

Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia



January 2010



The Equal Rights Trust

The Equal Rights Trust – Rohingya in Malaysia

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex and complementary relationship between different types of discrimination and developing strategies for translating the principles of equality into practice.

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This report is produced by The Equal Rights Trust as part of a project entitled “Stateless Persons in Detention”. This two-year project seeks to strengthen the protection of stateless persons who are in any kind of detention or restriction of liberty due at least in part to their being stateless, and to promote their right to be free from arbitrary detention without discrimination. It pursues two interrelated objectives: to document the detention, or other forms of physical restriction, of stateless persons (*de jure* and *de facto*) around the world; and to use this information to develop detailed legal analysis as a basis for international and national advocacy against the arbitrary detention of stateless people.

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Introduction

1. The Rohingya are one of the most vulnerable communities in the world today. Stripped of their nationality and subject to widespread persecution in their native Myanmar, they have travelled far and wide over the past forty years, desperately seeking refuge and a better life. They are stateless, without a legal nationality, and many are also refugees. Bangladesh, Thailand, India, Pakistan, Saudi Arabia and Malaysia have been preferred destinations of this community in flight, but for the vast majority, their suffering has not ended upon reaching new shores. All too often, the Rohingya experience of life is a cycle of acute discrimination, escape, trafficking, poverty, detention, extortion and deportation.
2. This report is one of the outputs of a global research and advocacy project of the Equal Rights Trust (ERT) on **stateless persons in detention**. It draws attention to the plight of Rohingya who have successfully made the hazardous journey to Malaysia – a present focus, and ‘hotspot’, for Rohingya migration. It focuses on detention practices in Malaysia and the cycle of deportation and trafficking, which must be broken.
3. This report documents the ways in which immigration related laws, practices and policies of Malaysia are discriminatory and detrimental to the rights and well-being of all irregular migrants in the country. The Rohingya are merely one – albeit particularly vulnerable – group amongst many others. By focussing on the Rohingya in Malaysia, this report raises grave human rights concerns about the treatment of all irregular migrants in the country. It also establishes the need for a robust, holistic and regional solution to the problems faced by the Rohingya, which is embedded in human rights principles.
4. The research consisted of a comprehensive literature review, a two-week field visit to Malaysia in May 2009 and a follow up one-week visit in September 2009. Detailed interviews were carried out with fourteen stateless Rohingya who have been victims of detention, deportation and trafficking. The interviewees were a mix of ‘registered’ and ‘unregistered’ Rohingya who presently reside in and around Kuala Lumpur and Penang. The UNHCR in Malaysia was consulted, as well as various NGOs working with refugees and irregular migrants in the country.
5. ERT research findings reveal that stateless Rohingya and other irregular migrants in Malaysia are often arrested without a warrant and convicted of immigration offences. According to Rohingya interviewed by ERT, after completing prison terms, during which many are caned, the Rohingya continue to be detained, in overcrowded and unsanitary immigration detention centres, until ‘deported’ into the hands of trafficking syndicates at the Thai Border. Those who cannot pay the traffickers to be sent back into Malaysia are sold as bonded labourers to work on fishing trawlers and plantations in Thailand. The practice of informal deportation has however appeared to have ceased since July 2009.
6. This report has four parts. **Part One** offers an introductory profile of the Rohingya; their past in Myanmar and their present in Malaysia. It also briefly surveys the role of the UNHCR in relation to the Rohingya in Malaysia. **Part Two** describes the realities of detention, deportation and trafficking faced by Rohingya in Malaysia, providing first hand evidence by way of personal testimony. **Part Three** explores the legal framework which is the basis of Malaysia’s policy of punishing, detaining and deporting irregular migrants, as well as perpetuating statelessness. **Part Four** looks at some positive recent developments, and sets out the recommendations of the ERT.

PART ONE

A Brief Introduction: Why the Rohingya Flee Myanmar

“We, Rohingya, are like birds in a cage. If you keep birds in a cage, you can grab them whenever you like. Likewise, the Burmese authorities use us whenever they need, for forced labour, extortion, etc. The only difference is that caged birds are fed whereas we also need to work for our own food.”

-- A villager from South Maungdaw, 4 April 2008

7. The Rohingya are a Muslim community of South Asian descent, closely related to the Chittagonian Bengali of neighbouring Bangladesh. An ethnic, religious and linguistic minority, approximately one million Rohingya live in the Rakhine state of Myanmar today, of which over 700,000 are concentrated in the northern region of the state.¹ The Rohingya are a community in flight, with possibly more Rohingya living outside Myanmar than within.
8. The 1982 Citizenship Law of Myanmar stripped the Rohingya of their nationality, making them legally stateless.² Furthermore, Myanmar does not recognise the existence of an ethnic community by the name of Rohingya. This law was the basis for arbitrary and discriminatory treatment against the Rohingya community. As a result, their human rights and freedoms have been systematically eroded through a series of draconian policies, arbitrary taxes and controls. The Rohingya do not have the freedom to move within Myanmar. In fact, they must pay for a travel permit even to visit a neighbouring village and they are not permitted to travel beyond the three townships of northern Rakhine state. This restriction severely impedes their already limited access to employment, education, health and trade. Rohingya who leave Myanmar are denied the right to return; their names are struck off family lists and they face long-term imprisonment if captured upon re-entry. The *NaSaka* – Myanmar’s border security force – also places severe controls on Rohingya marriages. A marriage permit must be obtained through a lengthy and expensive process which is rife with bribery and corruption. Marriages without a permit can result in up to ten years of imprisonment.³
9. In addition to acute discrimination and severe restrictions on their human rights, the extreme poverty and complete lack of development initiatives in northern Rakhine have ensured that this extremely vulnerable, downtrodden and impoverished community will continue to remain so.
10. Many Rohingya feel that life cannot get worse than in Myanmar. This is why they flee. They then have no option of return because they are stateless and Myanmar would not re-admit them. It is important to take stock of this fact. It is essential that Malaysia and all other destination countries reached by the Rohingya comprehend the implications of this reality.

¹ Lewa, C. “North Arakan: an open prison for the Rohingya in Burma”, *Forced Migration Review*, Issue 32, April 2009, p. 11, available at <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf> [accessed 3 January 2010]

² *Burma Citizenship Law* [Myanmar], 15 October 1982, available at: <http://www.unhcr.org/refworld/docid/3ae6b4f71b.html> [accessed 3 January 2010]

³ For a more detailed account of the Rohingya in Myanmar, see Lewa, Note 1 above.

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Malaysia: The Legal Framework

- Malaysia has not ratified the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.
- Malaysia has not ratified the 1954 Convention Relating to the Status of Stateless persons or the 1961 Convention on the Reduction of Statelessness.
- Malaysia has not ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment (CAT) or the Convention on the Elimination of Racial Discrimination (CERD).
- Malaysia has ratified the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), albeit with certain reservations.
- Malaysia has not acceded to the 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons. However, in 2007 Malaysia enacted the Anti-Trafficking in Persons Act to combat trafficking.
- Malaysia has not enacted any domestic legislation creating procedures to identify and protect refugees and stateless persons within the country.
- Malaysia does not distinguish between stateless persons, refugees and asylum seekers and other undocumented migrants. Under Malaysian immigration law, they are all considered to be 'illegal immigrants' subject to arrest, imprisonment, caning, immigration detention and deportation.
- The UNHCR has a global mandate to provide protection and assistance to stateless persons, refugees and asylum-seekers. However, in the absence of any national framework for refugees and stateless persons, its ability to provide effective protection is very limited within Malaysia.

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11. Despite Malaysia's poor track record of both ratification of international human rights treaties and harsh immigration laws and policies, it continues to be a focus and 'hotspot' for Rohingya migration. An estimated 20,000 to 25,000 Rohingya - deprived of citizenship and persecuted in Myanmar - currently live in Malaysia. More are expected to arrive. ERT research suggests several reasons for this:
 - Having suffered de-nationalisation, acute discrimination and persecution in Myanmar, many Rohingya are willing to take their chances in Malaysia.
 - The fact that Malaysia has a Muslim majority affords a (perhaps misguided) sense of security to Rohingya who have suffered religion-based discrimination in Myanmar.
 - Malaysia is, apart from Bangladesh, the easiest Muslim country for Rohingya to enter without travel documents.
 - Even menial jobs in Malaysia are economically attractive to the extremely impoverished Rohingya.
 - Whilst Malaysia has a poor human rights and immigration track record, so do other potential destinations for the Rohingya.
12. Although some Rohingya arrived in Malaysia a few decades ago, the first large influx dates back to 1991/92, coinciding with a mass exodus of Rohingya refugees from Myanmar to Bangladesh. In December 1993, 5,100 Rohingya were registered by the UNHCR in Malaysia.

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13. Over the years, Rohingya have used various means of transportation to get to Malaysia. In the 1990s, overland routes through Myanmar were commonly used and a few travelled by boat departing from Sittwe, until strict restrictions of movement were imposed on the Rohingya. Some also arrived by air via Bangladesh when brokers could easily procure 'Bangladeshi passports'.
14. Since 2006, however, most Rohingya have had no alternative to making a hazardous boat journey from Myanmar via Bangladesh to Thailand, from where they travel overland to Malaysia. Traffickers and smugglers play an integral role in providing transportation and safe houses. In December 2008, the Thai military began pushing Rohingya boat people back to the high seas, triggering an international outcry. Whilst several drifting boats were rescued in India and Indonesia, hundreds of boat people are believed to have perished.⁴ Having entered Malaysia illegally, the vast majority of Rohingya in the country are irregular immigrants. There is also a younger generation of Rohingya, who have been born in Malaysia, and whose parents are irregular migrants or refugees.
15. The Rohingya community in Malaysia can be categorised according to those who have been registered with the UNHCR, and those who have not:
 - 16,662 Rohingya had registered with the UNHCR as of 1 July 2009.⁵
 - Perhaps 5,000 or more unregistered Rohingya also live in Malaysia. This estimate includes those who arrived after January 2006 when the UNHCR suspended the registration of Rohingya due to the Malaysian government's promises to provide them with IMM13 permits (see Part Three below). It must be noted however, that since 1 July 2009, the UNHCR has started a mobile registration process for all unregistered Myanmar ethnic minorities which will include the Rohingya.
16. Rohingya who are registered with the UNHCR benefit from a level of *informal* protection against arrest and in case of detention. They can also gain limited access to government health care and other NGO services and can seek UNHCR intervention in emergencies. Unregistered Rohingya are mostly excluded from basic services as well as from any protection offered by the UNHCR and are therefore more vulnerable to abuse.
17. Given the history of persecution suffered by Rohingya in Myanmar, they may have a *prima facie* claim to be recognised as refugees. However, Malaysia has not ratified the 1951 Refugee Convention or its Optional Protocol. Furthermore, no Malaysian law obligates the government to offer protection to refugees. Malaysian immigration law and policy view the stateless, refugees, asylum seekers and irregular migrants through the same lens, treating them all as one large, amorphous group of unwelcome illegal immigrants.
18. The majority of Rohingya in Malaysia live in and around Kuala Lumpur. The second largest group (mostly from the towns of Maungdaw and Buthidaung, in Rakhine state in the western part of Myanmar) have established themselves in and around the state of

⁴ The Equal Rights Trust, *ERT Urges Thai MP to Rescue 126 Rohingya Pushed Out to Sea by Thai Military*, 23 January 2009, available at <http://www.equalrightstrust.org/newsstory23january2009/index.htm>

⁵ UNHCR Malaysia, *Active Caseload Breakdown as of 2 December 2009*, information provided to ERT by the UNHCR Malaysia via email, December 2009.

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Penang, whereas smaller communities are found in the states of Kelantan, Terengganu, Johor and Melaka (Malacca) as well as in plantations throughout the country.

19. ERT research has shown that many Rohingya who have arrived recently in Malaysia have fallen into vicious debt traps due to the following factors:
 - 1) Most were compelled to sell their meagre assets in order to pay for their travel by boat to Thailand, leaving their families behind with no assets and no breadwinner.
 - 2) They would then have had to borrow money to pay smugglers border crossing fees of up to 2,500 Ringgit⁶.
 - 3) When arrested and detained, they are unable to work, and when deported, especially if repeatedly, the release and trafficking fees add up to the initial debt.
 - 4) Most jobs available to irregular migrants without work permits are hard to find, often dangerous and poorly paid.

20. Rohingya, once in Malaysia, have little hope of seeing their families again. Travel and entry into Myanmar is barred for those who have left the country illegally. The vast majority of Rohingyas in Malaysia are male, and are either single or with family in Myanmar. Many married Rohingya men have married again in Malaysia – their second wives often being Burmese or Indonesian Muslims. However, a significant number of Rohingya men who have lived in Malaysia for up to two decades, have not remarried, and remain faithful to their family in Myanmar who they continue to support.

21. Many Rohingya work as garbage collectors for municipal councils in the urban areas around Kuala Lumpur. Others work in markets – sorting out and selling fruit – whilst some work on construction sites, plantations and factories.

22. The children of irregular migrants including the Rohingya are barred from state schools in Malaysia. Whilst most have no access to education, a few obtain informal education in NGO or community-based schools which are not recognised by the authorities. The threat of being arrested if they attend local hospitals significantly undermines access to health-care for unregistered Rohingya.⁷ Furthermore, whilst Rohingya registered with the UNHCR are entitled to use government health care facilities at half the price charged to other foreigners, this is still unaffordable to most of this very poor population.⁸ Some NGOs do run mobile clinics but their outreach is very limited.

The UNHCR

23. The UNHCR began its operations in Malaysia in 1975 with the arrival of Vietnamese boat people. Since the 1989 Comprehensive Plan of Action for Indochinese refugees came to an end in 1996, the UNHCR has had no formal agreement with the Malaysian government as a basis for its work in the country. However, it continues to maintain an office in Kuala Lumpur, and the government has not stopped accrediting UNHCR country representatives.

⁶ Approximately 510 Euro; 1 MYR=0.2038EUR on 10 January 2010.

⁷ Refugees International, *Rohingya: Burma's forgotten minorit'*, 19 Dec 2008.

⁸ US Committee for Refugees and Immigrants, *World Refugee Survey, Malaysia Country Update*, June 2009, available at <http://www.refugees.org/countryreports.aspx?id=2360> [accessed on 3 January 2010]

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24. Despite this, the lack of a formal agreement as well as the generally uncooperative attitude on the part of the host government have seriously hampered the ability of the UNHCR to make meaningful interventions on behalf of refugees, asylum seekers and stateless persons.⁹
25. Over the years, UNHCR policies towards the Rohingya in Malaysia have changed, reflecting both the extremely difficult circumstances under which they operate, and the changing realities on the ground.¹⁰ In fact, changes in UNHCR policy can be seen as indicators of changes in the Malaysian political context, and signify what the UNHCR felt was most feasible at any given time. Below is a list of the most significant policy changes in this regard:
- In 1992, during the first large Rohingya influx into Malaysia, the UNHCR issued letters to the Rohingya stating that they were '*applying for recognition of refugee status under the High Commissioner's mandate*'. For several months, Rohingya even received subsistence assistance in cash and in kind.
 - In late 1992, these letters were replaced with periodically renewable certificates listing family members with their photographs, declaring that the individual was a '*Rohingya Muslim from Myanmar*'. The issuance of certificates to newly arrived Rohingya stopped at the end of 1993, seemingly coinciding with the mass repatriation of Rohingya from Bangladesh to Myanmar. The 5,100 Rohingya who were registered at that point however, were allowed to continue certificate renewals.
 - The UNHCR stopped renewing existing certificates after December 1998, and began individually screening Rohingya to determine if they were refugees. Of the 1,597 applications received by the UNHCR in 1999, only 100 were granted refugee status.
 - In August 2002, the UNHCR began again to issue Rohingya with 'temporary protection letters' until 2005, when they were replaced by UNHCR identity cards, which are issued to all refugees.
 - In 2004, the UNHCR embarked on a new overall strategy to promote group-based, temporary local solutions for the Rohingya within Malaysia, while promoting international resettlement for all other refugees recognised under the individualised refugee status determination procedure.¹¹ Such policy was based on the assumption that the Rohingya, as Muslims, had 'closer links to Malaysia'.¹² This is a complex issue. The change in policy coincided with a demonstration of willingness shown by the Malaysian government to offer the Rohingya population a degree of local integration through the announcement that it would issue the IMM13 permit (see Part Three below) to the Rohingya, a concession which is difficult to envisage being made for a non-Muslim community. But even though they share the Muslim faith, the Rohingya have been acutely discriminated against in Malaysia. In response to this policy development, the

⁹ Human Rights Watch, *Living in limbo, Burmese Rohingyas in Malaysia*, July 2000.

¹⁰ See Human Rights Watch, Note 9 above.

¹¹ UN High Commissioner for Refugees, *UNHCR Country Operations Plan 2007 - Malaysia*, 1 September 2006, available at: <http://www.unhcr.org/refworld/docid/45221ff62.html> [accessed 3 January 2010]

¹² In its 2000 report, Human Rights Watch cited a UNHCR official saying that '*Rohingya refugees are informally tolerated by the Malaysian authorities and are better able to de facto integrate in that country than refugees of other backgrounds*'. (See Note 9 above.)

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UNHCR suspended registration of new arrivals at the end of 2005, except for a small number of particularly vulnerable individuals who were registered individually.

- In early 2009, the UNHCR reviewed its registration policy in light of failure of the government's IMM13 permit scheme, and is currently in the process of registering all unregistered minority ethnic groups from Myanmar, including the Rohingya, through an expedited individual screening procedure. This exercise is a joint registration and refugee status determination process which, if recognised, results in the issuance of refugee cards.
- As of December 2009, a total of 523 Rohingya individuals have been processed in 141 separate cases for resettlement which are in various stages of submission. A total of 37 individuals have departed for resettlement countries in 2009. 60 individuals were also resettled in other countries in 2008.¹³

¹³ See Note 5 above.

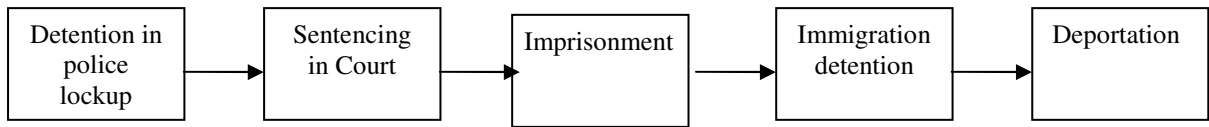
PART TWO

True Stories: Detention

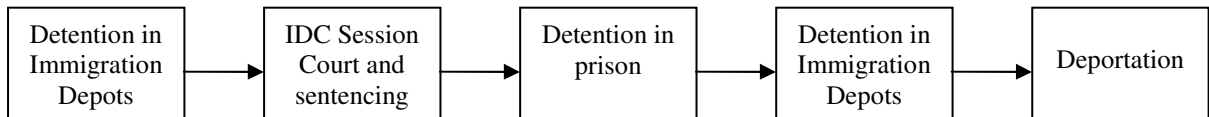
26. The Rohingya in Malaysia have been trapped in a repeated cycle of arrest, detention and deportation. Irregular migrants - men, women and children – who are arrested are taken into custody by the police or moved directly into immigration detention camps. They can legally be held for up to 14 days before being produced before a magistrate. Once presented to Court, they seldom have any legal representation, and are often convicted of immigration offences, which they serve in prison before being detained further in immigration detention centres pending deportation.

27. The process of arrest, prosecution, detention and deportation proceeds along one of two routes:

- 1) When arrested by the police, the Rohingya and other undocumented migrants are first detained in police custody and then presented to the Courts. They are typically sentenced and once they have served their term in prison, they are transferred into administrative detention in immigration detention centres pending deportation.



- 2) When the Rohingya and other undocumented migrants are arrested, either by Immigration authorities or in joint RELA (volunteer corps)-Immigration operations, they are sent to immigration detention camps and brought before special session Courts established within camp premises. After sentencing, they serve their sentences in prison and are then transferred into administrative detention in immigration detention centres pending deportation.



In rare cases, Rohingya and other irregular migrants are deported directly from immigration camps without being produced before a magistrate.

Until recently, even registered refugees have been detained, sentenced and deported in the above two manners. However, a recent positive development has been that any UNHCR-registered refugees who are arrested and charged in one of the two processes described above, are now released and their cases withdrawn. Furthermore, the UNHCR is now allowed to determine the status of unregistered Rohingya in detention.

Raids, Arrests and Detention

28. There are three authorities under the Ministry of Home Affairs which are primarily responsible for ‘cracking down’ on illegal migration in Malaysia. These are the Immigration Department, the Royal Malaysia Police and RELA (the Malay acronym for *Ikatan RELAwan Rakyat*) - a People’s Volunteer Corps. RELA personnel assist the

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Immigration Department in the arrest of illegal immigrants and in the administration of Immigration depots.

RELA, the People's Volunteer Corps

Established by the Essential (*Ikatan RELAWan Rakyat*) Regulations of 1966 under the Emergency (Essential Powers) Act of 1964, RELA was formed to allow citizens to help maintain public order and safeguard peace and security in the country. Any ordinary Malaysian citizen can join the 475,000-strong RELA volunteer reserve without any background requirements and without adequate official training.¹⁴

The 2005 amendment to the Essential (*Ikatan Relawan Rakyat*) Regulations further expanded the powers of RELA to include '*the right to bear and use firearms, stop, search and demand documents, arrest without warrant, and enter premises without warrant when the RELA personnel has reasonable belief that any person is a terrorist, undesirable person, illegal immigrant or an occupier*'. RELA officers are also afforded immunity from prosecution by virtue of the same provision,¹⁵ which came into effect on 1 February 2005. Since then, the primary activity of RELA has been to assist immigration authorities in conducting raids and arresting illegal migrants.

As an incentive, RELA personnel were initially awarded 80 Ringgit per person arrested, but at the end of 2007 this bounty system was discontinued and replaced by an hourly allowance.¹⁶ In November 2007, the government announced the transfer of control of immigration depots from the Prisons Department to the Immigration Department and declared that as a temporary measure, RELA would provide security for these camps for up to two years.¹⁷ In March 2008, 11 immigration camps were handed over to the Immigration Department and RELA completely took over their security.

According to ERT sources, RELA were withdrawn from all immigration detention camps by July 2009.

29. Crackdowns on illegal immigrants have dramatically increased in Malaysia since 2002. Some raids specifically target refugees and organisations which work on their behalf. More than 100 Rohingya were arrested in one such roundup on 5 August 2007.¹⁸ On 22 March 2008, 200 Rohingya were rounded up in Kuala Lumpur. Most of them had been registered by the UNHCR.
30. Raids are generally conducted either by the police, Immigration Department, or more frequently as a joint RELA-Immigration operation. They do not differentiate between refugees, stateless persons and illegal migrants and generally disregard any

¹⁴ Asia Human Rights Commission, *Malaysia: Arbitrary arrests and detention of 233 asylum seekers and refugees*, 13 July 2007.

¹⁵ Human Rights Watch, *UPR Submission Malaysia*, September 2008, available at http://www.hrw.org/sites/default/files/related_material/HRW%20Malaysia%20UPR%202008.pdf

¹⁶ SUARAM, *Malaysia Human Rights Report 2007*, p. 158.

¹⁷ US Committee for Refugees and Immigrants, see Note 8 above; see also *Amnesty International Report 2009*, Malaysia, available at <http://thereport.amnesty.org/en/regions/asia-pacific/malaysia> [accessed on 3 January 2010]

¹⁸ Amnesty International, Urgent Appeal 'Arrest of Rohingyas', 5 August 2007.

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UNHCR refugee documentation when making arrests. Such raids are known to take place in the middle of the night, without warrants, when RELA volunteers typically bang on people's doors demanding entry or break into their lodgings. The raid teams often search homes, taking away valuables, sometimes destroying UNHCR cards and beating up those who attempt to flee. Rohingya have also been arrested in markets, work places, teashops, metro stations, etc. When Rohingya have the means, they avoid arrest by bribing RELA personnel.

31. Below is the testimony of a 52-year old Rohingya from Sittwe (Rakhine state of Myanmar), who has been arrested three times in Malaysia, the last in 2008:¹⁹

'On a Saturday at about 1.30 AM, two RELA personnel banged on our door. My family and I were sleeping and they shouted: "Open the door. We are RELA!" We opened and they entered our room. They asked how many people there were. There were seven: my wife, my two daughters, another man and his two sons. They asked us to show our documents and we showed them our UNHCR cards. They took a look at them and gave them back to us. Within half an hour, a van arrived and the RELA men instructed us to take some clothes and other necessities with us and to lock our door. They brought us directly to Semenyih detention camp. Immigration has a court system inside the camp'.²⁰

32. The following account was given by a 53-year old Rohingya father of 10 children, who has been resident in Malaysia since 1978. He was arrested in 2004:

'At 4.30 PM, I was drinking tea in a teashop in Kasi Pumayia. Suddenly, the police and immigration surrounded the teashop. They arrested more than 50 Burmese, mostly Rohingya. It was raining heavily and people could not flee. We were all taken to a big field at Kajang police headquarters at about 8.00 PM. We were ordered to sit on one foot and the police and immigration kicked in the back those who fell on the ground. At about 4.00 AM, I was directly sent to Lenggeng immigration camp where I was detained for two months. I was never produced to a court and did not receive any sentence'.²¹

33. His wife then described the arrest of their daughter who had a newborn baby:

'The same year, our daughter had just given birth. Her baby was premature and still in an incubator at the hospital. She went with her husband to the Immigration Department to register the baby for a birth certificate. They were both arrested at the Immigration office. My daughter was sent to one camp and her husband to another while the baby was left alone in the hospital. The baby girl was only 15-days old. As grandmother I went to the hospital to take her but the doctor refused to give her to me. The hospital sent a letter to the detention camp and Immigration brought my daughter to the hospital. When she saw her baby daughter, she almost fainted. Then, she breastfed the child and requested the doctor to hand her over to me. I received the baby after 40 days. A relative gave me some milk and that is how I kept the baby alive'.

34. A 20-year old Muslim youth, born in Malaysia, was arrested near Kuala Lumpur in November 2008 after being assaulted by local thugs:

¹⁹ All names of Rohingya interviewees have been withheld for security purposes. ERT has the true identities of all interviewees on file, and will release them if necessary in the interest of justice.

²⁰ Interview ref. ERT-01/MAL conducted in Kuala Lumpur on 2 May 2009.

²¹ Interview ref. ERT-03/MAL with husband and wife conducted in Kuala Lumpur on 3 May 2009.

'I had gone to work cleaning the market in the evening when I was attacked by two Indian Malaysians. They snatched all my money and my UNHCR card. I protested and they beat me up. They broke my forearm. Then the police arrived. My attackers managed to escape but I could not. The police found me in the market and beat me too. They forced me to put my hands behind my neck. They realised I was injured and took me to the general hospital in Kuala Lumpur. I spent one night in hospital but the next morning, the police came to the hospital and took me with them to the Sentul police station'.²²

35. Ten years ago a 37 year old man, originally from Maungdaw, was arrested and escaped, but fell in the process and is now disabled. He has been abandoned by his family:

'In 1999, I was working on a construction site when suddenly the police arrived and surrounded the place. The police chased me and I tried to run away. I fell down from the 3rd floor to the ground. I did not remember anything. I later realised that someone had dragged me into a palm-oil plantation. My friends took me to Penang hospital. The X-ray showed that my spine was fractured. I was hospitalised for 15 days. Now I am a disabled man. What will happen to me when I get old?'²³

Caning

36. The average sentence for Rohingya who are convicted of immigration offences appears to be between two and four months. Since 2002, immigration sentences often include caning as well. Caning is a supplementary punishment for at least 40 crimes in Malaysia.²⁴ It is administered inside prisons by specially trained staff. Prisoners are stripped naked, strapped to an A-frame and struck the specified number of lashes with a rattan cane across their bare buttocks.
37. According to the Malaysian Home Minister, 34,923 irregular immigrants were caned between 2002 and 2008. 13.9 % were from Myanmar.²⁵ Caning is not inflicted on women and on men over 50 years of age. However, boys are sometimes sentenced to be caned.
38. Caning causes severe physical pain and mental distress. This judicial corporal punishment has been condemned as being cruel, inhuman and degrading treatment which undermines human dignity by Malaysian NGOs, Amnesty International and

²² Interview ref. ERT-06/MAL conducted in Selayang, Selangor State, on 8 May 2009.

²³ Interview ref. ERT-05/MAL conducted in Serdang, Selangor State, on 5 May 2009.

²⁴ Amnesty International, *Malaysia: End caning as a punishment against immigrants*, Press release dated 2 July 2009 (ASA 28/004/2009), available at <http://www.amnesty.org/en/library/info/ASA28/004/2009/en> [accessed on 3 January 2010]; see also Amnesty International, *Malaysia: Caning should be abolished*, Press release dated 12 August 2002, available at <https://www-secure.amnesty.org/en/library/asset/ASA28/003/2002/en/dom-ASA280032002en.html> [accessed on 3 January 2010]

²⁵ Media statement by MP Liew Chin Tong dated 17 June 2009, available at <http://www.dapmalaysia.org/english/2009/jun09/bul/bul3805.htm> [accessed on 3 January 2010]; see also Amnesty International, Note 24 above.

Human Rights Watch amongst others. The Malaysian Bar Council passed a resolution in 2007 calling for the abolition of this practice.²⁶

39. Below is the text of a notice found in the caning compound of a Malaysian prison²⁷:

PUNISHMENT BY CANING

This is the compound where the caning sentences for prisoners are carried out.

Caning is done on an appointed day for all prisoners who have been given the sentence. Every prisoner is given all the strokes in one session.

The caning usually starts at 8 a.m. in the morning.

Prisoners are brought to the cells and locked up together to await their turn. They are brought out one at a time for the punishment.

The prisoner is first examined by a qualified medical doctor to determine his fitness for the punishment.

After being certified fit, the prisoner will be ordered the sentence by the Prison Superintendent.

He is then secured to the wooden harness.

After he has been properly harness [sic], a well-trained officer or warden will carry out the caning. As the strokes are being given, a senior prison officer (ASP or DSP rank) will count the number of strokes as the doctor watches the proceedings. If the caning officer misses a stroke, it is counted as delivered.

Should the prisoner faint at any stage of the caning, the doctor may stop the caning to examine the prisoner. If the prisoner is certified fit to continue, the remaining strokes will be administered. Should the doctor proclaim the prisoner to be unfit to carry on, the remaining strokes will be waived.

At the end of the caning, the prisoner is released from the harness and checked by the doctor who will also instruct the assistants to apply the necessary medical treatment on the prisoner's buttocks. If the wound is serious, the doctor will order the prisoner to be admitted to hospital.

For adults, the rattan will not be more than one half of an inch in diameter. In the case of juveniles, a light rattan will be used.

²⁶ Malaysia Bar Council, 'Motion for the abolition of corporal punishment of whipping', adopted on 17-3- 2007, available at http://www.malaysianbar.org.my/malaysian_bars_resolutions/the_61st_annual_general_meeting_of_the_malaysian_bar_held_at_the_grand_ballroom_legend_hotel_kuala_lumpur_17_march_2007.html [accessed on 3 January 2010]

²⁷ As posted on the CORPUN website <http://www.corpun.com/myjur4.htm> [accessed on 3 January 2010]

40. A 48-year Rohingya man, originally from Maungdaw, fled to Malaysia in 1990, and has since been arrested 5 times. In 2002 he was caned:

'The court sentenced me to five months imprisonment and two strokes of the cane. I was sent to Sungai Buloh jail in Selangor. At the end of my five month sentence, I had not been caned yet. I had to stay one more week to get the lashes. That day, they called me and I had to take all my clothes off. I could only keep a cloth over my genitals. I had to lean face down against a frame and they tied my hands and legs to it. A jail guard, a strong man took a one and a half metre long cane and hit me twice on my buttocks. I felt pain even in my head and for a while, I could not see anymore. Then, they released my hands and took me to another place where they asked me to lie down and they put some medicine on my wounds'.²⁸

41. Another 38-year Rohingya from Maungdaw who arrived by boat in 2008 was arrested in Penang shortly after reaching Malaysia. The court sentenced him to four months imprisonment and three strokes of the cane.

'After three months and 20 days, a jail warden came with a list and called my name. 31 people were called altogether. They told us to get ready for the next morning caning session. The following morning they brought us to an office inside the jail. We were called one by one. They said: "You entered Malaysia without documents and the court has sentenced you with 3 strokes of the cane. We will now carry out that sentence." I replied that I would take the caning. They took me inside a separate room. They strapped me to an A-frame which looks like a ladder. They tied my two hands, my waist and my two legs to the frame. We had to take off all our clothes and we only kept one cloth in front of our private parts. Then, one man kept my head against the frame so that I could not see anything. The other man gave me three strokes with a cane on my buttocks: the first stroke, one minute, another stroke, one minute, and then the third stroke. The waves of the strokes went through my head. Each lash brought some blood. It was very painful. I felt excruciating pain in my chest, in my brain, throughout my whole body. I cried. Some people screamed but many remained silent during the caning. Then one guard untied my hands and legs from the frame. I could not walk after they freed me. They then took me to a place to rest and asked me to lie face down. They cleaned my wounds and put some medicine on it. It did not lessen the pain. After caning all 31 people, they allowed us to get dressed again and we were sent back to our respective prison cells'.²⁹

42. This 33 year old Rohingya man from the Oo Hla Pe village of Buthidaung Township, also underwent caning:

'I was arrested at my house by the police in 2004. I was first detained in the police lockup for eleven days and then I was produced before the court. The judge sentenced me to three months imprisonment and one stroke of the cane. After two months and sixteen days, a jail warden came and read the sentence that I had to get one stroke. There were 58 people to be caned. Some had to receive ten lashes, some five, me only one. Other prisoners such as criminals were also punished with caning; it was not only for immigration offences. I was taken to a room and my hands and legs were tied to a frame and all my clothes taken off. They struck me once on my buttocks. It was very painful. It was bleeding. Some people fell

²⁸ Interview ref. ERT-02/MAL conducted in Kuala Lumpur on 3 May 2009.

²⁹ Interview ref. ERT-10/MAL conducted in Butterworth, Penang State, on 10 May 2009.

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on the ground when their hands were untied. I did not receive any medicine. I was taken back to the jail cell. I felt the most terrible pain when I washed myself the next day'.³⁰

43. After completing their prison sentences the detainees are transferred to immigration detention centres where they remain in administrative detention pending deportation.

Detention Conditions

44. All interviewed Rohingya stated that the conditions in immigration detention centres were harsher than those in prisons. Detention conditions in immigration camps vary, and those located in more remote parts of the country are reportedly worse than those in and around Kuala Lumpur.
45. Immigration depots consist of large concrete floored halls with no fans or heating facilities, which hold up to 400 inmates. Detainees usually sleep on cement slabs or wooden platforms. In most camps, they do not receive any bedding but, in Juru and Lenggeng camps, a blanket is provided. Detainees are only allowed to carry one change of clothes although some remain for several weeks in the same clothes they were wearing upon arrest, until relatives manage to visit and bring them a change of clothing. Inmates are subject to a full strip-search upon arrival, a practice which is particularly resented by the Rohingya as it is considered humiliating and culturally inappropriate.
46. The conditions in immigration detention camps in Malaysia fall far below UN Standard Minimum Rules for the Treatment of Prisoners, and are often in violation of the regulations and standards relevant to Malaysian immigration detention centres as well. The key complaints expressed by former detainees relate to overcrowding, insufficient food, unhygienic environment, poor health care, physical violence and corruption.

Overcrowding

47. There are sixteen immigration detention centres in Malaysia. The following table was provided by the Immigration Department of Malaysia, and details the name, capacity and location of fifteen of them.³¹ For reasons unknown to the ERT, the Bekenu immigration detention centre in Sarawak has not been included:

	Immigration Detention Centre	Location	Capacity
1	Ajil	Ajil, Terengganu	500
2	Pekan Nenas	Pontian, Johor	700
3	Tanah Mera	Tanah Mera, Kelantan	500
4	Belantik	Sik, Kedah	350
5	Juru	Bukit Mertajam, Pulau Pinang	550
6	Kemayan	Temerloh, Selangor	400
7	Kuala Lumpur International Airport (KLIA)	Sepang, Selangor	600
8	Langkap	Langkap, Perak	700

³⁰ Interview ref. ERT-12/MAL conducted in Butterworth, Penang State, on 10 May 2009.

³¹ SUARAM, *Malaysia: Human Rights Report 2007*, Civil and political rights, sourcing the Immigration Department on 12 December 2007, p. 161.

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9	Lenggeng	Lenggeng, Negeri Sembilan	1,250
10	Machap Umboo	Machap Umboo, Melaka	400
11	Semeniyh	Semeniyh, Selangor	1,300
12	Sandakan	Sandakan, Sabah	1,000
13	Menggatal – Temporary detention centre	Menggata, Kota Kinabalu, Sabah	1,800
14	Tawau	Tawau, Sabah	800
15	Semuja	Semuja, Sarawak	550
	TOTAL		11,400

48. It is noteworthy that the largest of the centres is Menggatal, which is the only temporary detention centre of those listed. This suggests that the increasing number of persons being detained imposes a massive strain on the system, so temporary accommodation is needed. According to Immigration Department statistics, 55,618 undocumented migrants (of whom 4,510 were from Myanmar) were detained in Malaysia between 1 January and 30 September 2008.³² But, according to ERT sources, the actual number of undocumented migrants detained in the year 2008 (including the months October – December) was around 60,800. There are no statistics to indicate how many persons were in detention at any given point in time, but it seems probable that the 11,400 maximum combined capacity of Malaysia’s immigration detention centres was insufficient to house them all. In fact, only 42,389 of these detainees had been deported at the time these figures were published, meaning that at least 13,229 detainees remained in overcrowded conditions.³³ According to ERT findings, in 2008, the UNHCR was informed that on average between 75 and 115 registered Rohingya were detained each month. The number of unregistered Rohingya detained during that period is unknown.
49. In May 2009, serious overcrowding was reported as a result of what appears to be an ‘informal’ policy of the Immigration Department to reduce the number of deportations, whilst continuing raids and arrests at the same pace. As a result, inmates were often unable to lie down to sleep. In addition, Rohingya interviewees complained about the lack of exercise and recreation facilities.
50. A Rohingya who spent one month in Semenyih camp in 2008 stated that:
- ‘In Semenyih camp, there are five blocks numbered A to E. E is for women. The place was very overcrowded. At night, I could not lie on my back, only on my side against another prisoner. Sometimes it was only possible to sit throughout the night. We had to sleep on the concrete floor and we did not receive any bedding’.*³⁴
51. According to another Rohingya who was detained in Lenggeng camp in 2002:

*‘I was kept in a 2-storey building in the camp. On each floor there were more than 200 detainees. It was overcrowded. I could sleep but it was very uncomfortable. There were mosquitoes and bugs. There was a little space for walking but no space for recreation’.*³⁵

³² The Daily Express, *No plans to legalise illegals: Chor*, 4 December 2008.

³³ *Ibid.*

³⁴ Interview ref. ERT-01/MAL conducted in Kuala Lumpur on 2 May 2009.

³⁵ Interview ref. ERT-03/MAL conducted in Kuala Lumpur on 3 May 2009.

Food and Nutrition

52. According to those interviewed, the food provided at detention centres is largely insufficient and of poor quality. Detainees receive two meals a day, which are distributed by other detainees who reportedly siphon some off to give themselves extra rations. When combined with the effects of overcrowding and poor hygiene, the substandard diet of the detainees contributes to the spread of communicable diseases in detention centres.

53. Former detainees described the food situation as follows:

In Lenggeng camp: *'Food was the main problem. It was not enough and often Indonesians stole our share. We received two meals a day of fish soup, dry fish powder and rice. We did not receive any vegetables. In addition, they gave us one roti and three biscuits.'*

In Langkap camp: *'They served us only two meals a day with very little rice and one small piece of fish. Sometimes in the morning we received some hot water and five biscuits.'*

In Semenyih camp: *'The food was very poor. We only received a piece of meat once a week. The food was distributed to us by other prisoners who stole half of our food.'*

Hygiene and Health Care

54. The hygiene and healthcare situation in detention camps leaves much to be desired. Interviewed Rohingya stated that the sanitary facilities in detention centres are grossly inadequate. Only a small number of toilets, often also serving as bathrooms, are available for hundreds of prisoners. Some camps face regular shortages of drinking water.

55. According to interviewees, skin diseases, respiratory tract infections and tuberculosis are widespread among detainees. Furthermore, sick inmates are not segregated resulting in the rapid spread of transmittable diseases. HIV and tuberculosis patients remain in the common wards, often without treatment.

56. Access to health care is inadequate. There are no on-site medical dispensaries or full-time doctors in immigration depots. In the Semenyih detention camp, one medical doctor visits up to 1,500 detainees per week. Drugs are in short supply and medicines provided to detainees by their relatives are often confiscated by the camp authorities. Only critically ill detainees are transferred to hospitals, often too late. In its 2008 Human Rights Report on Malaysia, SUARAM, a well respected Malaysian NGO stated that *'According to the Home Ministry, there were 1,535 cases of deaths in prisons, rehabilitation centres, and immigration detention centres in the period between 2003 and 2007, while 85 cases of deaths in police custody were recorded in official statistics in the same period'*.³⁶ The Malaysian Parliament has also released statistics according to which 70 deaths in custody were reported in Malaysian Immigration Detention Centres between 2006 and September 2009. In May 2009, two Myanmar detainees died from leptospirosis - a bacterial infection transmitted through contaminated water - in Juru detention camp.³⁷

³⁶ SUARAM, *Malaysia Human Rights Report 2008*, Civil and Political Rights, p. 44.

³⁷ Memorandum to SUHAKAM on Poor Conditions of Immigration Detention Centres Contributing to the Outbreak of Leptospirosis, 27 May 2009. on file with ERT.

57. A Rohingya man detained in Semenyih camp in 2006 stated:

'A doctor visited the camp but covered only one block per day. Only if a detainee was very sick, would they transfer him to the central jail hospital. Some detainees got seriously ill and I saw them being taken away handcuffed to the hospital'.³⁸

58. According to a former Rohingya detainee of Juru camp:

'During the 3 months I spent in Juru camp in 2007, many people fell ill but they seldom sent a doctor. Only those who were severely sick were taken to the hospital with guards. Six prisoners died. Some were detained for a long time and many suffered from swelling'.³⁹

59. In Lenggang camp, a Rohingya suffering from gastritis had his medicine confiscated:

'I used to receive medicine for my acidity problems from my wife but half of it was seized by the camp authorities. No one died but some people were sick'.⁴⁰

Custodial Violence and Abuse

60. Violence and abuse at the hands of prison guards is not uncommon in Malaysia's immigration detention centres. Most Rohingya interviewed spoke of first hand suffering and/or witnessing others being subject to the verbal and physical abuse of guards. Violence is typically resorted to in order to quell quarrels between inmates and enforce adherence to detention centre rules. Men are kicked and beaten, children slapped. There have also been instances of ethnic violence between detainees of different nationalities.

61. According to one Rohingya man interviewed by ERT:

'I witnessed some violence in Semenyih camp. The guards hit prisoners with their batons when they argue with each other. However, I did not see any serious beatings causing injuries and no one died while I was there'.⁴¹

62. Another former detainee had this to say:

'In Juru camp I was beaten twice by prison guards. They hit my back with a baton because I could not squat as I had pain in my knees. Sometimes we were forced to sit in this position for hours and they beat whoever fell on the ground. Many other people also got beaten'.⁴²

Children in Immigration Detention

63. Even though Malaysia ratified the Convention on the Rights of the Child in 1995, there were several reservations made, including to Article 7 on the right of every child to acquire a nationality. Malaysia had also made a reservation on Article 22 which

³⁸ Interview ref. ERT-01/MAL conducted in Kuala Lumpur on 2 May 2009.

³⁹ Interview ref. ERT-09/MAL conducted in Butterworth, Penang State, on 9 May 2009.

⁴⁰ Interviews ref. ERT-03/MAL conducted in Kuala Lumpur on 3 May 2009.

⁴¹ Interview ref. ERT-01/MAL conducted in Kuala Lumpur on 2 May 2009.

⁴² Interview ref. ERT-09/MAL conducted in Butterworth, Penang State, on 9 May 2009.

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obligates states parties to protect children seeking refugee status.⁴³ However, even though in 1999 this reservation was removed in what must be viewed as a positive development, Malaysian law still does not implement the provisions of Article 22 by giving protection to refugee or stateless children. Rohingya children - including those born in Malaysia - are arrested and detained together with adults in immigration depots and sometimes deported to the Thai border. However, the UNHCR is generally given access to children in detention and has succeeded in obtaining the release of many.

64. Statistics for the number of children detained in immigration detention centres between 2004 and 2008 were released by the Home Ministry in a written reply to a parliamentary question during the June/July 2009 parliamentary session.⁴⁴ The table below gives the figures. It should be noted that the table includes a separate row for 'stateless' children – according to which two were held in immigration detention in 2006. However, this figure does not include Rohingya children, who would be amongst the 1,061 'Burmese' children held in immigration detention over this period.

Child Detainees According to Nationality

NATIONALITY	YEAR					TOTAL
	2004	2005	2006	2007	2008	
Bangladeshi			2	2	44	48
Burmese	55	73	63	58	812	1,061
Cambodian	16	6	18	54	77	171
Chinese			2		22	24
Filipino				14	29	43
French			1		0	1
Indian		14	1		16	31
Indonesian	75	158	237	179	934	1,583
Pakistani					8	8
Sri Lankan			1		11	12
Thai	12	21	17	107	226	383
Timor Leste					3	3
Vietnamese		32	2	4	61	99
Stateless			2		0	2
Unspecified				52	154	206
TOTAL	158	304	346	470	2,397	3,675

65. Arrested in a market in November 2008, a Rohingya youth (who looks very young and was mistaken for a child) narrated the experience of children detainees:

⁴³ Article 22 (1) of the Convention on the Rights of the Child provides: '*States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties*'.

⁴⁴ SUARAM, Press statement *Arbitrary Detention of Migrant and Refugee Children*, 28 August 2009, available at <http://www.suaram.net/node/200> [accessed on 3 January 2010]

I spent 14 days in the Sentul police lockup. They detained me in the children's section. It was one room with 20 boys. We received little food and no clothes to change. I had to sleep on the floor. I was not beaten but they seized my mobile phone.

After the court sentenced me, I was sent to Kajang jail for three months and 20 days in the child section. In Kajang jail I had to exercise every day. We had to jump and clap. About 40 children were there: Burmese but also Malaysians sentenced for theft. Every four hours, there was a change of guards. We had to stand up straight for the roll call and they counted us. The jail guards slapped me five times when I said I was from Burma. We were also slapped when we did not follow the rules of the jail.

In Semenyih camp I was put together with the adults because there was no separate ward for children, only one for women and small children. I was not beaten there but the food was bad. We only received rice with salted dry fish. I did not fall sick but there were detainees with TB and HIV. After two months, on 10 April 2009, the UNHCR released me'.⁴⁵

Monitoring and Access to Detention Camps

66. NGOs generally do not receive permission to visit immigration detention camps. Consequently, it is extremely difficult to monitor detention conditions. The UNHCR has sporadically been authorised access to detainees in detention centres. However, UNHCR personnel meet detainees in a meeting room and are not allowed to visit or monitor detention halls and other facilities. The UNHCR primarily relies on NGOs and relatives for information regarding detainees, and cannot intervene on behalf of detainees without having first obtained permission from the Malaysian authorities. In 2008, the UNHCR did not have unrestricted access to immigration detention camps, and most attempts to secure the release of adult refugees failed. It is only SUHAKAM, the national human rights commission of Malaysia, which by law has complete access to immigration detention centres.⁴⁶ However, in a recent positive development, the UNHCR has been granted access to immigration detention centres. Furthermore, Amnesty International was allowed to visit three such centres in July 2009.
67. Relatives are permitted to visit detainees, but being irregular migrants themselves, they may legitimately fear arrest, and so many do not do so. Transportation costs are also prohibitive, particularly when family members are detained in distant immigration camps.
68. One Rohingya woman whose husband was in detention was helped by a Malaysian man who accompanied her on visits:

To visit my husband in Lenggeng camp, I used to go accompanied by a local man. I was afraid I would be arrested and I had no choice. This Malay man could talk to the camp authorities and pay bribes to them on my behalf so that I could see my husband. I met him thrice over three months'.⁴⁷

⁴⁵ Interview ref. ERT-06/MAL conducted in Selayang, Selangor State, on 8 May 2009.

⁴⁶ FIDH-SUARAM, *Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination*, March 2008, p. 21.

⁴⁷ Interview ref. ERT-03/MAL conducted in Kuala Lumpur on 3 May 2009.

69. According to a former detainee:

'For the first 14 to 21 days, visits were not allowed but afterwards my relatives could come to see me. In order to visit me, my relatives had to show their UNHCR card at the gate. They received a number and then went to a room where I could meet them but we were separated by glass and we had to talk over a telephone'.⁴⁸

True Stories: Deportation

70. Administrative immigration detention in Malaysia is an interim measure which operates until detainees can be deported across the border. Most deportations are informal 'push-backs' in which detainees are removed over the Malay-Thai border and into the hands of human traffickers and smugglers. Some, however, are formal handovers to Thai Immigration officials. As far as ERT is aware, there are no deportations of Rohingya detainees directly to Myanmar, even though other Burmese nationals are being deported to Myanmar.

71. Once in the hands of traffickers, the former detainees face two options:

- To raise the required money to facilitate their illegal journey back into Malaysia; or
- To be forced into bonded labour on fishing trawlers and plantations.

72. Those with the financial means to choose the first option then face a hazardous journey back into Malaysia, where they can try to rebuild their lives, with the threat of re-arrest, detention and deportation never far away. Historically, the UNHCR has only succeeded in obtaining the release of a very small number of vulnerable detainees such as young children and pregnant women before deportation.

Deals Begin in the Detention Centres

73. Corruption levels in Malaysian immigration detention centres are reported to be high. There is evidence pointing in the direction of collusion between prison guards, immigration authorities (both Malaysian and Thai), and human trafficking agents. Deals related to trafficking activities at the Thai border are sometimes initiated within detention camps, with immigration officials connecting brokers with detainees and demanding that the families of detainees prepare ransoms to pay for their release and safe travel back to Malaysia after deportation. Since it is normal for deportations to be delayed by several months, detainees reportedly bribe officials to be deported more quickly.

74. This Rohingya detainee was contacted within the immigration camp to negotiate his freedom:

'Brokers have easy access to immigration camps. Immigration officials give them prisoners' details. An agent contacted me even before deportation, when I was still in Lenggeng camp. I gave him my wife's contact number. He then instructed her to pay 500 Ringgit as an advance and to pay the rest, 1,500 Ringgit in cash, when I am handed over to him by Immigration. He threatened her that, if she does not pay, I would be sold to the fishing boats'.⁴⁹

⁴⁸ Interview ref. ERT-01/MAL conducted in Kuala Lumpur on 2 May 2009.

⁴⁹ Interview ref. ERT-03/MAL conducted in Kuala Lumpur on 3 May 2009.

Deportation to Human Traffickers

75. The long-standing practice of Malaysian immigration officials has been to hand over deportees to human traffickers at the Thai border. Deportees have allegedly been transported in immigration department vehicles to remote jungle areas on the Malay-Thai border and handed over in the dark of the night to human traffickers waiting for them. The vast majority of such deportations, up to 80% according to interviewed Rohingya, take place in the vicinity of the Thai city of Sungai Kolok - adjacent to the Kelantan state of Malaysia. The remainder take place near Padang Besar, a border town in the Perlis state of Malaysia.
76. Deportees reported that they were counted upon handover and some witnessed an exchange of money between the traffickers and Malaysian immigration officials. The transaction allegedly costs 200 to 300 Ringgit per head. The traffickers then take the former detainees to makeshift jungle camps or plantations on the Thai side of the border, where they are guarded by armed persons and compelled to sleep in makeshift shelters, exposed to mosquitoes and other insects.
77. Subsequently, the traffickers facilitate their contact with relatives and friends in Malaysia via mobile phone, in order to arrange for the payment of a ransom ranging between 1,600 and 2,500 Ringgit, as the price of their release and safe return to their homes in Malaysia. If they cannot provide the amount demanded within a short period of time, the deportees are first beaten and if this does not work, are ultimately sold to labour traffickers. In many instances, a first instalment of the full amount is to be paid into a bank account in Malaysia and the rest handed over in cash when the deportee is sent home.
78. The abuse and violence meted out by traffickers has a devastating impact on their victims. A 21-year old Rohingya from Buthidaung was among 108 Rohingya boat people who sailed directly to Malaysia and were arrested near Penang on 4 March 2007. He was subsequently detained in the Juru immigration depot and deported to Sungai Kolok. According to him:

'Every month, some of us were deported to Kolok at the Thai border from Juru detention camp. I was deported to Kolok with 28 other detainees. We were handcuffed in the immigration bus. It started from Penang at 5.00 PM and reached Kolok in the early morning. The immigration counted us and handed us over to agents. These agents took us to their jungle camp on the Thai side of the border. There were many makeshift tents: a space open on all sides with plastic sheeting for a roof. The agents had walkie-talkies, mobile phones and guns. 20 guards working for them were also present. They demanded 1,650 Ringgit to release me. We could use a mobile phone and call whoever we wanted. I rang my village people in Malaysia and begged them to rescue me from there. They gathered money for me. But those who failed to pay the ransom within six days were beaten by the agents' men. In total, there were 45 deportees detained there. I stayed about five days in the agents' camp. We got released, except for 15 of us. I don't know what happened to them. These agents have contacts with Thai fishing trawlers. If detainees cannot secure the money, they are sold to work on boats'.⁵⁰

⁵⁰ Interview ref. ERT-09/MAL conducted in Butterworth, Penang State, on 9 May 2009.

79. A Rohingya man from Maungdaw, aged 38, was arrested in May 2008, caned and then deported from Langkap immigration depot near Ipoh, to Sungai Kolok. He provided a similar account of his deportation:

‘There were 86 of us in two prison vehicles. They took us to an agent in Kolok. One man arrived and counted everyone in the two vehicles and he put us on a boat to cross the river [to Thailand]. It was a hilly area in the jungle and we had to stay under plastic sheets attached to the trees. Those who had relatives who could pay for their release were taken back quickly but those who had none were beaten severely. This place belongs to a Thai Malay smuggler, whose name I do not know, but he employs Burmese guards who carry pistols and canes. The agent and his men also have a speedboat, eight motorbikes, walkie-talkies and cell phones. They gave us three days to contact our relatives and come up with the ransom. We could use mobile phones. I contacted my brother-in-law. He collected 1,900 Ringgit and paid the agent. I remained there for four days.

I was not beaten but one deportee was beaten with a cane in front of me. They asked him to take off his shirt and hit him on the back because his relatives could not come up with the money. They threatened deportees to sell them to fishing boats. I only spent four days there but I saw nine Rohingya being sold to fishing boats: the agents took them away and said that they had sold them to the agents of the fishing boats – two were young and the rest middle-aged. Eight of them have now returned home but one is still missing’.⁵¹

80. Another ERT interviewee gave this account of the inhuman treatment including beatings to death meted out to the victims of traffickers:

‘The agents told us that we, 20 Rohingyas deported together, had been bought by a trafficker and they dropped us in his rubber plantations. We found about 1,000 people detained there. We had to sit cross-legged and were given very little food. The agents immediately asked if we had phone numbers. I gave my cousin’s number in Malaysia. They warned that those who did not have any phone numbers would be beaten severely. Somebody showed me the graveyard. Indeed they beat detainees very badly, sometimes to death. I saw a man die in front of me. They punched him so badly in his face that he lost consciousness and died. Brokers hire Burmese men to beat the detainees. I was also beaten but I only received one stroke of baton because I had been going out of the area assigned to us. But I still feel pain in my back. I spent 3 days in this plantation. Three other men and I were taken away from the plantation and brought to Kota Bharu. Our relatives paid a ransom of 2,500 RM. My cousin picked me up in Kota Bharu and paid the money in the car’.⁵²

81. A Rohingya who did not have contacts in Malaysia and consequently no means of paying the traffickers, was beaten and tortured at the hands of the traffickers, and finally sold into bonded labour:

‘In the plantation, there were store rooms with a wooden platform, tin roofs and tin walls. They put us in there. Then a man arrived and asked us who had contacts in Malaysia. Since I did not know anyone in Malaysia, I failed to provide a contact number and they beat me up with a thick cane. I still have a scar on my arm. I was tortured there every day for about 20 days. More than 100 people, like me, could not give them any telephone number. The men who beat us were Sikhs from India. They used to give us very little rice once a day.

⁵¹ Interview ref. ERT-10/MAL conducted in Butterworth, Penang State, on 10 May 2009.

⁵² Interview ref. ERT-20/MAL conducted in Butterworth, Penang State, on 6 September 2009.

Only after 15 days I finally had a chance to bathe. I spent terrible days there. There was no space to sleep; sometimes we could only sit throughout the night.

On the 20th day, one of the trafficker's men ordered me to get ready and he put ten of us in a van. He brought us to the fish harbour in Songkhla and handed us over to a fishing trawler. He did not tell us that he had sold us and I did not realise it. It was about 5 PM and the boat immediately sailed off for fishing. It was a day fishing boat leaving the harbour in the evening and returning the next morning'.⁵³

82. Available information suggests that these human trafficking syndicates operating on the Thai-Malay border are led by Thai traffickers. They are sophisticated and powerful organisations, and are allegedly well connected with Malaysian and Thai authorities which turn a blind eye to their activities and even profit from them. Some of the agents employed by the traffickers are from Myanmar, including some Rohingya. They operate as guards and are reported to administer beatings on detainees. Some are themselves former deportees, who have been unable to pay the 'release fee', and so 'bought' their freedom by working for the syndicates.⁵⁴

Return Journey from the Thai Border

83. When deportees manage to raise the required funds to pay their ransom, the traffickers arrange the return journey to their homes in Malaysia. This journey can be hazardous. The deportees are transferred from agent to agent, over the various legs of the journey, often using different means of transport at each stage. It usually includes a journey by truck, a long walk or run through thick jungle, followed sometimes by a motorbike ride, and a journey squashed in the boot of a car or almost frozen in a refrigerated meat trailer. There are instances when these vehicles are stopped at checkpoints and the deportees are re-arrested, detained and deported again.
84. This 53-year old Rohingya described the ordeal of his journey back to his home in Kuala Lumpur after buying his freedom from the border traffickers:

'On the fourth night at the camp, a truck arrived and they had a list of the names of all those who had paid the ransom. At about 5.00 PM, 47 of us – six Rohingya and the rest Chin – were put on the truck and we were covered with a plastic sheet. They transported us for about 20 miles and then ordered us to get down and run across the border into Malaysia. We ran for about three hours in the jungle, led by the agents' guide.

They took us to an oil-palm plantation close to a road and ordered us to lie down. The agents had mobile phones. Cars started arriving. They pushed eight people into each car. Each car carried a driver and an agent in the front seat, four people in the back seat and four people in the boot. I had to go into the boot; when I could not squeeze into it, the agent kicked me on my back to push me in. The car drove for about one hour to Pasir Mas. I could not breathe as my nose was pressed against the roof of the boot. I heard that some people had died in car boots. Moreover, the road was bumpy and there were sparks caused by the friction of the car and the concrete surface of the road. I still do not know how I managed to survive this.

⁵³ Interview ref. ERT-21/MAL conducted in Butterworth, Penang State, on 7 September 2009.

⁵⁴ Radio Free Asia, *I worked for human traffickers*, 29 April 2009, available at <http://www.rfa.org/english/news/burma/traffickers-04292009084732.html?searchterm=None> [accessed on 3 January 2010]

In Pasir Mas, a big lorry, carrying frozen beef, was waiting in the dark. All 47 people were put into that lorry and they locked the backdoor. We were hidden behind chunks of beef. The driver started the air cooler and it was freezing cold. There were checkpoints on the road and the police opened the backdoor of the lorry but they could only see beef. I spent six hours inside that lorry – from 8.00 PM to 2.00 AM. Then, we were brought to a place where six other cars were waiting. They again transferred eight people into each car. This time I was lucky and was put on the backseat. Three cars went to Penang and three went to Kuala Lumpur. I had to change car in Selayang and the agent asked me where I wanted to go. I gave him my address and at 6.00 AM I was dropped at my house in Kuala Lumpur'.⁵⁵

Trafficking into Labour Bondage

85. Men and boys who are unable to meet the demands of the traffickers are sold to other brokers in Thailand as bonded labour to work on fishing boats and in plantations. Women have reportedly been sold to brothels or into domestic servitude. One elderly Rohingya woman who had been deported to the Thai border and could not pay the ransom had been forced to beg for six months in Kota Bharu, Kelantan, before being released.
86. The trafficked deportees who are sold to fishing trawlers are forced to work in slave-like conditions with little or no sleep; casting and mending nets and sorting fish. They are at times drugged with methamphetamines and medical care onboard is non-existent. When they fall sick, they are sometimes thrown overboard. Murder is not uncommon.⁵⁶ These long-haul fishing trawlers go out to the high seas for periods of up to two years, without coming back to shore. They are serviced by supply boats which provide fuel, food and new crews, and collect the catch on a regular basis. The Thai ports of Pattani and Songkhla are reportedly the main hubs for recruitment in southern Thailand, where trafficking gangs on the border sell persons from Myanmar including Rohingya deported from Malaysia. Jumping ship is often the only way to escape but there is a risk of falling back into the hands of traffickers.⁵⁷
87. A 48-year old Rohingya from Sittwe was trafficked onto a Thai fishing trawler in 2008. He was not deported from Malaysia. He had fled by boat from Sittwe in Myanmar to Thailand in early 2008, was arrested and deported to a Myanmar island near Ranong from where brokers picked him up and sent him to a jungle camp near the Thai-Malay border. The same trafficking syndicate apparently deals both with deportees from Malaysia and with boat people entering Malaysia. He had no money to pay his passage and was sold in Pattani.

'The brokers took us to a jungle where four Rohingya men, who had relatives able to pay them, were separated from our group. The rest of us were kept there until the next day and we did not receive any food. The next day two large pickup trucks took us to the fish harbour of Pattani – about a three hour drive. There were 26 Rohingya. Some Mon people from Burma acting as agents for the Thais bought us. They told us that we had been sold for six months: 20 of us to one fishing company and six to another. I was among the group

⁵⁵ Interview ref. ERT-03/MAL conducted in Kuala Lumpur on 3 May 2009.

⁵⁶ UNIAP, *SIREN case analysis: Exploitation of Cambodian men at sea, Facts about the trafficking of Cambodian men onto Thai fishing boats*, 22 April 2009.

⁵⁷ Yante, I., *Is toleration enough?*, UNHCR, Refugees Magazine, Issue 148, December 2007.

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of six and we were brought to a fishing trawler. The boat with 20 left immediately but our boat stayed in the port for two days. We were not tied but we were watched by armed guards and could not escape.

Our main work was to cast out and pull in nets from the sea. There were 35 crew onboard – mostly Thai plus eight people from Burma: six Rohingyas and two Rakhine who had also been sold. We had to work days and nights when the catch was good. I could not sleep for seven days during the first trip. When there was less fish we could sleep a bit. We were given two yabaa tablets every day, sometimes even four. So we did not feel tired or hungry. The first trip lasted 13 days. We anchored for one day in the Pattani harbour where we had to load and unload the trawler. It was impossible to escape because the Pattani docks were full of their men.

Then our trawler sailed to the high seas. After 15 days, another vessel arrived to collect the catch and bring food and other necessities for the crew. Our trawler did not return to shore. Every 15 days, the supply boat came and left. Nobody was beaten on my trawler but I heard that some people were beaten on other boats.

After 45 days I fell sick. I could no longer eat or drink. The captain watched me for 15 days. He ordered me to work but gradually I lost all my energy. One day the captain hit my head with his torchlight. I told him that I was sick. He checked with the cook who confirmed that I had been unable to eat any food for the last two days. The captain then realised I was being genuine and he became kind to me. I think he did not want to let me die. When the supply boat next arrived, he gave me the option of returning to port. I agreed instantly. I was returned to shore in Songkhla after two months at sea. I heard that some sick crew members on other boats were simply thrown overboard or shot dead. I was lucky. I was sent back to Pattani where the fishing company handed me back to the Mon broker.

This time, I told the broker that I had a friend in Penang. He called him and demanded 1,300 Ringgit to release me and to deliver me to Penang. The man then carried me from Pattani to Kolok and handed me over to the traffickers at the border who sent me to Penang'.⁵⁸

88. This is the story of another Rohingya who was sold into labour bondage on a trawler ship because he could not afford to pay the trafficking fees:

‘There was no way to escape from the trawler even though the boat came back to shore every morning because the police control the harbour. We had to stay on the trawler all the time. The boat always anchored in the sea but close to the shore and we could see land. They were floating shops in that area and we could hardly move out of the boat in order to buy cigarettes. We received five Ringgit per day as pocket money. Every night we had to work continuously casting and pulling the fishing nets, repairing them, cleaning fish, etc. Every three hours they cast new nets into the sea. We could only rest from 10 am to 4 pm. The boat left at 5 pm and returned at 6 am. We were fed properly. The trawler did not go out fishing on three days of the month but we still had to work. There were 30 crew members onboard but only 10 Rohingyas. The Thai fishermen were paid at the end of the month and they were free to move in and out of the boat and go around. We, the Rohingyas, could not leave the boat and we could not contact anyone, not even by phone.

I did not realize anything until the end of the first month of work when the Thai fishermen got paid and could go home. I also asked for my salary but the captain replied: “No, you

⁵⁸ Interview ref. ERT-11/MAL conducted in Butterworth, Penang State, on 10 May 2008.

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have been sold. Your boss took all the money.” Then I asked who my boss was. He told me the name of the trafficker! I suddenly felt as if the sky fell on my head. From that moment and until I was finally released nine months later, I cried every day. I did not know how long I would have to stay on this trawler. I thought that I had been sold for the rest of my life.

In Songkhla harbour every trawler uses slave labour. Some tried to escape and were caught by the police. They were detained and then resold. We heard that many people died when they protested against the captain. They were thrown overboard. The nine other Rohingyas and I were not beaten because we never disobeyed them. We were warned very clearly that, if we did not obey, we would be kicked out into the sea. Initially we used sign language to communicate with the Thai Malay crew but then we learnt some Malay and Thai.

I had to work in this fishing boat for 9 months in order to pay the trafficker’s fees. After 9 months, we were not told anything at all but agents arrived with a van at night and picked us up from the trawler. The van took us to the Malaysian border. We crossed a narrow river that separates the two countries in a small boat. On the other side, another van was waiting for us and, after half an hour dropped us at a mosque in Malaysia, near Kota Bharu.

I thank Allah that I finally got released from the trawler. I consider myself lucky. However, I am afraid that I could be arrested at any moment here in Malaysia and that this could happen again’.⁵⁹

89. Not all deportees sold into labour bondage are as lucky as this. An unknown number disappear after being sold, and never return to Malaysia. One example is the youngest son, still a child, of this 50-year old Rohingya man from Minbya, Rakhine state:

I have 2 sons. The younger is 17 and the elder 18. Both of them were arrested. The younger one has disappeared and the elder is currently in jail. On 15 April 2007, my younger son was arrested by RELA. Later, I learnt from fellow prisoners that he had been detained in Semenyih camp and that, one month later, he had been deported to Kolok. I never heard from my son again. No agent ever contacted me for money to secure his release. His friends too never heard from him again. My son was not clever; perhaps he could not remember his address or phone number. When agents at the border fail to contact relatives, they usually sell the prisoner. They sell boys to fishing boats in Thailand. Some boys are injured and become paralysed as a result of working in Thai fishing boats. Till today, I still hope to get news from my son’.⁶⁰

⁵⁹ Interview ref. ERT-21/MAL conducted in Butterworth, Penang State, on 7 September 2009.

⁶⁰ Interview ref. ERT-04/MAL conducted in Serdang, Selangor State, on 5 May 2009.

Deportation to Thailand Immigration Officials

90. From time to time, Rohingya have been handed over directly to Thai Immigration officers at the border. On some occasions, the deportees are immediately sold by Thai Immigration officers to trafficking syndicates or deported into Myanmar into the hands of traffickers. One ERT interviewee was deported twice in quick succession directly into the hands of Thai Immigration and had this to say:

'In March 2009, about two months after my arrival (in Malaysia), I was arrested by Malaysian Immigration near my worksite. I had headaches from the excessive heat and went to the nearby pharmacy to buy medicine. In total, they arrested 20 Rohingyas from the construction site. The same night, they deported us directly to Thai Immigration across the border and Thai Immigration immediately handed us over to the same brokers (who initially smuggled me into Malaysia) again. One of them works at the Thai Immigration and he bought us from Thai Immigration. I had to pay again 2,500 Ringgit for my release. I was only detained in the plantation for one day because two of my relatives in Saudi Arabia sent money to my cousin in Malaysia to release me.

In April 2009, I was again arrested at the bus station in Alor Star as I was returning from Langkawi. Four of us were arrested and we had no money to bribe the police. I was sent to Belantik immigration camp and was detained there for one month. This time again, the Malaysian Immigration deported us directly to the Thai Immigration. Within four days, Thai Immigration sent us to Mae Sot and deported us across a river to Burma in a Kayin rebels' area (the Democracy Karen Buddhist Army, an insurgent group). The brokers established in the rebel area kept us in a house for one month. I was under the control of a Burmese Muslim woman broker. She gave us food. She also required 2,500 Ringgit to send us back to Malaysia. I had no money to pay, so I had to spend two more months there. I did not have to do any forced labour.

Finally, one of my friends from Buthidaung paid the ransom to release me and to send me back to Malaysia. I had to walk two days and two nights over the hills with a Thai broker. They put us on a line bus with a guide – ten people into two buses to Bangkok. We spent one night in Bangkok and again we took another passenger night bus from Bangkok to Kolok. These agents have their own people at Kolok and we crossed the small stream by boat to return to Malaysia. I just returned here last week'.⁶¹

91. On other occasions, the deportees are re-arrested on Thai soil, detained locally and then transferred to Ranong immigration detention centre in Thailand, from where they are deported to a remote Myanmar island. A similar scenario then re-occurs at the Thai-Myanmar border near Ranong. Traffickers pick up deportees on the island and those who can pay a ransom are transported to their destination of choice in Thailand or back into Malaysia.
92. A 33-year Rohingya man from Buthidaung was deported from Malaysia into the hands of Thai Immigration in 2004:

⁶¹ Interview ref. ERT-20/MAL conducted in Butterworth, Penang State, on 6 September 2009.

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'From Juru immigration camp I was deported to the Thai border near Padang Besar. I was handed over directly to Thai Immigration. They took two trucks carrying 390 people. I was first detained in Thailand near the Malaysian border. Those with relatives or money were immediately sent to Ranong. I contacted a female agent and promised to work to pay all release money. We agreed that I would pay 1,800 Ringgit after returning to Malaysia.

After 12 days, Thai Immigration sent us to Ranong immigration detention centre for one night and then deported us by boat to a Burmese island near Kawthaung. Almost immediately after we landed on the island, another boat from the agents came to pick us up. The agents brought us to a Thai village where we spent the night. The next evening, they took two of us at a time in a covered van to a jungle place near the coast, from there we were transported in a boat and then in another pickup truck until we reached the Thai-Malaysia border. At night again, they took us through a barbed wire fence across the border. We had to walk for the entire night and at 8:00 AM, a van picked me up and took me home'.⁶²

⁶² Interview ref. ERT-12/MAL conducted in Butterworth, Penang State, on 10 May 2009.

PART THREE

93. A survey of Malaysian law, policy and practice relating to refugees, the stateless and irregular migrants, identifies a number of priorities and strategies:
- There is a well established legal and policy framework behind the caning, detention and deportation of Rohingya and other irregular migrants in Malaysia. This reflects a hard-line approach to the control and reduction of illegal immigration.
 - Although not a state party to the 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Malaysia enacted an anti-trafficking Act in 2007.⁶³ This is a signal of a serious intent to crackdown on trafficking, and a necessary step if Malaysia is to reduce illegal immigration.
 - The Malaysian Constitution can be utilised to afford citizenship to those born in Malaysia who are not citizens of any other country. However, Malaysia does not provide citizenship to stateless persons born in the country, including the children of stateless Rohingya born in Malaysia. This policy only serves to perpetuate the ‘illegal’ status of stateless irregular migrant communities, including second and third generations born in Malaysia.
 - Malaysia’s poor track record in ratifying international human rights, refugee and statelessness treaties, is a stark reminder of the value placed by the Malaysian Government on respecting, promoting, protecting and fulfilling the human rights of nationals and non-nationals.
94. Following is an analysis of the most relevant aspects of the Malaysian legal framework in relation to immigration, trafficking and statelessness.

Laws Pertaining to Arrest, Detention, Punishment and Removal

95. The main legislation regulating the admission into, and departure and removal from Malaysia is the Immigration Act 1959/1963 as amended in 2002.⁶⁴ Other immigration rules and regulations include the Passport Act of 1966 and the Immigration (Exemption) Order of 1963. Under the Immigration Act, any person who enters or remains in Malaysia illegally is liable to prosecution. Sentences include corporal detention, punishment in the form of caning and deportation.⁶⁵
96. The Immigration Act provides widespread power to arrest without a warrant, detain and ultimately deport illegal immigrants. The Immigration Department, the Royal Malaysia Police and RELA are primarily responsible for carrying out arrests and detention. According to section 51(1) of the Immigration Act, a person believed to be liable for removal from Malaysia may be arrested without a warrant by a police, customs or immigration officer. Furthermore, such officers also have the authority to enter and search any premises and stop and search any vehicle.

⁶³ *Anti-Trafficking in Persons Act 2007* [Act 670], available at <http://www.hsph.harvard.edu/population/trafficking/malaysia.traf.07.pdf> [accessed on 3 January 2010]

⁶⁴ *Immigration Act, 1959-1963* [Malaysia], 1 May 1959, available at: <http://www.unhcr.org/refworld/docid/3ae6b54c0.html> [accessed 3 January 2010]

⁶⁵ *UNHCR Country Operations Plan 2007*, Malaysia, available at <http://www.unhcr.org/45221ff62.html> [accessed on 3 January 2010]

97. A non-citizen arrested under the Act can be held for up to 14 days before being produced before a Magistrate, an excessively long period of time. The Magistrate may then make a detention order *'for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia, under this Act'*.⁶⁶ Furthermore, section 34 (1) of the Act does not provide for a maximum detention period pending removal, and this often results in the indefinite detention of Rohingya and other immigration detainees.
98. According to Section 51B of the Immigration Act, a person detained in an immigration detention camp is considered to be in lawful custody. Moreover, section 59A excludes acts and decisions made under the Immigration Act (including immigration detention) from judicial review, thus rendering immigration detainees with no access to justice.
99. Immigration-related detention is a three-step process:
- 1) Internment,
 - 2) Criminal imprisonment for offences under the Immigration Act 1959/1963; and,
 - 3) Administrative detention in immigration depots prior to deportation.⁶⁷

Punitive Measures

100. The 2002 Amendment to the Immigration Act imposes more stringent penalties for illegal immigration, introducing caning as a punishment for first time offenders. According to section 6 (3) of the Act, any person who unlawfully enters or resides in Malaysia is guilty of an offence and liable to:
- a fine not exceeding 10,000 Ringgit,
 - imprisonment not exceeding five years
 - caning of up to six strokes
- Such persons would also be subject to removal proceedings.
101. Despite being party to the Convention on the Rights of the Child (CRC), Malaysian law allows for the caning of children. Section 91 (1) (g) and Section 92 of the Child Act, 2001 (Act 611),⁶⁸ permits the caning of children, provided a lighter than normal cane is used. It must be noted that Malaysia has expressed reservations to many articles of the CRC which are incompatible with the constitution, laws, policies and ethics of Malaysia. Crucially, this includes reservations on Article 1 (the definition of a child), Article 2 (equality and non-discrimination), Article 7 (the right to be registered after birth and to acquire a nationality), Article 13 (Freedom of Expression), Article 14 (Freedom of Thought, Conscience and Religion), Article 15 (Freedom of Association) and Article 37 which requires States Parties to ensure that:

⁶⁶ *Immigration Act*, Note 64 above, Section 51 (5) (b).

⁶⁷ Global Detention Project, Malaysia Country Profile, Detention policy, updated June 2009, available at <http://www.globaldetentionproject.org/countries/asia-pacific/malaysia/introduction.html#c2134> [accessed on 3 January 2010]

⁶⁸ *Malaysia Child Act 2001* (Act 611), available at <http://www.parlimen.gov.my/actindexbi/pdf/ACT-611.pdf> [accessed on 3 January 2010]

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(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

International Standards pertaining to detention

102. Malaysia's practice of arrest, detention and deportation of irregular migrants including stateless persons and refugees, must be assessed against international standards. In the words of Navanethem Pillay, UN High Commissioner for Human Rights, *'The great majority of immigrants, refugees and asylum seekers are not criminals and therefore should not be confined in detention centres like criminals.'*⁶⁹ According to UNHCR guidelines relating to the detention of asylum seekers, detention is

*'confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.'*⁷⁰

103. According to these guidelines, *'(b)eing stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release.'*⁷¹

104. In addition to this, the guidelines also state that *'as a general principle asylum seekers should not be detained.'*⁷² The guidelines state that asylum seekers are often compelled

⁶⁹ Pillay, N., UN High Commissioner for Human Rights, as quoted by Reuters Africa, available at: <http://africa.reuters.com/top/news/usnJOE49112F.html> [accessed on 6 January 2009]

⁷⁰ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, (February 1999) Guideline 1, available at: <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> [accessed on 3 January 2010]

⁷¹ *Ibid.*, Guideline 9.

to use illegal means to enter a country of potential refuge, and often have traumatic experiences, which must be taken into account when determining any restriction of liberty. They are therefore compatible with Article 31 of the Refugee Convention according to which illegal entry into the country shall not be the basis for penalties to be imposed on asylum seekers.⁷³

The IMM13 Permit – an Exception of Sorts

105. Section 55 (1) of the Immigration Act stipulates that the Home Minister has the power to exempt any person or group of persons from the provisions of the Act. This section provides the legal basis to extend protection to certain groups and individuals by issuing them with a temporary residence permit called the IMM13.⁷⁴ IMM13 holders are allowed to remain legally in Malaysia, engage in lawful employment, register their children in government schools and to access public services. The permit is temporary in nature – renewable on an annual basis for a fee of 90 Ringgit - and can be cancelled at the Minister's discretion.⁷⁵
106. In October 2004, the Malaysian government announced its decision to regularise the residency of the Rohingya and on 1 August 2006, the registration process for IMM13 permits began for about 12,000 Rohingya, some of whom had been in Malaysia since the 1980s. The Immigration authorities did not rely on UNHCR registration records, or engage with the UNHCR in the identification and registration process; they relied instead on a few Rohingya community representatives to perform the registration. Amid allegations of corruption and fraud, the registration exercise was suspended within 17 days and has not been resumed ever since. The 5,000 Rohingya who had paid the mandatory 90 Ringgit registration fee were not issued with the permit.

Laws to Combat Human Trafficking

107. Many Malaysian and international NGOs⁷⁶ have exposed practices of human trafficking in Malaysia. All testimony in this report points to the strong hold the human trafficking industry has over irregular migrants including the Rohingya in Malaysia and in the rest of the region. Traffickers exploit three realities: that Malaysia deports irregular migrants; that deportees are willing to pay money to return to Malaysia; and that corrupt officials collude in their operations. In so doing they perpetuate the cycle of detention, deportation and trafficking and obtain immense financial benefit for themselves. Given the scope of this problem, it is surprising that Malaysia has not

⁷² *Ibid.*, Guideline 2.

⁷³ Convention Relating to the Status of Refugees, Article 31 (1).

⁷⁴ In Sabah, 61,314 Filipinos who had fled armed conflict in Mindanao were granted IMM13 cards in the 1970s and in 2005, Malaysia issued about 30,000 Acehese refugees with IMM13 permits on humanitarian grounds in the aftermath of the tsunami. Following the end of the conflict in Aceh, the government announced that their permit will not be renewed as of January 2009.

⁷⁵ FIDH-SUARAM, *Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination*, March 2008, p. 10.

⁷⁶ See, for example, the Tenaganita report 'The Revolving Door' (September 2008), which contains eight testimonies from Burmese refugees, including 2 Rohingya, disclosing their experiences of detention and deportation at the Thai border.

acceded to the 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons.

108. Despite this, in June 2007 Malaysia enacted the Anti-Trafficking in Persons Act (Act 670) to combat trafficking for commercial sex purposes as well as for labour exploitation. This law imposes heavy penalties on convicted traffickers:
- A minimum three year and maximum 15 year prison sentence for trafficking an adult (Section 12)
 - A minimum three year and a maximum 20 year prison sentence for trafficking a child (Section 14)
109. Whilst this is a welcome development, it must be noted that section 27 of the Act makes the Police and Immigration Departments the key enforcement agencies; this is a worrying fact given the alleged levels of collusion particularly between immigration officers and traffickers found by the research for this report. There has not yet been a single prosecution under the Act for labour trafficking offences.
110. It must also be noted that Article 35 of the CRC obligates state parties to take appropriate action to combat the abduction, sale and trafficking of children.
111. On 3 April 2009, the U.S. Senate Foreign Relations Committee released a report which directly implicated the Malaysian authorities in the trafficking of immigrants from Myanmar at the Thai-Malay border.⁷⁷ The Malaysian government had earlier rejected these claims as ‘wild allegations’. A promise was later made for an investigation by the Police and the Immigration Department,⁷⁸ but on 1 June 2009, the government reported that no evidence implicating police and immigration officers had been found. The Home Ministry declared that the government had ‘*already set up a few internal investigations, but it’s baseless*’.⁷⁹ This indicates a serious lack of commitment to enforce the Anti-Trafficking Act. Observers nevertheless believe that the publication of the US Senate report has resulted in the recent dramatic decrease of deportations to the Thai border.

Laws Relating to Statelessness and the Acquisition of Citizenship

112. Malaysia has not ratified either of the statelessness conventions and has no policy in place to determine statelessness and/or deal with the influx of stateless persons into Malaysia.⁸⁰
113. The Citizenship Rules of 1964 together with the Malaysian Constitution articulates the law related to the acquiring of Malaysian citizenship. Article 14 of the Malaysian Constitution read with Part II of the Second Schedule of the Constitution, entitles any person born within the Malaysian Federation, who is not born a citizen of any other country, to Malaysian citizenship. There is clear compatibility between these provisions

⁷⁷ See Report to the Committee on Foreign Relations: United States Senate, ‘Trafficking and Extortion of Burmese Migrants in Malaysia and Southern Thailand’, available at http://www.burmalibrary.org/docs07/Trafficking_and_Extortion_of_Burmese_Migrants-USCFR.pdf [accessed on 3 January 2010]

⁷⁸ Associated Press (AP), *Malaysia vows action on Myanmar human trafficking*, 25 April 2009.

⁷⁹ Associated Press (AP), *Malaysia denies claim of Myanmar human trafficking*, 1 June 2009.

⁸⁰ Latheefa Beebi Koya, ‘Statelessness in Malaysia’, in ERA Consumer, ‘Suhakam after 5 years: State of human rights in Malaysia’, May 2006.

on the one hand, and Article 7 of the CRC (the right to a nationality) on the other. However, Malaysia has attached a reservation in relation to Article 7 based on perceived incompatibility between the CRC and the Malaysian constitution, law and policy. Furthermore, this constitutional provision has not been implemented to give citizenship to second and third generation stateless Rohingya born in Malaysia. The children of mixed Malaysian-Rohingya marriages have however been able to acquire Malaysian citizenship.⁸¹ The constitution is thus applied in a discriminative way, treating some people less favourably on the basis of their ethnic origin.

114. Malaysia does give the children of refugees and undocumented migrants born in Malaysia the right to a birth certificate, and these birth certificates are reportedly stamped with the phrase '*orang asing*' (foreigner). However, there have been instances of parents being arrested at the registrar's office, and both because they fear arrest and because some are not aware that they are entitled to register a birth, most Rohingya parents do not register their newborn children for birth certificates. The Committee on the Rights of the Child has noted with concern that non-Malaysian children born in Malaysia are at risk of not being registered at birth and recommended that '*the State party improve the birth registration system of non-Malaysian children born in Malaysia [...]. Meanwhile, children without official documentation should be allowed to access basic services, such as health and education, while waiting to be properly registered*'.⁸²

The International Obligations of Malaysia

115. Malaysia has failed to ratify the majority of the human rights treaties, and attached extensive and vague reservations to its ratification of the CRC and the CEDAW. However, this does not mean that Malaysia has no international human rights obligations beyond these two treaty obligations. Customary international law, which forms the nucleus of international law, is binding on all States, regardless of whether or not they have expressly accepted such principles.
116. Article 38 of the Statute of the International Court of Justice enumerates customary international law as one of the sources of law which the ICJ must apply in its adjudications.⁸³ The '*persistent objector rule*' is the only exception to the universal application of principles of customary international law, according to which any State which has consistently and visibly objected to a particular principle of customary international law, would not be bound by it. The peremptory principles of customary international law are, however, not subject to compromise, even if a State has been a '*persistent objector*'.

⁸¹ Sadiq, K., *Paper Citizens: How illegal immigrants acquire citizenship in developing countries*, Oxford University Press US, 2008, pp. 13-14.

⁸² UN Committee on the rights of the Child, CRC/C/MYS/CO/1 dated 25 June 2007, para. 85.

⁸³ According to Malcolm Shaw, "*the essence of custom.... is that it should constitute "evidence of a general practice accepted as law". Thus, it is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is 'law'. As the International Court noted in the Libya/Malta case, the substance of customary law must be "looked for primarily in the actual practice and opinio juris of states."* (Shaw, M., *International Law*, 6th ed. Cambridge University Press, 2008, p. 74.)

117. Even treaties which conflict with the peremptory norms of international law are void.⁸⁴ These *'jus cogens'* principles of international law are universally applicable, and form the core content of a State's international obligations which cannot be derogated from under any circumstances. However, there is no clear list of which principles of international law are peremptory norms. The American Law Institute in a statement on Customary International Law in 1987 identified the prohibition of genocide, slavery, murder and the causing of disappearances, torture, cruel, inhuman or degrading treatment, prolonged arbitrary detention, systematic racial discrimination and the consistent and gross violation of internationally recognised human rights as *'jus cogens'* norms of international law. The institute proceeded to clarify that *'the list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law and some rights might achieve this status in the future'*.⁸⁵
118. Particularly relevant to the Malaysian context, is the principle of *non-refoulement*, which stands as an international human rights law restriction on the exercise of state sovereignty to regulate the presence of non-citizens in their territory. The principle has become an "essential and non-derogable"⁸⁶ cornerstone of refugee law, and it has been argued that it is part of customary international law.⁸⁷
119. The Refugee Convention was the first international instrument to articulate the principle, stating that no state party *'shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'*.⁸⁸
120. Whilst the principle of *non-refoulement* does not entail a right to be granted asylum in a particular state, *'It does mean, however, that where states are not prepared to grant asylum to persons who are seeking international protection on their territory, they must*

⁸⁴ Article 53 of the Vienna Convention on the Law of Treaties states that *'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'* (Vienna Convention on the Law of Treaties, signed in Vienna, 23 May 1969, entered into force 27 January 1980, Article 53).

⁸⁵ Restatement (Third) The Foreign Relations Law of the United States, American Law Institute (1987), Vol. 2, 161, para. 702.

⁸⁶ See OHCHR Discussion paper, "Expulsions of aliens in international human rights law", Geneva, September 2006, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf> [accessed on 3 January 2010]; for a useful discussion on this principle, see also UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [accessed 3 January 2010]

⁸⁷ Goodwin-Gill, G., "Non-refoulement and the new asylum seekers" (1986) 26 *Virginia Journal of International Law* p. 897.

⁸⁸ Convention Relating to the Status of Refugees, Article 33 (1).

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adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger...⁸⁹

121. Furthermore, the principle of *non-refoulement* is not exclusively the preserve of refugee law. Article 3 of the Convention against Torture also prohibits State parties from deporting persons who would be in danger of being subjected to torture in the country they are being deported to.
122. The relevance of the principle to Malaysia's deportation of refugees, stateless persons and irregular migrants including the Rohingya is self evident. The many testimonies quoted in Part II above indicate the acute levels of abuse suffered by such deportees at the hands of human traffickers and immigration authorities. Torture, murder and bonded slave labour are the three most serious offences in this regard, and others include forced detention in plantations and jungle camps. Furthermore, deported Rohingya often find themselves transported back into Myanmar, in direct contravention of the principle of *non-refoulement*. It must also be noted that the deportation of Rohingya children in this context would be a direct violation of Malaysia's treaty obligations under Article 22 of the CRC (which obligates state parties to provide adequate protection and humanitarian assistance to children seeking refugee status).

⁸⁹ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [accessed 3 January 2010]

PART FOUR

Positive Developments

123. Some recent positive developments have taken place:
- Research suggests that the practice of deportation of irregular immigrants including the Rohingya into the hands of traffickers at the Thai border may have considerably decreased or stopped in the second half of 2009; for example, the UNHCR has not received a single confirmed report of deportation since July 2009. However, this drop in deportations has led to severe overcrowding in detention centres which must be addressed as a matter of grave urgency.
 - After the publication of the U.S. Department of State 2009 Annual Report on Trafficking in Persons, in which Malaysia is ranked very poorly,⁹⁰ the Malaysian police made nine arrests, including of five immigration officials, for their alleged involvement with a trafficking syndicate which sells Rohingya into forced labour.⁹¹
 - Since March 2009, the Malaysian government has requested the UNHCR to screen Myanmar nationals (including Rohingya) detained in immigration camps - in order to verify or determine their status and accordingly secure their release. However, whilst this development has rendered those detained in immigration camps more accessible, the UNHCR continues to have, at best, *ad hoc* access to Malaysian prisons.

Whilst it is premature to read a shift in policy, it is hoped that the Malaysian government will build on these developments to establish a more progressive, rights-respecting immigration regime.

Recommendations

124. Based on the research set out in this report, the Equal Rights Trust puts forward the following recommendations for the consideration of the Malaysian authorities:

With Regard to Malaysia's international obligations:

- Take the necessary steps to ratify the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol;
- Take the necessary steps to ratify the 1954 Convention Relating to the Status of Stateless persons and the 1961 Convention on the Reduction of Statelessness;
- Take the necessary steps to ratify the core international human rights treaties. In particular, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture;
- Remove the existing reservations to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

⁹⁰ US Department of State, *2009 Annual Report on Trafficking in Persons*, June 2009 – Malaysia, p. 198-200, available at <http://www.state.gov/documents/organization/123363.pdf> [accessed on 3 January 2010]

⁹¹ Agence France Press, *Trafficking syndicate: Malaysia busts officials*, 21 July 2009.

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With regard to the UNHCR:

- Formalise the position of the UNHCR in Malaysia;
- Make the necessary provisions to facilitate the expansion of UNHCR operations in Malaysia;
- Allow the UNHCR unrestricted access into all detention facilities (including prisons) and shelters for victims of trafficking, to visit all stateless persons and persons entitled to refugee status.

With regard to the status of stateless persons and refugees in Malaysia:

- Establish separate but complementary refugee status determination and statelessness determination procedures in Malaysia;
- Ensure that Malaysian immigration policy distinguishes between refugees, stateless persons, asylum seekers, victims of trafficking and other irregular migrants;
- Recognising the unique nature of the Rohingya problem – being *de jure* stateless and refugees who are unable to return to their country of habitual residence - consider formalising the status of Rohingya who are resident in Malaysia (particularly those who have been resident in Malaysia for many years), and take necessary steps to combat all forms of discrimination against them;
- Amend the Immigration Act and as a minimum interim measure, make use of Section 55 of the Act (the provision of IMM13 permits), with a view to legalizing the status of stateless persons, asylum-seekers and refugees in Malaysia;
- Implement Article 14 of the Malaysian Constitution and give citizenship rights to the children of stateless parents (including the Rohingya) born in Malaysia.

With regard to immigration related punishment, detention and deportation:

- Formalise and publish as official policy the recent practice to minimise deportations over the Thai border;
- Immigration detention should be avoided as a general rule and only implemented in extreme cases under strong safeguards – when detention is essential to facilitating deportation. If formal deportation is not possible (as in the case of Rohingya from Myanmar), detention should not be allowed. If the formal deportation of undocumented migrants who are not refugees or stateless persons is possible, a maximum term not exceeding six months detention pending deportation should be implemented;
- Ban the punishment of caning, including for immigration detainees, particularly children;
- Disband RELA with immediate effect; or in the very least, impose strong limits on RELA powers of search and arrest, strip RELA officers of their immunity, and officially announce the withdrawal of RELA from the immigration detention centres;
- Implement a formal inquiry into alleged abuses of power and human rights violations carried out by RELA;
- Amend the Immigration Act to ensure immigration detainees have meaningful access to justice including a right of appeal and legal aid, the right to an interpreter, the right to apply for judicial review and *habeas corpus*.

With regard to human trafficking:

- Investigate and prosecute offenders under the Malaysian Anti-Trafficking Act;
- Conduct a thorough clean-up of the Malaysian Immigration Department and police force to ensure they have no links to trafficking syndicates;

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- Take the necessary steps to ratify the 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons;
- Bring Malaysian domestic law into conformity with the human rights protections contained in the Trafficking Protocol.

With regard to addressing the Rohingya problem from a regional perspective:

- Initiate a regional dialogue to address the Rohingya's protection needs at ASEAN level by:
 - Working closely with the ASEAN Inter-governmental Commission on Human Rights;
 - Bringing pressure on Myanmar to stop discriminating against and persecuting the Rohingya, and to grant them citizenship;
 - Protecting refugee and stateless Rohingya within ASEAN member states.

125. ERT strongly recommends that the Malaysian government adopts a new approach when dealing with the Rohingya; one which seeks to understand the motivations behind Rohingya migration, views them as victims – refugees fleeing persecution, and as stateless persons, who require protection. Such an approach must be regional in scope, and must be aimed at addressing this ongoing crisis in a comprehensive and sustainable manner.