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# Securing Malaysia's Borders from Covid-19: Legal Considerations to the Influx of Rohingya Migrants\*

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*On March 18, 2020, Malaysian Prime Minister Tan Sri Muhyiddin Yassin declared the nationwide enforcement of the Movement Control Order to curb the spread of COVID-19. In September 2020, Malaysia entered the third wave of the outbreak. Active cases rose from 60 to more than 13,000. The government's Ops Berteng stops illegal migrants, who are at high risk of bringing COVID-19 into Malaysia. This includes illegal Rohingya migrants, who enter Malaysia to flee persecution in their home country, Myanmar. There are approximately 150,000 Rohingya migrants in Malaysia and more are expected. This article examines the main reason behind the influx of Rohingya illegal migrants and discusses whether the Malaysian government should tighten its borders to safeguard against COVID-19. The government must prioritise its own citizens over the Rohingyas; the responsibility of*

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*managing this humanitarian disaster should be shared with other nations, particularly those party to the United Nations Convention relating to the Status of Refugees 1951.*

### **Keywords**

Sovereignty, COVID-19, Illegal Immigrants, Territorial Integrity, Humanitarian Disaster

## **1. Introduction**

Malaysia occupies terrestrial and maritime territories stretching from the Malay Peninsula to Sabah and Sarawak on the island of Borneo, sharing its frontiers with other South-East Asian nations.<sup>1</sup> Thailand, Brunei Darussalam, Singapore, Indonesia and the Philippines are among Malaysia's immediate neighbours.<sup>2</sup>

The northern portion of Peninsula Malaysia shares common frontiers with Thailand, extending 646.5 km from Perlis in the west to Kelantan in the east.<sup>3</sup> The Thai and Malaysian governments have erected eight immigration checkpoints along the length of their common border: Wang Kelian and Padang Besar in Perlis; Bukit Kayu Hitam and Durian Burung in Kedah; Pengkalan Hulu in Perak and Bukit Bunga; and Rantau Panjang and Pengkalan Kubor in Kelantan (Figure 1).<sup>4</sup>

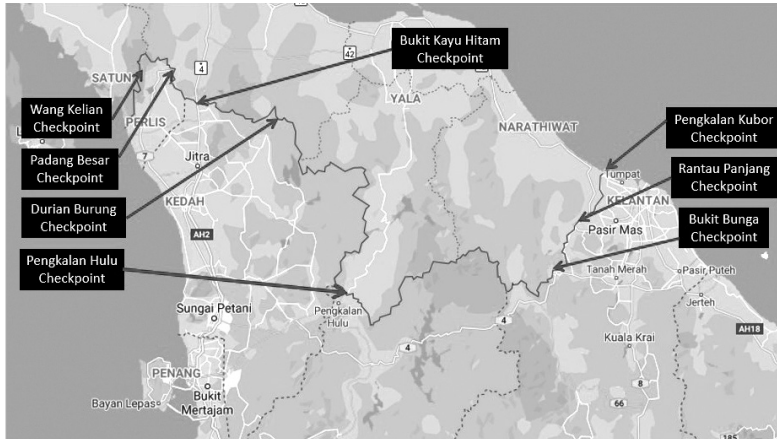
<sup>1</sup> Mohd Hazmi Mohd Rusli, *The Wang Kelian Checkpoint: Is Our Border Porous?*, MALAY MAIL ONLINE, Apr. 8, 2015, <https://www.malaymail.com/news/what-you-think/2015/04/08/the-wang-kelian-checkpoint-is-our-border-porous-mohd-hazmi-mohd-rusli/874657>.

<sup>2</sup> K. McGAHAN, *MANAGING MIGRATION: THE POLITICS OF IMMIGRATION ENFORCEMENT AND BORDER CONTROLS IN MALAYSIA* 3-10 (2008).

<sup>3</sup> Mohd Hazmi Mohd Rusli, Roman Dremluaga & Wan Talaat, *The Anglo-Dutch Treaty 1824: Was the Partitioning of the Malay World Valid?*, 13 J. EAST ASIA & INT'L L. 191-6 (2020).

<sup>4</sup> Mohd Hazmi Mohd Rusli, *COVID-19: Benarkah sempadan negara poros?* [How Porous Are Our Borders?], ASTRO AWANI, Apr. 14, 2020, <https://www.astroawani.com/berita-malaysia/covid19-benarkah-sempadan-negara-poros-238306>.

Figure 1. The Eight Immigration Checkpoints at the Thai-Malaysia border



Source: Compiled by the author (Modified from GoogleMaps)

Two international gateways link Malaysia and Singapore at the southern end of Peninsula Malaysia: Tanjung Kupang-Tuas and Johor Bahru-Woodlands.<sup>5</sup> The Malaysian Borneo states of Sabah and Sarawak share an uninterrupted land border -2,019.5 kms from Tanjung Datu all the way up north to Tawau, with Indonesian provinces of West, Central and North Kalimantan.<sup>6</sup> Sarawak surrounds its tiny but affluent neighbour, the Sultanate of Brunei Darussalam, sharing a land boundary of approximately 481.3 km.<sup>7</sup>

Malaysian frontiers are mostly isolated hilly areas and are thickly forested. Extensive surveillance to track down illegal activities such as smuggling, human trafficking and illicit trade in narcotics may be difficult.<sup>8</sup> For instance, the discovery of a shallow Rohingya grave in 2015 in areas near the Malaysia-Thailand border in Perlis was and still is a manifestation of the grim effects of human trafficking involving illegal Rohingya migrants.<sup>9</sup>

<sup>5</sup> Mohamed Farid Noh, *All Quiet at World's Busiest Causeway*, NEW STRAITS TIMES, Mar. 18, 2020, <https://www.nst.com.my/news/nation/2020/03/575714/all-quiet-worlds-busiest-causeway>.

<sup>6</sup> *See Border Disputes Differ for Indonesia, M'sia*, DAILY EXPRESS, Oct. 16, 2015, <http://www.dailyexpress.com.my/news.cfm?NewsID=103802>.

<sup>7</sup> COMCEC, *Improving the Border Agency Cooperation among the OIC Member States for Facilitating Trade* (2016), [https://sbb.gov.tr/wp-content/uploads/2018/11/Improving\\_the\\_Border\\_Agency\\_Cooperation\\_Among\\_the\\_OIC\\_Member\\_States\\_for\\_Facilitating\\_Trade.pdf](https://sbb.gov.tr/wp-content/uploads/2018/11/Improving_the_Border_Agency_Cooperation_Among_the_OIC_Member_States_for_Facilitating_Trade.pdf).

<sup>8</sup> M. Hunter, *Malaysia's Border Problems*, ASIA SENTINEL, July 26, 2019, <https://www.asiasentinel.com/p/malaysia-border-problems>.

<sup>9</sup> Mohd Hazmi Mohd Rusli, *The Rohingya Exodus: Is Malaysia in a Catch-22 Situation?*, FORBES, Jan. 23, 2017, <https://>

In addition, the vast maritime areas of northern Strait of Malacca-possessing hundreds of islands on both Thai and Malaysian sides-provide perfect hideouts for human traffickers, making it challenging for authorities to conduct extensive surveillance and monitoring. Recently, it has been reported that the outlying Thai island of Adang has been used as a transit point for Rohingya migrants to be smuggled into Malaysia by traffickers.<sup>10</sup> Since the implementation of the Movement Control Order, Malaysia has conducted Ops Benteng to strengthen border control and crackdown against illegal migrants, including the Rohingyas.<sup>11</sup>

In this essay, the authors will examine the main reason behind the influx of Rohingya illegal migrants and discuss whether the Malaysian government should tighten its borders to safeguard against COVID-19. In the following part, we will analyze the background of the Rohingyas' immigration, and the legal considerations to end such an influx in view of the Covid-19 pandemic that is still ravaging the nation.

## 2. The Rohingyas

The Rohingyas are a minority Muslim community residing in the Arakan or Rakhine provinces in north-eastern Myanmar, bordering neighbouring Bangladesh.<sup>12</sup> They are ethnically and linguistically distinct from other ethnic groups in Myanmar.<sup>13</sup> There are conflicting views in regard to the place of origin of the Rohingya community.<sup>14</sup> Some argue that the Rohingyas are originally from Rakhine, while others contend that they are migrants from Bengal who came to the region in the fifteenth century.<sup>15</sup> The Burmese empire reached its height as a regional power, with far-flung territories in the seventeenth and eighteenth centuries.<sup>16</sup> However, this former formidable

[www.forbes.com/sites/realspin/2017/01/23/the-rohingya-exodus-is-malaysia-in-a-catch-22-situation/#20732a403667](http://www.forbes.com/sites/realspin/2017/01/23/the-rohingya-exodus-is-malaysia-in-a-catch-22-situation/#20732a403667).

<sup>10</sup> Haspaizi Zain, *Malaysia perlu kerjasama Thailand sekat pelarian Rohingya* [Malaysia needs to co-operate with Thailand to stop Rohingya migrants], MALAYSIKINI, June 11, 2020, <https://www.malaysiakini.com/news/529781>.

<sup>11</sup> *Op Benteng dilaksanakan besar-besaran di seluruh negara-KPN* [Op Benteng launched on a big scale throughout the nation - IGP], BERITA HARIAN, June 10, 2020, <https://www.bharian.com.my/berita/nasional/2020/06/698433/op-benteng-dilaksanakan-besar-besaran-di-seluruh-negara-kpn>.

<sup>12</sup> Nurul Islam, *Rohingya: A People under Endless Tyranny*, 48 ASIAN AFF. AN AM. REV. 14-40 (2020).

<sup>13</sup> *Id.*

<sup>14</sup> Haradhan Kumar Mohajan, *History of Rakhine State and the Origin of Rohingya Muslims*, 2 INDON. J. SE. ASIAN STUD. 19-46 (2018).

<sup>15</sup> *Id.*

<sup>16</sup> E. Chew, *The Fall of the Burmese Kingdom in 1885: Review and Reconsideration*, 10 J. SE. ASIAN STUD. 372-80 (1979).

empire fell to British dominance and was annexed as part of the British Raj in 1885.<sup>17</sup>

The Rohingyas were brought into Myanmar by British administrators in the nineteenth century to toil on farms as labourers during the era of the British Raj; the fertile lands of Rakhine were sparingly populated then.<sup>18</sup> Some were brought in as military recruits. Under British administration, the Rohingya community contributed to the development of Rakhine province.<sup>19</sup> This migration, however, ceased after Myanmar gained independence and became a sovereign nation in 1948.<sup>20</sup>

The Malayan population possesses a somewhat similar history. Malays have established kingdoms and built empires on the Malay Peninsula and across the Malay Archipelago for centuries.<sup>21</sup> Langkasuka was believed to be the first regional kingdom to rule the Malay Peninsula as early as the third century AD.<sup>22</sup> In subsequent centuries, the first migration of a non-Malay community, the Baba-Nyonya Chinese community, came to the Malay Peninsula during the era of the Malacca Sultanate in the fifteenth century. The number was small, however.<sup>23</sup>

When Malaya was ruled by the British, mass migration of both Chinese and Indian communities into Malaya was encouraged in the nineteenth and the twentieth centuries.<sup>24</sup> They were employed as cheap labourers to satisfy the demands of the lucrative tin mining and rubber industries.<sup>25</sup>

Rohingya immigrants in Myanmar and non-Malay immigrants in Malaysia (then Malaya) were treated differently and had separate destinies. While the Chinese and Indian immigrants were granted citizenship when Malaya gained independence in 1957, in return of special rights provided to Malays, Rohingyas were not regarded

<sup>17</sup> D. Baillargeon, 'On the Road to Mandalay': *The Development of Railways in British Burma, 1870–1900*, J. IMPERIAL & COMMONWEALTH HIST. 654-78 (2020).

<sup>18</sup> S. Gibbens, *Myanmar's Rohingya Are in Crisis-What You Need to Know*, NAT'L GEOGRAPHIC, Sept. 29, 2017, <https://www.nationalgeographic.com/news/2017/09/rohingya-refugee-crisis-myanmar-burma-spd>.

<sup>19</sup> Rusli, *supra* note 9.

<sup>20</sup> K. Weber & A. Stanford, *Myanmar: Promoting Reconciliation between the Rohingya Muslims and Buddhist of Rakhine State*, 44 SOC. JUSTICE 55-82 (2017).

<sup>21</sup> Mohd Hazmi Mohd Rusli, *Straits of Malacca and Singapore: Pride of the Malay Archipelago, Priceless Maritime Heritage of the World*, J. HADHARI (Special Edition) 109-27 (2012), <https://ejournal.ukm.my/jhadhari/article/view/12303>.

<sup>22</sup> W. Southworth, *Langkasuka*, in SOUTHEAST ASIA: A HISTORICAL ENCYCLOPEDIA, FROM ANGKOR WAT TO EAST TIMOR 764-5 (Ooi Keat Gin ed., 2004).

<sup>23</sup> Mohd Salehuddin Mohd Zahari et al., *How the Acculturation of Baba Nyonya Community Affects Malacca Food Identity*, 20 ASIAN ETHNICITY 486-502 (2019), <https://www.tandfonline.com/doi/abs/10.1080/14631369.2019.1605825?journalCode=caet20>.

<sup>24</sup> J. Hagan & A. Wells, *The British and Rubber in Malaya, c1890-1940*, in PROCEEDINGS OF THE NINTH NATIONAL LABOUR HISTORY CONFERENCE 143-50 (G. Patmore, J. Shields & N. Balnave eds., 2005).

<sup>25</sup> Khoo Kay Kim, *Malaysia: Immigration and the Growth of a Plural Society*, 71 J. MALAY. BRANCH OF ROYAL ASIATIC SOCIETY 1-25 (1998).

as compatriots.<sup>26</sup> In contrast, the Chinese and Indian communities are treated with respect and enjoy rights as citizens provided by the Federal Constitution.<sup>27</sup> Many prominent politicians, successful entrepreneurs and respected scholars hail from Chinese and Indian communities in Malaysia.

The government of Myanmar generally respects all religions and allows freedom of religion, despite Buddhism being the main religion of the majority of its population.<sup>28</sup> There is a mosque situated just next to the famed Sule Pagoda in central Yangon, which could be viewed as a symbol of religious tolerance in Myanmar.<sup>29</sup> In addition, there is a large Malay Muslim population in the southern Tanintharyi region in Kampong Tengah, Kampong Ulu and Pase Panjang.<sup>30</sup> These Malay Muslim communities did not face discrimination and enjoy rights as citizens along with other ethnic groups in Myanmar.

Some argue that the oppression against the Rohingyas is not born of religion, but of race.<sup>31</sup> Most of the Myanmar population views the Rohingya community as illegal immigrants from Bengal who have nothing in common with other ethnic groups in Myanmar, and as such, should be expelled from the country.<sup>32</sup>

### 3. Persecution

There are around 2 million Rohingyas in the world; most are in Bangladesh, where about 1.3 million live in camps in Cox's Bazaar and a Rohingya settlement on Bhasan Char in the Bay of Bengal.<sup>33</sup> About 150, 000 Rohingya migrants live in Malaysia as of

<sup>26</sup> *Malaysia: Myanmar Pursues Ethnic Cleansing of Rohingya*, AL JAZEERA, Dec. 3, 2016, <http://www.aljazeera.com/news/2016/12/myanmar-ethnic-cleansing-rohingya-161203104609449.html>.

<sup>27</sup> Budiman Mohd Zohdi, *Taking Malaysia to Greater Heights*, NEW STRAITS TIMES, Aug. 23, 2017, <https://www.nst.com.my/opinion/columnists/2017/08/271412/taking-malaysia-greater-heights>.

<sup>28</sup> Iselin Frydenlund, *The Birth of Buddhist Politics of Religious Freedom in Myanmar*, 4 J. RELIGIOUS & POLITICAL PRAC. 1-15 (2017).

<sup>29</sup> K. Hunt & R. Wright, *Rohingya Crisis Unleashes Fears among Myanmar's other Muslims*, CNN, Nov. 28, 2017, <https://edition.cnn.com/2017/11/28/asia/myanmar-yangon-muslim-community-rohingya/index.html>.

<sup>30</sup> Haider Kotwal, *A History Rarely Told*, NEW STRAITS TIMES, Feb. 8, 2018, <https://www.nst.com.my/opinion/columnists/2018/02/333298/history-rarely-told>.

<sup>31</sup> Aurangzeb Qureshi, *How Institutionalized Racism Fuels the Rohingya Genocide*, AL ARABIYA, Sept. 28, 2017, <https://english.alarabiya.net/en/perspective/features/2017/09/28/How-institutionalized-racism-fuels-the-Rohingya-genocide>.

<sup>32</sup> *Myanmar Rohingya: What You Need to Know about the Crisis*, BBC NEWS, Jan. 23, 2018, <https://www.bbc.com/news/world-asia-41566561>.

<sup>33</sup> H. Beech, *From Crowded Camps to a Remote Island: Rohingya Refugees Move Again*, N.Y. TIMES, Dec. 4, 2020, <https://www.nytimes.com/2020/12/04/world/asia/rohingya-bangladesh-island-camps.html>.

2020. International media and human rights organisations have described Rohingyas as “among the world’s least wanted” and “one of the world’s most persecuted minorities.”<sup>34</sup>

The Rohingyas have been struggling for recognition of their rights since World War II. When the Japanese surrendered in 1945, Rohingyas attempted to merge the Mayu region in Rakhine as part of East Pakistan (now Bangladesh), which ended in failure.<sup>35</sup> In the 1950s, the Rohingyas planned to establish an autonomous Muslim state in Rakhine. This effort was opposed by Burmese forces led by General Ne Win, who launched military operations against the Rohingyas as early as 1962.<sup>36</sup> In 1982, the Burmese government, through the Citizenship Act 1982, denied Rohingyas Burmese citizenship, resulting in millions of Rohingyas becoming stateless in their own homeland.<sup>37</sup>

Violence against the Rohingyas still occurs, causing an exodus of refugees from Myanmar into neighbouring countries.<sup>38</sup> Meanwhile, the government of Myanmar, in its capital city, Naypyidaw has officially denied committing the alleged atrocities against the Rohingyas.<sup>39</sup>

Malaysia is one of the founding state members of the Association of Southeast Asian Nations (ASEAN). Thus, it respects the principle of non-interference-an underlying fundamental principle that an ASEAN member should not interfere in the domestic affairs of another.<sup>40</sup> ASEAN embraces the concept of “prosper thy neighbour.”

The Rohingya issue was originally considered a domestic question of Myanmar. However, as more and more Rohingyas flee persecution in Myanmar and arrive in neighbouring countries, this humanitarian disaster should no longer be viewed or treated as a domestic issue, but as rather an inter-regional catastrophe.

<sup>34</sup> *Who are the Rohingya?*, AL JAZEERA, Apr. 18, 2018, <https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya>.

<sup>35</sup> Z. BARANY, *THE ROHINGYA PREDICAMENT: WHY MYANMAR’S ARMY GETS AWAY WITH ETHNIC CLEANSING* 3-8 (2019).

<sup>36</sup> G. Alcorn, *The Land Where we Lived has Gone -the Life Story of a Rohingya Refugee*, GUARDIAN, Aug. 4, 2019, <https://www.theguardian.com/world/2019/aug/04/rohingya-refugee-myanmar-australia-oppression-suffering>.

<sup>37</sup> *Id.*

<sup>38</sup> *ASEAN Must Help Rohingya*, BANGKOK POST, Oct. 23, 2020, <https://www.bangkokpost.com/opinion/opinion/2006891/asean-must-help-rohingya>.

<sup>39</sup> *Was Myanmar’s Lawyer Caught on Tape Calling Crimes against Rohingya Muslims Genocide?*, S. CHINA MORNING POST, Dec. 14, 2019, <https://www.scmp.com/news/asia/southeast-asia/article/3042088/was-myanmars-lawyer-caught-tape-calling-crimes-against>.

<sup>40</sup> Mohd Hazmi Mohd Rusli, *Indonesian Haze: An Asean Integration too Far*, MALAY MAIL ONLINE, Sept. 15, 2015, <http://www.themalaymailonline.com/what-you-think/article/indonesian-haze-an-asean-integration-too-far-mohd-hazmi-mohd-rusli>.

## 4. Humanitarian Disaster

Although Malaysia is relatively young compared with other developed Western countries, it has been shouting its views against global persecution. This can be observed from the fact that Kuala Lumpur refused to engage in diplomatic relationships with the apartheid government of South Africa in Pretoria until 1994.<sup>41</sup> Malaysia has been very actively fighting for the rights of Bosnians fleeing the country during war in 1994.<sup>42</sup> Malaysia's position remains the same today; it shelters thousands of Rohingya and Syrian migrants at present.<sup>43</sup>

Even though being globally praised and acknowledged as a nation that aids Rohingya migrants, Malaysia has been criticised for not ratifying the United Nations conventions on refugees.<sup>44</sup> The choice of whether to ratify certain international conventions is solely the right of the sovereign State. Despite the US being one of the largest maritime nations in the world, its government has yet to become party to the United Nations Convention on the Law of the Sea 1982 (UNCLOS).<sup>45</sup> This inaction does not mean that the US government has no say in international law of the sea or global maritime matters because these are part of customary international law applicable to all states.<sup>46</sup>

Al Jazeera in November 2014 published a video entitled "Malaysia's Unwanted." It severely criticized the Malaysian government for neither stopping human trafficking, nor protecting refugees suffering from various kinds of abuse.<sup>47</sup> Malaysia has done its best accommodating the influx of migrants, particularly Rohingyas. Without Malaysia's steady economic growth and relative peace, these migrants would not be flocking into Malaysia.<sup>48</sup> Before the blame is attributed to Malaysia, it

<sup>41</sup> Mohammad Muda, *Malaysia-South Africa relations and the Commonwealth 1960-95*, 85 COMMONWEALTH J. INT'L AFF. (1996).

<sup>42</sup> Santha Oorjitham, *Remembering Our Role in Bosnia*, STAR, Sept. 20, 2015, <https://www.thestar.com.my/news/nation/2015/09/20/remembering-our-role-in-bosnia>.

<sup>43</sup> *I'm a Refugee, not Useless': In Malaysia, They Who Lost It All Help Uplift Others*, CHANNEL NEWS ASIA, Jan. 13, 2019, <https://www.channelnewsasia.com/news/cnainsider/refugees-malaysia-uplift-school-theatre-rohingya-11115436>.

<sup>44</sup> Rusli, *supra* note 9.

<sup>45</sup> C. Bates, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT'L L. & COM. REGULATION 745-88 (2006).

<sup>46</sup> L. Gradoni, *The International Court of Justice and the International Customary Law Game of Cards*, in A FAREWELL TO FRAGMENTATION REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 371-6 (M. Andenas & E. Bjorge eds., 2015).

<sup>47</sup> *Malaysia's Unwanted*, AL-JAZEERA, Nov. 21, 2014, <https://www.aljazeera.com/program/101-east/2014/11/21/malaysias-unwanted>.

<sup>48</sup> Mohd Hazmi Mohd Rusli, *Apa Benar Malaysia Negara Gagal? [Is Malaysia a Failed State?]*, ASTRO AWANI, Aug. 30, 2017, <http://www.astroawani.com/berita-malaysia/apa-benar-malaysia-negara-gagal-153880>.



should be noted that developed countries such as the UK and those of the European Union face great challenges and difficulties in handling Syrian refugees and African economic migrants swarming into Europe.<sup>49</sup>

## 5. Protecting Malaysia's Frontiers

Illegal immigration to Malaysia is the cross-border movement of people to Malaysia under the conditions in which official authorisation is lacking, breached, expired, fraudulent or irregular.<sup>50</sup> The cross-border movement of workers has become well established in South-East Asia, where Malaysia is a major labour-receiving country and Indonesia and the Philippines are the region's main labour-sending states.<sup>51</sup> As mentioned above, Rohingya migrants have fled their hostile home country of Myanmar and overcrowded camps in Bangladesh's Cox's Bazaar; they have been illegally trafficked into Malaysia, which is regarded as their "land of dreams" by most Rohingyas.<sup>52</sup> Therefore, managing cross-border migration (labour, refugee and human trafficking) has become an issue of increasing concern in Malaysia and its international contemporaries.<sup>53</sup> Human traffickers engaging in this illegal activity make billions of dollars every year, profiting from the suffering of others.<sup>54</sup>

Malaysian law stipulates that any individuals who enter Malaysia without valid documents are deemed "illegal immigrants."<sup>55</sup> The offender, if found guilty, may be liable to a fine of RM10,000.00 and/or imprisonment, not exceeding 5 years and

<sup>49</sup> *More than 1,000 People Dead in Mediterranean So Far This Year*, AL JAZEERA, Oct. 1, 2019, <https://www.aljazeera.com/news/2019/10/1/more-than-1000-people-dead-in-mediterranean-so-far-this-year>.

<sup>50</sup> Mohd Na'eim Ajis, Kamarulzaman Askanda & Saadon Awang, *International Migration and Human Trafficking in Malaysia: A Study on Illegal Immigrants*, 11 ASIAN SOC. SCI. 125-34 (2015).

<sup>51</sup> J. Anderson, *Managing Labour Migration in Malaysia: Foreign Workers and the Challenges of 'Control' beyond Liberal Democracies*, 42 THIRD WORLD Q. (2020), <https://www.tandfonline.com/doi/full/10.1080/01436597.2020.1784003>.

<sup>52</sup> *Malaysia the Land of their Dreams*, STAR, Oct. 16, 2017, <https://www.thestar.com.my/news/nation/2017/10/16/msia-the-land-of-their-dreams>.

<sup>53</sup> Malaysia has a number of laws on the protection of its borders against illegal migrants. Among them are the Immigration Act 1959/1963 (Act 155), Passport Act 1966 (Act 150), Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670), Malaysian Border Security Agency Act 2017 (Act 799), and the Malaysian Maritime Enforcement Agency (MMEA) Act 2004 (Act 633). These legislations could be accessed via Malaysia's Attorney General's Chamber Official Portal, <http://www.agc.gov.my>.

<sup>54</sup> According to Niel Jensen, then chief executive officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC), profits reaped through human trafficking activities reach between USD10 billion and USD 31.6 billion per year. See Nurul Amirah Hamzah, *Pemerdagangan Manusia di Malaysia: Isu dan Usaha Membanteras* [Human Trafficking in Malaysia: Issues and Efforts in Combating Such Crime], 4 INT'L J. L., GOVERNMENT & COM. 130-40 (2019).

<sup>55</sup> Immigration Act 1959/1963 (Act 155), § 6(1).

whipping of no more than 6 strokes.<sup>56</sup> Illegal migrants shall be liable to be removed from Malaysia, as stated in Section 32(1) of the Immigration Act 1959/1963 (Act 155).

Since the outbreak of COVID-19, the virus has claimed more than 500 lives in Malaysia, and there were more than 14,000 active cases by mid-December 2020.<sup>57</sup> By January 2021, the number had increased to 25,000. Malaysian Director General of Health Tan Sri Dr Noor Hisham Abdullah has repeatedly mentioned in his daily press conferences that the government should shut and secure Malaysia's international gateways to stop foreign importation of the virus.<sup>58</sup> In October 2020, Malaysian Prime Minister Tan Sri Muhyiddin Yassin also expressed concern about the increasing COVID-19 infections caused by illegal migration into Malaysia.<sup>59</sup>

Consequently, Malaysia, via Ops Benteng, has enhanced surveillance, not only on its official gateways,<sup>60</sup> but also on hundreds of "back alleys" along the thousands of kilometres of land and maritime boundaries encircling the nation.<sup>61</sup> In this regard, the recent arrival of the Rohingyas by boat in Malaysian waters near Langkawi indicates that efforts should be undertaken to further safeguard the nation's maritime frontiers.<sup>62</sup> These boats are not in any way exercising the right of innocent passage because their intention was to illegally bring Rohingya migrants.<sup>63</sup> These

<sup>56</sup> *Id.* § 6(3).

<sup>57</sup> Syafiqah Salim, *Covid-19: Malaysia Confirms 1,295 New Cases, Selangor Tops List with Most Infections*, EDGE MARKETS, Dec. 16, 2020, <https://www.theedgemarkets.com/article/covid19-malaysia-records-1295-new-cases-55-selangor-and-kl>.

<sup>58</sup> *COVID-19: Kawalan di sempadan, pintu masuk perlu diperketat-KP Kesihatan* [Control at the borders and immigration posts have to be enhanced-DG of Health], ASTRO AWANI, Apr. 7, 2020, <https://www.astroawani.com/berita-malaysia/covid19-kawalan-di-sempadan-pintu-masuk-perlu-diperketat-kp-kesihatan-237080>.

<sup>59</sup> *COVID-19: PATI sebahagian besar punca peningkatan kes di negara ini* [Covid-19: Illegal immigrants were responsible in the increase of infections in the country], (Oct. 6, 2020), <https://www.astroawani.com/video-malaysia/covid-19-pati-sebahagian-besar-punca-peningkatan-kes-di-negara-ini-1870386>.

<sup>60</sup> Malaysian Border Security Agency Act 2017, § 4. It stipulates that the Agency has powers to suppress any smuggling or other illegal activities across the Malaysian frontiers.

<sup>61</sup> Raja Noraina Raja Rahim & Yusmizal Dolah Aling, *Ops Benteng kawal lorong tikus' Pati* [Ops Benteng controls 'rat lanes' and influx of illegal immigrants], HARIAN METRO, Sept. 1, 2020, <https://www.hmetro.com.my/mutakhir/2020/09/616198/ops-benteng-kawal-lorong-tikus-pati>.

<sup>62</sup> The United Nations Convention on the Law of the Sea 1982 (UNCLOS), to which Malaysia is a party, allows foreign vessels to sail through the territorial sea of another State via the innocent passage regime. Article 17 of the UNCLOS stipulates that this passage must be continuous and expeditious. The Rohingya boats were not exercising the right of innocent passage when they were found drifting, not navigating, through the Malaysian waters. Therefore, the Malaysian Maritime Enforcement Agency (MMEA) possesses powers to take action against these boats to safeguard Malaysian waters from foreign intrusion. Section 7(2)(i) of the MMEA Act 2004 (Act 633) provides that the Agency shall have power "to expel any vessel which it has reason to believe to be detrimental to the interest of or to endanger the order and safety in the Malaysian Maritime Zone." The passage of the Rohingya boats could not be considered "innocent" because it involved the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or health laws of Malaysia, as stipulated in Section 7(6)(g) of the same Act.

<sup>63</sup> Section 5(1) of the Immigration Act 1959/1963 (Act 155) prohibits any individuals from entering or leaving Malaysia

illegal migrants are believed to have been trafficked into Malaysia by numerous agents.<sup>64</sup>

Some were even funded by Rohingya communities that already reside in this country.<sup>65</sup> According to Malaysian Minister of Home Affairs Datuk Seri Hamzah Zainuddin, traffickers<sup>66</sup> could be charged up to RM 15,000.00 per migrant they traffic into the country.<sup>67</sup> Malaysian law stipulates that consent of trafficked persons is irrelevant for the purpose of convicting an accused person committing such an offence.<sup>68</sup> In other words, although an individual has given his or her permission to be trafficked, the traffickers could still be prosecuted if caught committing this offence in Malaysia.

The Rohingyas are stateless people, so that they do not possess valid documents<sup>69</sup> when entering Malaysia.<sup>70</sup> There have been reports that Rohingya migrants purposely damaged their boats to compel Malaysian authorities to bring them ashore.<sup>71</sup> There have also been calls by some that the Malaysian government should continuously do

except at an authorised landing place, airport or point of entry.

<sup>64</sup> Naimul Karim, *Traffickers Demand Ransoms for Rohingyas Held at Sea in SE Asia*, REUTERS, June 15, 2020, <https://de.reuters.com/article/us-bangladesh-malaysia-rohingya-traffic/traffickers-demand-ransoms-for-rohingyas-held-at-sea-in-se-asia-idUSKBN23MIAC>.

<sup>65</sup> Based on the interview with the Enforcement Division of the Immigration Department of Penang, the Rohingya community already residing in Malaysia funds traffickers to bring in the rest of their family to Malaysia from Cox's Bazaar, Bangladesh. They would be brought in via a sea route through the transit island of Koh Adang in Satun, Thailand, or overland via the Malaysia–Thai border. According to the Immigration Department of Penang, there are no cases of Rohingya migrants being smuggled in via the gazetted entry and exit points of Malaysia. If traffickers somehow managed to bring them in, their activities would be repelled through roadblocks set up by police or the Malaysian Border Security Agency. Rohingya migrants are illegally transported into Malaysia via a number of “back alleys,” which are created by the traffickers. This interview was conducted on October 30, 2020. The lead researcher, Associate Professor Dr. Mohd Hazmi bin Mohd Rusli interviewed three immigration officers, Dian Karmilla, Mohd Shaafily bin Abdul Latif and Wan Mohd Zunaidi bin Wan Deraman at 3pm at the Immigration Department of Penang Building in Seberang Jaya, Penang, Malaysia. See Figure 2—a photo taken with the Immigration Department of Penang.

<sup>66</sup> Malaysia enforces strict laws against trafficking in people. Section 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 799) stipulates that any person who traffics in people for the purpose of exploitation will, upon conviction, be punished with imprisonment for a term not exceeding 15 years, and shall also be liable to a fine. This would also apply to any person who profits from the exploitation of a trafficked person as mentioned in Section 15 of the same Act.

<sup>67</sup> *Etnik Rohingya bayar sindiket RM15,000* [Rohingyas paid RM15,000 to trafficking syndicates], HARIAN METRO, Apr. 10, 2020, <https://www.hmetro.com.my/mutakhir/2020/04/564961/etnik-rohingya-bayar-sindiket-rm15000>.

<sup>68</sup> Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 799), §16.

<sup>69</sup> Section 2(1) of the Passport Act 1966 (Act 150) provides that every person entering Malaysia from any place beyond Malaysia shall produce to an immigration officer a passport and a valid visa for Malaysia (if required).

<sup>70</sup> *Rohingya Boat Turned Away from Langkawi over Covid-19 Fears*, NEW STRAITS TIMES, Apr. 18, 2020, <https://www.nst.com.my/news/nation/2020/04/585387/rohingya-boat-turned-away-langkawi-over-covid-19-fears>.

<sup>71</sup> *Sanggup bocorkan bot sendiri, PATI cuba raih simpati* [Destroying their own boats, illegal immigrants tried to get sympathy], BERITA HARIAN, June 29, 2020, <https://www.bharian.com.my/berita/kes/2020/06/705198/sanggup-bocorkan-bot-sendiri-pati-cuba-raih-simpat>.

more to accommodate these migrants.<sup>72</sup>

Figure 2: Officers of the Immigration Department of Penang



(Hazmi Rusli in the Middle)

Refugee status is decided by the receiving government's authorities under Article 1(A)(1) of the United Nations Convention Relating to the Status of Refugees 1951 (1951 Refugee Convention) which is also attributed to customary international law. Therefore, even without membership of the 1951 Refugee Convention, the Rohingyas could be refugees following the definition of Article 1(A)(2).

Nonetheless, as Malaysia is not a party to the 1951 Refugee Convention, it has consistently categorised them not as refugees, but as illegal immigrants.<sup>73</sup> In addition, Malaysia is not a party to the Convention Relating to the Status of Stateless Persons 1954 (1954 Stateless Person Convention), either. However, as a responsible nation, Malaysia has always respected the spirit of the 1951 Refugee Convention by sheltering thousands of Rohingya migrants for decades.<sup>74</sup>

According to research published by the Humanitarian Policy Group in 2016, the main priorities for Rohingya migrants building a new life in Malaysia are to financially support themselves and their families and ultimately to ensure better

<sup>72</sup> Rozanna Latiff, *Malaysia Can't Take any More Rohingya Refugees, PM Says*, REUTERS, June 26, 2020, <https://www.reuters.com/article/us-myanmar-rohingya-malaysia-idUSKBN23X19Y>.

<sup>73</sup> Mohd Iskandar Ibrahim, *Malaysia tak iktiraf status pelarian Rohingya* [Malaysia does not acknowledge the status of Rohingyas as refugees], BERITA HARIAN, Apr. 30, 2020, <https://www.bharian.com.my/berita/nasional/2020/04/683606/malaysia-tak-iktiraf-status-pelarian-rohingya>.

<sup>74</sup> Tamara Joan Duraisingam & Harmahinder Singh Iqbal Singh, *Legal Analysis on the Right to Livelihood for Stateless Persons in Malaysia*, 28 PERTANIKAJ. SOC. SCI. HUMANITIES 2279-93 (2020).

future for their children.<sup>75</sup>

In facing COVID-19, Malaysia should amend its priorities to protect and improve the lives and livelihood of Malaysians first, which will be the utmost priority.<sup>76</sup> However, this does not mean ignoring in totality the interests of the Rohingya migrants already residing in this country.

Malaysia's healthcare system could still accommodate the rising number of COVID-19 patients. However, this might not be the case if Malaysia opens its gates and continuously receives Rohingya migrants coming to its shores. Malaysia is a sovereign nation having exclusive rights and jurisdictions to protect its territories.

Cramped in dilapidated boats for months, these Rohingya migrants may not only have COVID-19, but perhaps also other diseases once they arrive in the country. This would make it more difficult and complicated for the Malaysian authorities to control and contain the outbreak, ultimately affecting the wellbeing of other Malaysians.

Malaysia has been doing its best to provide protection and shelter for thousands of Rohingyas for years.<sup>77</sup> However, conditions are no longer the same. This is the time for the government to prioritise Malaysians not only by tightening all gazetted entry and exit points, but also by identifying and destroying the "back alleys" often created by traffickers. In 2021, Malaysia is required to increase its efforts to disconnect the chain of transmission of COVID-19, so that it may rebuild its economy, which has been shattered by the pandemic.

## 6. Conclusion

As a member of ASEAN, Malaysia respects the principle of non-interference embraced by all ASEAN parties. Nonetheless, the Rohingya dilemma is no longer a domestic issue of Myanmar; it has exploded to become one of the worst humanitarian disasters in Asia as well as the world. These migrants were evicted from their hometowns in Rakhine and resettled in Cox's Bazaar, Bangladesh. Some have been relocated to Bhasan Char, an isolated island in the Bay of Bengal, by the Bangladeshi government.

<sup>75</sup> Caitlin Wake & Tania Cheung, *Livelihood Strategies of Rohingya Refugees in Malaysia 'We Want to Live in Dignity'* (2016), <https://www.refworld.org/pdfid/57922bbb4.pdf>.

<sup>76</sup> *M'sians Come First during Crisis, Not Rohingyas: Dons*, DAILY EXPRESS, Apr. 25, 2020, <https://www.dailyexpress.com.my/news/151432/m-sians-come-first-during-crisis-not-rohingyas-dons>.

<sup>77</sup> Florence Looi, *Rohingya Refugees Seeking Shelter in Malaysia*, AL JAZEERA, Apr. 8, 2018, <https://www.aljazeera.com/features/2018/4/8/rohingya-refugees-seeking-shelter-in-malaysia>.

Malaysia has received Rohingya migrants for more than a decade. Although Malaysia is neither a party to the 1951 Refugee Convention nor to the 1954 Stateless Person Convention, it has provided shelter to them; at the moment, more than 150,000 Rohingyas are seeking refuge in Malaysia.

As COVID-19 is infesting the nation, the Malaysian government has taken the necessary steps to seal its frontiers to curb further unwarranted importation of this deadly virus. The front line—the Royal Malaysian Police, the Malaysian Maritime Enforcement Agency (MMEA), the Malaysian Armed Forces and the Malaysian Border Security Agency—have been working tirelessly to safeguard the nation’s frontiers through Ops Benteng.

Malaysia has strict laws on border protection to combat trafficking of people. Although security at the gazetted points of entry and exit all over Malaysia has been enhanced, there are still encroachments in a number of so-called “back alleys,” where traffickers illegally operate. Therefore, the Malaysian government must take extra measures to invest in the assets of its front line, so that its frontiers, which stretch for hundreds of kilometres both in Peninsula and Borneo, can be better monitored, supervised and protected. Smuggling of people and other illegal activities taking place along the frontiers, particularly in the “back alleys,” could then be suppressed to avoid the unwarranted entry of illegal migrants.

Despite Malaysia’s strict laws on this matter, it may be advisable for the Malaysian government to increase the penalty prescribed in the Immigration Act 1959/1963 (Act 155), Passport Act 1966 (Act 150) and Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670), among others, as a deterrent against future offences. For example, Section 15 of Act 670 prescribes a fine of no less than RM 5,000.00 but not exceeding RM 1,000,000.00 against a person who has been convicted of profiting from exploitation of a trafficked person. In comparison with billions of ringgit of profits reaped by these human traffickers, a fine of RM 1,000,000.00 is a trivial amount that would not stop traffickers from continuously committing this offence.

In fact, Myanmar regards Rohingyas residing in Rakhine as illegal immigrants. Millions now remain stateless in a number of countries, such as Bangladesh, Thailand, Indonesia, Malaysia and nations in the Middle East. As a nation that values human rights and defends world peace, Malaysia has played its part in easing the exodus of Rohingya migrants.

Nevertheless, conditions are yet improving at all. In light of the COVID-19 pandemic, Malaysia has to secure its borders and stop receiving any more illegal migrants from Rohingya that may be carriers of COVID-19. The virus is spreading easily and quickly. It is time to think of new policy towards the influx of Rohingya

migrants into Malaysia.

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