THE *NON-REFOULEMENT* PRINCIPLE IN THE MALAYSIAN COURTS: THE STUMBLING BLOCK

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ABSTRACT:
This study seeks to analyse the applicability of the principle of *non- refoulement*, an international custom in the Malaysian courts. It begins with the explanation on whether or not there are profound evidence to conclude that the principle has become an international custom and the legal status of international law in the Malaysian legal framework. Analysis then continues on Malaysia's position as a dualist state. Another prime focus of this study is the judicial trend relating to international custom as shown in several case laws. Finally it will put forth argument to make the case for the application of the rule in local courts for the benefit of refugees.

KEYWORDS: *refugee in Malaysia, non- refoulement, customary international law.*

INTRODUCTION

The *non-refoulement* principle protects refugees from forced return by prohibiting states from rejecting, returning or removing refugees and asylum-seekers from their jurisdiction to any frontier that will expose them to a threat of persecution, or to a real risk of torture, cruel, inhuman or degrading treatment and punishment, or to a threat to life, physical integrity and freedom.[1] Protection against return is provided in Article 33 of the 1951 Convention Relating to the Status of Refugees (CRSR) as well as other international and regional instruments.[2] Scholars argue that the principle has become an international custom that binds all states without state consent. Such claim makes Malaysia legally bound to adhere to the rule despite continuous debate.[3] This article aims to analyse the applicability of the customary rule of *non- refoulement* in courts. It first analyses the formation of the rule as an international custom. Next, it examines the position of international law under the Malaysian legal framework to explain the applicability of customary international law rules in local courts by referring to judicial decisions.

THE FORMATION OF CUSTOMARY INTERNATIONAL LAW AND DUTIES OF STATE.

States have been practicing the rule of non- return even before the adoption of the CRSR in 1951. The concept was first articulated in international instrument in Article 3 of the 1933 Convention Relating to the International Status of Refugees.[4] It was then codified in Article 33 of the CRSR. Even though the rule exists in treaty law, it can also exist in the form of international

1 B.S. Chimni (Ed.), *International Refugee Law* (Sage Publications, New Delhi 2000) 85.
2 Universal Declaration of Human Rights (UDHR), European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), International Covenant on Civil and Political Rights (ICCPR), American Convention on Human Rights 1969 (ACHR), and African Charter on Human and People's Rights 1981 (Banjul Charter).
3 Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law*' (Cambridge University Press, UK 2003) 31-54.
4 Goodwin-Gill, G. S., and McAdam, J., *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007).

custom.[5] Two components must be satisfied in the formation of customary international law- general practice and acceptance as law or *opinio juris* [6] but there is a continuing debate over the weight that should be assigned to each component. For a practice to become 'customary', it must be constant, uniform and considered mutually obligatory among states.[7] Uniformity of the practice is not absolute but should be substantial, consistent, and without significant uncertainty, fluctuation, contradictory practice and discrepancy. Claims made by states without assertive acts do not amount to practice as required. [8] The first element, the generality of practice, no specific number of states can be ascertained or determined but it shall take into account the participation of states including the reaction of other states towards such practice.[9] Extensive acceptance among states whose interests are particularly affected is also vital.[10] Only general acceptance is needed to create customary law, not absolute recognition of a practice. Hence, a custom will also bind states that have not consented to the rule and do not object to it. Generality could require a large majority[11]and in some cases, generality depends on the evidence available for a particular circumstance.[12] Widespread practice with a representative participation among states, for example according to region is good example of general acceptance.[13] Generality does not demand specificity of time or duration.[14] A scholar even suggests that in extreme situations where precedents or prior practice are absent, custom could emerge instantly.[15] The second component, the *opinio juris*, requires that the practice be accepted and acknowledged as law, and that states voluntarily agree to be bound by the 'law'.[16] In determining the customary status of a rule, the traditional and modern customs have different views. They give different weights to both elements of state practice and *opinio juris*. The traditional custom makes general and consistent state practice as the primary consideration, and derives *opinio juris* from actual state practice. Greater weight is put on action than what the state publicly expresses. There are commentators who simply reject the *opinio juris sive necessitates* and rely solely on practice.[17] The modern custom however, puts greater

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5 *North Sea Continental Shelf,* Judgement, ICJ Reports 1969, 3 at para 64, 70-4; *Nicaragua v United States of America*, Judgement, ICJ Reports 1984, 392 at para 73. It was also stated that A customary rule can crystallise out of a provision of a treaty if it satisfies the three conditions: i) that the rule is fundamentally norm-creating character; ii) widespread and representative state support including affected states; and iii) consistent state practice and general acceptance and recognition of the rule.

6 Article 38 (1b) of the Statute of the International Court of Justice.

7 Malcolm N. Shaw, *International Law* (6th Edition, Cambridge University Press, UK 2008) 76; and James C. Hathaway, *The Rights of Refugee Under International Law* (Cambridge University Press, UK 2005) 34.

8 Fisheries Case (United Kingdom v Norway) ICJ Reports (1951) 191.

9 See Michael Akehurst, 'Custom as a Source of International Law' in *The British Year Book of International Law* 47 (1974-75) 1, 18.

10 See Fisheries Jurisdiction Case (United Kingdom v Iceland) ICJ Reports (1974) at p. 3, para 23- 26.

11 See South West Africa `Cases, ICJ Reports (1966) p. 291.

12 See Michael Akehurst, 'Custom as a Source of International Law; Ian Brownlie, *Principles of Public International Law* (7th Ed, Oxford University Press, Oxford 2008) 7; and Josef L. Kunz, 'The Nature of Customary International Law' (1953) 47 (4) The American Journal of International Law p. 662- 9.

13 See G.I. Tunkin, Theory of International Law (Harvard University Press, 1974) p. 118, Fisheries Jurisdiction Case (United Kingdom v Iceland) ICJ Reports (1974) at p. 3, para 23- 26 North Sea Continental Shelf Case, ICJ Reports (1969) at p. 4, para 42.

14 Ian Brownlie, *Principles of Public International Law* (7th Ed, Oxford University Press, Oxford 2008) 7.

15 Bin Cheng, "United Nations Resolution on Outer Space: 'Instant' International Customary Law?" (1965) The Indian Journal of International Law p. 35- 36.

16 James C. Hathaway, *The Rights of Refugee Under International Law* (Cambridge University Press, UK 2005) 34.

17 See Hans Kelsen, *Principles of International Law* (New York 1952)307.

importance to states expressions and declaration rather than their actual conduct.[18] Their stand is that a state may know that it has obligation under some laws but simply act contrary to the rule. This group believes that only *opinio juris* is vital in determining customary rules but not general practice since it is possible for customary rules to develop instantaneously even though the practice has never generally taken place.[19] The relevant proof of acceptance as law may include the assurance of policy-makers that certain practice is obligatory and has reached customary status.[20] Thus, contrary action by a state pertaining to a rule is unimportant when it has openly expressed the obligatory nature of a particular rule. Scores of commentators; Lauterpacht, Bethlehem, Goodwin-Gill, Hailbronner, Mushkat, Stenberg and Allain, support the idea that the principle of non-refoulement has become a customary rule over time.[21] Uniform and general state practices of *non-refoulement* are taken from various action including states' ratification and accession to one or more international or regional instruments that embody the rule of *non-refoulement*.[22] Nevertheless Malaysia is not a state party to any of the instruments. States' membership of international and regional organisations that adopt non- legal documents containing provisions of *non-refoulement* is another general practice. [23] Malaysia is a member state of the AALCO, which adopted the Bangkok Principles, a non-binding document concerning refugees that recognise prohibiton of forced return. The other practice is states' incorporation of the ratified treaties into municipal laws especially the principle of *non-refoulement*. More than 120 states have incorporated the *non-refoulement* provisions in their municipal law. Malaysia is not included in the statistic.Last but not least is states' actual practice of not rejecting, removing and returning refugees including their practice in relation to extradition. Nevertheless, many states do act against the principle and justify the breach and violation with security, social and economic reasons.

The rule or *opinio juris* is taken from a number of state expressions and statements including the unanimous view conveyed by state representatives during the UN Conference on the Status of Stateless Persons, which stated that the provision of *non- refoulement* in the Convention was taken as a demonstration and representation of a generally accepted principle of non-return.[24] The fact that the provision of non-return is embodied in various international treaties apart from the CRSR is also an *opinio juris*. Protests and objection by states and UNHCR to any breach of the *non-refoulement* principle or any conduct that amounts to *refoulement* demonstrate sense of legal obligation.[25] Lastly, the provision of Article 33 of the CRSR is considered to have a norm-

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Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 Am. J. Int'l. L. 757- 758; and Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Mich. J. Int'l. L. 115, 141- 161.

19 Bin Cheng, "United Nations Resolution on Outer Space: 'Instant' International Customary Law?" (1965) The Indian Journal of International Law p. 35- 36.

20 Anthony D' Amato, *The Concept of Custom in International Law* (Ithaca, London 1971) 34- 41.

21 Goodwin-Gill, G. S., and McAdam, J., *The Refugee in International Law,* 345-54; Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: 64-70; Gunnel Stenberg, Non-Expulsion And Non- Refoulement (Iustus Forlag, Uppsala 1989); Roda Mushkat, 'Mandatory Repatriation Of Asylum Seekers: Is The Legal Norm Of Non-Refoulement 'Dead'?' (1995) 25 (1) HKLJ 42-51; Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 538; and Seline Trevisanut, The Principle Of Non-Refoulement At Sea And The Effectiveness Of Asylum Protection' In Max Planck UNYB 12 (2008) 205-246.

22 Lauterpacht, E., and Bethlehem, D., 68.

23 Ibid.

24 Ibid., 45- 46.

25 Suzanne Gluck 'Intercepting Refugees At Sea: An Analysis of the United States' Legal and Moral Obligations' (1993) 61 Fordham L. Rev. 865-893 (Criticised America's response to Haitian refugees in the early 1990s); Nils Coleman '*Non-Refoulement* Revised: Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law' (2003) 5 Eur. J. Migration & Law 23-68; and Rita Bettis, 'The Iraqi Refugee Crisis: Whose Problem Is It? Existing Obligations Under International

creating character, the foundation of a customary law.[26] It is argued that Article 33 satisfies all the three prerequisites to become a customary rule as identified and applied by the ICJ in the *North Sea Continental Shelf Case*.

Regardless of the evidence, some commentators dispute the customary status. Hathaway, insists that no custom has ever been established, for several reasons. Firstly, there is a lack of consistent and uniform practice among contracting states.[27] In this regard, he refers to the negative practices of states, which are contrary to the prerequisite of uniform and consistent practice.[28] Hailbronner argues that actual state practice, as seen from the asylum laws and actions of Western Europe, the USA and Canada, has constituted contradictory evidence against customary status. Secondly, it is claimed that the rule is against states' desire to maintain control over their own borders; and thus, contrary to states' idea of sovereignty. The rule will impose on states an obligation to accept aliens into their territories or will remove states' powers of prerogative. The sufficiency of clear proof is another factor. There is inadequate evidence to support the proposal by taking into consideration all the inconsistent practice that has been occurring for decades to this day.[29] Proponents of the customary status of the *non-refoulement* argue that negative and inconsistent state practice should be regarded as violation and not denial of obligation. In Asia, during the Indochina crisis, Thailand, Malaysia, Indonesia, Singapore and Australia were all criticised for rejecting refugees by not allowing them to land and disembark on their shores. Boats were denied landing and ask to redirect to other destination but such redirections were argued as not amounting to a violation of the rule of non-*refoulement* since the boats are redirected to a safe country.[30] In Australia, the *Tampa* incident is a modern example of rejection. A freighter, which rescued Afghanistan refugees on the high seas was not allowed to land despite concern over the welfare and health of the refugees and the crew.[31] Australia continuously asserting that the refugees should not be allowed to apply for political refugee status and should not enter Australia illegally, but never denied its responsibility not to *refoule* the refugees.[32] Another argument to support *non-refoulement* as custom is the incorporation of the principle into domestic laws that should be taken as the *opinio juris* of the state. Such move is a demonstration that state has acted out of the sense of obligation under the principle of *non-refoulement*. By comparison, there are two significant and consistent state practices: first, becoming members of instruments that contain *non-refoulement* principle; and, second, the incorporation of the principle of *non-refoulement* into national laws. In addition to that, the number of states that practise the rule is greater than the number of states that violates the principle. The incompatible practices are insufficient to dismiss the consistency and generality of the *non-refoulement* principle. Thus it can be concluded that the principle of *non-*

Law, Proposal to Create a New Protocol to the 1967 Refugee Convention, & U.S. Foreign Policy Recommendations to the Obama Administration' (2011) 19 Transnat'l L. & Contemp. Probs., 261-292.

26 Lauterpacht, E., and Bethlehem, D., 64- 70; and *North Case*, ICJ Reports (1969) at 41-43.

27 Hathaway, 365.

28 See discussion in Nils Colesman, 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law'.

29 The idea of the customary status of the *non-refoulement* principle and its recognition is regarded as wishful legal thinking rather than a careful factual and legal analysis. Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985- 1986) 26 Va. J. Int'l L 857, 858, 872.

30 See discussion in Rachel Mansted, "The Pacific Solution - Assessing Australia's Compliance with International Law," (2007) 3 (1) Bond University Student Law Review 1, 5.

31 Tara Magner, 'A Less Than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 I.J.R.L. 53- 119; Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15 IJRL 159- 185; and Alice Edwards, 'Tampering With Refugee Protection: The Case of Australia' (2003) 15 I.J.R.L. 192- 218.

32 Ernst Willheim, 'MV Tampa: The Australian Response', 169,

refoulement has become an international custom. Relevant to this study, it must be noted that Malaysia is not a persistent objector to the rule and thus cannot escape the obligation under the rule.[33]

Malaysia's duties and obligation under the rule shall include the duty to identify 'persons' entitled to the protection of the rule. This could involve screening of aliens. The other duty is to provide the proper avenue to deal with the exception in the application of the protection.[34] Malaysia is required to determine that a person is in fact a refugee or someone who cannot be returned, thus enabling him/her to claim protection under the principle. The determination should be carried out by a specific body with a specific function similar to refugee status determination (RSD), as practised by contracting states to the CRSR which also provide appeal avenue.[35] However, since the UNHCR in Malaysia is allowed to process the application without any control, participation or involvement of the government throughout the process, does this amount to the positive discharge of the duty? It is argued that the screening and refugee determination by the UNHCR is an insufficient discharge of the duties under the non-refoulement principle because UNHCR no real legal power to execute its findings. In a Hong Kong case, *C v. Director of Immigration* [2013] 4 HKC 563, the applicants sought judicial review against the decision of the UNHCR of not recognizing the applicants as refugees and then the refusal upon appeal. They also sought a number of declaratory reliefs. It was held by the court in the first instance that the principle is a customary international law; but it was found to be contradictory to the law in Hong Kong law and thus rendering the rule inapplicable in Hong Kong. On appeal to the Court of Final Appeal, the court held that refugee screening is a duty of state even though UNHCR is already in the territory to conduct refugee status determination. It was also acknowledged that *non- refoulement* is a customary international law as was decided in the Appeal Court earlier. This case is relevant to the present study since Hong Kong and Malaysia are non-parties to the CRSR, and both persistently adhere to the policy of not granting refugee status, have no provisions for refugee protection and handling, and UNHCR fully handles refugee registration and determination of application for refugee status.

THE APPLICABILITY OF THE CUSTOMARY INTERNATIONAL LAW RULES FOR REFUGEES IN MALAYSIAN COURTS.

Malaysia has been practising a dualist approach towards international law and treaties.[36] In the dualism theory, international law and municipal law are two separate systems of rules without superiority effect over each other since each body of law regulate different subject matter.[37] Nevertheless in practice, dualist states often make laws that suppress international law.[38] In dualist state, its municipal law cannot be invalidated by international law.[39] The monism theory however, treats international law as supreme over national law.[40] It considers both laws as a

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33 As discussed in Supaat, D. I. (2013). Escaping The Principle Of *Non- Refoulement*. *Internatioanl Journal of Business, Economic and Law* (2: 3), 86-97. <http://ijbel.com/wp-content/uploads/2014/07/Escaping-The-Principle-Of-Non-Refoulement-Dina-Imam-Supaat.pdf>

34 Lauterpacht, E., and Bethlehem, D., 87

35 UKBA, 'Asylum' (UK Border Agency) available at http://www.ukba.homeoffice.gov.uk/asylum/ accessed 20 September 2013.

36 Abdul Ghafur Hamid , Judicial Application of International Law in Malaysia: A Critical Analysis in Asia Pacific Yearbook of International Humanitarian Law Vol 1 (Institute of International Legal Studies, Philippines 2005) 14-15.

37 Malcom N. Shaw, 131.

38 Ibid., 139.

39 Gerald Fitzmaurice, "*The General Principles Of International Law Considered From The Standpoint Of The Rule Of Law*" 92 Hague Recuil 5.

40 Malcom N. Shaw, 139.

single unit and international law is the basic law[41] and as a result, international law will automatically become part of municipal law.[42] Nevertheless, even though international and national law operate in different domain, there are occasions where both laws becomes in conflict which caused a state to breach its international obligation while acting in accordance with the domestic law.[43] In this situation the state is liable for the failure to fulfill its obligation under international law.[44] The Malaysian Federal Constitution does not provide the status or the effect of international treaties in Malaysian law and its legal framework.[45] The Constitution declares that the it is the supreme law of the land and that any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistencies be void.[46] Article 4 (1) is silent regarding international law but only provides that where the Constitution is in conflict with other statutes, the Constitution shall prevail. The Constitution also identifies specific powers of the Parliament to make laws in respect of matters concerning Malaysia's relation with other countries and international organisations.[47] The Parliament has to incorporate provisions of treaties, agreements and conventions into written legislation before it can be applied in Malaysian courts. The executive authority is empowered to administer and to implement matters, which fall under the authority of the Parliament.[48] A number of Parliamentary statutes have been enacted to give effect to international treaties[49] but have not yet fulfilled the obligation to implement some other treaties. Only selected provisions of the treaties are consolidated and incorporated into Malaysian laws such as the United Nations Convention on the Rights of the Child (CRC). It is important to determine the application of customary international law, an unwritten law that binds Malaysia without no state consent and ratification. Even if it the court can be convinced that the rule is an international custom, can a refugee be able to claim the right not to be returned under the *non- refoulement* principle in local courts?[50] Questions on how exactly customary international law can be applied and the extent of its legality as a source of law in the country have not sufficiently addressed both academically and judicially.[51] Commentators suggested that customary international law is applicable in Malaysia if it is regarded as part and parcel of the common law by virtue of Section 3 (1) of Civil Law Act 1956 (Revised 1972). Local courts are bound to apply common law and the law of equity as administered in England on the 7 April 1956 (for Peninsular Malaysia); 1 December 1951 (for Sabah); and 12 December 1949 (in the case of Sarawak) depending on the suitability of the law to local circumstances. It has been argued and confirmed in many English cases that the

41 Ibid., 132.
42 Ibid., 139.
43 Rebecca M.M. Wallace and Olga Martin- Ortega, *International Law*(Sixth Edition, Sweet Maxwell, England, 2009) 39.
44 Gerald Fitzmaurice, 15.
45 Abdul Ghafur Hamid , 14.
46 Malaysian Federal Constitution, Article 4 (1).
47 Federal Constitution, Article 74 (1) read together with the Ninth Schedule.
48 Federal Constitution, Article 80.
49 Including the Geneva Conventions Act 1962 (Act 512) (Revised 1993) which adopted provisions of the four Geneva Conventions for the Protection of the Victims of War or 1949; the Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636) (Revised 2004) that gives legal effect to the Vienna Convention on Diplomatic Relations 1961; and the International Organisations (Privileges and Immunities) Act 1992 (Act 485) that gives legal effect to the Convention on the Privileges and Immunities of the United Nations 1946.
50 In the case of *C v. Director of Immigration* [2008] HKCU 256 the Court of Appeal recognised the right of refugees under customary norm of *non- refoulement* and this provide a *locus standi* for the refugee to claim their rights in the courts.
51 Very limited journal articles and case laws discussed this matters including HL Dickstein, "The Internal Application of International Law in Malaysia: The Model of the relationship between international and municipal law" JMCL, 204- 215.

customary international law form parts of English common law and thus, customary international law could also be applied in Malaysia for the same reason.

In *Buvot v Barbuit (1737) Cas. Temp. Talbot 281*, Lord Talbot declares the court's recognition of international law as law in England by stating that: 'the law of nations in its full extent was part of the law of England'. After that, in *Triquet v Bath (1764) 3 Burr 1478*, Lord Mansfield agreed with the declaration made in *Buvot v Barbuit*.[52] In a Chung Chi Cheung v R [1939] AC 160,[53] Lord Atkin asserts that the courts will only apply international law which have been expressly accepted by English law and as for customary international law, it will be valid if it is consistent with written law and previous decisions of the courts. Later, Trendtex Trading Corporation v Central Bank of Nigeria [1977] 2 WLR 356 and Maclaine Watson v Department of Trade and Industry [1988] 3 WLR 1033 confirmed and reaffirmed the employment of the doctrine of incorporation as the correct approach in deciding the acceptance of customary international law rules into English law. These cases demonstrate that the application of customary international law in England is firmly founded on the doctrine of incorporation in which the rules are accepted and recognised by the courts provided that they are not in conflict with any statute of the Parliament or decisions of the highest court. [54]

In Malaysian context, the status of customary international law as a component of English law could be viewed as part of the common law which is applicable in the country as far as the rules are not in conflict with Malaysian law, public policy and local circumstances.[55] However, the application in Malaysian courts is still ambiguous issues on the application of customary international law in domestic courts have a very limited judicial consideration. In the case of *PP v Wah Ah Jee*[56] the court stated that it is the courts' duty to take the law as it is or as they find it and thus, whether a written law is contrary to international law should not be considered. In *Olofsen v Govt. Of Malaysia,*[57] the Singapore High Court applied a customary rule of state sovereignty despite no explaination was made on how did the rule is accepted into domestic legal framework. In *PP v Oei Hee Koi*[58] the Privy Council held that the customary international law as stated in the Oppenheim's International Law (Vol. 11 &th Ed) applied to the accused. It was also held that provisions of the Geneva Convention have not abrogated the customary international law rule and again, the extent to which customary international law shall be applied in Malaysia was not explained. On the contrary, the court in *PP v Narogne Sookpavit*[59] found the accused guilty of an offence under section 11(1) of the Fisheries Act 1963 (Revised 1979). The court rejected the defence council's argument that 'the right to innocent passage' has become customary international law and thus, is part of Malaysian law and therefore, the respondents should be able to enjoy the right of innocent passage.[60] According to Shanker J, the court is obliged to consider evidence that a particular custom really exist before endorsing its existence[61] and held that the right to inocent passage as a customary international law is not

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52 Malcom N. Shaw, 141; and D J Harris, Cases and Materials on International Law (Fifth Edition, Sweet Maxwell, London 1998) 74.

53 Reported in the Malayan Law Journal as *Chung Chi Cheung v The King* [1939] 1 MLJ 1.

54 Nonetheless, the application is limited by the rule that the court shall not take the role of the Parliament to create criminal sanctions. See the House of Lords in R v Jones and Others [2006] UKHL 16, [2006] 2 All ER 741.

55 Abdul Ghafur Hamid @ Khin Maung Sein, 201.

56 (1919) 2 F.M.S.L.R. 193

57 *[1966] 2 MLJ 300*

58 [1968] 1 MLJ 148.

59 [1987] 2 MLJ 100.

60 *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 101.

61 Evidence Act 1950, Section 13.

proved.[62] The court further held that even if it can be proved that an innocent passage is indeed a right, it cannot be applied and upheld as it is contrary to Malaysian statute particularly Regulation 3(b) of the Fisheries (Maritime) Regulations 1967. This judgement is an example where the court is capable of rejecting the the existence of a customary rule by citing a contradictory written law. Here, the Fisheries Act 1963 puts an obstacle to the application of the customary rule in domestic courts. It also shows that in order to establish the existence of an international custom, the Evidence Act 1950 must be closely adhered to.[63] This case also declares the supremacy of domestic laws over customary international law.

However, the case of *Village Holdings Sdn. Bhd. v Her Majesty The Queen in Right of Canada*[64] depicts a different decision. Shanker J held that Malaysia by virtue of section 3 of the Civil Law Act 1956, Malaysia is bound by the doctrine of absolute state immunity a common law Of England. He also refers to the fact that "the common law of England as administered in England on April 7, 1956 was that the immunity from legal process accorded to a foreign sovereign was absolute".[65] The case of *Mighell v Sultan of Johore* [1894] 1 QB 149 and *Duff Development Company Limited v Kelantan Government & Anor* [1924] AC 797 are also illustrative of this point. It was argued that court's recognition of the sovereign immunity principle *demonstrates that* since the rule is also a recognized as customary international law it impliedly points out that when Malaysian courts accept it as common it also means the acceptance of the rule as customary rule by the Malaysian courts. [66] The decision shows that the acceptance of common law is still subject to confirmation that it is a common law of England that is being administered as at April 7, 1956 since at that time, the common law of England on sovereign immunity has changed and developed to restrictive immunity as in the case of *Trendtex*.[67] This is the position if the provision of Section 3 of the Civil Law Act 1956 is to be strictly applied. It means that any developments in the common law of England after the cut off date of April 7, 1956 cannot be applied in Malaysia. In this situation, the legislature is the proper forum to update the development of the common law by enacting new laws.

Nevertheless, the real situation in Malaysia is somewhat different than the theoretical understanding of Section 3 of the Civil Law Act 1956. The restrictions is ignored in some instances and observed at other times. For example, in the case of *Saad Marwi* v *Chan Hwan Hua & Anor* [2001] 3 CLJ 98, in Gopal Sri Ram JCA asserts that after 1956, the judiciary are at liberty to shape the way the common law of England are to be applied in Malaysian courts Thus, he chose to apply the English doctrine of unconscionable bargain developed in England after 1956 through Section 3 of the Civil Law Act. On the contrary, the case of *Majlis Perbandaran Ampang Jaya* v *Steven Phoa Cheng Loon & Ors* [2006] 3 MLJ 389, was treated differently. Abdul Hamid

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62 *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 105.

63 Evidence Act 1950, Section 45.

64 [1988] 2 MLJ 656.

65 *Village Holdings Sdn. Bhd. v Her Majesty The Queen in Right of Canada* [1988] 2 MLJ 656, 662

66 Abdul Ghafur Hamid , Judicial Application of International Law in Malaysia: A Critical Analysis, in Asia Pacific Yearbook of International Humanitarian Law Vol 1 (Institute of International Legal Studies, Philippines 2005) 9. This inference however, must be treated with caution. It is clear in the case that the when recognizing the applicability of the rule in Malaysia, the court only refers to the common law status of the sovereign immunity and not its customary status. Nothing in the judgement could have impliedly point out that England applies the rule because it is a customary international law and thus Malaysia in accepting the rule as a common law also accept it on the basis of its customary status. This opinion is based on Chemerensky's commentary which stated that the doctrine of sovereign immunity as practiced in the United States is '…based on a common law principle borrowed from the English common law'. Erwin Chemerensky, 'Against Sovereign Immunity' (2001) 53 Stanford Law Review 1202, 1202.

67 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356

Muhammad FCJ is of the view that Malaysian courts can choose to apply the common law of England developed after 1956 if no common law before that date is found for a specific matter. He also acknowledges that the application of the common has sometimes failed to follow the correct approach as provided by the Civil Law Act 1956. The application of the doctrine of absolute state immunity is also reviewed by the Supreme Court in *Commonwealth of Australia v Midford (Malaysian) Sdn Bhd.*[68] Gunn Chit Tuan SCJ in answering whether absolute state immunity applies admits the applicability of the restrictive immunity rule through English common law that developed after 1956 as reflected in the case of *Philippine Admiral,*[69] *Trendtex*[70] and *The 'I Congreso' case*[71] but the court is silent of the status of the immunity rule as customary international law. It is more concern with the question of whether or not the rule has been made part of common law of England. Moreover, the court further asserts the principles in the application of common law in Malaysia: first, the court is at liberty to adopt the approach of applying common law rule that suits the legal needs of the country; and second, the Parliament has the power to enact a legislation which may be inconsistent with common law and thus, will have effect on the applicability of that rule. The Malaysian cases referred here displayed that there were not enough clarification on the formation of the custom, and second, that there are inconsistencies in the onus of proof of this matter. In some cases the court insisted that the defence or the party who asserts the existence of such rule made insufficient effort to prove that a particular customary rule exists.[72] In other cases, the court takes extra mile to show that a customary rule in question is a recognised rule in international law and thus applicable in local disputes such as in *Olofsen*.[73]

Three main principles are identified in the application of customary international law in domestic courts: first, the rule can be applied if it can be considered as Common Law. Second, the rule is not inconsistent with any written law, and third, the duty to prove a custom lies with the party who wants to invoke it.[74] To prove that the principle of *non-refoulement* is a common law, we have to look at the practice of English Courts in relation to *non- return*. In discussing the rights and protection of refugee, reference is always made to the CRSR and UK's obligation under it as a contracting state. The UK signed the CRSR on 28 July 1951 and ratified it on 11 March 1954. As a signatory to the CRSR, its regulation regarding asylum in the Asylum and Immigration Appeals Act 1993 incorporates provisions of CRSR.**[75]** UK is also a party to the European Convention on Human Rights (ECHR) and its provisions are adopted into the Human Rights Act 1998 and the protection against return or *non- refoulement* is provided under Article 3 of the Human Rights Act 1998. Without evidence supporting the position of *non-refoulement* as a common law, the rule cannot be applied in Malaysia via common law route. Even if the principle cannot be proved to be a common law, this study is of the view that the court is still open to follow the written law of England to some extent because the situation of refugee is not dealt with in Malaysian law and there is a lacuna. Thus, can the court refer to the written law of England on non- return, since the Civil Law Act 1956 only warrant the application of common law? In the

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68 [1990] 1 CLJ 878, [1990] 1 MLJ 475.

69 (1977) AC 373.

70 (1977) 2 WLR 356.

71 1983) 1 AC 244.

72 See *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 105..

73 As shown in *Olofsen* and *Param*..

74 Other factors could also influence court's acceptance of customary international law such as when judges are protecting governmental interests and international policies so that they will not interfere with policies already in place and to avoid upsetting the government's interests. See Eyal Benvenisti, Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts 4 EJIL (1993) 159, 161.

75 Inna Nazarova, 'Alienating "Human" From "Right": U.S. And **UK** Non-Compliance With Asylum Obligations Under International Human Rights Law' (2002) 25 Fordham Int'l L.J. 1335, 1340.

case of *Chan Ah Moi v Phang Wai Ann* [1995] 3 CLJ 846, the High Court, relying on the provision of Section 3, Civil law Act 1956, allows the application to exclude the husband from a matrimonial home based on the British Domestic Violence and Matrimonial Proceedings Act 1976 since no provisions dealing with such application is provided in any written law in Malaysia.[76] Later, however, in the case of *Jayakumari v Suriya Narayanan* [1996] 1 LNS 74 James Foong J. stated that the case of *Chan Ah Moi* was wrongly decided as it relies on the written law when it is not provided under the Civil Law Act 1956. In other words, the written law should not bind Malaysia. He insists that the cut off date should be complied with regardless of the absence of law. In deciding the case before him, he relies on several other English cases not referred to by the earlier case.[77]

The principle of customary international law accepted as common law in Malaysia is applicable provided that they are not inconsistent with any written law (statutes or Acts of Parliament) or decisions of the highest court. This is also the practice of many other states. What is not firmly established is the extent to which such inconsistency should takes effect or how much inconsistency is required before a principle of customary international law can be found void and thus inapplicable in Malaysian courts. **T**he Malaysian Immigration Act 1959/63 contains a provision that makes it an offence for anyone to enter and leave Malaysia through unauthorised entry points;[78] and to enter and stay in Malaysia without valid permit. The penalty for such offences includes fines and whipping and also removal and deportation.[79] These provisions is contrary to the *non- refoulement* principle that prohibits states to return an asylum seeker or refugee to a territory where there is a risk of being persecuted and when he/ she has no valid travel document or has entered a country illegally, penalty should not be imposed. From one perspective, this inconsistency can be used by the authority to deny its obligation. The provisions of the Immigration Act 1959/63 may be used to invalidate any attempt to invoke the principle of *non- refoulement* in Malaysian courts. If the court is to follow the finding in *Norogne*, there is a possibility that the principle of *non- refoulement* will be a futile method to refugees from deportation or removal from Malaysia. On the contrary, this study is of the view that laws which are deemed to be inconsistent with customary rule should be fully scrutinised to determine their effect. The idea that a customary international law cannot be applied at all when an inconsistent domestic law is present is unacceptable. Such notion will result in defeating international law by manipulating provisions of domestic laws rather than utilising the rules on state obligation and responsibilities for the benefit of marginalised population. It is suggested that courts should clearly outline the degree of inconsistency between a particular customary rule and the domestic law or even court's decision and specify the implication. An inconsistent legal provision should only have limited restriction effect on the principle of *non- refoulement*. It should not invalidate the whole principle or its contents. It should only becomes invalid to the extent of the inconsistency. This understanding in parallel with provision of the Federal Constitution that limit the effect of inconsistent law with the Constitution.

CONCLUSION

There are conclusive evidence that customary international law is theoretically applicable in Malaysian courts because of its common law status but the challenge lies in convincing the judiciary of the existence of the customary rule of *non- refoulement* and the common law path. The *non- refoulement* principle can be applied by the courts through liberal approach as in *Saad Marwi* and *Chan Ah Moi*. Nevertheless, a restrictive point of view as in *Majlis Perbandaran Ampang Jaya* v *Steven Phoa Cheng Loon & Ors* [2006] 3 MLJ 389 or refusal to address a *lacuna*

76 *Chan Ah Moi v Phang Wai Ann* [1995] 3 CLJ 846, 850.
77 *Jayakumari v Suriya Narayanan* [1996] 1 LNS 74, 76-80.
78 Section 5, Immigration Act 1959.
79 Section 6, Immigration Act 1959.

in domestic law will cause customary international law to be futile in local courts. The judiciary is reluctant to use and apply customary international law except for a limited number of established rules such as the diplomatic immunity. The stumbling block not only lies with proving international law as 'law' but also written laws that prevail over international law. In the spirit of protecting human rights, Malaysia should amend its immigration law or utilise the power of making a regulation to exempt refugees and asylum seekers from offences commonly associated with their presence.

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