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How Deportation Becomes Illegal Deportation?
(The Case of Deportation of Myanmar Nationals by Malaysia)

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Abstract

Deportation is the right of territorial states to return illegal or undocumented migrants to their home countries. However, the non-refoulement principle prohibits deportation if the illegal migrant faces persecution in their origin country. The territorial state should notice the situation in their home country before deporting them and refrain from their action if there is an indication of threat of persecution in the origin state. One of the cases happened in February 2022; Malaysia deported more than 1000 undocumented migrants from Myanmar back to Myanmar, even though a coup d'état had already occurred in Myanmar. This paper will explore the nexus whether coup d'état can lead to the well-founded situation and well-founded fear of persecution. Furthermore, it will assess the decision by Malaysia to deport Myanmar immigrants back to Myanmar with the non-refoulement principle. This paper uses a normative method to analyse the research problem. Research shows a clear nexus between a coup d'état and well-founded fear of persecution when the Coup creates uncertainty in citizen's lives and people in a dangerous situation. Consequently, the deportation decision by Malaysia violates the non-refoulement principle, hence it is illegal.

Keywords: Déportation, Illegal Migrants, Coup d'État, Non-Refoulement Principle, Persécution.

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A. INTRODUCTION

Freedom of movement is recognized not only by the UN Charter⁵ but also by the International Covenant on Civil and Political Rights (ICCPR⁶), as stated in Article 12. However, the right of freedom of movement can be limited by national security, public order, public health, or the morals and rights of other people.⁷ Therefore, both countries of origin and destination possess the right to limit freedom with the objective of protecting the people in both countries of origin and destination. The limitation might be justified by the country that implements the limitation.

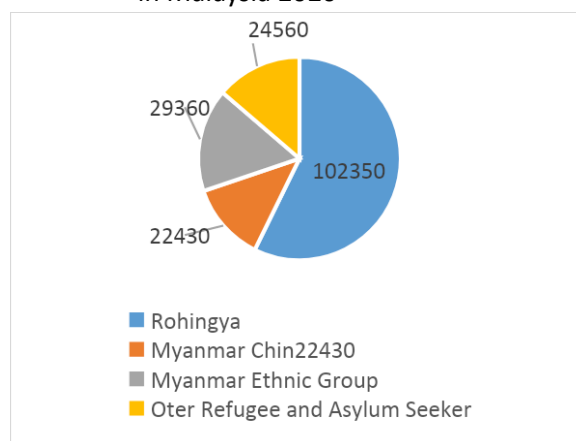
A problem occurs when individuals who conduct movement do not possess documents for or fulfil the requirements established by the destination country. The aim of the movement can be for seeking asylum or refugee status, or economic objectives, yet it becomes prohibitive for them to take care of official documents.

The problems regarding the movement of people have themselves occurred in almost all parts of the world, with ever-greater numbers of internal conflicts, fears of severe human rights violations, violence and torture⁸, and poverty that has yet to decrease.⁹ IOM recorded approximately 272 million international migrants.¹⁰ Meanwhile, the UNHCR recorded more than 26 million refugees, 45.7 and 4.2 million asylum seekers¹¹. These immense numbers become a

problem for both transit and destination countries, because not all of the people in movement possess skills which can compete with the residents of the destination country.

At the level of ASEAN itself, Malaysia is one of the most targeted destinations for those with economic objectives, seek asylum, or desire to obtain refugee status from the UNHCR in Malaysia compared with other ASEAN countries.¹² Data from the World Bank shows that Malaysia has 2.96 to 3.26 million migrant workers¹³, while the number of refugees and asylum seekers in Malaysia reach over 176 thousand people.

Diagram 1
Number of Asylum Seekers and Refugees in Malaysia 2020



Source: unhcr.org¹⁴

A new problem emerged when the government of Malaysia through its immigration planned to send Myanmar nationals back to their home country. On 23 February 2022, the High Court of Malaysia granted a request for the temporary residence of Myanmar nationals until a judicial review regarding their fates was conducted. Yet, immigration persisted in sending back more

⁵ Article 13 *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948)

⁶ McAdam, McAdam, Jane. 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty'. *Melbourne Journal of International Law*, vol. 12, 2011, pp. 2.

⁷ Paragraph 11, OHCHR. *Expulsions of Aliens in International Human Rights Law*. OHCHR, 2006, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_12_2014.pdf.

⁸ Amnesty International, 'Who Is a Refugee, a Migrant or an Asylum Seeker?' Amnesty International, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/>. Accessed on 1 March 2023

⁹ Rügger, Seraina. 'Refugees, Ethnic Power Relations, and Civil Conflict in the Country of Asylum'. *Journal of Peace Research*, vol. 56, no. 1, Jan. 2019, DOI, <https://doi.org/10.1177/0022343318812935>, p 43-44.

¹⁰ McAuliffe, Marie Dennison, James, and Binod Khadria. *World Migration Report 2020*. International Organization for Migration, 2019, at 10

¹¹ UNHCR. 'Figures at a Glance'. *UNHCR Global Website*, UNHCR, <https://www.unhcr.org/figures-at-a-glance.html>. Accessed 3 May 2023.

¹² Munir-Asen, Katrina. *(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management*. Deutsches Institut für Entwicklungspolitik, 2018, at 7

¹³ ILO. *Triangle in ASEAN Quarterly Briefing Note*. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_614381.pdf.

¹⁴ UNHCR. 'Figures at a Glance in Malaysia'. *UNHCR Asia Pacific*, <https://www.unhcr.org/figures-at-a-glance-in-malaysia.html>. Accessed 3 May 2023.

than 1000 Myanmar nationals to Myanmar military vessels to return to Myanmar.¹⁵

Malaysian immigration stated that the deportation¹⁶ does not include refugees and asylum seekers. However, for more than one year, the UN was unable to access immigrant detention centres.¹⁷ The vagueness regarding who are to be sent home causes concern for the international community, moreover after the fall of the Myanmar government at the hands of the military junta after the military coup d'état¹⁸.

The deportation of Myanmar can be justified as limitation of freedom of movement in human rights since it is a derogable right. However, the government of Malaysia also needs to consider the situation occurring in Myanmar. When it is proven that threats to life or serious human rights violations can occur to Myanmar nationals who are returned, the government of Malaysia violates the principle of non-refoulement as international customary law.

The principle of non-refoulement does not only cover asylum seekers and refugees, but also immigrants. Therefore, the sending home or deportation that is conducted by the party of the territorial state must be conducted with extreme caution and careful consideration.

The non-refoulement principle is one of the sources of international law that binds countries without having binding international treaties to exist.¹⁹ Therefore, the government of Malaysia with all its incapability to see the

situation in Myanmar can be charged with violating the non-refoulement principle, which is included as one of the international customs, specifically in the field of human rights law²⁰.

Although later it was proven that those who were deported were only illegal immigrants, their safety when they return as well as the justification for the deportation must also still be examined further. Malaysia should act with caution regarding the fates of the Myanmar nationals. Before the transfer, Malaysia should allow the UNHCR or any other UN institutions that deal with the issue of asylum seekers and immigrants to evaluate the Myanmar nationals.

Malaysia decided to defer the second stage of deportation after the "ASEAN emergency regional summit" was held.²¹ Even so, the status of 1086 Myanmar nationals that have been deported, were not known, whether all illegal migrants or asylum seekers. There is no clear certainty regarding their objectives, and thus it cannot be legally said that all of them are illegal migrants. There needs to be an in-depth analysis of those Myanmar nationals per-individual basis.

Therefore, protection toward foreign nationals, even if they are illegal immigrants, must still be provided. As such, it becomes necessary to conduct further research regarding the justification for the deportation of Myanmar nationals by Malaysia during that first deportation.

This article will analyse the application of the non-refoulement principle in the first part. Secondly, the right of deportation. Third, explanation of how a Military Coup D'état could lead to persecution. The last part of the article will analyse the Malaysian Government's Deportation activities toward Myanmar Illegal Migrants under International Law.

¹⁵ Human Rights Watch. 'Malaysia: Investigate Return of 1,086 Myanmar Nationals'. *Human Rights Watch*, 24 Feb. 2021, <https://www.hrw.org/news/2021/02/24/malaysia-investigate-return-1086-myanmar-nationals>, accessed 2 March 2023

¹⁶ Scholten stated that "Expulsion is an act by the government to return a person against his/her will from the territorial state, and deportation is a successful expulsion", Scholten, Andrew. *International Law Aspects of Forced Deportations and Expulsions*. Congress on Urban Issues, 2016, <https://www.aacademica.org/andrew.scholten/9.pdf>, pp. 1

¹⁷ Amnesty International, 'Malaysia's "Reckless" Plan to Send People Back to Myanmar'. *Amnesty International*, 18 Feb. 2021,

<https://www.amnesty.org/en/latest/news/2021/02/myanmar-deportation-malaysia-danger/>, accessed 1 March 2023

¹⁸ Al Jazeera. *Malaysia Departs 1,086 Myanmar Nationals despite Court Order*. <https://www.aljazeera.com/news/2021/2/23/malaysia-departs-1200-people-to-myanmar>. Accessed 3 Mar. 2023.

¹⁹ Hathaway, James. 'Leveraging Asylum'. *Articles*, Jan. 2010, p.506

²⁰ ICRC, 'Note on Migration and the Principle of Non-Refoulement: ICRC, 2018'. *International Review of the Red Cross*, vol. 99, no. 904, 2017, pp. 2

²¹ Ananthakshmi, A., and Rozanna Latiff. 'Malaysia Puts Deportations to Myanmar on Hold till after ASEAN Meets - Sources'. *Reuters*, 24 Mar. 2021. [www.reuters.com](https://www.reuters.com/article/myanmar-politics-malaysia-idUSL4N2LE3GO), <https://www.reuters.com/article/myanmar-politics-malaysia-idUSL4N2LE3GO>, accessed 2 February 2023

B. APPLICATION OF THE NON-REFOULEMENT PRINCIPLE IN INTERNATIONAL LAW

The protection in the *non-refoulement* principle can be evolved by recognition from the development of the Human Rights and International Humanitarian Law.²² The development can fill the gap between the situation in the future and the time that the convention was drafted. The application of this principle is intended to protect asylum seekers and refugees from actions of returning or deporting them from destination and transit countries to their countries of origin.

The principle of non-refoulement is contained in Article 33 of the 1951 Refugee Convention. It can also be found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter mentioned as CAT).²³ State parties to the convention are prohibited from returning a person to a country where it is believed that the person will be in a perilous situation.

This stipulation represents one of the fundamental parts of the CAT.²⁴ UNHCR itself takes the view that the non-refoulement principle that adheres to the 1984 CAT is an inseparable part of the CAT itself, which states that countries must execute non-refoulement as the prohibition of torture itself as in international law it already become a *jus cogens* (peremptory norm).²⁵ Furthermore,

the non-refoulement principle is also found in Article 16 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

The principle of non-refoulement²⁶ is also considered as customary international law,²⁷ and a *jus cogens* in international law, as therefore cannot be derogated²⁸. The implication of the *jus cogens* is that it must be executed by all countries, regardless of state party to a convention or not. It is because the nature of *jus cogens* is required to be compiled by states until other *jus cogens* replace the principle.²⁹

The non-refoulement principle becomes one of the main principles in the protection of people, for which the (government of the) country of origin is no longer willing or able to provide protection. In this way, the obligation of protection becomes shared responsibility of the international community³⁰, which in certain cases becomes the primary obligation of the territorial state where an individual is currently present. Territorial states also cannot

<http://ijbel.com/wp-content/uploads/2014/07/Escaping-The-Principle-Of-NonRefoulement-Dina-Imam-Supaat.pdf>, pp. 97

²⁶ The International Law scholar argues that the non-refoulement principle is *jus cogen*. However, some scholars still think that the principle is customary international law, the author will support the first argument.

²⁷ Costello, Cathryn, and Michelle Foster. 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to Test'. *Netherlands Yearbook of International Law*, vol. 46, 2015, https://doi.org/doi:0.1007/978-94-6265-114-2_10.

²⁸ No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. *Conclusions Adopted by the Executive Committee on International Protection of Refugees No. 79 (XLVII) General (1996)*; See also Arenilla, Shirley Llain. 'Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States'. *Anuario Mexicano de Derecho Internacional*, vol. 15, no. 1, 2015, pp. 283–322. DOI., <https://doi.org/10.1016/j.amdi.2014.09.005>, pp. 289; see also: Orakhelashvili, Alexander. *Peremptory Norms in International Law*. Oxford University Press, 2008.

²⁹ Article 53, Vienna Convention on Law of Treaties 1969

³⁰ Under the Human Rights obligation, the territorial state has an obligation to protect, to fulfil and to respect every person's rights, even if they are not their nationality. See: *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*. 2004, <http://hrlibrary.umn.edu/gencomm/hrcom31.html>. U.N. Doc. CCPR/C/21/Rev.1/Add.13; Karp, David Jason. 'What Is the Responsibility to Respect Human Rights? Reconsidering the "Respect, Protect, and Fulfil" Framework'. *International Theory*, vol. 12, no. 1, Mar. 2020, pp. 86–89. DOI., <https://doi.org/10.1017/S1752971919000198>.

²² Von Sternberg, Mark R. 'Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection'. *Journal on Migration and Human Security*, vol. 2, no. 4, 2014, pp. 320. DOI., <https://doi.org/10.1177/233150241400200404>, p.342

²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'. *OHCHR*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>, (entered into force 10 December 1984) [CAT], Article 3(1).

²⁴ Droege, Cordula. 'Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges'. *International Review of the Red Cross*, vol. 90, no. 871, Sept. 2008, pp. 669–701. DOI., <https://doi.org/10.1017/S1560775508000102>, pp. 687.

²⁵ "Annex: Jus Cogen," International Law Commission. *Annex: Jus Cogen*. Report of The International Law Commission 66th Session, <https://legal.un.org/ilc/reports/2014/english/annex.pdf>, accessed 5 March 2023; Supat, Dina Imam. 'Escaping the Principle of Non-Refoulement'. *International Journal of Business*, vol. 2, no. 3, 2013,

apply their national law to reject the application of the non-refoulement principle until it can be proven that the individual is not included in the group of people who cannot be deported nor who are excepted from non-refoulement, as with criminals who have been declared by courts to have committed serious crimes that disrupt the society of the country.³¹ On the other hand, destination countries will also examine whether the person is a threat to the security of the country.

However, the application of the non-refoulement principle depends on states³² although the principle has become *jus cogens*. Hence, its application is also sometimes hindered by the ability and willingness of the state to interpret or include the state of individuals or groups as being threatened.

The principle of non-refoulement in fact is also quite similar to other international legal principles that are very much dependent on each state for the maintenance of applicability. Many countries, such as the United States, build walls to prevent refugees or asylum seekers (from Latin America) from entering their territory.³³ This issue is certainly quite regrettable. Another case occurred in Indonesia when a Rohingya boat headed to Australia entered Indonesian territory; the Indonesian Navy only provided aid to the ships, without permitting them to set foot on Indonesian territory.³⁴ This problem triggered

heated debates regarding whether the action is considered to violate the non-refoulement principle or not. Meanwhile, Australia is alleged to pay Indonesia to prevent refugees from entering its territory.³⁵ Though this allegation has not been fully verified, the issue was heard by the international community.

Europe is one of the primary destinations for refugees and has its own regulations for states who are declared to violate the non-refoulement principle by “independent state responsibility”. However, it was clearly violated by deporting asylum seekers out of its territory. The second is “responsibility from an internationally wrongful act committed by a third country”.³⁶ In this regard, European countries do not directly commit the violation but intentionally assist, directing, or coercing such violation. Europe also possesses a human rights court that can impose sanctions on states that violate human rights in its territory.

Third-party or transit countries avoid the obligation to protect through their immigration laws states that they have rights to deport anyone who enters their territory without sufficient legal documents. Transit countries should provide wider exemption if indeed, according to a strong justification, the migrants are believed to be asylum seekers. This must be immediately reported to the UNHCR to be responded with good actions of management and protection.

Yet, there is a loophole in the 1951 Convention on the Status of Refugees in regards to the claim of illegal migrants in Article 33 Paragraph (2). The exception applies only if the condition of a direct relationship between persons and the above requirement is proven.³⁷ The territorial state shall analyse

³¹ Ernawati, Ninin. ‘The Dilemma of Australian Pacific Solution: The Non-Refoulement Principle Versus National Security’. *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)*, vol. 6, no. 2, Oct. 2019, pp. 340–60. jurnal.unpad.ac.id, <http://jurnal.unpad.ac.id/pjih/article/view/23997>. pp. 347

³² Susanto, Fransiska Ayulistya. ‘PERLINDUNGAN HAK ASASI MANUSIA BAGI PENGUNGSI DI NEGARA NON-ANGGOTA KONVENSII STATUS PENGUNGSI 1951 [Human Rights Protection for Refugees in Non-Member Countries of the 1951 Refugee Status Convention]’. *Law Review*, vol. 20, no. 2, Nov. 2020, p. 169. DOI., <https://doi.org/10.19166/lr.v20i2.2689>, p. 178

³³ Castañeda, Ernesto. *Building Walls: Excluding Latin People in the United States*. Lexington Books, 2019. p.21

³⁴ Media, Kompas Cyber. ‘Panglima TNI Tolak Kapal Pengungsi Rohingya Masuk RI, tapi Bersedia Beri Bantuan’. *KOMPAS.com*, 15 May 2015, <https://nasional.kompas.com/read/xml/2015/05/15/20213301/Panglima.TNI.Tolak.Kapal.Pengungsi.Rohingya.Masuk.RI.tapi.Bersedia.Beri.Bantuan>. See also: Curley, Melissa, and Kahlia Vandyk. ‘The Securitisation of Migrant Smuggling in Australia and Its Consequences for the Bali Process’. *Australian Journal of International Affairs*, vol. 71, no. 1,

Jan. 2017, pp. 42–62. DOI.org (Crossref), <https://doi.org/10.1080/10357718.2016.1181149>, p. 58

³⁵ ‘UNHCR: Kebijakan Australia soal pengungsi tidak bisa diterima’. *BBC News Indonesia*, 23 Mar. 2016, https://www.bbc.com/indonesia/dunia/2016/03/160323_dunia_pengungsi_indonesia.

³⁶ European Union Agency for Fundamental Rights. *Scope of the Principle of Non-Refoulement in Contemporary Border Management: Evolving Areas of Law*. Publications Office, 2016. DOI.org (CSL JSON), <https://data.europa.eu/doi/10.2811/39416>, p. 20

³⁷ Syahrin, M. Alvi. ‘The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia’. *Sriwijaya Law Review*, vol. 1, no. 2, July 2017, pp. 168. DOI., <https://doi.org/10.28946/slrev.Vol1.Iss2.41.pp168-178>, pp. 173

the situation for each asylum seeker or even the refugees. If the territorial state has any doubt situation in the origin state, the territorial state shall cancel or delay the deportation.

In the end, as customary international law 'non-refoulement' shall be applied regardless the state is party to the convention³⁸ or not. However, to make countries respect and fulfil the non-refoulement principle as customary of international law is still the work of the UN.

C. DEPORTATION OF MYANMAR NATIONALS FROM MALAYSIA TO MYANMAR DURING THE PERIOD OF THE MILITARY COUP D'ÉTAT IN MYANMAR IN INTERNATIONAL HUMAN RIGHTS LAW

The movement of people from one country to another has been conducted long before the advancement of technology and information and the movement is part of people's rights³⁹. This movement is conducted with various objectives, but the primary objective is related to the factors of economy, social and political⁴⁰ as well as security in the country of origin. Because of this movement, almost no country with open borders does not have foreign nationals who live in its territory.

On the other hand, the movements that people make are not only conducted according to law but also through illegal

means.⁴¹ They are called as "illegal migrants or undocumented or irregular Migrant"⁴². This can be the case if the destination country is a developed country that is quite selective in granting residence permits to other foreign nationals. This affects the security of the destination country, hence it is justified to deport foreign nationals who enter a country without appropriate permits according to the regulations of a territorial state.

Deportation is one of the authorities of territorial countries to maintain their territorial security as well as to protect its residents. Deportation applies to "a person who has either violate or admitted in error their residency or application"⁴³. Deportation can be applied to illegal migrants but not to asylum seekers or refugees. These two terms are applied to individuals in considering their reasons or objectives leaving their places of origin. If the main objectives are economic, then the individuals are included as migrants. But if the objectives are related to the fear of persecution based on religion, group, race, language, political affiliation, and nationality in their region of origin, then they are included as asylum seekers.⁴⁴

The case in Malaysia occurred when there was a military coup d'état in Myanmar. The junta military as the rulers of Myanmar request Malaysia to send back all Myanmar nationals who came illegally. In response to this, Malaysia immediately coordinated to deport Myanmar's illegal migrants who are present in the country. The illegal migrants were deported by the Myanmar military vessels that were intentionally sent by the government of Myanmar to carry back the Myanmar nationals. However, the Malaysian

³⁸ CAT, ICPPED, and 1951 Geneva Convention

³⁹ Universal Declaration of Human Rights'. *United Nations*, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>. Accessed 3 May 2023, Article 13

⁴⁰ de Haas, Hein. *The Determinants of International Migration: Conceptualizing Policy, Origin and Destination Effects*. Oxford: International Migration Institute (IMI), 2013, <https://www.ilo.org/dyn/migpractice/docs/225/Determinants.pdf>, p. 4; see also: Koser, Khalid, and Marie McAuliffe. *Establishing an Evidence-Base for Future Policy Development on Irregular Migration to Australia*. 01, 2013, Department of Immigration and Citizenship, Australia Government, 2013, <https://www.homeaffairs.gov.au/research-and-stats/files/evidence-base-for-future-policy.pdf>, p.19; Mc Auliffe, Marie. *Seeking the Views of Irregular Migrants: Decision Making, Drivers and Migration Journeys*. Occasional Paper Series, 05/2013, Department of Immigration and Border Protection, Australia Government, 2013, <https://www.homeaffairs.gov.au/research-and-stats/files/vi-ews-irregular-migrant-decision-drivers-journey.pdf>, at .10.

⁴¹ Aleshkovski, Ivan A. 'Illegal Immigration as A Structural Factor of Global Development'. *Globalistics and Globalization Studies*, 2013, pp. 243–56, https://www.sociostudies.org/books/files/globalistics_and_globalization_studies_2/243-256.pdf, p. 243

⁴² *Ibid*

⁴³ Buckinx, B., and A. Filindra. 'The Case against Removal: Jus Noci and Harm in Deportation Practice'. *Migration Studies*, vol. 3, no. 3, Nov. 2015, pp. 393–416. DOI, <https://doi.org/10.1093/migration/mnu072>, p.394

⁴⁴ OHCHR. *Differentiation between Migrants and Refugees*. OHCHR, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf>.

stated that the deportation must be postponed because the situation in Myanmar was not secure enough for Myanmar nationals. Nonetheless, 1086 illegal migrants from Myanmar were still deported from Malaysia⁴⁵. This was criticised by various countries, the UN, and NGOs in the field of humanitarian affairs.

After the first deportation of Myanmar illegal immigrants back to Myanmar, the government of Malaysia still has the agenda to conduct the second and third stages of deportation to Myanmar. This plan received greater opposition. At the same time, the situation in Myanmar was intensified with increased tension and the killing of activists in Myanmar. This brings Malaysia deferred the deportation but not cancel. Under the non-refoulement principle, the sending back of foreign nationals who do not possess official documents must consider the situation and condition of the country of origin of the illegal immigrants

1. Right Of Deportation

State sovereignty represents the highest right of a country. With this sovereignty, a state has the right to regulate its own territory⁴⁶ without interference or intervention from other states. However, this right is limited by international regulations, for example regarding the protection of human rights, as well as by the sovereignty of other states.

A government has the right to produce appropriate regulations to protect people in its territory. Hence, it becomes an absolute right of a sovereign government.

In terms of immigration, the government of a territorial state has the right to grant or deny permission to anyone entering its territory based on the

applicable laws.⁴⁷ However, in general, the regulation is merely focused on administrative matters such as documents to be fulfilled by individuals based on the purpose of entering the state. This applies not only to foreign nationals who intend to visit, but also who wish to study, work, or permanently reside in the destination country. Every country conducts its own screening with different requirements.

As explained above, when foreign nationals enter the territory of a destination state, there are two possibilities: first, they are permitted to enter with official documents; or second, they are denied because the documents are not fulfilled. The latter of these often occurs to immigrants, particularly those who wish to seek jobs in developed countries. For example, the United States, England, the Netherlands, France, and Australia are several countries that are inhabited by various kinds of immigrants who came from tens or even hundreds of years ago, thereby creating their own communities. These countries are countries with high rates of illegal immigrants entering their territories.

The entry of illegal immigrants causes states to conduct deportation for them. One of the most important reasons is to maintain the security and protection of their own nationals.

Deportation is a forced act of sending back foreign nationals, both individuals and groups, from the territory of a state.⁴⁸ This is a chosen policy for dealing with illegal or undocumented migrants.⁴⁹ The most important part about deportation is it affects not only to the deported person,

⁴⁵ HRW, 'Malaysia: Investigate Return of 1,086 Myanmar Nationals'. *Human Rights Watch*, 24 Feb. 2021, <https://www.hrw.org/news/2021/02/24/malaysia-investigate-return-1086-myanmar-nationals>, accessed 3 February 2023

⁴⁶ Heller, Hermann. *Sovereignty: A Contribution to the Theory of Public and International Law*. Edited by David Dyzenhaus, Translated by Belinda Cooper, First edition, Oxford University Press, 2019, p.58

⁴⁷ A State has a right to self-determination, which could justify the rejection of migrants; Gillian Brock's, Justice for People on the Move, in Schmid, Lukas. 'Deportation, Harms, and Human Rights'. *Ethics & Global Politics*, vol. 14, no. 2, Apr. 2021, pp. 98–109. DOI., <https://doi.org/10.1080/16544951.2021.1926083>, p.99

⁴⁸ Drotbohm, Heike. 'Deportation: An Overview'. *The Encyclopaedia of Global Migration*, edited by Wiley Blackwell, Blackwell Publishing Ltd, 2013, at 1

⁴⁹ Kalir, Barak. 'Qualifying Deportation: How Police Translation of "Dangerous Foreign Criminals" Led to Expansive Deportation Practices in Spain'. *Security Dialogue*, Nov. 2022, p. 096701062211187. DOI., <https://doi.org/10.1177/09670106221118798>, pp.1

⁵⁰ but their entire families are also affected by the verdicts and actions of all aspects of immigration, such as government staff, bureaucrats, attorneys, judges, security staff, border control agents, politicians, NGOs, and the media.

Deportation is also more commonly known as “expulsion” or “removal”, but in a meeting at the UN General Assembly in 2006 that discussed the “Expulsion of Aliens”, it was regulated that expulsion is slightly different from deportation. Expulsion is more directed to formal verdicts or orders that are issued by the department that handles foreign nationals, while deportation itself is the enforcement of verdicts or orders.

“Expulsion refers to the order of a State government advising an individual – in general, a foreign national or a stateless person – to leave the territory of that State within a fixed and usually short period of time. This order is generally combined with the announcement that it will be enforced, if necessary, by deportation. In short, expulsion means the prohibition to remain inside the territory of the ordering State; deportation is the factual execution of the expulsion order. ... The execution of expulsion normally entails deportation, i.e. the coercive transportation of the alien out of the territory of the expelling State, if the alien refuses to leave voluntarily.”⁵¹

Expulsion is a directive and deportation is the method that is conducted to carry out the expulsion.

The government of territorial states, in possessing rights to send back immigrants, also needs to execute those rights by conducting investigations on

whether they are immigrants or asylum seekers. The burden of proof lies with the respective individuals. Territorial states will only ensure, but for states that do not recognize refugees, the role of UNHCR and the willingness of the state to open up access for the UNHCR becomes very important in order to protect those foreign nationals.

Article 32 of the 1951 Geneva Convention, expulsion cannot be used on refugees even if under national security or public order. However, it could be done to undocumented migrants or illegal migrants.

In general, the deportation process is conducted for foreign nationals who conduct actions that are not appropriate to applicable laws in territorial states. Most instances of deportation are conducted toward foreign nationals who do not possess official documents or ones that are appropriate to the kind of residence permit. However, each state can add reasons for the deportation of foreign nationals to their respective immigration laws.

In the end, deportation is a right that is possessed by territorial states. To that right, the responsibility to protect the residents of territorial states and foreign nationals also adheres. Thus, in conducting deportation, territorial states need to be very cautious.

2. The Non-Refoulement Principle and the Territorial State Right to Conduct Deportation of Illegal Migrants

The non-refoulement principle only applies to foreign nationals who from their origins can prove that they are actual objects of persecution or torture. However, if the individual issue is merely an economic problem, this principle cannot be applied, and deportation becomes one of the results of their journey.⁵²

⁵⁰ Drotbohm, Heike, and Ines Hasselberg. ‘Deportation, Anxiety, Justice: New Ethnographic Perspectives’. *Journal of Ethnic and Migration Studies*, vol. 41, no. 4, Mar. 2015, pp. 551–62. DOI, <https://doi.org/10.1080/1369183X.2014.957171>, p. 552

⁵¹ Para 92, ILC. *Expulsion of Aliens*. UN General Assembly, 10 July 2006, https://legal.un.org/ilc/documentation/english/a_cn4_565.pdf, See Laso: Karl Doehring, Aliens, Expulsion and Deportation”, in Bernhardt, Rudolf. *Encyclopaedia of Public International Law*. Elsevier Science Publishers, 1992, pp. 109-112

⁵² OHCHR. *Expulsions of Aliens in International Human Rights Law*. OHCHR, 2006, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_12_2014.pdf, at 2

The principle of non-refoulement itself in the 1951 Convention on the Status of Refugees also contains an exception for party states, by which they are allowed to send back asylum seekers or refugees if it is considered that the asylum seekers or refugees can disrupt security and order in the destination country. However, this exception for *non-refoulement* under Article 33 (2) only applies if it can indeed be proven that a direct relationship exists between refugees and the requirement above.⁵³

However, the screening process needs to be conducted very carefully. For this, destination countries are not only considered from the 1951 Convention on the Status of Refugees but also the treaties of CAT, ICCPR, CRC, GC IV, and ICPPED.⁵⁴ This is because these treaties demand state parties not to send back foreign nationals who come to their territories.

Problems occur because several states have stated that they are not a state party to the refugee convention, and thus they do not have obligation under the convention. This creates much burden for asylum seekers to obtain protection, particularly in transit countries.

Transit countries such as Indonesia, Malaysia, and Thailand will never recognize refugees, since in their national law there are no regulations to accept them as refugees. As such, the screening will be left up to the UNHCR which is present in the country. Governments of transit countries usually only accommodate them if they enter territorial areas, and they will be transferred to the UNHCR. If they cannot convince immigration that they wish to ask for asylum at the UNHCR in transit countries, they will be classified as illegal immigrants, who in the end will be deported to their countries of origin forcefully.

This matter is supported by the viewpoint that they might threaten

national security. However, this is subjective because each state has sovereignty to make its own interpretations regarding which activities are considered to disrupt public order and security, and which are not. The interpretations among states can be different from one to another. This viewpoint becomes an important reference to create a safe and harmonious society.

Therefore, if a state deports foreign nationals for security and public order, it will be difficult for other countries to oppose unless they are willing to bring the case to an international court. It is important to prove that the deportation is within their regulations.

Even so, it shall be taken into account that the principle of non-refoulement is customary of international law and also considered as *jus cogens*.⁵⁵ Therefore, if a state defends itself behind its non-participation in treaties that explicitly forbid refoulement, deportation cannot be justified.⁵⁶ A state is bound by the principles of general law and *jus cogens* that must be obeyed.⁵⁷

In this way, there is an overlap between the right and prohibition to deport in the non-refoulement principle. However, to justify deportation, states must conduct investigations or screening of illegal migrants who enter their territories. Indeed, this needs time and costs, but that is what the state should do.

If a territorial state does not recognize refugees, the burden of recognition will be transferred to the UNHCR that is present in the territorial state. Thus,

⁵³ M. Alvi Syahrin, *Supra* note 37 at 173.

⁵⁴ OHCHR *Supra* note 52.

⁵⁵ Allain, J. 'The Jus Cogens Nature of Non-Refoulement'. *International Journal of Refugee Law*, vol. 13, no. 4, Oct. 2001, pp. 533–58. DOI.org (Crossref), <https://doi.org/10.1093/ijrl/13.4.533>.

⁵⁶ Lursmanashvili, Lasha. *The Peremptory Nature of Non-Refoulement Obligation: Juridico-Ethical Argument for Humanity*. Lund University, 2021, <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=9049756&fileId=9049760>, p.35-36

⁵⁷ Tasioulas, J. 'Human Rights, Legitimacy, and International Law'. *The American Journal of Jurisprudence*, vol. 58, no. 1, June 2013, pp. 1–25. DOI.org (Crossref), <https://doi.org/10.1093/ajj/aut001>.

access by the UNHCR to the detention centre for illegal immigrants must be granted. However, not all states are willing to provide access to the detention centres. Coordination between the government of a territorial state and the UNHCR must also proceed well for the interests of asylum seekers.

Another issue is that the asylum seekers have no documents at all and they mingle with other illegal immigrants. Thus sometimes territorial states gather them together and do not investigate per-individual basis.

With the excuse that the state has rights as part of sovereignty, territorial states prioritise deportation instead of participating in giving support through funds for foreign nationals. Hungary even created a blockade fence as a form of government rejection of asylum seekers who enter its territory.

In the end, the right of deportation must be executed with consideration of the non-refoulement principle. In this way, the deportation becomes valid according to law. With prudence applied in the screening process for foreign nationals, territorial states can protect them in the best manner.

3. Military Coup D'état as a Form of Persecution or Threat for the Continuity of Life of Civilians

Persecution drives people to leave their home and seek a safer life. Their lives are threatened by the persecution either by state apparatus or other civilians, and the government is unable or unwilling to provide protection for them.

The inability or unwillingness of governments to provide protection also becomes one of the factors that prove the absence of protection or the evidence of threats that are faced by individuals or certain groups, which causes fear among them. This fear becomes the basis for the fulfilment of the fear-of-persecution criteria that is present in Article 1 of the 1951 Convention on the Status of Refugees.

Moreover, Hathaway described "the sustained or systematic violation of basic Human rights demonstrative of a failure of state"⁵⁸ could be considered as 'persecution'.

In considering the case of Myanmar, there are problems where the legitimate government was overthrown by a military coup d'état. In particular, there was further escalation of popular opposition against the military coup d'état. The coup d'état is considered to harm the democracy in Myanmar that has been created with much effort, although indeed the Rohingya case also becomes a particular remark for the democracy in Myanmar.

The cause of this event is that the government of Myanmar is considered did not organised fair and honest general elections, and thus the military attempted to create general elections of a better quality according to their perceptions. However, until today general elections have never been held, and the military maintains power for a longer period.

A coup d'état (coup) is "the infiltration of a small but critical segment of the state apparatus which is then used to displace the government"⁵⁹. When interpreted, a coup is then the "entry of a critical state apparatus section for the purpose of toppling a legitimate government". Therefore, a coup is often understood as an act of state apparatus or the people to bring down or replace a legitimate government, to create a new government in the form that they desire.

A military coup that often occurs is forcefully conducted with the usage of full arms with the objectives of the coup

⁵⁸ Hathaway, James C., and Michelle Foster. *The Law of Refugee Status*. Second edition, Cambridge University Press, 2014, p. 104; see also, De Andrade, José H. Fischel. 'On the Development of the Concepts of "Persecution" in International Refugee Law'. *Anuário Brasileiro De Direito Internacional*, vol. 2, 2008, pp. 114–36, <https://corteidh.or.cr/tablas/r27152.pdf>, p.123

⁵⁹ Luttwak, in Olafsson, Nadine. 'When Military Coups d'état Become Acts of Social Justice'. *E-International Relations*, 17 Jan. 2020, <https://www.e-ir.info/2020/01/17/when-military-coups-det-at-become-acts-of-social-justice/>, p. 1

to be immediately achieved. Military coups were in Mali in 2012, Central African Republic in 2013, Sudan in 1989 that led to a civil war that eventually separated Sudan and South Sudan, which eventually again led to a struggle of power in South Sudan up to the present, and the latest in Afghanistan by the Taliban. Many coups often occur in the region of Africa, which is politically and economically still unstable. In addition, in ASEAN itself, military coups in Myanmar have also occurred several times and have led to persecution and fear for the civilians of Myanmar.

To examine whether a coup can be said to be one of the forms of persecution, it becomes necessary to examine what is meant by persecution in international refugee law. Persecution is indeed not defined clearly in the 1951 Convention on the Status of Refugees, but in the UNHCR Handbook in Paragraph 51 there is a commonly accepted definition taken from a case⁶⁰ that was adopted to become:

“to pursue, hunt, drive’ and ‘to pursue with malignancy or injurious action; especially to oppress for holding a heretical opinion or belief”.

Therefore, persecution can be understood as an act to seek people with fierceness, detriment, or even oppression because of different views or faith from the perpetrators. It can be because of religious backgrounds, ethnicities or races, or even different political viewpoints. Persecution must also be proven by individuals in each individually occurring case.

Persecution in international refugee law cannot be separated from “fear” itself. Both of these become important elements in determining the status of asylum seekers to be regarded as refugees. Fear of being persecuted is a quite abstract concept, where the

burden of proof is also placed on individuals and the assessor only examines from their point of view, as this can be said to be quite subjective.

Furthermore, persecution still does not have a clear definition.⁶¹ Persecution, when considered based on Article 32 of the 1951 Convention, can be regarded as an act that threatens freedom and living because of religion, nationality, political opinion, or becoming a member of a certain social group. Even so, it is necessary to examine on a case-by-case basis as the subjective factor of the actual fear that was experienced by the individuals must be understood by the assessment officers for asylum seekers. These officials, usually from immigration, shall be wise so every person can be protected according to their needs.

Persecution is different from prosecution. There is a clear limit between the two based on the clarity of the conducted punishment. Prosecution means that a law is violated, and therefore the state can legally impose punishment. Meanwhile, persecution is conducted by way of intent that can disturb the lives of people, whether by government apparatus or other people in general. As such, persecution can just be felt by some individuals, but not to others because the form of treatment can possibly be different.

Persecution is inseparable from fear toward certain actions that can endanger a person. It is not only limited to what was experienced but also possible events that can occur in the future or at a later time.

To answer whether a military coup d'état can provide justification for an actual fear of persecution for Myanmar residents, it is necessary to conduct individual assessments whether they will be actually affected or not. However, the

⁶⁰ 'R v . Immigration Appeal Tribunal Ex Parte Jonah'. *International Law Reports*, vol. 87, 1992, pp. 358–64. DOI, <https://doi.org/10.1017/CBO9781316152157.045> AR 7

⁶¹ Paragraph 51, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*. UNHCR, 2019, <https://www.unhcr.org/sites/default/files/legacy-pdf/5ddfc4c47.pdf>.

coup d'état that has developed into a social conflict that leads to the death of civilians can be the nexus between fear of persecution in a military coup d'état.

On the other hand, it is possible that people who did not take part in the struggle against the military coup d'état nor supporters of the legitimate government will not be persecuted. However, there is no guarantee in the midst of political instability in the country. According to Lord Hoffman, persecution can also be formulated as "*persecution = serious harm + the failure of state protection*"⁶². Persecution can be understood as serious danger or injury because the government fails to provide the expected protection. Hence, the nexus of fear is not only the direct consequence of them being injured or targeted but also fear of becoming the next victim.

UNHCR also claims that several actions could lead to persecution such as:

*'serious physical harm, loss of freedom, and other serious violations of basic human rights';*⁶³ *'Discriminatory treatment';*⁶⁴ *'The combination of numerous harms';*⁶⁵

Accordingly, a military coup d'état can be included within persecution, although it is also necessary to examine the level of the coup d'état that occurred in that state.

If a coup d'état has the potential to cause losses or injury, whether physical or mental such as through murder, leaving behind political opponents, forced dispersal of opposing demonstrations that can cause injury or death, inappropriate use of weapons to civilians, execution of opponents in public, this can give pressure and cause

serious injury to public. Further, because the military coup d'état is conducted by the state apparatus that has the task to maintain national security, the expected protection is unlikely to exist. It also tends to dull the law enforcement officers that have the duty to maintain public order such as the police or the Department of Justice.

A military coup d'état without consideration of civilians as the primary objective makes it a violation of human rights. This can be seen from the restriction of rights of the people while the will of the military becomes the primary matter in the execution of governance.

The nexus between a military coup d'état and persecution must also be examined on a case-per-case basis. There can still be the possibility that a military coup d'état can instead be desired by the people, which will not lead to persecution as a result of the coup d'état. In contrast, in the unwanted military coup d'état, persecution of civilians can occur in the beginning of the coup or later after the coup.

Accordingly, territorial states where illegal migrants are present must consider the condition of their country of origin. State can request its ambassador in the country of origin of the migrant or the ambassador of the country of the illegal migrants to explain the existing situation. If this is still considered insufficient, the state can ask related information through NGOs that are present in the country of origin. Through the uncovering of information from several parties, a territorial state can make the decision to deport or not. The decision will be far more appropriate and not violate the rights of the illegal migrants.

⁶² Richmond Chambers, 'What Is "Persecution" under the Refugee Convention?' *Richmond Chambers*, 31 Jan. 2020, <https://immigrationbarrister.co.uk/what-is-persecution-under-the-refugee-convention/>, accessed 2 April 2023.

⁶³ UNHCR, *Supra* note 61. para. 52

⁶⁴ *Ibid.* para 54, see also: Andreade argue that "*serious restriction on the applicant's rights could be categorised as persecution*", at 124

⁶⁵ *Ibid.*, para 53

4. The Application of the Non-Refoulement Principle in the Case of Deportation of Myanmar Nationals

The deportation by Malaysia is not only for illegal migrants from Myanmar but also from other countries such as Indonesia, the Philippines, Vietnam, Cambodia, Bangladesh, India, and Pakistan, as well as several Middle Eastern and African nationals. Each year, the government of Malaysia deport more than 1000 illegal immigrants to their countries of origin because they entered Malaysian territory without permission or sufficient documents to live in Malaysia.

Malaysia is one of the largest immigrant destination countries in Southeast Asia. Data from the Department of Immigration, Ministry of Home Affairs indicated that 1.98 million regular migrant workers worked in Malaysia in September 2019.⁶⁶ This number continues to increase every year, unless during a pandemic where countries close and tightly regulate their boundaries, the number has decreased. However, when the pandemic ends, it is predicted that the number will increase.

Indonesian nationals are the highest immigrant in Malaysia at 690,659 people. Meanwhile, Myanmar nationals as immigrants are 140,461 people. However, this data does not include undocumented migrants in Malaysia.

Most migrants choose Malaysia because the country has a large income and is also an Islamic country that becomes a new hope for Muslims in other developing or poor countries to seek a far better economic life as well as to carry out their religious teachings easier. Yet, this matter is exactly what makes Malaysia far more selective in accepting foreign workers who enter its territory.

Regulations regarding these migrant workers or immigrants are found in “The

Immigration Act, The Employment Act 1955/1998 and [the] Malaysia Penal Code”⁶⁷. The violation of this law can be sanctioned in criminal sentences. In handling the issue of immigration in Malaysia, Department, the police force, and Ikatan Relawan Rakyat Malaysia (People’s Volunteer Corps or Rela)”⁶⁸.

In Malaysia immigration Act it is not firmly stated as “deportation” but they use the term “removal”. Accordingly, the following are categories of people that can be deported:

- 1) *Prohibited Immigrant* :⁶⁹
 - a) “any person who is unable to demonstrate that he has ability to support himself and his dependants (if any) or that he has definite employment awaiting him, or who is likely to become poor or a burden on society
 - b) any person suffering from a mental disorder mental disability, or suffering from a contagious or infectious disease that makes his presence in Malaysia a danger to society;
 - c) any person who refuses to undergo a medical examination after being required to do so under subsection 39A(1);
 - d) any person who—
 - i. has been convicted any offence and sentenced to imprisonment for any term in any state, and has not received a free pardon; and
 - ii. because circumstances relating to the sentenced are considered by the

⁶⁶ Engblom, Anna. *TRIANGLE in ASEAN Quarterly Briefing Notes*. Report, 15 May 2023. www.ilo.org/asia/publications/WCMS_614378/lang-en/index.htm

⁶⁷ Kaur, A. *International Migration and Governance in Malaysia: Policy and Performance*. 2008. *Semantic Scholar*, <https://www.semanticscholar.org/paper/International-Migration-and-Governance-in-Malaysia%3A-Kaur/db33008b482055de1a6bcb9098503b8999564b09>, at 13

⁶⁸ *Ibid.*, at 14

⁶⁹ Law of Malaysia Act 155, Immigration Act 1959/63 incorporating all amendments up to 1 January 2006, Section 8 (3).

- Director General to be an undesirable immigrant;*
- e) *any prostitute, or any person, who is living on or receiving, or who, prior to entering Malaysia, lived on or received, the proceeds of prostitution;*
 - f) *any person who procures or attempts to bring into Malaysia prostitutes or women or girls for the purpose of prostitution or other immoral purpose;*
 - g) *vagrants and habitual beggars;*
 - h) *whose entry into Malaysia is, or at the time of his entry was, unlawful under this or any other written law for the time being in force;*
 - i) *any person who believes in or advocates the overthrow by force or violence of any Government in Malaysia or of any established government or of constituted law or authority or who disbelieves in or is opposed to established government, or who advocates the assassination of public officials, or who advocates or teaches the unlawful destruction of property;*
 - j) *any person who is a member of or affiliated with any organisation entertaining or teaching disbelief in or opposition to established government or advocating or teaching the duty, necessity or propriety of the unlawful assaulting or killing of any officer, either of specific individuals or officers generally, of any Government in Malaysia or of any established government, because of his or their official character, or advocating or teaching the unlawful destruction of property;*
 - k) *any person who, in consequence of information received from any source deemed by the Minister* to be reliable, or from any government, through official or diplomatic channels, is deemed by the Minister* to be an undesirable immigrant;*
 - l) *has been removed from any country or state by the government of that country or state on repatriation for any reason whatever and who, by reason of the circumstances connected therewith, is deemed by the Director General to be an undesirable immigrant;*
 - m) *any person who, being required by any written law for the time being in force to be in possession of valid travel documents, is not in possession of those documents or is in possession of forged or altered travel documents or travel documents which do not fully comply with any such written law;*
 - n) *the family and dependants of a prohibited immigrant; and*
 - o) *any person, or any member of a class of persons, against whom an order has been made under paragraph 9(1)(a), or whose Pass or Permit has been cancelled under paragraph 9(1)(b) or 9(1)(c) respectively, or to whom*

such cancellation applies under subsection 9(6)."

However, when Malaysian immigration suspects an individual belongs to the group of prohibited immigrants, the burden of proof is in the individual. Therefore, individuals must be prepared to prove upon entry into Malaysian territory that they are not part of the group of prohibited immigrants. Foreign nationals upon entry must be able to show proof that they came legally with the sufficient documents.

- 2) *Illegal Immigrant*
Illegal immigrants themselves are people other than Malaysians who conduct acts that violate these regulations:
 - a) *Section 5*
Regarding approved routes for entry into Malaysian territorial areas, such as airports or other regions that have been determined for entry portals
 - b) *Section 6*
Regarding access controls for entry into the Malaysian territorial area, for which foreign nationals must possess legal entry permits
 - c) *Section 8*
Regarding prohibited immigrants
 - d) *Section 9*
Regarding the power of the Director-General to forbid, or cancel permits that have been given, with reasons that can be held accountable
 - e) *Section 15*
Regarding unlawful entry or presence in Malaysia
- 3) *Unlawful persons remaining in Malaysia*
Illegal people who are present in Malaysia comprise individuals who stay:⁷⁰
 - a) *"after the cancellation of any Permit or Certificate under this Part;*

- b) *after the making of a declaration under subsection 14(4);*
- c) *after the expiration of the period of any Pass relating to or issued to him; or*
- d) *after the notification to him, in such manner as may be prescribed, of the cancellation, under any regulations made under this Act, of any Pass relating to or issued to him."*

Myanmar nationals who enter Malaysia without sufficient documents can be forbidden to enter Malaysia. Myanmar residents can be included into the categories of prohibited immigrant, illegal immigrant, or unlawful person remaining in Malaysia. This possibility is considering the immense flow of immigrants that enter Malaysia each year.

However, on the first stage of deportation by Malaysia, the status of deported immigrants is still not known. Malaysia believed that they were illegal immigrants and were valid to be deported. Malaysia also stated that there were absolutely no asylum seekers included. Furthermore, there were no Rohingya who were deported within the group.

Thus, deportation that was conducted by Malaysia was in line with existing general conditions. For foreign nationals included in the categories above, Malaysia has the legal right to deport them. Other countries or even the international community cannot interfere.

The deportation that is conducted by a territorial state, in this case Malaysia, is conducted in various ways. This can be by aeroplane or ship, depending on the agreement of each country. Deportation is conducted after the assessment from Malaysia regarding the status of the foreign nationals who are present in the

⁷⁰ Law of Malaysia Act 155, Immigration Act 1959/63 incorporating all amendments up to 1 January 2006, Section 9 (1),

territory. Malaysia or any other territorial state has the right to conduct arrest and even detention of illegal immigrants until another course of action takes place, such as deportation or efforts to assert the claim of refugee status.

However, the UNHCR doubts that all the people who were deported are illegal migrants because Malaysia does not permit the UNHCR to provide aid or even check the illegal migrants that enter Malaysia. Therefore, it becomes necessary to conduct an assessment beforehand, or at the very least, to obtain appropriate data from the government of Malaysia regarding the Myanmar nationals who were deported. In this way, if the entirety of those who were deported were illegal migrants from Myanmar, the deportation becomes valid in the legal perspectives of Malaysian law as well as international law.

However, it shall be taken into account when the illegal migrants were in Malaysia and established, and the repatriation request was received, the situation in Myanmar had already changed. The situation in Myanmar was no longer normal, as a military coup d'état had occurred and caused the instability. Therefore, the government of Malaysia must also consider this issue carefully.

The situation in Myanmar changed quickly by the military coup d'état that led to massive protests on the streets in the cities of Myanmar and escalated to violence and struggles between the military and civilians. BBC stated that the people of Myanmar experienced persecution. In 2017, persecution against the Rohingya ethnic group,⁷¹ and thus it is quite possible that civilians who are considered to be unsupportive of the new government will also be treated in the same way. Victims have become unavoidable, as more than 400 people

against the military coup died, and hundreds of others became injured.⁷² Additionally, Human Rights Watch also reported that 75 children were among those of the dead. More than 100 people were reported to be forcefully eliminated, tortured and raped. Over 100 cases of arbitrary arrest.⁷³ The Myanmar military stated a general election would be held in August 2023, meanwhile military take charge of the government.⁷⁴

The changing situation that occurred in the country of origin can also be the reason that deportation that was valid becomes inappropriate and violates the non-refoulement principle that exists in not only the refugee status convention but also the CAT, where Malaysia is a party to CAT. Because of the rapidly changing situation, particularly since civilians have risen up in opposition and the Myanmar military continued to attack civilians, whether directly or indirectly, it is proper for Malaysia to suspect the possibility that Myanmar nationals who are deported will not be assured of the safety and continuance of their lives. The insecure situation that occurs will not only destroy the economy but also possibly continue to disrupt national security and defence.

Although the deportation was conducted one week after the fall of the government of Myanmar to the hands of the military and the conflict had not escalated, yet the military coup d'état was not the first time. Furthermore, considering how the military handled cases such as the Rohingya and several ethnic groups that have risen up in

⁷¹ Cuddy, Alice. 'Myanmar: Who Are the Rulers Who Have Executed Democracy Campaigners?' *BBC News*, 2 Feb. 2021. [www.bbc.com, https://www.bbc.com/news/world-asia-55902070](https://www.bbc.com/news/world-asia-55902070), accessed 1 April 2023

⁷² BBC. 'Myanmar Coup: Generals Celebrated amid Global Fury over Massacre'. *BBC News*, 28 Mar. 2021. [www.bbc.com, https://www.bbc.com/news/world-asia-56547381](https://www.bbc.com/news/world-asia-56547381), Accessed 1 April 2023

⁷³ Human Rights Watch. 'Myanmar: Coup Leads to Crimes Against Humanity'. *Human Rights Watch*, 31 July 2021, <https://www.hrw.org/news/2021/07/31/myanmar-coup-leads-crimes-against-humanity>, accessed on 1 April 2023

⁷⁴ Reuters. 'Myanmar Army Ruler Takes Prime Minister Role, Again Pledges Elections'. *Reuters*, 1 Aug. 2021. [www.reuters.com, https://www.reuters.com/world/asia-pacific/myanmar-military-ruler-promises-elections-says-ready-work-with-asean-2021-08-01/](https://www.reuters.com/world/asia-pacific/myanmar-military-ruler-promises-elections-says-ready-work-with-asean-2021-08-01/) accessed 1 April 2023

opposition, Malaysia should have been able to foresee the worst possibilities toward Myanmar nationals.

While Malaysia arrested the illegal immigrants before the military coup d'état, during the deportation, the situation changed drastically. Malaysia can not rely on their prior assessment; they must also consider the condition of the country of origin up until the time of deportation and predict the conditions of the country in the near future, whether it would be dangerous to the deported people or not.

Indeed, the military coup d'état is not written explicitly as one of the reasons for persecution, yet the government of Malaysia should have been able to see that the persecution would affect or even threaten the lives of the Myanmar people later on. It is very much possible that in the beginning, they were not one of the groups that received persecution, but if they were deported, there is no guarantee that they will not be persecuted. Persecution is accompanied by "well-founded fear" of the individuals that they might get later on.

Unstable politics and opposition against the Myanmar military by the civilians is possibly causing the Myanmar nationals to be in the midst of uncertainties and become victims in the future. If a strong foundation is discovered regarding acts that can affect the lives of the people who are deported, other methods then need to be considered.

Malaysia should have given access to the UNHCR after the outbreak of the conflict or the military coup d'état in Myanmar to protect the illegal migrants who are possibly asylum seekers. Even if Malaysia is unwilling to provide access to the UNHCR or still considers them illegal immigrants, Malaysia should have deferred the deportation until there is certainty on the safety and protection when they return to Myanmar.

Even if Malaysia considers that temporary protection is perceived to be a

burden and can disrupt the stability of the state, Malaysia can seek assistance from other countries, international organisations, or NGOs to provide temporary protection for Myanmar immigrants while waiting for the process of restoring security in Myanmar. That is a state obligation in the condition of inability. Thus, a state, even in a critical condition, cannot simply leave alone without taking action, although they need requests for assistance for foreign nationals in its territory.

The exemption to the non-refoulement principle also cannot be applied in this case. It can only be applied if the state becomes a state party to the 1951 Convention because Article 33 (2) is not yet affirmed as an international customary law. In addition, Malaysia must prove that in the presence of those illegal immigrants, the security and stability of the state of Malaysia is threatened. Even if Malaysia says that it is not a party to the 1951 Convention and therefore has no obligation to provide protection toward illegal immigrants who can be asylum seekers after the coup d'état has occurred, human rights protection needs to be provided.

The non-participation of Malaysia in the ICCPR or ICESCR does not absolve the responsibility of the state to protect individuals in difficulties. The human rights principle is important, even if a territorial state declares itself not to be a part of a treaty, the human rights principle can protect and create pressure on territorial states to do so even if only temporarily.

Human rights law expects countries in the world to protect foreign nationals present in their territories if indeed their countries of origin are unable or unwilling to assist. Furthermore, the humanitarian and "responsibility to protect" principles allocate obligation or responsibility to the international community to provide assistance to foreign nationals in difficult or dangerous conditions.

Conclusion

The request of the Myanmar military junta to deport Myanmar nationals should be rejected by Malaysia considering the situation in the case. It is true that in the beginning, there were no classification as asylum seekers, but with the development of the struggle between the military junta and civilians, Malaysia should defer or cancel the deportation of the Myanmar people until the situation improves and the deportees did not face a well-founded fear of persecution in Myanmar. Yet, the first deportation that was conducted by Malaysia resulted in a violation of *jus cogens*, as the principle of non-refoulement. As such, the deportation should be cancelled because of the presence of the basic reason that security in Myanmar territory cannot yet be fully ensured, considering bloody struggles between the military and civilians.

The worsening situation of the military coup d'état will lead to a situation where "well-founded fear" becomes proven and fulfilled. Although it is not certain that the Myanmar nationals in Malaysia comprise members of civilian opposition or individuals who are considered enemies by the military junta government, the government of Malaysia should have appropriately assessed that the military coup d'état becomes sufficient reason to see that persecution is present in Myanmar. Even if the determinant of the situation – as being persecuted or not – has to rely on per-individual interpretation, in the end, it remains that the safety of people is a human right that must be prioritised over the right to deport or the request to return citizens to their areas of origin. Thus, in the end, civilians who cannot obtain protection from their countries can still acquire a sense of protection from another country, even if that protection is only temporary as each person has the right to be protected.

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