

INEFFECTIVE REFUGEE STATUS DETERMINATION PROCESS: HINDRANCE TO DURABLE SOLUTION FOR REFUGEES RIGHTS AND PROTECTION

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Abstract

In any State of Asylum, the process of Refugee Status Determination (RSD) conducted by the United Nations High Commissioner for Refugees (UNHCR) is critical in facilitating asylum-seekers to seek necessary protections. UNHCR ensures that asylum-seekers will not be returned involuntarily to the State of Origin where they could face persecution. As a long-term solution, UNHCR helps refugees to find appropriate and permanent solutions to their plights, either by repatriating them voluntarily to their homeland or assisting them to integrate into the States of Asylum or helping them to resettle in third States. In the absence of domestic legal protection in dealing with the refugees and asylum-seekers in Malaysia, a variety of operations are executed by UNHCR, including the admission, registration, documentation, and status determination of asylum seekers and refugees. To prevent the deportation of individuals qualified for international protection, UNHCR should reassess its RSD process in Malaysia, and consider alternative means that would be less burdensome and less risky for people who are fleeing violence and human rights violations. Primarily aimed at reassessing the RSD process in Malaysia using a doctrinal and comparative approach, the analysis is presented in four parts in this article. The first part provides for the definition and current statistics of refugee and asylum-seekers in Malaysia; the second part examines the mechanism of RSD conducted by UNHCR under international law; the third part focuses on how RSD operates in Malaysia; the last part reviews the mechanism of RSD in Indonesia and Brazil.

Keywords: *asylum-seekers; refugees; refugee status determination; states of asylum; unhcr*

Abstrak

Di Negara Suaka manapun, proses Penentuan Status Pengungsi (RSD) yang dilakukan oleh Komisioner Tinggi PBB untuk Pengungsi (UNHCR) dinilai sangat penting dalam memfasilitasi para pencari suaka yang membutuhkan perlindungan. UNHCR menjamin bahwa pencari suaka tidak akan dikembalikan secara paksa ke Negara Asal di mana mereka akan menghadapi tindakan kekerasan. Sebagai solusi, UNHCR membantu para pengungsi untuk menemukan solusi yang tepat dan pasti untuk meringankan penderitaan mereka, baik dengan memulangkan mereka secara sukarela ke tanah air mereka atau membantu mereka untuk berintegrasi di dalam Negara Suaka atau membantu mereka untuk bermukim kembali di Negara ketiga. Dengan tidak adanya perlindungan hukum nasional dalam menangani pengungsi dan pencari suaka di Malaysia, berbagai operasi yang dilakukan oleh UNHCR, antara lain berupa penerimaan, pendaftaran, pencatatan, dan penetapan status pencari suaka dan pengungsi. Untuk mencegah deportasi terhadap individu yang memenuhi syarat perlindungan internasional, UNHCR harus meninjau kembali proses RSD di Malaysia dengan mempertimbangkan cara-cara lain yang tidak akan membebani maupun membawa risiko bagi orang-orang yang melarikan diri dari kekerasan dan pelanggaran Hak Asasi Manusia. Artikel ini bertujuan untuk meninjau kembali proses RSD di Malaysia dengan menggunakan pendekatan doktrinal dan komparatif, artikel ini akan disajikan

dalam empat bagian. Bagian pertama membahas definisi dan statistik terkini tentang pengungsi dan pencari suaka di Malaysia; bagian kedua mengkaji mekanisme RSD yang dilakukan oleh UNCHR menurut perspektif hukum internasional; bagian ketiga membahas operasi RSD di Malaysia; dan bagian terakhir mengulas mekanisme RSD di Indonesia dan Brazil.

Kata kunci: pencari suaka; pengungsi; refugee status determination; negara suaka; unhcr

I. INTRODUCTION

According to the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria, the Convention Relating to the Status of Refugees 1951 (Refugee Convention) does not define the type of procedures to be taken to assess refugee status.¹ There is a wide variety of State practices on the ground relating to refugee status Determination (RSD) that needs to be recognized. New RSD models, like the Brazilian model, are increasingly emerging. Current models continue to develop, as any refugee law expert can confirm. Article 9 of the Refugee Convention, in response to the silence on the particular procedure to be followed, allows the use of temporary measures (such as detention) against a refugee only 'until the Contracting State has assessed the status of a refugee'. Additionally, Articles 32 and 33 define the formal legal procedures which must take place before expulsion and refoulement are allowed, respectively. Other international conventions and domestic procedural requirements have been largely satisfied by the lack of a consistent procedure offered by the Refugee Convention².

Articles 13 and 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR) provide procedural guarantees in various proceedings³. Procedural protections are legislative mechanisms set up by statute to ensure that justice is properly administered. This system is made up of a combination of democratic principles and institutions, procedural forms, legal relations, and the entire system of court procedure. The examples of procedural guarantees as provided under Article 14 of the ICCPR include a trial without undue delay, not to be compelled to testify against himself, and the right to be reviewed according to the law by a higher tribunal. Procedural protections are also laid down in Articles 19 and 22 of the more recent International Convention on the Rights of Migrant Workers and Members of Their Families 1990⁴. The American Convention on Human Rights 1969, the African Charter on Human and Peoples' Rights 1981⁵ (Banjul Charter), and the European Convention on Human Rights 1950⁶, also provide procedural guarantees. All these guarantees apply to asylum seekers in any RSD process.

A variety of procedures will examine the specific reasons for asylum-seekers to depart from their State of Origin; thus, determining their status as refugees. Depending on the locality, State of Origin, and personal history, procedures may differ.

¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 2019), 19.

² The United Nations General Assembly, 1951, *Convention Relating to the Status of Refugees*, Treaty Series, vol. 189, 137.

³ The United Nations General Assembly, 1966, *International Covenant on Civil and Political Rights*. Treaty Series 999 (December): 171.

⁴ The United Nations General Assembly, 1990, *International Convention on the Rights of Migrant Workers and Members of Their Families*, A/RES/45/158.

⁵ African Union, 1981, *African Charter on Human and Peoples' Rights*, OAU Dec. CAB/LEG/67/3 rev. 5, Art 7 and 8.

⁶ Council of Europe, 1950, *The European Convention on Human Rights*, ETS 5, Art 6.

Despite recent attempts to harmonize RSD procedures, especially in the European Union, there is still no single model for RSD, and the outcomes of similar cases remain alarmingly different. The diversity of States' practices and the implementation of the local officials concerning RSD leads to some problems, especially in terms of the quality of justice, which seems to vary from office to office. It is also found that there is a general lack of transparency about the RSD procedures, including the waiting time before they can be interviewed, a decision on the refugees and asylum-seekers claims, and resettlement.

Henceforth, primarily aimed at assessing the RSD process in Malaysia using a doctrinal and comparative approach, the analysis is presented in four parts in this article. The first part provides for the definition and current statistics of refugee and asylum-seekers in Malaysia; the second part examines the mechanism of RSD conducted by UNHCR under international law; the third part focuses on the operation of RSD in Malaysia; and the final part reviews the mechanism of RSD in Indonesia and Brazil.

II. ASYLUM-SEEKERS AND REFUGEES IN MALAYSIA

The current position in Malaysia is that there is no specific legislation on the right to asylum for asylum-seekers and refugees in Malaysia.⁷ The Federal Constitution of Malaysia and other domestic laws do not guarantee any rights of asylum-seekers and refugees in Malaysia. This is related to the fact that Malaysia is not a State Party to the Refugee Convention nor the 1967 Optional Protocol on Refugee Status (Refugee Protocol).⁸ Therefore, the refugees are exposed to the risk of detention and arrest.⁹ One example of legislation that may expose the refugees to arrest and detention is the Immigration Act 1959/1963 which gives power to the authorities to do so.¹⁰ Section 6 of the Act provides that anyone entering Malaysia without relevant paperwork will be penalized. The problem with this provision is that the Immigration Act does not differentiate between refugees and illegal migrants, and refugees are constantly exposed to the risk of arrest, detention, and expulsion without a secure legal status.

There were 178,920 refugees and asylum seekers registered with the UNHCR in Malaysia as of March 2021. Approximately 154,350 were from Myanmar, including 102,560 Rohingya, 22,430 Chin, and 29,350 other ethnic groups from conflict-affected areas or fleeing persecution in Myanmar. Additionally, there are 24,570 refugees and asylum-seekers from 50 countries fleeing war and persecution, including some 6,620 Pakistanis, 3,670 Yemenis, 3,270 Syrians, 3,230 Somalis, 2,640 Afghans, 1,710 Sri Lankans, 1,210 Iraqis, 750 Palestinians, and others.¹¹

The Refugee Convention and its 1967 Refugee Protocol are the leading

⁷ Katrina Munir-Asen, "(Re)Negotiating Refugee Protection In Malaysia: Implications For Future Policy In Refugee Management," *Econstor*. Discussion Paper, No. 29. (2018): 14, <http://hdl.handle.net/10419/199549>.

⁸ Aizat Khairi, "Managing the Challenges of Refugees and Their Rights in Malaysia," *Jurnal Studi Hubungan Internasional* (June 2012): 10, <https://www.neliti.com/publications/132161/managing-the-challenges-of-refugees-and-their-rights-in-malaysia#cite>.

⁹ Caitlin Wake & Tania Cheung, *Livelihood strategies of Rohingya refugees in Malaysia 'We want to live in dignity'* (UK: HPG Working Paper, 2016), 7.

¹⁰ Mohd Hamdan Adnan, "Refugee Issues in Malaysia: The Need for a Proactive Human Rights Based Solution," *Malaysian Journal of Human Rights* (2012): 24-31.

¹¹ UNHCR, "Figures at a Glance in Malaysia," accessed May 9, 2021, <http://www.unhcr.org/figures-at-a-glance-in-Malaysia.html>.

international conventions used to address refugee issues. The term refugee¹² and the rights recognized for those granted refugee statuses are defined in the Refugee Convention. However, the process involved in arriving at any decision by any States of Asylum as to whether an individual fits a refugee's conditions is not defined in the Refugee Convention. Instead, each State Party is left to develop the establishment of asylum proceedings and RSD. The concept of refugee found in the related international instruments to which they are a party is accepted by several States. On the other hand, the mandate of the UNHCR to provide foreign security to refugees originates from the 1950 Statute of the Office of the United Nations High Commissioner for Refugees, which provides that, in addition to certain treaties and agreements in force at the time of adoption of the Statute, the competence of the High Commissioner shall be applied to the following groups, in addition to those deemed refugees:¹³

Paragraph 6A (ii): Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, or for reasons other than personal convenience, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

Paragraph 6B: Any other person who is outside the country of his [or her] nationality or, if he [or she] has no nationality, the country of his [or her] former habitual residence, because he [or she] has or had well-founded fear of persecution by reason of his [or her] race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail him [or her]self of the protection of the government of the country of his [or her] nationality, or, if he [or she] has no nationality, to return to the country of his [or her] former habitual residence.

The definition of "refugee" contained in the Statute of the Office of the UNHCR 1950¹⁴ appears to be almost similar to the one adopted by the drafters of the Refugee Convention. The variations in the definition of "refugee" contained in the law of the UNHCR are valid without any time or location restrictions. The Refugee Convention argues that the membership of States in a specific social group as a reason for persecution is no longer relevant.

For decades, States have been offering protection to people and groups escaping persecution as it becomes the overriding aim of the new refugee regime. Article 14(1) of the 1948 Universal Declaration of Human Rights (UDHR) guarantees the freedom of refugees to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, providing for the "right to request and be granted asylum in a foreign territory" under the laws of the State and international treaties¹⁵.

¹² Article 1 of the Refugee Convention.

¹³ UNHCR, *Refugee Status Determination ("RSD") Self Help Kit for Asylum Seekers in Indonesia: Reopening* (Indonesia: Suaka, 2015), 3.

¹⁴ Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly, December 14, 1950. A/RES/428(V).

¹⁵ American Convention on Human Rights, 18 July 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Art 22(7) and The African Charter on Human and Peoples' Rights 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. Art 12(3).

In addition, Article 16 of the 2012 ASEAN Declaration on Human Rights provides that, in accordance with the laws of that State and the international agreements in force, every person has the right to apply for and receive asylum in another State. Unlike the UDHR, Article 14(1) of the ICCPR does not allow for the right to seek and enjoy asylum. Asylum is defined as the act of a State which, by granting him or her asylum within its territory, protects a person.¹⁶

While the Malaysian Federal Constitution is silent on the rights to seek asylum¹⁷ some other States guarantee the right to seek asylum in their Constitution, such as Brazil. Article 28 of Law No. 6,815 of the Brazilian Constitution determines that a foreign national admitted to Brazilian territory as a political asylum must satisfy all the duties placed on them by international law, along with the domestic legislation in effect and any additional duties imposed by the Government of Brazil. Without the express permission of the Brazilian government, the asylum does not leave the country; an asylum that renounces the asylum status is not permitted to re-enter the country.¹⁸

III. REFUGEE STATUS DETERMINATION

RSD is a process through which States and/or the UNHCR decide who is entitled to the benefits of refugee protection and thus facilitate the fulfillment of States' obligations to the beneficiaries of the international refugee regime. RSD does not grant the status of a refugee, but merely acknowledges it is a truism of refugee law.¹⁹ This implies that RSD is an integral component of being accepted as a refugee. This is the legal or administrative process that determines if State governments or the UNHCR deem an individual seeking international protection to be a refugee under international, regional, or national law.

The States are primarily responsible for determining the status of asylum seekers, but in cases where the States are unable or unwilling to determine their status, for example, if the State is not a party to the Refugee Convention, the UNHCR may do so. UNHCR also conduct RSD in States that are parties to the Refugee Convention but maintain geographical restrictions, thus refusing them access to their asylum procedures; and where the UNHCR has assessed significant flaws in the State's asylum process in such a way that makes it impossible for refugees to receive the protection they require, either because they are not recognized or because recognition does not mean the protection they should have.²⁰

In recent years, in more States than ever and for a more substantial number of persons, the UNHCR has been required to perform RSD. UNHCR conducted RSD in many States including, in our region Indonesia, Thailand as well as Malaysia. UNHCR does more RSD than most governments.²¹ In 2018, UNHCR had sole responsibility

¹⁶ Santhosh Persaud, *Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights* (Geneva: UNHCR, 2006), 6; James. C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge: Cambridge University Press, 2005), 186.

¹⁷ Caitlin Wake and Tania Cheung, *Livelihood strategies of Rohingya refugees in Malaysia 'We want to live in dignity'* (UK: HPG Working Paper, 2016), 7.

¹⁸ The Law Library of Congress, *Refugees Law and Policy in Selected Countries* (US: The Law Library of Congress, March 2016), 25.

¹⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 2019), 15.

²⁰ UNHCR, *Chapter Three – Refugee Status and Resettlement* (Geneva: UNHCR, 2018), 93.

²¹ The Australian Business Review, "UNHCR Must Account for Determining Refugee Status in Ma-

for RSD in 47 States or territories and shared some responsibility for RSD with the national government in 14 others.²² Claiming that a neutral third party, like UNHCR, is responsible for refugee policy eases pressure on governments. In effect, delegating RSD allows State governments to lay responsibility for decisions at UNHCR's door. Delegating responsibility for RSD also gives a government a degree of flexibility; it can detain or expel individuals under the pretext that it did not grant them refugee status itself in the first place.²³

Japan, on the other hand, is one example of a State Party to the Refugee Convention and the Refugee Protocol, making it more capable for the Japanese authorities to assess the status of refugees in Japan. Anyone who wishes to seek asylum in Japan must apply to the Ministry of Justice's immigration office for refugee status. A foreigner, regardless of his or her nationality and current legal status, can file his or her refugee claims with the Japanese government free of charge.²⁴

The Procedural Standards for RSD under the mandate of the UNHCR, published in 2003, establishes core standards and best practices to ensure that RSD procedures, including receipt and registration, are harmonized, successful, and of quality. To represent the legal and procedural changes, these are gradually being updated. The RSD operations of the refugee agency have been steadily enforcing the Procedural Requirements, along with other relevant key UNHCR documents. From the admission of asylum seekers by the UNHCR to the final determination of the application, the RSD Procedural Requirements provide detailed procedural guidance at every step of the process of mandating RSD.²⁵

A. UNHCR: Refugee Status Determination and Beyond

In addition to conducting RSD procedures, one of the duties of the UNHCR is to provide refugees with international security and to pursue permanent solutions to the refugee crisis. Therefore, it remains the only foreign agency with a strong mandate for the security of global refugees. Under its Statute of 1950 and Subsequent Resolutions 428(V) of 14 December 1950, adopted by the General Assembly of the United Nations and ECOSOC, the UNHCR is, within its competence, obliged to ensure international stability and to find effective solutions for refugees. Asylum applicants are also included in the definitions of "persons of concern to UNHCR" (as are returnees, stateless persons, and internally displaced persons in some circumstances).

In most situations where RSD is conducted by the UNHCR, this is done to assess if an individual/asylum seeker is a refugee, within the competence of the UNHCR. In deciding the type of security and assistance given by the UNHCR to the individual concerned, the decisions reached are of direct relevance. This may include documents certifying the refugee status of the individual, steps to reunite families or encourage voluntary repatriation, or material assistance of different kinds.

laysia," accessed January 10, 2018, <http://www.theaustralian.com.au/business/legal-affairs/unhcr-must-account-for-determining-refugee-status-in-malaysia/news-story/>.

²² UNHCR, "Refugee Status Determination," accessed May 9, 2021, www.unhcr.org/uk/refugee-status-determination.

²³ Forced Migration Review, "RSD by UNHCR: difficulties and dilemmas," accessed May 9, 2021, <https://www.fmreview.org/recognising-refugees/abdelaty>.

²⁴ Japan Association for Refugees, "To Those Who Wish to Apply For Refugee Status," accessed January 18, 2018, <http://aprrn.info/wiki/tiki-index.php?page=japan>.

²⁵ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (Geneva: UNHCR, 2020), 16.

In 2007, the UNHCR was involved in RSD in 68 countries. More than 90% of the RSD work was performed in 15 countries, obtaining applications and making decisions, with the main operations being in Kenya, Malaysia, Turkey, Somalia, Egypt, and Yemen. Applications to UNHCR rose by 48 percent between 2003 and 2006. In 2007, 75,690 applications (12% of global asylum applications) were received by the UNHCR and 51,200 decisions were made.²⁶

The growth of the role of the UNHCR in the success of RSD has brought many challenges with it, some faced by the States and some special to the UNHCR. The first is to guarantee appropriate and suitable personnel. The UNHCR office in Geneva has 140 full-time RSD workers and a further 150 part-time employees (UNHCR Status Determination and Protection). The ratio of staff to the number of asylum applications received by the UNHCR is much lower than, for instance, in most national initiatives in Europe or North America. Moreover, given the resulting high turnover, half of the 140 full-time workers are on short-term contracts, impacting productivity and rising training requirements. In all of these operations, expert RSD supervision is also required. Getting workers spread across the globe makes it a challenge to be reliable and have instruction. There are also problems in ensuring that decisions are made promptly, plus questions about the safety of workers, system credibility, and burnout. Finally, the attitudes towards asylum seekers and refugees are quite positive in some States; in others the security climate can be very negative, making the RSD work of UNHCR much more difficult.²⁷

B. Refugee Status Determination and Non-Refoulement Principle

The Refugee Convention and the Refugee Protocol define who is eligible for refugee status and lay down the fundamental principles of international security for refugees, in particular the non-refoulement principle. Both instruments do not, however, set guidelines for evaluating refugee status. The mechanisms put in place by States to review asylum claims differ, as differences in legal practices, resources, and circumstances affect them. However, where RSD is conducted on an individual basis, in the full and inclusive application of the Refugee Convention, fair and appropriate procedures are generally accepted as an important element.

International and regional human rights instruments, as well as, in particular, the relevant conclusions adopted by the Executive Committee of the UNHCR, contain international standards to be observed by States when establishing individual asylum systems under their domestic law in which procedural fairness principles also apply. It is not possible to over-emphasize the significance of RSD procedures and their successful functioning: a wrong decision may cost the life or freedom of the person. Most importantly, refugees are protected from returning to any State where they face the chance of persecution. This is known as the principle of non-refoulement. It is often referred to as the pillar of international refugee protection and is explicitly laid down in Article 33(1) of the Refugee Convention, according to which no State shall:

... expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of

²⁶ Richard Stainsby, "UNHCR and Individual Refugee Status Determination," accessed January 11, 2018, <http://www.fmreview.org/es/node/3213.html>.

²⁷ *Ibid.*

his [or her] race, religion, nationality, membership of a particular social group or political opinion.

Formal recognition of refugee status is not a precondition for protection against refoulement to apply.²⁸ It is an accepted principle of international refugee law, since refugees may be asylum seekers, that they should not be returned or expelled before their status has been determined. The non-refoulement principle has very strictly established exceptions, which are permitted only in the particular circumstances provided for in Article 33(2) of the Refugee Convention, which stipulates that:

... the benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The conditions under which Article 33(2) may apply is if a refugee presents a very serious potential danger to the security of the State of Asylum, such as a threat to the State's constitution, territorial integrity, freedom or external peace, or if he or she has been convicted by a judgment which is no longer open to appeal of a very serious crime (e.g. murder, rape, armed robbery). The exceptions provided for in Article 33(2) include processes to ensure that due process must be strictly followed.²⁹ Like all exceptions to human rights provisions, the exclusion clause of the Refugee Convention must be interpreted restrictively and applied with caution. Procedures in which exclusion is considered must offer procedural safeguards, involve a careful examination of the specific circumstances of the person concerned, and require a thorough assessment of whether or not the relevant criteria are met.³⁰

Article 33(2) of the Refugee Convention, however, will not apply if the removal of a particular refugee results in a substantial risk of torture or cruel, inhuman, or degrading treatment, or punishment. The prohibition of torture and other forms of ill-treatment, as provided for in Article 3 of the 1984 Convention against Torture and Article 7 of the ICCPR includes an inherent part of the prohibition of refoulement if such treatment might occur. It has become a peremptory norm of international law or the status of *jus cogens* and, as such, is binding on all States, whether or not they have become parties to the instruments in question.³¹ In this context, it should also be noted that the provision of non-refoulement contained in the 1969 Organization of the African Union (OAU) Refugee Convention, which applies to all those who comply with its definition of refugees, does not provide for any exceptions.³²

Meanwhile, the return of a person to a serious risk of violation of other fundamental human rights under international and regional human rights law is often prohibited by States, e.g. the right to asylum under Article 18 of the 2000 EU Charter of Fundamental Rights.³³

C. Refugee Status Determination within Selected Regional Framework

²⁸ UNHCR, *Refugee Status Determination Self-Study Module 2* (Geneva: UNHCR, 2005), 13.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Erika de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law," *EJIL* Vol. 15, No. 1 (2004): 100, 10.1093/ejil/15.1.97.

³² UNHCR, *Refugee Status Determination Self-Study Module 2* (Geneva: UNHCR, 2005), 13-14.

³³ UNHCR, *Legal Considerations on the Return of Asylum-seekers and Refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept* (Geneva: UNHCR, 2016), 3.

An example of a regional framework for RSD is the Cartagena Declaration on Refugees 1984 (the Cartagena Declaration) which is a federal instrument adopted by the Colloquium on International Protection of Refugees, held in 1984. It is based on the Refugee Convention, the American Convention on Human Rights of 1969, the doctrine of the Inter-American Commission on Human Rights, and the Refugee Convention, adopted by the Organization of African Unity in five countries in 1969. Brazil is one of the five countries that have already signed the Cartagena Declaration (Brazil, Mexico, Colombia, Ecuador, and Costa Rica) and is included in most of their domestic legal systems.³⁴

The Cartagena Declaration expands the concept of refugee found in the Refugee Convention to include people who fled their country because of generalized abuse, international invasion, internal conflicts, major human rights violations, or other circumstances that have seriously disrupted public order and have threatened their liberty.³⁵ The definition proposed by the Cartagena Declaration, which is specifically included in Act No. 9474/97 (Brazil), Decree 4503 (Colombia), and the Refugee and Complementary Security Act (2011), was adopted by Brazil, Colombia, and Mexico as part of their internal rules for the handling of refugees (Mexico).³⁶

There was no binding rule in the Cartagena Declaration; it is, after all, the final document of a gathering of scholars and practitioners. Most States in Latin America did not have a national legal structure in place to deal with refugee problems or RSD programs when the Cartagena Declaration was adopted. The definition of refugee in the Cartagena Declaration thus became widened to include victims of contemporary issues of security such as internal conflict, international armed conflict, and natural disasters.³⁷ This wider refugee definition focuses on the objective risk to an individual as a result of indiscriminate threats, rather than a fear of persecution on a selective or discriminatory basis.

Article 2 of Decree 3293 of 30 September 1987 (status - repealed) in Ecuador recognizes the concept of refugee in the Cartagena Declaration. The meaning was repeated in Article 2 of Decree No 3301 (status - repealed), published on 6 May 1992, in Official Gazette No 933 of 12 May 1992. Despite the amendment to that decree, the term continued without alteration on March 25, 2009. In addition, Ecuador applied the Cartagena Declaration concept during its Enhanced Registration Process (Registro Ampliado), a government program introduced in 2009 consisting of an in situ eligibility system at the northern border with the direct participation of an Eligibility Committee. This phase has been a very progressive and optimistic pattern in the region. Despite its inclusion in previous legislation and its widespread use, Ecuador's new Executive Decree 1182 does not include the notion of a refugee in the Cartagena Declaration.³⁸

³⁴ 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: Brazil* (Geneva: UNHCR, 2011), 2.

³⁵ UNHCR, "Refugee Protection Section, Cartagena Declaration," accessed January 11, 2018, http://www.acnur.org/index.php?id_pag=2302.

³⁶ Karina Sarmiento and Jessica Soley, *Refugee Status Determination in Latin America: Regional Challenges & Opportunities The National Systems of Brazil, Colombia, Costa Rica, Ecuador, and Mexico* (Ecuador: Asylum Access, 2013), 11.

³⁷ Michael Reed-Hurtado, *The Cartagena Declaration on Refugees and The Protection of People Fleeing Armed Conflict and Other Situation of Violence in Latin America* (Cambridge: Cambridge University Press, 2013), 15.

³⁸ Karina Sarmiento and Jessica Soley, *Refugee Status Determination in Latin America: Regional Chal-*

According to the Asociación de Consultores y Asesores Internacionales de Costa Rica, the Cartagena Declaration was implemented de facto in Costa Rica for the admission of refugees fleeing the Central American conflict (ACAI). However, the enlarged description was never included in the legislation.

While the Cartagena Declaration is not a treaty, its terms are known in Central America and have been incorporated into certain national laws. The Cartagena Declaration remains the most detailed concept originating from Latin America of a refugee.³⁹ It has become the basis of the region's refugee policy and has been adopted into many States' national legislation; attempts to enforce it also need to be strengthened. Mexico is the first country to comply with all the Cartagena Declaration requirements, which means that the Declaration has been adopted and domestic legislation has been enforced accordingly.

IV. REFUGEE STATUS DETERMINATION IN MALAYSIA

At the first glance, as the procedures are independently handled by UNHCR Malaysia, the Malaysian government seems to have no role in any refugee-related operation. Since the UNHCR performs RSD in Malaysia, this means that the Malaysian government itself does not have a refugee assessment mechanism and is not a party to the Refugee Convention. Under Article 35 of the Refugee Convention, State Party has a duty to co-operate with the UNHCR in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention. Since Malaysia is not a party to the Refugee Convention, the UNHCR plays a central and vital role in ensuring a wide spectrum of security for refugees, from RSD to seeking permanent solutions. States which involve UNHCR in their RSD processes usually formalize this arrangement in a Cooperation Agreement or Memorandum of Understanding (MoU). However, that is not the case for Malaysia since such formality is not present. Through activities such as reception, registration, documentation, status determination, and resettlement of refugees by UNHCR, the agency is considered to be a key player in the security and assistance of refugees. Hence, the absence of a formal agreement does not affect the UNHCR's universal mandate to protect refugees in any way.⁴⁰

In 2010 and the first quarter of 2011, there were some promising changes. These included the development of opportunities for the UNHCR to send to the government proposals for the creation of a legal and administrative system for the management of asylum and the provision of assistance to refugees. UNHCR was also able to campaign with the government for the latter to give the right to work to refugees and to improve their access to education and health care. Finally, UNHCR continued to call on the government to accede to the Refugee Convention and the Refugee Protocol. The Malaysian government has stated that those proposals are currently being considered.⁴¹ The Monitoring Refugee Information System (TRIS) was implemented by Malaysia to update and collect data on refugees. The government keeps lists of refugees with TRIS, and there will be no loopholes open for those who wish to

lenges & Opportunities The National Systems of Brazil, Colombia, Costa Rica, Ecuador, and Mexico (Ecuador: Asylum Access, 2013), 11-12.

³⁹ Matthew Gibney and Randall J. Hansen, *Immigration and Asylum: From 1900 to the Present* (Santa Barbara: ABC Clío, 2005), 848.

⁴⁰ Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly, December 14, 1950. A/RES/428(V).

⁴¹ UNHCR, *Global Appeal 2012-2013* (Geneva: UNHCR, 2011), 212.

take advantage of refugee status. After the system started in April 2017, only 291 of the total number of 150,000 refugees registered with the UNHCR in Malaysia have registered with the TRIS as of January 2018.⁴²

The UNHCR office in Malaysia is located in the capital city, Kuala Lumpur. It is the only office in Malaysia since the closing of its Sabah office. Thus, refugees have to approach or get to the UNHCR office in Kuala Lumpur to apply for RSD. It implies that refugees must travel to the city to make the request. The trip and its costs may prevent the request from being made by refugees living far from Kuala Lumpur. In addition, refugees can also refuse to travel to avoid being detained by the authorities, in particular by RELA representatives, for there are some allegations of extortion on refugees in exchange for not being arrested. UNHCR supervises and intervenes in the detention of refugees, represents refugees convicted of crimes under the Malaysian Immigration Act 1959⁴³ in court, and organizes outreach programs for refugee populations.

One such instance in which UNHCR intervenes is the case of Iskandar Abdul Hamid v PP (2005) 6 CLJ 505, in which an Indonesian boy aged 17 was charged with an unlawful stay offense under the Immigration Act 1959/1963. At the hearing, a representative of the UNHCR was present. When the prosecutor was assured that the boy was a refugee under the auspices of the UNHCR, the accusation was then retracted.⁴⁴ Malaysia's High Court made a landmark decision regarding child refugees in this case by allowing an officer from UNHCR to be present in court during the proceedings under section 12(3)(b) of the Child Act 2001. The officer was classified as a person "directly concerned" in the case within the meaning of section 12(3)(b) of the 2001 Act and could thus advocate on behalf of the child.⁴⁵

V. REFUGEE STATUS DETERMINATION IN SELECTED STATES

The following paragraphs discuss the review of RSD procedures in Indonesia and Brazil. The purpose of such a review is to identify any features of RSD procedures that could be implemented in Malaysia by the UNHCR. Indonesia is chosen for this review because of its status as one of the States of Asylum with the highest number of asylum seekers within ASEAN. Brazil is chosen because of its status as a State of Asylum with a stronger refugee legal framework.

A. Indonesia

Mixed population movements, surrounded by States hosting significant numbers of asylum seekers and refugees, such as Malaysia, Thailand, and Australia, are constantly affecting Indonesia. After a lull in the late 1990s, the number of asylum seekers arriving in Indonesia began to rise in late 2000, 2001, and 2002. From 2003 to 2008, arrivals slowed down, but they picked up again in 2009. The number of individuals who registered with UNHCR remained relatively constant in 2016 and 2017. As of May 2017, Indonesia is hosting some 14,500 refugees and asylum seekers

⁴² Aina Nasa, "Gov't Introduces Tracking Information System to Update, Gather Data on Refugees," accessed January 12, 2018, www.nst.com.my/amp/news/nations/2017/08/263348/govt-introduces-tracking-refugee-information-system-update-gather-data.

⁴³ Part V of the Immigration Act 1959.

⁴⁴ Dina Supaat, "The UNHCR in Malaysia: The Mandate and Challenges," *South East Asia Journal of Contemporary Business, Economics and Law* Vol. 5 No. 4 (Dec 2014): 25, <https://seajbel.com/wp-content/uploads/2014/12/LAW-49-The-UNHCR-in-Malaysia-The-Mandate-And-Challenges.pdf>.

⁴⁵ Iskandar Abdul Hamid v PP (2005) 6 CLJ 505.

from some 52 countries, with approximately half coming from Afghanistan, as well as from Pakistan, Myanmar, Iraq, Iran, Sri Lanka, and other countries.⁴⁶ As of June 2017, there were 5,274 asylum seekers and 8,819 refugees in Indonesia under UNHCR protection.⁴⁷ The number of refugees and asylum seekers entering the UNHCR office in Indonesia is lower than the 152,420 asylum seekers in Malaysia.

Indonesia is neither a party to the Refugee Convention nor the Refugee Protocol. Not until 2016, Indonesia does not have any domestic legislation on refugee security and the national RSD mechanism in place.⁴⁸ As a result, UNHCR processes refugee status applications in Indonesia on behalf of the government, and the government authorizes UNHCR to carry out its refugee security mandate and find solutions for refugees in the country.⁴⁹

Indonesia is a transit country (rather than a destination country) where, before moving to a State of Settlement such as Australia and the USA, a significant number of asylum seekers and refugees had previously planned to stay for a short period. As a non-party to the Refugee Convention, Indonesia does not conduct refugee evaluations or provide any means for refugees to obtain permanent residency there. The International Organization for Migration (IOM), the Church World Service (CWS), and the Jesuit Refugee Service (JRS) are other organizations that work with refugees and asylum seekers in Indonesia. They are all distinct organizations and are not part of the UNHCR.⁵⁰

The UNHCR executes a systematic RSD procedure, which begins with the identification of asylum seekers to obtain basic biodata, photos, iris scans, and to examine the reasons why individuals leave their State of Origin to seek international protection. The UNHCR conducts comprehensive interviews, accompanied by a competent translator, with each asylum seeker after registration and issuance of the necessary documentation. This approach tests the integrity of the individual and makes a fair judgment on whether the individual qualifies under the mandate of the UNHCR for refugee status because of a well-founded fear of persecution due to ethnicity, religion, nationality, participation in a particular social group, or political opinion. The process requires a probable exclusion assessment in which the UNHCR decides whether a person who is otherwise eligible for refugee status may not be eligible for international protection because he or she has committed crimes against humanity, war crimes, serious non-political crimes, or crimes contrary to the principles of the United Nations. The procedure provides an opportunity for the applicant to appeal the decision to the UNHCR for those who are originally deemed not to be refugees because the UNHCR is the only agency in Indonesia operating all asylum and refugee RSD procedures.⁵¹

⁴⁶ UNHCR, "UNHCR in Indonesia," accessed January 12, 2018, <http://www.unhcr.org/id/en/unhcr-in-indonesia> and UNHCR, "*Indonesia Fact Sheet*," accessed January 11, 2018, <http://www.unhcr.org/en/my/protection/operations/50001bda9/indonesia-fact-sheet.html>.

⁴⁷ UNHCR, "UNHCR in Indonesia," accessed January 12, 2018, <http://www.unhcr.org/id/en/unhcr-in-indonesia>.

⁴⁸ Muzafar Ali, Linda Briskman and Lucy Fiske, "Asylum Seekers and Refugees in Indonesia: Problems and Potentials," *Cosmopolitan Civil Societies Journal* Vol. 8 No.2 (2016): 25, <http://dx.doi.org/10.5130/ccs.v8i2.4883>.

⁴⁹ UNHCR, "UNHCR in Indonesia," accessed January 12, 2018, <http://www.unhcr.org/id/en/unhcr-in-indonesia>.

⁵⁰ UNHCR, *Refugee Status Determination ("RSD") Self Help Kit for Asylum Seekers in Indonesia: Reopening* (Indonesia: Suaka, 2015), 3.

⁵¹ UNHCR, "UNHCR in Indonesia," accessed January 12, 2018, <http://www.unhcr.org/id/en/unhcr-in-indonesia>.

At the end of 2016, the President of the Republic of Indonesia signed the Presidential Regulation on the Handling of Refugees, which contains fundamental definitions and sets out procedures for the identification, protection, and security of refugees and asylum seekers. On 31 December 2016, to enforce the provisions of Article 27 Paragraph (2) of Law No 37 of 1999 on Foreign Relations, President Joko Widodo signed the Presidential Regulation (Perpres) No 125 of 2016 on the treatment of refugees from abroad.⁵² It is expected that the implementation of the provisions of the Presidential Regulation will create stronger working relations between the Government of Indonesia and the UNHCR, including joint registration of asylum seekers.

UNHCR's security activities begin by ensuring that refugees and asylum seekers are safe from refoulement, i.e. from forced deportation to a country or territory where there may be a risk to their lives or liberty. UNHCR will start looking for one of the available options that they deem inclusive for refugees. Historically, these options have included moving to a third State, voluntary repatriation (if a person can return safely and with dignity) and local integration into the State of Asylum.⁵³

However, with more than 65 million displaced people around the world in the current global refugee crisis, UNHCR is working to identify several other solutions, including temporary stay initiatives that allow refugees to have access to self-reliance opportunities before a longer-term solution can be found; complementary routes, such as university scholarships, labor migration schemes, and State-facilitation schemes.⁵⁴ The determination of an effective long-term solution for each refugee is a complex and sometimes lengthy process involving understanding the unique circumstances of the individual or family and identifying solutions that meet their particular needs.

B. Brazil

As of 2018, the total number of refugees and asylum population in Brazil amounted to 9,077 persons. Between 1 January and 30 June 2016, 5,685 asylum claims were registered by the Government of Brazil. By the start of 2016, there were 20,815 applications pending analysis. Taking into consideration the 5,685 asylum claims during the first semester, and the 761 cases analyzed in the first semester, the UNHCR estimated the backlog of 25,739 cases. The Government of Brazil has been facing serious challenges in its RSD system, as the incoming caseload is much larger than what the State can process.⁵⁵ These numbers are the most current statistics published in the UPR 27th Session, representing a significant shift in the profile of refugees and asylum-seekers compared to Malaysia and Indonesia.

The UDHR, the ICCPR and its Protocol, the ICESCR, the American Convention on Human Rights, and the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas 2010 are among the international human rights instruments that guarantee and secure the rights of refugees and asylum seekers. Brazil was the

⁵² Cabinet Secretary Indonesia, "President Jokowi Signs Presidential Regulation on Handling of Refugees from Abroad," accessed January 12, 2018, <http://setkab.go.id/en/president-jokowi-signs-presidential-regulation-on-handling-of-refugees-from-abroad/>.

⁵³ UNHCR, "Durable Solutions in Malaysia," accessed January 15, 2018. <https://www.unhcr.org/en-my/durable-solutions-in-malaysia.html>.

⁵⁴ *Ibid.*

⁵⁵ Karina Sarmiento and Jessica Soley, *Refugee Status Determination in Latin America: Regional Challenges & Opportunities The National Systems of Brazil, Colombia, Costa Rica, Ecuador, and Mexico* (Ecuador: Asylum Access, 2013), 11-12.

State that introduced most of these instruments into its constitution and, in many cases, established unique rules.⁵⁶

To meet its international obligations under treaties and international criteria for asylum rights, Brazil has demonstrated its ability to pursue joint and progressive options. The region of Latin America has taken steps to be a pioneer in the recognition and security of refugees. The fact that Brazil was one of the States that ratified the Refugee Convention and its Protocol is an indication of leadership in this region. Moreover, several initiatives, including the Cartagena Declaration, the 1989 International Conference on Central American Refugees (CIREFCA), the 2004 Mexican Declaration and Action Plan to Improve the International Security of Refugees in Latin America, and the Brasilia Declaration on the Protection of Refugees in Latin America, have shown strong agreement on the value of refugees in Latin America.

Brazil has signed the 2012 Mercosur Declaration of Principles on the International Protection of Refugees. It underlines the commitment of States to harmonize domestic legislation to improve the security and integration mechanisms of asylum seekers and refugees, including the RSD process by ensuring that refugees and their families are respected for their human rights. In addition, Mercosur has been proclaimed an enlarged humanitarian space for the protection of refugees.⁵⁷

Brazil has ratified, mainly without any reservation, the Refugee Convention and its Refugee Protocol, except for the express reservation referred to in points (a), (b and c) of Articles 26, 31, 32, and 17 relating to freedom of employment and place of residence. By law, Brazil's domestic legislation includes the Refugee Convention. Vol. 9474/97, from 1997. In addition, Brazil's 1988 Constitution includes the right to seek asylum and refugee status. The declarative essence of refugee status is recognized by Brazilian law, i.e., a person is a refugee once he or she meets the criteria set out in the description. Due to the declarative and non-constitutive nature of the decision to grant refugee status, even if a person has not been identified as a refugee, he or she should be considered as such.⁵⁸

Brazil has created a framework for the Commission responsible for RSD, the National Committee for Refugees (CONARE), an inter-ministerial collegial body under the Ministry of Justice with members of the government, civil society, and the United Nations. It was created and approved by Act No. 94744 on July 22, 1997. According to Article 12 of Act No. 9474, the powers of CONARE are (a) the analysis of the request for declaration or recognition of refugee status in the first instance; (b) the decision to withdraw refugee status in the first instance, ex officio or at the request of the competent authorities; (c) the determination of the loss of refugee status in the first instance; (d) the guidance and coordination of the necessary and effective treatment of refugee status; and (e) approve the normative instructions regarding this law.⁵⁹

CONARE may use any source of jurisprudence or doctrine that appears useful, valid, or appropriate. One interesting instance is the recent case of Haitians requesting asylum in Brazil. Many Haitians arrived in Brazil after the earthquake

⁵⁶ UNHCR, "Asylum claim, Residence and Naturalization," accessed January 20, 2018, <https://help.unhcr.org/brazil/en/asylum-claim/#:~:text=The%20Brazilian%20Refugee%20Law%20considers,widespread%20human%20rights%20violation%20in.>

⁵⁷ Ministerio de Justicia de Brasil, "Extranjeros: Conare," accessed January 12, 2018, <https://www.justica.gov.br/seus-direitos/refugio/conare.>

⁵⁸ Karina Sarmiento and Jessica Soley, *Refugee Status Determination in Latin America: Regional Challenges & Opportunities The National Systems of Brazil, Colombia, Costa Rica, Ecuador, and Mexico* (Ecuador: Asylum Access, 2013), 11.

⁵⁹ Article 12 of Act No. 9474/1997.

in 2010 and submitted asylum applications. CONARE determined, after reviewing several applications, that such applications were unfounded. In all cases, the analysis and decision on refugee status were transferred to the National Immigration Council (CNIg) based on ExCom Conclusion 30⁶⁰ and a Resolution of the Conselho Nacional de Imigração (CNIg) (National Immigration Council) that focused on humanitarian cases. These Haitian asylum seekers have thus benefited from access to permanent residency on humanitarian grounds.

In addition to the relatively complete Act No. 9474/97, CONARE and the National Council for Immigration (CNIg) have issued resolutions with specific guidelines on the RSD process and ensuring due process. CONARE Normative Resolution 6, 26 May 1999, for example, provides for the granting of a protocol to asylum seekers. Once an asylum seeker has a provisional protocol, he or she is entitled to a labor license and a financially relevant document, the Register of Natural Persons, so that he or she can begin to fully integrate into Brazilian society.⁶¹ While it is an undisputed fact that accepting refugees and ensuring that they can integrate into a new society requires investing resources, especially when the refugees come from a distant culture and don't speak Portuguese, Brazil could seek funding and assistance from the private sector, United Nations agencies, and donor countries to enhance its capacity. Historically, Brazil took in tens of thousands of Europeans after the two World Wars. Many of them have made invaluable contributions to their State of Asylum.

Brazil stands out due to tripartite participation in the decision-making of the RSD procedure. However, it should be noted that it acts on behalf of the Network of Migrants and Refugee Organizations specializing in refugee affairs. Furthermore, the Instituto Migrações e Direitos Humanos de Brasil (IMDH) notes that before the plenary session, a study group meets, analyses all requests, evaluates whether the process is well implemented, and draws up an opinion that is then taken to the plenary session. Importantly, although only one organization votes, some civil society actors participate directly in CONARE meetings to guide processes, interviews, and opinions on eligibility, cooperate in all working groups, and, as reported by the IMDH, provide refugees with proposals for public policy or administrative actions. Furthermore, there is no deadline for filing an asylum application.⁶²

Different types of services, such as free legal advice on RSD, access to rights in the State of Asylum highlight the role and efforts of NGOs in Brazil in helping and supporting asylum seekers (e.g. right to work, right to housing right to social security, etc. and the provision of humanitarian assistance upon arrival). This participation is part of the framework of the democratic rule of law, which enables civil society actors to participate in supporting governments' actions to ensure the human rights of refugees. In the specific case of RSD proceedings, NGOs participating in this report provide several free services aimed at facilitating refugees and asylum seekers to effectively exercise their rights under the Refugee Convention.

The Government of Brazil has reported on some best practices on access to employment rights, health, legal representation, education and training, resettlement,

⁶⁰ UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, No. 30 (XXXIV) (Geneva: UNHCR, 1983), 1.

⁶¹ Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinário, "Refugee Status Determination in Brazil: A Tripartite Enterprise," *Refugee* Vol 25 No. 2 (2008): 39, <http://dx.doi.org/10.25071/1920-7336.26029>

⁶² Karina Sarmiento and Jessica Soley, *Refugee Status Determination in Latin America: Regional Challenges & Opportunities The National Systems of Brazil, Colombia, Costa Rica, Ecuador, and Mexico* (Ecuador: Asylum Access, 2013), 17.

permanent residence, housing, and other types of assistance to asylum seekers. For example, the government grants the applicant the right to work legally in the country, alongside all other rights, from the moment he or she applies.⁶³

VI. CONCLUSION

The discussion in this article demonstrates that there are some weaknesses and discrepancies in the practice of RSD in Malaysia. Since it is independently managed and conducted by UNHCR Malaysia, the Malaysian government itself does not contribute to the assessment and resettlement process. This represents a lack of commitment on the part of the State in the procedure which has an impact on the quality of its justice and causes a delay in the approval of every application. Therefore, it is strongly suggested that Malaysia officially recognizes the presence and existence of refugees and asylum seekers in this State by regulating the group and facilitating their enjoyment of their rights. Practices that violate the human rights principles of refugees, such as detention and imprisonment, must also be stopped because they will not serve any purpose in Malaysia. It is not easy to send refugees back and they can stay in the detention center longer, putting a greater financial burden on the authorities, particularly concerning infrastructure and resources. Malaysia may contribute to human trafficking and smuggling if the refugees are to be deported, as traffickers are known to take advantage of refugee deportations.

A specific legal and institutional framework to deal with refugees in the country is prudent for Malaysia to devise. The law should require the creation of an independent mechanism for the screening of refugees, subject to appeal and judicial review. Since the UNHCR has no direct control over State affairs, the effort is less efficient than it should be, Malaysia should take the forward step to enhance the RSD procedure, using the Brazilian system with necessary modifications. The significance of this is that it will make it more reasonable for the government to combat economic migrants.

Finally, as the guardian of international refugee law, UNHCR has to live up to its role, remembering that the law is only there to protect the people it was intended to assist so that political and/or economic considerations should be kept to a minimum in the light of the refugees' humanitarian plea. The design of tripartite RSD in Malaysia, including UNHCR, the Government of Malaysia, and the NGOs, is certainly the best practice in terms of RSD and refugee protection, but its outcomes must progress from the local/subjective level to the national/objective (positive law) level and then become a model to be duplicated *mutatis mutandis* in other States.

VII. ACKNOWLEDGEMENT

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⁶³ *Ibid.*

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