

Submission by the United Nations High Commissioner for Refugees

For the Office of the High Commissioner for Human Rights' Compilation Report

Universal Periodic Review: 3rd Cycle, 31st Session

MALAYSIA

I. BACKGROUND INFORMATION

Malaysia is not party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (hereafter *1951 Refugee Convention*), the *1954 Convention relating to the Status of Stateless Persons*, or the *1961 Convention on the Reduction of Statelessness* (hereafter *1954 Convention* and *1961 Convention* respectively).

There is presently no comprehensive domestic legal or policy framework to identify and protect asylum-seekers and refugees. As a result, asylum-seekers and refugees remain in a precarious protection environment. The current legal and policy framework does not distinguish asylum-seekers and refugees from undocumented migrants,¹ thus placing them at risk of arrest, prosecution, detention, deportation and *refoulement*.² It also further limits their ability to access lawful work, health and education opportunities and exposes them to abuse, exploitation and other rights violations. Under its statutory mandate, UNHCR undertakes the reception and processing of asylum-seekers, including the identification, registration, status determination and issuance of documentation. Notwithstanding its longstanding presence in Malaysia for over forty years there is no formal status agreement for UNHCR in Malaysia.

As of January 2018, there were 153,480 refugees and asylum-seekers registered with UNHCR. This population is largely urban, often living around major cities. Approximately 133,000 persons originate from Myanmar, of whom 42% have been identified to be ethnic Rohingya. UNHCR also estimates there are an additional 35,000 unregistered asylum-seekers in Malaysia, who are mostly Rohingya. In addition to the Myanmar population, UNHCR receives asylum-seekers and refugees originating from 50-plus countries including Syria, Palestine, Yemen, and Somalia.

In relation to statelessness, national laws on access to birth registration and nationality are not applied consistently and this has resulted in the failure to recognise some individuals who are entitled to nationality. This would include some 12,300 stateless ethnic Indian

¹ Malaysian *Immigration Act* 1959/63.

² Malaysia is not a signatory to the *1951 Refugee Convention*, however an Attorney General's Circular issued in 2005 provides a degree of immunity from prosecution under the *Immigration Act* for asylum-seekers and refugees registered with UNHCR.

Tamils residing in West Malaysia.³ There is no publicly available data on the extent of statelessness in East Malaysia. While the Government of Malaysia has made efforts to address this issue alongside a number of NGOs, challenges remain in ensuring the births of all children are registered in accordance with the law and that legal identification documentation is properly issued. Without regular status and proper documentation, stateless and undocumented individuals are at risk of arrest and detention and have limited access to employment, public education and government supported health care.

II. ACHIEVEMENTS AND POSITIVE DEVELOPMENTS

Positive developments linked to 2nd cycle UPR recommendations

Linked to 2nd cycle UPR recommendation no. 146.226: “Consider improving existing administrative frameworks to better manage and process refugees and asylum seekers in the country (Afghanistan)”.

UNHCR welcomes the formation of a Government of Malaysia-UNHCR Joint Task Force (GOM-UNHCR JTF) in December 2016, *inter alia*, to address the management and processing of refugees and asylum-seekers in the country. UNHCR is also pleased about the proposal to develop subsidiary technical working groups, including in the areas of policy, work, health, education, and immigration detention. Since the 2nd UPR cycle, the Government has piloted three protection schemes, namely: (i) the registration of asylum-seekers and refugees in a Tracking Refugees Information System (TRIS), linked to the issuance of a proposed ‘my refugee card-“MY-RC”; (ii) established a pilot work rights scheme targeting 300 Rohingya refugees; and (iii) engaged in a Temporary Relocation Programme for Syrian nationals. Dialogue between the Government and UNHCR on these issues is ongoing.

Linked to 2nd cycle UPR recommendation no. 146.172: “Ensure birth registration of all children to facilitate the access to social services (Sierra Leone)”.

The Government has increased efforts to enable access to birth registration for all including through the use of mobile courts and registration campaigns targeting stateless and undocumented persons. Aligned with efforts to facilitate greater access to birth registration, the Government has amended legislation to extend the period for birth registration.

III. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Issue 1: Establishment and implementation of a national legislative and policy framework for refugee protection

Linked to 2nd cycle UPR recommendation no. 146.226: “Consider improving existing administrative frameworks to better manage and process refugees and asylum seekers in the country (Afghanistan)” and **no. 146.225:** “Ensure that all migrant workers, refugees and asylum seekers are treated in accordance with international standards, including respecting the principle of *non-refoulement* (Canada)”

³ Based on data collected by a local NGO, Development of Human Resources in Rural Areas Malaysia (DHRRM). See page 117 of the Malaysian Indian Blueprint available at: http://mib.my/wp-content/uploads/210417v1_MIB-English-PDF.pdf

The absence of a comprehensive domestic legal and policy framework governing refugee protection and assistance matters in Malaysia results in a precarious protection environment for asylum-seekers and refugees, most of whom are currently unable to access legal employment, mainstream education or other public services and they face limitations on their ability to access adequate health services. Refugees registered with UNHCR are able to benefit from reduced rates of 50% off the foreigners' medical rates, but these fees doubled in 2016 placing the costs of some services beyond the reach of many. There is also a directive in place in public hospitals establishing that undocumented asylum-seekers and migrants who seek medical attention must be referred to the Immigration Department. In recent years, this led to significant numbers of unregistered asylum-seekers being arrested and taken from hospitals directly to immigration detention centres (IDCs), including women and their new-born babies.

While refugee children in Malaysia are able to access informal education through NGO or community run-schools, they are currently unable to access the formal education system and only 35% of school-age children regularly attend informal schools. In 2018, the Ministry of Education began to regularize UNHCR's partner community learning centres, which should impact positively on access to education. However, without legal status in the country, safety and security concerns for children will continue to affect school attendance. The inability of parents to work legally also means household incomes are often insufficient to support school costs and children are at risk of being sent to work or female children being married early instead of attending school.

The lack of a comprehensive legal and policy framework for asylum-seekers and refugees impacts on their protection against *non-refoulement*. UNHCR is aware of at least ten (10) documented cases where UNHCR-registered persons of concern have been deported or expelled in contravention of the principle of *non-refoulement* since the 2nd UPR cycle. In addition, push-backs by the Malaysian authorities at border points are known to occur, including the initial refusal in 2015 to allow the disembarkation of asylum-seekers aboard boats that had crossed the Bay of Bengal as well as the denial of entry of registered asylum-seekers and refugees at airport check-points. There have been a number of cases involving asylum-seekers and refugees registered with UNHCR "voluntarily" repatriating to their country of origin or departing to other countries from immigration detention centres in which they had been held on an indefinite basis. The indefinite nature of their detention brings into question the voluntariness of the decision, as is required under international standards⁴.

Recommendations:

UNHCR recommends the Government of Malaysia:

- (a) Accede to the 1951 *Refugee Convention* and its 1967 Protocol, and ensure the country is in full compliance with international refugee protection standards.
- (b) Fully respect the principle of *non-refoulement* in accordance with customary international law;
- (c) Enact a legislative and administrative framework for the treatment and protection of refugees and asylum-seekers, and establish appropriate mechanisms to receive, register, process and document asylum-seekers and refugees; and

⁴ 1993 Vienna Declaration and Programme of Action, as well as in Resolution 1994/24 of the UN Sub-Commission on the Prevention of Discrimination and Prevention of Minorities.

- (d) Put in place measures to regularize all UNHCR cardholders, permitting their legal temporary stay in Malaysia and access to the legal employment sector, as well as to formal education, health and other public services.

Issue 2: Arrest, detention and prosecution of asylum-seekers and refugees

Linked to 2nd UPR recommendation no. 146.148: “Ensure that detention conditions and provisions for access to legal and in particular judicial remedies comply with international standards and strengthen the training of police and other law enforcement officials and set up effective mechanisms to ensure an independent investigation of alleged misconduct (Germany)”.

A 2005 Circular issued by the Attorney-General’s Chambers establishes that those persons registered with UNHCR at the time of arrest should not be prosecuted for immigration offences. This Circular thereby provides a degree of immunity from prosecution for immigration charges. UNHCR enjoys good cooperation with the authorities in the application of this directive. However individuals who are unregistered continue to face heightened risk of arrest and detention under applicable immigration law. In addition, registered individuals who are prosecuted for immigration and criminal offences including for working without authorization, are transferred to immigration detention centres upon completion of their prison sentence. In this context, thousands of asylum-seekers and refugees experience immigration detention every year, including women and children. As of January 2018, approximately 65 registered minors remained in detention.

Conditions in IDCs are chronically overcrowded⁵ and reportedly fall short of international and national standards.⁶ In March 2017, the Human Rights Commission of Malaysia (SUHAKAM) reported that more than 100 individuals had died in IDCs during the 2015-2016 period,⁷ some of whom died due to illness possibly exacerbated by poor sanitation and food, physical abuse, and lack of medical care.⁸ SUHAKAM, which faces both access and financial constraints on its monitoring work, has observed that conditions in the IDCs are “unsanitary” and “inhuman”, which is particularly challenging for vulnerable individuals such as women and children.

Recommendations:

UNHCR recommends that the Government of Malaysia:

- (a) Ensure refugees and asylum-seekers are not penalized for illegal entry or stay; that detention is only used as a last resort and where necessary, is for as short a period as possible and subject to safeguards to prevent arbitrary and/or indefinite detention;
- (b) Implement the alternatives to detention (ATD) pilot project for unaccompanied children and establish other ATD mechanisms, such as screening and referral protocols for unregistered women, children, victims of human trafficking and other vulnerable asylum-seekers and refugees; and

⁵ SUHAKAM, *Annual Report 2016*, page 3, available at:

<https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view> [accessed on the 12th of December 2017]

⁶ Dainius Pūras, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum, Visit to Malaysia (19 November–2 December 2014)*.

⁷ SUHAKAM, *Annual Report 2016* (above cited), page 61.

⁸ Reuters, ‘Exclusive: More than 100 die in Malaysian immigration detention camps in two years’, 30 March 2017, available at: <https://www.reuters.com/article/us-malaysia-detention-deaths/exclusive-more-than-100-die-in-malaysian-immigration-detention-camps-in-two-years-idUSKBN1710GR> [accessed on the 17th of November 2017]. See also ‘Report of the Special Rapporteur on Health’ (above cited).

- (c) Take measures to improve the oversight of the basis for and conditions of immigration detention to ensure they meet international standards, including increasing funding, and enable SUHAKAM and other bodies to undertake independent monitoring.

Issue 3: Statelessness (including access to birth registration and the issuance of birth certificates)

Linked to 2nd cycle UPR recommendation no. 146.172: “Ensure birth registration of all children to facilitate the access to social services” (Sierra Leone).

Malaysian law provides for universal birth registration for all births registered on the territory. However, in practice, birth registration is not available to everyone.⁹ The National Registration Department (NRD) stipulates conditions when a parent wishes to register the birth of their child, including documentary evidence. Moreover existing legal have the potential of discriminating insofar as they do not allow Malaysian mothers to transfer nationality to their children born outside the territory, and Malaysian men may not transfer nationality to their children born within Malaysia if the child is born outside a legally recognised marriage. These conditions can act as obstacles for refugees, asylum-seekers, stateless or undocumented persons who are unable to provide a legally recognised form of identification document. Refugees, asylum-seekers, stateless and undocumented persons have limited access to public healthcare and many do not give birth in hospitals and thus do not obtain the proof of birth to enable birth registration at NRD.

In line with the Government’s commitment in the Malaysia Indian Blueprint (MIB)¹⁰ to resolve stateless and undocumented issues within the Indian Tamil community, lengthy administrative procedures and waiting periods for documentation applications could be reduced. For other groups known to be at risk of statelessness in East Malaysia, including the *Bajau Laut*, descendants of Indonesian and Filipino migrant workers, indigenous peoples, and street children, there remains a lack of publicly available data on such persons affected by statelessness.

Recommendations:

UNHCR Recommends that the Government of Malaysia:

- (a) Increase efforts to ensure registration of all births in the country is in line with domestic legislation and Article 7 of the Convention on the Rights of the Child;
- (b) Accede to the *1954 Convention* and *1961 Convention*;
- (c) Implement existing legal safeguards which can prevent against statelessness; and
- (d) Improve availability of baseline data on populations affected by statelessness, including with the support of relevant stakeholders, which would assist devise interventions for the prevention and reduction of statelessness.

**UNHCR
March 2018**

⁹ Section 7, Births and Deaths Registration Act 1957; Article 14(1)(b), Second Schedule, Part II, Section 1(e) Federal Constitution of Malaysia.

¹⁰ See: the Malaysian Indian Blueprint which was launched on 23 April 2017, available at: http://mib.my/wp-content/uploads/210417v1_MIB-English-PDF.pdf.

ANNEX

Excerpts of relevant Recommendations from the 2nd cycle Universal Periodic Review and Recommendations of Special Procedures mandate holders

MALAYSIA

We would like to bring your attention to the following excerpts from the 2nd cycle UPR recommendations and recommendations from UN Special Procedures mandate holders' reports relating to issues of interest for UNHCR persons of concern in Malaysia.

I. Universal Periodic Review (Second Cycle – 2013)

Recommendation ¹¹	Recommending State/s	Position ¹²
Accession to international instruments		
146.2. Sign and ratify the 1951 Convention relating to the Status of Refugees, and enact domestic refugee law in line with international standards	New Zealand	Noted
146.18. Accede to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol	Djibouti	Noted
146.28. Consider ratifying the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and allowing refugees and other migrants to seek employment while they await resettlement or other durable solutions	United States of America	Noted
Refugees and asylum-seekers		
146.225. Ensure that all migrant workers, refugees and asylum seekers are treated in accordance with international standards, including respecting the principle of non-refoulement	Canada	Noted
146.226. Consider improving existing administrative frameworks to better manage and process refugees and asylum seekers in the country	Afghanistan	Supported
146.227. Cooperate with international and regional organizations and diplomatic missions to tackle problems experienced by asylum seekers, refugees and foreigners who lose their documents in the country	Sudan	Supported
Access to nationality and birth registration		
146.33. Withdraw reservations to articles 2 and 7 of the CRC to ensure to everyone the right to a name and nationality through universal birth registration	Belgium	Noted ¹³
146.73. Ensure prompt registration of all new-born children	Australia	Supported
146.172. Ensure birth registration of all children to facilitate the access to social services (Sierra Leone);	Sierra Leone	Supported
146.203. Take concrete measures to prevent children from becoming stateless and guarantee universal access to free primary education, irrespective of citizenship and immigration status	Norway	Noted

¹¹ All recommendations made during its 2nd cycle UPR can be found in: "Report of the Working Group on the Universal Periodic Review of Malaysia" (4 December 2013), A/HRC/25/10, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MYindex.aspx>.

¹² Malaysia's views and replies, in English, can be found in: *Addendum* (4 March 2014), A/HRC/25/10/Add.1, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MYindex.aspx>.

¹³ **Addendum:** "Presently, Malaysia has no plans to lift its reservations to the Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD). The Government underscores that such reservations do not run counter to the intent and purpose of those instruments and were made taking into account relevant constitutional provisions and the Islamic (Syariah) law which together form an integral part of the country's legal framework."

146.221. Facilitate the process of immigration's regularization for those persons who have resided in the country for an extended period and allow the registration of their children born in Malaysia	Mexico	Noted ¹⁴
Trafficking		
146.131. Continue the significant progress made in fighting trafficking	Djibouti	Supported
146.134. Further its national efforts to eradicate trafficking in persons, especially women and children	Egypt	Supported
146.138. Enhance measures to implement the CRC and CEDAW, and to combat trafficking in persons, especially women and children, including strengthening cooperation with NGOs in the area of protection of victims of trafficking in persons	Philippines	Supported
146.141. Continue its efforts to fight against trafficking in persons and protect the rights of migrants	Algeria	Supported
146.142. Allocate more resources to ensure the effective implementation of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act	Mozambique	Supported
146.144. Cease the practice of detaining trafficking victims, and allow them to travel, work and reside outside government facilities	United States of America	Noted ¹⁵
Children		
146.97. Continue its efforts to combat all forms of discrimination particularly religious discrimination and protecting of religious minority groups	Iran	Supported
146.100. Decriminalize homosexuality and respect the fundamental rights of LGBT persons	France	Noted
146.104. Enact legislation prohibiting violence based on sexual orientation, and repeal laws that directly or indirectly criminalize consensual same-sex sexual activities	Canada	Noted
146.72. Continue strengthening its efforts to promote and protect the rights of children in Malaysia	Qatar	Supported
Gender discrimination and SGBV		
146.31. Withdraw all reservations to CEDAW and abandon discriminatory laws against all women regardless of their ethnic or religious background	Norway	Noted ¹⁶
146.96. Continue with the measures aimed at eradicating gender discrimination, particularly in relation to migrant women	Argentina	Supported
146.128. Continue with its efforts to strengthen the enforcement of law on violence against women and protect the rights of women	Maldives	Supported
Protection of vulnerable groups		

¹⁴ **Addendum:** "Protection scope for migrant workers in Malaysia extends to documented foreign workers excluding their family members. Every person entering Malaysia, including undocumented migrants are subject to the applicable laws and regulations including the Immigration Act and are afforded protection under the law, as appropriate. Malaysia maintains that decisions on the possible naturalisation or the regularisation of status of aliens residing in the country is a sovereign matter."

¹⁵ **Addendum:** "Malaysia does not detain victims of trafficking in persons. However, such victims are required to reside in shelters provided for and gazetted by the Government with a view to afford them better protection and safety. The Government provides income-generating facilities and programmes in such shelters in order to further assist such victims."

¹⁶ **Addendum:** "Presently, Malaysia has no plans to lift its reservations to the Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD). The Government underscores that such reservations do not run counter to the intent and purpose of those instruments and were made taking into account relevant constitutional provisions and the Islamic (Syariah) law which together form an integral part of the country's legal framework."

146.71. Continue strengthening its efforts in safeguarding the rights of women and children	Brunei Darussalam	Supported
146.179. Step up its efforts in ensuring universal access to affordable health services particularly for the poor, vulnerable and marginalized groups	Thailand	Supported

II. Special Procedures Mandate Holders

Report of the Special Rapporteur on the right to food on his mission to Malaysia

Addendum: Mission to Malaysia (3 February 2014) [A/HRC/25/57/Add.2](#)

Concluding observations and recommendations

80. The Special Rapporteur recommends that the Government of Malaysia:

- (l) Accede to the Convention relating to the Status of Refugees and the Protocol thereto, as also recommended by the Committee on the Rights of the Child and the Working Group on Arbitrary Detention, and take immediate steps to ensure that refugees and asylum seekers with UNHCR identification documents are allowed to work and that refugee children are admitted to public schools;

Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his mission to Malaysia

Addendum: Mission to Malaysia (1 May 2015) [A/HRC/29/33/Add.1](#)

Conclusion and recommendations

111. The Special Rapporteur recommends that the Government:

- (b) Ratify the 1951 Convention relating to the Status of Refugees and its 1967 Protocol in order to ensure adequate protection of refugees and asylum seekers;
- [...]
- (m) Ensure that non-nationals, in particular undocumented migrants, refugees and asylum seekers, can afford to access public health care, and consider exempting them from the increase in fees;
- (n) End the practice of establishing immigration counters in public hospitals, and of arresting undocumented migrant and asylum-seeking women who have just given birth in these hospitals;
- (o) Ensure that the conditions of immigration detention centres are up to international standards, and ensure that they are regularly monitored by the relevant authorities and institutions, including the Ministry of Health, Suhakam, the International Committee of the Red Cross, and UNHCR;
- (p) Make sure that children are not detained in immigration detention centres, and find suitable alternatives to their detention that preserve the family unit and providing such children with the necessary environment and services;

Report of the Special Rapporteur on trafficking in persons, especially women and children on her mission to Malaysia

Addendum: Mission to Malaysia (15 June 2015) [A/HRC/29/38/Add.1](#)

Recommendations

91. On the basis of the above findings, and in the spirit of cooperation and dialogue, the Special Rapporteur offers the following recommendations to Malaysia:

- (a) Ratify without delay the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families;
- (b) Ratify, without delay, ILO Domestic Workers Convention, 2011 (No. 189); the ILO Protocol of 2014 to the Forced Labour Convention, 1930 and ILO Abolition of Forced Labour Convention, 1957 (No. 105);
- (c) Ratify, without delay, the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto;
- (d) Establish, with countries of origin, transit and of destination, bilateral and multilateral agreements for the exchange of information, mutual legal assistance and safe returns in order to jointly tackle the root causes of trafficking in persons in the region and implement existing agreements focusing on the human rights of trafficked victims.

93. With regards to identification, training and capacity-building, she recommends that the Government:

- (a) Specifically outline and harmonize identification protocols to combat trafficking in persons, developing a range of red flags and indicators to be used when screening vulnerable persons, including undocumented migrants, refugees, asylum seekers and stateless persons;
- (b) Ensure that victims of trafficking can be identified, even when they are in immigration detention centres and avoid their repatriation and re-victimization;
- (c) Provide legal clarity on the elements of trafficking and raise awareness of the distinction between cases of trafficking and other situations, including irregular migration, labour disputes and prostitution to facilitate accurate identification of victims by front-line officers;
- (d) Continue providing comprehensive training programmes on trafficking in persons to enhance the knowledge and awareness of human trafficking of all stakeholders, including police, immigration, customs and maritime officers, labour inspectors, prosecutors, judges, lawyers, employers/businesses, employment agencies, CSOs and the media;
- (e) Train all service providers (protection officers) involved in the assistance and care of victims of trafficking.

94. With respect to support service for victims of trafficking, she recommends that the Government:

- (a) Protect and assist all victims of trafficking, including child victims, victims of labour trafficking and domestic servitude with full respect for their human rights, and integrate a human rights-based approach in the investigation of trafficking cases;
- (b) Make provision for unconditional and appropriate assistance, including social, psychological, medical and legal support, as well as translation assistance and interpretation services, in accordance with article 6 (6) of the Trafficking in Persons Protocol in shelters. Ensure victims inside shelters have freedom of movement, access to employment and legal stay in the country;
- (c) Amend the existing legal framework to enable adequately funded service providers and organizations working on trafficking in persons to provide comprehensive assistance, such as social, psychological, medical and legal support, as well as translation and interpretation services, for victims of trafficking;
- (d) Provide victims of trafficking who do not wish to return to their countries owing to fear of retribution, hardship or re-trafficking viable alternatives to remain and work legally in Malaysia, including through granting special work permits and employment visas;

- (e) Ensure that the free 24-hour hotlines are accessible in the languages that may be the only ones that potential victims speak and are serviced by multilingual staff who have received specialized training on trafficking in persons;
- (f) Maintain close cooperation with international and regional organizations, particularly the International Organization for Migration and the Office of the United Nations High Commissioner for Refugees as well as diplomatic missions for the safe return of trafficked victims to their country of origin, having due regard to the need, if any, for international protection of the victims and the application of the principle of non-refoulement;
- (g) Establish a fund that will provide for a comprehensive national compensation scheme for victims of trafficking;
- (h) Ensure that appropriate procedures are in place to evaluate the best interests of the child during the stage of identification, protection and assistance and before making any decision on the eventual repatriation of the child.