to the NSC Resolution on 10 November 2003, the Cabinet Resolution on 2 March 2004 and the Cabinet Resolution on 26 April 2011)
	a. Displaced persons fleeing fighting and persecution from Myanmar b. Rohingya; and c. North Koreans	Specific measure under the National Security Council, aimed at deportation or resettlement in the 3 rd country
4. Other “illegal” immigrants	Persons who have overstayed their visa, mafia and outlawed groups	Subject to arrest under Immigration Act

Under the Comprehensive Strategy, Rohingya are categorised alongside irregular migrant workers, displaced persons from Myanmar, and North Koreans, but in different groups as set out in Table 2, above. Some studies suggested that Rohingya are considered by the Thai authorities as a threat to national security because of their involvement in political unrest that may cause tension in diplomatic relations between Thailand and Myanmar.⁷²

The fact that the Rohingya are perceived and treated differently from other groups of irregular immigrants has a significant impact. First, the approach does not address the fact that the Rohingya residing in Thailand are refugees who fled persecution and acute poverty in Myanmar.⁷³

72 *Ibid.*, see also Meeboonlue, Jesda and Piyanut Pipau, *Rohingya problem and solutions*, Institute of Strategic Research, Institute of National Defense, available at: http://www.sscthailand.org/uploads_ssc/rhohingya.pdf.

73 See for example, Immigration Act 1979, B.E. 2522 (1979), chapter 6, section 54 stipulates that “any alien who enters or comes to stay in the Kingdom without permission or when such permission expires or is revoked [will be deported] out of the Kingdom”.

Second, the government's policy on the legalisation of migrant workers offers limited opportunity to Rohingya, as they are often unable to pass the nationality verification process, because the government of Myanmar refuses to recognise them as citizens.⁷⁴ Under the 2012 strategy, those who cannot pass the nationality verification process are subject to deportation.⁷⁵ Finally, although a number of Rohingya have been living in Thailand for a long time, they have been excluded from the national survey of status of persons in the past.⁷⁶

As discussed above, it was under the first national survey of aliens in Thailand conducted between 1970 and 1999 that many aliens obtained identification papers, or so-called "coloured cards" and a right to temporary residence. The acquisition of these coloured cards paved the way to Thai nationality or at least regularised immigrant status. The subsequent 2006–2008 survey identified six additional groups, including: (1) Stateless ethnic minority groups and their children who were not present or missed previous registrations (1970–1999); (2) Stateless students; (3) Rootless persons; (4) Stateless good-deed persons; (5) Registered migrant workers from Cambodia, Lao PDR. and Myanmar who were not recognised as nationals (through the nationality verification process) by their respective countries of origin; and (6) Other groups of persons with undetermined nationality who cannot return to their country of origin due to the threat of persecution. It is observed that only the first four groups are recognized in the 2012 Comprehensive Strategy on Resolving Irregular Migrants Problems. Groups (5) and (6) are not addressed in the Strategy.⁷⁷ As Rohingya are most likely to fall into groups (5) and (6), their chances for registration and regularisation of their status in Thailand are limited.

It is unclear to what extent the 2012 strategy has been monitored and implemented so far. Under the military-installed National Council for Peace and Order

⁷⁴ Information obtained from Office of Foreign Workers Administration, Ministry of Labour suggested that those registered migrant workers from Myanmar who were rejected under the Nationality Verification process are Rohingya; Equality Myanmar, "Rohingya Denied passports to Work in Thailand", *Equality Myanmar*, 16 February 2012, available at: <http://equalitymyanmar.org/rohingya-denied-passports-to-work-in-thailand>.

⁷⁵ See above, note 70.

⁷⁶ See above, note 67.

⁷⁷ National Human Rights Commission, Letter to the Prime Minister; Sub: Proposal on Resolutions of Status of Persons According to the cabinet resolutions on 18 January 2005, and 7 December 2010, dated 29 November 2011.

(NCPO) government, which took power in 2014 coup d'tat and continues to rule in 2016, the focus has been on solving problems of migrant workers and the protection and suppression of human trafficking.⁷⁸ This latter policy direction followed the downgrading of Thailand from Tier Two to Tier Three under the Trafficking in Persons Report, which is used by the United States of America Department of State to rate all countries on their efforts to fight human trafficking.⁷⁹ As a result, there was a shift in priority from implementing the 2012 strategy for all groups to focusing on human trafficking.

In short, under the existing legislative framework and policies, Rohingya residing in Thailand are not recognised. The exclusion of Rohingya from the past national surveys of status of persons created tremendous challenges for Rohingya who have been in the country for a long time to achieve legal residence affecting future generations of children.

3. Concept, Development and Analysis of Thailand's Nationality Laws

a. Thailand's Nationality Laws and Policies Development

i. Key Developments of Thailand's Nationality Laws and Policies

According to the academic Phunthip K. Saisoothorn,⁸⁰ the concept of Thai nationality did not exist until Thai society was exposed to the western world. The term "Thai nationality" appeared for the first time in the Nationality Act B.E.2456 (1913) that was enacted by King Rama VI, though the concept of being a Thai person existed since the period when the Thai State was established, the Sukhothai Period (1238–1438). The development of Thailand's nationality laws and related policies could be divided into four periods as follows:

78 The Announcement of National Council for Peace and Order No.68/2557, *Urgent Measures on Protection and Suppression of Trafficking in Persons, and Temporary Measures on Resolving Migrant Workers' Problems*, 17 June 2014, available at: <http://www.thaigov.go.th/index.php/th/ncpo-annoncement/item/84503-id84503.html>.

79 US Department of State, *Trafficking in Report: Thailand*, 2014, available at: <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226832.htm>. Thailand was upgraded to Tier 2 Watch List in 2016 Report.

80 Kanchanachittra Saisoothorn, P., "Development of Concepts on Nationality and the Efforts to Reduce Statelessness in Thailand", *Refugee Survey Quarterly*, Vol. 25(3), 2006, p. 40.

- The first period: Thai customary law on nationality, in force before 10 April 1913;
- The second period: the Nationality Act B.E.2456 (1913), in force from 10 April 1913 to 12 February 1952;
- The third period: the Nationality Act B.E.2595 (1952), in force from 13 February 1952 to 4 August 1965; and
- The fourth, current, period: the Nationality Act B.E.2508 (1965), in force from 5 August 1965 until present.

Since the establishment of the Thai State, an individual has been able to acquire Thai nationality both at birth and after birth. With regard to acquisition of Thai nationality at birth, Thai nationality laws include both principles of *ius sanguinis* (i.e. nationality acquired by virtue of having a parent who is a Thai national) and *ius soli* (i.e. nationality acquired by virtue of being born in Thailand). Thai nationality can also be acquired after birth by naturalisation and through marriage. All of this said, the relevant law governing the acquisition of Thai nationality has been different in each period of development.

In the first period, under Thai customary law, Thai nationality law applied the principle of *jus sanguinis*, where a child was born to a Thai parent, and naturalisation. Naturalisation was possible for aliens as well as their entire family, including an alien's spouse and their children.⁸¹ Naturalisation of the aliens could occur if they, as legal adults, had fully assimilated into Thai society, socially contributed to Thailand, or formerly had Thai nationality in accordance with Article 6, Article 7(1) and Article 7(2) of the Naturalisation Act in 1911, respectively. In accordance with Article 12 and Article 13 of the Naturalisation Act Ror Sor 130 (1911), a wife and a minor child were able to acquire Thai nationality automatically by operation of law when the husband or father had obtained nationality by naturalisation. It is worth noting that in the period prior to 1913, the principle of *jus soli* did not exist in Thai law. This clause did not apply to the spouse and children of women who had obtained nationality by naturalisation.

In the second period, Thai nationality was determined by the Nationality Act B.E.2456 (1913) and the Naturalisation Act Ror Sor 130 (1911). The bases for obtaining Thai nationality were *jus sanguinis*, *jus soli*, naturalisation and marriage. Under the *jus soli* principles in the Nationality Act (1913), every child born on the

⁸¹ *Ibid.*, p. 41.

territory from 10 April 1913 to 12 February 1952 obtained Thai nationality at birth, regardless of the legal status of their parents.⁸² It was also the first time that Thai nationality could be automatically granted to an alien woman who married to a Thai man.⁸³ Over 39 years of operation of this Act, direct family members coming to Thailand for family reunification, particularly from China, India and Vietnam, as well as people from different ethnicities in Thailand were granted citizenship.⁸⁴

In the third period, under the Nationality Act B.E.2495 (1952) the principles for obtaining Thai nationality were similar to those in the second period. However, nationalism began to emerge and was reflected in the new nationality legislation. For instance, the new legislation limited acquisition of Thai nationality based on the principle of *jus soli*.⁸⁵

In the fourth (current) period, the grant of Thai nationality is governed by the Nationality Act B.E.2508 (1965). The basis for granting Thai nationality is not significantly different. However, the rules became more rigid, as is evident in the Revolutionary Party Regulation No. 337 or so-called "Por Wor 337" that was in force from 1972 to 1992. Por Wor 337 was introduced to prevent children born in Thailand to people who had migrated from communist countries from acquiring Thai nationality. However, it affected all aliens. As a consequence, the Thai nationality of persons born in Thailand before 14 December 1972 to a legally recognised father with non-permanent residence, or an alien mother with non-permanent residence (in circumstances where the legally recognised father is absent) was revoked, while Thai nationality was not granted to persons born in Thailand from 14 December 1972 to 25 February 1992 to parents under the same circumstance.⁸⁶ Under this Regulation, many were rendered stateless. However, the Thai government made several attempts to minimise the negative impact of Por Wor 337, for example through amendments in 1992, 2008 and 2012 which will be discussed below.

⁸² Nationality Act B.E.2456 (1913), Article 3(3).

⁸³ *Ibid.*, Article 3(4).

⁸⁴ See above, note 81, p. 43.

⁸⁵ *Ibid.*, p. 46. Nationality Act, B.E.2495 as amended by the Act No. 2 B.E.2496, Article 7(3) legislated that the RTG would only grant Thai nationality based on *jus soli* where the mother had Thai nationality).

⁸⁶ *Ibid.*, p. 48. See also Revolutionary Party Announcement No. 337, 13 December 1972, Clause 1, (Por Vor 337), available at: <http://web.krisdika.go.th/data/law/law2/%ca25/%-ca25-21-2515-a0001.tif>.

i. Key Developments of Thailand's Nationality Laws and Policies

Since 5 August 1965, the main rules for obtaining Thai nationality have been framed under the Nationality Act B.E.2508 (1965) (as amended in 1992, 2008 and 2012). There are two methods of acquiring Thai nationality under this Act: (1) acquisition of Thai nationality at birth, based on the principles of *jus sanguinis*⁸⁷ and *jus soli*;⁸⁸ and (2) acquisition of Thai nationality after birth, through naturalisation⁸⁹ and marriage.⁹⁰

In Thailand, the right to nationality at birth in accordance to Nationality Act 1965 as amended by the Act No.2 and 3 in 1992, is provided to those who were born either to a Thai parent or in Thailand during the period of enforcement of the Nationality Act B.E.2508 (1965). Exception, however, is made where a specific provision provides retroactive effect. For example, section 10 of the Nationality Act No.2 in 1992 provides retroactive effect to section 7(1). This means any persons born to a Thai parent can acquire Thai nationality by birth although they were born before this amended legislation came into force.⁹¹ Section 21 of the Nationality Act No.4 in 2008 also provides retroactive effect to the provision on acquisition of Thai nationality through a biological father (section 7 paragraph two).⁹² Moreover, section 9/5, section 9/6 and section 9/7 under the 2012 amendments (the Nationality Act No.5 B.E.2555 (2012)) retroactively reinstate Thai nationality by birth under *jus sanguinis* principle for a specific group of per-

87 Nationality Act B.E.2508 (1965) as amended by the Nationality Act (No.2) B.E.2535 (1992), section 7 paragraph 1(1); see above, note 23, section 9/5, section 9/6, section 9/7.

88 *Ibid.*, Nationality Act B.E.2508 (1965) as amended by the Nationality Act (No.2), Section 7 paragraph 1(2); Nationality Act No.4 B.E.2551 (2008) Section 23; Nationality Act B.E.2508 (1965) as amended by the Nationality Act (No.4) B.E.2551 (2008), Section 7 bis paragraph 2.

89 *Ibid.* Nationality Act B.E.2508 (1965), section 10 and Section 11(1) and 11(3); Nationality Act B.E.2508 (1965) as amended by the Nationality Act (No.4), section 11(2) and 11(4); Nationality Act (No.4), section 12/1(1).

90 *Ibid.* Nationality Act B.E.2508 (1965), Section 9.

91 According to the Section 7 in the original Act in 1965, only those born to a Thai father were eligible to acquire Thai nationality regardless of where they were born. A Thai mother could transmit Thai nationality to the children only when the children were born outside of Thailand to an unknown father.

92 Before the implementation of the amended Act No.4 in 2008, the term of father in the Act was interpreted as only the father who was legally recognised.

sons, called “Displaced Thais”.⁹³ Thai ancestors of these Displaced Thais had died over 100 years ago, and it was not possible to confer Thai nationality to their children and descendants by virtue of the general legal provision on the acquisition of Thai nationality. The Nationality Act No.5 aims to provide an exception and address statelessness among the descendants⁹⁴ of these Thai nationals who may have become stateless due to state succession in the past. However, these Displaced Thais are still required to follow the conditions set forth in the relevant Ministerial Regulation.

To obtain Thai nationality at birth in accordance with the principle of *jus sanguinis*, a person must meet one of the following requirements:

- Being born to a Thai father or a Thai mother whether within or outside Thailand (section 7 paragraph 1(1) of the Nationality Act B.E.2508 (1965) as amended by the Nationality Act (No.2) B.E.2535 (1992); and section 7 paragraph (2) as amended by the Nationality Act (No.4) B.E. 2551 (2008));
- Being recognized as a Displaced Thai by the Committee on the Recognition of Displaced Thais (section 9/5 of the Nationality Act No.5 B.E.2555 (2012));
- Being descendants of recognised Displaced Thais (section 9/6 of the Nationality Act No.5 B.E.2555 (2012)); and
- Being descendants of Displaced Thais and having acquired Thai nationality through other means, particularly after birth (section 9/7 of the Nationality Act No.5 B.E.2555 (2012)).

To obtain Thai nationality on the basis of the principle of *jus soli*, a person is required to meet one of these conditions:

- Being born in Thailand to alien parents unless they are persons under Section 7 bis paragraph one (Section 7 paragraph 1(2)of the Nationality Act (No.4) B.E.2551 (2008));
- Being born in Thailand, but as a result of Regulation of the Revolutionary Part No. 337 the individual's Thai nationality was revoked or was not granted. This

93 See above, note 23, section 4. Section 4 states that a “Displaced Thai” refers to an ethnic Thai who has become a subject of another State because of territorial succession of the Thai Kingdom during the British rule (Burma) and does not possess any nationality of any other country, has immigrated into and resides in the Kingdom of Thailand for a consecutive period, observed the Thai way of life and has been surveyed and registered according to the Civil Registration Act as prescribed in the Ministerial Regulation. Or, hold other relevant and similar characteristics according to Ministerial Regulation.

94 Children and grandchildren.

- applies to the children of such persons who were born in Thailand (section 23 of the Nationality Act (No.4) B.E.2551 (2008));⁹⁵ and
- Being born in Thailand to alien parents with non-permanent residence, and the Minister deems that it is appropriate to grant Thai nationality in conformity with the rules prescribed by the Cabinet (section 7 bis paragraph 2 of the Nationality Act B.E.2508 (1965) as amended by the Nationality Act (No.4) B.E.2551 (2008)).

The acquisition of Thai nationality after birth under the current law is not automatic: it is only granted once an application has been filed and approved by the Minister of the Interior. Applicants have to prove that they meet all necessary conditions, which include:

- Being an alien woman who marries a Thai national (section 9 of the Nationality Act B.E.2508 (1965));
- Being a lawful adult alien; having good behaviour; having regular occupation; having a domicile in Thailand for a consecutive period of not less than five years prior to the day of filing the application for naturalisation; and having the requisite knowledge of Thai language as prescribed in the Regulations (section 10 of the Nationality Act B.E.2508 (1965));
- Being a lawful adult alien who has rendered a significant contribution to Thailand, has good behaviour and a regular occupation (section 11(1) of the Nationality Act B.E.2508 (1965));
- Being a lawful adult alien who has rendered a significant contribution to Thailand and used to have Thai nationality, has good behaviour and a regular occupation (section 11(3) of the Nationality Act B.E.2508 (1965));
- Being a lawful adult alien who has rendered a significant contribution to Thailand and is a husband of a Thai national, has good behaviour and a regular occupation (section 11(4) as added by the Nationality Act (No.4) B.E.2551 (2008));
- Being a legally alien adult who was adjudged by a court as incompetent and are under supervision of a Thai national; being born in Thailand; having good behaviour; and having a domicile in Thailand for a consecutive period of not less than five years till the day of filing the application for naturalisation (Section 12/1(1) as added by the Nationality Act (No.4) B.E.2551 (2008));

⁹⁵ Section 23 aims to retroactively address nationality problems of those whose nationality were revoked and for those who were unable to acquire one, including their children due to the Regulation of Revolutionary Party No.337 that was in force from 1972–1992; see above note 87. Over 200,000 persons who were born in Thailand are estimated to benefit from this provision.

- Being a minor alien under the supervision of a public foster home; who has been in the foster home not less than 10 years, has good behaviour and has been domiciled in Thailand for a consecutive period of not less than five years prior to the day of filing the application for naturalisation; and who has the requisite knowledge of Thai language as prescribed in the Regulations (section 12/1(2) as added by the Nationality Act (No.4) B.E.2551 (2008)); and
- Being a minor alien under the age of five who has been adopted and registered as a legitimate child of the Thai person, who was born in Thailand, has good behaviour; was domiciled in Thailand for a consecutive period of not less than five years prior to the day of filing the application for naturalization; and has the requisite knowledge of Thai language as prescribed in the Regulations (section 12/1(3) as added by the Nationality Act (No.4) B.E.2551 (2008)).

It is important to highlight that nationality in Thailand has not been granted to any aliens with irregular status as indicated by the term “a lawful adult” and the fact that the grant of nationality under the above provisions is not automatic. In effect, this means that all Rohingya adults within the country are disbarred from acquiring citizenship. This in turn narrows the pathway to citizenship for their children, as the children of Rohingya cannot rely on their parents’ legal residency to acquire citizenship (excluding those with one Thai parent), but it does not mean that it is impossible.

The most significant provision for the children of Rohingya is section 7 bis of the Nationality Act B.E.2508, which provides that the Minister may exercise his discretion to grant nationality to the children of alien parents with non-permanent residence.⁹⁶ However, this provision has not been widely used.

Another possibility for the children of Rohingya to acquire Thai nationality is the right under section 12/1(2) for children living in public foster care and under section 12/1(3) for minors who are adopted by Thai persons.⁹⁷ Again, the use of these provisions has been rare. Moreover, it is very unlikely that Rohingya whose status is irregular would ever make any formal approach to the authorities for fear of deportation.

⁹⁶ See above, note 88, Nationality Act B.E.2508 (1965), Section 7 bis paragraph 2.

⁹⁷ See above, note 89, Nationality Act (1965) as amended by the Nationality Act (No.4), Sections 12/1(2) and (3).

b. Nationality and Human Rights: The Contesting

The 1954 Convention relating to the Status of Stateless Persons defines a stateless person as someone “who is not considered as a national by any state under operation of its law”.⁹⁸ This definition implies a crucial link between an individual and a state. Nationality creates a sense of identity and belonging and regardless of the requirements of international human rights law, in practice is also the key route to accessing a number of economic, social and political rights under national law, including rights to education, health care, legal employment, property and political participation and freedom of movement. Being stateless has a “devastating impact” on the lives of individuals and their families.⁹⁹

The concept of nationality is the subject of significant debate. Hannah Arendt, one of the great political thinkers, was one of the first to advocate for the rights of persons who become stateless as a result of being stripped of citizenship.¹⁰⁰ According to Arendt, the loss of citizenship is equivalent to loss of the “very qualities which make it possible for other people to treat him as a fellow man”.¹⁰¹ Loss of citizenship makes a man become “nothing”, someone who could “live and die without leaving any trace, without having contributed anything to the common world”.¹⁰² In short, although international human rights law does not restrict rights to persons with a nationality, the practical reality is that statelessness or the loss of nationality can result in the denial of access to all rights provided within national law. According to Benhabib, the term “the right to have rights” refers to a moral claim to a membership of humanity as persons belonging to some human group.¹⁰³ The second use of the term “rights” is built upon after one has already become a member of a political and legal community, which entitles the person to civil and political rights.¹⁰⁴ This re-

98 Convention relating to the Status of Stateless Persons, Article 1(1).

99 UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians* No. 22, July 2014, pp. 3–8.

100 Arendt, H., *The Origins of Totalitarianism*, Meridian Books, 1962, p. 300.

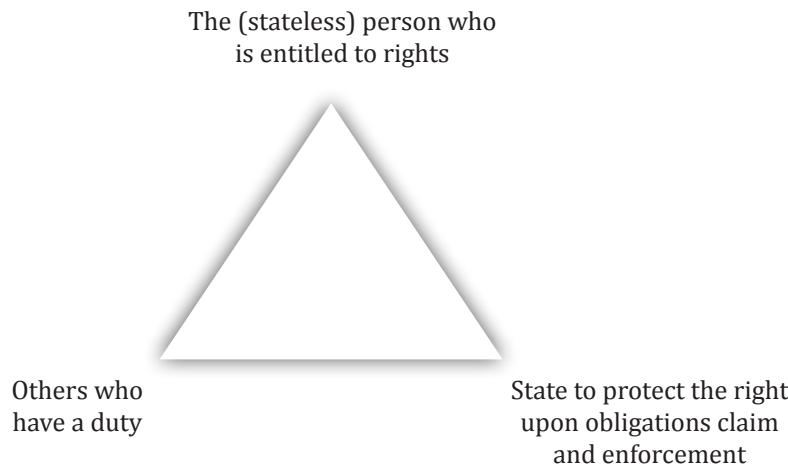
101 *Ibid.*

102 *Ibid.*

103 Benhabib, S., *The Rights of Others: Aliens, Citizens and Citizens*, Cambridge University Press, 2004, Cambridge, pp. 56–57.

104 *Ibid.*

flects a triangular relationship among the stateless person and other actors in the community as below:¹⁰⁵



The triangular relationship is between the stateless person who has is entitled to claim his rights, a state which has duty to protect and others who have a duty to respect. Benhabib underlines the significance of membership within the bounds of social communities to having rights and argues for a “just” membership there which should entail, among other things, the recognition of the moral claim to have rights and the protection of non-nationals particularly refugees and asylum seekers, regardless of their legal and political status. Having rights should also entail the right to citizenship for these disadvantaged people who have fulfilled certain conditions.¹⁰⁶ A person’s identity lies in the hand of state; the state has the power to allow the person to access to, or exclude them from all the possibilities of being in and development as a part of a community.¹⁰⁷ One of the most critical powers of state is to decide the conditions of access to such a community, for example through an immigration and citizenship policy, which affect not only

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid*, pp. 2–3.

¹⁰⁷ Shotter, J., “Psychology and Citizenship: Identity and Belonging” in *Citizenship and Social Theory*, London: SAGE Publications, 2000, pp. 115–125.

the person's legal status but also his or her freedom of movement, temporary and permanent residence and finally access to citizenship.

As discussed earlier, the development of the basic concepts of the Thai nationality prescribed in the laws over the past hundred years reflect that Thai nationality is not acquired by "right". Rather, the Thai government has consistently upheld its discretionary power to grant, or refuse to grant, as well as limit, revoke and return Thai nationality to those qualified in accordance with set conditions, specified periods, and adequate supporting evidence. The principle of *ius soli* was short lived in Thai law; naturalisation is allowed, but subject to relatively strict conditions. The result of the strict policy on immigration and citizenship has been to widen and deepen the statelessness problems to the detriment of all immigrants, in particular the Rohingya.

c. Impact on the Protection of the Rights of Rohingya in Thailand

Article 15 of the UDHR stipulates that every individual has the right to nationality, and no one shall be arbitrarily deprived of nationality. This right is also expressed in the 1954 Convention relating to the Status of Stateless Persons¹⁰⁸ and the 1961 Convention on the Reduction of Statelessness,¹⁰⁹ which, as set out in the 2010 Equal Rights Trust publication 'Unravelling Anomaly', ensure that those who do not have a nationality are not deprived of the range of rights afforded to those with a nationality.¹¹⁰ The 1954 Convention aims to regularise the status of stateless persons and ensure basic rights, and the 1961 Convention creates obligations upon state parties to take positive measures to prevent, reduce and avoid statelessness.¹¹¹ The rights affirmed by these Conventions include rights relating to employment, housing, social security, education for children, and freedom of movement and association. Thailand is not a signatory to either the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness.

In addition, the 1951 Convention relating to the Status of Refugees (also known as the 1951 Refugee Convention) has not been ratified by Thailand, meaning that

108 Convention relating to the Status of Stateless Persons.

109 Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, 1961.

110 Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, p. 43.

111 *Ibid.*, p. 43, 48.

Rohingya asylum-seekers in Thailand are unable to rely on the 1951 Convention's guarantees with respect to the granting of asylum and to the basic rights and benefits afforded to refugees.¹¹² However, the obligation not to *refoule* individuals to a country where their life is at risk or where they face a real risk of torture or inhuman or degrading treatment is a principle of customary international law and is therefore binding on all states.¹¹³

Like other member states of the United Nations, Thailand has an obligation to protect the human rights of all persons who are in its territory and subject to its jurisdiction. Despite not being a signatory to the 1954 and 1961 Conventions, and not having ratified the 1951 Refugee Convention, Thailand is a party to seven of the core international human rights instruments, which seek to protect all "human beings" including the Rohingya. They are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with disabilities (CRPD).

In addition to the principles of equality and non-discrimination upheld in all of these core treaties, a number of the treaties to which Thailand is party have strong provisions on the acquisition of nationality. Article 24 of the ICCPR and Article 7 of the CRC stipulate that every child shall be registered immediately after birth and have a right to acquire a nationality. This right is mirrored in Article 18 of the CRPD for children with disabilities. These provisions make it clear that the right to nationality is a fundamental civil and political right that should be established from birth, regardless of race, colour, or ethnic origin. Article 9 of the CEDAW requires states to grant equal rights between men and women to acquire, change or retain their nationality and requires states to grant women equal rights with men "with respect to the nationality of their children". Article 5(d)(iii) of ICERD obliges states to eliminate all forms of racial discrimination and to guarantee that all persons, irrespective of race, colour, or ethnic origin, have the right to nationality.

¹¹² Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 1954.

¹¹³ UNHCR, *NGO manual on international and regional instruments concerning refugees and human rights*, 1998, p. 17.

If Thailand were to apply these principles in the domestic context, it would eliminate the possibility that the children will inherit statelessness and prohibit the denial of nationality to Rohingya as a result of their ethnic origin.

In the regional context, Article 18 of the non-binding 2012 ASEAN Human Rights Declaration, issued by the Association of Southeast Asian Nations (ASEAN), of which Thailand is a member state, addresses the right to a nationality. It provides: “[e]very person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality”.

The above discussion makes it clear that nationality itself is a fundamental right, that every person is entitled to access to, claim and obtain nationality, and not to be arbitrarily denied a nationality. In addition, as discussed earlier in this paper, the right to nationality is in practice a prerequisite for the enjoyment of other rights such as the right to access to work, to social welfare, and the right to vote and participation in industrial politics, despite that international human rights law does not make human rights contingent on having a nationality (other than in the aforementioned exceptional cases).

The Thai Government has made efforts for decades to reduce statelessness through its improvement of domestic citizenship legislation for the acquisition of nationality. Moreover, the withdrawal of a reservation to Article 7 of the CRC (which provides that every child shall be registered immediately after birth and have a right to acquire a nationality) in late 2010 was a positive sign. This move led to the amendment of the 2008 Nationality Act and the 2011 Civil Registration Act which stipulates that all children born in Thailand shall be registered at birth. These positive developments are welcome, but the Thai government retains its reservation to Article 22 of the CRC regarding the protection of child refugees and asylum seekers, stating that the application of this article “shall be subject to the national laws, regulations, and prevailing practices in Thailand”.¹¹⁴

In response to Thailand’s position, the Committee on the Rights of the Child, in its concluding observations to Thailand’s state report in 2011, expressed concerns that a significant number of people, including children, particularly those belonging to the disadvantaged groups including refugees and asylum seekers remain

¹¹⁴ See Thailand’s reservation at UNTC, *Convention on the Rights of the Child*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec.

unregistered and thus stateless.¹¹⁵ The Committee went on to urge the Thai government to ensure that children at risk of becoming stateless are provided with access to Thai nationality.¹¹⁶ Similarly, in the 2011 Universal Periodic Review, Thailand was encouraged to take steps to ensure the birth registration of refugee children.¹¹⁷ These observations reflect the gap between Thailand's international obligations and its domestic law.

Those foreign nationals who pass the national verification process, for example, registered migrant workers from Cambodia, Laos PDR and Myanmar, are entitled to greater benefits of social security schemes, work accident compensation, and freedom of unrestricted travel within Thailand and to their home countries. Irregular migrant workers who have been regularised through the registration process are eligible to receive only basic health care services under the universal health-care scheme. Irregular migrants have no rights to employment at all under national law. According to international law, however, the government is obligated to guarantee the rights to work and health to all, not just to citizens or those legally resident in the country.¹¹⁸

The status of many Rohingya is indefinitely irregular which makes it hard for them to claim their fundamental rights. The first hurdle comes from their country of origin – Myanmar – where they are deprived of nationality by the 1982 Citizenship Law, rendering them stateless.¹¹⁹ Rohingya in Thailand are irregular migrants who have been denied citizenship. They cannot prove nationality of their country of origin and nor can they easily acquire Thai nationality – this means it is very difficult for Rohingya to access other rights, including the right to work in Thailand. This will be discussed in more detail in the next section.

The irregular immigrant status of Rohingya also presents an obstacle for Rohingya children's access to education. The Thai government has been implementing the "Ed-

¹¹⁵ Committee on the Right of the Child, *Concluding Observations: Thailand*, UN Doc. CRC/C/THA/CO/3-4, 16 January – 3 February 2012, Paras 41–44.

¹¹⁶ *Ibid.*

¹¹⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Thailand*, UN Doc. A/HRC/19/8, 8 December 2011, Para 61.

¹¹⁸ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 1966, Articles 6 and 12.

¹¹⁹ Burma Citizenship Law, [MMR-130], 15 October 1982; see also above, note 8 pp. 8–11.

ucation for All" policy since July 2005; under this policy all children born in Thailand, including those born of unregistered migrants, are entitled to access the Thai education system. The policy also clarifies that there is no requirement to submit documentation, such as proof of birth registration, in order to access education. Although this policy is a welcome development, in practice Rohingya are unlikely to send their children to school for fear of being arrested;¹²⁰ they also consider that the lack of birth registration document will inhibit access despite the fact that this is not a requirement. In addition, there is a lack of coherence between policies, such as Thailand's migration management policy which applies to short-term stay and the long-term commitment for the needs of migrant children under the education policy. This, combined with the lack of information and failure to campaign to communicate the content of the education policy results in barriers to education for children who are not registered.¹²¹

d. Opportunities and challenges for Rohingya in Thailand

As discussed above, in accordance with the right to Thai nationality at birth based on the principle of *jus sanguinis* as set out in national legislation, Rohingya born to at least one Thai parent (father or mother), automatically acquire Thai nationality. However, problems occur in relation to proof of parentage. In this regard, birth registration is key as it is the first legal document of a child and a formal proof of whether a person has acquired nationality by place of birth or descent.

Reportedly, the births of Rohingya children are not widely registered for several reasons. Many Rohingya are not aware that they have the right to birth registration, nor do they necessarily appreciate the impact of non-registration.¹²² However, even without birth registration, Rohingya children born to at least one Thai parent can always prove parentage by conducting a DNA test.¹²³

In accordance with the nationality legislation which is based on the principle *, children of Rohingya who were born in Thailand before 26 February 1992 can*

120 Human Rights Watch, *Two Years With No Moon: Immigration Detention of Children in Thailand*, 2014; for discussion of the same issue arising for Rohingya in Malaysia, see also Radu, A., "Rohingya children in Malaysia, an undocumented life", *Al-Jazeera*, 20 June 2016, available at: <http://www.aljazeera.com/indepth/inpictures/2016/06/rohingya-children-malaysia-undocumented-life-160620042659161.html>.

121 International Organization for Migration, *Thailand Migration Report 2014*, 2014, p. 49.

122 See above, note 67.

123 *Ibid.*

obtain Thai nationality in accordance with section 23 of the 2008 Nationality Act. In addition to birth registration, the provision also requires that the person shall have “good behaviour or have done acts to the benefits of official service”. Under section 7(2), children of the Rohingya who were born after 26 February 1992 may be eligible to apply for Thai nationality on the condition that the Cabinet considers it necessary and has set out relevant rules.

Rohingya who have lived in Thailand for a long time, have been assimilated into the society or who have rendered a significant contribution to Thailand or who have a Thai husband or wife can apply for Thai nationality by naturalisation or marriage. However, any such right to acquire Thai nationality is not automatic. Rohingya applicants have to meet all the relevant conditions, such as the strict requirement that they must be lawfully resident, as discussed above. Another example of a difficulty faced by Rohingya in acquiring Thai nationality is section 9, which provides that an alien who is a wife of a Thai man can apply for a nationality by marriage on the condition that their marriage has to be officially registered. Rohingya may struggle to have their marriages registered as many Rohingya do not possess the relevant identification documents as a result of their statelessness.

In conclusion, the Rohingya in Thailand may have the right to acquire Thai nationality. However, the conditions required to obtain nationality are particularly difficult for the Rohingya to achieve. As a result, it is crucially important to ensure that basic human rights, particularly ones that can lead to acquisition of Thai nationality (i.e. right to birth registration, right to marriage registration and right to documentation), of the Rohingya are protected. For Rohingya who remain in Thailand, the most important goal is securing legal status, as being stateless and not being recognised inhibits their access to other rights. The possibility of changes to nationality law is highly dependent on the political will of the Thai government.

4. Concept, Development and Analysis of Thailand's Immigration Laws

a. *The development of Thailand's immigration laws and policies*

i. *Key developments of Thailand's immigration laws and policies and the lessons learned*

As an alien, the right to enter and right to reside in a state are conditional rights. A state has sovereignty and discretion to decide whether it will allow any alien to enter and reside in its territory or not.

Like other countries, Thailand's immigration laws have been enforced to control entrance and residence of aliens in Thailand. Thailand enacted its first written immigration law in 1927. Prior to that, immigration was regulated by customary law under which aliens could enter and reside in Thailand without any conditions. The development of Thailand's immigration laws and policies can be divided into five periods as follows:

- The first period: Thai customary law on immigration in force before 11 July 1927;
- The second period: Immigration Act B.E.2470 (1927) in force from 11 July 1927 to 18 December 1937;
- The third period: Immigration Act B.E.2480 (1937) in force from 19 December 1937 to 24 January 1950;
- The fourth period: Immigration Act B.E.2493 (1950) in force from 25 January 1950 to 29 May 1979;
- The fifth period: Immigration Act B.E.2522 (1979) in force from 30 May 1979 until present.

In the first period (prior to 11 July 1927), the right of aliens to enter and reside in Thailand was governed by Thai customary law on immigration. Thailand welcomed aliens to settle in its territory as it was in need of a workforce. Thailand provided the right to permanent residence to aliens who entered before 11 July 1927 and the right to Thai nationality to the children of these aliens which were born in Thailand. During this period, permission to enter the country was not required and aliens were considered as lawful aliens even though they entered Thailand without any identification papers.

Since 1927, the situation in Thailand has changed dramatically. There was an influx of foreign aliens during the 1930s, a time of economic depression in Thailand.¹²⁴ From 11 July 1927 to 18 December 1937, migration of aliens to Thailand was regulated by the Immigration Act B.E.2470 (1927), the first written immigration law of Thailand. The 1927 Immigration Act provided two main legal channels for immigrants to enter Thailand: entrance in general and entrance as an exceptional case. Sections 6 and 8 of the 1927 Immigration Act specified certain persons who were not permitted to enter Thailand, namely those who had: (1) no travel document or paper to prove their nationality issued by the country of their origin; (2) any of the

¹²⁴ Boomgaard, P. and Brown, I., *Weathering the Storm: The Economies of Southeast Asia in the 1930s Depression*, Kitlv Press, 2000, p. 10.

diseases prescribed in the Government Gazette by the Minister; (3) not yet been vaccinated against smallpox and refused to have such vaccinations; (4) inadequate salary or a lack of financial support from others or who were mentally unstable and unable to work to earn a living; (5) behaviour which would indicate possible danger to the public; and (6) a nationality of any of countries as prescribed in the annual immigration quota. There was a discretionary power under section 10 to allow any alien to enter Thailand. Aliens without travel documents or any identification proving their nationality could be permitted to enter Thailand if officials deemed appropriate in accordance with section 6 paragraph 2.

Ten years later, the immigration law was reformed and the Immigration Act B.E. 2480 (1937) was introduced. The 1937 Immigration Act also provided two main legal channels for immigrants to enter into Thailand: general entry and entry on an exceptional basis. In addition to the six conditions as provided in the previous law, section 12 of this Act provided two additional conditions for general entry, namely: (1) immigrants had to hold a valid travel document and (2) immigrants had to have a visa issued by Thailand's embassy or consulate in the foreign country endorsed in the travel document. Section 13 made provision for undocumented aliens who wished to enter Thailand in exceptional circumstances if the relevant officials deemed it appropriate. In these cases, the personal data of the undocumented immigrants would be recorded and they would be issued with identification papers at the border.

In 1950, the Immigration Act B.E.2493 (1950) entered into force. This Act was in force from 25 January 1951 to 29 May 1979. Section 4 of the 1950 Immigration Act provided a noteworthy definition of "immigrants" at that time, which included aliens who entered Thailand seeking permanent residence. In accordance with this definition, aliens who wished to enter Thailand during this period could be divided into two categories: (1) Immigrants and (2) Non-immigrants. Immigrants were aliens who entered with a purpose of seeking permanent residence while non-immigrants were aliens who entered and temporarily resided in the country. As with the previous iterations, the 1950 Immigration Act provided two main legal channels for aliens to enter: entrance in general and entrance as an exceptional case. In special circumstances, under section 15(2), aliens still could be given permission to enter the country by the Minister of the Interior. This represents a narrowing of the discretionary scope under the law, as officials could no longer allow aliens to enter and identification papers were no longer issued to undocumented aliens at the point of entry. It is worth noting that it was the first time in the history of Thailand's immigration law that "stateless persons" was included as a target group of the annual immigration quota for permanent residence permission, in accordance with section 29.

With two amendments in 1980 and 1999, the Immigration Act B.E.2522 (1979) has been in effect since 30 May 1979 until the present day. Section 4 of the 1979 Immigration Act introduces a new definition of “immigrants” as all aliens who enter Thailand. This definition therefore covers all aliens who enter and reside in the country. In the same manner, the 1979 Immigration Act provides two main legal channels for aliens to enter Thailand based on the same principle: entry in general and entry on an exceptional basis. In the general circumstances, aliens who wish to enter Thailand during this period of time are required to meet 11 conditions in accordance with section 12.¹²⁵ Exceptionally, Section 17 gives the Minister of the Interior the power to permit (subject to Cabinet approval) any alien or any group of aliens to enter and stay in Thailand.

Immigration laws of Thailand have developed over the past 90 years as a result of several factors, including the situations in the neighbouring countries, the numbers and the particular circumstances of aliens in Thailand, the need for labour, as well as Thailand’s economic conditions. Before 1927, Thailand welcomed immigrants and freely granted the right to permanent residence, and the right to Thai nationality to the children of immigrants who were born in Thailand. Between 1927 and 1950, Thailand’s immigration control offered a degree of flexibility for undocumented immigrants who were at risk of statelessness. These undocumented migrants were able to enter and reside in Thailand at the point of entry and were given an identification paper. In special circumstances, aliens, who were already in the country, might be permitted to have legal immigrant status and the right to reside even though they entered the country illegally in the first place. However, by 1951 the situation had changed and the rules tightened considerably. That being said, there are still some options: sections

125 Under section 12, to be permitted entry into Thailand aliens must: (1) Have a valid travel document or a visa endorsed in the travel document by Thailand’s embassy or consulate in the foreign country, in case of necessity; (2) Have an adequate means of living in Thailand; (3) Have no intention to work as an unskilled labourer or to work in violation of the Ministerial Regulations; (4) Not be “mentally unstable” or have any of the diseases prescribed in the relevant Ministerial Regulations; (5) Have been vaccinated against smallpox or undergone any other necessary medical treatment; (6) Have not been imprisoned in accordance with a judgment of a Thai Court or by a judgment of a court of foreign country; (7) Not behave or have not behaved in a way which indicates possible danger to the public order; (8) Have not behaved in a way that suggests that entrance into Thailand is for the purpose of being a sex worker or is related to human trafficking or drug smuggling, or other types of smuggling which are contrary to public morality; (9) Have money or a bond as prescribed by the Minister; (10) Not be prohibited by the Minister to enter the country; and (11) Have not been deported by either the Government of Thailand or another foreign country, or have had the right to reside either in Thailand or in foreign countries revoked.

10, 13, 15(2) and 17 of the 1979 Immigration Act allow Thailand to grant special permission to any alien or any group of aliens to enter and stay in the country and to acquire permanent residence.

ii. General Principles Under Current Law and Policy in Relation to the Right to Enter and Reside

In addition to the provisions of the Immigration Act, there are a number of other specific laws that regulate aliens' entry and residence. For instance, as already stated, certain laws give privileges to investors who wish to enter, stay and acquire Thai nationality.¹²⁶

However, Thailand's immigration laws are still the main legal mechanisms to control entry and residence of aliens. Section 12 of the 1979 Immigration Act sets forth requirements for aliens who wish to enter the country in general circumstances. Sections 13 and 15 set out the exceptional circumstances in which aliens may be permitted to enter Thailand. In relation to permission to remain, sections 34 and 35 stipulate conditions for aliens who wish to remain temporarily, while sections 40, 41, 42, 43 and 51 set out the conditions for permanent residence. There is one section which is of particular relevance to the Rohingya: section 17 which allows those who already reside in the country to convert their immigration status from illegal to legal, and to be given permission to remain either on a temporary or permanent basis. However, our research indicated that this provision has not been applied to Rohingya.

Section 12 of the 1979 Immigration Act stipulates five core universal principles to administer entry to, and residence of, aliens in Thailand in general circumstances: (1) identification;¹²⁷ (2) permission to enter;¹²⁸ (3) non-economic burden,¹²⁹

126 See above, note 88, Nationality Act (1965), Section 7 bis (3); Investment Promotion Act B.E. 2520 (1977), section 24 and 25; Industrial Estate Authority of Thailand Act B.E. 2522 (1979), section 45; Act Implementing Asian Development Bank B.E.2509 (1966), section 9; and Act Implementing Common Fund For Commodities B.E.2535, section 8. These laws give privilege to investors to entry, stay and even acquire Thai nationality.

127 See above, note 74, section 12(1).

128 *Ibid.*, section 12(1).

129 *Ibid.*, sections 12(2), (3) and (9).

(4) non-public health burden;¹³⁰ and (5) non-national security risk.¹³¹ Certain conditions under the principles are out of date. For example, section 12(5) requires a vaccination against smallpox although smallpox has been eradicated since 1980 and in 1979 the World Health Organization recommended that vaccination against smallpox be stopped.¹³²

As discussed above, in “appropriate” special circumstances, section 17 of the 1979 Immigration Act provides that:

[T]he Minister, by Cabinet approval, may permit any alien or any group of aliens to enter and stay in the Kingdom under certain conditions, or may consider exemption from being [in] conformity with this Act.

Thailand has many times in history used this provision to allow aliens fleeing oppression, violence, and poverty as a result of civil war to enter and stay temporarily in Thailand. A clear example is the case of migrant workers from Myanmar, Lao PDR and Cambodia who entered Thailand without documentation but were allowed to remain in Thailand for employment. Those who assimilate into Thai society can be granted permanent residence under section 17 and later naturalise as Thai nationals under nationality law. However, challenges in the application of this provision include providing evidence and meeting the conditions in order to stay in Thailand with Cabinet approval.

As mentioned earlier, although States are sovereign and may control who is permitted to enter and remain in its territory, and despite that Thailand has not ratified the 1951 Refugee Convention, international customary law makes it clear that States are required to grant protection in exceptional circumstances, for example to those fleeing violence and persecution.¹³³ In addition, as Thailand has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (one of three “Palermo Protocols”), in circumstances where aliens are trafficked to the country, Thai immigration law and migration control must respect the need to protect the human rights of victims of trafficking to en-

130 *Ibid.*, sections 12(4) and (5).

131 *Ibid.*, sections 12(6), (7), (8), (10) and (11).

132 World Health Organisation, *Smallpox*, available at: <http://www.who.int/csr/disease/smallpox/en>.

133 See above, note 116, p. 17.

sure that these vulnerable individuals are given full protection, particularly while criminal proceedings are ongoing.¹³⁴

The development of Thai immigration law shows that Thailand has recognised the situation of immigrants, especially from neighbouring countries. Moreover, Thailand has shown flexibility in accepting certain groups, for example, it accepted refugees from Indochina from the 1970s to the 1990s and certain asylum seekers from Myanmar who are permitted to stay in temporary shelters along the Thai-Myanmar borders. These people were, as recorded, provided temporary stay, basic rights and identification papers. After assimilating into Thai society, these aliens could possibly be granted permanent residence and Thai nationality if they meet the requirements according to the relevant laws.

The Anti-Trafficking in Persons Act B.E.2551 (2008) and Implementation

While Thai immigration law generally regulates the eligibility of non-Thai nationals to enter, reside, and be deported, the Anti-Trafficking in Persons Act (the Anti-Trafficking Act) protects both Thai and non-Thai persons, who become victims of trafficking in Thailand and abroad. The Anti-Trafficking Act guarantees the victims of trafficking the right to lawfully remain in the country for a certain period. The Act prohibits the transfer, recruitment, or harbouring of persons by means of force or for the purpose of exploitation. It defines the term “trafficking” as the act of procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harbouring or receiving a person by means of threatening, force, abducting, deceiving, abusing or bribing for the purpose of exploitation.¹³⁵ Secondly, “exploitation” is clarified as seeking benefits from the following circumstances: prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.¹³⁶ Should any person be involved in any of such acts of exploitation, they shall be considered as victims of trafficking.¹³⁷ The sanctions for traffickers are severe,

¹³⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2237, UNTS 319, 2000, Articles 2(b) and 6.

¹³⁵ Anti-Trafficking Act 2008, Chapter 1, Section 6.

¹³⁶ *Ibid.*, Section 4.

¹³⁷ *Ibid.*, Section 6.

ranging up to imprisonment for a maximum of 15 years and fine of 300,000 Baht (approximately US \$8,350).¹³⁸

The Act also sets out the procedure for screening victims; this procedure empowers officials to conduct fact-finding and allows a trafficked person to be placed in the custody of officials for no longer than twenty-four hours, or not more than seven days with the court's approval.¹³⁹ Once the screening process is over and victims have been identified, the Ministry of Social Development and Human Security is required by sections 33 to 38 of the Act to provide appropriate assistance to victims of trafficking. This includes food, shelter, medical treatment, physical and mental rehabilitation, education, training, safety protection, a temporary right to work and legal aid, as well as return to the individual's country of origin. Victims may be sent to shelters where they will be provided with beds, 3 meals a day, some personal belongings, medical treatment for any accidents or chronic diseases, and the option of joining recreational and occupational training activities and receiving counselling. Section 37 allows officials to assist trafficked persons to obtain permission to temporarily stay and work in the Kingdom, something which will be discussed in the next chapter.

It should be noted that, if, following the screening person an individual is deemed not to be a victim or trafficking or to be a victim who is denying assistance, he or she will be taken to an immigration centre pending deportation.¹⁴⁰

As set out in the table below, the victims of trafficking are sent to different shelters based on their gender and age. The problem with such segregation is that it cannot cater for the fact that many victims of trafficking, for example the Rohingya, undertake journeys in groups or families. Such an approach may result in separation of families. There is only one shelter, PathumThani, which can house families together.¹⁴¹ The most recent estimates suggest that there are about 300 Rohingya who have been identified as victims of trafficking and are currently housed in these shelters; of these, 13 were sent to resettle in the United States.¹⁴²

138 *Ibid.*, Chapter 6, Section 52.

139 *Ibid.*, Section 29.

140 *Ibid.*, Section 33.

141 Institute of Human Rights and Peace Studies, Mahidol University and the Equal Rights Trust, Anonymous respondent at National Workshop on the Promotion and Protection of Stateless Rohingya, Bangkok, 29 January 2016.

142 *Ibid.*

Table 4: Temporary Protection to Victims of Trafficking in Persons with Consent to Assistance¹⁴³

Type of Foreign Victims	Type and location of shelters
The victim is female, has a baby, or is a baby boy aged not more than six.	Protection and Occupational Development Centers in Nonthaburi, NakornRatchasimaPhitsanulok, and SuratThani provinces
The victim is a boy aged 6-15 years	Primary shelter in Nonthaburi province
The victim is a man of more than 15 years old, or a family.	Center of Protection of Safety to Victims of Trafficking in Persons in Chiang Rai, PathumThani, Ranong and Songkhla provinces

a. Impact on the protection of the rights of the Rohingya

It is clear that in normal circumstances, immigration law does not allow undocumented aliens or foreign nationals, including the Rohingya who arrive by either land or sea, or those who have been residing without proper documentation, to enter Thailand. However, as mentioned in previous section, records indicate that Thai governments have historically exercised their power under section 17 of the Immigration Act, to allow undocumented migrants to temporarily stay in the country. This suggests that there is scope for the application of such an exception to the Rohingya, all that is needed is political will.

The Anti-Trafficking in Persons Act provides Rohingya who are identified as victims of trafficking with immunity for unlawful entry into Thailand. Section 41 of the law prohibits the police from charging victims of trafficking for illegal entry and residing in the country under the Immigration Act,¹⁴⁴ or for using forged travel documents, prostitution, or working without permission under the Alien Work law. Under this provision, trafficked persons are protected from expulsion on the criminal charge of illegal entry.

¹⁴³ Human Rights and Development Foundation, *The Protection of Safety to Victims of Trafficking in Persons*, pp. 208–209, available at: <http://hrdfoundation.org/anti-labor-trafficking>.

¹⁴⁴ See above, note 74, sections 20 and 54 which allow the immigration bureau of the Ministry of Interior to hold irregular migrants in a detention centre for up to seven days or more and deport them.

b. Opportunity and Challenges for Rohingya

It is clear that, as victims of trafficking, the Rohingya are protected by the Anti-Trafficking in Persons Act, which not only prevents police from charging them with illegal entry, but also enables them to lawfully stay and work for a period of time while court proceedings are ongoing. However, there are a number of challenges in identifying potential victims: victim identification is usually done at the site of a rescue operation, and must be done within 24 hours according to the law. This is because collecting evidence at the rescue site is critical for the officials, known as the “multidisciplinary team”, to be able to support the prosecution of the trafficking offence.¹⁴⁵ In practice, there are frequently problems caused by the lack of appropriate translation, hindering effective communication between Rohingya and the “multidisciplinary team”.¹⁴⁶

In reality, some there is a divide between victims who are deemed to have been trafficked and those deemed to have been smuggled. While trafficking is about coercive exploitation, smuggling is considered to be consensual agreement between the individual and the smuggler. As many Rohingya pay smugglers of their own volition, they are not eligible to receive the benefits of the protective trafficking framework.¹⁴⁷ Rohingya cases are often considered smuggling rather than trafficking.¹⁴⁸ In practice, as the UNHCR points out, there is overlap between smuggling and trafficking.¹⁴⁹

145 Interview with a field social worker of a non-governmental organization monitoring the implementation of the Anti-Trafficking Act, Ranong, 18 August 2016.

146 Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, UN Doc. A/HRC/20/18/Add.2, 2012, Para 40.

147 Yamada, M., *Is the Anti-Trafficking Framework Really for the ‘Victims’? Reflections on Burmese victims of human trafficking and non-trafficked migrants in Thailand*, Institute of Developing Economies, 2011, p. 7; Kojima, Y., “Rohingya Women in Migration: Lost Voices”, *Our World*, 8 December 2015.

148 Interview with a field social worker of an anonymous non-governmental organization monitoring the implementation of the Anti-Trafficking Act, Ranong, 18 August 2016.

149 UNHCR, *South-East Asia Irregular Maritime Movements, January-November 2014*, p. 1, available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/Irregular%20Maritime%20Movements%20-%20Jan-Nov%202014.pdf>.

5. Other Human Rights Issues Relevant to Rohingya in Thailand: the right to birth registration

a. Birth Registration as a Universal Human Right

Birth registration, the official recording of a child's birth by the state, establishes the existence of the child under law, allowing the safeguards of the child's civil, political, economic, social and cultural rights in national law to apply.¹⁵⁰ Birth registration is a right in itself and also facilitates the realisation of many other human rights such as right to healthcare, right to education and also right to nationality of the child. Birth registration can also be fundamental to preventing statelessness as it establishes a legal record of where a child was born and who his or her parents are. This constitutes a key form of proof of whether a person has acquired nationality by place of birth or descent. Furthermore, birth registration is identified as an important child protection tool. Children without birth certificates are at particular risk in the context of migration and displacement, being particularly exposed to child trafficking, child labour, forced recruitment into armed groups and child marriage. As discussed in greater detail in the Equal Rights Trust publication, *Equal Only in Name*, Article 7 of the CRC and Article 24 of the ICCPR both require that children are registered after birth.¹⁵¹

b. Impact of Non-Registration of Children

The right to birth registration is closely linked to the realisation of many other human rights. Unregistered children can face difficulties in enjoying their rights with regard to protection, access to social and health services, education, and nationality.

Unregistered children have particular difficulties accessing healthcare, as they are not eligible for subsidised healthcare and therefore cannot access immunisations or any complex healthcare. Registration can also impact on the right to education, notwithstanding the obligation under the CRC and ICESCR to ensure compulsory and free primary education for all.¹⁵²

¹⁵⁰ UNICEF, "Child protection from violence, exploitation and abuse: Birth registration", *UNICEF*, 25 October 2016, available at: https://www.unicef.org/protection/57929_58010.html.

¹⁵¹ See above, note 8, p. 62.

¹⁵² Convention on the Rights of the Child, Article 28; International Covenant on Economic, Social and Cultural Rights, Article 13.

In addition, birth registration is fundamental to the prevention of statelessness. It facilitates the right of every child to acquire a nationality, as although it does not automatically confer the nationality on the children, it documents where a child was born, and who his or her parents are.¹⁵³ Most children without birth registration are not stateless, but where they are born in certain situations – for example, born to parents from different countries, born in a migratory setting, born to refugee or asylum seeker parents, or born in border areas – lack of birth registration can contribute to statelessness.¹⁵⁴

c. Right to Birth Registration in Thailand

Thailand is a party to the CRC and the ICCPR as well as the CRPD, all of which require that the births of all children should be registered.¹⁵⁵ Based on amendments to civil registration law in 2008, all births in Thailand should be registered regardless of the legal status of a child's parents: this applies to children of migrants, asylum-seekers, refugees and stateless people.¹⁵⁶

There are three stages to securing birth registration in Thailand, as set out in section 18 of the Civil Registration Act, B.E.2534 (1991) as amended by the Act (No.2), B.E.2551 (2008). First, the parents receive a "Certificate of Delivery" or "Document of Birth Acknowledgement" from the persons in charge of birth reporting. Children born in hospitals or other recognised medical facilities receive a "Certificate of Delivery";¹⁵⁷ the parents of children born in a community have a duty to report the birth with a village headman in order to get a "Document of Birth Acknowledgement" (Tor Ror 1 Ton Na).¹⁵⁸ Under section 19/2 of the Civil Registration Act, B.E.2551 (2008), foundlings are also entitled to obtain a proper birth registration. Prior to registration, foundlings are also provided with a "Document of Birth Acknowledgement" as basic evidence until the status of their birth has been verified. The second step is for

153 UNHCR and Plan International, *Under the Radar and Under Protected*, 2012, p. 5.

154 *Ibid.*

155 Convention on the Rights of the Child, Article 7(1); International Covenant on Civil and Political Rights, Article 24(2); Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S 3, 2008, Article 18.

156 Civil Registration Act B.E.2534 (1991) as amended by the Act No.2 B.E.2551 (2008), section 18.

157 *Ibid.* Civil Registration (1991), section 23.

158 *Ibid.*

the parents or guardians to report the birth to the local registrar to obtain a “Birth Certificate” (Tor Ror 1, Tor Ror 2, Tor Ror 3, Tor Ror 03, Tor Ror 031).¹⁵⁹ The last stage in securing birth registration is to be recorded in the “Household Registration” (Tor Ror 14, Tor Ror 13, Tor Ror 38/1, or Tor Ror 38 Kor) system, a part of civil registration system.¹⁶⁰ The result of this process is that the child is formally recognised by the Thai State, regardless of whether they have nationality. It is important to note that, although registration at birth is provided by law, it does not guarantee access to right to nationality as citizenship is governed by the Nationality Act.

Table 5: Birth Registration process under Thailand’s civil registration law

STEP 1 Securing “Certif- icate of Delivery” or “Document of Birth Acknowl- edgement”	Children born in a hospital		Children born outside a hospital		Foundlings
	Tor Ror 1/1		Tor Ror 1 Ton Na		Tor Ror 100
STEP 2 Acquiring a “Birth Certificate”	Thai nationals		Non-Thai nationals with temporary residence¹⁶¹	Non-Thai na- tionals born to registered mi- grant workers	Non-Thai na- tionals born to undocu- mented state- less parents
	Tor Ror 1	Tor Ror 2	Tor Ror 3	Tor Ror 03	Tor Ror 031
STEP 3 Registration in the “Household Registration” system	Permanent Residents¹⁶²		Temporary Residents¹⁶³	Registered migrant work- ers	Former undocumen- ted stateless persons
	Tor Ror 14		Tor Ror 13	Tor Ror 38/1	Tor Ror 38 Kor

¹⁵⁹ Civil Registration (1991) as amended by Act (No.2) (2008), section 18.

¹⁶⁰ *Ibid.*, section 36 and section 38.

¹⁶¹ Non-Thais with temporary residence who are eligible for Birth Certificate Tor Ror 3 include stateless persons and foreign nationals born in Thailand.

¹⁶² Permanent residents who are eligible to be registered in Residence Registration Tor Ror 14 include Thai nationals, foreign nationals as well as stateless persons with the right to permanent residence.

¹⁶³ Temporary residents who are eligible to be registered in Residence Registration Tor Ror 13 include foreign nationals and stateless persons.

Thus, it can be seen that the law on civil registration both allows and requires all children to be registered at birth. As a result, Rohingya children born in Thailand should be registered. However, in reality, this has not been the case. Field research conducted by the authors¹⁶⁴ has revealed that awareness among Rohingya of the birth registration process is low. Further, many Rohingya are afraid to register the birth of their child for fear of being discovered. Finally, officials tend to draw a link between birth registration and nationality, and may, therefore, decline or be reluctant to register the child at birth. There is therefore an urgent need to raise awareness among both Rohingya and officials.

From a legal perspective, the right to birth registration is recognised under both international and national law. However, there is a gap between law and practice: despite a universal right to birth registration under the Civil Registration Act, many stateless children have not been registered at birth. This has resulted in difficulties for children to access education and proper employment.

6. Other Human Rights Issues Relevant to Rohingya in Thailand: the right to work

The human right to work is a fundamental right for all people. It is enshrined in Article 6 of the ICESCR.¹⁶⁵ After the preamble and the State's duty prescribed in the Covenant, the right to work is the first of the specific rights acknowledged in the ICESCR, which entitles every individual to the opportunity to gain his living by work which he freely chooses or accepts.¹⁶⁶ In accordance with Article 2(2) of the ICESCR, the right to work is guaranteed to all without discrimination of any kind as to national or social origin or other status, meaning that signatory states are obligated to ensure the right to work for citizens and non-citizens alike.¹⁶⁷

In addition to the right to work, the ICESCR guarantees the right to adequate remuneration obtained from work, to equal pay for work of equal value, to safe and healthy working conditions, to equal treatment and opportunity for advancement in career, to a decent and dignified living, and the right to limited workdays and

¹⁶⁴ Field research and interviews with officials as well as Rohingya, Mae Sod, October 2015, and Ranong, August 2016.

¹⁶⁵ International Covenant on Economic, Social and Cultural Rights, Article 6.

¹⁶⁶ *Ibid.*, Article 6(1).

¹⁶⁷ *Ibid.*, Article 2(2).

a paid rest period. Rights at work also include the right to freedom of association and to form unions, and right to social security and social insurance.¹⁶⁸

In addition, the International Labour Organization Convention concerning Employment Policy of 1964 (No.122), to which Thailand is a party, ensures three fundamental features of the right to work, as follows:

- a.) Every person who is available for and seeking work can access to work;
- b.) Every person is entitled to engagement in productive employment and may not be prevented from doing so;
- c.) Each person has freedom of choice of employment and has an opportunity to use his skills as well as ability and talent in a job should he be qualified for regardless of race, colour, sex, religion, political opinion, national withdrawal or social origin.¹⁶⁹

In order to realise their right to work, a person must be able to participate in the economic activities in a community. Further, the benefits accrued from work can provide the person an adequate standard of living. Therefore, nobody must be excluded from the economic activity, or be the subject of discriminatory practices that impede a person from engaging with the work he or she is qualified for.

In Thailand, employment rights are guaranteed under the Labour Protection Act B.E. 2541 (1998, amended in 2008), which, in principle, equally protects Thai nationals and migrant workers, irrespective their regular or irregular status. The Labour Protection Act is the primary piece of legislation regulating employment standards and conditions to which employers have to adhere. This includes level of remuneration, working days and overtime hours, remunerated holidays, safe and hygienic working conditions, and welfare.

a. The Right to Work in Thailand

In Thailand, the right to work is determined in part by an individual's legal status. The Alien Work Act B.E.2551 (2008) sets out the conditions for non-Thai nationals, including skilled, semi-skilled and unskilled migrant workers, to be eligible to work. As a general principle, only foreigners and migrant workers holding a valid

168 *Ibid.*, Articles 7 and 8.

169 International Labour Organization, Convention concerning Employment Policy, C122, 1966.

work permit in the employment system can stay in the country and work for the period permitted. Unlike the previous legislation of 1978 that forbade foreigners from engaging in certain occupations, the current Alien Work Act attempts to determine occupations open for foreign and migrant workers based on the three guiding principles: (1) national security, (2) career opportunities for Thai nationals, and (3) migrant labour workforce necessary for the country's economic growth and development.

Under the Alien Work Act, there are four main groups of foreign workers who are qualified under the law's provisions to legally work in the country, as set out in Table 6 below.

Table 6: Foreign workers eligible to obtain work permits and work in Thailand¹⁷⁰

Section	Provisions	Eligible Foreign Workers [Number of those receiving work permits]
Section 9	Aliens who enter the country in accordance with the Immigration Act B.E.2522 (1979)	<ol style="list-style-type: none"> Foreigners who have permanent residency in Thailand and hold valid Alien Identification Documents [983] Investors, Skilled workers, experts, technicians, who work in Thailand on temporary permits (general) [100,449] Unskilled workers from Cambodia, Laos and Myanmar under the Memoranda of Understanding [300,097] Illegal migrant workers from Cambodia, Laos and Myanmar whose nationalities have been verified, with valid travel documents and visas [1,066,955]
Section 12	Aliens with skills who engage in work in Thailand under the Investment Promotion Act B.E. 2520 (1977) or other relevant laws	Investors, skilled workers, experts, technicians etc. [39,499]

¹⁷⁰ Office of Foreign Workers, *Statistics of Foreign Workers who Received Work Permit as of July 2015*, 2015, available at: <http://wp.doe.go.th/wp/images/statistic/labor/58/se0758.pdf>.

Section	Provisions	Eligible Foreign Workers [Number of those receiving work permits]
Section 13	Aliens not able to apply for work permit in section 9 due to the following reasons; 1) Aliens awaiting deportation according who have been granted leniency to work; 2) Illegal immigrants who are given permission for a temporary stay while awaiting deportation; 3) Persons whose Thai nationality has been revoked under the Notification of the Revolutionary Council No.337, dated 13 December B.E.2515; 4) Persons born in Thailand who do not have Thai nationalities under the Notification of the Revolutionary Council No.337, dated 13 December B.E.2515, or under other laws.	Minorities living in Thailand including Shan, Karen, Mon, Tai Lue, Chinese Lua, Lahu, displaced persons from Myanmar (with Thai race entering Thailand before and after 9 March 1976), and Permanent Immigrants from Myanmar (entering Thailand after 1976), and other nationalities [23,724]
Section 14	Aliens in areas adjacent to border provinces allowed access to employment on a daily or short-term or seasonal basis	Unskilled workers from neighbouring countries living near the border provinces [No information available]

Those eligible to work under section 13 includes victims of trafficking in accordance with section 37 of the Anti-Trafficking Act. Section 37 is implemented by a Regulation of the Ministry of the Interior which allows victims of trafficking who are in the legal process against their traffickers to be eligible for a six-month work permit and visa with renewable options during the court proceedings.¹⁷¹ However, trafficking victims are only entitled to perform labour and domestic work.¹⁷²

There are certain professions which are reserved to Thai nationals alone, and other professions for which foreign nationals are eligible. The Regulation of the Minis-

¹⁷¹ This is supported by Regulation of the Ministry of Interior on “Permission for Some Groups of Aliens to Stay in the Kingdom under Certain Conditions”, 28 February 2011.

¹⁷² Regulation of the Office of the Prime Minister, “the Determination of Type of Work for Foreign Workers According to Section 13 of the Alien Work Act to Perform”, 29 February 2012.

try of Labour regarding the Occupations Permitted for Foreign Workers according to Section 12, B.E.2539 (1996), sets out 27 occupations for which foreign workers are eligible. The Royal Decree on Occupations and Professions Forbidden for Foreign Workers B.E. 2522 (1979) determines 39 occupations reserved exclusively for Thai nationals.

Table 7: Occupations and Professions Reserved to Thai Nationals¹⁷³

Category of work	Occupations
Unskilled, semi-skilled work	1. labourer, 2. plasterer, carpenter, or construction-related worker
Agricultural work	3. agriculture worker, 4. forest worker, 5. livestock or fishery worker (except work requiring expertise or farm management)
Handicraft, hand-made work	6. lapidary, 7. hand-weaver, 8. woven-mats maker, 9. wood-carver, 10. Sa-paper worker, 11. lacquerware maker, 12. nielloware maker, 13. gold ornaments or silverware maker, 14. stone-polished metal worker, 15. classical Thai dolls-maker, 16. bed or blanket maker, 17. alms-bowl-maker, 18. hand-made silk products maker, 19. Buddha image sculpter, 20. knife-maker, 21. paper or fabric umbrella maker, 22. shoe- maker, 23. hat-maker, 24. earthenware-maker, 25. cigarette hand-roller, 26.letter-printing blocks maker, 27. silk drawer (with hands)
Professions	28. auctioneer, 29. accountant and auditor, 30. hair dresser, 31. Agents, except those in the international trade business, 32. engineer and civil engineer, 33. architect, 34. fashion designer, 35. tourist guide, clerk or secretary, 36. lawyer or legal service provider
Others	37. auto-mobile or non-engine automobile driver, 38. shopkeeper, 39. street vendor

Some exceptions on these occupations are applied. For example, foreign workers are permitted to work as labourers and gold ornaments or silverware makers, under the 1996 Regulation on the Occupations Permitted for Foreign Workers.

It is noteworthy that the list of professions reserved to Thai nationals inhibits the opportunities for unskilled or skilled manual foreign workers to find employment. For example, foreigners may not work as street vendors in Thailand. Equal Rights Trust research has found that Rohingya who remain in Thailand are mostly

¹⁷³ The Royal Decree on Occupations and Professions Forbidden for Foreign Workers B.E. 2522 (1979).

self-employed in the Thai economy's informal sector, working as Roti sellers in the capital or urban areas.¹⁷⁴ Rohingya typically do not have skills or formal education to do many jobs.¹⁷⁵ Thus, as irregular migrants without recognized legal status, the Rohingya have no right to work in Thailand; being unable to work in the formal economy places them at greater risk of extortion by the police as well as arrest, detention, and possible deportation.¹⁷⁶

There is a real need for Thailand to review the application of the laws and make use of some provisions which give discretion and power to authorities to authorise Rohingya, who are the victims of discrimination and persecution to live their life with dignity.

7. Conclusions and Recommendations

As demonstrated in previous sections, laws in Thailand including nationality laws, immigration laws, the anti-trafficking law, the civil registration law and the law on the employment of aliens all provide scope for interpretation to advance the rights and protections of stateless persons, including Rohingya. However, as also demonstrated, Thai laws including nationality laws and immigration laws, have become increasingly restrictive over time, due to the changing concepts of the nation state, citizenship as member of a political community, state sovereignty and the scarcity of resources.

The concept of membership goods and political community which, from human rights and international law perspectives, is arbitrary seems to be applied in most of the countries around the globe. The concept suggests that citizens and those with recognized status are entitled to a range of goods because they are "members" of a specified community; non-nationals or those without recognized status are not entitled to such goods. The "goods" to which "membership" grants access include:

- Employment;
- Emergency services and socio-economic resources;

¹⁷⁴ See above, note 8, pp. 68–72.

¹⁷⁵ See for example, Carroll, J., "Myanmar's Rohingya deprived of education", *Aljazeera*, 4 August 2014, available at: <http://www.aljazeera.com/indepth/features/2014/08/myanmar-rohingya-deprived-education-201484105134827695.html>.

¹⁷⁶ See above, note 8, pp. 68–72.

- Political participation;
- Permanent residence;
- Immunity from expulsion;
- Citizenship.¹⁷⁷

Thailand State, during the most recent decades as demonstrated in this legal study makes the right to permanent residence and citizenship, the most difficult “goods” to obtain. It was seen that the access to the said membership goods depends very much on laws and policies of a particular country and it also depends on political will. In most, if not all cases, “different bundles of goods are provided differently to individuals depending on their different status”.¹⁷⁸ One of the most disadvantaged among non-citizens are stateless persons such as Rohingya. Access to membership goods of this group of aliens is always limited and/or sometimes, nonexistent.

For example, Rohingya often experience human and labour rights violations. Irregular migrant workers are vulnerable to criminal networks, to human rights abuses by authorities and exploitation by employers. However, there are opportunities in Thailand for Rohingya, although limited. Under the registration scheme, undocumented aliens become registered workers who, in principle, receive a work permit and also get access to health and other social services.

From the human rights perspective there is no such thing as an illegal human. It is unfortunate that Thailand claims to adhere to human rights but, simultaneously promotes the belief that irregular aliens are outsiders who are potentially harmful. This fear is used to justify policies to regulate the entry, length of stay and access to “goods” by foreign nationals. Such a position is not consistent with the increasingly global and mobile world.

The statelessness Rohingya are subject to discrimination and persecution in their own country, exploited where they are and many times rejected. To improve this situation it is essential that all actors work together to implement the following recommendations:

¹⁷⁷ Coleman, Jules L. and Harding, S., “Citizenship, the demands of justice, and the moral relevance of political borders”, in Warren F. Schwartz (ed.), *Justice in Immigration*, Cambridge University Press, 1995, p. 40.

¹⁷⁸ *Ibid.*

For Thai Authorities

1. Guaranteeing, in law and in practice, the enjoyment of all human rights to citizens and non-citizens;
2. It is critical to train Thai officers on civil registration and nationality laws, immigration law as well other relevant legislation and international obligations of Thailand;
3. Push for status identification at the border and but remove the requirement that such identification take place within 24 hours as this leads to abuses;
4. Register aliens in Thailand regardless of their status to establish a comprehensive data base at the national and provincial levels;
5. Undertaking a comprehensive programme of birth registration to ensure that all Rohingya children are duly registered, and providing, through executive order, a pathway to citizenship for all Rohingya children born in Thailand;
6. Advocate for the reinstating of the right to nationality of Rohingya in their country of origin and addressing the root causes of their plight.

For NGOs

7. Equip NGOs and Bar Council members with knowledge about Thai laws and international human rights treaties to build their capacity to raise awareness of stateless persons including Rohingya;
8. Conduct outreach to Rohingya communities and assist those who wish to in connecting with Thai authorities;
9. Conduct capacity building and awareness raising among Rohingya communities of their rights. Implement a Pilot Project in a few border provinces to demonstrate that national security can be balanced against human rights and human security;
10. Utilise and strengthen the regional coalition for regional and national advocacy which is an invaluable mechanism to advocate for implementation of these recommendations.

For the Equal Rights Trust and Academic Institutions

11. To translate this study into local language (in this case, Thai).

Recommendations



A father plays with his daughter in their home on the outskirts of Kuala Lumpur, Malaysia.

Recommendations

On the basis of the findings presented by the authors of the four papers in this publication, and the Trust's previous and ongoing work in the region, the Equal Rights Trust makes the following recommendations.

Recommendations to the Government of Myanmar

While the papers in this publication examine the legal status of the Rohingya in countries to which they have been displaced, the central role of state policy in Myanmar in initiating the Rohingya's cycle of flight cannot be ignored. Therefore, the government of Myanmar is urged in the strongest possible terms to take the following measures:

Recommendations for Immediate Action

- Urgently take all necessary steps to end the violence in Rakhine state and protect all individuals within the territory or subject to the jurisdiction of Myanmar, in an equal and non-discriminatory manner.
- Immediately prevent and punish all human rights abuses and crimes committed by state or private actors against Rohingya.
- Fully cooperate with, and allow timely access to UN agencies and other representatives of the international community, to enable independent monitoring of the situation and freedom of information.
- Fully cooperate with UN agencies and international NGOs to enable the provision of humanitarian assistance and support to affected communities.
- Fully cooperate with any independent international Commission of Inquiry established by the UN to examine allegations of human rights abuses suffered by Rohingya in Myanmar and to determine whether any such abuses constitute crimes against humanity.
- Provide compensation to victims of violence, restore their damaged property and adopt measures to ensure re-integration of victims into society.

Long-term Recommendations

- Take all necessary steps to prevent future conflict by ensuring equal access to justice, repealing discriminatory laws, and restoring the rights of Rohingya and other ethnic minorities in Myanmar.

- Adopt all measures necessary to improve the living conditions for Rohingya living in Internally Displaced Persons camps within Myanmar.
- Take steps to end restrictions on the right to freedom of movement for Rohingya.
- Integrate the principles of human rights, equality and non-discrimination into the legal and political reform process in Myanmar.
- Reform citizenship laws to ensure equal access to citizenship without discrimination on grounds including race, ethnicity and religion.
- Reduce statelessness in Myanmar by establishing clear paths towards the acquisition of citizenship and effective nationality for all stateless persons with legitimate claims to Myanmar nationality including Rohingya.
- Reform immigration laws to make them compatible with international human rights law and ensure that they are implemented in a manner which does not discriminate against minority groups or opponents of the state.
- Engage with the governments of Bangladesh, Malaysia, Thailand and Indonesia hosting Rohingya refugees originating from Myanmar to identify durable solutions.
- Ratify and take all necessary steps to implement the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination and other core human rights treaties.
- Ratify and take all necessary steps to implement the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

Recommendations to the Governments of Bangladesh, Malaysia and Thailand

Strengthen International Commitments

The governments of Bangladesh, Malaysia and Thailand are urged to strengthen their participation in instruments of international human rights and humanitarian law, including, in particular, those set out below.

Bangladesh, Malaysia and Thailand should ratify:

- The 1951 Convention Relating to the Status of Refugees;

- The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

Malaysia should ratify:

- The International Covenant on Civil and Political Rights;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Convention on the Elimination of All Forms of Racial Discrimination;
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Thailand should ratify:

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The governments of Bangladesh, Malaysia and Thailand are urged to remove all reservations to ratified treaties, including, in particular, those set out below:

- Malaysia should remove its reservations to Article 9(2) of the Convention on the Elimination of All Forms of Discrimination against Women; Articles 2, 7, 28(1)(a) and 37 of the Convention on the Rights of the Child; and Article 18 of the Convention on the Rights of Persons with Disabilities;
- Thailand should remove its reservation to Article 22 of the Convention on the Rights of the Child;
- Bangladesh should remove its reservations to Articles 2, 3, 7, 10 and 13 of the International Covenant on Economic, Social and Cultural Rights; Articles 2 and 16(1)(c) of the Convention on the Elimination of All Forms of Discrimination against Women; and Article 14(1) of the Convention against Torture.

Respect and Abide by Norms of Customary International Law

The governments of Bangladesh, Malaysia and Thailand are urged to respect and abide by all norms of customary international law, including in particular by:

- Observing the principle of *non-refoulement* and ceasing all practices of “pushing back” or forcibly returning Rohingya refugees;

- Respecting the definition of statelessness as set out in Article 1 of the 1954 Convention Relating to the Status of Stateless Persons;
- Prohibiting all forms of racial discrimination in accordance with customary international law.

Respect and Enhance Compliance with Obligations Under International Human Rights Instruments

Malaysia is urged, as noted above, to ratify the five international human rights treaties which it is yet to ratify and to remove all reservations to the treaties which it has ratified, and having done so, to bring its national law, policy and practice into line with these treaties.

Bangladesh and Thailand are urged to respect their obligations under the treaties which they have ratified, and to take urgent measures to bring their national law, policy and practice into compliance with these treaties, with a particular focus on:

- Ensuring equal access of Rohingya to the protection and enjoyment of all human rights without discrimination on the grounds of race, colour, religion, national or social origin or nationality in accordance with Articles 2(1) and 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights;
- Prohibiting the arbitrary detention of Rohingya asylum seekers and refugees in contravention of Article 9 of the International Covenant on Civil and Political Rights, and of Rohingya children under Article 37(2) of the Convention on the Rights of the Child and ensuring that any detention is in accordance with international best practice;
- Removing any restrictions on the right of Rohingya to freedom of movement in accordance with Article 12 of the International Covenant on Civil and Political Rights and Article 5 International Convention on the Elimination of All Forms of Racial Discrimination;
- Protecting the right to family life, including the right to marriage registration, in Article 23 of the International Covenant on Civil and Political Rights, and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women;
- Recognising the importance of the right to work and observing their obligations under Article 6 of the International Covenant on Economic, Social and Cultural Rights;
- Protecting the right of everyone “to the enjoyment of the highest attainable standard of physical and mental health” without discrimination in accord-

- ance with Article 12 of the International Covenant on Economic, Social and Cultural Rights;
- Guaranteeing the right of all Rohingya children to an education regardless of their legal status in accordance with Article 13 of the International Covenant on Economic, Social and Cultural Rights and Article 28 of the Convention on the Rights of the Child;
 - Ensuring birth registration of all Rohingya children, in compliance with Article 7 of the Convention on the Rights of the Child;
 - Ensuring that stateless Rohingya children born on the territory of the state are able to access citizenship, in compliance with Article 7 of the Convention on the Rights of the Child.

Advance the Rights of the Rohingya Under National Law

The governments of Bangladesh, Malaysia and Thailand are urged to take the following action at the national level to ensure the enjoyment of all human rights by the Rohingya, without discrimination on the basis of their race, religion or other characteristics. In particular, these states are urged to take the following measures:

Liberty and Security of the Person

- Recognise the importance of the rights to liberty and security of the person in accordance with international human rights law and adopt measures to ensure that the Rohingya are not subject to arbitrary deprivations of this right.
- Cease the arrest and detention of Rohingya refugees for breach of national immigration laws.
- Protect all Rohingya refugees from the arbitrary deprivation of liberty.
- Develop and implement community-based alternatives to immigration detention for all refugees and asylum seekers including Rohingya.

Freedom of Movement

- Guarantee all Rohingya refugees the right to freedom of movement.
- Remove restrictions on the freedom of movement of Rohingya living in camps in Bangladesh.

Family Life and Marriage Registration

- Protect and advance the protection of the right to marry and found a family recognising that the family is a fundamental group within society.

- Ensure all Rohingya have equal access to marriage registration regardless of their legal status.

Work

- Ensure equal enjoyment of the right to work without discrimination.
- Take steps to eliminate the exploitation of Rohingya working in informal employment.
- Allow Rohingya in refugee camps to seek external employment.

Education

- Ensure the equal enjoyment of the right to education without discrimination.
- Take positive steps to ensure equal access to education regardless of legal status, including through removing all legal and practical barriers that prevent Rohingya from accessing education.

Legal Status

- Recognise the importance of the right to legal status and the impact that the denial of legal status has upon access to other fundamental rights.
- Develop an administrative and legal framework for the identification, processing and protection of refugees and stateless persons in accordance with international standards, including through the development of refugee reception, referral and protection-sensitive border management practices.
- Register all Rohingya within the territory, or as a short-term measure, empower UN High Commissioner for Refugees (UNHCR) to register all Rohingya within the territory.
- To the extent that they meet the definition, recognise Rohingya as refugees and/or stateless and not as “illegal immigrants”.
- Pending the adoption of laws granting Rohingya refugees legal status, utilise discretionary provisions within nationality and immigration legislation to regularise the legal status of statelessness Rohingya.
- Repeal discriminatory nationality laws and cease discriminatory practices which deny Rohingya legal status as a result of their ethnic origin or gender.
- Take measures to ensure all births within the territory are registered and provide training to state officials on the proper implementation of registration laws.
- Sensitise Rohingya on the mechanisms for and importance of birth registration.
- Ensure that Rohingya children whose birth has not been registered can access social services, healthcare and education.

- Take measures to prevent human trafficking and effectively investigate and prosecute all incidences of human trafficking.

Investigation of Past Abuses

Bangladesh, Malaysia and Thailand must:

- Fully investigate human trafficking of Rohingya and, in particular, the discovery of mass graves of Rohingya, and bring those responsible to justice;
- Conduct prompt and thorough investigations into *refoulement* of Rohingya refugees including through the closing of borders and “push back” policies for Rohingya arriving on boats.

Recommendations for the Association of Southeast Asian Nations (ASEAN) and the ASEAN Intergovernmental Commission on Human Rights (AICHR)

ASEAN should:

- Foster cooperation to find durable solutions to the situation of Rohingya refugees across the region;
- Foster cooperation to address the root causes of human trafficking across the region;
- Foster cooperation to develop a mechanism to facilitate and improve maritime search and rescue in the region;
- Adopt the Terms of Reference of the Trust Fund to Support Emergency Humanitarian and Relief Efforts in the Event of the Irregular Movement of Persons in Southeast Asia;
- Call upon ASEAN member states to ratify the ASEAN Convention Against Trafficking in Persons, Especially Women and Children;
- Call upon ASEAN member states to bring national law into line with international standards. Signatories of the 1951 Refugee Convention and its 1967 Protocol should be called upon to comply with their obligations in respect of resettlement and mutual assistance;
- Call upon ASEAN member states to unequivocally respect the principle of *non-refoulement*;
- Ensure that the issues of migration and birth registration form part of the standing ASEAN agenda;

- Advocate for the ratification of the 1951 Convention Relating to the Status of Refugees, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;
- Advocate for consistent and uniform determination of refugee status of all Rohingya fleeing Myanmar in accordance with the definition set out in the 1951 Convention Relating to the Status of Refugees;
- Form a Task Force on Planning and Preparedness to engage in dialogue with ASEAN to improve regional responses to large influxes of migrants, as agreed in the 11th Meeting of the Ad Hoc Group of Senior Officials under the Bali Process in November 2016;
- Encourage ASEAN Member States to implement procedures to ensure the status determination of all migrants, with support from UNHCR;
- Develop the capacity of AICHR to operate a regional monitoring and protection mechanism for stateless persons and refugees across the region;
- Urge the government of Myanmar to comply with the ASEAN Human Rights Declaration, and in particular to ensure the rights and freedoms provided for in that Declaration can be enjoyed by the Rohingya, without discrimination as to their race or religion;
- Provide support to “front-line” countries such as Bangladesh which experience large influxes of refugees.

Recommendations for Participants in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime

Participants in the Bali Process should:

- Develop a coordinated regional response and facilitate durable solutions to the large influxes of refugees to countries in the region;
- Publish the Report of the Review of the Region’s Response to the Andaman Sea Situation which was commissioned by the Bali Process in May 2015;
- Establish national procedures for detection, search and rescue and identification, screening and registration systems;
- Identify agreed disembarkation points for migrants arriving on boats;
- Establish a Task Force on Planning and Preparedness, comprising operational-level governmental officials responsible for implementing identification, screening and registration systems and for taking actions against smugglers and human trafficking networks;
- Actively engage with civil society to improve the situation of stateless persons and refugees in the region;

- Make concerted efforts to engage with countries of origin to address the root causes of migration;
- Coordinate law enforcement operations to combat smuggling and human trafficking utilising the Working Group on Disruption of Criminal Networks;
- Implement the Bali Process Strategy for Cooperation.

Recommendations to the United Nations

The United Nations should establish an independent Commission of Inquiry to examine allegations of human rights abuses suffered by Rohingya in Myanmar and to determine whether any such abuses constitute crimes against humanity.

The Office of the High Commissioner of Human Rights should work with the governments of Bangladesh, Malaysia, Myanmar and Thailand to develop sustainable strategies for improving the situation of the Rohingya across the region.

Recommendations to the UN High Commissioner for Refugees (UNHCR)

The UNHCR should:

- Continue to engage with the governments of Bangladesh, Malaysia, Myanmar and Thailand to ensure the protection of stateless persons and all refugees;
- Ensure that all new arrivals in Malaysia are registered, including, in particular, pregnant women and new-born babies.

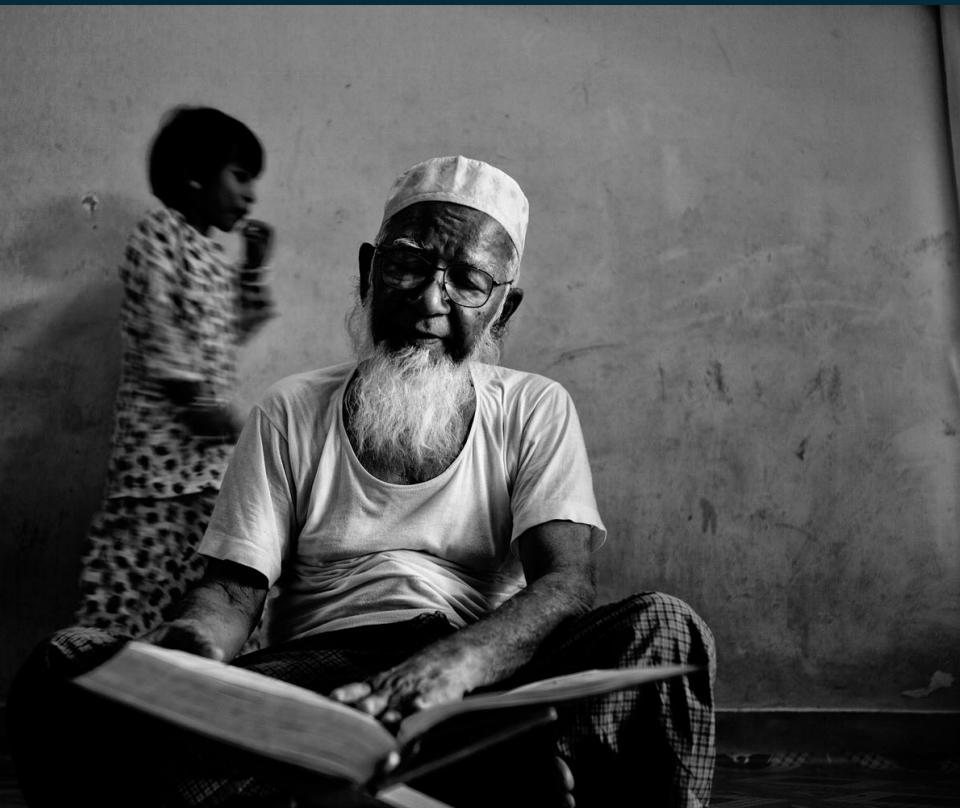
Recommendations to the International Community

Members of the international community are called upon to:

- Engage with and assist the government of Myanmar in taking immediate steps to end the violence in Rakhine State, and long-term measures towards the reduction of statelessness, building the rule of law and integrating equality and respect for human rights into their reform processes;
- Engage with the government of Myanmar to enable the provision of humanitarian aid to Rakhine State;
- Advocate for an international and independent investigation into the violence in Rakhine State, with the objective of identifying and bringing those responsible to justice, whether agents of the state or private individuals, compensating the victims and restoring damaged property;

- Engage with the government of Myanmar to ensure that the violence in Rakhine State does not result in increased restrictions upon the rights of the Rohingya in Myanmar;
- Engage with the governments of Bangladesh, Malaysia and Thailand to open their borders to refugees fleeing the violence and to stop *refoulement* of Rohingya refugees;
- Support the governments of Bangladesh, Malaysia, and Thailand in providing protection to Rohingya refugees both in the short and long-term;
- Assist the governments of Bangladesh, Malaysia and Thailand by sharing the responsibility of refugee protection, including by offering voluntary resettlement to Rohingya refugees outside these countries.

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An elderly Rohingya man reading the Holy Quran in Kuala Lumpur, Malaysia.

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