

Migration and Statelessness: Turning the Spotlight on Malaysia

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ABSTRACT

Migration has been a socio-political hallmark in Southeast Asia, more so in recent times as the region advances towards an ASEAN community by 2015. With its steady economic growth and internal political stability, Malaysia receives the most number of migrants aside from Thailand and Singapore. Statelessness and its risk look set to continue in the long run both as a cause and implication of cross-border movement of persons. A considerable number of such migrants share one striking attribute, i.e. their irregular status in the host country, and hence, the lack of protections of their basic rights both from the source and host countries. Going on the premise that there is a strong underexplored nexus between migration and statelessness, this article unravels the interconnections between these two scenarios. Beginning with the crucial introduction of the term ‘statelessness’ and its causes and consequences, this article subsequently embarks on exploring the manner in which modern patterns of migration expose several groups of vulnerable persons of a migratory background to the risk and limbo of statelessness in Malaysia. Central to the analysis are how the identified groups of persons are impacted by both concepts of *de jure* and *de facto* statelessness, the unique interplay between migration and statelessness, the many facets of disenfranchisement of rights saddled upon them by their irregular status, and the underlying challenges behind such anomaly. The article adopts international law as the main framework to guide the overall discussion.

Keywords: Malaysia, migration, refugees, statelessness, trafficking, undocumented, UNHCR

ARTICLE INFO

Article history:

Received: 24 February 2015

Accepted: 21 August 2015

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INTRODUCTION

Definition

Statelessness is essentially a concept being the reverse of that of nationality. Article 1 of the Convention relating to the Status

of Stateless Persons 1954 ('the 1954 Stateless Persons Convention') defines the 'stateless person' as "a person who is not considered as a national by any State under the operation of its law". Those who meet this definition are commonly referred to as *de jure* stateless, i.e. the legally stateless persons, despite the absence of the term *de jure* itself in the 1954 Stateless Persons Convention and the 1961 Convention on the Reduction of Statelessness. This legal definition has also acquired the status of customary international law (International Law Commission [ILC], 2006).

While *de jure* statelessness generally coincides with refugees and State successions, another category of statelessness known as *de facto* statelessness emerged at a later stage. In essence, *de facto* stateless persons generally experience inability to prove their nationality or possess nationality that is ineffective. Series of irregular migration that take place around the globe have contributed to this latter category of statelessness (Lee, 2005, p. 7). A *de facto* stateless person is however neither defined in the 1954 Stateless Persons Convention nor the 1961 Convention on the Reduction of Statelessness. Two key points constitute the fulcrum of the concept of *de facto* statelessness, namely, the unwillingness to avail oneself of protection of the country of nationality and being unable to avail oneself of such protection. As for the former, there must be valid reasons for one to refuse the protection of the country of their nationality (UNHCR, 2010a).

Causes and Consequences

The first clear traditional cause of statelessness through law creation is conflict of nationality laws. A child may be born in a State that practices the *jus sanguinis* principle (i.e. nationality based on descent of parents), whereas the child's parents may originate from a State that practices the *jus soli* principle (i.e. nationality based on place of birth) (Brewer, 2014, p. 65). The problems that arise due to conflict of nationality rules would not surface if all States agree to practice the *jus soli* principle. Many countries in Southeast Asia such as Indonesia, Philippines and Malaysia subscribe to the *jus sanguinis* rather than the *jus soli* principle. In the context of Malaysia, persons born after Malaysia Day may acquire Malaysian citizenship at birth through operation of law, subject nonetheless to the status of their parents. For those born within the Federation, one of the parents is required to be a citizen or a permanent resident of Malaysia at the time of their birth [Federal Constitution of Malaysia 1957, Article 14 (1)(b), read together with Second Schedule, Part II, Section 1(a) to (e)].

Existing laws of a State may render certain quarters of community stateless. States that subscribe to the strict application of the *jus sanguinis* principle may cause children to inherit statelessness from their stateless parents or if the State does not allow the mother to pass on her nationality to her child, the child may then inherit the statelessness of the father (Simperingham, 2003, p. 4). Orphaned, abandoned or even

illegitimate children may also be prevented from attaining the nationality of the State of birth if the State subscribes to the *jus sanguinis* principle (UNHCR, 2012a, p.7).

Conflict of nationality issues also arise with regards to renunciation of nationality, where one State would only allow renunciation provided the person has acquired citizenship of the other State but the other State requires renunciation of the original citizenship before acquisition of new citizenship (Achiron, 2008, p. 28). The second traditional cause of statelessness would be laws that discriminate against gender, race, ethnicity and political opinion. Women who marry foreign men may lose their nationality in certain patriarchal societies. If they are unable to attain their husband's nationality or if the husband is stateless, it would render them stateless as well (UNHCR, 2014d, p. 1). Discriminatory laws against ethnic groups are prevalent in the African and Asian continents. The Rohingya Muslims of northern Rakhine State represent the devastating case of statelessness in that context. Discrimination against this ethnically, linguistically and religiously distinct minority by the Government of Myanmar since the country's independence has become more systematic when this minority was deliberately precluded from the 132 races entitled to full citizenship under the 1982 nationality law.

The third traditional cause of statelessness includes territorial changes such as mergers, absorption and dismemberment of States. Territorial

changes give rise to changes in the municipal law that renders certain people stateless. An example of dismemberment would be the dissolution of the Union of Soviet Socialist Republic (USSR). Some of the stateless persons of the former USSR included the 160,000 Russian-speaking individuals from Estonia (Lynch, 2005, p. 17).

More contemporary causes of statelessness prevalent within developing states include failure to register births and irregular migration (Conklin, 2014, p. 19). Asian States such as Nepal have numerous persons without citizenship certificates to confirm their identity. Closer to home, Thailand faces the problem of hill tribe minority ethnic groups living in the mountainous northern region without the relevant documentation to prove eligibility of citizenship simply because their births were not registered. In Malaysia, the problem of lack of birth certificates arises within the Indian community, as well as migrants of Philippine and Indonesian descent residing in East Malaysia. This inadvertently heralds the second contemporary cause of statelessness is the focus of this paper. Irregular migration is not entirely a new phenomenon in Malaysia. Part of the reasons why there still exist Indians who do not possess birth certificates is due to the fact that Indian migration into Malaysia was not adequately regulated.

Regardless of the manner in which a person is rendered stateless, the consequences of such a status are indeed

grave. The negative consequences of statelessness can be seen within the international, as well as the domestic spheres. Under international law, a stateless person has no recourse to diplomatic protection. In *Movrammatis Palestine Concession (Jurisdiction)* (1926), it was highlighted that when a State takes up a case for one of its subjects, the State is asserting its own right to ensure respect for the rules of international law. No State will take up a case of a non-national. Apart from that, the right of return to home country provided for in Article 13 (2) of the Universal Declaration of Human Rights (UDHR) and Article 12 (4) of the 1966 International Convention of Civil and Political Rights (ICCPR) is not available to stateless persons.

Within the domestic sphere, basic human rights may be eschewed from stateless persons. First generation rights particularly freedom from non-discrimination, right to a fair trial and freedom of movement are often not available to stateless persons. Such deprivation extends to second generation rights including the rights to education, employment, housing and social security.

CONNECTING MIGRATION TO STATELESSNESS

Initial Window to the Nexus

In 2008, Southeast Asia recorded 4.3 million stateless individuals, out of a total of 6.6 million stateless population throughout the world. This made the region to have the highest number of stateless persons in the

world, with Thailand having the biggest share of around 3 million stateless people. Despite this magnitude, statelessness on the whole is still an ambivalent and barely understood subject among the Southeast Asian nations (Caballero-Anthony & Cook, 2013, p. 152). New sources of statelessness have considerably contributed to the size of the problem today. The intersections between statelessness and other subjects, inter alia, women, children, migration, trafficking and national security add another layer of complexity testifying to the nuances surrounding the concept (UNHCR, 2011b).

Statelessness may be created, and the risk of it may heighten when migrants move from the country of their nationality or habitual residence to a new destination country. Along this process, the value of their nationality is gradually weakened over time. Their movements are induced by different considerations predominantly forced displacement, economic migration, trafficking, smuggling and the increasingly dynamic interplay of one or more of the preceding motives, better known as the 'mixed migration' situation (Van Hear, Brubaker, & Bessa, 2009). Their legal status while they move into and reside in the new country largely decides how they are treated from the legal perspective.

Several basic ideas are helpful for one to understand the connection between irregular migrants and their susceptibility to statelessness. Among other is the tolerance of the host State towards their presence, i.e. immigration laws are not stringently put

into effect for humanitarian consideration such as the prohibition of non-*refoulement*. On top of that, destination countries often need them but simultaneously 'do not want' them. The incentive behind their tolerant acceptance boils down to the economic benefits accrued to the host State by having pools of inexpensive, imported and irregular labour force (Koser, 2005, p. 91). Nonetheless, the aspect of their human rights receives negligible attention both from their home countries and the host States. Above all, the majority of them are less likely to fulfil the main requirement of naturalisation, which is a required period of lawful residence (UNHCR, 2012b, para 16).

Cross-border Migration and the Rise of Statelessness in Malaysia

From the perspective of modern migration patterns, forced and irregular migrations largely explain the emergence of three categories of migrants who are extremely vulnerable to statelessness. They are irregular migrants, victims of trafficking and refugees, particularly in countries without asylum law who mutually share one prominent attribute, i.e. their breach of immigration regulations and policies, and hence, their irregular or unlawful status.

Together with them are accompanying family members including wives and children, and those children who are born in the new host State to such different categories of non-citizens. Their families inevitably expand. Generations of children born in the host State who live in irregularity

eventually find themselves trapped in the vicious cycle of statelessness through no fault of their own with an extremely uncertain future. Their increasingly large numbers and permanent presence also mean that the term 'irregular' is no longer sustainable (van Waas, 2007, p. 443).

Refugees and statelessness. Whether stateless or otherwise, to be refugees, asylum seekers must be able to satisfy the criteria of a 'refugee' under the 1951 Convention Relating to the Status of Refugees ('the 1951 Refugee Convention'). In substance, a refugee refers to a person outside her country who needs and deserves international protection because she reasonably believes that her civil or political status puts her at risk of serious harm in that country and that her own government cannot or will not protect her (Hathaway, 2014, p. 8). A refugee may be *de jure* or *de facto* stateless. As indicated in *A Study of Statelessness* (1949), refugees may be *de jure* stateless at the same time if they have been deprived of nationality by their country of origin or *de facto* stateless if they still hold their nationality but are unable to enjoy the protection and assistance of their country of nationality (United Nations, 1949). Interestingly, the situation of refugee flows may in effect relate to statelessness as both a cause and a consequence of forced migration.

Being *de jure* stateless, groups like the Rohingya have no country to call home and return to. For these stateless refugees, deprivation of their legal nationality triggers abject poverty. Their economic conditions,

together with the incentivised political and religious violence against them, are the combined spectres of their displacement beyond borders. Tens of thousands of Rohingyas continue to flee Myanmar for safer countries in the Middle East. Popular transit or destination countries in the region are Bangladesh, Malaysia and Thailand. Both stateless and undocumented, they are left with zero option other than to resort to perilous illegal migration routes including deadly journeys through sea, regularly falling victims to corrupt smugglers and traffickers (Refugee Studies Centre, 2010, p. 13).

Their admission in the destination country is at the latter's indulgence. Countries without a formal mechanism for refugee protection like Malaysia and Thailand are less willing to accept them. Their tolerated stay is merely on humanitarian grounds without altering the fact that they are irregular. In countries with a *jus sanguinis* nationality system, what ensue are second-generation migrants born to such asylum seekers or persons of concern¹, who are prevented from birth registration and without any legal tie to both the countries of origin and destination and thus placing them at a disproportionate risk of statelessness.

The foregoing picture depicts how statelessness serves as a potential cause for forced migration and refugee situations as

¹A 'person of concern' is an individual who receives assistance from the UNHCR typically in a State not party to the Refugee Convention who may have his refugee status determined or otherwise.

well as how the latter in turn creates and breeds further cases of statelessness. As part of the response, the annual meeting of the UNHCR Executive Committee (the 'ExCom') through its Conclusion 78 issued by the ExCom in 1995 underscores that 'the prevention and reduction of statelessness and the protection of stateless persons are important in the prevention of potential refugee situations'. In 2003, the ExCom through Conclusion 96 requires States to take positive actions to prevent cases of statelessness including pursuing measures that make possible the grant of a legal status to stateless persons (Darling, 2009, p. 750).

In Malaysia, the Filipino migrants' entry into East Malaysia also took effect within the milieu of forced or irregular migration (Idris, 2012, p. 40). Although there had been a steady flow of migrants from the Philippines into East Malaysia from the time of the Spanish conquest, the predominant cause of increased migration into East Malaysia was by virtue of the Mindanao insurgency in the Philippines under the authoritarian rule of President Marcos in the 1970s. Migrants coming into East Malaysia from the Philippines were of Suluk and Bajau origins. The distinctive quality of these migrants was the fact that they were considered to be refugees. These refugees settled in the townships of Sandakan, Tawau, Semporna and Lahad Datu (Commissioners of Commission of Enquiry on Immigrants in Sabah, 2014, pp. 235-236). Three decades later in 2004, the number of Filipino refugees in Sabah

was quoted to be approximately 65,889, assuming that the estimate is also based on IMM13 documents issued to them under Regulation 11(10), Immigration Regulations 1963 (Kassim & Imang, 2005, p. 91). The IMM13 document issued under the Regulations allows the holders to reside and work in Malaysia. Although reasons for claiming refugee status have long ended, the in-flow of migrants from the Philippines remains high.

The distinction between refugees in Peninsular Malaysia and refugees in East Malaysia lies in the fact that the refugees in Peninsular Malaysia are still categorised as refugees, thereby they are entitled to resettlement coordinated by the UNHCR. Conversely, the reasons for claiming refugee status for Filipino migrants ended by virtue of a Peace Treaty between the Philippines Government and the Moro Liberation Front way back in 1976 (Sadiq, 2005, p. 106; United States Institute of Peace, 2005, p. 4). The Filipino refugees have also been excluded from the UNHCR Kuala Lumpur Factsheet on Refugees mainly due to the closure of the UNHCR sub-office in Sabah in 1987, subsequent to the Government's decision to provide residency visas to the refugee population in Sabah (UNHCR, 2013, p. 1). Despite this development, certain actions affecting the refugee population such as their resettlement from one village to another by the State Government were to some extent referred to UNHCR, indicating the latter's indirect engagement in monitoring the welfare of such people (Kassim, 2009,

p. 61). However, in terms of the enjoyment of rights, the refugees in Sabah holding IMM13 enjoy a more secure status until today as compared to those refugees in the Peninsula for their ability to reside with their dependants, work legally and apply for a Permanent Resident (PR) status after residing between 15-19 years in Sabah (Commissioners of Enquiry on Immigrants in Sabah, 2014, p. 234). In short, there is a visible pathway for the holders of IMM13 to not only gain the PR status but also to avail themselves of the opportunity to apply for naturalisation according to the requirements set out in the Federal Constitution.

In terms of protection, historically, refugees and stateless persons were thought to be common beneficiaries to the refugee protection regime. Prior to and after the First World War, they shared the similar context on many levels particularly their numbers and condition. Subsequently, the two groups were set apart with refugees deserving recognition on the basis of their reasons of flight while statelessness if it existed, is perceived to be an incidental cause (Sen, 1999, p. 644). The 2010 Prato Conclusion underlines that a stateless person who is also a refugee according to the definition of Article 1(1) of the 1954 Stateless Persons Convention should receive the higher standard of protection, which in most cases will be the international refugee law, especially the protection from refoulement in Article 33 of the 1951 Refugee Convention (UNHCR, 2010a, p. 2). For those refugees who still

hold the nationality of their states of origin, statelessness may appear *de facto* due to their inability to effectively enjoy the State protections or unwillingness to avail such while in refuge. In practice somehow, experts have agreed that it is not useful for reference of *de facto stateless* to be directed to refugees who formally possess a nationality for the confusion that it may cause (UNHCR, 2010a, p. 6).

Notwithstanding the guaranteed protections on the international level, in Malaysia, stateless refugees will have to contend with the fact that the country has neither legal nor administrative framework in place to oversee their situation and provide legal protections. According to UNHCR, the law in Malaysia has to date ignored the need to differentiate refugees from undocumented migrants (UNHCR Malaysia, 2014a). This is exacerbated further by the massive number of migrants in the country. As of August 2014, UNHCR records 149,027 registered refugees with 137,788 coming from Myanmar, mostly of Chin and Rohingya ethnicities (UNHCR Malaysia, 2014b). Such figures do not include the unregistered asylum seekers and persons of concern in East Malaysia. They formed part of approximately 4 million migrants with almost half of them being undocumented. Their uncertain legal status means they are at risk of arrest, detention and deportation. Legal employment for them is restricted to the informal sector, usually involving the 3D (i.e., dirty, dangerous and difficult) jobs. Their condition makes them constant

victims of exploitation by employers who provide extremely meagre or at times no wages altogether. Meanwhile, the public healthcare facilities provided at 50% discount off the foreigner's rates are generally unaffordable given their poor economic status (UNHCR Malaysia, 2014a).

Irregular labour migrants and statelessness. At the global level, illegal migration has outgrown all the other types of international migrations in recent times (Migration Policy Institute, 2005). Such reflects the incapacities of states in their migration management policy and design. Within ASEAN, intraregional labour migration movements mainly take place through illegal channels concentrating on several countries in Southeast Asia and East Asia (Prasai, 1993). Episodes of irregular migration have highlighted the noteworthy category of *de facto* stateless persons who remain outside the purview of the 1954 Statelessness Convention yet equally experience vital issues of legal protections (Blitz & Lynch, 2011, pp. 4-6).

Although the fine distinction between economic migrants and refugees can hardly be sustained due to the overlapping motives of outflow and inflow of forced and economic migrations, the underlying criterion of the availability of state protection is still fundamental. In theory at least, this means that for economic migrants, they have the choice of returning home and/or availing state protections as opposed to refugees, who are not able to return home safely in the first instance (UNHCR Malaysia, 2014c).

Instances of *de facto* statelessness include inability to prove one's nationality and where a certain finding and declaration made by a State that a person is or is not its national may not be compatible with the finding by another State and subsequently result in the latter challenging the said determination. This situation of deadlock and uncertainty may leave the affected individual a *de facto* stateless (UNHCR, 2010b).

For a migrant who lacks identity documents and is unable to prove his or her nationality, unwillingness on the part of the alleged country of origin in verifying whether the person is his national may be seen amounting to refusal of protection that could potentially render them *de facto stateless*. Arguably when protection is unavailable from the country of origin, it would be inappropriate to conclude that the said individual has refused the protection and therefore is not *de facto* stateless (Gruberg, 2011, p. 537).

The lack of coherent definition of and ambiguity surrounding *de facto* statelessness has somehow muddied the actual determination of persons actually belonging to this category in accordance with international law. In certain cases, groups that are described as stateless at any particular time may actually befit the label of 'at risk of statelessness' for their various circumstances that render them vulnerable to statelessness (The Institute of Statelessness and Inclusion, 2014, p. 43). Efforts are indeed required to cautiously appraise their situations based on the

existing legal definition of a 'stateless person' in the 1954 Stateless Persons Convention, and through a mechanism of nationality verification in order to avoid jumping to the straight conclusion that they are stateless.

It is also worthy to highlight that paragraph 12(f) of Part II of the Prato Conclusions adopts the position that unsettled cases of *de facto* statelessness in particular beyond two or more generations may transform the *de facto* status into that of *de jure* (UNHCR, 2010a). Above all, protracted cases of statelessness amongst such individuals eventually result in their zero prospect of gaining access to an alternative nationality. The common State practice with regards to naturalisation worldwide is that the basic requirement of a minimum period of lawful residence is fixed in addition to other criteria. An irregular migrant who may have lost his nationality, unable to prove it or has been rendered stateless prior to his displacement is highly likely to stay in the state of this legal limbo indefinitely (van Waas, 2008, p. 168).

In the Malaysian context, while the colonial administration had inadvertently created stateless Indians within the Peninsular, post-colonial period has predominantly witnessed the emergence of statelessness in East Malaysia. Open borders between East Malaysia, Philippines and Indonesia have facilitated cross-border movements into East Malaysia, especially Sabah. Early cross-border movements between the 1950s to the 1980s were

prevalent, albeit unnoticed, especially with regards to Indonesians who arrived since they were not in competition with the local population (Vijayakumari, 2007). Many of the Indonesians eventually acquired Malaysian citizenship. By the 1980s, attempts were made to regulate the inflow of migrant workers in East Malaysia from Indonesia via bilateral agreements. Although security operations commenced in the 1990s, they failed in curtailing illegal entry of migrants into East Malaysia since the demand for labour exceeded supply.

Kanapathy (2008) enumerates the main groups of persons who constitute irregular or undocumented migrants in Malaysia. They are: (i) persons who gained unauthorised entry and employment; (ii) persons who gained authorised entry but unauthorised employment; (iii) persons who gained authorised entry and employment but have invalidated work permits; (iv) refugees; and (v) children of undocumented migrants/ refugees born in Malaysia but whose births are not registered with the relevant authorities (p. 4).

The citizenship problem in Sabah is far more complex that it necessitates a totally separate debate and analysis. Foreign workers in Sabah, including those with irregular statuses, are mostly concentrated in timber mills and plantations aside from the construction, agriculture, transport and service sectors. The delicate on-the-ground issues of citizenship in Sabah are highly interwoven with the multiple ties and connections that migrant workers have with the State itself.

At the minimum, three factors trigger such complexity. The first being the porous borders between Sabah, Phillipines, and Indonesia that aid the unregulated inflow and outflow of migrants of both countries (Dambul, Omar, & Osman, 2010, p. 88). Secondly, the lack of systematic and proper regulation of citizenship amongst the native Sabahans renders a weak exercise of defining and controlling citizenship by the official authorities. This may be illustrated by the diversity of the legal statuses of the natives ranging from those who are completely documented and those who possess multiple documents issued by various state agencies such as a 'Permanent Resident' identity card and IMM13. The varied nature of such statuses further blurs the distinction between citizens and non-citizens and undermines the already tenuous monitoring and preservation of official standard rules and regulations by the State (Sadiq, 2005, pp. 113-114). Thirdly, the context of migrations that is most relevant in discussing the protracted issue of such populations at risk in Sabah is the refugee movements in the 1970s up until the 1980s from the southern Phillipines subsequently followed by the steady increase of the economic migrants and other family members who entered the State for family reunification.

Children of refugees and labour migrants. In Southeast Asia, two categories of children are particularly at a heightened risk of statelessness. They are firstly the children of migrants residing in countries of *jus sanguinis* that tie citizenship to

parentage, and secondly, the children of migrants who reside in states with poor or defective registration systems. The latter is particularly a major impediment for children to access birth registration, to have a record of birth and later to meet the documentary requirements for citizenship application (Paxton, 2012, p. 633). Birth registration may not only protect children from the risk of trafficking and other exploitations, it is also an important tool for family reunification as well as to prevent and reduce statelessness. Even if the child may not be eligible to obtain nationality, a birth certificate will serve as a significant supporting evidence for any claim to entitlement (European Network on Statelessness, 2014, p. 21).

Unlike the universal right to birth registration, the right to acquire a nationality including for a child is not universal when it is often subjected to the immigration status of the child and their parents, coupled with the duration of their stay. Many irregular migrant workers, including refugees, give birth to children outside their home State while at the same time lacking the legal status in the country they are currently residing in.

In Malaysia, children of the undocumented workers and refugees are automatically classified as undocumented by virtue of the irregular status of their parents (Kanapathy, 2008). One explanation behind this is 'an illegal person cannot produce a legal person'. This irregular or illegal status will be handed

down continuously from one generation to another leading to the situation called permanent illegality (van Waas, 2007, p. 446). *Jus sanguinis* countries generally provide for the children of their nationals born abroad to acquire their parents' nationality. However, the latest trend sees the introduction of certain restrictions by some countries such as the UK through its British Nationality Act 1981 that seeks to avoid the continuing conferral of nationality to persons who in fact have little or no genuine connection with the State (Aleinikoff & Klusmeyer, 2001, p. 25). In most cases, however, the majority of children born to parents from *jus sanguinis* countries should be able to claim for nationality *jus sanguinis*.

In Sabah, the children of the irregular Filipino and Indonesian migrants generally do not possess identity documents such as passports including those whose parents have been deported. In addition, these children are unable to trace their family ties in their parents' country. Procedural hurdles also constitute an enduring problem for the realisation of their birth registrations. Without a valid passport for each parent and a certificate of marriage, it is impossible for them to obtain a birth certificate. Other barriers include lack of knowledge on the part of parents about the registration procedures, the prohibitive hospital charges for foreigners and the fear of being reported and nabbed by the authorities (Voice of Children, 2013, pp. 1-2). Even though birth registration is possible for these children, their birth

certificates will be stamped 'orang asing' (foreigner) indicating the parents as being non-citizens.

For children born to irregular Indonesians and Filipinos in Sabah, the fundamental question is whether they will be considered a national by the governments of Indonesia and the Philippines. For the former, the issue is at least tackled by the presence of an Indonesian consulate in Kota Kinabalu responsible for issuing certificates and passports for the children of its nationals. The practical utility of the services is somehow compromised by its remote accessibility for those migrants residing in the interior Sabah. However, the scenario is much more complicated for the children and grandchildren of Filipino nationals. Apart from the non-availability of the Philippines' consulate in Sabah, the anti-Filipino sentiment built around the historical claim of the Philippines to Sabah is strong among the natives. The services of the mobile registration units organised occasionally in Sabah by the government of Philippines are regrettably not widely publicised amongst the populations at risk (Allerton, 2014, pp. 30-31). At the very minimum, such children appear clearly to be at a heightened risk of statelessness.

Another important observation regarding the impasse in terms of their legal status is the lack of desire amongst such children to apply for the Filipino citizenship. To them, the sense of attachment that they have to Malaysia is far stronger than that to the Philippines. Despite going through various difficulties,

such children, typically through the stories of violence in their homeland told to them by the parents and grandparents, believe that at least Sabah is a safer place for them (Allerton, 2014, p. 32).

Refugees giving birth and raising stateless children is also a problem that arises in Peninsular Malaysia. The communities with stateless children residing in Peninsular Malaysia include the Rohingya and the Palestinians. Although birth certificates are issued to children of refugees born in Malaysia, formal education is denied to them (Duraisingam & Nordin, 2013).

Victims of trafficking. Human trafficking is another inconspicuous dimension of cross-border migration that places men, women and children at a high risk of statelessness. In the ASEAN region, the most widespread forms of irregular migrations are irregular labour migration and trafficking, either for sexual and/or labour exploitation (International Organisation for Migration, 2012).

Malaysia is noted for being simultaneously a country of origin and a profitable destination and transit country for traffickers to transport trafficking victims. The statistics by the Secretariat of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) recorded a total of 591 reported cases of different types of exploitation from February 2008 to November 30, 2012, with 797 arrests of those involved in the crime. Within five years, 3,363 victims of trafficking were granted Interim Protection

Orders (IPO) and a number of 1,325 were entitled to protection orders (Ministry of Home Affairs [MOHA], 2012). These victims of sexual exploitation, forced labour and involuntary domestic servitude among others were taken to undisclosed shelter homes. It has been reported that from 2008 to 2010, 74 percent of the victims were children. Such percentage immensely outnumbered the figures of trafficked female and male adults (Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants [MAPO], 2011).

Despite stricter law enforcement and amendment made to the Anti-Trafficking in Persons Act 2007 (Act 670), which is now known as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, together with the implementation of the National Action Plan against Trafficking in Persons (2010-2015), Malaysia remained on Tier 2 Watch List of the US State Department for four successive years until 2013, thanks partly to its written plan outlining efforts to comply with the minimum standards for the eradication of trafficking. According to the US State Department's 2013 Trafficking in Persons Report (TiP), the increasing effort to curb human trafficking by the government is still hampered by the lack of improvement to its victim protection system. The report also revealed that the authorities failed to identify victims of trafficking making them susceptible to detention and deportation. Victims are also not allowed to be hired while waiting to testify against alleged traffickers or smugglers. In Malaysia, the majority of these victims are also among

the approximately two million documented and another two million undocumented foreign workers (Su-Lyn, 2014). Recently, the continuous lack of significant efforts on the part of the Government to improve the various flaws in its victim protection regime, alongside with numerous reports involving a host of violation of rights of migrants, refugees and stateless victims by traffickers including passport confiscation, debt bondage, abuse, detention and forced labour finally saw the country being downgraded to Tier 3 in 2014, the lowest ranking in the annual TiP (U.S. Department of States, 2014).

Trafficking victims are frequently treated as irregular migrants with some enjoying interim status granted by the authority. As pointed out by Weissbrodt and Collins (2006, pp. 263-264), slavery and trafficking constitute a mechanism of *de facto* statelessness. Additionally, the victims' hazy status and the trouble of proving or establishing their identity and link to their state of origin highly expose them to the risk of being persons not recognised as a national by any state under its law. Conversely, the fact that a person is found to be stateless similarly increases his or her chances of being trafficked, due to their various circumstances of defenselessness, including their inability to employ valid methods of migration (UNHCR, 2010c, p. 10).

Such unique dilemma surrounding trafficking victims pose a distinctive challenge to the prevention of statelessness in this context. On the regional level, the

states in Southeast Asia have recorded their commitment to cooperate in the verification of identity and nationality of trafficking victims through the Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (UNHCR, 2011a, p. 10).

UNDERLYING CHALLENGES

A complete assessment of the relevant international standards on the subject may not be realistic here. Basically state's obligations beyond the domestic framework can be identified through largely three types of codifications, namely, treaties, conventions and declarations proclaimed by international and regional organisations. One unique aspect of most of these instruments is their universal application to all persons, not just citizens or persons with residency status. For migrants, refugees and stateless persons, this is important as the distinction between citizens and non-citizens is removed from the start (Gurowitz, 2000, p. 878). The enormous challenge here is the rather weak influence such international human rights norms have on the government policies in countries espousing strong Asian values like Malaysia (Nordin, 2010, pp. 32-33).

Malaysia has acceded to pertinent conventions that provide protection in part to stateless persons. These include the 1957 Convention on the Nationality of Married Women, the 1979 Convention

on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1989 Convention on the Rights of the Child (CRC). Conventions nevertheless 'articulate a combination of rules and standards that grant States and adjudicators varying degrees of discretion' (Banks, 2010, p. 1257). States are free to enter reservations to treaty provisions so long as the reservations are compatible with the object and purpose of the convention. In terms of Malaysian accession, reservations have been entered pertaining to provisions on nationality such as Article 9(2) of CEDAW and Article 7 of CRC.

Southeast Asia regrettably has a long standing history of avoiding international human rights law. In the area of refugee law, several reasons shape such evasive attitude among the States in this region. They include the Eurocentric nature of the refugee convention and the prevailing perception that refugees like the Indochinese are not genuine refugees but economic migrants. Thailand has also relied on the international refugee legal framework to justify their pushing back practices of the Rohingyas (Davies, 2008). These reasons partly nurture the similar resistance towards the acceptance of the international frameworks on refugee and statelessness in the country. Malaysia in particular is known to place its foremost priority on its economic interests, associations with other member States in ASEAN and ethnic stability. Rights and integration are sidelined from the government's official policy (Gurowitz, 2000, p. 865).

CONCLUSION

Migration and statelessness prove to be closely associated with the latter, which is often a consequence and a cause of migration. The prominently dynamic interaction between *dejure* and the more recent idea of *defacto* statelessness, which are both created and have been prolonged by international migration deserves a greater and more serious attention from our policy makers, legislators and other stakeholders. Labels aside, the need for a change of mindset and stand on human rights issues highlighted would be in the interest of countries in Southeast Asia, especially when those arising from the nexus between migration and statelessness are mostly their shared concerns for over many decades. A more durable solution would necessitate addressing the enduring cycle of statelessness apart from the lack of protections mostly stemming from their irregular status that inhibits access to birth registration and their ability to acquire a nationality. The lukewarm approach and commitment to international human rights law development, often due to its potential conflicts with highly prioritised economic, political and security interests of the State, have been major long-term obstacles in the protection of stateless persons in Malaysia. Needless to say, as long as Malaysia is not willing to up its ante by refusing to look at the issues from the prism of human security and human rights, remaining cautious in its application of international law within its domestic framework, complete and consistent

provision of rights will never materialise to the benefit of stateless persons as well as other unprotected migrants residing in the country.

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