

MIGRANTS, REFUGEES AND THE LAW

By

Dato' Mohd Hishamudin Yunus
Former Court of Appeal Judge
Consultant, Messrs Lee Hishammuddin Allen & Gledhill
In conjunction with Law Awareness Day 2016

Mr. Harmahinder Singh,
Dean, Taylor's Law School,

Dato' Mahadev Shankar,
Adjunct Professor, Taylor's Law School,
and Former Court of Appeal Judge,

Distinguish guests,
Ladies and Gentlemen,
Selamat pagi, Good morning.

1. Introduction

First and foremost, I wish to say 'Thank you' to the Law School of Taylor's University for inviting me to deliver this keynote address and to launch the Law School's Law Awareness Day. It is indeed a pleasure and an honour to be so invited and to be associated with the School's Law Awareness Day.

And may I congratulate the Law School for launching this Law Awareness Day and choosing the theme 'Migrants, Refugees and the Law'.

2. Overview

I consider the theme 'Migrants, Refugees and the Law' as appropriate and timely as today issues on migrants and refugees are one of the issues that make headlines all over the world.

We have read quite recently that last year more than a million migrants and refugees crossed into Europe sparking a crisis as the European countries affected struggled to cope with the influx and how best to deal with resettling people.¹ The conflict in Syria continues to be by far the biggest cause of migration. Other causes are the ongoing violence in Afghanistan and Iraq, abuses in Eritrea, and poverty in Kosovo.

¹ (2016, March 4). Migrant crisis: Migration to Europe explained in seven charts. *BBC News Europe*. Retrieved from <http://www.bbc.com/news/world-europe-34131911>

Many of those that went to Europe claimed asylum. Last year Germany received the highest number of new asylum applications, some 467,000 applications; followed by Hungary with 177,130 applicants as at the end of December 2015.

Malaysia, on her part, has announced that she would accept 3000 migrants from Syria over the next three years.²

At home in Malaysia what made headlines was, first, the discovery of human smuggling camps and the bodies of illegal immigrants dumped in mass graves at Songkhla and Padang Besar near the Thai-Malaysia border.³

Secondly, there was the controversial announcement by the Government to bring into the country 1.5 million workers from Bangladesh in stages over 3 years,⁴ only to be followed very soon after this announcement by another announcement, this time by the Deputy Prime Minister, of a freeze on all recruitment of foreign workers, including those from Bangladesh.⁵

3. Refugees

As at 2015, there were 21.3 million refugees worldwide, over half of whom are under the age of 18.⁶ 54% of refugees worldwide came from three countries, namely,-

- (1) Syria, 4.9 million;
- (2) Afghanistan, 2.7 million; and
- (3) Somalia, 1.1 million.

Turkey has become the world's biggest refugee hosting country having 2.5 million refugees. Pakistan is second, hosting 1.6 million refugees. Lebanon is third, hosting 1.1 million.

3.1. Refugees and International law

Historically, States, for centuries, have been granting protection to individuals and groups fleeing persecution. However, the modern international legal regime on refugees is largely the product of the second half of the twentieth century. Like

² (2015, December 9). Malaysia accepts first of 3,000 Syrian migrants. *BBC News Asia*. Retrieved from <http://www.bbc.com/news/world-asia-35048291>

³ (2015, May 25). Malaysia confirms discovery of 23 trafficking camps, 139 graves sites believed to contain migrants. *ABC News*. Retrieved from <http://www.abc.net.au/news/2015-05-25/malaysia-mass-graves-of-suspected-migrants-deeply-concerning/6494908>

⁴ Carvalho, M. & Rahimy Rahim (2016, February 18). Malaysia and Bangladesh ink deal to recruit 1.5 million workers. *The Star Online*. Retrieved from <http://www.thestar.com.my/news/nation/2016/02/18/bangladeshi-workers-malaysia-mou/>

⁵ Ling, S. (2016, February 19). Zahid Hamidi: Government freezes intake of all foreign workers, including Bangladeshis. *The Star Online*. Retrieved from <http://www.thestar.com.my/news/nation/2016/02/19/zahid-hamidi-governemnt-freezes-intake-of-all-foreign-workers/>

⁶ UNHCR: The UN Refugee Agency. *Figures at a glance: Global trends, statistical yearbooks*. Retrieved from <http://www.unhcr.org/figures-at-a-glance.html>

international human rights law, modern international law on refugees has its origins in the aftermath of the Second World War as well as the refugee crises of the interwar years that preceded it.⁷ Article 14(1) of the **Universal Declaration of Human Rights (UDHR), 1948**, guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the “*right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.*” (See the **American Convention on Human Rights**, art. 22(7); and the **African [Banjul] Charter on Human and People’s Rights**, art. 12(3).)

3.2. The 1951 Refugee Convention

The foundation of international refugee law is the **1951 Convention relating to the Status of Refugees** (‘the Refugee Convention’) and its **1967 Optional Protocol relating to the Status of Refugees** (‘the 1967 Optional Protocol’). The Refugee Convention defines the term ‘refugee’ and sets minimum standards for the treatment of persons who are found to qualify for refugee status. The Refugee Convention also establishes the principle of non-refoulement. (I will elaborate on this principle later.)

The Refugee Convention does not prescribe how States Parties are to determine whether or not an individual satisfies the definition of a ‘refugee’. Instead, the Convention leaves it to the State Party to formulate the rules on asylum proceedings and the determination of refugee status. This, however, has resulted in disparities among different States as each State will formulate the laws on asylum based on its own resources, national security concerns, and experiences with forced migration movements. Despite differences at the national and regional levels, the overriding objective of the modern legal regime on refugees is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

3.3. The 1967 Optional Protocol

Whenever we refer to the Refugee Convention of 1951, in the same breath we also refer to the 1967 Optional Protocol relating to the Status of Refugees. Originally, the Refugee Convention was of limited scope. It’s scope was confined only to refugees in Europe and to events occurring before 1 January 1951. The 1967 Optional Protocol is a supplementary treaty to the Refugee Convention. It is a supplementary treaty that removes the geographical and time limitations written into the original Convention. In other words, this supplementary treaty (the 1967 Optional Protocol) turned the Convention into a truly universal instrument that could benefit refugees everywhere.

⁷ International Justice Resource Center. *Asylum & the rights of refugees*. Retrieved from <http://www.ijrcenter.org/refugee-law/>

4. Who is a Refugee?

On the definition of the term 'refugee', Article 1(A)(2) of the Refugee Convention states that a refugee is an individual who is **outside his or her country of nationality or habitual residence** who is **unable or unwilling to return** due to a **well-founded fear of persecution** based on his or her **race, religion, nationality, political opinion, or membership in a particular social group**.

Although the Refugee Convention definition of 'refugee' remains the dominant definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

Countries in the Americas and Africa experiencing large-scale displacement as the result of armed conflicts found that the Refugee Convention definition of 'refugee' did not go far enough in addressing the protection needs of populations. Consequently, both Article 3 of the **Cartagena Declaration** and Article 1(2) of the **1969 Convention Governing the Specific Aspects of Refugee Problems in Africa** have extended the definition of 'refugee'. For example, the latter, that is to say, the **1969 African Convention** extends refugee status to an individual who **'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'**.

As of today, the total number of State Parties to the Refugee Convention is 145; whilst the total number of State Parties to both the Refugee Convention and the 1967 Protocol is 142. The only ASEAN States who are parties to the Refugee Convention and the 1967 Protocol are Cambodia and Philippines.

Malaysian is not a State Party to the 1951 Refugee Convention and its Protocol.

4.1. The principle of non-refoulement

In relation to refugees, there is an important principle of customary international law called the principle of non-refoulement. We can find this principle in Article 33(1) of the Refugee Convention. It is expressed in the following terms:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

As this principle of non-refoulement is generally accepted as a principle of customary international law, this principle is binding on all nations regardless whether the State is a party or not to the Refugee Convention. This means that Malaysia, although not a party to the Refugee Convention, is, nevertheless, bound by this important principle of international law.

4.2. Internally displaced persons (IDPs)

Applying the definition of 'refugee' under the Refugee Convention, internally displaced persons (IDPs) are not considered refugees under the Convention. Who are 'internally displaced persons'? Unlike refugees, IDPs have not crossed an international border to find sanctuary but have remained inside their home countries; but they (IDPs) have fled from their homes because of compelling circumstances such as armed conflict, generalized violence and human rights violations.

It is estimated that at the end of 2014 there were some 38.2 million internally displaced persons (IDPs) around the world. Currently the country with the largest IDPs is Syria (7.6 million IDPs), followed by Colombia (6 Million) and Iraq (3.6 million).⁸

5. United Nation High Commissioner for Refugees (UNHCR)

The Office of the United Nation High Commissioner for Refugees (UNHCR) is a United Nation Agency established on 14 December 1950, with its headquarters in Geneva, Switzerland. Considered to be the guardian of the Refugee Convention, the agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.

UNHCR's mandate has today been expanded to include protecting and providing humanitarian assistance to persons whom it describes as 'other persons of concern', including internally displaced persons (IDPs).

For its contribution in the field of human rights, the UNHCR has won two Nobel Peace Prizes, once in 1954 and again in 1981.

5.1. UNHCR in Malaysia

The UNHCR began its operations in Malaysia in 1975 when Vietnamese refugees began to arrive by boat in Malaysia and other countries in the region. From 1975 until 1996, UNHCR assisted the Malaysian government in providing protection and assistance for the Vietnamese boat people. Over these two decades, as part of an international burden sharing effort, UNHCR resettled more than 240,000 Vietnamese to countries including the United States, Canada, Australia, France, New Zealand, Sweden, Finland, Denmark and Norway. During that same period more than 9,000 persons returned home to Vietnam with the support of UNHCR.⁹

During the 1970s and 1980s UNHCR assisted the Malaysian Government in receiving and locally settling over 50,000 Filipino Muslims from Mindanao who fled

⁸ UNHCR: The UN Refugee Agency (2015, June 18). *Global trends: Forced displacement in 2014*. Retrieved from <http://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html>

⁹ UNHCR: The UN Refugee Agency, Malaysia. *UNHCR in Malaysia*. Retrieved from <http://www.unhcr.org.my>

to Sabah. UNHCR also supported the Malaysian Government in locally settling several thousand Muslim Chams from Cambodia in the 1980s and several hundred Bosnian refugees in the 1990s.¹⁰

During the last 10 years alone the UNHCR in Malaysia has resettled more than 100,000 refugees.¹¹

Although Malaysia is not a State Party to the 1951 Refugee Convention and its Protocol Relating to the Status of Refugees, the Malaysian Government is nevertheless a member of the United Nations. That being so, Malaysia is obligated to co-operate – and she does co-operate – with UNHCR in addressing refugee issues on humanitarian grounds.

It must be mentioned here that Malaysia is a party to the **Convention on the Rights of the Child** and to the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**. Thus in dealing with refugees, Malaysia must give effect to her obligations under these two Conventions, where the issues involved women and children.

In Malaysia, presently, there are no legislative or administrative provisions in place to deal with the situation of asylum-seekers or refugees, UNHCR undertakes all activities pertaining to the reception, registration, documentation and status determination of asylum-seekers and refugees.¹²

In this article, from time to time I will be referring to the term ‘refugees’ and ‘asylum seekers’. One might ask as to the difference between a ‘refugee’ and an ‘asylum seeker’. An asylum seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated by the State authority of the country in which the claim to refugee status is made.

As part of its programme of humanitarian support for refugees and asylum seekers, UNHCR in collaboration with various bodies/partners such as government agencies, non-government organisations and volunteers, carry out, among others, the following activities:

- to provide assistance for refugees and asylum seekers in a variety of areas such as healthcare, education, shelter, counselling and other welfare needs;
- to carry out detention monitoring and intervention;
- to provide legal representation in court for offences under the Immigration Act;

¹⁰ UNHCR: The UN Refugee Agency. *Malaysia factsheet*. Retrieved from <http://www.unhcr.org/protection/operations/56167f6b6/malaysia-fact-sheet.html>

¹¹ Sumisha Naldu (2016, March 24). UNHCR defends registration card system in Malaysia. *Channel NewsAsia*. Retrieved from <http://www.channelnewsasia.com/news/asiapacific/unhcr-defends/2627594.html>

¹² UNHCR: The UN Refugee Agency (2016, January). *Malaysia fact sheet*. Retrieved from <http://www.unhcr.org/malaysia.html?query=malaysia>

- to support long-term solutions for refugees, such as resettlement to countries like Australia, Canada, Czech Republic, Denmark, New Zealand, Sweden, and the United States.¹³

6. History of refugee policy in Malaysia

Malaysia's current policy toward refugees has its roots in its experience with Indochinese refugees in the 1970s and 1980s. After the fall of the South Vietnamese government supported by the US military in 1975, hundreds of thousands of Vietnamese began to leave the country. Most fled by boat to other countries in Southeast Asia, and, for a time, Malaysia was their principal first stop. These refugees were placed in camps under the auspices of the Malaysian Red Crescent Society in co-ordination with the United Nation High Commissioner for Refugees (UNHCR).

6.1. Malaysia's current policy on refugees

Malaysia does not recognize the status of 'refugees'. Malaysia only allows asylum seekers to stay in this country on a temporary basis after which they have to go back to their country of origin or to be resettled in a third country.

Be that as it may, Malaysia has, on an *ad hoc* basis, voluntarily hosted certain groups of refugees such as the Khmer Muslims from Cambodia, Filipinos Muslims, and Bosnians.

Malaysia lacks any institutionalised protections for refugees. Under our general immigration law, refugees are not distinguished from other undocumented workers. In other words, refugees are considered illegal immigrants.

6.2. Fact sheet on Refugees

In Malaysia, there were a total of 156,342 refugees and asylum seekers registered with UNHCR as at end January 2016.¹⁴

Table 1: By country of origin

Country	Total
Myanmar	143,669
Sri Lanka	3,278
Pakistan	1,476
Somalia	1,412
Other countries	6,507
Total:	156,342

¹³ *Ibid*

¹⁴ *Ibid*

Of the 143,669 refugees and asylum seekers from Myanmar, some 52,570 are Rohingyas, some 45,380 are Chins, and some 12,200 are Myanmar Muslims. The remainder are Rakhines, Arakanese and other ethnicities.

Among the refugees and asylum seekers that come under the category of 'Other countries' are Syrians, Iraqis, Yemenis, Palestinians, and Iranians. Some 70% of refugees and asylum-seekers are men, while 30% are women. There are some 33,640 children below the age of 18.

7. Living as a refugee (and asylum seeker) in Malaysia

I will now say something about living as a refugee and asylum seeker in Malaysia. Malaysians of my generation can never forget about the presence of the Vietnamese refugee camp in the 70s and 80s as we travelled south from Kuala Lumpur towards Seremban. As one approached Sungei Besi, one could see the refugee camp on the right side of the road. Today the camp is no longer there as the Vietnamese refugees have been re-settled elsewhere in receiving countries.

Although, presently, we hardly feel the presence of refugees and asylum seekers in our country, the truth is, as we have seen, there are some 156,000 refugees and asylum seekers in this country. Today the various refugee and asylum seeker communities are scattered throughout the country, living mostly in the Klang Valley. Unlike the era of the 70s and 80s, there are no longer refugee camps in Malaysia. Instead, refugees and asylum seekers share living spaces, sometimes in groups of up to 40 people or more, living in low-cost flats or housing areas side by side with local Malaysian homes in cities and small towns. Many also live near the construction sites or plantations where they seek employment.¹⁵

As Malaysia is not a State Party to the 1951 Refugee Convention and the 1967 Optional Protocol, we do not have an asylum system in place to regulate the status and rights of refugees and asylum seekers. The situation of refugees and asylum seekers in Malaysia is difficult as a result of their lack of official status.

As Malaysian law makes no distinction between refugees and undocumented migrants, refugees are at risk of being arrested and detained for immigration offences.

Refugees and asylum seekers in Malaysia have no access to legal employment. They tend to work in jobs that the local population do not wish to take (the 3D jobs: dirty, dangerous and difficult). Some employers exploit their dire situation by paying extremely low or no wages at all.

They are also at risk of being the victims of human traffickers.

¹⁵ UNHCR: The UN Refugee Agency, *supra* n. 10

Refugee children are denied access to the formal education system in the country. However, some children are able to attend community-run learning centres and learning centres set up by UNHCR and NGO partners. Presently, there are 124 community-based learning centres. 11 of them are operated by six NGO partners, and 113 are run by the communities themselves with support from NGOs, faith-based organisations, and other stakeholders. Currently, some 6,100 (29%) registered refugee children aged 3-17 years old are enrolled in early childhood, primary, and secondary level education at these learning centres.

It must be mentioned here that UNHCR provides financial and material support to the learning centres. UNHCR has also signed memoranda of understanding with five private tertiary institutions, namely the HELP University, University of Nottingham Malaysia Campus, Limkokwing University of Creative Technology, International University Malaya-Wales, and Brickfields Asia College (BAC), all of which have collectively enrolled some 45 refugee youths in their foundation and undergraduate programmes.

Refugees and asylum seekers in Malaysia who are UNHCR document-holders are able to access healthcare facilities at a reduced rate, but the cost of treatment and refugees' irregular income make healthcare unaffordable to many refugees and asylum seekers.¹⁶

8. Refugees and Migrants: What is the difference?

Unlike migrants, refugees and asylum seekers do not choose to leave their countries; they are compelled to do so because of serious discrimination in their home countries, armed conflict, serious public disorder and other complex human rights issues.

Migrants, on the other hand, are persons who leave their countries to seek material improvements in their lives. The key difference between migrants and refugees is that migrants enjoy the protection of their home countries; refugees do not.

Migrants do not fall within the criteria for refugee status and are therefore not entitled to benefit from international protection as refugees.

8.1. Some suggested solutions for Malaysia's refugee problems

It would be ideal if Malaysia were to be a party to the Refugee Convention. I hope that in the near future Malaysia will be a party to the Convention. But that is about for the future. In the meantime, however, there are certain measures that could be taken to alleviate the hardship faced by refugees and asylum seekers.

The first is the formal registration of all refugees and asylum seekers by the Government. It is true that refugees and asylum seekers registered with UNHCR

¹⁶ UNHCR: The UN Refugee Agency, *supra* n. 12

are issued by UNHCR with the UNHCR refugee cards; and these cards act as an identification for refugees in Malaysia and is meant to protect them from arrest. However, it is often reported that refugees are still vulnerable to arrest and detention as illegal immigrants even though they hold these cards. This is because, strictly in law, the UNHCR refugee cards have no legal standing; and, furthermore, many enforcement officers have yet to be familiarised with these cards.

From the refugees' standpoint, having proper documentation and identification means a lot to them, especially if they have never been recognised as citizens in their own country, like the Rohingyas in Myanmar.

Apart from the issuance of the identification cards, the refugees and asylum seekers should also be accorded access to some basic needs like employment, healthcare and education.

With this system of registration, refugees and asylum seekers in this country would no longer need to live in fear of arrest and detention, and at the same time the enforcement agencies could monitor and enforce immigration rules more easily.

Another measure that could be taken towards helping the refugee problem is to formally permit them to work. If permitted to work and given proper training, refugees and asylum seekers could make a better contribution to Malaysia's economy than what they could at the moment. If refugees and asylum seekers were to be given employment rights, they would become financially independent. They no longer have to rely on charity. They could live with dignity.¹⁷

9. Migrants

In 2015 the number of international migrants was about 244 million.¹⁸ Nearly two thirds of all migrants live in Europe (76 million) or Asia (75 million). Northern America hosted the third largest number of international migrants (54 million), followed by Africa (21 million), Latin America and the Caribbean (9 million) and Oceania (8 million).

In 2015, two thirds (67 per cent) of all international migrants were living in just twenty countries. The largest number of all international migrants live in the United States of America (47 million), followed by Germany with 12 million of migrants and the Russian Federation with also 12 million of migrants, and Saudi Arabia (10 million).

Nearly all countries are concerned by migration, whether as sending, transit, or receiving countries, or as a combination of these.

¹⁷ Aslam Abdul Jalil (2015, August 5). Solutions for Malaysia's long-suffering refugees. *New Mandala*. Retrieved from <http://www.newmandala.org/solutions-for-malaysias-long-suffering-refugees/>

¹⁸ United Nations, Department of Economic and Social Affairs, Population Division (2016). *International migration report 2015: Highlights* (ST/ESA/SER.A/375). New York: United Nations

9.1. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is a United Nations multilateral treaty governing the protection of migrant workers and families. Signed on 18 December 1990, it entered into force on 1 July 2003.

This United Nations Convention on the Protection of the Rights of All Migrant Workers constitutes a comprehensive international treaty regarding the protection of migrant workers' rights. It emphasizes the connection between migration and human rights.

As of May 2015, 48 states have ratified the Convention. The only ASEAN Country that has ratified the Convention is Philippines. Cambodia has signed the Convention but has yet to ratify it. Malaysia is not a party to this Convention.

So far, countries that have ratified the Convention are primarily countries of origin of migrants such as Mexico, Morocco and the Philippines. For these countries, the Convention is an important vehicle to protect their citizens living abroad. In the Philippines, for example, ratification of the Convention took place in a context characterized by several cases of Filipino workers being mistreated abroad: such cases hurt the Filipino population and prompted the ratification of the Convention.

No migrant-receiving state in Western Europe or North America has ratified the Convention. Other important receiving countries, such as Australia, Arab states of the Persian Gulf, India and South Africa have not ratified the Convention.

9.2. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

The ASEAN countries have recognized the importance of labour migration in the ASEAN region. In January 2007, ASEAN made a significant move to address the issues of migrant workers by adopting the **ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers**. The adoption of this declaration followed by the subsequent setting up in 2008 of the ASEAN Committee in the Implementation of the ASEAN Declaration (ACMW) demonstrate ASEAN's commitments to protect the rights of migrant workers.

The Declaration calls upon ASEAN States to ensure the dignity of migrant workers by undertaking the following obligations:

- (1) the protection of migrant workers from exploitation, discrimination, and violence;
- (2) the governance of labour migration; and
- (3) the fight against trafficking in persons.

The Declaration does not contain concrete and specific provisions on how to implement its provisions. Nevertheless, it is a significant move towards the creation of a sectoral mechanism or instrument that can further promote and protect the rights of migrant workers.

The ASEAN Committee in the Implementation of the ASEAN Declaration is currently in the process of drafting an ASEAN instrument on the protection and promotion of migrant workers' rights.

9.3. Migrant issues in Malaysia

Malaysia has always been and is very dependent on migrant labour for its economic growth. Presently Malaysia has about 6 million migrant workers of which 2.9 million are documented. The remainders are undocumented.¹⁹ In other words, the majority of migrants in Malaysia are undocumented. These migrants, documented or otherwise, are employed in various sectors such as manufacturing, construction, plantation and housemaids. The majority of them comes from Indonesia. The rest comes from countries such as Bangladesh, Nepal, Philippines, Thailand, Vietnam, Cambodia, Laos, Myanmar, Pakistan, Sri Lanka, India and China.

Currently migrant workers make up approximately 20% of the labour force in Malaysia. They make up around 50% of the construction workforce in the country, and nearly 60% of the workforce in the manufacturing sector.²⁰

In Malaysia, matters pertaining to terms and conditions of work of migrants are regulated by the Employment Act 1955 and the Workmen's Compensation Act 1952, under the administrative jurisdiction of the Labour Department. Issues regarding relations between employers and migrant workers are covered by the Industrial Relations Act 1967, while labour unions are regulated by the Trade Unions Act 1959. These laws are all overseen and implemented by the Ministry of Human Resources.

In addition to the above laws, migrant workers' affairs are also regulated by immigration laws and regulations, supplemented by policies from the Ministry of Home Affairs which issues work permits.

9.4. Legal problems concerning migrants

There are several legal problems that migrants in this country face. Time does not permit me to touch on every issue. I shall touch on a few.

¹⁹ Teh Wei Soon (2015, February 10). Migrant Workers: Malaysia's 'invisible' workforce. *Malaysian Digest*. Retrieved from <http://www.malaysiandigest.com/features/541277-migrant-workers-malaysia-s-invisible-workforce.html>

²⁰ Malaysian Digest, *supra* n. 19

9.4.1. Equality before the law

Article 8 of the Federal Constitution provides that 'All persons are equal before the law and entitled to equal protection of the law.'. This guarantee of equality extends to all persons whether citizens or not; and, accordingly, to all migrant workers whether documented or undocumented. This equality is also reflected in our Employment Act 1955 which applies to all workers, irrespective of whether the person is a local worker or a foreign worker. Even a migrant worker is accorded the right to make a complaint about discrimination at work to the Director General of Labour. However, there is a legal problem when it comes to trade unions. Although the Trade Unions Act 1959 provides that a migrant worker can be a member of a trade union, yet under the law he/she is prohibited from holding an executive position in trade unions.²¹ It can be argued that this prohibition is discriminatory and is in contravention of the Constitution.

9.4.2. Outsourcing of migrant workers

The majority of migrant workers in the manufacturing sector are not hired directly by the factories, but by outsourcing agents, which manage not only the bureaucratic aspects of the recruitment and migration process, but also the wages of foreign workers. In other words, these outsourcing companies have become direct employers. These labour outsourcing companies are approved and regulated by the Ministry of Home Affairs. Workers hired by such labour outsourcing companies remain the employees of those companies and not the employees of the factories where they work. This means that the responsibility for labour management has moved from the employer (for whom the migrant worker is actually working) to the outsourcing companies.

The legal issue that arises is in designating who is the responsible employer for the purpose of ensuring that wages, conditions of work, and other aspects of the treatment of migrant workers (such as accommodation, access to medical care, etc.) comply with the relevant labour laws. Under this outsourcing arrangement, it becomes technically possible for a factory owner to claim that he/she is not legally responsible for the unlawful treatment accorded to migrant workers in his/her factory because they were provided by a labour contractor.

9.4.3. Seizing of migrants' passports

In Malaysia, it is common practice for employers to seize migrant workers' passports upon arrival to this country. This practice is, however, illegal under the Passports Act. Nevertheless, the withholding of migrant workers' passports is widely used as a mechanism of control by employers over the workers which enhances their vulnerability and restricts their ability to move.

²¹ Trade Union Act 1959 (Act 262), section 28(1)(a)

9.4.4. Access to justice

Migrant workers are often fired by employers for filing complaints with government officials or groups like NGOs or trade unions. Termination of employment results in the ending of the work permit, which is the basis in law for the migrant's right to stay in Malaysia. Thus, filing a complaint prompts action by the employer that makes the migrant complainant subject to immediate deportation.

9.5. Perception towards migrants

Despite the fact that migrant workers actually contribute positively to our country, there is still uneasiness among some Malaysians on the presence of foreign workers. In general, the perception of Malaysians towards migrant workers has been quite negative.

Some even believe that the influx of foreign workers is the main cause of the increase in crime rates in the country. This is a fallacy because the cases of crime involving migrant workers are only less than 10% of the total crime cases nationwide.²²

9.6. The work of Tenaganita

This article is incomplete if I do not say a few words on the good work of a non-governmental organization called 'Tenaganita'. Tenaganita was founded in 1991, born out of the struggles of women workers in the plantation and industrial sectors to gain their rights as workers; for decent wages, for decent living conditions and to stop discrimination and gender based violence.

Today Tenaganita's scope has grown to address issues of exploitation, discrimination, unequal treatment and violence not just against women, but also against refugees, documented and undocumented migrant workers, trafficked persons and domestic workers.

I take the opportunity to pay my tribute to the late Dr. Irene Fernandes, the founder of Tenaganita, for her outstanding and courageous work to stop abuses of migrant workers.

10. Conclusion

Refugees do not come to this country out of their own free will. They are forced to flee for their lives from their country of origin because they have been persecuted on the basis of their beliefs or ideology or dissent. They do not choose to come to our country to live off our prosperous economy; they come here in the hope that

²² *Ibid*

their lives will be safer than it is back home. Their stay is temporary and hope to return when peace and democracy returns.

Personally, I hope someday in the near future Malaysia will be a party to the Refugee Convention and the 1967 Protocol. We have a moral duty towards humanity to be a party to this Convention. If Malaysia were to be a party to this Convention, then we can legalise the presence of refugees and asylum seekers in this country. Their status will no longer be that of illegal immigrants. They will then have access to medical facilities, to education, and to legal employments. They will be protected by our laws. They will not be exposed to exploitations. They will not be at risk of being the victims of human traffickers.

On migrants, although some migrants come to Malaysia because of choice, the vast majority of migrants, however, come to Malaysia because of economic hardship that they faced back home in their countries, and they look up to Malaysia as a place where they could find a decent employment in order to alleviate their economic hardship, as well as the economic hardship of their families back in their home countries.

Refugees and migrants are people and are entitled to be treated with dignity as human beings. We have a moral duty to make them feel welcome and secured. It must not be overlooked the fact that whilst there are migrants in this country, there are also Malaysian migrants overseas, in Australia, United Kingdom, Canada, New Zealand and the United States, towards whom we expect the host countries to accord respect, and fair and dignified treatment. We must appreciate the migrants' contribution to the economic development of our country. There must not be any feeling of prejudice towards refugees and migrants. They should not be looked upon as desperate or vulnerable people whom employers can take advantage off to exploit or to ill-treat. They deserve decent wages and fair terms of employment. They deserve the protection of the Constitution and the law.

I hope my keynote address will inculcate in the students of Taylors Law School awareness and interest or greater awareness and greater interest on the subject of migrants and refugees, particularly, on the legal aspects.

I end by wishing the students of the Law School all the best in your studies and a successful Law Awareness Day. Once again, thank you.