

Fourth Universal Periodic Review of Malaysia

Submission by the United Nations Country Team in Malaysia (UNCT)

21 July 2023

I. Introduction

Malaysia's 3rd Universal Periodic Review (UPR) took place in November 2018 during which, Malaysia received 268 recommendations, 148 of which it supported and noted 120. This submission will comment on progress achieved and highlight persisting issues.

II. Background

Malaysia is a State Party to only three¹ of the nine core human rights treaties. Attempts to ratify the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 2018 and the Rome Statute of the International Criminal Court in 2019 were unsuccessful following strong public and political opposition. Efforts have since been made to enhance understanding of the international human rights system, including by translating, through the UPR Voluntary Fund, the human rights treaties into Malay (Bahasa Malaysia).

Malaysia has issued a standing invitation to Special Procedure mandate holders with the last visit conducted by the Special Rapporteur on extreme poverty and human rights in August 2019. With support from OHCHR, Malaysia is the first country globally to roll out the National Recommendations Tracking Database (NRTD) 2.0 to strengthen its National Mechanisms for Implementation, Reporting and Follow-up (NMRF). Malaysia is currently a member of the Human Rights Council (HRC, 2022-2024).

III. Promotion and Protection of Human Rights

1. Constitutional and legislative developments

Pursuant to recommendations accepted from previous UPR processes, Malaysia has taken steps to strengthen the Human Rights Commission (SUHAKAM) and to harmonize national and international laws and standards. In 2019, the government established the Office of the Children's Commissioner (OCC) to further strengthen SUHAKAM's advisory role on the rights of the child². SUHAKAM's Annual Reports were debated twice in Parliament, for the first time in 2019 and in June 2023.

On 16 June 2023, the government published in the official gazette two laws to remove the mandatory death penalty and establish a resentencing process for those on death row and imprisonment for natural life. The Abolition of Mandatory Death Penalty Act 2023, which came into force on 4 July removes the mandatory death penalty for eleven offences, including drug trafficking, murder, treason, and terrorism. The Act also removes the death penalty for serious crimes that do not cause death, including kidnapping while "natural life imprisonment" is replaced by a 30 to 40-year prison term or corporal punishment. However, the new law retains the death sentence for drug related offences under the Dangerous Drugs Act 1952.

The Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023 (yet to be enforced) will apply retroactively allowing those on death row or imprisonment for natural life with their sentences already confirmed by the Federal Court, 90 days to apply for resentencing³. Those undergoing trial and appeals will have a chance to request the commutation of their sentences as part of the ordinary court process.

¹ CEDAW, CRC and CRPD. Malaysia has also ratified the CRC-OP-SC and CRC-OP-AC.

² Children's Commissioner appointed to SUHAKAM. <https://www.pmo.gov.my/2023/01/childrens-commissioner-appointed-to-suhakam/>; https://suhakam.org.my/2023/05/suhakam-press-statement-no-15-2023_-suhakam-annual-report-2020-highlights-crucial-human-rights-issues-in-malaysia-kenyataan-media-suhakam-no-15-2023_-laporan-tahunan-suhakam-2020-membangkitkan-isu/

³ <https://www.ohchr.org/en/press-releases/2023/04/malaysia-un-experts-hail-parliamentary-decision-end-mandatory-death-penalty>

The UNCT welcomes the Penal Code (Amendment) Act of 2022, which includes criminalisation of stalking, virtual or otherwise, making it a punishable offence⁴. Meanwhile, debates to amend the Criminal Procedure Code to include anti-stalking provisions are reportedly ongoing.

On 23 March 2023, several provisions of the Anti-Sexual Harassment Act 2022 came into effect; other provisions will come into effect in stages. On laws related to children, the Sexual Offences against Children (Amendment) Bill 2023 affords enhanced legal protection to child victims of sexual violence, including online violence. Also, the Evidence of Child Witness (Amendment) Bill 2023 provides for an increase in the age limit of the definition of ‘children’ from 16 to 18 years ensuring that all children are afforded more protection, amongst other crucial amendments⁵.

The UNCT also notes ongoing efforts to amend the Constitution so children born overseas to Malaysian mothers married to foreign husbands can be granted citizenship, a right thus far only granted to Malaysian fathers. While this is an important step towards advancing equality and non-discrimination in nationality and in strengthening compliance with international treaty obligations⁶, the UNCT is concerned with proposals to remove constitutional protections, risk adversely affecting some categories of stateless people, including children born to parents without a valid marriage certificate, children adopted by Malaysians, abandoned children and children from undocumented families⁷ and may create barriers excluding them from citizenship⁸.

The UNCT notes the Government’s commitment towards achieving the Sustainable Development Goals (SDGs), mainstreamed in national development plans, and the Government’s active engagement with the Voluntary National Review process, including on progress in support of SDG 5 and gender-related aspects of all other goals⁹. The Twelfth Malaysia Plan 2021-2025 outlines provisions to reduce socio-economic inequalities and ensure equal rights to work without discrimination.

2. Administration of justice, impunity, and accountability

Serious concerns remain with regards to issues of police accountability and due process of law, in particular the continued use of security laws that violate international standards relating to the right to fair trial and allow for preventive detention without effective judicial oversight, including the Security Offences (Special Measures) Act (SOSMA), Prevention of Crime Act 1959 (POCA), Prevention of Terrorism Act 2015 (POTA) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DDA). SOSMA allows for preventive detention of up to 28 days without judicial review¹⁰ while both POCA and POTA allow police to order up to 60 days detention and government-appointed boards to order up to two years detention without trial.

In April 2022, in a step towards safeguarding the rule of law, the Federal Court ruled as “unconstitutional, and void” POCA’s ouster clause, which restricts supervisory jurisdiction of courts to review and challenge executive decisions, such as the legality of detention¹¹.

⁴ Section 507A

⁵ <https://www.unicef.org/malaysia/stories/easing-road-justice-child-victims#:~:text=This%20Evidence%20of%20Child%20Witness,to%20help%20them%20give%20evidence>

⁶ CEDAW’s 2018 Concluding Observations on Malaysia (CEDAW/C/MYA/CO/3-5); CRC’s 2007 Concluding Observations (CRC/C/MYS/CO/1); UPR Malaysia 2019 A/HRC/40/11

⁷ <https://www.freemalaysiatoday.com/category/nation/2023/06/10/8-proposals-on-changes-to-citizenship-laws/>; SUHAKAM Press Statement No. 22 – Elimination of Discrimination and Barriers Against Children Toward Citizenship / Kenyataan Media No.22 – Hapuskan Diskriminasi Dan Kekangan Terhadap Kanak-Kanak Untuk Menjadi Warganegara, Available here: <https://suhakam.org.my/2023/06/press-statement-no-22-elimination-of-discrimination-and-barriers-against-children-toward-citizenship-kenyataan-media-no-22-hapuskan-diskriminasi-dan-kekangan-terhadap-kanak-kanak-untuk-menjadi/>

⁸ Press Statement No-22: Elimination-of-discrimination-and-barriers-against-children-toward-citizenship, 28 June 2023, Available here: <https://suhakam.org.my/2023/06/>

⁹ https://sustainabledevelopment.un.org/content/documents/285982021_VNR_Report_Malaysia.pdf

¹⁰ These offences, under the Penal Code are categorized as “security offenses” for which different rules of evidence and trial procedure apply.

¹¹ The ouster clause in s. 15B, provides to oust the jurisdiction of the court in relation to judicial scrutiny of preventive detention proceedings pertaining to acts of the Prevention of Crime Board constituted under the Act. DHINESH TANAPHELL v. LEMBAGA PENCEGAHAN JENAYAH & ORS [2022] 5 CLJ 1 FEDERAL COURT, CRIMINAL APPEAL NO: 05(HC)-12-01-2021(B)], 11 APRIL 2022. Available here: <https://www.cljlaw.com/bulletin/?CLJBulletin;2022;21;b;>

In July 2022, the parliament voted to extend for another five years the provision of preventive detention in SOSMA, after the extension was originally voted down in March. The Malaysian Bar has expressed concerns that certain provisions of this law go beyond stopping or preventing national security threats, and “encroach on the trial of an accused and powers of the Judiciary.”¹²

Reports of allegations of torture, ill-treatment and custodial deaths remain a reoccurring problem in Malaysia, as does a lack of accountability for such offences¹³. According to parliamentary records, in 2022, there were 170 reported cases of custodial deaths, 3.5 times higher than in 2021 (48 cases)¹⁴. Of concern is the lack of transparency in information related to the cause of custodial deaths, the status of investigations and inquest proceedings, where initiated.

Overcrowding in prisons and immigration detention centres (IDCs) remains a concern. As of February 2023, according to official statistics, prisons are more than 30 percent over capacity¹⁵. While steps are being taken to address prison overcrowding, including by amendments to the existing Lockup rules and procedures¹⁶, urgent measures are needed to review the operation of the criminal justice system and address prison management challenges, including by investing in non-custodial alternatives to detention both pre-trial and post sentencing¹⁷.

On 26 July 2022, the Parliament passed the Independent Police Conduct Commission Act (IPCC) 2020 establishing an independent body to provide oversight and accountability of the Royal Malaysian Police. However, grave concerns remain with regards to the independence, transparency, and impartiality of the oversight mechanism, including its ability to conduct meaningful and effective investigations into police misconduct, with the IPCC exempt from investigating actions outlined in the Inspector-General Standing Orders. Concerns have also been raised regarding the mechanism's limited powers to compel cooperation from government agencies, subpoena documents and provide for prosecution¹⁸.

3. Fundamental Freedoms

The UNCT notes with concern the continued use of restrictive laws such as the Communications and Multimedia Act 1998 (CMA), often used in conjunction with the Sedition Act 1948 and the Peaceful Assembly Act (PAA) 2012 to deter legitimate speech, silence public debate, and criticism of government policies and suppress freedom of expression and peaceful assembly. Netizens, media, human rights defenders (HRDs), vulnerable groups and others, continue to risk police investigation for various forms of expression and speech. During the pandemic, 265 investigation papers were opened in connection with the dissemination of alleged fake news on COVID-19¹⁹ and as on 28 February 2023, at least 367 investigations have been opened under the Sedition Act from 2018 to 2022 with only five cases tried in court²⁰. In 2022, at least 126 individuals were investigated under the CMA²¹.

¹² Repeal SOSMA in its entirety: Press Release by Malaysia Bar, 25 March 2022, available here:

<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-repeal-sosma-in-its-entirety>

¹³ Press Release: When will Deaths in custody End, 7 February 2022, Malaysian Bar, available here:

<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-when-will-deaths-in-custody-end> Press release:

IPCC Lacks authority to uphold police accountability, Malaysian Bar, 22 December 2022, Available here:

<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-ipcc-lacks-the-authority-to-uphold-police-accountability>

¹⁴ SUARAM opinion, 24 February 2023, available here: <https://www.thevibes.com/articles/opinion/86040/increase-data-transparency-for-custodial-deaths-sevan-doraisamy>

¹⁵ <https://www.malaymail.com/news/malaysia/2023/02/03/prisons-dept-reveals-jail-congestion-at-36pc-taking-measures-to-reduce-overcrowding/53253>

¹⁶ <https://www.thestar.com.my/news/nation/2023/02/28/sedition-act-367-probed-only-five-charged-since-2018-says-home-minister>

¹⁷ Media statement by Malaysia Prison Department, February 2023, available here:

<https://www.nst.com.my/news/nation/2023/02/876134/prisons-dept-takes-measure-reduce-overcrowding-and-recidivism>. Also see:

<https://www.freemalaysiatoday.com/category/nation/2021/09/28/our-prisons-are-overcrowded-says-deputy-minister/>

¹⁸ Press release: IPCC Lacks authority to uphold police accountability, Malaysian Bar, 22 December 2022, Available here:

<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-ipcc-lacks-the-authority-to-uphold-police-accountability>

¹⁹ OHCHR, “Asia: Bachelet alarmed by clampdown on freedom of expression during COVID-19,” 3 June 2020, at

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920&LangID=E>

²⁰ <https://www.thestar.com.my/news/nation/2023/02/28/sedition-act-367-probed-only-five-charged-since-2018-says-home-minister>

²¹ Report on the State of Freedom of Expression in Malaysia 2022, Centre for Independent Journalism, available here: https://cijmalaysia.net/wp-content/uploads/2022/12/FOE-REPORT-2022_10Dec2022.pdf

In July 2019, the parliament passed amendments to the PAA decriminalising street protests and reducing the mandatory police notification period from 10 to 7 days, though this still falls short of international standards that call for a maximum of 48 hours²². The amendments also lack provisions to allow an exception to the notice requirement for spontaneous assemblies, where it is not practicable to give advance notice. Furthermore, while the amended law authorizes the police, pursuant to written consent from the Public Prosecutor, to compound up to RM 5,000 in lieu of prosecution of a punishable offence, it retains provisions that allow criminal penalties for alleged violations of a peaceful assembly.

The UNCT notes the recent government's efforts towards legal and institutional reform, including proposed plans to establish a Special Task Force on Institutional Reform²³. It is critical that the reform process is open, transparent, and participatory with the full and effective participation of all concerned stakeholders²⁴.

4. Equality and non-discrimination

Malaysia's Constitution explicitly prohibits discrimination based on gender. However, the absence of a legal definition of discrimination, encompassing direct and indirect discrimination, in both public and private spheres, and an acknowledgment that it can be perpetrated by state and non-state actors, has rendered this provision meaningless. The Federal Court and the Court of Appeal, in different cases, have held that the prohibition of discrimination only binds the government, not private parties²⁵.

The UNCT reiterates previous concerns raised by the CEDAW Committee regarding the dual legal system of civil law and multiple versions of Syariah law, which have not been harmonised in accordance with CEDAW and which result in continuing discrimination against women, particularly in marriage and family relations²⁶.

Of concern are amendments to the Terengganu Syariah Criminal Offences Enactment 2022²⁷, which risk violating fundamental freedoms and rights guaranteed under the Constitution and international human rights law whilst exacerbating inequalities and discrimination on grounds of gender identity, expression and sexual orientation, religion, conscience and/or belief.

The amendments introduce new provisions²⁸ that criminalise pregnancy and/or childbirth out of wedlock and include punishment for both girls or women and boys or men involved in the pregnancy to a maximum fine of RM 5,000, 3 years of imprisonment and 6 lashes, raising a particular concern on the impact on survivors of sexual assault. The amendments also criminalise acts deemed preparatory to sexual relations between men²⁹, the act of a female posing as a man or wears "male attire"³⁰ as well as anyone or any medical treatment, practice or act deemed to involve shamanism, witchcraft, or anything inconsistent with *hukum syarak* or Islamic Law. CSOs have raised concerns that the broadly worded provisions risk the spread of misinformation and/or perpetuating stigma against various forms of medical

²² Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 24 April 2013, A/HRC/23/39. Available here: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf

²³ https://www.kln.gov.my/web/guest/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=9441338&_101_type=content&_101_urlTitle=malaysia-commemorates-human-rights-d-1&inheritRedirect=false&redirect=https%3A%2F%2Fwww.kln.gov.my%2Fweb%2Fguest%2Fhome%3Fp_p_id%3D101%26p_p_lifecycle%3D0%26p_p_state%3Dmaximized%26p_p_mode%3Dview

²⁴ <https://www.thevibes.com/articles/opinion/84416/increasing-voices-calling-for-institutional-reform-denison-jayasooria>

²⁵ In *Beatrice Fernandez v. Sistem Penerbangan Malaysia and Anor* (2005), the Federal Court ruled that this law only applied to public authorities, and hence private sector employers had the right to terminate their pregnant employees. Almost a decade later, the Court of Appeal made a similar argument in the *Air Asia Bhd v. Rafizah Shima Mohamed Aris* (2014) case, i.e., the constitutional guarantee under Article 8(2) did not extend to private entities.

²⁶ Concluding Observations by the CEDAW Committee in the combined initial and second periodic report and combined third to fifth periodic report in 2018 (CEDAW/C/MYS/1-2, 2006; CEDAW/C/MYS/3-5, 2018) and CEDAW/C/MYS/CO/2, para. 14 and CEDAW/C/MYS/CO/3-5, para. 11

²⁷ Amendments were passed on 2 December 2022

²⁸ Section 29A

²⁹ Section 36A

³⁰ Section 33A

practices, including indigenous, traditional, or alternative medicine³¹. Other ‘offences’ that are subject to punishment include acts that are deemed disrespectful of Ramadhan, or propagate wrongful worship, apostasy, and alleged claims deemed as deriding Qur’anic verses or Hadith.

Hateful rhetoric and discriminatory laws have led to a rising tide of incitement to discrimination, hostility, and/or violence towards lesbian, gay, bisexual, transgender, intersex, queer people (LGBTIQ+), including the right to live with dignity, non-discrimination and freedom of expression and opinion. Malaysia’s Penal Code criminalises consensual same-sex relations, imposing a sentence of 20 years in prison and mandatory whipping while state Sharia enactments, such as the Kelantan Syariah Criminal Code Enactment of 2019 proscribe a range of offenses, such as “indecent attire” and “transgender expression”, which are punishable with imprisonment, fines, caning or “rehabilitation”³².

The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI), has raised concerns regarding several programmes and plans that have been adopted by Malaysia to curb behaviours perceived as immoral, including same-sex behaviour, such as the promotion of practices of “conversion therapy,” in university and other programmes and practices, including exorcism³³.

Concerns remain with regards to discrimination in health care settings, often due to a lack of affirming and non-discrimination policies, training and gender sensitisation of personnel, and monitoring and evaluation of the programmes and practices. As noted by SUHAKAM, LGBTIQ+ people continue to face various forms of bullying and intimidation that hinder their access to medical and health care³⁴.

5. Stereotypes and harmful practice

UNCT notes that despite the clear stand taken by the UN and other international bodies in ensuring that female genital cutting (FGC) is not performed including by health professionals, the rate of medicalization has not reduced in Malaysia. While there are underreporting of the practice, CSO reports indicate that 20.5 per cent of the procedure is done by doctors due to the perceived notion that the procedure is safer and more hygienic, despite FGC being absent in the medical curriculum³⁵. Concerns are heightened with reports of side effects among 15% of the girls who undergo it such as mild and short pain, minor bleeding, and pain during urination³⁶.

Also of concern is the persistence of child marriage in Malaysia, which continues to be practiced largely due to the lack of a standardized minimum age of marriage, and laws that allow and facilitate child marriage. Malaysia’s complex legal system – which encompasses Syariah, civil and customary law – makes it difficult to define ‘child’ in the context of child marriage. Furthermore, while there is a minimum age of marriage stated in Islamic and civil laws, exceptions to these provisions have facilitated the practice of child marriage. For example, civil law stipulates that the legal age of marriage for non-Muslims, as regulated by the Law Reform (Marriage and Divorce) Act 1976 (LRA), is 18 (although females aged 16 to 18 may marry with the consent of their state Chief Minister). Meanwhile Muslim law or the Islamic Family Law Act/Enactment (IFLA/E), which governs Malaysia’s Muslim-majority population, provides that while girls may marry at 16 and boys at 18, the Syariah Court may grant permission to marry below those ages (i.e., below 16 for girls and below 18 for boys). Additionally, a separate set of customary laws regulate the marriage and divorce of indigenous peoples, or the Orang Asli

³¹ Legal Analysis: Terengganu Syariah Criminal Offences Enactment- Justice for Sisters, Sisters in Islam, Legal Dignity, December 2022.

Available here: <https://sistersinislam.org/wp-content/uploads/2022/12/Analysis-of-Terengganu-Syariah-Criminal-Offences-Enactment.pdf>

³² “I don’t want to change myself”- Anti-LGBT Conversion Practices, Discrimination, and Violence in Malaysia, Human Rights Watch, 10 August 2022, available here: https://www.hrw.org/report/2022/08/10/i-dont-want-change-myself/anti-lgbt-conversion-practices-discrimination-and#_ftn159

³³ Practices of so-called “conversion therapy” Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 1 May 2020, A/HRC/44/53, Para 33;

Available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/108/68/PDF/G2010868.pdf?OpenElement>

³⁴ <https://arrow.org.my/wp-content/uploads/2021/01/LGBTIQ-Rights-in-Malaysia-.pdf>; SUHAKAM Mid Term UPR Report, available here: https://www.upr-info.org/sites/default/files/documents/2021-10/suhakams_mid-term_report_for_the_3rd_upr_05102021.pdf

³⁵ <https://www.malaymail.com/news/malaysia/2022/07/29/facing-religious-and-cultural-hurdle-womens-groups-draft-two-year-roadmap-to-end-female-genital-mutilation-in-malaysia/20021>

³⁶ https://wao.org.my/wp-content/uploads/2021/12/WAO-SIS-ARROW_FGMC-Chapter_Extract.pdf

of Peninsular Malaysia, and the Orang Asal of Sabah and Sarawak, if they opt to marry under these. None of these legal systems have a common minimum marriage age.

Whilst the Syariah courts have established a standard operating procedure (SOP) for child marriages³⁷, it is imperative that legislative and other measures be taken to prohibit child and/or forced marriage, without exceptions.

In addition, child marriage is often the preferred approach to concerns linked to pre-marital sexual activity and pregnancy out of wedlock³⁸. Other factors that drive child marriage in Malaysia include poor and/or lack of access to sexual and reproductive health (SRH) information and services, including the adoption and delivery of age-appropriate Comprehensive Sexuality Education (CSE), as outlined, and approved in the 2009 National Policy and Plan of Action on Reproductive Health and Social Education, for both in and out of school adolescents, which in turn leads to a higher risk of pregnancy out of wedlock. Social and cultural norms that allow and perpetuate traditional practices of child marriage and lack of parental knowledge and skills to communicate effectively with children on SRH issues also perpetuate child marriage³⁹.

According to UNICEF, at least 1,500 children marry every year in Malaysia⁴⁰. However, this is an underestimation as there are no available data for girls aged between 16 and 18 married under Islamic law or marriages conducted by the Sabah Native Court. Generally, child marriages under customary laws are often not recorded as it is not a legal requirement. These figures also do not include non-formalized relationships involving children; nor do they include unregistered non-Malaysian marriages such as those amongst the undocumented, stateless, refugee and asylum-seeking communities.

The launch in January 2020 of the National Strategy Plan in Handling the Causes of Child Marriage (2020-2025) and the Sabah State action plan to end child marriage 2019 are positive indications of the government's commitment in addressing the issue. Coordinated efforts are needed by all stakeholders to ensure effective implementation of these plans.

6. Business, environment, and human rights

Although Malaysia is a signatory to the Declaration on the Rights of Indigenous Peoples (UNDRIP), the lack of effective recognition of native/indigenous land title based on the principle of self-identification, restricts indigenous peoples (Orang Asli, Natives of Sabah, and Sarawak) from registering and/or proving formal ownership of land. The lack of oversight mechanisms has made it easier for state and private actors to appropriate lands, territories, and natural resources, or gazette land as Forest reserve, without the free prior and informed consent of indigenous peoples⁴¹. Large extractive business activities and megaprojects on land deemed as ancestral or customary, coupled with widespread corruption and weak land/resource governance and weak environmental impact assessment mechanisms continue to adversely affect livelihoods and the right to meaningful participation of affected communities in policy formulations,⁴² exacerbating land and/or forest-related conflicts between communities, private companies, and State-owned enterprises.

Serious concerns remain on heightened attacks, surveillance, targeting and criminalisation of HRDs, environmental HRDs, lawyers defending their cases, as well as representatives of local communities resisting and/or critical of business operations linked to the protection of their environment and land. One such case is the strategic lawsuit against public participation or SLAPP case filed in 2021 against the

³⁷ <https://www.thestar.com.my/news/nation/2018/07/11/ministry-sets-up-sop-on-child-marriages-under-syariah-court/>;
<https://www.straitstimes.com/asia/se-asia/child-marriage-sop-just-short-term-solution-ban-under-consideration-malaysian-minister>;
<https://www.malaymail.com/news/malaysia/2018/07/06/suhakam-wants-child-marriage-criminalised-opposes-sop/1649545>

³⁸ Towards ending child marriage in Malaysia, Advocacy brief, UNICEF Malaysia. Available here:
<https://www.unicef.org/malaysia/reports/towards-ending-child-marriage-malaysia>

³⁹ <https://www.unicef.org/malaysia/media/1781/file/Advocacy%20brief:%20Towards%20ending%20child%20marriage%20in%20Malaysia.pdf>

⁴⁰ <https://www.unicef.org/malaysia/media/1781/file/Advocacy%20brief:%20Towards%20ending%20child%20marriage%20in%20Malaysia.pdf>

⁴¹ <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA2894242018ENGLISH.pdf>

⁴² Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Malaysia 8 July 2019; A/HRC/42/47/Add.2
Available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/206/98/PDF/G1920698.pdf?OpenElement>

CSO, SAVE Rivers, by two private limited companies, part of the Samling Group of companies, for loss and damage amounting to \$1.18 million resulting from alleged defamatory reports concerning suspected violations by the company in the rural Baram region of Sarawak. The alleged violations include illegal logging, destruction of areas of high conservation value, and failure to secure free, prior, and informed consent of indigenous communities in and around the forest concessions⁴³.

While courts have recognized that certain communities have customary rights to live on land that they have occupied for generations and that these rights are proprietary in nature, implementation of the rulings has remained weak. Despite a 2019 High Court Ruling, which recognises the customary land rights of indigenous Orang Asli people of the Temiar tribe near Gua Musang forest in Kelantan, deforestation and illegal encroachment continues, including recent reports of illegal logging in the Nenggiri permanent forest reserve⁴⁴. Of concern is also the planned construction of multi-billion hydroelectric dams in Nenggiri, Kelantan and Papar, in Sabah despite grave threat to the surrounding communities.

Since the last UPR review, steps have been taken by the government to address issues related to business and human rights, including advancing the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). In June 2019, the then Minister of Parliament and Law, formally announced a cabinet decision to develop a National Action Plan on Business and Human Rights (NAP BHR) under the leadership of the Legal Affairs Division, Prime Minister's Department (BHEUU). In cooperation with SUHAKAM and UNDP, BHEUU has conducted public awareness raising programs, consultations, and capacity building activities with a range of stakeholders, based on identified priority areas, namely, environment, labour, and governance. A baseline assessment on BHR launched in 2023 is currently being finalised and will serve as the foundation for the NAP BHR, to be completed in 2024.

7. Refugees, asylum seekers, stateless people, migrants, and undocumented people

Refugees and asylum-seekers: Malaysia has not ratified the 1951 Convention relating to the Status of Refugees or the 1967 Protocol, nor the 1954 Convention relating to the Status of Stateless persons or the 1961 Convention on the Reduction of Statelessness (the 1954 Convention and the 1961 Convention respectively).

The absence of a legal and policy framework governing refugee matters results in a precarious protection environment for asylum-seekers and refugees, who do not have access to legal work, formal education, adequate health services and financial services.

Although refugees registered with UNHCR are charged 50% of foreigners' rates at government health facilities, this fee can still be prohibitive to seek treatment. The fear of being reported to immigration officials and detained in IDCs for unregistered asylum-seekers is an additional deterrent.

Anyone who irregularly enters or remains in Malaysia can be subjected to arrest, prolonged detention, and deportation. There is no distinction between children and adults, and except for recognised trafficking survivors, people in vulnerable situations are not exempted from these penalties. Of concern is the absence of specific standard operating procedures for the protection and care of children in IDCs. As of April 2023, there were 1,030 children (579 boys, 451 girls) in immigration detention⁴⁵.

The UNCT commends the establishment of a UNHCR-Government of Malaysia Joint Task Force, which is a valuable platform for dialogue and cooperation on asylum policy, law and other issues relating to the protection of asylum-seekers and refugees. However, reports on deportations of asylum-seekers and refugees continue, including of individuals from Myanmar and those seeking international protection, thus disregarding the international customary law principle to prevent the *refoulement* of persons in need

⁴³ Communication sent by Special Procedures mandate holders to the Government of Malaysia on 29 August 2022; Ref: AL MYS 2/2022, Available here: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27493>

⁴⁴ <https://www.freemalaysiatoday.com/category/nation/2022/06/12/come-clean-on-logging-in-nenggiri-forest-reserve-kelantan-govt-told/>

⁴⁵ <https://www.malaymail.com/news/malaysia/2023/04/15/home-ministry-to-table-paper-on-shifting-children-from-immigration-detention-centres/6489>

of international protection. Pushbacks at sea are known to occur; however, there is no official data available.

A 2005 Circular by the Attorney-General's Chambers establishes that those registered with UNHCR at the time of arrest should not be prosecuted for immigration offences. However, the Circular is not systematically implemented, and refugees and asylum seekers continue to be at risk of arrest, detention and/or prosecution upon entry into Malaysia under the Immigration Act 1959 as well as *refoulement*. Also of concern are cases of asylum-seekers and refugees being “voluntarily” repatriated to their country of origin or departing to other countries from IDCs.

Statelessness: No official statistics are available on the total number of stateless persons in Malaysia. Stateless people are unable to access a wide range of public services, including healthcare, education, and formal work, which places them at elevated risk of poverty. Their absence from official data makes the extent of their vulnerability almost impossible to assess⁴⁶.

While the Federal Constitution affords key protections, contributing to reduce statelessness in Malaysia, discriminatory provisions in the nationality and citizenship laws remain. Stateless families face challenges in obtaining birth certificates and other forms of documentation for example, children born outside of hospitals are often unable and/or families are reluctant to apply and/or obtain the necessary proof of birth given the underlying high cost to non-Malaysian nationals as well as due to fear of being reported to immigration officials if they are residing in Malaysia irregularly⁴⁷. Those who do register for a birth certificate may nevertheless not be entitled to access basic services. Non-Malaysian children born in Malaysia, such as asylum-seeking and refugee children as well as children of undocumented migrant workers, children of single mothers and children born in remote areas of the country, are also at risk of not being registered at birth given the difficulties in accessing the registration office.

Migration: The Government has taken important steps to strengthen protection of migrant workers' rights, including issues of forced labour and the concurrent problem of human trafficking. In June 2021, Malaysia renewed its National Action Plan on Anti-Trafficking in Persons (NAPTIP 3.0) for a third five-year term. In November, the National Action Plan on Forced Labour (NAPFL) 2021-2025 was launched. The ratification of the ILO Forced Labour Convention 1930 (No. 29) in 2022 is a step in the right direction that must be followed by legislative amendments and effective enforcement to circumvent, and remedy forced labour practices occurring in Malaysia or involving Malaysian companies.

Amendments to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) provide for a more expansive definition of forced labour, criminalize labour trafficking, and sex trafficking and increase penalties for some offenses. An amendment to the Employment Act of 1955 that took effect on 1 January 2023 criminalizes employers use of threats, intimidation, restriction of movement, and fraud to induce labour or services.

However, victims of trafficking and exploitation continue to be punished for immigration violations as enforcement officers often conflate human trafficking and smuggling, adversely affecting victim identification efforts⁴⁸. Meanwhile employment laws continue to exclude domestic workers from several forms of protection, including maximum working hours and minimum wage⁴⁹.

The UNCT commends the Government's recent pilot project to register undocumented migrants in palm oil plantations belonging to state-owned palm oil producers Sawit Kinabalu⁵⁰. Recalibration programmes aimed at regularising or hiring undocumented migrants in the country is a promising initiative to document individuals already residing in the country. However, the underlying high application cost risks

⁴⁶ UNICEF, “Submission by UNICEF Malaysia to the UN Special Rapporteur on Extreme Poverty Human Rights,” June 2019

⁴⁷ <https://www.unicef.org/eap/media/13391/file/UNICEF%20Migration%20Country%20brief%20Malaysia.pdf>

⁴⁸ <https://www.state.gov/reports/2022-trafficking-in-persons-report/malaysia/>

⁴⁹ See First Schedule of Employment Act 1955.

⁵⁰ <https://www.freemalaysiatoday.com/category/nation/2023/06/02/pilot-project-in-sabah-estates-finds-half-of-migrants-undocumented/>

incurring of high debts⁵¹.

The UNCT also notes the Government's initiative to launch the Alternatives to Detention (ATD) pilot programme in 2022 for unaccompanied and separated children in immigration detention⁵². However, implementation has stalled, and no children have been released into the ATD pilot programme to date. The UNCT welcomes the administration's announcement in early 2023 that children would soon be released from immigration depots and that a working paper would be tabled in Cabinet on this matter⁵³.

Undocumented persons: This group, intersecting and overlapping with the above populations (specifically migrants and stateless persons), crucially includes Malaysian nationals who are unable to verify their citizenship, especially ethnic minorities living at remote locations. Undocumented status results in the absence of legal recognition, the lack of access to basic public services including schooling and healthcare, and limits employment opportunities to informal sector work. As a result, this group suffers high levels of poverty and multiple deprivations. The undocumented population is particularly sizeable in the State of Sabah (some estimates suggest around 25% of the total population), given it has been subject to waves of migration from neighbouring countries and is host to many indigenous and often marginalized groups.

8. Children's rights

Malaysia has made significant progress in closing education gaps across urban-rural areas, socio-economic class, and gender. The National Education Policy makes primary education compulsory for all children aged six to twelve, including non-citizens. Recent government initiatives and collaborations to expand educational access for out-of-school children, such as undocumented Malaysians and migrant children in Sabah, is a welcome move. The Zero Reject Policy launched in 2019 provides access to primary-level education for all children in the country, including stateless children. However, as enrolment in public schools requires legal or identity documents, accessing education remains a challenge for a significant number of children including those from indigenous and minority communities, undocumented, stateless, refugee and asylum-seeking children, children of migrant workers, children born to non-citizens and children from the rural and urban poor communities.

Refugee children cannot access formal education, and only 30% receive informal education through CSO led alternative learning centres (ALCs) or community run schools, putting many refugee children at risk of child labour, child marriage and other forms of exploitation. Those who receive education are prohibited from sitting for national examinations, preventing them from certifying and furthering their education. The lack of an enabling environment such as the lack of legal protection and the rise in xenophobia against the refugee community has further impacted access to education⁵⁴.

Adults' (lack of) right to work also impacts children's right to education. Without the right to work, marginalised non-citizens are forced to participate in low-wage, unsafe, and insecure jobs in the informal sector which puts them at risk of exploitation by employers. Not only are many non-citizen families unable to afford schooling expenses, but children also face financial pressures to enter the informal workforce prematurely. Schooling is sometimes discouraged as education does not improve employment prospects. Although there has been no national child labour survey and official statistics on working children don't exist, empirical research studies indicate that children, especially in remote rural areas and hard to reach sectors, continue to perform hazardous work.

While health services have improved, especially for children in urban areas, gaps remain in terms of accessibility, availability and affordability of quality health and medical care for children in rural and

⁵¹ <https://mbam.org.my/wp-content/uploads/2023/02/FAQ-REKAB-2.0.pdf> Migrants excluded include those who do not have a passport with minimum 18 months validity, refugees and asylum seekers, those above 49 years old, and those who did not undergo medical examination with FOMENA and declared fit to work.

⁵² <https://idcoalition.org/news/ecd-n-welcomes-launch-of-atd-pilot-in-malaysia/>

⁵³ <https://www.thestar.com.my/news/nation/2023/02/17/suhakam-welcomes-govt039s-decision-to-move-children-from-immigration-detention-depot>; <https://www.thesundaily.my/local/kdn-to-table-paper-on-shifting-children-from-immigration-detention-centres-BO10874335>

⁵⁴ Left far behind: The Impact of COVID-19 on Access to Education and Healthcare for Refugee and Asylum-Seeking Children in Peninsular Malaysia; UNICEF 2022. Available here: <https://www.unicef.org/malaysia/media/3006/file/Left%20Far%20Behind%20-%20Full%20Report.pdf>

remote areas. Children living with HIV/AIDS face stigmatisation, difficulties in accessing education, and effective care and support services that meet their needs.

The prevalence of mental health issues among children in the country is also worrying. The 2019 National Health Morbidity Survey (NHMS) shows that one in 20 children in Malaysia aged five to nine are estimated to have mental health related issues with depression, anxiety, and behavioural disorders as the leading causes of illness and disability among children⁵⁵.

Caning and other forms of corporal punishment remain a serious issue and continue to be used as a disciplinary measure in penal institutions, as well as schools and alternative care settings. Also, corporal punishment in the family home is believed to be widespread⁵⁶.

Recommendations:

- Outline clear steps within a reasonable timeframe to ratify the remaining six core international human rights treaties to meet Malaysia's voluntary pledge and commitments.
- Take urgent steps to ensure that the resentencing process is in line with international fair trial standards and other due process safeguards, including timely access to effective legal representation and the ability to promptly access existing and new documentation to provide evidence of mitigating factors relating to the circumstances of the offence. Amend alternative sentencing to remove caning, a punishment that amounts to torture under international human rights law.
- Take urgent steps, in consultation with relevant stakeholders, to substantially amend the IPCC Act to address gaps and challenges and incorporate necessary provisions to ensure a strong oversight mechanism that strengthens compliance with SDG 16. Fully repeal SOSMA and other preventative detention laws (in entirety).
- Ensure that ongoing efforts to addressing prison management issues are evidence-based, comprehensive, transparent, systematic and in compliance with the internationally agreed UN Standard Minimum Rules for the Treatment of Prisoners.
- Ensure all alleged custodial deaths are fully investigated; investigations should establish the cause, manner, place, and time of death, as well as any pattern or practice that may have caused it; investigation findings should be publicly accessible, although the findings may be anonymized.
- Urgently review, amend and/or repeal, within a clear time frame, laws that violate the right to freedom of expression and opinion, including the Anti-Fake News Act, Sedition Act, CMMMA, as well decriminalize defamation and subsequently incorporate it into the Civil Code, in accordance with international standards.
- Take effective measures to adopt a comprehensive anti-discrimination law, to strengthen protection, combat violence and discrimination against vulnerable groups, including religious minorities, LGBTIQ+ and gender diverse people, and ensure all perpetrators of violence are prosecuted and adequately punished by a competent court, that victims and witnesses can file complaints without fear of retribution or stigma and have access to effective remedies and victim support, such as medical and psychological assistance.

⁵⁵ Mental disorders among the young on the rise, Malaysian Paediatric Association. Available here: <https://mpaeds.my/mental-disorders-among-the-young-on-the-rise/>

⁵⁶ Baseline data on physical punishment by NHMS 2016 and 2022, available here: https://iku.gov.my/images/nhms-2022/1a_Infographic_AHS_BI_15062023.pdf page 13; <https://iku.gov.my/images/IKU/Document/REPORT/2016/NHMS2016ReportVolumeII-MaternalChildHealthFindingsv2.pdf> <https://iku.gov.my/images/IKU/Document/REPORT/2016/NHMS2016ReportVolumeII-MaternalChildHealthFindingsv2.pdf> (2016)

- Amend all provisions in laws that allow or facilitate child marriage and set the minimum age of marriage at 18 without exceptions, in all legal jurisdictions including customary laws.
- Continue efforts to review the Age of Majority Act and Guideline on Management of Adolescent Sexual and Reproductive Health, with a view to lower the age of required parental or spousal consent for adolescents to access SRH services and information in line with international guidance and best practice.
- Facilitate multi-stakeholder platforms to address, prevent and mitigate business-related human rights abuses and challenges with a risk-to-people approach. The ongoing efforts towards drafting a NAP BHR affords an opportunity to strengthen compliance, in law and practice, with key principles relating to human rights due diligence as outlined in the UNGPs.
- Expedite efforts to protect indigenous peoples' right to access and use natural resources, including by strengthening policy and laws to ensure their meaningful inclusion, participation, and cooperation in all decision-making, that may affect their interests including in the adoption, assessment and implementation of actions and strategies and if necessary, correct these actions.
- Take systematic action to address human rights violations, loss of means of livelihood and environmental degradation, caused by development and extractive projects, including by enacting necessary regulations, and investigating systematically and thoroughly each complaint in a fair, credible, independent, open, and transparent manner.
- In cooperation with UNHCR, adopt and enact a legislative and administrative framework for the management, reception, registration, processing and documentation of refugees and asylum-seekers and providing basic services and legal work in line with international refugee protection standards. Ensure that refugees and asylum-seekers are not detained or otherwise penalized for irregular entry or stay and are not deported in line with the principle of *non-refoulement* and in accordance with customary international law.
- Ensure that alternatives to detention are pursued and reinstate UNHCR's access to IDCs. Urgently implement the existing government led ATD pilot programme for unaccompanied and separated children and take steps towards ending child immigration detention. Ensure that families, especially children are not separated because of detention.
- Take urgent steps, in consultation with all stakeholders, to ensure that the proposed amendments to citizenship law comply with international treaty obligations. Improve baseline data on persons who may be affected by statelessness and ensure that citizenship applications are processed in a timely manner to enable persons entitled to Malaysian citizenship to access rights and services.
- Develop and implement a comprehensive, inclusive, and affordable recalibration programme accessible to all migrants in the country to strengthen existing pathways for regular migration and address the vulnerabilities for people on the move, including by decriminalising irregular migration.
- Undertake measures to provide all undocumented persons with basic legal identity. With a special focus on the large undocumented population in Sabah, these efforts should ensure access to basic public services and an ability to earn a livelihood through participation in the labour market.