

Mandates of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; the Special Rapporteur on minority issues; the Special Rapporteur on the right to education; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on discrimination against women and girls

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; Special Rapporteur on minority issues; Special Rapporteur on the right to education; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on violence against women, its causes and consequences and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 43/22, 43/8, 44/3, 43/6, 42/10, 43/20, 44/4, 41/17 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the situation of refugee and asylum-seeking children, mostly of minority background including unaccompanied and separated children, among whom child sexual abuse survivors, who continue to face a heightened risk of abuse and exploitation including by being subjected to immigration detention, extortion, sale, child forced labour, trafficking, sexual exploitation, child forced marriage and other forms of gender-based violence against women and girls upon arrival in Malaysia.**

According to information received:

As of end November 2020, there were some 178,499 refugees and asylum-seekers registered with UNHCR in Malaysia, including 46,656 children below the age of 18. Some 153,895 are from Myanmar, including from various minorities. Reportedly, gender-based violence against women and girls among refugees is underreported due to social stigma and difficulties in accessing safe and confidential services and fear of deportation and violation of immigration laws. Agencies working with survivors of gender-based violence have indicated that one third of all reported cases are child sexual abuse cases, of which 60 per cent are child forced marriage cases, and approximately 35 per cent reported incidences of rape. It is reported that child refugees who were forcibly married off by their parents, involve girls as young as 10 years old. In some cases, children elope and thereafter lose the support of their families making them vulnerable to sale, sexual exploitation and other forms of gender-based violence and exploitation.

The access to asylum seeking and refugee child victims and survivors of trafficking, sexual exploitation and abuse has reportedly been challenging due to the lack of child-sensitive and gender-responsive services and in-person assistance. Accessing State social protection services is reportedly challenging as support is often inaccessible to non-Malaysian children and families. Information dissemination on assistance and services depends largely on male leadership structures, SMS and web-based notices, which due to literacy and language gaps often prevent women and children from adequately accessing information on services available.

It is further reported that since August 2019, UNHCR has not been able to access asylum-seekers and refugees detained in Immigration Detention Centers (IDCs) in Peninsular Malaysia. Subsequently, such asylum-seekers reportedly remain without access to an asylum procedure in line with international protection standards. It is also reported that, despite repeated requests, UNHCR has not been granted permission to release from detention in a systematic manner refugees and asylum seekers, including children. As a result, many asylum-seekers and refugees, including children, continue to be subjected to prolonged and indefinite administrative detention.

As of 26 October 2020, there are reportedly approximately 756 minors in IDCs of whom 488 are boys and 268 girls. 405 are unaccompanied and separated children, of whom 326 are reportedly from Myanmar.¹ Facilities in these IDCs are known for their deplorable conditions.² There are reportedly no child-sensitive medical and psychosocial services in these facilities, as well as remedies and assistance to victims and survivors of gender-based violence.

Serious concern is expressed about mandatory and often prolonged and indefinite detention of asylum seekers and refugees in Malaysia. Of particular and imminent concern is the situation of detained refugee and asylum-seeking children, including unaccompanied and separated children, among whom victims and survivors of child sexual abuse and exploitation. Reportedly, children are detained with adults, merely due to their or their parents' migration status. Children are also reportedly at heightened risk of being exposed to abuse and exploitation including extortion, sale, forced labour, trafficking, sexual exploitation, forced marriage and other forms of gender-based violence upon arrival in Malaysia. Further serious concern is expressed at the use of immigration detention of children, mostly of minority background, and the lack of adequate care and reception for asylum-seeking and refugee children, pregnant and breastfeeding women, and other individuals with specific vulnerabilities, who are in need of care, protection, education, rehabilitation or treatment. Concerns are raised at the lack of protection for refugee and asylum-seeking children in Malaysia, and child-sensitive, affordable medical services and psychosocial counselling, as well as remedies and assistance to the victims and survivors of gender-based violence against women and girls.

¹ Source: House of Representatives, Oral Answers, 3 November 2020.

² *SUHAKAM 2019 Annual Report*:
<https://drive.google.com/file/d/1aTcuhM3l29YCeodjpL5FSDmbpntLXQ5k/view>

We would also like to express serious concern at the reported poor detention conditions, the overcrowding, insufficient and poor-quality food and poor sanitation, limited access to healthcare, the lack of basic sanitizer facilities, which are particularly unsuitable for children, babies and nursing mothers. These conditions, and the inability to practice social distancing and isolate sick detainees, make it difficult to adhere to existing guidelines in managing COVID-19 in detention settings.

Without in any way implying any determination on the facts of the case, we would like to draw your attention to the relevant international human rights instruments and standards relevant to these allegations.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on measures taken towards the complete termination of immigration detention of children and their families as well as efforts made to provide effective protection, adequate care and reception, including access to education, for migrant, asylum-seeking and refugee children.
3. Please provide information on policies and measures taken to prevent any act of sexual abuse and sexual violence to which asylum seekers and refugee women and girls detained in Immigration Detention Centers are particularly exposed.
4. Please provide information on the availability of child-sensitive victim identification, assessment and referral procedures in place and standard operating procedures for coordination among law enforcement, humanitarian actors and civil society organizations/other service providers, to ensure that child victims and their families are neither detained nor forcibly returned to their countries of origin.
5. Please provide information on the availability of child protection shelters and mechanisms, and the provision of appropriate protection and humanitarian assistance, comprehensive health care and counselling to child victims of sexual abuse and exploitation and other human rights violations, regardless of their migration status and, as far as possible, in their languages or in a language they understand. Please provide information on the accessibility of child-sensitive justice complaints, reporting and referral mechanisms allowing victims to report abuses without fear of deportation and violation of immigration laws.

6. Please indicate through which policies, laws and mechanisms Malaysia ensures the protection of all children, including migrant, asylum-seeking and refugee children, from forced marriage, forced labour, trafficking and other forms of exploitation.
7. Please provide information on the measures taken to implement the *Child Act 2001* to ensure migrant, asylum-seeking and refugee children exercise their rights and access State protection systems and services in a non-discriminatory manner, in line with Malaysia's commitment to meet the Sustainable Development Goal 16 to end violence against all children.
8. Please provide information on measures taken to increase collaboration and mobilise support between all child protection stakeholders in Malaysia, including the Ministry of Women, Family and Community Development to safeguard the well-being of asylum seeking and refugee children at risk.
9. Please indicate which mechanisms are applied by all the domestic authorities, whether investigative, prosecuting and judicial authorities - including the police, immigration and border officials, and any other law enforcement agency or officials - when a situation triggering the application of non-punishment is first identified.
10. Please provide information on measures taken to reinstate UNHCR's access to IDCs to assess the international protection risks of detainees.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

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Dubravka Šimonovic
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Elizabeth Broderick
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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Excellency's attention to the following human rights standards:

Article 3 (1) of the Convention on the Rights of the Child, which your Excellency's Government acceded to on 17 February 1995, states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Article 37 (b) of the CRC states that '[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily.' In this regard, the Committee on the Rights of the Child has clearly stated that immigration detention of any child is a violation of children's rights and always contravenes the principle of the best interests of the child; and recommended that States expeditiously cease the detention of children on the basis of their or their parents' migration status.³ This position has been affirmed by joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 (2017) of the Committee on the Rights of the Child (CMW/C/GC/4-CRC/C/GC/23) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. In addition, we would like to refer your Excellency's Government to a recent report of the Special Rapporteur on the human rights of migrants on ending immigration detention of children and providing adequate care and reception for them (A/75/183).

Furthermore, Article 22 (1) of the CRC states that '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.' Article 22 (2) further clarifies that '[f]or this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.'

Furthermore, Article 34 of the CRC provides that States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. Moreover, article 35 provides that States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

³ Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September, 2012.

We also wish to highlight article 13 of the International Covenant on Economic, Social and Cultural Rights, which recognizes the right of everyone to education.

With regards to the principle of *non-refoulement*, we wish to draw your attention to the CRC General Comment No.6 (2005) – Treatment of unaccompanied and separated children outside their country of origin. States must fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law. CEDAW General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration highlights that refugee women and girls are highly vulnerable to trafficking and are in need of international protection, especially against *refoulement*. In particular we would also like to recall recommendations regarding victim identification and victims’ assistance and protection, as stated in paragraph 38 on the positive obligations on States to identify victims of trafficking, and paragraph 39 to 41 on the obligations of States to provide victims with high-quality support services with immediate availability, which must be inclusive and accessible, include access to information on their rights, the medical, psychological, social and legal services available to them and how to acquire access to them, as well as to safe and appropriate accommodations. Furthermore, concerns over Malaysia’s capacity of victim identification and lack of protection were highlighted by CEDAW in its Concluding Observations in 2018 – specifically in paragraph 25: (a) The lack of a formal and uniform victim identification procedure, which may lead to the punishment of women and girls who have been trafficked for the violation of immigration laws; and (c) The inadequate assistance provided to victims of trafficking. Recommendations were also given to this end, calling your Excellency’s government to establish a formal procedure that is applied uniformly throughout the State party to “promptly identify victims of trafficking and refer them to appropriate services for protection, including the conduct of an assessment of their need for international protection, and systematically train all relevant law enforcement officials on gender-sensitive procedures for interacting with victims of trafficking; and (b) Ensure that victims of trafficking are not punished for violations of immigration laws and that they obtain effective protection, such as temporary residence permits, irrespective of their ability or willingness to cooperate with law enforcement authorities, and redress, including rehabilitation and compensation”.

Furthermore, we would like to bring to your Excellency’s attention para 14 of the CEDAW General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, where [...] [t]he Committee recognizes that displacement arising from armed conflict, gender-related persecution and other serious human rights violations that affect women compounds existing challenges to the elimination of discrimination against women. It also recognizes the persistence of other forms of exploitation concomitant with displacement, such as trafficking for purposes of sexual or labour exploitation, slavery and servitude. The Committee therefore reiterates the obligation of States parties to treat women with dignity and to respect, protect and fulfil their rights under the Convention at each stage of the displacement cycle, as well as in the enjoyment of durable solutions, including integration and/or resettlement in receiving States and/or voluntary repatriation to their State of origin. The Committee is therefore of the view that States parties have an obligation to ensure that no woman will be expelled or returned to another State where her life, physical integrity, liberty and security of person would be threatened, or where she would risk suffering serious forms of discrimination, including

serious forms of gender-based persecution or gender-based violence. What amounts to serious forms of discrimination against women, including gender-based violence, will depend on the circumstances of each case (CEDAW/C/GC/32, para 23). The Committee states further that [g]ender sensitivity should be reflected in reception arrangements, taking into account the specific needs of victims of sexual abuse and exploitation, of trauma and torture or ill-treatment and of other particularly vulnerable groups of women and girls. Reception arrangements should also allow for the unity of the family as present within the territory, in particular in the context of reception centres (ibid, para 34). As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Moreover, [a]s a general rule, detention of pregnant women and nursing mothers, who both have special needs, should be avoided, while children should not be detained with their mothers unless doing so is the only means of maintaining family unity and is determined to be in the best interest of the child (CEDAW/C/GC/32, para. 49).

We would further like to draw your attention to the report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, following her visit to Malaysia from 24 September to 1 October 2018 (A/HRC/40/51/Add.3, para. 52). The Special Rapporteur noted that children often become separated from their families as a result of raids and are stranded in immigration depots waiting to be collected by their parents who, in turn, fear charges and deportation due to their illegal status. All immigration detention centres tend to house children. Due to the lack of temporary shelters (there are only two shelters for minors in the Peninsula), child victims are often stranded with their parents for several months in immigration depots and detention centres (ibid).

The Special Rapporteur has further noted that the phenomena of sale of children, child sexual abuse and exploitation are vast and real in Malaysia against the backdrop of stateless, asylum-seeking and refugee populations, particularly among the Filipino and Indonesian communities in Sabah and Rohingyas from Myanmar in Peninsular Malaysia (A/HRC/40/51/Add.3, para. 23). She was concerned that refugee and asylum-seeking, undocumented, street and migrant children are particularly exposed to sexual exploitation, forced begging and child labour. A significant number of refugees, asylum seekers and stateless persons, particularly from the Filipino and Indonesian communities in Sabah and Rohingyas from Myanmar, are increasingly becoming victims of trafficking for forced labour and drug-running. Without legal recognition, these children are more susceptible to becoming easy prey of unscrupulous traffickers and criminal networks. The Special Rapporteur learned from Rohingya child victims about their plight, being trafficked typically by embarking on maritime and overland journeys ranging between 10 days to a month to arrive in Malaysia. Initially smuggled across borders, some are subsequently trafficked to fishing boats and palm oil plantations for labour exploitation, including the sex trade, ending up in bonded labour to repay their debts. Underage victims whose information and age are reportedly falsified by recruitment agencies to meet the demand for domestic workforce face additional distress in trying to escape their abusive employers. Many are sold to marriage brokers as child brides, often by parents who reportedly resort to marrying off their daughters to foreigners to “protect” them. In 2014, some of the 26 Rohingya child brides detained at the Thai border by the Malaysian immigration authorities reportedly revealed that they had been trafficked for marriage (A/HRC/40/51/Add.3, paras. 10-11).

Concerning the legislative, institutional and policy framework, the Special Rapporteur recommended the Government to expedite efforts to ratify the remaining international treaties, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness; the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption; the International Labour Organization conventions and the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, among others (A/HRC/40/51/Add.3, para. 61.a). She further recommended to urgently conduct a comprehensive mapping of the situation of street and undocumented, refugee and stateless children and develop a comprehensive national intervention, in collaboration with NGOs (*ibid*, para 63.c); establish alternatives to detention for undocumented children, including refugee and asylum-seeking children in Sabah and Sarawak (para. 63.g); publish the findings of the task force on a comprehensive action plan in an effort to address the root causes and main drivers of child marriage practices in Malaysia, including among the refugee and asylum-seeking population, migrant workers and indigenous communities (para. 63.k); and ensure easy access to child-sensitive justice complaints, reporting and referral mechanisms allowing victims to report abuses without fear of deportation and violation of immigration laws (A/HRC/40/51/Add.3, para. 61. b).

We would also like to draw your attention to the Report of the Independent Expert leading the United Nations global study on children deprived of liberty, recalling Article 37 (b) of the Convention on the Rights of the Child and noting that the latter establishes a high standard, applicable to all situations in which children are deprived of liberty. Together with the guiding principles of the Convention on the Rights of the Child, above all the best interests of the child, the prohibition of discrimination and the right of children to development and participation, this high standard requires States to reduce the detention of children to an absolute minimum by developing and applying appropriate non-custodial solutions. The precise extent to which the principle of measure of last resort allows deprivation of liberty depends on the type of detention. States are required to develop specific child justice systems with the aim of diversion. If diversion measures are not possible, the principle of the shortest appropriate period of time needs to be applied, and so life imprisonment without possibility of release and other excessively long prison sentences should not be applicable. The Committee on the Rights of the Child, in its general comment No. 24 (2019) on children's rights in child justice systems, states that, in the case of police custody, every child arrested should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours. In the case of pretrial detention it states that no child should be held longer than 30 days without formal charges being laid, and a final decision on the charges should be made within six months from the initial date of detention, failing which the child should be released (A/74/136, paras. 88 - 89).

The Independent Expert leading the United Nations global study on children deprived of liberty further noted that in most States, primary caregivers, usually the mothers, who are sentenced to a prison term, are permitted to keep their young children with them in prison, if no other solution can be found, which satisfies the principle of the best interests of the child. In most States, children can stay with their caregivers until the age of three, but regulations differ considerably. It was found in the study that rigid State regulations are not effective, because they jeopardize a careful balancing of

different interests on a case-by-case basis, and that the problem of children growing up in prisons can most easily be avoided if primary caregivers with young children are not sentenced to a prison term. Detention for purely migration-related reasons is never in conformity with the Convention on the Rights of the Child. Whether children are on the move unaccompanied, separated or with their families, migration-related detention never meets the high standards of a measure of last resort in article 37 (b) of the Convention or of the best interests of the child in article 3 of the Convention, as there are always non-custodial solutions available, which need to be applied. Similar considerations apply to children deprived of liberty in institutions. In principle, the United Nations, in its Guidelines for the Alternative Care of Children (General Assembly resolution 64/142) envisages that States should refrain from institutionalizing children who are in need of care, protection, education, rehabilitation or treatment (A/74/136, paras. 90- 92).

The Independent Expert urged States to prohibit and end all forms of migration-related detention of children and their families. States should: prohibit child and family immigration detention in law; decriminalize irregular entry, stay and exit; adopt child-sensitive identification and referral procedures in the context of migration; and dedicate sufficient resources to appropriate non-custodial solutions for children and their families. Unaccompanied children should be provided with alternative care and accommodation, in line with the United Nations Guidelines for the Alternative Care of Children. States should provide refugee children with access to asylum procedures and other appropriate protection and humanitarian assistance, including family reunification, education and health care. Children with family members should be allowed to remain with their families in non-custodial, community-based contexts while their immigration status is resolved and the children's best interests are assessed. Children should not be separated from their families. The need to keep the family together is not a valid basis for deprivation of liberty of the child; instead, the State should provide non-custodial solutions for the entire family (A/74/136, paras. 121-124).

The Special Rapporteur on violence against women would like to bring to Your Excellency's attention Article 1 of the United Nations Declaration on the Elimination of Violence against Women which provides that the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Similarly, Article 2 provides that violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Furthermore, we would like to draw the attention of your Excellency's Government to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), accepted by your Excellency's Government on 26 February 2000.

According to the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, States have an international obligation not only to identify traffickers but also to identify victims of trafficking. It is highlighted that a failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. We also would like to refer to Principle 13 of these recommended Principles and Guidelines, which provide that "States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors".

In addition, we would also like to bring to your attention the work of the Special rapporteur on trafficking in persons, especially women and children and in particular her recommendations to made in her report to the Human Rights Council, A/75/169 para. 70). The non-punishment provision is a key element in any system of protection of victims of trafficking. It is critical for an effective implementation that the non punishment principle is practically applied from the starting point of the detection of a victim of trafficking to ensure effective access to protection.

We would also like to bring to your Excellency's attention, Article 27 of International Covenant on Civil and Political Rights which entered into force on 23 March 1976 in which States agree that in "those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

Finally we would also like to draw your Excellency's attention to the obligations derived from the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ratified by Malaysia in 2017) – and in particular to the obligations on State Parties set out in Article 11(1)(b), and Article 14 (11), (12), (13) on prevention mechanisms and protection of victims.