



ASYLUM ACCESS MALAYSIA

**INDEPENDENT SHADOW REPORT TO THE COMMITTEE ON THE CONVENTION ON THE
ELIMINATION OF DISCRIMINATION AGAINST ALL WOMEN (CEDAW)**

REFUGEE AND ASYLUM-SEEKING WOMEN

STATE PARTY:

MALAYSIA

ANNEX

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INTRODUCTION

This is the annex to the independent shadow report to the Committee for the Elimination of Discrimination against Women ('CEDAW Committee') which examines Malaysia's legal obligations under the Convention on the Elimination of Discrimination against Women (CEDAW).

The accompanying shadow report focuses on **Malaysia's state practice** in relation to four key issues:

1. Detention and non-refoulement;
2. Sexual and gender-based violence and access to justice;
3. Lack of formal access to employment; and
4. Lack of access to healthcare.

This Annex contains:

1. An **overview** of asylum-seeking and refugee women in Malaysia;
2. An **executive summary** of the issues for consideration during the plenary; and
3. A list of **recommendations**.

This Annex also provides the following further information related to the four key issues above:

- a) Malaysia's legal obligations and political commitments;
- b) Prior observations by the CEDAW Committee; and
- c) The Malaysian government's position on each issue.

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OVERVIEW: ASYLUM-SEEKING AND REFUGEE WOMEN IN MALAYSIA

This report focuses on asylum-seeking and refugee women in Malaysia. At the end of December 2017, there were 152,320 asylum seekers and refugees registered with the United Nations High Commissioner for Refugees (“UNHCR”) in Malaysia. Approximately 34% of these are women.¹

Despite the constitutional guarantee of equality brought about by the amendment of Article 8(2) of the Federal Constitution² to include the word “gender” in the definition of discrimination, inequality continues to exist due to a failure to implement laws and policies that adequately enforce women’s rights. Nowhere is this more palpable than for asylum-seeking and refugee women in Malaysia.

Malaysia is not a signatory to the 1951 Refugee Convention, or its 1967 Protocol, and has no legislative or administrative framework in place to identify and protect asylum seekers and refugees in Malaysia. Under the Immigration Act 1959/63,³ asylum seekers and refugees are not distinguished from undocumented migrants (of which there are some estimated 2-4 million currently in Malaysia),⁴ leaving them vulnerable to arrest, penal sanction,⁵ detention and refoulement. The Malaysian Government has stated that they allow refugees to be temporarily present in Malaysia until they can be resettled to a third country based on “elements of humanity”, however they do not know how long this will be as it involves national security

¹ UNHCR, *Figures at a glance in Malaysia*, available at <http://www.unhcr.org/figures-at-a-glance-in-malaysia.html>:

‘Some 133,070 are from Myanmar, comprising some 65,910 Rohingyas, 34,020 Chins, 9,910 Myanmar Muslims, 4,070 Rakhines & Arakanese, and other ethnicities from Myanmar. There are some 19,240 refugees and asylum-seekers from other countries, including some 5,480 Pakistanis, 2,450 Yemenis, 2,400 Syrians, 2,270 Somalis, 2,080 Sri Lankans, 1,470 Iraqis, 1,210 Afghans, 740 Palestinians, and others from other countries.’

² Federal Constitution of Malaysia, available at [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf)

³ Immigration Act 1959/63 (Act 155).

⁴ UNHCR, *Challenges and Way Forward in Handling Rohingya Refugees in Malaysia*, available at <https://reliefweb.int/report/malaysia/challenges-and-way-forward-handling-rohingya-refugees-malaysia>

⁵ US Department of State, *Malaysia 2015 Human Rights Report – Executive Summary*, available at <https://www.state.gov/documents/organization/252989.pdf>: Such persons face mandatory imprisonment for a maximum of five years, a maximum fine of RM 10,000 (\$2,287), or both, and mandatory caning of not more than six strokes.

matters.⁶ This lack of legal framework and protection is especially problematic in the context of asylum-seeking and refugee women because they face unique violations of their rights throughout the displacement cycle, including specific forms of gender-based discrimination, violence and exploitation.

We acknowledge that the Government allows UNCHR to carry out registration and refugee status determination for asylum seekers and refugees (including women)⁷ and that there has been some recent effort by the Government to improve policies around refugees, including the establishment of a Joint Task Force with UNHCR in December 2016, and a pilot programme to allow 300 Rohingya UNHCR card-holders to work in the plantation sector in March 2017.⁸

However, in the absence of any laws and enforceable policies on the rights of refugee women to obtain legal status and access healthcare, formal employment and justice, the Malaysian Government continues to fail to act upon General Recommendation 32.⁹ States bear the primary responsibility for ensuring that asylum-seeking and refugee women within their territory or under their effective control or jurisdiction are protected from violations of their rights under CEDAW.¹⁰

Asylum-seeking and refugee women continue to be denied legal status in Malaysia, which exacerbates their vulnerability in many ways. It limits their ability to access justice and treatment for SGBV, precludes lawful access to the labour market and restricts their access to

⁶ Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, 2014 (p.30) available at <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>.

⁷ International Federation for Human Rights (FIDH) and SUHAKAM, *Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination*, March 2008, available at <https://www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf> p 9; Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, 2014, available at <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>; Written instructions were issued in 2005 by the Attorney-General not to prosecute immigration-related offences committed by asylum-seekers and refugees holding valid UNHCR documentation. Written instructions have also been issued by the Ministry of Health to reduce medical fees for refugees to 50 per cent of the foreigners' rate; and UNHCR is provided with access to refugee or asylum-seeker detainees in immigration detention centres.

⁸ Haikal Jalil, *Pilot project to allow Rohingya UNHCR card holders work legally to begin from March: Zahid*, The Sun Daily, 2 February 2017, available at <http://www.thesundaily.my/news/2148173>; Bernama, *Only 40 Rohingya registered for work under pilot scheme*, Malaysiakini, 4 April 2017, available at <https://m.malaysiakini.com/news/378003>.

⁹ Committee on the Elimination of Discrimination Against Women, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 14 November 2014, available at: <http://www.refworld.org/docid/54620fb54.html> ('General Recommendation 32').

¹⁰ General Recommendation 32, para 7.

healthcare. In 2017, less than 2% of refugees and asylum seekers registered with UNHCR were resettled to a third country by UNHCR.¹¹ The vast majority of the tens of thousands of refugees and asylum seekers will undertake often dangerous journeys from Malaysia in search of better opportunities, or remain in Malaysia for years, sometimes decades, with no legal recognition or protection, without the ability to work legally and at constant fear of arrest and detention due to their lack of legal status.

We welcome the recommendation of the CEDAW Committee in its 2006 Concluding Comments¹² that the Malaysian Government adopt laws and regulations to regulate the legal status of asylum seekers and refugees in Malaysian order to ensure protection for asylum-seeking and refugee women and their children¹³ and integrate a gender-sensitive approach throughout the process of granting asylum and/or refugee status in close cooperation with the UNHCR.¹⁴

¹¹ UNHCR Resettlement Data, available at: <http://www.unhcr.org/en-my/resettlement-data.html>. [last accessed: 29 January 2018].

¹² Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia*, 35th session, 15 May 2006-2 June 2006, available at http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENT_S/Malaysia/Malaysia-CO-1-2.pdf paragraph 45 ('CEDAW Committee Concluding Comments (2006)').

¹³ CEDAW Committee Concluding Comments (2006) paragraph 45.

¹⁴ CEDAW Committee Concluding Comments (2006) paragraph 45.

EXECUTIVE SUMMARY: ISSUES FOR CONSIDERATION DURING THE PLENARY SESSION

The Malaysian Government ('the Government') has failed to protect asylum-seeking and refugee women within its jurisdiction in line with its international human rights obligations under the Convention for the Elimination of Discrimination against Women ('CEDAW'). There appears to be no long-term strategy or plan to address the lack of legal status afforded to asylum-seeking and refugee women in Malaysia. This report focuses on four key issues as stated above for consideration by the Committee for the Elimination of Discrimination against Women ('CEDAW Committee') during their upcoming plenary session.

This Executive Summary focuses on the Government's practices and how they affect asylum-seeking and refugee women in Malaysia.

Pursuant to CEDAW Articles 1, 2 and 12, failure to address the specific needs of women in immigration detention and to ensure that they are treated with respect could constitute discrimination. Refugees and asylum seekers in Malaysia are not distinguished from other undocumented migrants and as such are vulnerable to arrest and detention, especially when not registered with the UNHCR. There is no legal framework governing the process of arrest and detention of refugees and asylum seekers. Data from the Malaysian government as at September 2017 indicates that there are 1,825 women and girls in 12 immigration detention centres across the country.¹⁵ As explained below, they are detained in deplorable conditions and do not have access to services and facilities to meet their specific needs. Moreover, there are recent distressing reports of sexual and gender-based violence perpetrated against asylum-seeking and refugee women by the staff members in immigration detention centres. In addition, we received several reports of deportation of refugee and asylum-seeking women being deported in breach of the customary international legal principle of *non-refoulement*.

Pursuant to CEDAW Article 15, lack of equality before the law, including lack of access to justice, could constitute discrimination within the meaning of the convention.¹⁶ In relation to SGBV and other forms of harm perpetrated by non-state actors, CEDAW Articles 2(d)-(e) indicate that failure by state parties to ensure that women are protected against discrimination

¹⁵ Reply to List of Issues 2017, Annex 7

¹⁶ General Recommendation 32, para 32: 'Consistent with articles 2(c) and 15(1) of [CEDAW], States parties must take steps to eliminate discrimination against women in the public and private spheres and should confirm women's equality with men before the law. to this end, States should take positive measures to ensure that women are not discriminated against and that they are provided with effective legal protection throughout the asylum process, including by providing legal aid, legal representation and assistance, as necessary.' See also: paras 24, 27

generated by non-state actors could constitute discrimination within the meaning of the convention. Asylum-seeking and refugee women in Malaysia are vulnerable to SGBV in a range of contexts, including detention, at work and in the home. The lack of legal status of asylum-seeking and refugee women who are survivors of SGBV creates a barrier to access to justice as many are afraid to approach the police to report incidents of SGBV for fear of arrest. These women and girls also lack access to treatment for SGBV owing to difficulties in accessing affordable healthcare.

Pursuant to CEDAW Article 11, failure to take appropriate measures to eliminate discrimination against women in the field of employment, including the right to work as an inalienable right of all human beings and the right to the same employment opportunities and the protection of health and safety in working conditions, could constitute discrimination within the meaning of CEDAW.¹⁷ Asylum-seeking and refugee women in Malaysia do not have formal access to employment owing to their lack of legal status under the Employment Act 1955. They are therefore forced into the informal labour market, where they are vulnerable to exploitation in the workplace, including a heightened risk of SGBV, withheld wages, unsafe working conditions and unfair dismissal.

Pursuant to CEDAW Article 12, failure to ensure asylum-seeking and refugee women have access to affordable and appropriate health care, including access to family planning services, services in connection with pregnancy, confinement and the post-natal period, as well as adequate nutrition during pregnancy and lactation, could constitute discrimination within the meaning of the Convention.¹⁸ The cost of healthcare for asylum-seeking and refugee women is prohibitively high and they are largely unable to access healthcare as a result. This results in their being at high risk of suffering from pregnancy complications, pregnancy-related death and infant disease or death.¹⁹ They also lack access to family planning services and reproductive healthcare.

¹⁷ General Recommendation 32 para 33.

¹⁸ General Recommendation 32 paras 33, 48.

¹⁹ Women's Refugee Commission, *Livelihoods Facts and Figures*, available at: <https://www.womensrefugeecommission.org/empower/resources/practitioners-forum/facts-and-figures>.

LIST OF RECOMMENDATIONS

Recommendation 1: Protect asylum-seeking and refugee women from **arbitrary arrest and detention** by:

- a. Revising the domestic legal framework to identify and protect refugees and asylum seekers in line with international law to include, at a minimum:
 - i. To establish screening and referral mechanisms as part of initial reception arrangements to ensure that vulnerabilities and protection needs of asylum-seekers and other groups are identified and addressed;
 - ii. Include specific rights and protections for refugees and asylum seekers within the Immigration Act, including the right to seek asylum, the principle of non-refoulement and the right to liberty and security of person;
 - iii. Ensure procedural safeguards for immigration detainees including access to judicial remedies and legal representation, maximum periods of detention and periodic review of detention decisions are guaranteed.
- b. Implementing alternatives to detention for asylum seekers and refugees, as well as other vulnerable groups.

Recommendation 2: Where detention of asylum-seeking and refugee women is unavoidable, ensure compliance with CEDAW Articles 1, 2, 5(a) and 12 as well as General Recommendation 32 by:

- a. ensuring that asylum-seeking and refugee women are provided with adequate facilities and services which meet their specific needs, including by
 - i. ensuring that there is effective screening for vulnerabilities among detainees (including in the cases of pregnant and lactating women and unaccompanied children) and referrals to the appropriate service to address those needs,
 - ii. providing staff at detention centres with robust and regular training relating to gender sensitivity and the specific needs and rights of women and
 - iii. providing separate facilities and materials to men and women within custody and detention to meet the specific needs and rights of women; and
- b. taking active measures to eradicate SGBV and abuse of asylum-seeking and refugee women in detention, including by thoroughly investigating allegations of such abuse and implementing monitoring mechanisms to monitor the health and safety of asylum-seeking and refugee women in detention.

Recommendation 3: Collect and make **publicly available gender-disaggregated data** on a regular basis:

- a. the number of asylum-seeking and refugee women (as distinguished from other migrants) held in immigration detention between 2012 and 2017;
- b. the number of asylum-seeking and refugee women that were pregnant or lactating and held in immigration detention centres between 2012 and 2017;
- c. the number of asylum-seeking and refugee women subjected to SGBV (including that perpetrated by staff at immigration detention centres) while in immigration detention;
- d. the number of asylum-seeking and refugee women released from immigration detention since 2012;
- e. the average length of spent by asylum-seeking and refugee women held in detention between 2012 and 2017;
- f. the number of deaths and the causes of deaths of asylum-seekers and refugees in immigration detention and police custody and what percentage of those deaths were of women;
- g. the number of persons who have died in the custody of the Immigration Department every year between January 2014 and October 2017, disaggregated by place of death, age, gender, country of origin, cause of death and whether or not the individuals were registered with the UNHCR; and

Recommendation 4: Remove barriers deterring asylum-seeking and refugee women from seeking **access to justice** and **seeking treatment** following incidents of SGBV, including by ensuring that they are provided legal status and access to legal aid.

Recommendation 5: Construct and implement a **clear strategy to address and prevent incidents of SGBV** perpetrated against asylum-seeking and refugee women which includes guaranteeing asylum-seeking and refugee women **access to government-run One Stop Rape Crisis Centres** by removing the requirement that a police report must be lodged in order for an individual to gain access to services provided at these centres.

Recommendation 6: Put in place **monitoring mechanisms** to identify and record incidents of SGBV perpetrated against asylum-seeking and refugee women, particularly in the following contexts:

- a. domestic violence; and
- b. SGBV perpetrated against asylum-seeking and refugee women by government officials, including but not limited to police, immigration officials and staff working in immigration detention centres

Recommendation 7: In accordance with its obligations under CEDAW Article 11 and General Recommendation 32, the **government should ensure that all refugees, in particular refugee women, access to formal employment.** This includes but is not limited to amending the Employment Act 1955 and other existing employment laws and policies to:

- a. create mechanisms through which asylum-seeking and refugee women may **report abuses and record complaints** with respect to their treatment in the workplace;
- b. **strengthen** the capacity of the national **Department of Labour** to take appropriate measures to **protect asylum-seeking and refugee women against abuse and exploitation** in the workplace; and
- c. **where appropriate, prioritise the employment of refugees and UNHCR-registered asylum seekers** within its jurisdiction over sourcing external migrant workers.

Recommendation 8: The government should, in a **non-punitive manner**, collect and make **public** information on the following:

- a. the levels of **participation** of asylum-seeking and refugee women in the informal employment sector;
- b. the **types of informal work** being done by asylum-seeking and refugee women;
- c. the **conditions** in which asylum-seeking and refugee women work in the informal sector; and
- d. **poverty levels** in households where asylum-seeking and refugee women are the

Recommendation 9: The government should ensure that

- a. all asylum-seeking and refugee women can **safely access affordable health care especially in situations of emergency such as childbirth**; and
- b. to the greatest extent possible, asylum-seeking and refugee women have access to **critically important family planning and reproductive health care services**

Recommendation 10: The Malaysian government must put **concrete measures** in place to realise its obligations under CEDAW Article 12, General Recommendation 32 with respect to providing asylum-seeking and refugee women access to appropriate and affordable healthcare. In particular, the measures should focus on **removing the prohibitive costs of health care** for asylum-seeking and refugee women and ensuring that they are **provided with legal status** that allows them to access healthcare without fear of arrest and detention due to their undocumented status.

Recommendation 11: The government should collect and make **publicly available information** on the following:

- a. statistics on illegal **abortions** of asylum-seeking and refugee women;
- b. **maternal mortality rates** of asylum-seeking and refugee women;
- c. statistics on asylum-seeking and refugee women with **communicable diseases**;
- d. what **family planning and other preventative health care services** are available to asylum-seeking and refugee women and at what **cost**; and
- e. the numbers of asylum-seeking and refugee women who have been able to access

ISSUES FOR CONSIDERATION DURING THE PLENARY SESSION

ARTICLES 1, 2, 12: DETENTION AND NON-REFOULEMENT

Malaysia's legal obligations and political commitments with respect to detention and non-refoulement of asylum-seeking and refugee women

Pursuant to CEDAW Articles 1, 2 and 12, failure to address the specific needs of women in immigration detention and treat them with respect could constitute discrimination. Protection from arbitrary arrest and detention is also provided for in the 1948 Universal Declaration of Human Rights (UDHR), Article 9²⁰ and the ASEAN Human Rights Declaration, Article 12.²¹

The OHCHR 'Working Group [on Arbitrary Detention] believes that detention of migrants should be decided upon by a court of law, on a case-by case-basis, and pursuant to clearly and exhaustively defined criteria in legislation under which detention may be used.'²² Their report goes so far as to say that immigration detention should not be used at all in the case of, *inter alia*, asylum seekers, refugees, pregnant women and breastfeeding mothers.²³ In any event, all immigration detainees 'should be provided with automatic periodic review by a court of law of the necessity and legality of their detention at any time.'²⁴

Gender sensitivity should be reflected in reception arrangements. These include ensuring separate facilities for men and women,²⁵ not detaining pregnant women and nursing mothers, the promotion of the employment of female guards and wardens in detention, training on

²⁰ Universal Declaration on Human Rights article 9: "no one shall be subjected to arbitrary arrest, detention or exile"; ASEAN Human Rights Declaration article 12: 'every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.'

²¹ ASEAN Human Rights Declaration article 12.

²² Human Rights Council, *Report of the Working Group on Arbitrary Detention: Mission to Malaysia – Addendum*, 16th session, 8 February 2011, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/106/38/PDF/G1110638.pdf?OpenElement> para 71 ('Working Group on Arbitrary Detention 2011').

²³ Working Group on Arbitrary Detention 2011, para 71.

²⁴ Working Group on Arbitrary Detention 2011, para 73.

²⁵ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> ('UNHCR Guidelines on Detention')

gender-specific needs and human rights of women,²⁶ and the availability of alternatives to detention.

Section 8(3) of the Immigration Act 1959/63 sets out that when the authorities are processing persons categorised as prohibited from entering Malaysia, where those persons are from vulnerable groups, including pregnant women, the authorities are required, on the basis of humanitarian grounds, to take all reasonable measures to treat these persons with appropriate care and attention.²⁷

During the Universal Periodic Review second cycle, Malaysia agreed to 'continue with its efforts to strengthen the enforcement of law on violence against women and protect the rights of women'.²⁸ Malaysia also agreed to 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 officials²⁹ 'to the extent that it is compatible with national laws and policies and its obligations under applicable international instruments'.³⁰

The principle of *non-refoulement* is a rule of customary international law.³¹ The Government has accepted and acknowledged its responsibility to uphold the rule of *non-refoulement*.³²

²⁶ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (General Assembly resolution 65/229, annex), rule 5, 9 and 33(1); UNHCR Guidelines on Detention para 9.3

²⁷ Report of the Working Group on Arbitrary Detention on its mission to Malaysia (7–17 June 2010), para 71, A/HRC/16/47/Add.2; available at http://www.hr-dp.org/files/2015/07/30/Mission_to_Malaysia,_2011.pdf.

²⁸ UN General Assembly, *Report of the Working Group on the Universal Periodic Review: Malaysia*, 4 December 2013, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MYindex.aspx> ('UPR 2013'); UN General Assembly, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum*, 19 March 2014, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MYindex.aspx>, Recommendation 146.128 ('UPR 2013 - Addendum').

²⁹ *ibid*, Recommendation 146.148.

³⁰ UPR 2013 – Addendum, p3.

³¹ General Recommendation 32, para 18.

³² House of Representatives – 4 April 2017, page 15 (translation from Bahasa Melayu): 'Dato Seri Dr Shahidan bin Kassim: [...] For the period in which UNHCR card-holders remain in Malaysia, [...] they will not be sent back to their country of origin in accordance with the principle of *non-refoulement* except if they return voluntarily or their country of origin achieves peace'.

Prior observations and issues raised by the CEDAW Committee with respect to detention and non-refoulement of asylum-seeking and refugee women

In the List of Issues 2017 (paragraph 20), the CEDAW Committee raised the issue of detention of women and girls in detention centres and requested that the Government provide information on (i) the number of women and girls placed in immigration detention, disaggregated by age and nationality (ii) measures taken to ensure that their specific protection needs are effectively addressed in detention, including protection against sexual exploitation and violence, and access to facilities and services for pregnant women and women detained with their children (iii) what alternative measures to detention are available and the extent to which such alternatives are applied; (iv) measures taken to ensure that asylum-seeking and refugee women are protected from arbitrary detention and non-refoulement; and (v) the content and regularity of trainings provided to law enforcement officials to ensure that the protection claims of asylum-seeking women and girls are considered in a gender-sensitive manner, in line with General Recommendation 32.

In 2006, the Committee noted its concern that Malaysia 'has not enacted any laws or regulations concerning the status of asylum seekers and refugees. In particular, the Committee is concerned that asylum seekers and refugees, including women, are prosecuted for immigration-related offences and may be indefinitely detained at immigration detention centres or deported.'³³

The Government's position on the issue of detention and non-refoulement of asylum-seeking and refugee women

The Government has repeatedly asserted its commitment to upholding the principle of *non-refoulement*.³⁴ It also stated that UNHCR card-holders enjoy freedom of movement in Malaysia and are not arrested and charged for illegal entry except for their involvement in activities that are against the laws.³⁵

³³ Concluding Observations 2006 para 27 and 28.

³⁴ Reply to List of Issues para 61; House of Representatives – 4 April 2017, p15; Committee on the Elimination of Discrimination against Women, *Consideration of reports submitted by States parties under article 18 of the Convention, Combined third to fifth periodic report of States due in 2012: Malaysia* – Appendix A: Responses to the CEDAW Committee's Concluding Comments on Malaysia's Initial and Second Periodic Report, August 2016, p21 ('**Reply to Concluding Comments (2006)**'): 'Malaysia understands that the applicability of the principle of non-refoulement shall be moderated based on reasonable grounds and pertinent facts of the case. For instance, a refugee who has been convicted by a final judgment of a particularly serious crime, which constitutes a danger to the community of that country, cannot claim protection under the principle' and that 'although Malaysia is not yet a party to any treaties relating to refugees particularly the 1951 Convention ... and its 1967 Protocol, Malaysia continues to fulfil its moral obligation in providing assistance to such persons in compliance with customary international law.'

³⁵ Reply to List of Issues 2017, Appendix 7; House of Representatives – 4 April 2017, p15.

At the same time, however, the Government has confirmed that all women and girls placed in immigration detention centres are 'illegal immigrants' and are not distinguished from asylum seekers and refugees.³⁶ It has stated that the Ministry of Home Affairs will collaborate with UNHCR to verify the refugee status of the detainees.³⁷

In its recent Reply to the List of Issues 2017, the Government provided the following information on asylum-seeking and refugee women in detention: (i) the number of women and girls being held in immigration detention centres, disaggregated by age and nationality,³⁸ (ii) women and girls being held in immigration detention centres may only be released where the UNHCR has verified that they qualify for international protection under the Refugee Convention,³⁹ and (iii) only female officers will handle the women detainees as clearly stated in the depot's standard operating procedures.⁴⁰ It also stated that detention centres are monitored directly by the Human Rights Commission of Malaysia (SUHAKAM) and the Enforcement Agency Integrity Commission (EAIC) to provide the following to women and girls being held in immigration detention:

- a. a healthy diet as recommended and approved by the Ministry of Health;
- b. medical check-ups at government hospitals and clinics subject to the recommendation of a depot's Medical Assistant;
- c. monthly medical check-ups for pregnant women; and
- d. personal hygiene toiletries.⁴¹

The Government stated in its Reply to the List of Issues 2017 that the Ministry of Home Affairs 'conducts training, dialogue session and information sharing regularly to ensure officers is well equipped with the law/current issues/SOP.'⁴²

³⁶ Reply to List of Issues 2017, paras 60, 11.

³⁷ Reply to List of Issues 2017, Appendix 7.

³⁸ Reply to List of Issues 2017.

³⁹ Reply to List of Issues 2017, para 60.

⁴⁰ Reply to List of Issues 2017, para 60.

⁴¹ Reply to List of Issues 2017, para 60.

⁴² Reply to List of Issues 2017, para 61.

ARTICLE 15, 2(d)-(e): SEXUAL AND GENDER BASED VIOLENCE AND LACK OF ACCESS TO JUSTICE

Malaysia's legal obligations with respect to SGBV and lack of access to justice

Pursuant to CEDAW Article 15, lack of equality before the law, including lack of access to justice, could constitute discrimination within the meaning of the convention.⁴³

In relation to SGBV and other forms of harm perpetrated by non-state actors, CEDAW Articles 2(d)-(e) indicate that failure by state parties to ensure that women are protected against discrimination generated by non-state actors could constitute discrimination within the meaning of the convention. This is supported by General Recommendation 19,⁴⁴ which states that 'gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.⁴⁵ In the context of refugee women, General Recommendation 32 clarifies that in relation to these CEDAW articles the essence of refugee status is to provide effective protection to the refugee woman.⁴⁶

The ASEAN Human Rights Declaration Articles 2 and 21(1) provide for the right to equal access to legal aid.

Prior observations and issues raised by the CEDAW Committee with respect to SGBV and lack of access to justice

In paragraphs 27 and 28 of their 2006 Concluding Comments, the Committee recommended that Malaysia 'adopt laws and regulations relating to the status of asylum-seekers and refugees in Malaysia, in line with international standards, in order to ensure protection for asylum-seekers and refugee women and their children.'

⁴³ General Recommendation 32, para 32: 'Consistent with articles 2(c) and 15(1) of [CEDAW], States parties must take steps to eliminate discrimination against women in the public and private spheres and should confirm women's equality with men before the law. to this end, States should take positive measures to ensure that women are not discriminated against and that they are provided with effective legal protection throughout the asylum process, including by providing legal aid, legal representation and assistance, as necessary.' See also: paras 24, 27.

⁴⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence Against Women*, paragraph 9-10, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf

⁴⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence Against Women*, paragraph 9-10, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf

⁴⁶ General Recommendation 32, para 32.

In its List of Issues 2017, the Committee asked the Government to provide information on 'any measures ... adopted to ensure access to justice by women from disadvantaged groups' and on 'the availability of legal aid an assistance to women who are not citizens ... such as asylum-seeking women [and] refugee women'.⁴⁷

The Government's position on the issue of SGBV and lack of access to justice

The Government did not specifically address the issue of SGBV within asylum seeker and refugee communities as part of their combined third to fifth periodic report under CEDAW. This failure has not been remedied by the Government's Reply to the List of Issues 2017 as the Government again failed to deal specifically with the perpetration of SGBV against asylum-seeking and refugee women.

With respect to access to legal aid, the Government said in its Reply to the List of Issues 2017 that 'legal aid assistance is ... available to non-citizens regardless of their gender ... in capital punishment cases'.⁴⁸

In August 2017, the Government amended the national Legal Aid Act⁴⁹ to remove the right to legal aid for non-citizens of Malaysia.

ARTICLE 6, 11: LACK OF FORMAL ACCESS TO EMPLOYMENT

Malaysia's legal obligations with respect to the lack of formal access to employment

Pursuant to CEDAW Article 11, failure to take appropriate measures to eliminate discrimination against women in the field of employment, including the right to work as an inalienable right of all human beings and the right to the same employment opportunities and the protection of health and safety in working conditions, could constitute discrimination within the meaning of CEDAW.⁵⁰

General Recommendation 32 further articulates that female refugees should be offered sources of livelihood and employment opportunities,⁵¹ and this right is also enshrined in Article 25 of the Universal Declaration of Human Rights and Articles 17-19 of the 1951 Refugee Convention. Article 27(1) of the ASEAN Human Rights Declaration also provides for the right to

⁴⁷ List of Issues 2017, para 4.

⁴⁸ Reply to List of Issues 2017, para 9.

⁴⁹ Legal Aid Act 1971, available at http://www.commonlii.org/my/legis/consol_act/laa197164/.

⁵⁰ General Recommendation 32 para 33.

⁵¹ Ibid.

work and to appropriate employment conditions and Article 13 of the Cairo Declaration on Human Rights in Islam further articulates that the right to work is to be guaranteed by the State. Malaysia is also party to five (out of the eight), International Labour Organisation (ILO) core conventions, which articulate the fundamental principles of the right to work.⁵²

In the Human Rights Council Universal Periodic Review for Malaysia, it was recommended that Malaysia should 'allow refugees and other migrants to seek employment while they await resettlement or other durable solutions',⁵³ however the Government rejected this recommendation.

Pursuant to CEDAW Article 6, Malaysia also has obligations to 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.' Malaysia is a participant in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime ('Bali Process'). In 2016, as part of the Bali Process, Malaysia endorsed commitments to 'consider how labour migration opportunities can be opened up to persons with international protection needs.'⁵⁴

Prior observations and issues raised by the CEDAW Committee with respect to lack of formal access to employment

In paragraph 27 and 28 of their 2006 Concluding Comments, the Committee recommended that Malaysia 'adopt laws and regulations relating to the status of asylum-seekers and refugees in Malaysia, in line with international standards, in order to ensure protection for asylum-seekers and refugee women and their children.'

The Government's position on the issue of lack of formal access to employment

The Malaysian Government did not address the issue of employment for asylum seekers and refugees in their combined third to fifth periodic report under CEDAW, or in their recent Reply to the List of Issues 2017.

⁵² International Labour Organization, *ILO Ratifications for Malaysia*, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102960; Malaysia has ratified 17 ILO Conventions, of which 15 are currently in force, one is to be enforced and one was denounced in 1990.

⁵³ UPR 2013, Recommendation 146.28; UPR 2013 – Addendum.

⁵⁴ NHRAP Annexure A paragraph 11; Sixth Ministerial Conference of the Bali process on people smuggling, trafficking in persons and related transnational crime - Co-chairs' statement, 22 March 2016, <http://reliefweb.int/report/world/sixth-ministerial-conference-bali-process-people-smuggling-trafficking-persons-and> [accessed 3 October 2016].

ARTICLE 12: LACK OF ACCESS TO HEALTH CARE

Malaysia's legal obligations with respect to the lack of access to health care

Pursuant to CEDAW Article 12, failure to ensure asylum-seeking and refugee women have access to affordable and appropriate health care, including access to family planning services, services in connection with pregnancy, confinement and the post-natal period, as well as adequate nutrition during pregnancy and lactation, could constitute discrimination within the meaning of the convention.⁵⁵

General Recommendation 32 also clarifies that women seeking asylum and refugee women are to be granted, without discrimination, the right to a range of services, including health care.⁵⁶ This is also provided for by General Recommendation 24 on Women and Health, which require States to eliminate discrimination against all women in their access to health care services.⁵⁷

The right of asylum seekers and refugees to health services (equal to that which is enjoyed by the host country population) is enshrined in the 1951 Convention Relating to the Status of Refugees and Article 25 of the 1948 Universal Declaration of Human Rights. It articulates that everyone has the right to a standard of living adequate for the health and medical care.

We note that in the last Universal Periodic Review, Malaysia accepted a recommendation by the Government of Thailand, to 'step up efforts in ensuring universal access to affordable health services, particularly for the poor, vulnerable and marginalised groups.'⁵⁸

Prior observations and issues raised by the CEDAW Committee with respect to lack of access to health care

In paragraphs 27 and 28 of their 2006 Concluding Comments, the Committee recommended that Malaysia 'adopt laws and regulations relating to the status of asylum-seekers and refugees in Malaysia, in line with international standards, in order to ensure protection for asylum-seekers and refugee women and their children.'

⁵⁵ General Recommendation 32 paras 33, 48.

⁵⁶ General Recommendation 32, para 48.

⁵⁷ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, available at: <http://www.refworld.org/docid/453882a73.html>, para 2.

⁵⁸ Human Rights Council, *Universal Periodic Review Report of the Working Group on the Universal Periodic Review – Malaysia*, 4 December 2013, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MYSession17.aspx>, Recommendation 146.179.

The Government's position on the issue of lack of access to health care

In Appendix A to their Third to Fifth Combined Periodic Report (2016), the Malaysian government asserted that refugees and asylum seekers are 'not denied access to health care facilities, including maternal and child healthcare services.'⁵⁹

The government also recently announced plans to use allocations from the Qatar Development Fund to expand areas of health insurance for Rohingya refugees.⁶⁰

In its Reply to the List of Issues 2017, the Government stated that once individuals obtained UNHCR cards, they 'deserve some form of protection namely ... access to public and private healthcare.'⁶¹

⁵⁹ Reply to Concluding Comments (2006), Appendix A, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/INT_CEDAW_ADR_MYS_25048_E.pdf, p20.

⁶⁰ House of Representatives – 4 April 2017, p15.

⁶¹ Reply to List of Issues para 60.