



Asia Pacific Refugee Rights Network

Malaysia Universal Periodic Review – 3rd Cycle Submitted 29 March 2018

INTRODUCTION

1. The following report is submitted on behalf of Asylum Access Malaysia (AAM)¹ and the Asia Pacific Refugee Rights Network (APRRN)² for consideration in Malaysia's third Universal Periodic Review (UPR) to take place during the 31st Session of the UPR Working Group. The report observes the **rights of refugees, asylum seekers, and victims of trafficking**.

EXECUTIVE SUMMARY

2. As of January 2018, there are 153,480 urban asylum seekers and refugees registered with the Office of the United Nations High Commissioner for Refugees (UNHCR) in Malaysia.³ Despite hosting one of the largest refugee populations in Southeast Asia, Malaysia has yet to ratify the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") or the 1967 Protocol Relating to the Status of Refugees.⁴ The absence of a legal or administrative framework leaves asylum seekers and refugees without legal status and formal rights, and puts them at risk of arbitrary arrest, detention, *refoulement*, exploitation and other human rights violations.
3. Malaysia, on humanitarian grounds, generally allows asylum seekers and refugees in the country. Since Malaysia's second UPR cycle in 2013, there has been an increase in initiatives by the government in addressing refugee issues. These include:
 - (a) Malaysia's substantial regional role in responding to Southeast Asia's recent Rohingya refugee crisis, particularly for Rohingyas in Bangladesh;
 - (b) the establishment of the Tracking Refugee Information System (TRIS) in 2017, a refugee registration-tracking project,⁵ and pilot programs permitting Rohingya UNHCR cardholders to work in plantation and manufacturing sectors;⁶
 - (c) the inclusion of asylum seekers and refugees as a marginalized group in Malaysia's National Human Rights Action Plan in 2016;⁷
 - (d) increased cooperation with UNHCR, including the establishment of a Joint Task Force in 2016;⁸

- (e) Malaysia’s commitment to provide humanitarian assistance and temporary shelter to 7,000 refugees and migrants stranded at the Andaman Sea in 2015;
 - (f) Malaysia’s pledge to host 3,000 Syrian refugees in 2015;
 - (g) active participation in regional and international forums and high-level meetings on refugee-related issues.
4. Whilst these efforts indicate progress, serious breaches of asylum and refugee rights, inconsistent with international standards, continue to occur.
 5. This report covers the review period from 2013 to 2018, and highlights breaches related to: (1) denial of legal recognition due to the lack of a formal framework; (2) freedom from arrest and detention; (3) protection from *refoulement*; (4) access to fundamental human rights (the right to legal employment, healthcare and education); and (5) protection of trafficking survivors, and their access to rights. This report also highlights recommendations to the government to improve compliance with its obligations under both domestic and international law.
 6. Since refugee status is declaratory and not dependent on adjudication, any person who satisfies the definition of a refugee under the Refugee Convention⁹ is a refugee. For purposes of this report however, the term “refugee” will be used to refer to any person whose refugee claim has been recognized by UNHCR. The term “asylum seeker” will be used to refer to any person seeking to be adjudicated for refugee status who is yet to be recognized as a refugee by UNHCR.
 7. The submitting organizations propose the following recommendations to Malaysia for consideration by the UPR Working Group:

Issue 1: Regarding the denial of legal recognition and lack of a formal framework

- Establish a specific body comprising relevant government agencies, SUHAKAM, UNHCR and civil society organizations to efficiently manage forced migration and refugee issues.
- Develop a comprehensive legal and formal framework for the identification, protection and processing of refugees and asylum seekers, to provide them with due legal status and recognition in line with international standards.
- Increase cooperation and ensure meaningful engagement with civil society organizations.
- Ratify the Refugee Convention and Protocol, and enact/amend relevant national laws to incorporate the provisions.

Issue 2: Regarding freedom from arrest and detention

Arbitrary arrest and detention

- Urgently implement Malaysia’s second UPR cycle commitment to improve domestic legislation in order to prevent arbitrary detention and guarantee the right of detainees to a fair trial.
- Reform the Immigration Act 1959/63 (Immigration Act) to legally exempt asylum seekers and refugees from arrest, detention and prosecution for irregular entry. In the interim, the Home Minister is to exercise his discretionary powers under Section

55 of the Immigration Act to immediately exempt asylum seekers and refugees from arrest, detention, and all other penalties under the Act.

- Institute screening and assessment procedures to enable refugees and asylum seekers to be clearly identified and their individual circumstances assessed. Where immigration detention is used for asylum seekers and refugees, ensure that it is a measure of last resort, and alternatives to detention (ATD) are applied in the first instance.
- Revise Malaysia's detention framework to identify and better protect refugees and asylum seekers in line with international standards, including standardizing access to asylum procedures and the release of all asylum seekers and refugees for whom immigration detention is not reasonable, necessary or proportionate. Impose a time limit on detention and ensure detainees have the ability to challenge the grounds of their detention before a court or other competent, independent and impartial authority.
- Provide asylum seekers and refugees in detention with access to legal aid, and extend access to the domestic legal aid scheme to all non-citizens, regardless of nationality or status.
- Ensure that data on the numbers of persons held in immigration detention is systematically collected and publicly disseminated, and is disaggregated by age, gender, nationality, migration status, ethnicity and any vulnerabilities.

Deplorable detention conditions and treatment

- Urgently implement Malaysia's second UPR cycle commitment to improve its detention infrastructure.
- Ensure detention conditions are in line with international standards, including allowing unimpeded access and sufficient resources to SUHAKAM to enable it to meaningfully carry out its monitoring mandate. Ensure access to other stakeholders to provide necessary services (e.g. psychosocial and medical).
- Take concrete measures to eradicate all forms of abuse of refugee and asylum seekers in detention.

Children in detention

- End the immigration detention of children under 18 years of age and their families, and develop community-based alternatives to immigration detention for them and other vulnerable groups.
- Revise the legal policy and framework applicable to asylum-seeking and refugee children under the Immigration Act and the Child Act 2001, requiring the use of alternatives to detention for children and their families, and other vulnerable groups.
- Withdraw all reservations under the United Nations Convention on the Rights of the Child (CRC) to better protect refugee and asylum seeker children in Malaysia.
- In the interim, ensure non-separation of families in detention centers and that children are not detained with adults who are not family members.

Women in detention

- Provide adequate facilities and services that meet the specific needs of women in detention, including effective screening for vulnerabilities and gender sensitivity training for staff at detention centers.

Issue 3: Regarding the protection from refoulement

- Guarantee full respect for the *non-refoulement* principle, including urgently developing legal safeguards protecting asylum seekers and refugees from

refoulement.

- End all policies denying asylum seekers entry at frontiers, including push-back policies against boat arrivals.
- Ensure adequate reception facilities to all asylum seekers upon arrival.

Issue 4: Regarding access to fundamental human rights

Lawful employment

- Allow asylum seekers and refugees to obtain lawful employment and access to formal labor markets, including exempting asylum seekers and refugees from existing employment prohibitions.
- Strengthen domestic employment laws and policies in accordance with international labor standards to protect asylum seekers and refugees against any form of abuse and exploitation.

Affordable healthcare

- Urgently implement Malaysia's second UPR cycle commitment to ensure universal access to affordable health services for poor, marginalized and vulnerable groups, such as asylum seekers and refugees, including by removing prohibitively expensive fees and charges.
- Guarantee protection against arrest and detention at the point of registration or during treatment in public hospitals, health clinics (Klinik Kesihatan), and maternal and child health clinics.

Education

- Remove all barriers restricting asylum seekers and refugees from accessing education, including withdrawing reservations to Articles 7 and 28(1)(a) of the CRC.
- Implement programs to facilitate the integration of asylum seekers and refugees into public schools.

Issue 5: Regarding the protection of trafficking survivors

- Ensure that all asylum seekers and refugees who are trafficking survivors can access adequate services and protection. This includes access to UNHCR from trafficking (TIP) facilities and protection from deportation in accordance with the principle of *non-refoulement*.
- Enable the full implementation of amendments (2015) to the anti-trafficking law (ATIPSOM) to allow, *inter alia*, freedom of movement and the right to work, preventing against the *de facto* detention of trafficking survivors in government TIP facilities.
- Reform domestic law provisions to distinguish smuggled migrants from trafficking survivors.
- Enhance enforcement efforts to ensure traffickers are prosecuted and punished according to international standards, and immediately stop the criminalization of trafficking survivors for violation of immigration and labor laws.

ISSUE 1: NO FORMAL FRAMEWORK GRANTING LEGAL RECOGNITION

8. In Malaysia's second UPR cycle, the government made a commitment to improve its existing framework relating to the management and processing of asylum seekers and refugees.¹⁰ To date, there has been no substantial progress: Malaysia has yet to establish a comprehensive formal legal or administrative framework affording legal recognition to asylum seekers and refugees.
9. The indiscriminate application of the Immigration Act,¹¹ which currently governs the situation of asylum seekers and refugees in Malaysia, does not legally distinguish UNHCR-registered refugees and asylum seekers from irregular migrants. In effect, owing to their deemed illegal presence, they are unidentifiable, denied legal recognition and treated as "illegal" immigrants. Without any guaranteed protection afforded by the government, they are vulnerable to arbitrary arrest, detention, *refoulement* and barred from having access to justice, lawful employment, healthcare and education.
10. Whilst the Malaysian government cooperates informally with UNHCR, the current policies and screening practices by the authorities in distinguishing UNHCR cardholders from other asylum-seekers and undocumented migrants remain ad hoc, resulting in their inconsistent and discretionary application.
11. Malaysia has no specific body to manage refugee-related matters. Depending on the circumstances, the government characterizes them as an issue concerning national security, immigration and border management. Such jurisdictional fragmentation between various different ministries and state agencies not only creates institutional gaps but also leads to uncoordinated management efforts. Moreover, the National Security Council, which is primarily responsible for forced migration issues in Malaysia, adopts a highly classified internal decision-making process. As their decisions are excluded from any form of public review, they are discretionary and also legally unchallengeable.
12. In 2017, the government developed the Tracking Refugees Information Systems (TRIS), a refugee monitoring and tracking system where registrants will be issued with a government "MyRC" identity card, valid for one year. Although discussed during parliamentary debates, the government has failed to clarify the precise rights and protections that will be afforded to "MyRC" cardholders.¹² It is equally unclear as to how the status of UNHCR issued documents will be impacted hereafter, including their recognition by law enforcement and immigration authorities. The existence of a parallel registration-vetting system run by both the government and the UNHCR creates protection risks for UNHCR registered individuals who may be denied registration under TRIS, or unable to access it.¹³
13. Without an institutionalized legislative or administrative framework protecting asylum seekers and refugees, Malaysia's current *de facto* ad-hoc and case-by-case policy approach remains fragile and grossly inadequate. Malaysia's informal 'protection' policies and cooperation arrangements fall far below international human rights standards. For instance, whilst laudable, Malaysia's commitment to host 3,000 Syrian refugees under the Temporary Relocation Programme for Syrian Migrants (PPSMS) in October 2015 is discriminatory, as it does not extend to refugees of other nationalities.¹⁴

ISSUE 2: FREEDOM FROM ARREST AND DETENTION

14. In the absence of a legal and administrative framework, asylum seekers and refugees are without legal status and criminalized for their irregular entry and presence in Malaysia. They are not protected from arrest, detention or prosecution for violation of immigration laws.

2.1 Arbitrary arrest and detention

15. By arbitrarily arresting, detaining and prosecuting asylum seekers and refugees, Malaysia continues to act contrary to Article 9 of the 1948 Universal Declaration of Human Rights (UDHR)¹⁵ and Article 12 of the ASEAN Human Rights Declaration (ADHR)¹⁶ which provide the fundamental human right of liberty and security. Malaysia's further lack of respect for procedural standards and legal safeguards also contravene the right to equality before the law and access to legal aid under Malaysia's Federal Constitution and the ADHR, respectively.
16. Despite the provisions of the Immigration Act, which does not distinguish between refugees and other undocumented immigrants, the government maintains that registered asylum seekers and refugees with UNHCR documents enjoy freedom of movement.¹⁷ It is presumed that this policy derives from two documents, both of which are not publically available: (i) standard operating procedures issued by the Immigration Department; and (ii) a written directive issued by the Attorney General's Chambers in 2005 that allow for the release and/or non-prosecution respectively, of UNHCR cardholders for immigration offences.¹⁸ Since 2016, the government has been increasingly recognizing UNHCR's newly issued cards with enhanced anti-fraud security features and verification methods, which consequently afford cardholders better protection against arbitrary arrests and detention.¹⁹
17. However, this policy is not legally codified, and may be subject to the discretion of the government, which may lead to inconsistent application.²⁰
18. Although UNHCR is able to register or otherwise request for the release of detained UNHCR cardholders or persons of concern to the agency, to the submitting organizations' knowledge, requests are sometimes left unheeded by the authorities. The administrative process for release is also considerably lengthy, ad hoc and applied inconsistently and discriminately only towards select nationalities and ethnic groups such as the Rohingya. This puts detained asylum seekers and refugees at risk of prolonged or indefinite detention, and *refoulement*. As the Immigration Act provides that detainees, pending removal, may be detained for "such period as may be necessary,"²¹ and does not provide for periodic review, immigration detainees are subjected to prolonged and indefinite periods of detention, averaging between two months to two years.²² UNHCR also faces restrictions on its access to certain populations of asylum seekers and refugees currently in detention, as well as to certain sections of detention centers.²³
19. There is no systematic and comprehensive screening and assessment procedure to ensure refugees and asylum seekers are identified at an early stage, and any individual vulnerabilities and risks assessed; this includes an assessment of whether detention is necessary, reasonable and proportionate in the individual case. There are also no provisions for ATD in law.

20. Data on asylum seekers and refugees held in immigration detention in Malaysia are not made publicly available on a regular, ongoing basis. Where available, data are often not sufficiently disaggregated by migration status, age, or vulnerabilities. The latest publicly available data suggests that as of 2016, a total of 86,795 'immigration detainees' were being held. As of September 2017, 1,686 women and 517 children were in immigration detention centers throughout Malaysia.²⁴ As there is no formal screening mechanism to determine if an immigration detainee is an asylum seeker or a refugee, their exact figures are as such indeterminable, and in any event not made publicly available by the government. Based on UNHCR's figures for 2015, 5,648 asylum seekers and 2,282 refugees experienced immigration detention.²⁵

21. In Malaysia's second UPR cycle, the government had also accepted the recommendation to "continue to improve domestic legislation in order to guarantee the right of detainees to a fair trial."²⁶ The situation, however, specifically in the context relating to detained asylum seekers and refugees, appears to have regressed. Detained asylum seekers and refugees not only continue to have poor access to justice but also face harsher restrictions in obtaining legal representation.

22. Although the Federal Constitution guarantees both citizens and non-citizens the right to equality before the law and the right to legal representation,²⁷ actual application is limited in practice. To date, no laws or clear policies allow immigration detainees formal access to interpretation and/or legal representation services either during trial or detention. Furthermore, the passing of an amendment bill by the Parliament's House of Representatives' in August 2017 effectively removes the right to legal advice for non-citizens under Section 29 of the Legal Aid Act, which is further cause for concern. Access to legal representation is especially crucial since whipping sentences are mandatory for immigration violations under Malaysian law.²⁸

2.2 Deplorable detention conditions

23. Overall conditions in Malaysia's immigration detention centers remain gravely deplorable and inconsistent with international minimum standards.

24. Despite Malaysia's commitment during its second UPR cycle, no progress has been made towards satisfactorily improving its detention infrastructure to comply with international standards.²⁹ Although the government took several initiatives in 2016 to enhance healthcare resources in its detention centers,³⁰ they are still grossly insufficient.

25. Numerous reports,³¹ including a 2015 report released by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (following a visit to two detention centers in 2014),³² reveal specific concerns, namely in addressing basic needs, such as poor sanitation (exposure to risk of infectious diseases), lack of adequate food, water, and medical care,³³ overcrowding³⁴ and inappropriate bedding. Reports further indicate that immigration detention centers in Malaysia are severely under-resourced and face hard budget constraints.³⁵

26. Death rates in immigration detention centers have also been high. According to SUHAKAM, since 2015, 118 deaths have been reported.³⁶ The occurrence of physical abuse in

detention is also widely documented.³⁷ Poor government accountability on these issues remains gravely concerning.

2.3 Children in detention

27. The continued detention of asylum seeker and refugee children in immigration detention centers contravenes the principle of the best interest of the child and breaches Article 22 of the CRC³⁸.
28. Child detainees in Malaysia are detained in unacceptable fetid conditions and are often placed in adult facilities by gender – including those unaccompanied and separated from family – exposing them to an increased risk of abuse.³⁹ Boys aged 12 and above are separated from female family members and may be detained with unrelated men.⁴⁰
29. In recent years, the government has taken some positive steps toward developing ATD models for children,⁴¹ including establishing a formal working group to explore ATD for unaccompanied and separated children⁴² Relatedly, the decision of the High Court in 2016 ordering that a child refugee be released on bail in favor of alternative care arrangements, is also highly welcomed.⁴³ However, progress on implementing community-based ATD for children remains painstakingly slow; the Malaysian government has taken few steps to initiate the legal and policy reforms required to enable the implementation of ATD.
30. Malaysia, despite having ratified the CRC, maintains reservations to: (a) Article 2 of the CRC which primarily protects children from being discriminated against or punished on the basis of the status of their parents, legal guardians or family members;⁴⁴ and (b) Article 37(b) of the CRC which protects children from being arbitrarily or unlawfully deprived of their liberty whereby the arrest, detention or imprisonment of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time.”⁴⁵ Failure to withdraw these reservations creates major impediments to providing protection to asylum seeker and refugee children in Malaysia.

2.4 Women in detention

31. By detaining women refugees and asylum seekers, including those with further specific needs such as pregnant and lactating women, Malaysia breaches its obligations under Articles 1, 2, 5(a), 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁶ and the Committee General Recommendation 32 which places an onus on CEDAW state parties to ensure that refugee and asylum seeker women within their jurisdiction are not exposed to violations of their rights under CEDAW.⁴⁷
32. Given their heightened vulnerability, female detainees are exposed to the risk of sexual and gender-based violence (SGBV) and other forms of abusive treatment.⁴⁸ Of particular concern is the arrest and detention of undocumented asylum-seeker and refugee women who have just given birth, nursing mothers and the detention of girls, either unaccompanied or with their family members.⁴⁹ Available reports further indicate that detained pregnant and lactating women are denied adequate access to facilities and services, including ante-natal and medical services, appropriate to their specific needs.⁵⁰ In addition, the detention of women with compromised immune systems puts their health at risk.

ISSUE 3: PROTECTION FROM REFOULEMENT

33. By forcibly returning asylum seekers and refugees and adopting push-back policies to reject boat arrivals at sea, Malaysia not only risks the *refoulement* of victims of persecution but also violates its international obligations.
34. Although not a party to the Refugee Convention⁵¹ or the Convention against Torture (CAT)⁵², Malaysia's *refoulement* of those at risk of persecution or serious harm still violates the principle of *non-refoulement* under customary international law. Rather than having persistently or legally objected to the principle of *non-refoulement*, Malaysia has continued to recognize the duty to protect against *refoulement*. This includes the adoption of the 1966 Bangkok Principles on the Status and Treatment of Refugees in 2011⁵³, on protecting refugees against forcible returns.
35. Whilst the Malaysian government generally respects the principle of *non-refoulement* by tolerating the presence of refugees and asylum seekers to temporarily remain in the country pending a durable solution, there is still no legal codification of any such safeguard.
36. Ample available evidence provides that Malaysia continues the *refoulement* of asylum seekers and refugees without due regard to their international protection needs. These include, but are not limited to the following instances –
 - (a) In February 2018, the government indicated the possible deportation of eleven at-risk Muslim Uighurs to China despite receiving strong criticism from the international community.⁵⁴
 - (b) In May 2017, the government officially deported three high profile Turks (two of which were registered with UNHCR) accused of being allegedly involved in anti-government activities. Despite facing arbitrary detention, unfair trial and a real risk of torture, they were refouled to the Turkish authorities.⁵⁵
 - (c) In May 2015, Malaysia implemented a 'push-back policy' and refused the safe disembarkation of boats carrying thousands of Rohingya and Bangladeshi asylum seekers attempting to disembark in Malaysia, leaving them stranded at the Andaman Sea and the Bay of Bengal.⁵⁶ Although the boats were eventually allowed to disembark following immense international pressure, many lost their lives and Malaysia continues to put lives at risk by maintaining such policies;
 - (d) In 2014, Malaysia handed over three Sri Lankan Tamil refugees under UNHCR protection to Sri Lanka.⁵⁷

ISSUE 4: ACCESS TO FUNDAMENTAL HUMAN RIGHTS

37. Without formal recognition from the government legalizing their statuses, asylum seekers and refugees are severely barred from seeking lawful employment and accessing basic services, such as healthcare and education facilities.

4.1 Lack of access to legal employment

38. With no access to lawful and formal employment and protection at their workplace, asylum seekers and refugees are barred from the right to work, exacerbating their unstable economic situations.
39. In recent years, there has been some indication of progress. In 2014, the Industrial Court held in *Ali Salih Khalaf v Taj Mahal Hotel* [2014] 4 ILJ 15 that all workers, including refugees, should be treated equally before the law and accordingly, protected by domestic employment laws. Similarly, in early 2017, the government announced a pilot program to allow 300 Rohingya UNHCR cardholders to work legally in the plantation and manufacturing sectors.⁵⁸
40. However, serious concerns remain. Malaysian employment law requires foreign persons to hold a Temporary Employment Pass.⁵⁹ Without legal status, there is no avenue for refugees and asylum seekers to apply for the requisite permits.⁶⁰ The government's position that refugees may be permitted to do odd jobs, despite their lack of realizable formal work rights, is contradictory and concerning.⁶¹ Such unofficial policies compel asylum seekers and refugees to seek informal or ad hoc work. Often without employment contracts, they are vulnerable to exploitation and unfavorable work conditions (non-payment of wages, long working hours, dangerous working environment, and no health coverage). Abuse, harassment and anti-immigrant sentiments are also pervasive.

4.2 Lack of access to healthcare

41. In its second UPR cycle, Malaysia accepted the recommendation to "step up its efforts in ensuring universal access to affordable health services particularly for the poor, vulnerable and marginalized groups."⁶² Refugees and asylum seekers, however, even if registered with UNHCR, still face significant challenges in accessing healthcare. These obstacles contravene Malaysia's obligations under the CRC,⁶³ CEDAW⁶⁴ and the Convention on the Rights of Persons with Disabilities (CRPD),⁶⁵ to guarantee the right to the highest attainable standard of health without discrimination.
42. Non-citizens do have some access to public health services in Malaysia, however costs greatly impact on the ability of the refugee population to access these services. In January 2015, charges and deposits were introduced for all non-citizen patients,⁶⁶ and were doubled in 2016.⁶⁷ However, deposits may be waived in emergencies, and fee exemptions for the treatment – but not diagnosis – of certain infectious diseases exist.⁶⁸
43. Moreover, the government permits UNHCR refugee cardholders to receive a 50% subsidy on non-citizen rates.⁶⁹ The stated commitment to expand health insurance for Rohingya refugees also implies a positive direction, although no progress has been made on this so far.⁷⁰
44. Despite these efforts, healthcare is often unaffordable for a population prohibited from employment, and subject to economic instability. Foreigner rates for registration are 40-120 times that of Malaysian citizens, and ward charges vary from 3.5 times, to 53 times more expensive for the most basic healthcare.⁷¹ A normal child delivery costs RM3500 (890 USD). Moreover, the 50% subsidy policy is limited to UNHCR refugee cardholders, and does not extend to asylum seekers.

45. In addition to the increasingly high costs for non-citizens, barriers to healthcare include: (a) language; (b) reluctance to go to public hospitals and facilities due to fear of arrest and detention by authorities at the point of registration or during treatment;⁷² and (c) instances of refused registration or treatment of undocumented asylum seekers.⁷³ This relates to increased morbidity and suffering among a vulnerable group.
46. Indeed, a 2001 Ministry of Health Directive, reiterated in 2014, stipulates that government healthcare providers are obligated to report “illegal immigrants” seeking healthcare services to the police and immigration authorities.⁷⁴ These reporting procedures, coupled with the Immigration Department’s permanent presence at some hospitals, such as the Kuala Lumpur General Hospital,⁷⁵ lead to instances of undocumented asylum seekers being detained from healthcare facilities. Moreover, the well-founded fear of arrest deters people from seeking healthcare and treatment, and in some cases results in patients absconding from hospitals. The resultant restricted use of health services impedes the positive direction implied by the exemption fees for infectious diseases.

4.3 Lack of access to education

47. Regrettably, Malaysia has yet to withdraw its reservations to Article 7 and 28(1)(a) of the CRC,⁷⁶ which in effect restricts the registration of refugee and asylum seeking children, barring them from having free and compulsory education at primary level. Denial of access to education violates the basic right of all refugee and asylum-seeking children to education under Article 28 of the CRC.⁷⁷
48. Refugee and asylum-seeking children of school-going age have no access to the national education system. According to UNHCR, out of 28,823 of school-going children, only 30% of refugee children in Malaysia are enrolled in learning centers supported by UNHCR and/or civil society organizations and the communities.⁷⁸ Without proper national documentation, they face severe obstacles in registering for enrolment due to their ineligibility. Whilst parents can, in principle, apply for birth certificates, the fear of arrest and detention often prevails over such initiatives.
49. Education is therefore mainly provided through a parallel school system run by 128 Alternative Learning Centers and Community Learning Centers in Malaysia, implementing informal syllabuses.⁷⁹ Most centers are overcrowded, face severe financial constraints, lack adequate facilities and resources and employ unqualified and untrained teachers.

ISSUE 5: PROTECTION OF TRAFFICKING SURVIVORS

50. Inadequate domestic laws and weak legal enforcement against traffickers violate Malaysia’s obligations under the international framework of anti-human trafficking to meet minimum standards for the eradication of trafficking and protection of trafficking survivors.
51. Without legal status or access to the formal labor market, refugees and asylum seekers are vulnerable to trafficking and abusive exploitation schemes. Many are trafficked into the country across the Malaysia-Thai border. Asylum seeker and refugee women are particularly vulnerable to abuse, SGBV and sexual exploitation.⁸⁰

52. Since Malaysia's second UPR cycle, several events have highlighted the gravity of trafficking activities in Malaysia. Of specific concern was the discovery of mass graves of suspected trafficked Rohingya refugees and Bangladeshi migrants along the Malaysian-Thailand border in 2015,⁸¹ to be sold for sex and labor.⁸²
53. In 2014, Malaysia was downgraded to Tier 3 on the Watch List in the US State Department's Trafficking in Persons Report. In 2016, although Malaysia failed to meet minimum standards to eliminate trafficking, the government was reported to have been 'making significant efforts to do so' and was upgraded, albeit controversially, to the Tier 2 Watch List.⁸³ In 2017, Malaysia was removed from the Watch List.⁸⁴ This indicated some increased efforts to combat human trafficking and protect survivors.
54. Despite these efforts, fundamental legal protection gaps remain. Malaysia's 2007 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM),⁸⁵ was amended in 2015 to enhance protection for survivors. However, the conflation of 'trafficking' and 'people smuggling' jeopardizes effective protection and assistance. Refugee trafficking survivors who are inaccurately identified as 'smuggled migrants' under ATIPSOM risk being detained and consequently deported, in violation of the *non-refoulement* principle.
55. In 2015, further amendments were made to ATIPSOM to allow trafficking survivors freedom of movement and the right to work.⁸⁶ However, implementation of the amendments has been limited.⁸⁷ Regardless of an intention to protect trafficking survivors, their lack of freedom of movement outside government TIP facilities results in a situation of *de facto* detention.
56. The government however has indicated to civil society organizations (including the submitting organizations) that the scope of ATIPSOM would not be extended to include refugees, who remain under the purview of UNHCR. This unequal application of ATIPSOM results in a critical legal gap and creates major obstacles to effectively protecting refugees and asylum seekers who are trafficking survivors. On the other hand, where refugees are identified as trafficking survivors and housed in government TIP facilities, no formalized channel exists to enable their access to UNHCR. This may put them at risk of deportation in violation of the *non-refoulement* principle, upon expiration of their Protection Order (PO).
57. Legal enforcement and prosecution efforts by the Malaysian authorities against traffickers and their accomplices have also been weak, in comparison to the Thai authorities who have, for instance, arrested, prosecuted and convicted more than a hundred individuals (including complicit government officials). Since the 2015 discovery of mass-graves along its border, the Malaysian authorities have only managed to convict four non-citizens for their involvement.⁸⁸
58. In the same vein, following a visit to Malaysia in 2015, the Special Rapporteur on trafficking in persons raised specific concerns relating to the government's poor focus on trafficking activities, especially women and children, for sexual exploitation purposes.⁸⁹ She also highlighted Malaysia's limited immigration policies, which do not provide adequate protection or proper screening mechanisms for trafficking survivors.⁹⁰

¹ Asylum Access is an international refugee rights organization providing legal aid, empowerment, law and policy reform for refugees in Latin America, Africa and Asia. Asylum Access Malaysia is a locally-

registered and locally led organization focusing on improving refugee rights in Malaysia (www.asylumaccess.org).

² The Asia Pacific Refugee Rights Network (APRRN) is a network consisting of more than 300 civil society organisations and individuals from 28 countries committed to advancing the rights of refugees in the Asia Pacific region (www.aprrn.info).

³ This comprises 133,880 from Myanmar, of which some 67,300 are Rohingya. 34% of registered refugees are women, and 40,240 children. See UNHCR, *Figures at a Glance in Malaysia*, <http://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>

⁴ *Convention Relating to the Status of Refugees* (Refugee Convention), 28 July 1951, 189 U.N.T.S. 137.

⁵ The Malay Mail, “Malaysia-UNHCR joint task force formed to tackle migration issue”, 18 August 2016 available at <http://www.themalaymailonline.com/malaysia/article/malaysia-unhcr-joint-task-force-formed-to-tackle-migration-issue#VJ8VS3rcxrJTivZD.97>

⁶ Beh Lih Yi, “Malaysia in pilot scheme to allow Rohingya refugees to work”, Thomas Reuters Foundation, 24 November 2016 available at <http://news.trust.org/item/20161124122606-2e8s6/>

⁷ National Human Rights Society (HAKAM), “PM to launch National Human Rights Action Plan in March” 26 January 2018 available at <http://hakam.org.my/wp/index.php/2018/01/26/pm-to-launch-national-human-rights-action-plan-in-march-azalina/>.

⁸ The Malay Mail, “Malaysia-UNHCR joint task force formed to tackle migration issue”, 18 August 2016 available at <http://www.themalaymailonline.com/malaysia/article/malaysia-unhcr-joint-task-force-formed-to-tackle-migration-issue#VJ8VS3rcxrJTivZD.97>

⁹ Refugee Convention (n 4), *article 1(2)*.

¹⁰ UPR Info, 2RP: Responses to Recommendations & Voluntary Pledges: Malaysia, Second Review, Session 17, Malaysia’s responses to recommendations (as of 11.07.2014), (“**Malaysia’s Second UPR Cycle Responses to Recommendations & Voluntary Pledges**”) available at https://www.upr-info.org/sites/default/files/document/malaysia/session_17_-_october_2013/recommendations_and_pledges_malaysia_2014.pdf, Recommendation A – 146.226.

¹¹ Immigration Act 1959/1963 (Act 155)

¹² The Official Portal of the Parliament of Malaysia, House of Representatives, Hansard Special Chamber, Official Statements, 7 November 2017 available at <http://www.parlimen.gov.my/files/hindex/pdf/DR-07112017.pdf>

¹³ Aina Nasa, ‘Gov’t issues Tracking Refugee Information System to update, gather data on refugees’ *New Straits Times*, 2 August 2017 available at <https://www.nst.com.my/news/nation/2017/08/263348/govt-introduces-tracking-refugee-information-system-update-gather-data>.

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