The Role of Various Stakeholders in the Incorporation of International Law for the Protection of Stateless Persons in Malaysia

Dr. Tamara Joan Duraisingam
Senior Lecturer, Taylor's Law School, Taylor's University
Tamarajoan.duraisingam@taylors.edu.my

Dr. Kuek Tee Say
Senior Lecturer, Taylor's Law School, Taylor's University
TeeSay.Kuek@taylors.edu.my

Saratha Muniandy
Lecturer, Taylor's Law School, Taylor's University
Saratha.Muniandy@taylors.edu.my

Abstract

This conceptual paper analyses the role of various institutions, be it governmental or non-governmental, regional or municipal, which through their actions may propel the Federal Government of Malaysia to consider protecting stateless persons who reside in Malaysia through the incorporation and application of international law domestically. Practices within the United Kingdom and the United States of America are evaluated to determine whether long-term solutions can take the form of supranational organizations. These states are selected as Malaysia shares characteristics of both states in its practices relating to stateless persons.[1]

Keywords: Stateless, refugees, monism, dualism.

1. Introduction

Malaysia like most developing states subscribes to the dualism theory of incorporating international law within the municipal sphere whereby international law would generally have to be incorporated before the law can be applied municipally due to the perception that both international law and municipal law operate in different spheres. States that subscribe to monism on the other hand allow for international law to apply directly as the theory acknowledges that both international law and municipal law operate in the same sphere. Since international law does not apply automatically within the State, certain categories of people who are marginalized due to lack of citizenship (i.e. stateless) have minimal recourse to legal protection in Malaysia. Various governmental and non-

[1] Ideas for this paper were presented at International Conference on Social Transformation, Community and Sustainable Development, University Malaysia Sabah, UNISZA &Imus Institute of Science and Technology from 7-9 November 2017.

governmental organizations therefore have come to the aid of stateless persons. In states like Malaysia, there is a need to maintain the fine balance between upholding State sovereignty and promoting transnational network systems which assist in the incorporation of international law for the protection of stateless persons residing in Malaysia.

Participation by non-state actors in human rights development of a State is rampant owing to the fact that the International Court of Justice has clearly recognized the increase of entities having qualified personality within the international system of law post WWII.[2] Non-state actors would include international governmental organizations like the United Nations, transnational groups or corporations as well as individuals. Most of the non-state actors have personality only between consenting subjects and have international rights and duties which are limited to their sphere of operation.[3] The United Nations is the exception to the general rule as it represents a vast majority of the international community.[4] It therefore has objective personality and is subject to a wide range of international rights and duties.

From these developments, one can deduce that there are various players who can assist in the promotion of incorporation of international law either directly via treaty accession and statutory implementation or indirectly through liberal interpretation of the Federal Constitution and use of the Monism method of incorporation of international law. NGOs, the media, regional bodies, treaties bodies and the national human rights institutions are able to promote incorporation of treaty law that protect stateless persons such as the *Convention relating to the Status of Stateless Persons 1954* (Stateless Persons Convention),[5] the *Convention on the Reduction of Statelessness1966* (Reduction of Statelessness Convention)[6] and the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (Hague Convention).[7] NGO initiatives, media and the inherent reporting mechanisms within treaties encourage governments to act in the manner that promotes human rights in the country. Regional bodies may provide additional support to State efforts in protecting the stateless person. Additionally, there could be a regional mechanism of addressing the issue of statelessness that would transfer the burden from the State individually to South East Asian States collectively. This conceptual paper analyses the role of various institutions be it governmental or non-governmental; regional or municipal which through their actions may propel the Federal Government to consider protecting the stateless person who resides in Malaysia through the incorporation of International Law. Practices within the United Kingdom (UK) and the United States of America (US) are evaluated to determine whether durable solutions can take the form of supranational organizations. These states are

[2] *Reparations Case* [1949] ICJ Rep 174.
[3] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 205.
[4] *Reparation for injuries suffered in the service of the Nations, Advisory Opinion* [1949] ICJ Rep 174, ICGJ 232.
[5] Convention Relating to the Status of Stateless (Stateless Persons Convention 1954) 360 UNTS 117.
[6] Convention on the Reduction of Statelessness (Reduction of Statelessness Convention 1961) 989 UNTS 175.
[7] Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, 179 LNTS 4137.

selected as Malaysia shares characteristics of both states in its practices which relate to stateless persons.

2. The Role of NGOs and the Media

In promoting incorporation of international law, entities that would have a role to play include the media and non-governmental organizations. Non-governmental organizations (NGOs) especially those with transnational reach have what is known as a "universalist understanding of human rights".[8] Such non-governmental organizations such as Amnesty International, SUARAM, MSRI actively work in Malaysia. Opinions of NGOs are important as NGOs are present in all levels of society, can be found across the region and have broad working relationships with trade unions, the media, academia as well as the private sector.[9] Depending on how aggressive these organizations are they will be able to influence governmental ministers in the decisions that they make. According to Thio, "Ministerial Pronouncements in a dominant party State carry quasi-law weight and shape expectations of how constitutional actors will act."[10]

As the two-party system is in its infancy in Malaysia, the once opposition party that has been able to assert control in the last elections can be influential in shaping the reception of international law on stateless persons provided they are receptive and open to the causes of the various transnational non-governmental organizations. NGOs, often perceived as busy-bodies, cranks or mischief makers could very well assist governments in various ways. The Government should also be reminded that these organizations already have *locus standi* in countries like the United Kingdom.[11] Therefore, actions of the government in relation to stateless persons may be eventually open to review in court through the efforts of the NGOs.

Constitutional law jurist MP Jain did state that the Malaysian law pertaining to *locus standi* for application for judicial review of administrative action seems "ancient and antiquated and out of tune with modern developments in judicial thinking in the common law world."[12] NGOs have a long way to go before *locus standi* be given in Malaysian courts.

Although the media and NGOs have a role to play in the universality of human rights treaties, States are in fact accountable to the policies that they promote. The traditional tenets of international law still hold weight today. Concepts such as territorial integrity,

[8] Mark Tushnet, 'The Inevitable Globalisation of Constitutional Law' (2009) 49 (4) VJIL 989.

[9] Hao Duy Phan, 'Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report' (2009) 31(3) Contemporary Southeast Asia 472.

[10] Li-annThio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4 National Taiwan University Law Review 343.

[11] *R v Secretary of State for the Environment ex parte Greenpeace Ltd* (No 2) (1994) 4 All ER 35.

[12] M.P Jain, *Administrative Law in Malaysia and Singapore* (3rd edn, Kuala Lumpur: Malayan Law Journal 1997) 765.

sovereign equality and non-interference assist the State in its promotion and implementation of human rights law. In contrast according to Parrish, 'new transnational leaders of globalization, i.e. corporations, the media, interest groups, religious organizations, as well as environmental, philanthropic and other non-governmental actors, are less accountable for the policies they promote'.[13]

Transnational networks have acted as the conduit to mobilize support for human rights by the gathering and disseminating information about human rights abuses, educating the public, defining human rights norms and lobbying governments.[14] Kingston gives the example of the 'Save Dafur' alliance in highlighting the positive role of such partnerships. Composed of more than one hundred organizations, the alliance's unity statement advocated the end of violence, facilitation of aid and safe return of displaced persons as part of its goals.[15] These are the boons of the network that ought to be maintained.

While various groups especially non-governmental and religious organizations within the State assist the stateless persons in Malaysia to a large extent, the onus is primarily on the State to ensure that various human rights standards do make their way into the local jurisprudence.

States are crucial to the creation of a world system that promotes human dignity for two reasons. Firstly, States are long-lasting entities whereas organizations may be dissolved at any point of time. A permanent existence is the virtue of the State but not a virtue possessed by organizations, be it national or international. Secondly, States are *ipso facto* subjects of international law whereas organizations do not automatically attain that status within the international forum.

Naturally there are banes in the traditional concept of sovereignty as well as some States do invoke territorial sovereignty to shield outside criticism and scrutiny of internal state practices.[16] State sovereignty is also not able to shed its imperialistic and colonial nature. Nonetheless it assigns to itself treaty obligations which is the product of negotiations and consent.[17] This signifies legitimacy in the practice of States.

As transnational networks do not have the ability to consent to treaty laws, their actions as such do not benefit from the characteristic of legitimacy. In sum States are the key promoters of human rights due to their staying power, status within the international

[13] Austen L Parrish, 'Rehabilitating Territoriality in Human Rights' (2011) 32 Cardozo Law Review 1106.
[14]David P Forsythe, *Human Rights In International Relations* (Cambridge University Press 2000) 166-72.
[15]Lindsey N Kingston, 'Legal Invisibility: Statelessness And Issue (Non) Emergence' (PhD, Graduate School of Syracuse University 2009) 167.
[16] David Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention* (2nd edn, London: Pluto Press 2006) 128-29.
[17]AL Parrish, 'Rehabilitating Territoriality In Human Rights' (2010) 32 Cardozo L. Rev 1124.

system and legitimacy of practice. Modern modes of incorporation of international law depend on a web of organizational influences.

The role of the media is important in addressing the issue of protection of stateless persons. For protection of stateless persons to appear as a core interest within the State, all organizations and institutions of the State would have to first understand the concept of statelessness and second realize that it is a conundrum of Malaysian society that needs to be given attention to. The media plays a strong influence in providing knowledge on the plight of the stateless person. Statelessness unfortunately has failed to emerge as an issue which grabs the public's attention. Kingston is of the view that the story of statelessness fails to emerge due to three factors[18]:-

Firstly, the story of statelessness is difficult to construct. A clear image of a stateless person does not appear and the narrative would not be all that easily understood. Secondly the issue lacks credible solutions at global level. There are various causes of statelessness and each cause may require a separate solution. The message therefore would be difficult to market and promote. Thirdly there is lack of political will due to the fact that statelessness has a close nexus to the concept of sovereignty.

Additionally, statelessness has always had to make way for refugee protection and rights. The refugee issue does not suffer the consequences of those factors extrapolated by Kingston. As the NGOs do not focus on the plight of the stateless and the media would find it difficult to clearly explain the issue, the institutions of government including the judiciary may not feel the need to develop this area of law. The other alternative would be to allow for regional bodies to highlight and address the issue of statelessness.

3. Roles of Regional Bodies

Just as NGOs and the media play an important role, regional bodies are also able to influence incorporation of international law. Within the European States, since the creation of the European Convention of Human Rights in 1951, a system has been put in place to ensure that States abide by European human rights law. Even dualist States like the United Kingdom that refused to incorporate the convention into local law until almost 50 years later, by virtue of the Human Rights Act 1998 have been held responsible for human rights violations within the regional plane. Hence the enforcement mechanism is strong. European based concepts like proportionality of governmental action or decision have made their way into the more conservative States like the United Kingdom due to the maturity of its transnational treaty body.

[18]LN Kingston, 'Legal Invisibility: Statelessness And Issue (Non) Emergence' (PhD, Graduate School of Syracuse University 2009) 7.

Within our region, ASEAN may be able to emulate the methods employed within the European system provided the rights protected are those rights that are suitably chosen for the region. At present there exists the ASEAN Intergovernmental Commission on Human Rights that handles matters in relation to human rights. Its mandate and functions have included developing strategies for the promotion of human rights; developing an ASEAN Human Rights Declaration; enhancing public awareness, promotion of capacity building; encouraging States to accede to international Human Rights instruments; promoting full implementation of ASEAN instruments relating to human rights; providing advisory, technical and consultative assistance; obtaining information from ASEAN Member States, developing common approaches, preparing studies and submitting annual reports.[19]

This Commission therefore merely plays a promotional and consultative role and is yet to achieve the level of competence that already exists within the European system. Respondents of an expert based survey on regional human rights co-operation in Southeast Asia were of the view that ASEAN member States lacked the readiness that was required for a protective rather than promotional body.[20] Looking at how ASEAN has been slowly developing, the South East Asian region sits more than fifty years behind the EU. Fortunately, there is the EU model in place that would allow for the expansion of human rights law enforcement within the ASEAN region.

4. Roles of Treaty Bodies

Major human rights treaties provide for a system of reporting which inadvertently leads to greater involvement of international law within the domestic setting. The Committee on the Elimination of Discrimination against Women established under Article 17 of *the Convention on the Elimination of All Forms of Discrimination against Women 1979* (CEDAW)[21] is an example of such treaty-based bodies. Although there have been criticisms as to its competencies, nonetheless it is a Committee that has been established for purposes pertaining to the implementation of this treaty which other treaties may lack. Article 43 of the *Convention on the Rights of the Child* 1989 (CRC)[22] which provides for the creation of a monitoring body referred to as the Committee on the Rights of the Child is yet another example. The UNHCR was created prior to the *Convention relating to the Status of Refugees 1951* (Refugees Convention).[23] Refugees Convention creates the body that oversees not only the workings of the Refugees Convention but also the Stateless Persons Convention.

[19] Association of Southeast Asian Nations (ASEAN), Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, July 2009 <https://www.refworld.org/docid/4a6d87f22.html> accessed 22 February 2019.
[20] Hao Duy Phan, 'Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report' (2009) 31 Contemporary Southeast Asia 478.
[21] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979) 1249 UNTS 13.
[22] Convention on the Rights of the Child (CRC 1989) 1577 UNTS 13.
[23] Convention Relating to the Status of Refugees (Refugees Convention 1951) 189 UNTS 150.

For most part, State parties are required to report to supervisory bodies created under treaty.[24]

Although human rights treaties have their own monitoring mechanism to achieve compliance by the State, there are different levels of supervision that takes place. Article 35 of the Refugees Convention focuses on co-operation that the UNCHR needs from the States. During the 25th Meeting of the 2nd Conference of Plenipotentiaries,[25] a great deal of the discussion between representative States was related to who would be the one the State would have to co-operate with rather than the nature of the supervisory function of the said organization. Hence Article 35 is not considered to be a robust monitoring provision as Article 17 of CEDAW and Article 43 of CRC profess to be. Furthermore, there is no equivalent provision within the Stateless Persons Convention underscoring the point that there is no one monitoring body specifically monitoring the application of the Stateless Persons Convention. Nevertheless, UNHCR has spearheaded important developments in legal principal.[26] From 1995 onwards, ExCom conclusions and General Assembly resolutions have progressively developed UNHCR's mandate on statelessness[27].

NGOs are also given the opportunity to present shadow reports. In this way, compliance to international treaty obligations is monitored. It ought to be noted however that not all of the treaties provide for such a committee. As with the Stateless Persons Convention, The Hague Convention and the *Convention on the Nationality of Married Women 1957* (Nationality Convention)[28] do not create such committees. Apart from which the committees themselves may not be all that effective as it is unable to hear inter-state or individual complaints and therefore is unable to take enforcement action as such.

CEDAW through its optional protocol mandates the committee to receive communications from individuals or groups of individuals and may initiate inquiries.[29] Unfortunately, not all conventions have this mandate. Be that as it may, the media plays a vital role as adverse reporting will affect the reputation of the State. Examples of such negative media reporting include the refugee swap deal between Malaysia and Australia. This can be seen as a non-legal constraint to the State's actions. International perception of legality of State action is

[24] Rebecca J. Cook, 'Women's International Human Rights Law: The Way Forward' (1993) 15 Human Rights Quarterly 252.

[25] 'Conference Of Plenipotentiaries On The Status Of Refugees And Stateless Persons', *Summary Record of the twenty-fifth Meeting* 1951 (UN Doc A/CONF2/SR25).

[26] Michelle Foster and Hélène Lambert, 'Statelessness As A Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 571.

[27] Matthew Seet, 'The Origins of UNHCR'S Global Mandate On Statelessness' (2016) 28 International Journal of Refugee Law 11.

[28] Convention on the Nationality of Married Women (Nationality Convention 1957) 989 UNTS 175.

[29] For more information about the Committee on the Elimination of Discrimination against Women, see its web page <http://www2.ohchr.org/english/bodies/cedaw/index.htm> accessed 28 March 2013.

important and provides the impetus for States to go in-line with international human rights standards.

5. The Role of National Human Rights Institutions

The developments that have taken place through human rights law has created what can be termed as 'hybrid organizations' known as National Human Rights Institutions (NHRIs). States have sponsored or created their own human rights organizations as a way to exert greater influence in the international arena.[30] In Malaysia the relevant organization would be the Human Rights Commission of Malaysia (SUHAKAM) created via an act of parliament i.e. the Human Rights Commission of Malaysia Act 1999 (Act 597) and which officially began its work in the year 2000.[31]

NHRIs become part and parcel of the transnational network system which is a form of 'cross-border collective action to promote compliance with universally accepted norms.[32] Networks can be defined as "a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors" for whom cooperation is the best way to achieve common goals.[33] These transnational network systems may pressure the government to act in a manner compatible with international human rights standards.

Bodies like SUHAKAM act as a bridge between international human rights standards and their implementation at the national level.[34]The 1991 Principles relating to the status and functioning of national institutions[35] (the Paris Principles) enunciates the role of the NHRIs as the promoter of human rights treaties at national level at the same time contributing to the State's reporting function. Even though the Paris Principles is merely soft law, the international statement is one of the most authoritative statements made thus far. Nonetheless the powers vested unto SUHAKAM is in fact a far cry from the criteria put forward within the Paris Principles.

[30]Pierre-Marie Dupuy and Luisa Vierucci, *Ngos In International Law* (Edward Elgar Publishing Limited 2008) 71.

[31]Suruhanjaya HakAsasiManusia Malaysia (SUHAKAM) - My Profile' (*Suhakam.org.my*, 2019) <http://www.suhakam.org.my/info/profile> accessed 22 February 2019.

[32] Hans Peter Schmitz, 'Transnational Human Rights Networks: Significance And Challenges' Syracuse University <http://www.isacompss.com/info/samples/transnationalhumanrightsnetworks_sample.pdf> accessed 22 February 2019.

[33] Tanja Borzel, 'Organizing Babylon-On the Different Conceptions of policy Networks' (1998) 76 Public Administration254.

[34] Richard Carver, 'A New Answer to an old question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 Human Rights Law Review 2.

[35]Principles relating to the status and functioning of national institutions for protection and promotion of human rights (endorsed by the UN Commission for Human Rights Res. 1992/54, 3 March 1992, annexed to GA Res. A/RES/48/134, 20 December 1993, A/RES/48/134).

The Paris Principles provide that a national institution may be authorized to hear and consider complaints and petitions concerning individual petitions and may have quasi-judicial competence in that respect. The functions entrusted to them are based on:-

(a) Seeking an amicable settlement through conciliation, binding decisions or on the basis of confidentiality;
(b) Informing parties about their rights and remedies and promoting access to them;
(c) Hearing complaints or petitions or transmitting them to any other competent authority and
(d) Making recommendations to competent authorities.[36]

SUHAKAM however does not have this far reaching authorization and acts merely as an advisory body without quasi-judicial enforcement powers.[37] The Paris Principles also provides for submission of opinions, recommendations, proposals and reports to Parliament. The Human Rights Commission Act 1999 merely provides for reports to be submitted to parliament under S. 21 of the Act. SUHAKAM could therefore have been vested with more powers, had all the criteria of the Paris Principles been applied domestically.

As the Paris Principles were only adopted by the General Assembly in 1993, initial human rights treaties created have not provided for the creation NHRIs to implement human rights law domestically. At the most, an international treaty body would be created to facilitate enforcement. The Stateless Persons Convention does not provide for an international body, neither does it provide for the creation of NHRIs. More modern human rights treaties however have been drafted to incorporate the role of NHRI's. One such example would be Article 33(2) of the *Convention on the Rights of Persons with Disabilities 2006*[38]which has in fact been acceded to by the Malaysian Government. It is hoped that the NHRIs would be the link between States and human rights regimes. As noted in the earlier paragraph however even if the convention stipulates specifically the obligations of the NHRI, it is still subject to the local legal system in terms of the manner in which the said NHRI would operate. SUHAKAM for instance is confined by its limited functions based on Section 4(1) of Act 597.

According to Carver, NHRIs are given different mandates depending on the statute creating it. Of the statutes surveyed by Carver, 45 percent provide that the institutions have a treaty

[36] Additional principles concerning the status of commissions with quasi- judicial competence, The Paris Principles.
[37] Human Rights Commission of Malaysia 1999 (Act 597), section 4.
[38] Article 33 National implementation and monitoring:
'*States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights*.'
Convention on the Rights of Persons with Disabilities 2006, GA Res. 61/106 Annex 1, A/61/49 (2006).

mandate whereby the NHRI is given authority to explicitly apply international human rights treaty law, in particular those treaties that have been ratified by the State. 10 percent have a national mandate, i.e. the institution only has mandate to promote or protect treaty rights that are explicitly contained in national law. Another 45 percent of statutes mandate the institution to defend human rights generically. This is termed as an unspecified mandate.[39]

Even though the Asian continent displays the highest proportion of statutes with treaty mandate, nonetheless the Human Rights Commission of Malaysia Act 1999 (Act 597) merely provides for a national mandate.[40] "Human rights" is defined in the act to refer to fundamental liberties as enshrined in Part II of the Federal Constitution.[41] This may be expected since Malaysia is a dualist State which focuses on the national laws and would only refer to treaty provisions provided they are incorporated within the domestic system. Nonetheless Section 4(4) of Act 597 does state that "For the purpose of this Act, regard shall be had to the *Universal Declaration of Human Rights 1948* (UDHR) to the extent that it is not inconsistent with the Federal Constitution".[42] As such SUHAKAM may not be directly enforcing treaty law within the State but does have its role to play in safeguarding human rights on a higher plane than what was previously safeguarded in Malaysia before the act came into force.

Nonetheless the UDHR has not been liberally utilized by the judiciary. One of the setbacks to the liberal usage of international human rights law is the fact that the UDHR articles looked at must be in line with the provisions of the Federal Constitution which include fundamental liberties enshrined in Part II of the Federal Constitution. These fundamental liberties however do not cover all first, second and third generation human rights which are available within the general understanding of the term. Rights that are covered are merely liberty of the person,[43] rights against slavery and forced labour,[44] protection against retrospective criminal laws and repeated trials,[45] equality before the law,[46] prohibition of banishment and freedom of movement,[47] freedom of speech, assembly and association,[48] freedom of religion,[49] rights in respect of education[50] and rights to property.[51] Furthermore, even the rights covered through the Federal Constitution are limited in scope if compared to

[39] Richard Carver, 'A New Answer To An Old Question: National Human Rights Institutions And The Domestication Of International Law' (2010) 10 Human Rights Law Review 6.
[40] ibid 10.
[41] Human Rights Commission of Malaysia Act 1999, section 2.
[42] Universal Declaration of Human Rights 1948 (UDHR) U.N.Doc.A/810, 71.
[43] Federal Constitution of Malaysia 1957, Article 5.
[44] Federal Constitution of Malaysia 1957, Article 6.
[45] Federal Constitution of Malaysia 1957, Article 7.
[46] Federal Constitution of Malaysia 1957, Article 8.
[47] Federal Constitution of Malaysia 1957, Article 9.
[48] Federal Constitution of Malaysia 1957, Article 10.
[49] Federal Constitution of Malaysia 1957, Article 11.
[50] Federal Constitution of Malaysia 1957, Article 12.
[51] Federal Constitution of Malaysia 1957, Article 13.

similar provisions under the UDHR. Hence application of the UDHR by the judiciary is in that sense somewhat limited. Certain provisions within the Federal Constitution refer to citizens alone thereby leaving stateless persons out of the equation.

Although Section 4(4) of Act 597 is open to liberal interpretation, nonetheless the case law pertaining to the application of the UDHR has been rather static. In the case of *Merdeka University Bhd v Government of Malaysia*[52] which was decided before the establishment of SUHAKAM, Justice Abdool Cader did state that "the Universal Declaration of Human Rights … is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules." Case law post establishment of SUHAKAM unfortunately employ a similar method of interpretation. In *Than Siew Beng & Anor v KetuaPengarahJabatanPendaftaran Negara &Ors*[53] it was stipulated that the UDHR is merely a declaration, it is not a legally binding document for the High Court to give effect. As such the UDHR would only apply upon adoption through legislation. This understanding was repeated in the case of *Lim Jen Hsien & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*.[54]According to the court, the position has not changed even with of the enactment of S.4 (4) of Act 597. Hence even though there is an avenue for judges to allow for the UDHR to have effect in the State via liberal interpretation of the statute establishing SUHAKAM, judges are still reluctant to do so.

Regardless of incorporation of the UDHR, Carver does point out that SUHAKAM appears to make considerable use of the insertion of international law into Act 597.[55] SUHAKAM does for example monitor the treatment of prisoners in order to ensure that there is compliance with the UN Standard Minimum Rules on the Treatment of Prisoners[56] in spite of the fact that Malaysia is a dualist nation that confines the mandate of the Commission to enforce rights protected in the national constitution. Section 4(2)(d) of Act 597 specifically grants power to SUHAKAM to visit places of detention in accordance with procedures as prescribed by the laws relating to places of detention and to make necessary recommendations. Within this monitoring process, treatment of stateless refugees is closely watched by SUHAKAM as well.

No doubt the Refugees Convention is yet to be acceded to, nonetheless the provisions of the UDHR especially those that relate to non-discrimination as well as certain international custom such as the principle of non-refoulment acts as sufficient mandate for SUHAKAM to act on refugee issues.[57] SUHAKAM has for example secured access to places of detention for

[52] *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, p 366.
[53]*Than Siew Beng& Anor v KetuaPengarahJabatanPendaftaran Negara &Ors* [2015] 2 MLJU 2059.
[54] *Lim Jen Hsien & Anor vKetuaPengarahJabatanPendaftaran Negara &Ors* [2017] 8 MLJ 122.
[55] Richard Carver, 'A New Answer To An Old Question: National Human Rights Institutions And The Domestication Of International Law' (2010) 10 Human Rights Law Review 14.
[56] Human Rights Commission of Malaysia (Annual Report 2007) 76.
[57] Human Rights Commission of Malaysia (Annual Report 2007) 76.

the UNHCR.[58] SUHAKAM acts as the conduit between UNHCR and the government. The outcome of meetings between SUHAKAM and UNHCR have been conveyed to the Malaysian National Security Council and other governmental agencies.[59]

The problem that arises at this juncture is that the work of SUHAKAM in relation to refugees does not get official support from the institutions of government due to lack of accession to the Refugees Convention. As such attention to the plight of the refugee is sporadic and piecemeal. There is no systematic assistance to this group of persons within Malaysia coming from the NHRI. The same can be said about stateless persons as there is no hint of State accession to the Stateless Persons Convention. Nevertheless, there has been progress whereby on 14 September 2017, an MOU was signed between SUHAKAM and UNHCR to formalize their commitment towards protection of rights of stateless persons amongst others.[60]

Carver therefore only paints half the picture though his analysis. He fails to look at the judicial trend and include in his analysis pertinent case law like *Merdeka University Bhd v Government of Malaysia*,[61]*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara*[62]or *SIS Forum (Malaysia) v Dato' Seri Syed Hamid Albar*[63]which demonstrates a different perception of the role of SUHAKAM within the municipal sphere.

Nonetheless, the method employed within the local NHRI seems conventional and suited to the State that wants to promote human rights in a slow, fluid and consistent manner as opposed to liberal, more aggressive incorporation of international human rights law. There are advantages to having this method of subtle incorporation of international human rights law. According to Carver, "international standards elucidate the content of applicable rights".[64] A clear interpretation of international law assists in the further growth and development of good human rights standards within the State. Apart from which "NHRIs use international standards as a means of extending the scope of rights that are applicable at the municipal level".[65] Carver in fact gives Malaysia as the example where rights are extended to refugees residing in the State.

According to Section 4(1)(c) of Act 597, SUHAKAM is able to make recommendations to the executive on the various treaties or other international instruments that ought to be

[58] Human Rights Commission of Malaysia (Annual Report 2007) 104-105.
[59] Suruhanjaya HakAsasiManusia Malaysia (SUHAKAM) - My Profile' (*Suhakam.org.my*, 2019) <http://www.suhakam.org.my/info/profile> accessed 22 February 2019.
[60] Human Rights Commission of Malaysia (Annual Report 2017) 23.
[61] *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356.
[62] *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449.
[63]*SIS Forum (Malaysia) v Dato' Seri Syed Hamid Albar*[2010] 2 MLJ 377**.**
[64] Richard Carver, 'A New Answer To An Old Question: National Human Rights Institutions And The Domestication Of International Law' (2010) 10 Human Rights Law Review 16.
[65] ibid 13.

subscribed or acceded to by the State. For SUHAKAM this is a central aspect of their work looking at the number of treaties that have been acceded to thus far by the Malaysian government.[66] NHRIs also do monitor legislation for compliance with international human rights law. S. 4(2)(c) specifically stipulates that the Commission may study and verify any infringement of human rights in accordance with the provisions of the Act. Although SUHAKAM focuses on governmental accession to the six core human rights treaties,[67] nonetheless SUHAKAM has conveyed to the government the view that there is room for the government to comply with the Refugees Convention on a progressive basis.[68] SUHAKAM however has yet to recommend accession to the Stateless Persons Convention.

NHRIs are able to propose laws that will give substance to the State's human rights treaty obligations. This is however an extensive process that not all NHRIs including SUHAKAM are ready to commit to. NHRIs in certain States do not stop at mere recommendations but actually do involve themselves in legislative initiation. There are also NHRIs that draft proposal for laws or amendments and later present these to parliamentarians willing to tableit in the House of Representative or Select Committee meetings. Examples of those States include Latin American States like Columbia and Peru.[69]

Again, SUHAKAM is yet to acquire such extensive mandate and therefore at present remains uninvolved in legislation initiation. In fact, even recommendations made by SUHAKAM are not necessarily accepted by the government. For example, SUHAKAM has for some time now pressed for accession to ICCPR and ICESCR. This however has not been acceded to by the Federal Government. Even though S.21 (1) stipulates that SUHAKAM is to submit its annual report to Parliament every year, nowhere in S.21 is it stated that these reports are to be debated in Parliament.

6. Durable Solutions through Supranational Organizations

Apart from mere promotion of incorporation of international law, one of the durable methods of dealing with statelessness within South East Asia would be through regional mechanisms rather than individual efforts of the State. Malaysia through the Association of South East Asian Nations (ASEAN) may need to establish a regional arrangement similar to that of the European Union (EU). The EU as a regional system of law has validity and legitimacy through the creation of treaties that govern the relationship between member states. So too ASEAN through the ASEAN Charter ratified by all member states of ASEAN has transformed itself from "a loose association into a union consolidated by a legally binding

[66] ibid 16.
[67] Human Rights Commission of Malaysia (Annual Report 2016) 6.
[68] Human Rights Commission of Malaysia (Annual Report 2016) 178.
[69] Richard Carver, 'A New Answer To An Old Question: National Human Rights Institutions And The Domestication Of International Law' (2010) 10 Human Rights Law Review 13.

treaty"[70]. As certain key areas of law like asylum, immigration and refugee protection come under the purview of the EU, past practices within the United Kingdom prior to Brexit become important to shed light into how the burden of dealing with such instances is shared between EU states. The EU arrangements could be used as a model for ASEAN member States.

Data from the United States is relevant as the United States, like Malaysia, is a Federation albeit greater in size and population. The United States in contrast to the United Kingdom is not party to the Stateless Persons Convention. Contrary to the practice of the United Kingdom and Malaysia, the United States generally upholds the theory of monism in the incorporation of international law within its municipal system. The United States applies the principle of nationality based on the place of birth. Whereas Malaysia and the UK principally apply the principle based on descent of parents.

Malaysia shares the characteristics of both these States. Like the United Kingdom, Malaysia abides by dualism and goes by the philosophy that international law only becomes part of municipal law with the incorporation of a treaty via an act of parliament. Emulating characteristics of the United States, Malaysia too is not a party to the Stateless Persons Convention.

In comparison with United Kingdom's existing membership to the EU and Malaysian membership in ASEAN, the mechanism in place within the EU is rather advanced in spite of it being less than 60 years since its inception. One of the primary aims of the *Treaty of Rome* 1957 (hereinafter known as the EC Treaty) when it established the European Economic Community (now known as the European Union) was to remove the obstacles to the free movement of persons as highlighted in Article 3(1)(c) EC Treaty.[71]*The Treaty of Maastricht on European Union 1992*[72] (hereinafter known as the Maastricht Treaty) established a three-pillar structure for the EU. Asylum seekers fell under the third pillar of Justice and Home Affairs. Under this pillar, each State negotiated and agreed with one another as equals on particular points. Justice and Home Affairs Ministers from each sovereign state of the EU naturally favoured securitarianism over humanitarianism. Hence asylum issues were dealt with inter-governmentally.[73]

The EU institutions predominantly the European Council, the European Parliament and the European Commission were initially not involved in the regulation of asylum seekers, which would include stateless persons and refugees. A new method of policy making also emerged

[70] Yuval Ginbar, 'Human rights in ASEAN-setting sail or treading water?' (2010) 10(3) Human Rights Law Review 504.
[71] Treaty Establishing the European Economic Community 1957 (EC Treaty) 298 UNTS 11.
[72] Treaty of Maastricht on European Union 1992 (Maastricht Treaty) OJ C 224,1.
[73]Satvinder S Juss,'The Decline and Decay of the European Refugee Policy,' (2005) 25 Oxford Journal of Legal Studies 751.

under the Maastricht Treaty known as 'intensive transgovernmentalism'. This method allowed subordinates to the Heads of State to make decisions for the State. By virtue of the Treaty of Amsterdam 1997,[74] reception of asylum seekers, procedures for the granting and removal of refugee status and temporary protection for displaced persons are now regulated by the institutions of the EU.[75]

Regardless of the existence EU law in this area of asylum seekers, it cannot be denied that a restrictive immigration regime is the political landscape which Satvinder refers to as securitarianism over humanitarianism.[76] Commentators like Nathwani[77] and Feller[78] do not entirely agree with this stance. The mischaracterization of those in need of asylum causes the refugees and stateless persons to be classified as irregular migrants even though their plight is far more precarious than any other migrant. Control of movement therefore seems to be more important than seeing to their needs. There is the unfortunate link in the public mind between international terrorism and asylum which again causes tighter immigration rules. This coupled with the fact that the United Kingdom only became a member of the EU in 1973, chose to refrain from being part of all the treaties within the EU treaty system and decided to exit the EU from March 2017 onwards, indicates that not all EU initiatives may be sound and feasible to be emulated by ASEAN.

Law and practice of the United States is reviewed at this point as the United States, being a federation like Malaysia, shares the characteristic of failing to accede to the Stateless Persons Convention. Apart from that, various trends in the incorporation of international law within the municipal system have been developed within United States international law jurisprudence and could have a bearing on the Malaysian practice. With regards to asylum seekers in the United States, a Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America[79] highlights that protection accorded to the asylum seeker within the EU is relatively strong compared to the United States. Asylum seekers are generally not entitled to government support in the United States save for a few minor exceptions. The EU has sufficient legislation that enables the court to effectively enforce rights of the asylum seeker. This however is lacking within the United States asylum system and even more so with the Trump administration. There is an inability to call upon

[74] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts 1997 (Amsterdam Treaty) OJ C 340, 173.

[75] Anthony W Bradley & KD Ewing, *Constitutional and Administrative Law* (14thedn, England: Pearson, Education Ltd 2007) 466.

[76]Satvinder S Juss, 'The Decline and Decay of the European Refugee Policy,' (2005) 25 Oxford Journal of Legal Studies 751.

[77] Niraj Nathwani, 'The Purpose of Asylum,' (2000) 12 International Journal of Refugee Law 355.

[78] Erika Feller, 'Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come,' (2006) 18 International Journal of Refugee Law 512.

[79] R Hansen, S Martin, A Schoenholtz, P Weil, 'Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America' (2000) 14 Georgetown Immigration Law Journal 801.

basic protective functions of the state[80] for fear of deportation. It is contended that Malaysia too lacks a system of effective enforcement of rights for the asylum seeker which may include the stateless person.

One must take note of the fact however that the geographical landscape of States does have an influence on matters of asylum since insular States would be able to screen immigrants more carefully compared to continental states; an example being France. Within this perspective, we do share the characteristics of both the United States and the United Kingdom. The United States' main immigration in-flow of persons which causes problems for the State would be that of arrivals from Mexico. Apart from that, the United States is not geographically positioned to allow for asylum seekers to make their way there. The EU on the other hand has had to deal systematically and aggressively with the asylum issue within EU member states simply because the in-flux of asylum seekers makes administration of asylum more onerous. Even way back during the 24th Meeting of the 1st Conference of Plenipotentiaries, it was already acknowledged that there was a distinction between insular and continental countries.[81] Malaysia being an insular state apart from its connection to Thailand would allow for more stringent immigration control at borders and inadvertently less enforcement of rights for the asylum seeker.

7. Conclusion

Domestic systems within the international legal framework have developed in such a way to allow for greater reception of international law in spite of traditional theories being subscribed by States, including Malaysia. Traditional theories like dualism which form the basis of Malaysian reception on international law, is slowly giving way to monism through unconventional judicial interpretation techniques. This coupled with the role of various stakeholders in promoting the incorporation of international law provides constant support for the State in applying international law rules. Be that as it may, States have not chosen to abandon the dualist approach. Malaysia for one is clearly dualist in its reception of both treaty and customary international law. General judicial approaches to international law and the promotional role of NGOs, the media, ASEAN, treaty bodies and SUHAKAM, the Malaysian human rights watchdog, have not caused an abandonment of dualism in favour of monism. At the most, there is what seems to be a gradual encroachment of international human rights law into the Malaysian legal system. This gradual encroachment can be seen as a boon in allowing for the plight of the stateless to be addressed in the State in a clear and systematic manner. Even regional sub-systems like the EU have seen the need to take the reins when it comes to asylum cases to ensure that a balance is met between the

[80]Jaya Nogales, 'The Right To Have Rights: Undocumented Migrants And State Protection' (2015) 63 Kansas Law Review 1045.

[81]'Conference Of Plenipotentiaries On The Status Of Refugees And Stateless Persons', *Summary Record of the twenty-fifth Meeting* 1951 (UN Doc A/CONF2/SR25).

securitarian approach on one side and the humanitarian approach on the other. Whether this would be emulated by ASEAN is however yet to be seen.

REFERENCES

Legislation

Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 (Hague Convention) 179 LNTS 4137.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979) 1249 UNTS 13.

Convention on the Nationality of Married Women (Nationality Convention 1957) 989 UNTS 175.

Convention on the Reduction of Statelessness (Reduction of Statelessness Convention 1961) 989 UNTS 175.

Convention on the Rights of Persons with Disabilities 2006, GA Res. 61/106 Annex 1, A/61/49 (2006).

Convention on the Rights of the Child (CRC 1989) 1577 UNTS 13.

Convention Relating to the Status of Refugees (Refugees Convention 1951) 189 UNTS 150.

Convention Relating to the Status of Stateless Persons (Stateless Persons Convention 1954) 360 UNTS 117.

Federal Constitution of Malaysia 1957.

Human Rights Commission of Malaysia 1999 (Act 597).

Principles relating to the status and functioning of national institutions for protection and promotion of human rights (endorsed by the UN Commission for Human Rights Res. 1992/54, 3 March 1992, annexed to GA Res. A/RES/48/134, 20 December 1993, A/RES/48/134).

Treaty Establishing the European Economic Community (EC Treaty 1957) 298 UNTS 11.

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts (Amsterdam Treaty 1997) OJ C 340.

Treaty of Maastricht on European Union (Maastricht Treaty 1992) [1992] OJ C 224.

Universal Declaration of Human Rights (UDHR 1948) U.N.Doc.A/810 p 71 (1948).

Cases

Lim Jen Hsien & Anor v Ketua Pengarah Jabatan Pendaftaran Negara &Ors [2017] 8 MLJ 122.

Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356.

Merdeka University Bhd v Government of Malaysia 2 MLJ 356.

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara [2002] 4 MLJ 449.

R v Secretary of State for the Environment ex parte Greenpeace Ltd (No 2) (1994) 4 All ER 35.

Reparation for Injuries Suffered in the Service of the United Nations 1949 ICJ Reports 174.

SIS Forum (Malaysia) v Dato' Seri Syed Hamid Albar[2010] 2 MLJ 377**.**

Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara &Ors [2015] 2 MLJU 2059.

Books

Bradley W. & Ewing K.D, *Constitutional and Administrative Law* (14thedn, England: Pearson, Education Ltd 2007).

Chandler D, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention* (2nd edn, London: Pluto Press 2006).

Dupuy PL Vierucci, *NGOs In International Law* (Edward Elgar Publishing Limited 2008).

Forsythe D.P, *Human Rights in International Relations* (Cambridge university press 2000).
Human Rights Commission of Malaysia, Annual Report 2016.
Jain M.P, *Administrative Law in Malaysia and Singapore* (3rd edn, Kuala Lumpur: Malayan Law Journal 1997).
Kingston L.N., 'Legal Invisibility: Statelessness and Issue (Non) Emergence' (PhD, Graduate School of Syracuse University 2009).
Shaw M.N, *International Law* (8th edn, Cambridge University Press 2017).

Journal Articles

Borzel T, 'Organizing Babylon-On the Different Conceptions of policy Networks' (1998) 76 Public Administration 254.
Carver R, 'A New Answer to an old question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 Human Rights Law Review 2.
Cook R.J, 'Women's International Human Rights Law: The Way Forward' (1993) 15 Human Rights Quarterly 252.
Feller E, 'Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come' (2006) 18 International Journal of Refugee Law 512.
Foster M. and Lambert H., 'Statelessness as A Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 571.
Ginbar Y., 'Human rights in ASEAN-setting sail or treading water?' (2010) 10(3) Human Rights Law Review 504.
Hansen R., Martin S., Schoenholtz A., Weil P., 'Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America' (2000) 14 Georgetown Immigration Law Journal 801.
Hao Duy Phan, 'Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report" (2009) 31(3) Contemporary Southeast Asia 472.
Li-annThio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4 National Taiwan University Law Review 343.
Nathwani N., 'The Purpose of Asylum,' (2000) 12 International Journal of Refugee Law 355.
Nogales J., 'The Right to Have Rights: Undocumented Migrants and State Protection' (2015) 63 Kansas Law Review 1045.
Parrish, A.L. 'Rehabilitating Territoriality in Human Rights' (2011) 32 Cordozo Law Review 1106.
Phan H.D., 'Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report' (2009) 31 Contemporary Southeast Asia 478.
Satvinder S., 'The Decline and Decay of the European Refugee Policy (2005) 25 Oxford Journal of Legal Studies 751.
Schmitz H.P., 'Transnational Human Rights Networks: Significance and Challenges' Syracuse University <http://www.isacompss.com/info/samples/transnationalhumanrightsnetworks_sample.pdf> accessed 22 February 2019.
Seet M., 'The Origins of UNHCR'S Global Mandate On Statelessness' (2016) 28 International Journal of Refugee Law 11.
Tushnet M., 'The Inevitable Globalisation of Constitutional Law' (2009) 49(4) VJIL 989.